



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 16<sup>th</sup> century onwards.**
- (c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.**
- (d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.**

Question 1.2

**Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response to this statement.**

- (a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.**
- (b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.**
- (c) This statement is untrue since discharge of debt never became part of any of these systems.**

**(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.**

Question 1.3

**England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.**

**(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.**

**(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.**

**(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.**

**(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.**

Question 1.4

**There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.**

**(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.**

**(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved" after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.**

**(c) The statement is untrue since insolvency law rules are not collective in nature.**

**(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.**

Question 1.5

**All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.**

- (a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.**
- (b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.**
- (c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.**
- (d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.**

Question 1.6

**The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.**

**In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?**

- (a) Public International Law.**
- (b) UNCITRAL Legislative Guide on Insolvency Law.**
- (c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.**
- (d) Private International Law.**

Question 1.7

**Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign**

*insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.*

*Which of the following statements, concerning the request for recognition and enforcement in England, is true?*

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).*
- (b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.*
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.*
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.*

Question 1.8

*Which of the following best describes international insolvency law?*

- (a) It is public international law governing insolvency law between States.*
- (b) It is private international law governing insolvency law between States.*
- (c) It may involve aspects of both public international law and private international law.*
- (d) It involves a simple classification within either public international law or private international law.*

Question 1.9

*To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.*

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.*
- (b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.*

- (c) *This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.*
- (d) *This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.*

Question 1.10

*Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response to this statement.*

- (a) *This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.*
- (b) *This statement is untrue because North America was not a party to these agreements.*
- (c) *This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.*
- (d) *This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.*

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

*Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.*

*African states still largely follow the laws of their respective colonial powers. States such as Kenya, Nigeria, Zambia, and Tanzania have an English law tradition whose roots can be traced back to the early English debt collection law where debtors could be imprisoned. On the other hand, states such as Mozambique and Angola have a civil law tradition based on Portuguese law.*

*The historical roots of this system can be traced back to Roman law in procedures such as forced liquidation of assets, assignment of property, and compositions with creditors.*



*West Africa's Francophone states also have a civil law tradition, specifically French law. This system's roots can be traced back to the Ordonnance de Commerce of 1673 which was the basis of later French insolvency law in the 1807 and 1838 commercial codes.*

*Other countries such as Namibia and South Africa however follow a mixed legal system given that their legal systems were influenced by English Law and Roman-Dutch law respectively. The roots of Dutch law can be traced back to the ordinance of Amsterdam of 1772 and the Faillissementswet of 1897.*

3

Question 2.2 [maximum 3 marks]

***Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.***

*The aftermath of the 1998 financial crisis is an important event that resulted in some insolvency law reform in Eastern Asia. After the crisis, corporations, governments, and creditors keenly felt the absence of effective, orderly, and predictive ways to handle insolvency issues. Nonetheless, an example of such reform initiatives is that Thailand overhauled its bankruptcy laws to allow for corporate reorganization.*

*On the other hand, Singapore, which is becoming a major key player in Eastern Asia passed a new Insolvency, Restructuring and Dissolution Act in October 2018. The law sought to consolidate the state's personal and corporate insolvency into a Unified Act and was officially enforced on 30 July 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.***

*In the 1970s, Canada and the U.S. were working towards a bilateral insolvency treaty but failed to reach an agreement. However, both states made more practical progress when they adopted the Model Law and applied mechanisms such as Protocols. There is scope to elaborate regarding *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128 **More importantly, the American Law Institute (ALI) took steps to help in the resolution of international insolvency issues between North America and Canada.***

*The initiative formed advisory groups with experts from the U.S., Canada, and Mexico. The result of this was the preparation and approval of the Principles of Cooperation that focused on the insolvency of companies and legal persons taking part in business activities. Furthermore, the ALI Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases for global insolvencies involving North America and Canada. Nonetheless, these initiatives were successful.*

*The adoption of the Model for instance was an important first step in bringing North America's and Canada's insolvency laws in accord, thus signaling responsiveness by individual governments towards further harmonization. Similarly, the ALI Transnational Insolvency Project succeeded in promoting the harmonization in the treatment of international insolvencies within the NAFTA region. It complemented the Model Law by proposing specific procedures by which formal cooperation between North America and Canada might be effectuated.*

More detail was needed to achieve full marks for this sub-question.

3

Marks awarded 9 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.***

*There are many ways to categorize the many legal families or systems around the world, but generally speaking, most of these families have either an English law or what is generally referred to as a civil law-oriented foundation.*

*There are different approaches towards cross-border insolvency laws regarding voidable dispositions because of the difference in underlying principles that govern these laws in different states. Moreover, certain features of insolvency law such as fast and regulated bankruptcy and creditor payment procedures are influenced by regional legal traditions, fundamental freedoms, and how a system addresses related issues like security rights or labor issues.*

*One of the treatment guidelines for insolvency systems focuses on the limitation of periods, which is essential for reasons of limitation, making it impossible to file a lawsuit after a specific amount of time has passed. In civil law systems, fraudulent conveyance legislation is based on the Action Pauliana, but English law bases this remedy on the Act of Elizabeth of 1570.*

*Nonetheless, these rules are important in that they are key to establishing a more uniform and effective approach to international insolvency law dispensation despite differing domestic insolvency laws and approaches.*

You also needed to provide a context or framework for the treatment of these rules in insolvency systems. This could have been done by briefly explaining the nature of voidable dispositions. To achieve higher marks, you also needed to more directly answer the question and elaborate upon the importance of the rules

2.5

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 author acknowledges that this concept has limitations because it is dependent on a certain country's legal system governing insolvency. Furthermore, the author referenced Fletcher's definition to expose these limitations.*

*Fletcher proposed that international insolvency should be thought about as a situation involving the occurrence of insolvency in circumstances that somehow go beyond the scope of one legal system, such that the provisions of one set of domestic insolvency law cannot promptly and altogether employed without considering the matters brought forward by the case's foreign elements.*

*Essentially, when insolvency proceedings are initiated in another state of the common market where the debtor has assets, regardless of whether they are federal or national in origin, their recognition cannot only rely on the reputation of the first state.*

**More detail would have improved the mark awarded for this sub-question.**

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.**

*Bilateral international insolvency conventions that began in Europe in the 13th and 14th centuries dealt with evading creditors and later gathered assets.*

*Modernized versions of bilateral treaties or conventions concerning jurisdiction, acknowledgment, and enforcement in relation to bankruptcies, winding up, agreements, and compositions concerning their State first emerged in the 19th century.*

*In the case of international insolvency matters, various states have acceded to or ratified conventions that import into their domestic laws, and principles to resolve insolvency issues that are connected with another country. Through this manner, states bind themselves and impact their domestic law accordingly. Conventions as a source of cross-border insolvency law were deemed to be unsuccessful for several years.*

*However, this saw a turn in 1990 with the Istanbul Convention. The Istanbul Convention, Council of Europe Treaty Series No. 136, is a case in point of a successful attempt to achieve international multilateral insolvency conventions. It is regarded as a source of insolvency law because the current iteration of the European Insolvency Regulation<sup>16</sup> originated from this draft convention.*

*This treaty had a big influence on how the European Union dealt with the problems of international insolvencies among its members, such as Bulgaria and Poland. For example, it established a number of geographical rights, such as the ability of the liquidator to exercise rights abroad and the right of creditors to submit claims abroad. The European Union has also achieved more success as it has influenced broader multilateral developments in cross-country insolvency law.*

*More detail would have improved the mark awarded for this sub-question.*

4

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?**

*Formal insolvency proceedings are initiated and governed by insolvency law. Such proceedings typically include both reorganization and liquidation proceedings. On the other hand, informal insolvency proceedings are not subject to regulation by insolvency law. Rather, they entail voluntary negotiations between the debtor (FPPL) and the creditor (Lobo Lending Ltd). These negotiations provide for the restructuring of the insolvent debtor.*

*Regarding an informal out-of-court workout arrangement, Lobo should consider that such an arrangement costs significantly less than a formal arrangement since it does not involve the court. Furthermore, an informal agreement is advantageous in that there will be no publicity regarding the fact that FPPL is experiencing financial difficulties in Asgard. This can negatively affect FPPL’s goodwill.*

*On the other hand, Lobo should also consider that one of the disadvantages of an informal arrangement is that unlike in a formal arrangement, FPPL will not be granted a moratorium to prevent other creditors from going to court and beginning an insolvency proceeding. For Lobo, this means that FPPL might put its informal arrangement on hold as the company attempts to solve the pressing insolvency proceeding.*

*Another disadvantage is that unlike in a formal arrangement, informal arrangements are based on the contractual variation of existing rights by way of waiver, compromise, or deferment of debts or changes in priorities. They can bind parties to the contract; thus any dissenting creditors (creditors other than Lobo) can stop the informal arrangement when they commence a formal insolvency proceeding.*

*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.**

*A concurrent insolvency proceeding commenced against FPPL in Encanto would result in cross-border difficulties relating to coordination and cooperation since Lobo has already obtained a formal court order against FPPL in Asgard.*

*If the representative fails to adequately coordinate and cooperate with the Courts in Encanto, then there is a risk that both proceedings will compete with each other or are even incompatible in nature. This in turn may result in unnecessary capital losses for Lobo and the other creditor since attempts to solve FPPL's financial crisis under a reconstruction or rescue scheme could be prevented.*

*Furthermore, it will be challenging for the representative to determine which law will ultimately govern the questions pertaining to elements such as priority payments and security rights. The concurrent proceedings may also lead to a race between Lobo and the other creditor for FPPL's assets and the representative could encounter challenges observing the principle of equality.*

*This will defeat the whole purpose of a proceeding which is to ensure that FPPL's assets are administered efficiently and fairly while maximizing benefits to the creditors. These coordination and cooperation difficulties may also result in detrimental forum shopping and a risk of fraud. Nonetheless, treaties, conventions, Model laws, protocols, and Cross-Border Insolvency Agreements have been developed to assist with respect to these difficulties.*

*A case in point would be the European Guidelines on Communication and Cooperation (2007) which contains non-binding rules and a Draft Protocol on how representatives should cooperate and communicate. ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012) is yet another instrument that assists with respect to these difficulties.*

*Similarly, EU JudgeCo Principles and EU Cross-border Insolvency JudgeCo Guidelines (2015) and Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016) are other global instruments that help representatives navigate cooperation and coordination.*

*There is some scope to elaborate.*

4.5

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 FPPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency***

**proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.**

*The European Insolvency Regulation Recast only applies in the European Union. As such, it would not apply with respect to the UK's commenced insolvency proceedings due to the UK's exit from the European Union at 11 pm on 31 January 2020.*

*Ideally, the EIR recast allows a jurisdiction to open main insolvency proceedings to the courts of the Member State within which a debtor has a center of main interest. EIR recast also provides for the automatic recognition of these proceedings in all Member States.*

*This means that the judgment opening insolvency proceedings is to result in the same effects in all the EIR member states without any further necessary formalities. Since the UK is not a member of the EIR recast, this means that it becomes a third country to the EIR member states. Therefore, the insolvency proceeding that has already been opened in the UK will not be automatically recognized in the country in Europe but any insolvency processes in Europe country will be recognized in the UK under the MLCBI framework.*

*Recognition and enforcement must thus, be sought on a jurisdiction-by-jurisdiction basis. This would be time-consuming, costly, and cumbersome. Nonetheless, when answering this question, I will need information such as the day the UK exited the EIR recast, the specific transitional period, and FPPL's center of main interest. It would also be beneficial to know if MLCBI has been adopted.*

4.5

Marks awarded 13.5 out of 15

**\* End of Assessment \***

**TOTAL MARKS AWARDED 43/50**

**An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.**