INSOL INTERNATIONAL

# FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

## SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

## (INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

***This is the*** summative (or formal) assessment for Module 1 ***of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment1summative]***. An example would be something along the following lines: 202223-363.assessment1summative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked***.***

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words***.***

6. ***The final submission date for this assessment is*** 15 November 2022***. The assessment submission portal will close at*** 23:00 (11 pm) GMT on 15 November 2022***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages***.***

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

***Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one*** that makes the most sense and is the most correct***. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

***Civil Law and English (Common) Law countries have the same historical roots. Select from the following the*** best response ***to this statement.***

***(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.***

***(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.***

***(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.***

***(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.***

Question 1.2

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

***(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.***

***(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.***

***(c) This statement is untrue since discharge of debt never became part of any of these systems.***

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

***(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.***

***(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.***

***(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.***

***(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.***

Question 1.6

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

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

***(a) Public International Law.***

***(b) UNCITRAL Legislative Guide on Insolvency Law.***

***(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.***

***(d) Private International Law.***

Question 1.7

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

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

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

***(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).***

***(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.***

***(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.***

***(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.***

Question 1.8

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

***(a) It is public international law governing insolvency law between States.***

***(b) It is private international law governing insolvency law between States.***

***(c) It may involve aspects of both public international law and private international law.***

***(d) It involves a simple classification within either public international law or private international law.***

Question 1.9

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

***(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.***

***(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.***

***(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.***

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

Question 1.10

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

***(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.***

***(b) This statement is untrue because North America was not a party to these agreements.***

***(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.***

***(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.***

Marks awarded 9 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 insolvency laws in African jurisdictions commonly find their roots in the insolvency laws of their colonial powers, which can be further traced back and categorized into civil law system and English law systems.]***
***p. 10, Module 1 Guidance Text, Introduction to International Insolvency Law (the "Guidance Text")***
More detail is required for a higher mark

1

Question 2.2 [maximum 3 marks]

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

*[The 1998 financial crisis stimulated the development of insolvency laws in Eastern Asia jurisdictions. Indonesia and Thailand have profoundly revised their insolvency laws.]*
***p. 11, the Guidance Text***
More detail is required for a higher mark

1.5

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.***

*[United States and Canada attempted to enter into a bilateral insolvency treaty in 1970s, but the attempt was not successful. Thereafter, both states adopted the UNCITRAL Model Law on Cross-Border Insolvency. In a later stage, NAFTA countries of United States, Mexica and Canada have initiated American Law Institute Transnational Insolvency Project, and the above states successfully approved in 2000 the Principles of Cooperation among the NAFTA Countries under the project framework. Subsequently, American Law Institute and the International Insolvency Institute initiated a project and the project fructified in 2012 in form of ALI- III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to Court Communication in Cross- Border Cases.]*
***p. 54-57, the Guidance Text***

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
Marks awarded 4.5 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.***

*[Voidable disposition is a common mechanism in insolvency laws of different jurisdictions. It is a mechanism which permits cancellation of transfer of assets or undertaking of obligations made in a time span usually closely prior to the opening of insolvency proceedings. Such mechanism is important, because it aims to protect the creditors' interests and preventing fraud via safeguarding the integrity of estate and thereafter ensuring a pari passu distribution.* There is scope to elaborate and consider preference avoidance (as well as fraud avoidance.
*Though such mechanism is common in different jurisdictions, the requirements for remedy under such circumstances may vary. The possible historical reasons for the difference may lie in the different roots of the laws. The actio Paulia and the Act of Elizabeth are respectively the different roots of voidable disposition in civil law and English law.]*
***p. 22 and p. 28, the Guidance Text***
There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

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.***

*[Because such definition is connected to the existence of domestic insolvency laws. However, the current insolvency laws in most jurisdictions are far from consummate in regard of cross-border insolvency issues, which leads to unpredictability or even infeasibility in the co-ordination and cooperation between courts of different states. Without domestic laws guiding the cross-border insolvency co-ordination and cooperation, different insolvency laws may compete with each other, which may lead to multiple proceedings, and the creditors will be involved in a fierce race fighting for assets in different proceedings. Such consequences are neither in consistence with the spirit of international insolvency law, nor represent a state legislator's intention. It is therefore oblivious that the international insolvency law could be reduced to a castle in the air without the foundation of domestic insolvency laws.]*
***pp. 31-34, the Guidance Text***

There is scope to elaborate, for example with respect to Fletcher's comments.

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.***

***[Compared to the so-called soft laws, treaties and conventions have binding power upon signatories. Much as the efforts are made to accomplish treaties or conventions among states, the successful examples are limited. The successfully signed and functioning treaties or conventions are, for examples, the Nordic Convention (1933) as well as the European Insolvency Regulation (EIR) (2000) which is recast in 2015. The reasons may lie in the complexity and comprehensiveness of a treaty/convention, a state's willingness to be directly bound, the significant heterogeneity of the signatories' domestic insolvency laws, etc. On the other hand, the soft laws which usually serve as unbinding recommendation for indirect application (via domestication) seem more acceptable for most states, especially developing ones.]***
***pp. 46-47, the Guidance Text***

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. There was scope to discuss, for example, examples and their significance in further detail.

3.5

Marks awarded 11.5 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?***

*[Compared to "informal" insolvency proceedings, "formal" ones are initiated by qualified applicant for debtor satisfying relevant insolvency "thresholds". The "formal" proceedings are organized and supervised by the court, and normally an insolvency representative will be appointed by the court for administration of estate. Formal proceedings normally are required to adhere to strict procedural regulations, and there is usually no room for creditors and debtors to revert back once the proceedings are opened. While as for "informal" proceedings, it is in its nature the contractual agreements between a debtor and its creditors, thus majorly depending on parties' autonomous will and regulated by the basic contract laws in the corresponding jurisdictions.*

*If Lobo considers to initiate informal insolvency proceedings in Asgard, the key advantages could be 1)easy to initiate, no threshold requirement; 2)room for a more flexible repayment/ debt restructuring plan (e.g., The debt priority cascade may be compromised.) 3) getting repaid ahead of other creditors and avoiding a pari passu distribution, 4) preserving the asset value by avoiding the opening of insolvency procedures, thus achieving a potentially higher liquidation rate; etc. The key disadvantages are 1) the risk of cancellation of repayment after the opening of insolvency proceedings due to avoidable disposition, 2) the lengthy negotiation and unpredictability of achieving an acceptable repayment plan or debt restructuring plan, 3) the informal repayment plan has no binding power upon other creditors, therefore is threated by the other creditors' readiness of imitating formal insolvency proceedings, etc.]*

**It would be beneficial to also consider matters such as moratorium and publicity in greater detail. 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

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.***

*[In the above scenario, there are two concurrent insolvency proceedings against FPPL in Asgard and Encanto. Some difficulties may arise when the courts in Asgard and Encanto are dealing with FPPL's insolvency case, including but not limited to: 1) Which court shall have jurisdiction of the insolvency case? 2) How to decide the centre of main interest of FPPL and the seat of main insolvency proceedings? 3) How to recognize the initiated proceedings and the appointed insolvency representative in*

*another jurisdiction? 4) How to decide the application of domestic laws of Asgard and Encanto regarding specific questions in insolvency proceeding?*
*Examples of international insolvency instruments assisting resolving the aforesaid difficulties are UNCITRAL Model Law on Cross-Border Insolvency, the Nordic Convention (1933), the European Insolvency Regulation (EIR) (2000) which is recast in 2015, the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, etc. These instruments are very important and have been making significant contribution to the harmonization of domestic international laws, uniform choice of law principles, uniform recognition laws as well as co-operation and co-ordination to promote recognition and enforcement (pp.53-54 the Guidance Text). Such changes, as results of either binding effects of "hard laws" or domestication of "soft laws" by member states, have led to higher predictability of cross-border insolvency.]*

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

4

Question 4.3 [Maximum 5 marks]

***Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.***

*[As the UK has exited EU since 31 January 2020, the European Insolvency Regulation Recast (EIR (Recast)) will no longer apply for insolvency proceedings initiated after 31 December 2020 (p. 64 the Guidance Text). As in this scenario, the insolvency proceedings were opened in the UK on 30 June 2022, therefore, the insolvency representative appointed by the UK court may not apply for recognition and enforcement according to EIR (Recast). However, that does not necessarily mean the cooperation and coordination of cross-border insolvency issues between EU member states and the UK is rendered impossible. In spite of the inapplicability of EIR (Recast), EU member states and the UK have domesticated other international instruments facilitating cross-border insolvency issues, such as the UNCITRAL Model Law on Cross-Border Insolvency, relevant parties can still maintain cooperation and coordination on a basic level.]*

5

Marks awarded 12 out of 15

* End of Assessment *

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

TOTAL MARKS 37/50