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.

Largely as a result of African countries being former colonies, they have adopted their former respective law traditions. For example those countries colonized by Portugal, Angola and Mozambique have civil law tradition based on Portuguese law. Those east Africa countries like Kenya and Tanzania are based on English law (common law). The Francophone countries of West Africa follow French law. South Africa and Namibia have mixed legal systems Roman-Dutch law (civil law) and English law (common law) as former colonies of England and Germany respectively.

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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 Crisis was a significant event which impacted particularly Indonesia and Thailand – given the unprecedented financial distress/crisis experienced at that time. Thailand overhauled its bankruptcy laws and Singapore passed a new Insolvency, Restructuring and Dissolution Act to consolidate its corporate and personal insolvency restructuring laws into a unified Act in 2008, which came into effect 30 July 2020.

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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 1970s Canada and the US worked towards a bilateral insolvency treaty, however it was too ambitious in its scope and they failed to reach agreement. More progress was made in the adoption of Model Law and through mechanisms such as Protocols.

The American Law Institute Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases for international insolvencies involving the USA, Canada and Mexico. This was to solve insolvency issues between the North American Free Trade Agreement (NAFTA) countries of the US , Canada and Mexico. This was and in light of these Principles of Cooperation among the NAFTA Countries was prepared and approved by the ALI Council and Members in 2000. The ALI and International Insolvency Institute (III) went further to develop the ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases.

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.

In English law the word "bankrupt" first appeared in the early part of the 16th century and the law did not initially provide for imprisonment for debt. Imprisonment was introduced later in the 13th century and then abolished in 1869. The first English Bankruptcy Act of 1542 held as a fundamental, that in the case of a fraudulent debtor there should be compulsory administration and distribution on the basis of equality amongst creditors.

This is contrasted to Roman or civil law which traced its roots prior to English law and where debt execution developed from the debtor pledging his own body for the repayment of the loan and he could be imprisoned, sentenced to death or sold as a slave in order to secure repayment of the debt. Hence a central theme of the development of debt collection and insolvency was the gradual move from execution against the person towards a dispensation of execution against the assets of the debtor.

The action 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. Therefore there are underlying detailed differences in dealing with voidable dispositions by each system. These rules are important as they deal with fundamental principles in dealing with insolvency such as collective right to act for creditors, distribution on the basis of equality for creditors, treatment of certain voidable transactions on the part of the debtor and compulsory consequences for administration and distribution based on said transactions of debtors' estate.

This question also requires a consideration of the nature and importance of voidable transactions.

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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 limited since it is connected to the existence of a national legal framework of insolvency law. Furthermore insolvency can arise in each State that a debtor is present – without the requirement of any international aspect.

Since each national law differs in approach, policy, substantive and procedural rules the above quoted definition does not adequately address the complexity or application of insolvency matters.

Generally the application of the law of each State will not reach beyond its own borders. The resolution of international aspects of a case would either require another State to approve or require a supra-national State or enforcement agency.

Due to globalisation, trade and the movement of assets across borders, creditors may be compelled to deal with the estate of the debtor in a number of States in an attempt to reclaim their debts.

While the quote is correct in drawing attention to the international aspect of a case – as stated above the resolution of an insolvency situation does depend on a national system as well as the international aspects.

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

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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.

Classic public international instruments are treaties and conventions to which States become signatories, thus binding their domestic laws according to these overarching laws. These are so-called "hard law" principles on insolvency. In Europe bilateral international insolvency conventions appeared from the 13th and 14th centuries dealing with absconding debtors. From the 19th century more modern forms of bilateral treaties or conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding-up, arrangements and compositions appeared. The Nordic Convention (1933) was a success involving Scandinavian countries. European effort at achieving multilateral international insolvency conventions were unsuccessful for many years. In 1990 it concluded a Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe No 136, it was only signed by 8 members and was not ratified by a sufficient number to enter into force. The European Union's European Insolvency Regulation (EIR) (2000), was more successful which influenced broader multilateral developments in international insolvency law.

In general while these conventions and treaties were not successful they did lay the groundwork for deliberations on regulations governing international insolvency law.

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

3.5

Marks awarded 9.5 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?

Lobo will have to evaluate if Asgard's insolvency regime is debtor or creditor friendly and assess the advantages of formal proceedings with regards to its loan. Firstly Lobo needs to understand if FPPL has met any of the formal definitions for distress/insolvency that would imply formal proceedings must be followed. Formal proceedings would have exact definitions for 1) debt moratoriums thus staying any individual creditor execution or prevent liquidation proceedings 2) make provision for distribution of assets 3) make binding decisions for all creditors. The disadvantages of a formal proceedings in general are 1) negative publicity for FPPL and a potential withdrawal of support from future creditors or negative implications should FPPL recover from its distress and 2) the costs for any formal workout are usually higher. The advantages for an informal workout could be 1) lower costs 2) it may be a quick fix that can be negotiated on a bilateral basis.

It would be beneficial to also consider privacy and to elaborate on a discussion of differences between formal and informal arrangements.

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.

As FPPL's head office is in Encanto and since proceedings have already been instituted here, Lobo will have to consider how it enforces its court order in that foreign jurisdiction. Should Encanto's insolvency regime subscribe to a universal model that would mean as the centre of main interest (COMI) Encanto's proceedings may take precedence and indeed Encanto's insolvency representative will be pursuing FPPL's assets in Asgard. However if Encanto follows a territorial approach – Lobo may continue to commence proceedings against FPPL in Asgard. Asgard's insolvency representative will further have to consider that its application may be superceded by the proceedings already instituted in Encanto. Lobo will have to assess if Encanto subscribes to any conventions or treatise with Asgard in international insolvency private law. There may be a supranational body that governs Lobo's debt instruments such as the EU Court – which would then consolidate the insolvency proceedings. Lobo's counsel would further need to understand if Encanto subscribes to any 'soft laws' in common with Asgard and finally Lobo's insolvency representative would have to evaluate whether Encanto subscribes to any model insolvency practice such as the UNCITRAL Model Law – which has been developed with cross-borders issues in mind.

In short Asgard's insolvency representative needs to assess 1) the choice of forum to exercise jurisdiction in the matter 2) the recognition and effect accorded foreign proceedings in the same matter and 3) the choice of law to apply to that matter.

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

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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.

Unfortunately the EIR Recast ceased to apply to the UK following its exit from the European Union from 11pm on 31 December 2020. The English court has jurisdiction to wind up a foreign company, that is one which was incorporated under law of a country other than the United Kingdom. This jurisdiction may be based on that foreign company complying with a requirement to register its presence and nominating a resident person or persons to accept service of process and other formal notices on its behalf. Therefore Lobo can actually continue with proceedings in the UK. This may be an advantageous approach given that proceedings (however minor) have already been instituted within the UK. Lobo could then have a better say over the insolvency proceedings rather than working through an EU court. In an English winding up under the Insolvency Act 1986 including of a foreign company, English law applies to matters of procedure and substance. It is possible that reference may be made to a foreign law to establish some matter.

The case of Maxwell Communication Corporation plc is evidence of the UK courts applying the Model Law on Cross Border Insolvency and Lobo would have to evaluate if those are acceptable standards with regards to its aims in formal insolvency proceedings.

It would be beneficial to consider the MLCBI.

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Marks awarded 9.5 out of 15

* End of Assessment *

TOTAL MARKS 37.5/50

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