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.

Ansnwer:
Laws in most African states are based primarily on laws adopted from the former colonial powers which exerted influence in the respective countries. For instance; Nigeria, Kenya, Botswana, Zambia and other countries from eastern Africa have an English Law tradition. Angola and Mozambique's laws are influenced by civil law traditions based on Portuguese laws. **There is scope to consider French law.**

Some countries also exhibit influences of Roman (Civil Law) and English Law on account of both these powers having had an influence on these countries for instance South Africa and Namibia.

The overarching theme however remains that the domestic laws are heavily influenced by the former colonial powers which ruled or exerted significant influence over these countries.

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.

Answer:
The 1998 Financial Crisis was a major catalyst which propelled the East Asian countries to undertake much needed economic reforms which directly benefited the insolvency legislations in these countries.

In response to the crisis Thailand for instance reformed its bankruptcy laws and similarly Singapore also majorly reformed its insolvency laws and passed a new insolvency ***legislation to consolidate personal and corporate insolvencies in 2018, this act came into force in 2020.***

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.

Answer:
North America and Canada have witnessed several attempts at resolution of International insolvency issues, for instance:

1. In 1970s Canada and United States attempted to work out a bilateral insolvency treaty. However, the same could not materialise.
2. Since then both states have adopted the UNCITRAL Model Law on cross border insolvency.
3. The American Law Institute has also taken steps to address international insolvency issues with NAFTA countries which includes Canada, United States of America and Mexico. Principles of Cooperation amongst NAFTA Countries were prepared and approved by ALI Council and members in 2000. These principles focus primarily on corporate insolvencies and commercial aspects.
4. Importantly Canada and America have witnessed long history of cooperation on insolvency law issues through judicial precedents respecting the principles of comity.

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

3
Marks awarded 8 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.

Answer:
It is aptly said that approaches to insolvency laws in various states vary greatly and the source of such differing system can largely be traced back to the influence that the states have been under of civil law or common law. While civil law developed from codified laws in contrast common law developed primarily through dealings between merchants and these commercial customs eventually took the colour of law codified or otherwise.

An important aspect of any insolvency law is treatment of voidable transactions. The need for existence of rules for treatment of voidable transactions arises because insolvency is essentially a common debt collection mechanism. It must be ensured that all creditors which are situated similarly in terms of their ranking must be given an equal treatment. A debtor in order to frustrate this goal can potentially give favourable terms to a single creditor prior to commencement of insolvency. Or a Debtor could also potentially undertake a clever transaction solely devised to deny the creditors the benefits of all the assets of the Debtor. Such transactions would run to the common theme of all insolvency laws and need to be avoided or in other words reversed.

While principally all jurisdictions would agree that some transactions need to be avoided or reversed, which transactions would come within the net of voidable transactions is a question which gets very difficult to answer on a global level. The answer would largely depend on local laws which are guided by the country's public policy. This is a prime example of how it becomes challenging to harmonise laws from different jurisdictions.

It would be beneficial to discuss A 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.

3.5

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.

Answer:
The primary limitation of the definition appears to be that it is focused on the domestic aspects of a legislation and in fact presumes existence of a domestic law which governs and prescribes mode and manner of dealing with international insolvencies. As is often the case a domestic

jurisdiction may be completely silent on the international insolvency aspect or may have enabling framework which would not have been at present implemented.

A better way of approaching international insolvencies would be to consider the definition in terms of insolvency cases where the insolvent entity has assets in multiple jurisdictions which require a common administration for the benefit of all stakeholders.

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.

Answer:
Many states have entered into treaties and conventions which import into the domestic laws of the relevant country aspects to resolve insolvencies with an international element, this has been perhaps the most dominant and acceptable methodology for development of international insolvency issues. The approach of entering into treaties or convention is acceptable to states since these are voluntary acts by individual states and more importantly afford a large degree of control and flexibility to the states to determine the issues between the contracting states. The natural downside of this approach is that it is hard to reach global consensus since most states will focus on specific reginal issues which may have cropped up during the course of trade between the contracting states. Despite its obvious flaws treaties or conventions are the traditional and time tested method to resolve international insolvency issues.

For instance, in Europe bilateral conventions appeared for the first time around 13th and 14th century addressing absconding debtors and for collection of their assets. The Council of Europe in 1990 had concluded the Istanbul convention, Council of Europe Treaty Series No. 136 while this was never signed by enough member states to enter into force it had a significant impact on the way international insolvency issues were dealt with by the European Union later.

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

4

Marks awarded 12 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?

Answer:
A formal insolvency proceeding will be an action initiated by Lobo before the Courts in Asgard for insolvency resolution of FPPL by contrast an informal insolvency arrangement will be an agreement between Lobo and FPPL which addresses the concerns of both the parties and will afford a much larger area of play to the parties to come to an amicable solution.

Lobo should keep in mind that FPPL is only registered as a foreign company in Asgard, this would typically mean that Lobo is essentially a resident of Encanto and it would need to be examined if the two countries have any treaty dealing with entities which are not domiciled in the country where insolvency proceedings are initiated. If no such treaty or other common law principles exist, it would be difficult for Lobo to effective run the insolvency proceedings in Asgard. Further, corporations do not generally run asset heavy operations as a foreign registered entity since this structure does not afford to them the protection of a separate legal entity, thus chances are high that FPPL may not have sufficient assets in Asgard for Lobo to enforce its rights against even if the courts in Asgard provide full support to Lobo. Keeping the above considerations in mind it would be preferable for Lobo to explore an informal insolvency arrangement, if for any reason such arrangement does not fructify Lobo will in any event have the option of approaching through the formal enforcement mechanisms.

It would be beneficial to consider additional issues such as costs, privacy, moratorium and ability to bind dissenting creditors.

2

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.

Answer:

The two insolvency representatives are bound to have multiple issues unless a treaty or convention adopting a common approach exists between the states the differences in procedure to be followed by the two representatives will in itself be a challenge for instance the time lines within which the insolvency has to be conducted and closed may be different in the two jurisdictions, even more challenging will be a situation if the priority required to be given to different classes of creditors is not the same in both jurisdictions, it will be a huge challenge to balance the interests of stakeholders in both jurisdictions. For instance, one jurisdiction may place crown debt at highest priority while another may put crown debt at lower priority. Another point of contention between the two is likely to be the fact that no separate legal entity exists in Asgard and thus effectively insolvency representative of Encanto may claim rights over the assets which are located in Asgard and may be statutorily bound to bring in those assets into the insolvency process at Encanto.

Assuming there exists no treaty or convention between Asgard and Encanto it would be extremely difficult for the two insolvency representatives to resolve their differences more so since both would be statutorily bound to the principles enunciated in the domestic laws of Encanto and Asgard. To resolve such issues various soft law approaches have been attempted for instance the UNCITRAL Model Law on Cross-Border Insolvency, while this binds no state the principles enunciated in the model law can guide the member states to mould the domestic laws in a harmonious manner which may benefit global stakeholders.

Another way to resolve the differences between the two insolvency representatives would be through the courts in Asgard and Encanto which would ideally be bestowed with sufficient jurisdiction to examine specific issues and differences and then rule on how to resolve the same such that rights of all stakeholders are adequately balanced.

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.

Answer:
The European Insolvency Regulation (EIR) (2000) Recast would not apply in the UK since it has exited the European Union in December 2020 and the proceedings in UK have been initiated on 30 June 2022. **What is the consequence of this?**

Lobo can consider initiating action in any other European Union member state and through such action would be in a position to enjoy the harmonising benefits of EIR Recast amongst European Union member states. Lobo also needs to evaluate whether the insolvency proceedings initiated in UK would have any significant impact on operations in other

jurisdictions or on Lobo's ability to recover its dues, if the answer is yes then Lobo would also need to precipitate action in a favourable jurisdiction quickly to ensure assets from other jurisdictions are preserved and not utilised for satisfaction of the minor creditor in UK.

It would be beneficial to consider the MLCBI.

2.5

Marks awarded 7.5 out of 15

*** End of Assessment ***

TOTAL MARKS 36.5/50

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