



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 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.**

*Although a number of African jurisdictions have had legislative reforms recently, the insolvency law families tend to follow the imported legal systems of the modern era colonising powers. The British former colonies of Nigeria, Kenya, Botswana and Zambia, for example, follow common law systems while the European former colonies follow civil law systems. Angola and Mozambique are influenced by Portuguese law and West African countries like Algeria, Mauritania, Mali and Niger are influenced by French law. South Africa and Namibia have mixed systems. The Dutch East India Company brought Roman-Dutch law to South Africa in the mid 1600's but the first local insolvency law was enacted while the country was under British rule. The Insolvency Act 24, enacted in 1936, applies along side the Roman-Dutch common law principles. These influences, and the Act, were applied in Namibia when it became a protectorate of South Africa under the Peace Treaty of Versailles in 1919.*



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 1997 financial & economic crisis in East and Southeast Asia left a large part of the corporate sector insolvent and destabilised the financial systems. The lack of a structured insolvency framework to deal with restructuring and re-organisation was acutely felt in the region for the first time. Due to creditors and investors becoming more aware of the importance of effective insolvency regulation and the creditor protection it can bring, new investment was not forthcoming. Fears of a worldwide financial crash following the crisis instigated outside help in the form of IMF bailouts. These came with conditions, one of which was reform of the financial systems, including the insolvency regime.*

*Thailand, where the crisis started and one of the worst hit countries, overhauled their Bankruptcy Act 1940 and assigned a Bankruptcy Court dedicated to bankruptcy and reorganisation cases. They also developed the Establishing Bankruptcy Courts and Bankruptcy Case Procedures 1999 Act.*

*Singapore, although not as severely hit, also started to prioritise insolvency reforms. After overhauling the Companies Act in 2017 they passed the unified Insolvency, Restructuring & Dissolution Act in 2018 and it came into force on 30 July 2020. This act consolidated the insolvency regime in Singapore and allows the debtor to attempt recovery before resorting to liquidation.*

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 1970's North America & Canada were working towards a bilateral insolvency treaty but it failed to be ratified. The Canada-United States Free Trade Agreement (CUFTA) was signed in 1988. Following the early 1980's Latin America debt crisis the Mexican president approached the US to negotiate a similar agreement. Worried that this might undermine Canada's benefit from CUFTA Canada's president requested that they be party to the talks. The North America Free Trade Agreement (NAFTA) was signed in 1992 and, after some negotiation and two side agreements added by Bill Clinton, was ratified by the three countries in 1993. The NAFTA was subsequently updated by Donald Trump in 2020 by the United States - Mexico - Canada Agreement (USMCA) but the changes were minor.*

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

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Marks awarded 8 out of 10

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

#### Question 3.1 [maximum 5 marks]

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

*Developing along side the individual debt collecting procedures, legal systems introduced rules that can void transactions that disadvantaged a creditor or creditors. Voidable transactions have two distinct categories; Fraudulent Conveyance Law (FCL) and Preference Law (PL).*

*FCL aims to void actions designed to put assets out of the reach of the creditor and therefore avoid collection of the debt. These transactions disadvantage the creditor even if insolvency does not then occur. PL on the other hand, improves a creditor's position within the body of creditors by transferring money or assets to the favoured creditor to the detriment of other creditors. PL is often restricted to situations involving insolvency.*

*There was earlier law against voidable dispositions but the 1571 Statute of Elizabeth (SE Act) formed the core basis for England and other common law jurisdictions. The SE Act was in general law and started with FCL; PL came later. Both creditors and the insolvency practitioner (if there was one) could use the law to impeach a transaction and while there was a focus on purposeful fraud, the law also recognised genuine transactions. After the SE Act came several Law of Property Acts in 1922, 24 and 25 that allowed any person prejudiced by the transaction to pursue a claim of voidable disposition. The 1914 Bankruptcy Act introduced remedies which were only available post bankruptcy, being remedies against undervalue transactions. The law around remedies the moved into the 1986 Insolvency Act but these rules are still a remedy in general law as insolvency is not a prerequisite.*

*The civil law on voidable dispositions developed out of early Roman law remedies (around 1<sup>st</sup> century BCE) which lead to the actio Pauliana. This was an action*

*specifically created to void fraudulent transactions and became the backbone of voidable dispositions in civil law. Unlike common law, the transaction must have caused or increased insolvency.*

*One of the key elements to insolvency proceedings is to move the debt collection process from individual to collective and to then ensure that creditors are treated equally and fairly within their ranking group. It is essential then that actions taken prior to the commencement date should be looked at, either where the debtor had fraudulently hidden assets for their own later benefit and therefore potentially prejudiced the whole body of creditors or preferred a creditor to the prejudice of other creditors. It is also important that genuine transactions be recognised and protected while having strong routes for recovery of fraudulent or preferential transactions. As creditors become more aware of insolvency law and proceedings, the mere existence of the remedy to the insolvency practitioner can prevent voidable transactions being undertaken in the first place.*

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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.***

*Limitations of the definition above and of other attempts at definition arise because, as Wessels said, it assumes the existence of a “national legal framework of insolvency law” (page 34 of Module 1 Guidance Text). The problem with assuming such a framework exists lies in the way insolvency law, in many jurisdictions, is inextricably interwoven with other areas of law. Property law is a common area, as seen with the Law of Property Acts in 1922, 24 and 25 in the UK dealing with voidable transactions, but there may also be application of certain types of law such as employment law, human rights law or customary or religious law as well as different local approaches to various matters, such as socio-economic issues.*

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

3.5

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.**

*In general treaties or conventions have had a long history and varied success in establishing rules for cross-border insolvency law. In the 13<sup>th</sup>, 14<sup>th</sup> and 19<sup>th</sup> century Europe had a number of bilateral agreements between countries but multilateral agreements are not common and often only involve a few countries. Treaties or conventions also tend to cover countries within a geographical region and none are truly international. They therefore appear to be good sources for cross-border insolvency law amongst certain groups of countries but not for the wider international insolvency law.*

*The longest lasting multilateral agreement has been between some of the Latin American States. The Montevideo Treaty (1889) has been ratified by 6 countries, including Argentina, Paraguay and Uruguay who have also ratified the 1940 Montevideo Treaty on International Commercial Terrestrial Law. 15 countries from the Latin and Middle American States concluded the Havana Convention on Private International Law in 1928.*

*An exception and rare success of a multilateral agreement in the European region has been the 1933 Nordic Convention between Denmark, Finland, Iceland, Norway and Sweden. It is still in effect and remarkable for how it displays the courteous and considerate behaviour the Scandinavian countries accord each other.*

*Less successful was the 1970 Northern America bilateral treaty as it may have been too ambitious. On the other hand in 1992 the US, Canada and Mexico signed the North America Free Trade Agreement (NAFTA), an amended version of which is still in effect.*

*And in 1990 the Council of Europe tried a convention on Certain International Aspects of Bankruptcy, known as the Istanbul Convention but only 8 out of the 47 members signed it. Instead the European Union went down the regulation route of the European Insolvency Regulation (EIR).*

I'd like to also see a brief discussion of the nature of conventions / treaties.

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Marks awarded 12.5 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?**

*The main differences between formal and informal insolvency proceedings are that formal proceedings are regulated under an insolvency law and started under that law. Formal proceedings could include arrangements for rescue and / or restructure or liquidation and winding up. Informal proceedings are not always regulated and tend to involve negotiating voluntary agreements between the debtor and its creditors.*

*From Lobo's perspective the main advantages under an informal arrangement are that the costs of any proceeding are likely to be lower, leaving more funds available for the creditors, and if available even the debtor and there can be great flexibility as any agreement could be made, so long as it is legal, enforceable and binding. Another advantage is that Lobo can always fall back on formal proceedings if the negotiations fail. The disadvantages are that there is no way of preventing another creditor petitioning for a formal proceeding, no way of binding other creditors if Lobo wanted to consider a group agreement.*

*The advantages for Lobo under formal proceedings are that there would be a moratorium against further action by other creditors and, depending on the type of proceeding, there could be mechanisms to bind dissenting creditors, unless that are in the majority.*

Privacy and international considerations are also relevant.

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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 first issue that the insolvency representatives would encounter would be recognition of the proceeding and the representative. This can then lead on to other elements that help make the proceeding orderly & fair.*

*Another key issue which is closely connected is that of whether it would be possible to stay further actions by creditors from the other State. On the other hand there can also be issues restricting creditor participation or recognition of claims and clashes between the laws around adjudication and acceptance of claims.*

*There could be other conflict of law issues such as those around realising or disclaiming property, recovery of voidable transaction and the debtor's discharge and its effects.*

*Some of the international insolvency instruments that have been developed are:*

**1. The European Guidelines on Communication and Cooperation.**

*The objective of this instrument is to enable courts & insolvency representatives to operate efficiently and effectively in the cross-border context of the EC Insolvency Regulation and aims to facilitate the coordination of proceedings administration that involve the same debtor;*

**2. ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Available to Court-to-Court Communication on Cross-Border Cases**

*Building on the ALI NAFTA Principles and the results of global research into the feasibility of achieving worldwide acceptance of NAFTA, this instrument concentrates on 3 main areas. General Principles for coordination on international insolvency cases, court to court communications and global rules on conflict of law matters;*

**3. The EU JudgeCo Principles and EU Cross-Border Insolvency JudgeCo Guidelines**

*Designed to be a practical framework for judges and enabling courts and insolvency representatives to operate effectively and efficiently in order to maximise the value of assets, preserving the business (where possible) and furthering the just administration of the proceeding; and*

**4. The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Boarder Insolvency Matters.**

*This instrument's objective is also improving efficiency and effectiveness through the improved coordination and cooperation of the courts dealing with international insolvency cases.*

*The development of such instruments is the foundation of a global cross-border insolvency framework which allows economic growth and prosperity in a global economy that is changing rapidly with complex corporate structures and digital advances.*

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.**

*Due to Brexit, at 11pm on 31 December 2020 the EIR Recast ceased to apply to the UK. This means that the UK Insolvency Practitioner (IP) will have to refer to domestic legislation on points previously covered by the Recast and to the domestic legislation of the other states as the UK insolvency proceeding will no longer be automatically recognised.*

*The IP could also consider the Cross-Border Insolvency Regulations 2006 which enacts the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) in the UK. This would allow the UK to recognise foreign proceedings but to be recognised in other states the IP would have to find out if that state had adopted Model Law and what changes may have been made to it in the enactment in to that state's domestic law. Recognition under Model Law is not automatic and an application will have to be submitted to court.*

*Common law in the UK is based on the principles of modified universalism so the court has the power to assist with foreign insolvency proceedings where it can but for the UK IP dealing with matters in another state it will very much depend on whether that jurisdiction follows common law, and may favour comity, or civil law, which may not.*

\* End of Assessment \*

**TOTAL MARKS 43.5/50**  
**Excellent Paper**