



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 8 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.**

[ *Different countries in Africa have different legal systems depending on the colonial history of a given Country. Therefore, the insolvency law systems of countries such as Zambia, Kenya, Nigeria, Bostwana and many others that were under the British Rule are premised on English law tradition. On the other hand, the insolvency law systems of countries (which countries) that under the Portuguese Rule are founded on a civil law tradition whereas those that were under the French Rule mainly the Francophone Countries in West Africa their insolvency law systems are anchored on civil law. On the other hand, certain countries in Africa have insolvency law systems that trace their roots on a mixed legal system by virtue of having been under two different colonial rules. For example, South African and Namibian insolvency law systems are premised on Roman Dutch law and English law by virtue of them having been under the English and Roman Dutch Rule at some point]*



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.**

[ *A crisis can be a moment of reflection and also a turning point in any given Country. The 1998 Financial crisis was a major turning point in Eastern Asia as it brought about reforms in the area of insolvency laws for example; Thailand reformed wholesomely its bankruptcy laws post the 1998 financial crisis. Singapore in October 2018 enacted a new insolvency, restructuring and Dissolution Act to consolidate its corporate, personal insolvency and restructuring laws into a unified Act ]*

There is some scope to elaborate

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.**

[ *The American Law Institute has been very instrumental in assisting with resolution of international insolvency issues between North America and Canada. The American Law Institute Transnational Insolvency Project was initiated to improve corporation in the area of international insolvencies across the Member States of the North American Free Trade Agreements. The aforesaid project under the leadership of Professor Westbrook and various members of advisory groups prepared an international statement on the relevant country's insolvency law as applicable to international cases. It is important to mention the international statement on the relevant country's insolvency law referred to above gave birth to the principles of corporation among the NAFTA Countries which were prepared and approved by Council of the American Law Institute and Members in 2000. The general principles are on Cooperation and Recognition. The principle on cooperation requires that Courts and Administrators must cooperate in a transnational bankruptcy matter with the aim of maximizing the value of the Debtor's assets worldwide and promoting the just administration of the proceedings. On the other hand, the principle on recognition requires that the bankruptcy of a Debtor in one NAFTA Country should be recognised and given appropriate effect in each of the other NAFTA Countries. The general principles address issues of moratorium, information, sharing of value, National Treatment and adjustments of distributions. The success of highlighted initiatives is dependent on what steps each member country has taken in passing legislation aimed at adopting the Model Law on transnational insolvency.]*

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

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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.***

[ *It is beyond question that the historical background of each country has a direct bearing on the insolvency laws and approaches that will be applied in that country. Therefore, insolvency laws and approaches usually vary from country to country depending on the historical roots of a given country. For example, countries that were under British rule anchor their insolvency laws on English law which regard voidable dispositions as fraudulent transfers of property by the insolvent without receiving adequate consideration in return. In other words, voidable dispositions are transactions that are aimed at diminution of the assets of the insolvent either in form of donation or undervalue transactions that ultimately increase the insolvency of the Debtor and these transactions are susceptible to be set aside by the Liquidator in order to protect the Creditors. The rule of voidable dispositions in English law developed or was premised on the Act of Elizabeth of 1570 whereas in civil law countries it is or was premised on doctrine of actio pauliana. Actio pauliana according to [thefreedictionary.com](http://thefreedictionary.com) This is not the most reputable source to reference means, "A transfer of property that is made to swindle, hinder, or delay a creditor, or to put such property beyond his or her reach" It is important to note that most insolvency systems regard these rules to be very important for protection and preservation of the assets for the benefit of the creditors especially the unsecured creditors who may have nothing to fall back on in cases where voidable dispositions are allowed to stand.]*

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 foregoing definition indeed has limitations on the ground that Wessel conceded that his definition of international insolvency law is connected to the existence of a national legal framework of insolvency law. The foregoing entails that international insolvency law goes beyond the confines of a national legal system. In other words, international insolvency law cannot be applied using the national legal system exclusively without resorting to the issues raised by foreign elements of a case. It is important to note that the limitation posed by the definition above is premised on the lack of a uniform global insolvency legal system that applies to all the countries regardless of whether a country is steeped in an English law tradition or civil law tradition.* ]

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.**

[ *Treaties and conventions are a great source for cross boarder insolvency law on the ground that signatories to the Treaties and Conventions bind themselves thereby affecting the domestic law of party states. For example, certain conventions and treaties may have a provision to the effect that the provisions of the Treaty or convention will take precedence over the member state's national laws. On the other hand, provisions in the treaties and conventions may require state parties to domesticate the treaties and conventions thereby making it enforceable in the local courts hence forming part of state's hard law. Treaties like the Nordic Convention (1933) is regarded as rare successful multilateral Treaty for the Scandinavian Region. The Istanbul Convention, Council of Europe Treaty Series No 136 it is regarded to some extent as successful for having influenced the development of a European Union response to the problems of international insolvencies among its member*

*states. On the other hand, the European Insolvency Regulation (EIR) 2000 has greatly influenced broader multilateral developments in international insolvency law though it is not a convention. ]*

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

3.5

Marks awarded 11 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 difference between formal and informal insolvency proceedings is that "formal insolvency proceedings" entails commencement of proceedings under the provisions of the insolvency law and such proceedings are primarily regulated under the Insolvency law. In other words, formal insolvency proceedings means presenting a petition for winding up or restructuring or business rescue of a company before a national court under the provisions of the insolvency legislation. On the other hand, "informal insolvency proceedings" entails none invocation of insolvency law as parties (Debtor and Creditor) opt to voluntarily resort to negotiations. It is important to note that though informal insolvency proceedings are not amenable to insolvency law, the parties to such proceedings depend on the existence of an insolvency law for their effectiveness which provide indirect incentives or persuasive force to achieve reorganization. The advantages of formal insolvency proceedings are that the Insolvency Practitioner is appointed by the Court upon presentation of a petition and immediately takes control of the assets of the company thereby protecting the assets of the company and ultimately protecting the creditors.*

*On the other hand, there is no appointment of an insolvency practitioner for purposes of taking charge and control of the company in informal insolvency proceedings as such; the creditor is at risk on the ground that there is no protection and preservation of the assets during informal insolvency proceedings. The preceding are the key advantages and disadvantages that Lobo should consider when dealing with FPPL regarding an informal out of court arrangement compared to formal debt recovery options]*

It would be beneficial to also consider matters such as the absence of moratorium and the inability to bind dissenting creditors in an informal workout. 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.

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.**

[ *The doctrine of sovereignty of nations entails that enforcement of national laws starts and ends with the country's national borders. The foregoing poses a huge challenge when faced with concurrent proceedings beyond the national borders which include enforcement of the Judgment in another country, recognition of the judgment in another country and choice of the law applicable to security rights and priority of payments and whether the legal system is pro creditor or pro debtor. Thus, the UNCITRAL Legislative Guide on Insolvency is an important instrument that seeks to offer legislative guidelines to countries on insolvency law. The other international insolvency instrument that has been developed to assist with respect to the aforesaid difficulties is the European Insolvency Regulation (EIR) 2000. The development of these instruments are important as they seek to promote cooperation and coordination in insolvency proceedings among countries where the debtor's centre of interest and also in enforcement of the Judgments]*

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

3.5

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 UK is no longer a member of the European Union as such, the European Insolvency Regulation (EIR) 2000 ceased to apply to UK post its exit from the European Union. The additional information required is the Centre of FPPL's interest. The said information may be needed for purposes of coordinating and cooperation]*

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. It would be beneficial to discuss the MLBCI for example.

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Marks awarded 10 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.**