INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the summative (or formal) assessment for Module 1 ***of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment1summative]***. An example would be something along the following lines: 202223-363.assessment1summative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked***.***

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words***.***

6. ***The final submission date for this assessment is*** 15 November 2022***. The assessment submission portal will close at*** 23:00 (11 pm) GMT on 15 November 2022***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages***.***

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct***. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

Civil Law and English (Common) Law countries have the same historical roots. Select from the following the best response ***to this statement.***

(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.

(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.

(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.

(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.

Question 1.2

Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response ***to this statement.***

(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.

(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.

(c) This statement is untrue since discharge of debt never became part of any of these systems.

(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.

Question 1.3

England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.

(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.

Question 1.4

There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.

(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.

(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved' after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.

(c) The statement is untrue since insolvency law rules are not collective in nature.

(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.

Question 1.5

All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.

(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.

(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.

(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.

Question 1.6

The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign

insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is true?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.8

Which of the following best describes international insolvency law?

(a) It is public international law governing insolvency law between States.

(b) It is private international law governing insolvency law between States.

(c) It may involve aspects of both public international law and private international law.

(d) It involves a simple classification within either public international law or private international law.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

Question 1.10

Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response to this statement.

(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.

(b) This statement is untrue because North America was not a party to these agreements.

(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.

(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

The insolvency laws of African jurisdictions are heavily influenced by the laws of the colonial/imperial countries which formerly ruled them. For this reason, similar to varying laws of the European countries which occupied Africa, African countries have varying systems of insolvency which find their roots in either civil law or English common law. For example, countries formerly occupied by the French largely still rely on a historical civil law system like the French do. Similarly, countries which were formerly occupied by the English tend to have insolvency law systems based on English law, like in Kenya and Tanzania.

There is scope for more country specific examples and to discuss mixed legal systems.
2

Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

The insolvency laws of Eastern Asia were heavily reformed, particularly in Thailand, following the 1998 financial crisis. Reform has continued and very recently, Singapore adopted a unified law for insolvency covering both personal and corporate bankruptcy. Furthermore, many East Asian and Asian-Pacific countries have moved forward with adopting the Model Law on Cross-Border Insolvency. Finally, leaders and scholars have worked to develop the Asian Principles of Business Restructuring which is a guiding soft law intended to influence corporate restructuring.

There is scope to elaborate further

2.5

Question 2.3 [maximum 4 marks]

Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.

At the same time that US Bankruptcy Code was being substantially reformed, the United States and Canada attempted to craft a treaty among the two states which would address cross-border insolvency. However, the initiative was never completed. Subsequently, both the US and Canada adopted the MLCBI. The American Law Institute and International Insolvency Institute collaborated to produce guidelines for cooperation (Principles of Cooperation) among courts in NAFTA countries (the United States, Canada, and Mexico) and such guidelines are seen by scholars as complementary to the MLCBI. The NAFTA principles are broad in scope, covering procedure, cooperation, recognition and sharing of value, to name few.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

2

Marks awarded 6.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards

insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

Voidable dispositions can be categorized into fraudulent transfers and preferences. The enforcement of each is essential to the process of insolvency because the potential liability for a voidable disposition discourages creditors and insiders from behaving badly prior to the onset of the insolvency process. For example, a creditor may be liable for a fraudulent transfer, thus being forced to turnover the asset to the bankruptcy estate, if they creditor receives property without due consideration just prior to bankruptcy. This possible liability may encourage creditors to work reasonably with the Debtor and potentially avoid bankruptcy and discourage the "grab assets and run" behaviour that may tip a Debtor into insolvency or allow the creditor to collect assets that may have otherwise been shared among creditors or used by the Debtor in their business.

Civil law systems tend to be historically pro-creditor, which English law systems tend to be historically pro-debtor. In civil law systems, which find the roots of their voidable disposition law in the actio Pauliana, the pro-creditor history is clear. The actio Pauliana presents a process by which a creditor can attack the Debtor's fraudulent acts which are detrimental to the creditor's recovery. The act is clearly for the protection of creditors and civil law systems tend to view voidable dispositions as a creditor-protection mechanism today.

On the contrary, English law systems draw from the Act of Elizabeth of 1570 as the basis for their voidable disposition laws, which focuses on recovery by the Debtor's estate of payments or transfers made to creditors which allowed such creditor to recover more than others. While this mechanism is similar in the way it prevents the Debtor from preferring certain creditors over others, it is driven from the Debtor and/or insolvency administrator.

There is scope to elaborate and discuss the importance further. But this is well answered.

5

Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

> ***"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without***

consideration being given to the international aspect of a given case."

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

Wessels believes his own definition is limited because it assumes that a national insolvency law system has been adopted. As globalization continues and businesses and people continue to move freely across national borders, the lack of domestic law which addresses the international facets of modern-day insolvencies highlights the limitation of Wessel's definition. In short, the definition assumes that there is an applicable law which is merely limited in the fact that it cannot be enforced internationally/extraterritorially when in fact, many domestic laws wholly lack such an applicable law.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks

4

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

Sources of cross-border insolvency law are generally categorized as either "hard" or "soft" laws. Treaties and conventions are considered "hard" laws, as they are directly enforceable in courts and become part of the signatory state's domestic law. Treaties or conventions may be attractive because they make laws directly enforceable and are binding on the courts of each country. However, because of the restraint they put on each country, treaties and conventions can be incredibly hard to negotiate, especially when the parties seek to impose a multilateral treaty rather than a bilateral treaty. For example, multiple attempts to propose a multilateral treaty among European countries have failed in the past, and even the attempt to negotiate a cross-border insolvency treaty among the three NAFTA countries failed and the parties opted for soft law guidelines instead. While treaties and conventions bring certainty and predictability to cross-border insolvency in member countries, they have historically been challenging to negotiate and are often abandoned. For this reason, treaties and conventions are not particularly successful in establishing widespread rules for cross-border insolvencies. Rather, soft laws or regulations have been more influential, such as the MLCBI (Soft law) and EIR (regulation).

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

3.5

Marks awarded 12.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.

If you require additional information to answer these questions, briefly state what it is and why it is relevant.

Question 4.1 [Maximum 5 marks]

What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

The primary differences between formal and informal insolvency processes are 1) the ability to bind other creditors, 2) cost, and 3) flexibility. Elaboration is needed. ***Here, Lobo may want to consider whether FPPL has other creditors in Asgard. Generally, a formal insolvency process will include some type of automatic stay or moratorium on individual creditor action. If FPPL has other creditors in Asgard, where FPPL is failing to keep up with its debt obligations, and Lobo believes these creditors may not be responsive to joining in informal insolvency proceedings, Lobo may want to take advantage of the automatic stay precipitated by a formal insolvency proceeding. Furthermore, Lobo may want to consider the cost of an insolvency proceedings to both itself and FPPL. Informal insolvency proceedings are less costly, and if the parties can come to a contractual agreement without court involvement, Lobo will likely avoid cost to itself and FPPL will avoid the costs of formal insolvency, which may ultimately diminish Lobo's recovery. Finally, Lobo may want to consider whether its goal for the insolvency can be accomplished under formal procedures, or if the flexibility of an informal insolvency may be preferred. In a formal insolvency process, Lobo will be bound to any restrictions imposed by the domestic insolvency laws regarding access to foreign assets, priority of payments, and recovery of preferential funds paid to Lobo. Conversely, in an informal insolvency process, Lobo and FPPL will have more room for negotiation without regard to the domestic insolvency laws of either Asgard or Encanto.***

It would be beneficial to also consider matters such as the absence of moratorium and the inability to bind dissenting creditors in an informal workout. Also, it is made more complex by FPPL carrying

on business in more than one State because it is more complicated and costly to monitor the other creditors.

2.5

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

Concurrent insolvency proceedings can cause hardship for both the insolvency representatives and the Debtor which is the subject of these proceedings. For example, it's likely (if not certain) that there are variations in the domestic insolvency laws of Asgard and Encanto. This may be as minor as a variation in priority of payment or whether certain local contracts may be rejected – for example, one country may be similar to France in that the labour force has much more power in bankruptcy, whereas another country may deem labour contracts as "rejectable" or knock employees down in the priority of payment waterfall. At the very best, this causes inconsistencies between the two cases. At worst, a major variation in law (or even the principles underlying the laws – such as whether each country has a pro-creditor or pro-debtor regime) could lead to major variations, such as whether the Debtor is eligible for discharge or whether certain contracts with cross-border implications may be rejected in one court and must be assumed in another. Ultimately, this makes enforcement and forward progress of one company subject to two insolvency proceedings very challenging. International insolvency instruments, such as the MLCBI and ALI NAFTA guidelines, have been created to foster coordination and communication amongst courts. Under the MLCBI specifically, a Protocol may be developed whereby courts can communicate, coordinate, agree on issues of law, and even hold joint proceedings, which ultimately decreases the cost of insolvency, preserves the estate, and creates uniformity in enforcement, creating a predictable path forward for the Debtor. Because such instruments create a framework for cost savings and uniformity, they are critical to international insolvencies.

Elaboration regarding international instruments is warranted.

4

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

Following the UK's exit from the European Union, the EIR Recast would not apply to a 2022 insolvency proceeding commenced in the UK and thus coordination of the two proceedings would be substantially more difficult that if the EIR was application to the UK. It would be beneficial to discuss the resulting lack of automatic recognition. ***For example, the EIR uses the Center of Main Interest (COMI) model for determining which insolvency proceeding will be the primary proceeding. Under this regime, perhaps the state where Lobo, as the primary creditor of FPPL, is incorporated might be considered the COMI. However, under the UK's insolvency regime, UK courts have broad jurisdiction to wind up companies, even those which are unregistered. Furthermore, because the UK is no longer subject to the EIR Recast, the UK is under no obligation to coordinate, cooperate, or communicate with a foreign court which is subject to the EIR Recast. For this reason, facilitating two proceedings with consistent results would be challenging.***

It would be beneficial to consider the MLCBI.

3

Marks awarded 9.5 out of 15

* End of Assessment *

TOTAL MARKS 38.5/50

A very good paper that generally addresses the questions asked and substantiates its answers.