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.

African countries have various historical roots in insolvency law which is largely dependent on their colonial history. British colonies such as Nigeria, Kenya, Botswana and Zambia and some countries located in East Africa have an English law tradition. Angola and Mozambique follow the civil law system based on Portuguese law. The Francophone countries of West Africa are based on civil law and French law. South Africa and Namibia have a mixed system applying Roman-Dutch which is a civil law system and English Law.

3

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 1998 Asian Financial Crisis lead to insolvency reform in many East Asian countries. In Indonesia there were amendments to the existing bankruptcy law with the creation of the Jakarta Initiative and the Indonesian Debt Restructuring Program (INDRA). Thailand also amended their bankruptcy laws during the course of 1998 and 1999 which had the effect of creating bankruptcy courts and passing the Procedure for Bankruptcy Cases Act.

3

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.

In the 1970's Canada and the United States tried to reach agreement on a bilateral insolvency treaty however no agreement was reached. Both the United States and Canada have adopted the UNCITRAL Model Law on Cross Border Insolvency. The two states have history of case law and protocols which promote cooperation and comity between proceedings in the two states. Furthermore the American Law Institute has taken steps to assist with resolution of international insolvency issues between the nations of Mexico, United States and Canada by forming the ALI Transnational Insolvency Project with the aim of improving cooperation between the nations. Experts on insolvency law from the three countries were appointed and they prepared an international statement on each countries insolvency law relevant to international cases. Principals of Cooperation were then approved by the NAFTA countries in 2000. I believe that these initiatives are successful because they promote cooperation between the nations which can be seen through recent cases and judgments granted where the principal of comity was used.

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

2.5
Marks awarded 8.5 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.

Different insolvency systems around the world are based from the civil law system or the English law system. The civil law system bases their fraudulent conveyance laws on the actio pauliana whilst the English law system is based on the Act of Elizabeth of 1570. These different systems cause differences in the requirements for remedies to be applied depending on whether or not they are pro-creditor or pro-debtor. Generally voidable dispositions can be classified as either fraudulent conveyances i.e. dispositions under their value or preferences i.e. settlement of debts favouring one creditor over another. These principals can have the effect of undermining the predictability of contractual relationships however they are vitally important in recovering monies that would not have been available to creditors, had the voidable disposition principal not been applied and are thus beneficial to creditors.
There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

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.

The limitations in international insolvency law are created by the fact that there is no international insolvency law statute and very little harmonisation. Substantive insolvency law are not harmonised and are often focused on the domestic insolvency law of the particular state where proceedings are instituted. Foreign proceedings and judgements are not automatically recognised and have no effect in other jurisdictions. This lack of harmonisation between jurisdictions can also result in concurrent insolvency proceedings in respect of the same company running in multiple jurisdictions simultaneously. There is lack of recognition of foreign judgements, lack of jurisdiction and the question of which choice of law to apply.

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.

Several treaties and conventions have been adopted over the years which relate to cross border insolvency. Most notably are the:
Nordic Convention 1933
European Insolvency Regulation Recast (2000) & (2015)
The Montevideo Treaties (1889) & (1940)
Havana Convention on Private International Law (1928)
Principles of Cooperation amongst NAFTA Countries (2000)
The Organisation pour l'Harmonisation en Afrique du Driot de Affaires (OHADA) (1995) and their adoption of the UNCITRAL Model Law on Cross Border Insolvency
Several states around the globe have also adopted the UNCITRAL Model Law on Cross Border Insolvency. These treaties are advantageous because they determine which choice of law will apply and deal with issues of recognition of foreign proceeding, which saves a lot of time and money and is ultimately an advantage to creditors.

It would be beneficial to briefly explain treaties and conventions and elaborate upon their importance.

3.5
Marks awarded 11.5 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?

Formal insolvency proceedings are normally brought through a designated court, whereby a court order is granted. This order has the effect of placing a moratorium on all piecemeal debt collection and execution procedures. Informal Insolvency arrangements involve an agreement with creditors restructuring your repayment obligations. The advantages of informal out-of-court workout arrangements is that the company is not placed in liquidation and can continue to trade. Jobs of employees are saved and the company is granted time to get out of its financial woes. The risks would be the creditor could back out of the agreement at any time and could sue for liquidation of the company, as can any other creditor that is not party to the agreement as there is no court order placing a moratorium on insolvency proceedings.
It would be beneficial to also consider matters such as costs, privacy 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.

The difficulties that would arise in this scenario would be each state applying its own laws with little extraterritorial effects of foreign judgements. International insolvency instruments which were developed to combat these difficulties would be the UNCITRAL Model Law on Cross Border Insolvency, the American Law Institute created the Transnational Insolvency Project which developed the ALI NAFTA Guidelines Applicable to Court-to-Court communications in Cross border Cases which cover insolvency proceedings in Canada, the United States and Mexico. The American Law Institute and the International Insolvency Institute created the ALI – III Global Principals for Cooperation in International Insolvency in Cross-Border Cases in 2012. In Europe the European Insolvency Regulation Recast was passed which promotes coordination between European member's states. Also within the European Union the EU JudgeCo

Guidelines was published which promotes coordination between European members states. The Judicial Insolvency Network created the JIN Guidelines with the objective of improving communications amongst courts where multiple proceedings are running simultaneously. This is important so that there is uniformity when multiple proceedings are running against the same debtor in different states.

5

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.

The European Insolvency Regulation Recast (EIR) would not apply to the UK commenced insolvency proceedings because the EIR only applies to members states and the UK left the European Union at 11pm on the 31st of January 2020. As the UK insolvency proceeding began well after the 31st of January 2020 exit date the EIR would not apply in this scenario. The consequence of this would be the ability for Lobo to institute insolvency proceedings against FPPL in an European country provided it can prove that FPPL has a centre of main interest in that particular European country. Depending on whether or not the European country applicable has adopted the UNCITRAL Model Law of Cross Border Insolvency, Lobo could have the UK judgement recognised in the European country

5
Good!

Marks awarded 12.5 out of 15

*** End of Assessment ***

TOTAL MARKS 42.5/50
Excellent work.