



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.*

*Insolvency laws across the African continent have ties to Europe. As such countries that were formerly part of the British Empire (e.g. Nigeria, Kenya, Botswana and Zambia) use English Law principles as the basis for local insolvency proceedings. Similar situation can be found in Francophone countries of West Africa in that they tend to follow civil law that has roots in French / Napoleonic laws. Other countries (e.g. Angola and Mozambique) also rely on civil law, although the founding principles are tied to Portuguese law.*

*Understandably new laws are being introduced (and developed) in all of these jurisdictions in order to encourage both legal and economic reforms.*

*There is scope to elaborate on mixed law countries.*

2



Question 2.2 [maximum 3 marks]

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

*Following the East Asian financial crisis (1998) it became evident that insolvency laws in the region had to be updated and reformed. To that extent Thailand, and more recently Singapore, have reformed their bankruptcy laws.*

*In 2018 Singapore passed a new set of insolvency regulations aimed at consolidating corporate and personal insolvency laws into a unified Act (similar to what the UK did with the Insolvency Act 1986). The law came into force in July 2020.*

There is scope to elaborate re Thailand.

2.5

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.**

*Throughout the 1970s, the US and Canada have been trying to agree a bilateral insolvency treaty. Although this initial attempt had failed, the outcome it had produced, i.e., both countries adopting the Model Law and the establishment of NAFTA Principles, can be considered a success.*

*NAFTA Principles are the result of the American Law Institute's (ALI) Transnational Insolvency Project. They were prepared and approved by the ALI Council and Members in 2000, and cover areas such as cooperation, recognition, moratorium, amongst others.*

*In addition the NAFTA Principles call for each NAFTA country to adopt the Model Law on cross-border insolvency, and recommend a number of important points that would improve the collaboration across international bankruptcy estates. These include automatic stays, priority claims and simplified authentication of documents.*

*Unfortunately the NAFTA Principles exclude the insolvency of natural persons, non-profit organisations and financial institutions, and in that sense would probably need to be expanded.*

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 7 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.***

*To start with, insolvency systems across the world are not consistent in the most basic of forms - some are debtor friendly, while others are pro-creditor in their approach. Broadly speaking common-law jurisdictions are considered more debtor friendly since rehabilitation is strongly considered as a viable option for a business in distress.*

*Historically, Civil code would have evolved from Roman laws and the Twelve Tables, and so the approach to dealing with debtors would have drawn on some of those original principles (e.g., debtor imprisonment, death or enslavement). In fairness, Common law (English law) treatment of debtors evolved over time, initially starting out as very pro-creditor (and not too dissimilar to the Roman approach), and eventually transitioning to more humane principles (e.g., debtor discharge).*

*Today there is a majority view that insolvency is a collective creditor procedure with the option to rehabilitate the debtor if it enhances creditor recoveries. Therefore the principles of insolvency are broadly aligned across civil and common law jurisdictions. However, there is still substantial difference in interpretation of these principles by local courts, especially in civil law countries where precedent is not relied upon.*

*One specific example are voidable dispositions - i.e., transactions aimed at putting assets outside the reach of the creditors either through fraud or preference. There is scope to elaborate in describing voidable transactions In Civil law countries action Pauliana is the building block for dealing with fraudulent conveyance, while in Common law countries it is the Act of Elizabeth (1570).*

*There are a number of elements that need to be considered and interpreted in order to form a view on what constitutes a voidable disposition and possible remedies:*

- *When did the debtor become insolvent (or when was it apparent that the business was heading for insolvency)? Different jurisdictions may use different tests to come up with this answer, and could even apply different time intervals (e.g., in some jurisdiction cessation of payments is needed for a period of 6 months while in others it is 30 days).*
- *How far back (from the start of insolvency) can we look to ascertain what assets have been transferred and if this was done in the ordinary course of business or to prefer a certain creditor? Depending on the type of action (fraud or preference) timelines are likely to differ even within the single insolvency framework, and especially across jurisdictions.*
- *Did the person receiving the property transact in good faith (i.e., without knowing the state of the debtor or its intentions) or was this done in collaboration with the debtor? Applying the test of good faith in different jurisdictions is likely to yield a different outcome.*
- *From a practical perspective - possession is 9/10ths of the law, so in certain countries individual creditors will take control of the assets (ahead of a liquidator or an administrator being appointed).*

A greater discussion of the importance of the rules is needed.

3

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.**

**Although it is hard to critique a single statement without having the full context, there may be a couple of potential issues with this definition.**

**First of all there is no universal international insolvency law that applies across all countries. This is partly due to historical differences (e.g., Civil vs. Common law) but probably more due to various nation states looking to protect their sovereignty by retaining control over its courts and economies.**

*Second, “full enforcement” of proceedings or measures is possible in countries that have BOTH adopted the UNCITRAL Model Law on Cross Border Insolvency AND have a competent judiciary.*

*Third, to the extent that countries have signed treaties or conventions (e.g., the Nordic Convention of Bankruptcy) the international aspect does not necessarily play a role, in that the laws of the home state (i.e., country where the insolvency proceedings have been initiated) will apply. As such execution would be more immediate and certain.*

*Finally, individual countries can rely on private international law to ascertain jurisdiction, deal with foreign judgements and decide the choice of law. This does not need to take into account the international aspects of the case, but is likely to delay execution.*

It would be beneficial to also consider the author’s own comments and the discussion by Fletcher

3

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 public international instruments that countries choose to sign and in doing so adopt into the local legislation, thereby potentially making them part of a country’s “hard law”. Insolvency is closely tied to trade, and as such the desire for uniformity and cross-border recognition in disputes is as old as (if not older than) Lex Rhodia. To that extent, treaties and conventions have had a positive impact on cross-border insolvency, as issues (and potential solutions) encountered by insolvency practitioners are discussed in public. Fundamentally next step in the evolution of insolvency laws is the universal adoption of UNCITRAL Model Law on Cross Border Insolvency since not all the countries are parties to all the treaties around the globe.*

*Covering each geography in turn:*

*Latin America has some of the longest standing treaties on cross border insolvency matters (e.g., Montevideo Treaties (1889) and (1940)). Although a number of states have signed up to the treaties, they have not done so in a uniform manner and therefore a careful analysis in a cross-border insolvency situation is required.*

*North America*

*Although no treaty exists between the NAFTA states (i.e., US, Mexico and Canada) there are principles in place that guide the conduct of cross-border insolvencies. However, given that these are not “hard law” their application can be challenged in practice.*

### Africa

*Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA) has a treaty amongst its 17 members (from Sub-Saharan Africa) that took effect in 1995. In 2015 all the members adopted the UNCITRAL Model Law on Cross-Border insolvency. Therefore this could be labelled as a significant step forward.*

### Middle East

*Although there are currently no cross-border treaties regulating insolvencies across countries in the Middle East, work is ongoing to enhance local insolvency laws and adopt UNCITRAL Model Law in order to promote greater collaboration of the local courts.*

### Asia and the Pacific

*Although there are currently no treaties between Asian countries on cross-border insolvency, work is ongoing to promote and adopt UNCITRAL Model Law as a framework to deal with such issues.*

### Europe

*There have been many attempts to codify cross-border insolvency issues (and solutions) into law in Europe, starting from the 13<sup>th</sup> and 14<sup>th</sup> centuries, initially on a bilateral basis, but then expanding to the multi-lateral format. Many of these attempts have not been particularly successful, with the exception of the Nordic Convention (1933) and more recently the European Insolvency Regulation (2000).*

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?**

*Formal insolvency arrangements are generally court-supervised (or sanctioned) and as such carry with them a certain stigma, costs and potential disruption to operations for a number of reasons (e.g., if the existing management team is replaced). Informal insolvency is both much less invasive and costly, and is flexible enough to allow for an agreement to be reached between the debtor and its creditors. Privacy is also relevant. Downside to informal insolvency is that there is no moratorium during the course of negotiations, and any agreement reached with creditors needs to be unanimous - otherwise dissenting creditors can take individual action to recover their debts.*

*As far as Lobo is concerned, it would need to consider:*

- a) Its security position (if FPPL has assets in Asgard that Lobo could enforce against to recover its debts - that may both be more effective and expedient relative to an informal process);*
- b) FPPL's financial prospects in Asgard (if the business is likely going to fail - might as well fail now before more debts are incurred and Lobo's position in the creditor stack is worsened)*
- c) Is FPPL (Encanto) going to provide financial support to FPPL (Asgard) and if so, what are the financial prospects of FPPL (Encanto) (i.e., availability of assets, number of creditors, etc.)*
- d) Number of other FPPL creditors in Asgard (Lobo could reach an out of court agreement with FPPL but another creditor may not and would then decide to take direct action against FPPL or push it into insolvency).*

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.***

*First issue will be the recognition of the office holder in other jurisdictions. For example, will the Asgard office holder have standing in Encanto? If not, they may find themselves unable to take actions that would protect the estate in other countries, including Encanto.*

*Assuming the office holder gets recognized, second issue will relate to the coordination between the two insolvency representatives (IR) to maximize the assets of the FPPL estate. Alternatively the two IRs may end up spending a substantial amount of the estate's money on legal fees and procedural matters.*

*Even if there is cooperation between the IRs, there will inevitably be conflicts of laws between the two countries - since both IRs are officers of the court, they will need to act in line with local regulations. Therefore some form of alignment and court approval will be needed anytime there is a conflict of legal interpretation.*

*The IRs could look to a number of international insolvency instruments to help bridge some of these gaps. Various bodies, ranging from the World Bank to the International Bar Association, have put together guidelines on cross-border insolvency applications. These are helpful in coordinating action between the IRs, to the extent there is agreement on some of the key point highlighted previously - recognition (jurisdiction) of the IR and judgements, and the conflict of laws provision. Issue is - often there is no agreement on these key points. The only real asset to the IRs in this case would be if both Encanto and Asgard adopted UNCITRAL Model Law on Cross-border Insolvency, and the judiciary in both countries was competent enough to know how to apply relevant laws in an expedient manner.*

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

3

Question 4.3 [Maximum 5 marks]

***Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against 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.**

*As a result of Brexit, European Insolvency Regulation (EIR) Recast do not apply in the UK as of 11PM on 31 December 2020. Since the original set of proceedings was opened in the UK, it is therefore not automatically correct to assume that English Law will apply in case Lobo were to decide to open another set of proceedings in another EU jurisdiction.*

*However, if FPPL had a COMI in the UK, and if Lobo was comfortable with English Law being used to guide the insolvency proceedings (due to its history, predictability and case law), Lobo may decide to file a claim in the UK insolvency proceeding, especially if that's where FPPL's substantial assets are.*

*On the other hand, if FPPL's major assets are outside the UK, and Lobo is comfortable with EU specific insolvency laws, they may decide to open proceedings in another country, especially if that country is creditor friendly.*

*Finally, to the extent that assets of FPPL are dispersed throughout the UK and Europe, FPPL would need to make sure to register as a creditor in the UK proceedings, and initiate proceedings in Europe, just to make sure that actions of any other creditors (to the extent there are any) are stayed across the continent and assets are preserved for all the creditors.*

*Obviously advice would change depending on whether Lobo was secured or not, the level of distress of FPPL in the UK (i.e. are UK creditors likely going to subsume all the EU assets), and also the situation of FPPL's operations in non-EU countries as they may be the main source of cash / assets.*

It would be beneficial to consider the MLCBI.

3.5

Marks awarded 11 out of 15

**\* End of Assessment \***

**TOTAL MARKS 39/50**

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