



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.*

*Africa represents one of the emerging markets and developing country systems. Therefore, as customary with other emerging markets and developing country systems Africa inherited the insolvency law systems of their former colonial powers and their historical roots. Nigeria, Kenya, Botswana, Zambia Tanzania have an English law tradition. Angola and Mozambique have a civil law tradition based on Portuguese law. The Francophone countries share civil law French civil law with South Africa and Namibia having mixed legal systems or civil and English law. However, it is important to note that while African countries have imported their legal systems, they have begun introducing modern legislation as they emerge.*

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Question 2.2 [maximum 3 marks]



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

*The aftermath of the 1998 financial crisis in East Asia gave rise to insolvency law reform in Eastern Asia which led to Thailand in particular overhauling their bankruptcy laws. The 1998 financial crisis in East Asia also led to Singapore becoming a major player in the region. Another example of reform was evidenced in October 2018 with Singapore's passing of a new Insolvency, Restructuring and Dissolution Act to consolidate their corporate and personal insolvency and restructuring laws into a unified act.*

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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.**

*There have been various initiatives undertaken over the years to assist with the resolution of international insolvency issues between North America and Canada, namely the 1970 bilateral treaty and the American Law Institute (ALI) Transnational Insolvency project. In 1970 Canada and North America worked toward establishing a bilateral insolvency treaty but failed. However, they achieved progress through their adoption of the model law and other protocols. Additionally, the American Law Institute launched the ALI Transnational Insolvency Project to resolve the international insolvency issues between the United States, Canada and Mexico by improving cooperation amongst the NAFTA states. The successful project concluded with recommendations that each NAFTA country adopt the Model Law on Cross-border insolvency coupled with recommendations of automatic stays, notices to creditors, priority claims, and binding effect of reorganisations.*

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 9 out of 10

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

Question 3.1 [maximum 5 marks]

***It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards***

***insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.***

*Voidable dispositions are the settlement of pre-existing unsecured debts to creditors or providing security to the creditors which will improve their position once insolvency is commenced. These transfers/payments are typically classified as fraudulent conveyances or preferences and are clawed back by the liquidator during their appointment. English law and civil law both have different approaches regarding the treatment of voidable dispositions due to their basis of their remedy. The action Paulina forms the basis of fraudulent conveyance law in civil law systems and the Act of Elizabeth of 1570 forms the basis of the remedy in English law.*

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

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Question 3.2 [maximum 5 marks]

***A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:***

***"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."***

***However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.***

*The author, Wessels, concedes that his definition as well as Fletcher's on international insolvency law has limitations due to its connection to an existence of a national legal framework of insolvency law. The limitation of Wessels' definition coincides with the heart of insolvency's greatest issue, the non-existence of a single set of insolvency rules that applies globally. We have witnessed the rise in globalization, the free movement of goods, services, capital, and persons with no single set of laws and most domestic legal systems being ill-equipped with handling insolvencies with implications across national borders. The complexity of cross-border insolvency cases is due to (but not limited to) debtors having economic affairs with a foreign counterparty, interests in property located in more than one state, foreign creditors, contractual*

*obligations falling under a foreign state's jurisdiction and govern by foreign law, and obligations being incurred outside of a debtors home state to be performed in a foreign state which leaves unanswered questions on how to coordinate possible multiple concurrent insolvency proceedings against one debtor. The answer to insolvency's limitations would be establishing a national legal framework of insolvency law which Wessels definition alludes to and makes Wessels' definition limited.*

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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 public international instruments which allow states to become signatories and bind themselves together to create legally binding agreements (domestic laws enforceable in court) under international law. Treaties and conventions are generally viewed as an unsuccessful way of establishing cross border insolvency law, despite the appearance of bilateral international insolvency conventions from the 13<sup>th</sup> and 14<sup>th</sup> century and more modern forms throughout the 19<sup>th</sup> century, as the Nordic Convention of 1933 boasts as a rare successful multilateral treaty. Further evidence of this is the unsuccessful European efforts at achieving multilateral international insolvency conventions for many years. While it was influential in the development of the European Union, Europe has observed more success by way of European Insolvency Regulation and its progression rather than the use of conventions.*

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

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?**

*While both formal and informal insolvency arrangements share the common goal of resolving a debtor’s financial difficulties, they both take different avenues of achieving it. The main difference relates to the fact that insolvency proceedings are not always regulated by insolvency law and requires voluntary negotiations between a debtor and its creditors, whereas formal insolvency proceedings are commenced and governed by insolvency law. Formal insolvency includes liquidations and rescue proceedings. While formal insolvency provides the benefits of an automatic stay on debts and the pooling of assets to pay credits pari passu, the costs and publicity associated typically provides indirect incentives for debtors to achieve reorganization or seek repayment plans. Should Lobo consider an informal out of court workout arrangement it is important that they understand both the advantages and disadvantages of doing so. The benefit of reaching an informal agreement would save the assets of the FPPL and allow for an opportunity for a successful reorganization or reinvestment of the company and in turn allow for the full repayment of debts. However, the disadvantage of reaching an informal agreement would be the fact that it does not secure you against other actions from other debtors and is not court binding. Agreeing to a formal repayment plan may be the most advantageous informal arrangement for Lobo as not all systems allow for the discharge as well as it saves costs.*

There are other matters to consider such as binding dissenting creditors, moratorium, publicity. 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.

2.5

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 difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination are due to the fact that each sovereign state govern and develop their own legislation, applies their own rules, and no or very limited extraterritorial effect would not be given to foreign proceedings. The development of international insolvency instruments would assist in the difficulties faced in cross border insolvency proceedings, however, the greatest development that is needed is a greater form of co-operation and co-ordination from states in the cases with multiple concurrent insolvency proceedings.*

While the question says 'briefly' it is for 5 marks. Elaboration was needed, including with respect to the various relevant international insolvency instruments.

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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.***

*It is important to note that as of 11 pm on 31 January 2020 the UK ceased to be a member of the EU, which effectively means that the European Insolvency Regulation Recast no longer applies to post 11pm 31 December 2020 proceedings in the UK and simply not applicable to the current hypothetical proceedings. Due to aforementioned fact, Lobo must understand that the success of the hypothetical proceeding will largely depend on both the local UK laws, historical cases and local customs as well as obtaining a foreign recognition is expensive as continually evidenced in cases globally. Lobos case is further complicated due to the complexities of a possible concurrent international insolvency cases and the lack of globally accepted law.*

It would be beneficial to consider the MLCBI

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Marks awarded 6.5 out of 15

\* End of Assessment \*

**TOTAL MARKS 35/50**

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