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 countries are, in principle, rooted in the laws of their respective former colonial powers. Therefore, countries in the Eastern part of Africa, such as Tanzania, have an English law tradition, whilst other countries, such as Mozambique, are steeped in Portuguese law. Due to their colonial backgrounds, some other countries, including South Africa, have mixed legal systems (including civil and English law). Evolving from such roots, a number of African countries have started to modernize their insolvency laws. A development which may also be driven by the IMF and the World Bank, since these sometimes require a reform of insolvency laws as a condition of loan support.

There is some scope to elaborate, for example with respect to French law-based countries.

2.5

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.

An important event, which shaped the landscape was the 1998 financial crisis which had a particular effect on Indonesia and Thailand, resulting in Thailand to overhaul its bankruptcy laws.
Furthermore, Singapore is striving to become a major role-player in the region. In light of these ambitions, Singapore passed a new Insolvency, Restructuring and Dissolution Act, in order to consolidate corporate and personal insolvency and restructuring laws into a unified act (following, for example, the 1986 Insolvency Act in England and the 1978 Bankruptcy Code in the USA).
As regards soft law, the initiative of the Asian Business Law Institute on the Asian Principles of Business Restructuring are particularly noteworthy.

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.

Starting in the 1970s with working towards a bilateral insolvency treaty, there have been numerous initiatives, including success stories in the context of resolution of international insolvency issues between North America and Canada. Although the bilateral insolvency treaty ultimately failed to reach an agreement, North America and Canada continued their close bilateral co-operation and co-ordination based on existing legislation and case law. Subsequently, both States adopted the Model Law, including its Protocols.

A further, very successful, initiative to improve the co-operation in international insolvencies across member states of the North American Free Trade Agreement (***NAFTA***), including the United States and Canada, was the American Law Institute Transnational Insolvency Project. The principles of cooperation (***NAFTA Principles***), as developed by this initiative, were approved in 2000 (excluding, however, principles on the insolvency of individuals). The NAFTA Principles conclude with recommendations for legislation (including the adoption of the Model Law), providing further guidance on how to improve international insolvency law matters.
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 7.5 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.

The possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions include the fact that civil law systems developed from early Roman law principles relating to debt recovery and English law systems developed via legislation, especially from the 16th century onwards. Therefore, with regard to civil law systems, the *actio Pauliana* forms the basis of fraudulent conveyance law, whilst in English law systems, such remedy was first implemented in the Act of Elizabeth of 1570. Voidance rules are of particular importance in insolvency, since these aim at preventing favouritism / preferential treatment of some creditors at the expense of others (including sudden losses of assets before the opening of insolvency proceedings), considering that equal treatment of insolvency creditors is one of the main pillars of collective debt-collecting mechanisms. Also, in some jurisdictions, the voidance rules which are in place can incentivize debtors and, in particular creditors to conclude out-of-court settlements, in order to mitigate the risk of the respective transaction being set aside in formal insolvency proceedings.

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

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.

The definition is perceived to have limitations due to the fact that it is connected to the existence (and, thus, also the functioning) of national legal frameworks of insolvency law. This is especially noteworthy since it can be observed that domestic legal systems are mostly ill-equipped when it comes to cross-border insolvencies (ie the enforcement capacities end with the jurisdiction's national border). Furthermore, considering globalisation and the present-day mobility of people and assets, the functioning of international markets depend on clear and uniform rules relating to cross-border issues, including clear and predictable insolvency rules, not only to prevent fraud and forum shopping but also to stop capital losses for creditors and the liquidation of distressed but still viable debtors. Therefore, co-ordination and co-operation of courts of different jurisdictions is of essence.

There is scope to elaborate. But this is answered quite well.

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.

In Europe, bilateral international insolvency conventions were discussed from the 13th century onwards (mainly addressing absconding debtors and the collection of assets). Starting from the 19th century, modern forms of bilateral treaties (including considerations on recognition and enforcement and the conclusion of arrangements) appeared. With the exception the Nordic Convention and the conclusion of the Istanbul Convention, which was, however, not ratified, these ambitions were mainly unsuccessful.
Influenced by broader multilateral developments in international insolvency law, the European Insolvency Regulation "revolutionized" the legal landscape when it comes to international insolvency law within the European Union (noting that the EIR Recast ceased to apply in the UK following Brexit).

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. A discussion of the nature of treaties/conventions would be beneficial together with more examples of them and a consideration of success with regard to those examples.
3
Marks awarded 10.5 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 advantage of an informal, out-of-court work out for Lobo to consider include

- Flexibility: agreements reached in out of court restructurings are contractual in nature, therefore the parties have great(er) flexibility to agree – to the extent legally permissible – just anything with suits them commercially;

- Confidentiality: out-of-court arrangements are typically confidential, which means FFPL's financial distress should not be in the public domain, resulting in, for instance, suppliers termination supply contracts, which could further threaten/jeopardize FFPL's restructuring.

- Lower voidance risk: The risk of a transaction, which as been executed within certain limitation periods, being voidable upon the opining of insolvency proceedings can be mitigated.

- Cost advantage: The cost of out-of-court settlements is typically lower.

The disadvantage of informal, out-of-court work out for Lobo to consider include

- No moratorium: There is typically no moratorium in place, so that other creditors could file for the opening of insolvency proceedings

- Dissenting creditors: Dissenting creditors or creditors which are not a party to the respective arrangement cannot be bound to such arrangement.

The above applies vice versa to formal proceedings.

Elaboration regarding differences between formal and informal arrangements is warranted

3.5

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.

Difficulties that may arise include questions regarding the recognition of the foreign opening order of the court, the recognition of the foreign representative (ie insolvency administrator), the moratorium on creditor actions and, in general, creditor participation in such proceedings, priorities and preferences, the voidance of transactions and the discharge of debt, the recognition of a scheme of arrangement etc.

Instruments to assist in respect of these difficulties are, first and foremost, international treaties and conventions, including the European Insolvency Regulation (which is, in a technical sense, no convention in the traditional sense but a legal act of the European Union).

Furthermore, there are soft law “instruments”, including the Model Law on Cross-border Insolvency.

Establishing clear and uniform rules, regulations and best practice is extremely important to further facilitate international trade and investment and, ultimately, the functioning of global markets.

This question required you to 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. This required discussion of different laws, and territorial approaches, together with consideration of international insolvency instruments developed to assist liquidators appointed in concurrent insolvency proceedings. It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

1.5

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 EIR Recast ceased to apply in the UK following Brexit. Instead, the law of the UK and the relevant domestic laws of each of the individual (member) states apply. In order to answer this question I would further need to look into such domestic laws.

Elaboration is needed.

2.5

Marks awarded 7.5 out of 15

*** End of Assessment ***

TOTAL MARKS 35.5/50
A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.