



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment1summative]. An example would be something along the following lines: 202223-363.assessment1summative. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 15 November 2022. The assessment submission portal will close at 23:00 (11 pm) GMT on 15 November 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

- (a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.**
- (b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.**
- (c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.**
- (d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.**

Question 1.2

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

- (a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.**
- (b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.**
- (c) This statement is untrue since discharge of debt never became part of any of these systems.**

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

- (a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.**
- (b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.**
- (c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.**
- (d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.**

Question 1.6

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

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

- (a) Public International Law.**
- (b) UNCITRAL Legislative Guide on Insolvency Law.**
- (c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.**
- (d) Private International Law.**

Question 1.7

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

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

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

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).*
- (b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.*
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.*
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.*

Question 1.8

Which of the following best describes international insolvency law?

- (a) It is public international law governing insolvency law between States.*
- (b) It is private international law governing insolvency law between States.*
- (c) It may involve aspects of both public international law and private international law.*
- (d) It involves a simple classification within either public international law or private international law.*

Question 1.9

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

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.*
- (b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.*

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

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

Question 1.10

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

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

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

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

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

Marks awarded 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.

The insolvency law roots in African nations are typically based on the laws of their respective colonial settlers. For example, Burkina Faso, Ivory Coast, Egypt, Guinea, Mali and Senegal have their roots in French Civil Law whilst Lesotho, Malawi, Nigeria, Tanzania, Uganda and Zambia in English Common Law. A number of nations have developed through a mixture of colonial influences such Roman Dutch and English Common Law for South Africa and Zimbabwe and French Civil and English Common law for Mauritius. Developing African nations are now seeking to modernise their approach taking global influence to develop provisions to better support restructure.

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 1997-98 Asian Financial Crisis kicked off by the depreciation of Asian currencies (initially Thai baht and Indonesian rupiah) which spread throughout other Asian currencies and markets resulting in significant depreciation in asset values and ultimately large scale insolvencies. The aftermath saw an overhaul of insolvency laws in Thailand including the introduction of "business rescue" concepts into the region. The crisis was used as an opportunity in some jurisdiction to modernise their insolvency laws and bring in business rescue opportunities particularly in jurisdictions such as Singapore which is becoming known as an Asian or alternative global hub for restructuring. Elaboration regarding Singapore is warranted.

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.

The well developed economies in North America have supported the establishment of initiatives and projects to resolve international insolvency issues with varying degrees of success. Some of the successful outcomes of these initiatives include:

- *The development of Principals such as the NAFTA Principals of Cooperation which have sought to develop principles of cooperation in relation to cross-border insolvency for the USA, Canada and Mexico. The Principals consist of:*
 - *General principals in relation to cooperation between courts, insolvency practitioners and stakeholders along with recognition of foreign insolvency proceedings being granted efficiently with minimum legal formalities*
 - *Procedural principals in relation to the structure of a cross border insolvency case, initiation of a case, administration of a case and completion.*
 - *Recommendations for legislation or international agreement.*
- *A subset of the Principals is the development of Guidelines such as ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross Border Cases (2000) for international insolvencies involving USA, Canada and Mexico which seek to support a consistent and efficient way for Courts in the different jurisdictions to communicate.*
- *Importantly, both USA and Canada have adopted the UNCITRAL Model Law and protocols.*

However, not all of these initiatives have resulted in successful outcomes. A bilateral insolvency treaty between USA and Canada was never able to reach agreement, likely due to its ambitious scope.

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

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.

*Voidable disposition laws seek to support fairness and the principal of *pari passu* whereby each creditor, within a class, should be treated the same. It does this in two ways:*

- 1. By disincentivising management from preferring certain creditors as a company approaches insolvency.*
- 2. It also acts as a mechanism to bring about fairness where certain creditors have been preferred ahead of the general body of creditors after an insolvency occurs.*

Voidable disposition laws further seek to deter and penalise where related or connected parties are involved. Voidable disposition laws typical "look back" at transactions within a specified time frame, some months or even years, and assesses whether those payments were "in the ordinary course of business" or were they executed for a different purpose. For example, to prefer a certain creditor which pressed harder than others, who had knowledge of the impending insolvency or who had a connection to the company or management.

*Voidable disposition laws differ across each jurisdiction with the time frames (look back period) and criteria required to be met under the different categories of voidable transaction different. The differences typically evolve with economic cycles and the extent to which a jurisdiction is "creditor or debtor friendly" at any given time. The historical starting points however, can be traced back to the *actio Paulina* for civil law and *Act of Elizabeth 1570* for common law jurisdictions.*

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

4

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.

International insolvency laws are a collection of separate and distinct insolvency laws relating to each jurisdiction. The commentator is correct that the laws are typically not immediately enforceable, however, the majority of jurisdictions have mechanisms in place which allow the recognition of a foreign insolvency proceeding. In some instances, those recognitions can range from being granted very quickly and inexpensively (NAFTA and South America) through existing treaties and conventions. Other jurisdiction may not have developed cross-border insolvency laws however a fall back is to employ private international law to obtain recognition in the absence of statutory rules or where there is a gap in legislation. It's clear that, for the most part, recognition can be obtained perhaps not immediately but often eventually.

Foreign recognition proceedings provide the foreign representative with powers of the foreign jurisdiction which can then be executed on whether to support the collection of records and information, support the recovery of assets and to distribute funds to those creditors entitled within the relevant jurisdictions.

It would be beneficial to consider Fletcher's discussion on the topic.

2

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

Treaties and conventions which are established between States will establish the grounds for the applicable rules to apply in relation to recognition, enforcement and the applicable insolvency laws to follow. Absent treaties and conventions, the State's own private international laws will apply.

Some European treaties and conventions date back to the 13th and 14th centuries and other treaties have long been embedded in the cross border insolvency landscape

such as those in the Scandinavian and South American regions. These treaties and conventions are typically implemented as part of an overall suite of agreements which support cross-border business and capital flows. The implementation of cross-border treaties and conventions is the “book end” to these relationships between States and assist in giving certainty to providers of credit, without which, the risks of entering into foreign markets may dissuade investment.

Whilst treaties do provide some clarity when cross-border insolvencies arise, they are not the only tool available to support efficient cross-border insolvency. For example, a “soft law” approach which most notably resulted in the development of the UNCITRAL Model Law which allowed States to adopt either in full or with modification which is another way to support cross-border counterparties in understand the situation should insolvency occur.

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

3.5

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 commenced and governed by a formal systems of laws and rules. They typically involve a collective approach to recovery of debt, a stay of proceedings against the debtor and a third party managing part or the entire insolvency process. In comparison to informal insolvency arrangements which are not typically initiated or governed by formal laws and rules, do not automatically provide for collectivism, no stay of proceeds and often do not involved a third party managing the process.

In general, the formal insolvency approach is good for a creditor when the relationship with the debtor has deteriorated, management are unwilling or unable to right the ship, other customers are available to fill the void and there are other parties which may be benefiting from a closer relationship with the troubled debtor. A formal insolvency supports these situations as it brings the issues to a head and any leverage the debtor has is eroded. Most jurisdictions have a look-back period during which parties who were preferred (often related parties or those with influence of the debtor) will be required to disgorge funds which will then be applied equally amongst the creditor pool.

The disadvantages of a formal insolvency approach is that it is significantly value dilutive to the debtor and therefore to the creditors receiving a distribution and can be costly and time consuming to undertake with no guarantee of resulting in a return.

Informal processes support the debtor to continue into the future, where viable, and also preserves the possibility of maintaining a good relationship. Informal processes can be more cost effective (not always) and can provide opportunities to take control in the debtors business. The creditor continues to have the threat of formal insolvency procedures at its disposal whether the threat is perceived or actual. It would also be beneficial to consider publicity issues.

However, informal insolvency processes require the debtor to be a willing participant and there is often no law or rules which require its participation. The incumbent management may not be the best party to manage the affairs of the debtor and the formal insolvency process which replaces management with an independent insolvency practitioner may be better placed to resolve the issues of the debtor. It would also be beneficial to consider inability to bind dissenting creditors and lack of moratorium.

For Lobo, as a creditor of FPPL, it will need to ask a number of questions:

- *What information does it have and can it get from FPPL to assess how severe FPPL's financial difficulties are? A temporary cash flow shortage with a realistic prospect of returning to financial viability would indicate an informal process, for example, extending terms may result in a better return than if Lobo were placed into an insolvency proceeding which would may be value dilutive and therefore lower the prospect of a return to Lobo.*
- *Lobo must also ask whether FPPL is vital to its own business and would the commencement of formal insolvency proceedings in FPPL cause a significant flow on impacts to Lobo. To avoid this, Lobo may prefer to pursue informal processes such as amending terms, taking a discount or seeking to convert its debt to equity or take security. Informal processes like this could provide FPPL with opportunities to take a controlling stake in FPPL.*
- *If Lobo is left "in the dark" about FPPL's financial position and FPPL is not engaging, Lobo may consider taking steps to initiate a formal insolvency*

process to get the attention of FPPL's management, thereby arresting the situation in order to bring things to a head. Lobo will need to know what steps it needs to take in Encanto to have its Asgard debt recognised in Encanto being the country of its incorporation. Then Lobo will need to be able to satisfy Encanto law that FPPL ought to be placed into a formal insolvency procedure.

Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

3

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

Where concurrent insolvency proceedings have been commenced in Asgard and Encanto, the issues encountered by the insolvency representatives includes:

- *Identifying which assets are available to which proceeding. It is possible the insolvency proceedings will result in both insolvency practitioners having claims over the same assets. The establishment of which insolvency proceedings is the main proceeding and which insolvency laws apply need to be understood whether under treaty, convention, cross-border insolvency law or private international law.*
- *Determining which creditors can claim in which insolvency proceeding and how those claims are to be quantified depending on the applicable insolvency laws.*
- *The application of any voidable disposition and breach of directors duties and claims thereto will also depend on the insolvency laws available to be applied and how those impact on recoveries to the insolvent estate.*

The development of any treaties and conventions between Asgard and Encanto will assist the insolvency representatives to understand these issues. So too would the enactment of any Model Law. In the absence of treaties, conventions and aligned Model Law, there is significant uncertainty surrounding the abovementioned issues. Furthermore, obtaining clarification from a Court may not be binding in the foreign jurisdiction and it's possible both insolvency practitioners end up in a dead lock situation.

It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

3

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.

If FPPL was incorporated in the UK, the EIR Recast would not apply due to the UK's exit from the European Union effective 31 December 2020. The EIR Recast determines where the primary jurisdiction of the debtors is, being the centre of main interest. The EIR Recast would support the opening of a subsidiary territorial proceeding in other members states. To satisfy the requirements of a subsidiary territorial proceeding, the debtor will need to establish that the State is a place of operation which carries out non-transitory economic activity with employees and assets.

To assist in understanding the situation for FPPL and Lobo, it will be important to understand the current position the UK is taking in relation concurrent insolvency proceedings. Furthermore it will be important to know which country in Europe Lobo is seeking to open foreign proceedings in, the basis of "establishment" it can demonstrate and the reasons it is seeking to do so. If Lobo can demonstrate that there are long standing operations, assets and employees which are required to be dealt with under the insolvency proceeding, it is more likely the UK Court would be supportive rather than if it were a plan designed to benefit Lobos only. It would also be beneficial to know if the MLCBI applies.

3.5

Marks awarded 9.5 out of 15

* End of Assessment *

TOTAL MARKS 37/50

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