



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.**

It is pertinent to understand that the historical roots of all countries across the globe are either based on the civil law or the English Law. Most of the African countries were colonised in the past. Apparently, the legal system thus developed in these African countries have largely been based on the English Law (England) or Civil law, followed by its former colonial masters.

If you look at the historical roots of the insolvency legal system in European Countries, they followed a communal legal system across all its countries. On the contrary, the African countries had no common legal system. They followed the laws laid down by its colonial master as mentioned below:

1. Nigeria, Kenya, Botswana and Zambia, and Countries in the Eastern part of Africa such as Tanzania, have an English law tradition
2. Angola and Mozambique have a civil law tradition based on Portuguese law.
3. The Francophone countries of West Africa are steeped in civil law, in particular French law



4. Some countries, such as South Africa and Namibia, have mixed legal systems since both the Roman-Dutch law (civil law) and English law influenced their respective legal systems.

Consequently, the current insolvency legal system of these African Countries is based on these imported laws.

3

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 which had engulfed the East Asian Countries, more particularly affecting Indonesia and Thailand gave rise to some insolvency law reform in Eastern Asia.

Following are the two examples of such reform initiatives:

1. Singapore passed a new Insolvency, Restructuring and Dissolution Act to consolidate Singapore's corporate and personal insolvency and restructuring laws into a Unified Act.
2. Adoption of Model Law in Cross-Border Insolvency by substantial economies of Eastern Asian Countries. Example: Republic of Korea.

It would have been beneficial to consider Thailand reforms.

2.5

Question 2.3 [maximum 4 marks]

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

1. Various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada are mentioned below:
  - a. Adoption of the Model Law of Cross-Border Insolvency by both North America and Canada and following the Protocols.
  - b. Initiation of the American Law Institute (ALI) Transnational Insolvency Project for improving the co-operation in international insolvencies across the NAFTA states (United States, Canada and Mexico)

2. Result of the Initiatives mentioned above:

Initiation of the American Law Institute (ALI) Transnational Insolvency Project successfully lead to formulation of the Principles of Cooperation among the NAFTA Countries. Also, these principles recommended for Legislation or International Agreement and adoption of Model Law on Cross-Border Insolvency by each NAFTA Country. Thus, the Model Laws were adopted by North America and Canada.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

2.5

**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.***

In order to understand the difference in approaches regarding the treatment of voidable dispositions under both the English and Civil law, it is necessary to look at the historical roots of these laws which lay down the rules in insolvency systems and their importance.

1. Rules under the Civil Law and its importance for treatment of voidable dispositions:

In the primeval days, debt execution developed from the debtor pledging his own body for repayment of loan and he could be imprisoned, sentenced to death or sold as slave in order to secure repayment of debt, irrespective of whether the insolvent was an honest or dishonest person. The bodies of the debtor could be cut into pieces and distributed amongst the Creditors or they could be enslaved.

If you look at the history of Civil laws, they originated from the Roman Laws and Table 3 of the Twelve tables dealt with the execution of judgements. The Roman Law grasped firmly to the concept of "*cessio bonorum*" (assignment of property) under which, the Debtor whose insolvency was not due to his own fault was permitted cession Bonorum. Hereunder, the Debtor may opt for either assignment of property to creditor with consent or may apply to the emperor for an order requiring the creditors to choose by vote whether they would proceed at once to the surrender and sale of estate. This remedy was available only to honest debtors. In this way, the Roman law directly punished the fraudulent debtor for he could not have the privilege granted to honest debtor. Thus, by adopting this, the Debtor escaped liability to arrest.\*

Also, religious fears and scruples were employed to prevent fraud. Further, under the Roman laws, aside from encouraging honesty and penalizing fraud, elaborate provisions for vitiating fraudulent transfer of property belonging to insolvency debtors were framed. In case of any act by which the debtor diminished the amount of his property divisible amongst creditors was held to be in fraud of creditors. Also, if the transfer was without consideration, the act was rescinded, even if the grantee were wholly innocent. \*

Later, the actio Paulina formed the basis of fraudulent conveyance under the Civil Law.

2. Rules under the English Law and its importance for treatment of voidable dispositions:

Under the English law, the voidable dispositions are considered under the Act of Elizabeth in 1570. The 1570 Act is an outcome of legislation. Thus, voidable dispositions are dealt with by the Parliament. The 1570 Act provides for

- a. Compulsory sequestration, to be applied to a dishonest and absconding debtor.
- b. Compulsory administration and distribution on the basis of equality amongst all the creditors.
- c. Transfer of jurisdiction of the supervision of the estate to the Lord Chancellor. A bankruptcy proceeding could be opened by a creditor following an "act of bankruptcy" by the debtor. Creditors could thus petition the Lord Chancellor to convene a bankruptcy meeting, who could appoint Bankruptcy Commissioner to supervise the process.
- d. The commissioners would examine the debtors transactions and property and the debtor was obligated to transfer his property to the Commissioner.
- e. The commissioner could summon the persons for questioning and they could even commit people to prison.

Reference:

[https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7663&context=penn\\_law\\_revie\\_w](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7663&context=penn_law_revie_w)

You also needed to provide a context or framework for the treatment of these rules in insolvency systems and discuss their importance.

2

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.***

Wessels, the Dutch commentator himself concedes that the above definition has limitations. He refers to the definition quoted by Fletcher, "International insolvency or cross-border insolvency. should be considered as a situation in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

One can understand from above that the international insolvency laws are the norm and not the exception.

International Insolvency is the brainchild of globalization. In the current world economy, national borders are becoming increasingly irrelevant. Irrespective of a formalized common market, communications and interaction between individuals, businesses and States have given rise to transnational or cross-border cases of insolvency. Investments and the establishment of branches and subsidiaries in foreign countries are common.

Thus, the application of domestic insolvency laws without consideration to international laws in cross border situation are futile. Also, without co-ordination and co-operation between different Courts of different states in a cross-border situation, there will always be a risk of multiple insolvency proceeding against the same debtor.

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.**

1. The Nordic Convention (1993) hails from the Scandinavian region, Europe and is considered as a rare successful multilateral treaty. It was signed between 5 countries viz. Norway, Denmark, Finland, Iceland and Sweden (1993). It promotes the idea of universality of a nominated insolvency, adopting unity of proceedings whilst permitting concurrent proceedings in limited circumstances.
2. The EIR (European Insolvency Regulation) Recast: The EIR allocates jurisdictional competence to the courts of member state within which is situated the “centre of the debtors main interest”.
3. UNCITRAL Model law on Cross Border Insolvency: The provisions of Model Law provides provisions that facilitate co-operation and co-ordination of concurrent proceedings
4. American Law Institute (ALI) Transnational Insolvency Project for improving the co-operation in international insolvencies across the NAFTA states (United States, Canada and Mexico)
5. Judicial Insolvency Network (JIN): It is a network of insolvency judges from across the world with the aim of providing judicial thought leadership, developing best practices and facilitating communication and co-ordination amongst national courts in cross-border insolvency and restructuring matters.

You also needed to discuss the nature and success of treaties/conventions.

2.5

Marks awarded 9.5 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?***

Formal insolvency proceedings are those which are commenced under the insolvency law and governed by that law. They include both liquidation and reorganization or rescue proceeding.

Informal insolvency proceeding is not (always) regulated by the insolvency law and will generally involve negotiations between the debtor and some or all of its creditors.

While considering any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options, Lobo should contemplate the following:

1. Adoption of Model Law or Cross Border insolvency treaty or convention between Encanto and Asgard.
2. Administrative claim or expense: The costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor (FPPL), debts arising from the exercise of the insolvency representative's functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings.
3. Assets of the FPPL: The property, rights and interests of the FPPL, including rights and interests in property, whether or not in the possession of the FPPL, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned
4. Burdensome assets: Whether FPPL has any assets that may have no value or an insignificant value to the insolvency estate or that are burdened in such a way that retention would require expenditure that would exceed the proceeds of realisation of the asset or give rise to an onerous obligation or a liability to pay money.
5. Cash proceeds: Receivables/proceeds in case of the sale of encumbered assets during insolvency.
6. Pari-passu: Creditors are paid pari-passu, i.e on a proportionate basis out of the available assets based on their claims.

You need to address advantages / disadvantages of informal vs formal procedures.

2

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.***

Westbrook, a strong proponent of universalism, has identified nine key issues in cross-border cases:

1. Standing (locus standi) for (recognition of) the foreign representative;
2. moratorium on creditor actions;
3. creditor participation;
4. executory contracts;
5. co-ordinated claims procedures;
6. priorities and preferences;
7. avoidance provision powers;
8. discharges; and
9. conflict-of-law issues.

International insolvency instruments that have been developed to assist with respect to difficulties in cross-border insolvency:

1. Domestic Dimension: Domestic laws addresses circumstances where a company engaged in trade and commerce becomes insolvent. However, these dimensions only cater debtors operating within the state and do not cater in a comprehensive way with the international or cross-border dimensions.
2. International Dimension: In the case of international insolvency matters, which may be thought of as a sub-set of international trade law, various States have ratified or acceded to treaties or conventions which import into their domestic laws principles to resolve insolvency issues that have a connection with another State. If this has not occurred, then the State's own private international law principles will determine the three pertinent questions of forum, recognition and enforcement and, importantly, the choice of insolvency (or related) law that will resolve the matter for the debtor, creditors or other parties involved.
3. Treaties and Conventions: Classic public international instruments are treaties and conventions to which States become signatories and as such bind themselves and affect their domestic law accordingly. As part of domestic laws enforceable in the courts, these may then form part of a State's hard law on insolvency.
4. Soft Law: Most success is achieved by Soft law solutions to international insolvencies. Eg. UNCITRAL Model law on Cross-Border Insolvency.

**Elaboration is needed regarding international instruments. This is a focus of the question.**

**1.5**

**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 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.**

With effect from December 31, 2020, the European Insolvency Regulation (EIR) Recast ceased to apply in UK following its exit from the European union. **What is the consequence of this?**

Lobo may consider opening proceedings in another country in Europe. However, the following additional information shall be required viz.

1. Centre of the debtor's (FFPL's) main interests (COMI)
2. Establishment of Debtor (FFPL): Anyplace of operations where the Debtor (FFPL) carries out a non-transitory economic activity with human means and assets

The (EIR) Recast allocates jurisdictional competence to the courts of a member State within which is situated the "centre of the debtor's main interests" (COMI). The EIR allocates primary jurisdiction based on the centre of the debtor's main interests (main proceedings). Further, it allow for the possibility of subsidiary territorial proceedings in other member States, where the debtor has an "establishment". Such subsidiary proceedings may be either "independent proceedings", opened prior to the main proceedings, or "secondary proceedings", opened subsequent to the bankruptcy adjudication in the State with the centre of main interests.

The MLCBI should be considered.

2.5

Marks awarded 6 out of 15

**\* End of Assessment \***

**TOTAL MARKS 31.5/50**

**A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.**