



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.**

*The historical roots of the various insolvency law systems in Africa are based on the legal systems of the former colonial powers in each modern day country.*

*For example the legal systems for each of the below countries is outlined below:*

- *South Africa - Roman-Dutch, English*
- *English - Zambia*
- *Portuguese - Angola, Cape Verde*
- *French - Senegal*

*However, this is not true across the board, and a number of countries have now started to enact more modern legislation.*

*There is some scope to elaborate.*



## 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.**

**1997 / 1998 financial crisis (the "Asian Financial Crisis").** This was an important event that led to insolvency law reform in Eastern Asia. The Asian Financial Crisis started in July 1997 in Thailand when Thailand allowed the baht to devalue quickly (after it became financially unsustainable to support its value). Following this devaluation, there was then contagion to the rest of the East Asian economy, with currencies across the region devaluing. As a result of this crisis many countries like Thailand and Indonesia overhauled their bankruptcy laws.

**Rise of Singapore.** Another development in insolvency law reform has been Singapore's rise as a global financial centre. From 2010 to 2018 Singapore worked to transition from its English law insolvency roots to a consolidated legislative framework that adopts and adapts the (*inter alia*) the UNCITRAL Model Law on Cross-Border Insolvency.

There is scope to elaborate upon Singapore reforms.

## 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.**

**Through the 1970s, Canada and the USA worked towards concluding a bilateral insolvency treaty.** The countries failed to reach an agreement for numerous reasons, and many commentators have said it was because the scope of the treaty may have been too ambitious. However, despite this failure, the USA and Canada have taken steps to co-operate on a bilateral basis on insolvency matters. Much of this co-operation started informally through the application of existing legislation and case law in relation to comity. Further, additional progress has been made through the adoption of the Model Law, and mechanisms such as cross-border, court-to-court protocols (which established procedures for the coordination of cross-border proceedings in Canada and the United States).

**In addition, there has of course been the introduction of the North American Free Trade Agreement ("NAFTA"), which was signed into law by Bill Clinton in the USA, and covers the USA, Canada and Mexico.** Since its introduction, the the American Law Institute (the "ALI") has since taken steps to assist with the resolution of international insolvency issues arising out of NAFTA. This initiative, has further sparked progress, such as the ALI Insolvency Project, which aims to improve

*cooperation in international insolvencies across the NAFTA States. For example, the ALI Insolvency Project has prepared and issued a "Transnational Insolvency: Cooperation Among the NAFTA Countries: International Statement" for each of the NAFTA States which sets out each of the relevant country's insolvency law in international cases. At present, such works have culminated into the publication of "Principles of Co-operation among the NAFTA Countries", which was approved by the ALI Council and Members at its annual meeting in May 2000.*

*In summary, even though initial, direct, and bilateral attempts between Canada and the US to formalise a bilateral insolvency treaties have not been successful, since then, significant progress has been made via soft law methods, and the work of the courts in relation to the same.*

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 8 out of 10

### QUESTION 3 (essay-type questions) [15 marks in total]

#### Question 3.1 [maximum 5 marks]

***It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.***

*The law of voidable or impeachable transactions is critical to any insolvency regime as a fundamental duty of any insolvency practitioner is 'get in' all the outstanding assets of an insolvent entity for the benefit of the outstanding creditors to the entity (and members if there are still funds outstanding after making the relevant creditors whole). There is some scope to explain voidable transactions here before explaining their significance.*

*In most jurisdictions, be the jurisdiction pro-creditor or pro-debtor, the relevant insolvency practitioner will have some mechanism (which differs from country to country) for getting in assets that were (i) donated, (ii) disposed of at an undervalue, or (iii) transferred to selective creditors prior in time to the formal insolvency. In these circumstances that the voidable or impeachable transaction may be (i) void ab initio, (ii) voidable / liable to being set aside or (iii) otherwise 'attacked' or reclaimed for the benefit of the relevant debtor now in administrative / liquidation.*

**One major issue in international insolvency law is that the rights outlined above differs between regimes / jurisdictions. One major reason for this difference is that:**

- **Civil law countries were informed by Roman law, and in particular the principle of *actio pauliana*. This principle broadly allows for the recovery of assets that have been alienated *in fraudem*. Some commentators say civil law systems are more pro-debtor (or otherwise look to protect other rights, such as labour (for example - France)).**
- **Whereas English law is largely informed by the Act of Elizabeth of 1570. In this Act no provision providing for the release of debts was included. One further common view amongst commentators, are that English courts are pro-creditor.**

4.5

**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.**

***It is obvious that in an international context judgments and orders from foreign courts and tribunals may not be immediately recognised, enforced or executed in local courts.***

***That said, there has been a trend towards cooperation and predictability in recent times, and measures and orders in insolvency proceedings from foreign courts and tribunals are today fully enforced in other countries:***

- ***By reference to public international law treaties and conventions;***
- ***With reference to basic principles of comity;***
- ***With reference to many courts inherent jurisdiction, or other principles of the common law (in systems that have their genesis in the English system)***
- ***Through domestic legislation, either national or supra-national, such as frameworks established by OHADA, EU, or on the basis of the UNCITRAL rules (where such frameworks are particularly common (and likely necessary) in common markets);***
- ***Bespoke protocols created in relation to specific insolvencies, such as Lehman Brothers.***

*The above measures help in the movement towards a clear and predictable frameworks in international insolvency.*

It would be beneficial to canvas the author's comments on limitations of the definition and also reference to Fletcher.

2.5

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.***

*One source of law in the insolvency context, for example in countries like the Netherlands, is certain public law instruments (which become directly applicable in local courts there). However, that is the exception, and in most countries conventions and treaties are implemented by local law in order to have an effect (such as Australia). Even so, even in these countries treaties or conventions a rich source for cross-border insolvency law.*

*One pertinent example are the soft law instruments that have been produced by the United Nations, such as the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) and the UNCITRAL Legislative Guide on Insolvency Law (2004).*

*Other common examples of successful treaties include the Nordic Convention (1933) and the Istanbul Convention (1990). In modern times, other successes include the European Insolvency Regulation (EIR) (2000)*

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

3.5

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?**

**Differences between formal and informal insolvency proceedings:**

- *Informal out-of-court arrangements are ad hoc and not collective.*
- *An informal debt collection method has been described as 'piece meal'*
- *A formal process is collective and structured and will place a moratorium on out of court processes* [There is some scope to elaborate here.](#)

**Key advantages regarding informal out-of-court arrangements:**

- *Informal arrangements may be value accretive for both creditors and the debtor company, particular if the company is only cash flow insolvent (but is balance sheet insolvent).*
- *If a formal process may cause current management to lose control and may also trigger events of default on other debts which may have a negative impact on Lobo*
- *Triggering a formal process will also trigger the following issue: what will the rules in a formal cross border be? In particular, will other creditors have preference? Because they are secured or otherwise have priority in Encanto?*
- *In summary, an informal process is generally preferable (and likely to be less costly than a formal process).*

**Key disadvantages regarding any informal out-of-court arrangements (and reasons why a formal debt recovery option may be preferable):**

- *This will be structure and order to proceedings;*
- *Does not require the consent of FPPL;*
- *Prior arrangements under the informal process may be void if a formal process is ultimately commenced (and thus it may be preferable to skip the step of an informal process, especially if a formal process is inevitable).*

[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.**

**When a debtor has been put into a formal state of insolvency in both Asgard and Encanto the following issues will arise:**

- **What rules on cross border insolvency apply?**
- **Will Asgard or Encanto be more pro-creditor (potential discharge in 10 years) / pro-debtor (potential discharge in 1 year)?**
- **How will employees be treated (in Asgard or Encanto)?**
- **How will property law in Asgard or Encanto effect the insolvency?**
- **What is the law in relation to security in either jurisdiction, and how will that effect matters?**
- **In particular, are there special rules in relation to banks / FI, groups of companies, State Owned Enterprises, non-profits, municipalities, or sovereign debt (and is any of that applicable in this circumstance)?**
- **How will contracts be dealt with in each jurisdiction?**
- **Further issues that will also arise also include:**
  - **Will the system provide a moratorium or automatic stay in Asgard?**
  - **Will the IP in Asgard remain in possession / will the company directors remain in position?**
  - **Given the concurrent proceedings, what is the power of the IP professional / the directors in each instance?**
  - **Will the company be entitled to discharge / partial discharge?**
  - **Will there be a creditors committee? How?**
  - **What is the standing of the foreign Insolvency estate representative in Asgard now?**

**Many of these issues are solved through international insolvency instruments as they can move to create greater certain and predictability as to how these issues will be dealt with. Current instruments are driving predictability / certainty in:**

- **Recognition of foreign judgments**
- **Creating protocols for communication between courts when there are multiple proceedings.**

**Apply these principles, given that the headquarters, place of incorporation, and main place of business are all in Encanto, one would expect that Encanto procedure should regulate the whole matter, even if there are assets in Asgard.**

Elaboration is needed regarding the international instruments.

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 would be influential with respect to the UK commenced insolvency proceedings. Further, the Insolvency Act 1986 would also naturally be on importance. The Recast will not apply due to the timing. The MLCBI needs to be considered.*

*The following factors would be highly determinative as to whether proceedings could be successful brought in Asgard, or whether Encanto should be the only place where proceedings are brought:*

- *Where is FPPL incorporated?*
- *Where is FPPL's main office / HQ?*
- *Where is FPPL's centre of business?*
- *Was the process in the UK closed / dismissed / stayed?*
- *Is the business a special kind of business such that there is a special application of the EU/ UK regulations?*

0.5

Marks awarded 7 out of 15

\* End of Assessment \*

**TOTAL MARKS 35.5/50**

**A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.**