



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.**

*African countries still suffer the direct influence of their colonizing countries. Therefore, most African countries adopt models of legislation that follow the legal structure adopted in colonizing countries. For instance, Angola and Mozambique are countries that adhere to the civil law model, based on Portuguese legislation. In turn, Nigeria, Kenya, Botswana, Zambia and Tanzania have an English legal tradition. The same is true for African countries that were most influenced by France, such as Mauritania, Senegal, Mali, Guinea, Ivory Coast, Burkina Faso, Benin and Niger. There are also some countries that suffered cross-influences from more than one colonizer, as is the case of South Africa and Namibia, which have traces of the civil law and English law systems. Thus, in summary, there is a pattern that the basis of the legal system comes from the former colonizing country, but this does not exclude the fact that African countries have introduced modern legislation in recent decades.*

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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 1998 financial crisis started in Thailand and spread across East Asia. Thailand had its economy particularly impacted, which aroused the need to modernize its insolvency system and led to a process of reviewing its bankruptcy legislation. Singapore, as it has increasingly become an economically relevant country in the region, passed in October 2018 a new bankruptcy and corporate restructuring legislation, covering both individuals and companies. This new unified legislation entered into force on July 30, 2020.*

3

Question 2.3 [maximum 4 marks]

**Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.**

*In the 1970s onwards, the United States of America and Canada began negotiations to conclude a bilateral insolvency treaty. However, the attempt failed and the integration of the legal system of both countries improved a few years later with the adoption of the Model Law on Cross-border Insolvency and through other mechanisms such as Protocols.*

*In addition, the American Law Institute (ALI) promoted advances in terms of cooperation in matters related to transnational insolvency between the countries signatories of the North American Free Trade Agreement (NAFTA), such as the United States of America, Canada and Mexico. For instance, the ALI Transnational Insolvency Project was initiative to improve insolvency cooperation between NAFTA States that led to the approval in 2000 of the Principles of Cooperation among the NAFTA Countries.*

*The NAFTA principles focus on insolvency of companies and other legal entities involved in business operations. Therefore, they exclude the insolvency of individuals (natural persons) and they also do not deal with the financial crisis of non-profit organizations and financial institutions. In addition, NAFTA principles recommend that each signatory country of the treaty also adhere to the Model Law on Cross-border insolvency, in order to improve the international cooperation in transnational insolvency matters. Other points addressed by the NAFTA principles are automatic stays; notice to creditors; claims priority order; binding effect of reorganization plans; and simplified procedures for document authentication.*

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

3.5

Marks awarded 9.5 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.***

*The essence of an insolvency legal proceeding is that there is a collective debt recovery process, which will discourage one or another creditor from proceeding with individual asset expropriation measures. However, some debtor transactions that took place prior to the bankruptcy may suggest that they were carried out through fraud, which requires investigation. In the event that the fraud is recognized, the legal act will be declared ineffective before the bankruptcy estate and those creditors must be refunded in the amount determined by the practice of the illicit.*

*In the legal system of English tradition, the root for the settlement of voidable transactions is in the Elizabeth Act of 1570, which introduced a first "bankruptcy statute", which also contained textual provisions for the prevention of fraud. It is recalled that the foundations for a fair bankruptcy process had already been laid by the English Bankruptcy Act of 1542, which contained two fundamental principles for the bankruptcy process: collective debt collection and equitable distribution of liquidated assets among creditors.*

*In civil law systems, in other hand, the actio pauliana is a typical remedy which main objective is to recover goods or assets where a debtor has transferred assets to a third party with intent to defraud its creditors. In addition, the right to file actio pauliana arises when the fraudulent disposal was made with the knowledge of the person to whom the alienation was made.*

*The differences between the two remedies may arise from the conception that in Roman Law debtors could be sentenced to prison and death, while in England initially the legal system did not even provide for the possibility of incarceration on account of non-payment of a debt. This option was only introduced in the late 13th century by the Statute of Marlbridge of 1267 and abolished in 1869 by the Debtors Act. Hence, it can*

*be noted that between the 13th and 19th centuries the English insolvency system was pro creditor.*

*In any case, the collective enforcement of the debt in both civil and English law systems have its center shifted from the person of the debtor to the assets he owns, making the procedure more "human".*

*The sub-question also requires consideration of the importance of the rules. This requires elaboration.*

3.5

Question 3.2 [maximum 5 marks]

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

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

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

*The limitation stems from the definition being related to the existence of a legal structure of insolvency law in a given country. In other words, the recognition of insolvency proceedings in a State where the debtor holds assets departing from a State order where exists a main bankruptcy proceeding cannot depend solely on the goodwill of the State in which the debtor holds assets. This is because regardless of the existence of a formalized common market, current communications and interactions between individuals, companies and States have greatly increased, what led to the rise of transactional insolvency cases. Therefore, transnational insolvency matters tend to be the rule rather than the exception and it is a increasingly routine to have Investments and to establish branches and subsidiaries in foreign countries. Furthermore, a country's capital markets are now accessed by citizens from all over the globe and the national currency exchange market is about to undergo significant changes with the advent of cryptocurrencies. Therefore, in the current world economy, national borders are becoming irrelevant, which demonstrates the limitation of the proposed concept of transnational insolvency.*

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

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.**

*Article 3 of the UNCITRAL Model Law on Cross-Border Insolvency indicates that a bilateral treaty should prevail if a conflict arises between the agreement signed by the country and the domestic Law. Hence, the UNCITRAL model adheres to the principle of supremacy of international obligations of the enacting State over internal law. Therefore, the article gives preference to international treaties, if it deals with topics also covered by the MLCBI, which denotes the relevance of the topic for the transnational insolvency law. Certainly, allowing the introduction of this article into the country's domestic legislation without any critical sense would undermine the desired uniformity of the cross-border insolvency law. For this reason, the issue must be handled carefully at the time of adoption of the MLCBI by the enacting State, so that MLCBI does not lose its scope. In any case, from that point of view, it can be said that treaties are successful sources for the transnational insolvency law. Although, historically, it is possible to identify many bilateral conventions or treaties that failed in its purpose, such as the Istanbul Convention, approved by the Council of Europe in 1990, which was signed only by 8 member States and was not ratified by enough countries for it to enter into force.*

*There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, the nature of treaties/conventions at the outset.*

3.5

Marks awarded 11 out of 15

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

***Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.***

***FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.***

***If you require additional information to answer these questions, briefly state what it is and why it is relevant.***

**Question 4.1 [Maximum 5 marks]**

***What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should***

**Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?**

*A formal insolvency proceeding must be done through a Court, which makes the procedure more expensive, due to the need to involve court personnel and appoint a judicial administrator who will oversee the process. In addition, the procedure tends to be slower, due to the numerous subjects involved in the process. Finally, the degree of technicality and expertise of the judge who will be responsible for the process must be considered, as not all countries have specialized bankruptcy law chambers.*

*In turn, informal arrangements are its essence an out-court procedure, and it will not necessarily be governed by domestic insolvency law. In addition, it will be based on voluntary negotiations stipulated between the creditor and the debtor. Although not directly regulated by the insolvency law, the bankruptcy statute may at least provide for ways for the agreement to be judicially enforced in case the debtor does not comply with what was agreed.*

*Therefore, Lobo should consider as key advantages of informal arrangements the fact of being a more economic procedure, as they will not involve the structure of a Court, as well as the flexibility of informal workout, as creditor and debtor will have greater freedom to handle the case and negotiate their wishes. In other turn, as disadvantages, Lobo should note that there is no moratorium on the debtor and that FPPL may be charged simultaneously by other creditors, who may even anticipate and start formal insolvency proceedings before Lobo; and that there is no way to bind what Lobo and FPPL agree to other FPPL creditors. Finally, it must be considered the publicity of a formal insolvency proceeding, which will expose the financial crises of the debtor.*

*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.*

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, it would be important to investigate the framework of the insolvency legislation of Asgard and Encanto since each country could tend to a universalism approach or a territorialism approach regarding transnational insolvency issues.*

*Universalism advocates that only the law of one country will govern all other bankruptcy proceedings that are underway in other jurisdictions. On the other hand, territorialism advocates that the bankruptcy process will produce legal effect only in the jurisdiction in which it was opened. In other countries, new bankruptcy proceedings may be opened, which will be conducted by the law of the respective country.*

*So, assuming that Encanto and Asgard adopt a framework tending to universalism and that both countries adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) is possible to mention the following problems that may arise from a transnational insolvency case, based on the authoritative text of Professor Fletcher: (i) in which jurisdiction should the bankruptcy process be opened; (ii) the choice of law to apply to the matter, according to the particularities of the process; (iii) the recognition and effects that the main process will have on secondary processes. Therefore, the main difficulties of the transactional bankruptcy process will permeate the confrontation of these three points.*

*In this context, the foreign representative of the Asgard insolvency proceeding must face the provisions of the article 17.2 of the MLCBI, that states the following:*

*“2. The foreign proceeding shall be recognized:*

- (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or*
- (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State”*

[Article 27 is relevant](#)

*Considering that 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, but less than in Encanto, it is probably that the foreign main proceeding would take place in Encanto, where FPPL has the centre of its main interests.*

*While is pending a decision to recognize the foreign main proceeding, in case it is needed urgently relief, the foreign representative of the insolvency proceeding opened in Asgard may request relief of provisional nature to stay execution against FPPL’s assets before the Court where the debtor’s assets are located; and any other measures to grant additional relief under the law of this State, accordingly to Article 19.1 of MLCBI.*

*Once the main insolvency procedure has been defined, binding effects on FPPL's creditors will arise, as provided for in article 20.1 of the MLCBI. For example, individual actions or individual insolvency proceedings would be stayed; enforcement of judgments against FPPL would be stayed; rights to transfer or dispose of FPPL assets would be suspended.*



*Therefore, the foreign representative of the Asgard bankruptcy proceeding would be bind by the possible recognition of a main bankruptcy proceeding in Encanto. As a result, the credit held by Lobo before the FPPL should be submitted to collective execution, respecting a single payment order to creditors, which would be available in the main bankruptcy proceeding.*

This question required you to 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. This required discussion of different laws, and territorial approaches, together with consideration of international insolvency instruments developed to assist liquidators appointed in concurrent insolvency proceedings. It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

3.5

Question 4.3 [Maximum 5 marks]

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

*The European Insolvency Regulation Recast would not apply to the commenced insolvency proceedings opened by the minor creditor, since the UK ceased to be a member of the EU on 31 January 2020 and the transitional period expired at 11 pm on 31 December 2020.*

*Hence, the matter would have to be resolved based on the cross-border insolvency laws adopted by England and Wales. In particular, section 426 of the insolvency act 1986, which is a adoption of the UNCITRAL Model Law on Cross-Broder Insolvency, that took place in 2006. Common law principles would also apply for the matter. Furthermore, it should be noted that the recognition of the existence of insolvency proceedings outside the EU is an amendment area of the EIR Recast, which could complicate the co-operation and co-ordination between the concurrent insolvency proceedings.*

There is some scope to elaborate.

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Marks awarded 12 out of 15

\* End of Assessment \*

**TOTAL MARKS 42.5/50**  
**Excellent Paper**