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 9 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.

According to LEX Africa's guide to insolvency law, in most African states, the historical roots of insolvency laws are dictated by their former colonial countries. For example, English-colonised countries emulate the English system; countries colonised by France emulate the French system, while countries colonised by Portugal follow the Portuguese system. However, it should be noted that their had been development in insolvency laws.

Elaboration is needed, including with respect to specific country examples

1.5

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.

According to Roman Tomasic,[1] the 1998 financial crisis was a key facilitator of insolvency law reform in Eastern Asia. Another facilitator of reforms identified by Tomasic, is governments from countries such as Australia and Japan. Forum for Asian Insolvency Reforms (FAIR) has also lead reforms in Asia.[2] Thailand and Singapore have reformed their insolvency laws. The Act for Singapore is called Insolvency, Restructuring and Dissolution Act 2018 , effective from 30 July 2020. The Act for Thailand is Bankruptcy Act No. 8, 2015 came into force on 27 August 2015.

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.

A bilateral treaty failed due to the scope being too ambitious in dealing with international insolvency issues between them.

Adopting Model Law on Cross-border insolvency (Model Law) led to practical progress in resolving international insolvency issues between the two.

The American Law Institute (ALI), a professional body, uses its ability to resolve issues arising from North American Free Trade Agreement (NAFTA) which include insolvency matters.

NAFTA's recommendation of Mexico, USA and Canada to adopt the Model Law, which also deals with the issue of international insolvency issues, have been a success.

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]

[1] Roman Tomasic, 'Insolvency Law Reforms in Asia and Emerging Global Insolvency Norms' (2007) 15 Insolvency Law Journal 229.

[2] The World Bank, 'Forum for Asian Insolvency Reform (FAIR)' 2016 < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 15 November 2022.

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.

Ian Fletcher identified that the beginning of insolvency law was aimed at collecting debt whose roots can be traced back to the Romans.[3] Civil law has developed from enforcement of debt against an individual towards enforcement against the person's assets.[4] This has to lead to the concept that allows the debtors to start anew without the debt. English law is based on two matters that have proceeded to modern insolvency law. They are that the creditors come together to recover money owed and that the money that is recovered from the debtor is paid pari pasu to the creditors.

This question required a consideration of the nature and context of voidable transactions and discussion of their importance. As to the historical roots of this aspect of insolvency law: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law.

0.5

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.

Bob Wessel identifies the limitation as being connected to the facts that the definition is associated with the existence of a national legal framework in insolvency law.[5] Bob goes further and identifies that the definition provided by Ian Fletcher as well has

[3] Ian F Fletcher, *The Law of Insolvency,* (Sweet and Maxwell, 5th ed, 2017), Ch1, 6.
[4] L E Levinthal, The Early History of Bankruptcy Law' (1918) 66 Uni Pennsylvania Law Review and American Law Register, 223.
[5] Bob Wessel, *International Insolvency Law* (Kluwer, 2006), 1.

limitation in the same manner. Wessel proposes that the definition of international insolvency should be above the confines of a single legal system. The effect of this is that the application of international insolvency law would not be confined to particular jurisdictions but rather can apply to multiple jurisdictions that are relevant in those particular situations.

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

3.5

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.

States come together to create conventions and treaties. Once the treaties and conventions are created the states become signatories to them. The effect is that the conventions and treaties are adopted to domestic laws hence creating a source of cross-border insolvency law. There have been treaties that have been effective in providing cross-border insolvency laws. An example is The Nordic Convention (1993) which was adopted in the Scandinavian area. The European Convention on Human Rights which lead to the creation of The Council of Europe, which has lead in the creation of cross-border insolvency laws in EU.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. It would be beneficial to elaborate, for example, upon your consideration of success.

3.5

Marks awarded 7.5 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?

Irit Mevorach and Adrian Walters have described informal arrangements as agreements between the creditor (Lobo) and debtor (FPPL registered in Asgard) that are settled out of court.[6] Informal insolvency arrangements are, in most cases, voluntary between the parties. According to Mevorach and Walters, formal procedures include using legal procedures provided by the countries, in this case, Asgard's legal system.[7] One advantage of an informal arrangement between Lobo and FPPL is that they can negotiate the terms of the agreement between themselves hence keeping the costs down and the matter private. However, Lobo should note that there will be no moratorium in effect during and/ or after the informal procedure. If FPPL has other creditors in Asgard, the out-of-court workout with Lobo would not be binding on them. In contrast, if FLLP was to use the formal route, it is likely that a moratorium would be provided by statute and that the decisions would be binding on creditors that are not in agreement with the decisions reached under the procedure.

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.

4.5

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.

It is important to understand the current insolvency laws in Asgard and Encato whether they deal with cooperation or co-ordination of insolvency proceedings. Therefore, both insolvency systems should be looked at on how they address these issues. It might be the case that the laws in Asgard and Encato deal with insolvency differently

[6] Irit Mevorach and Adrian Walters, 'The Characterization of Pre-insolvency Proceedings in Private International Law' (2020) European Business Organisation Law Review < https://doi.org/10.1007/s40804-020-00176-x> accessed 15 November 2022.

[7] [7] Irit Mevorach and Adrian Walters, 'The Characterization of Pre-insolvency Proceedings in Private International Law' (2020) European Business Organisation Law Review < https://doi.org/10.1007/s40804-020-00176-x> accessed 15 November 2022.

hence impacting the right of Lobo differently in each county, according to Paul Omar.[8] According to Friman, the language of the insolvency provisions in both countries may be different, which might lead impacting on the rights of Lobo due to no equivalent reference. The UNCITRAL Model Law has a provision that requires domestic courts to cooperate with foreign courts. In this scenario, more information is required as to whether Asgard has adopted the Model Law. If Asgard has adopted the Model Law, has it amended the provision that requires Asgard's court to the assist foreign courts. Asgard may amend the Model Law in relation to that provision.

It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

3

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.

Under EIR Recast, art 3(1), the provision will not apply to UK proceedings because the UK is no longer a member state of the European Union. Lobo can apply to open insolvency proceedings in the UK via Insolvency Act 1986, s 426 as a foreign company.

Elaboration is warranted regarding consequences of the EIR Recast not applying. Also the MLCBI should be considered.

2.5

Marks awarded 10 out of 15

*** End of Assessment ***

TOTAL MARKS 33/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.

[8] Paul J Omar, 'The Landscape of international Insolvency' (2002) 11, IIR 173.