



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 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.

As most African countries were colonies of European countries, the historical roots can be traced to civil (roman) and common (English) law. Nigeria, Tanzania, Kenya, Botswana and Zambia have an English law tradition. Angola and Mozambique have civil law tradition, derived from being French colonies and South Africa have a mixed legal system derived from Dutch (civil law) and English (common law) influence.

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Question 2.2 [maximum 3 marks]

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

The 1998 Financial Crisis in Asia gave rise to insolvency laws reform in Thailand and Indonesia.

Elaboration was needed to achieve a higher mark. You needed to detail your examples
1.5

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 first attempt to create an instrument to assist with the resolution of international insolvency issues in North America was a 1970 treaty proposal between the United States and Canada, but the agreement failed because it was too ambitious in its scope. Later, after the sign of the NAFTA, the American Law Institute developed the ALI Transnational Insolvency Project to improve cooperation in international insolvency between NAFTA parties (Mexico, United States and Canada). The project involved working groups with experts and concluded in the NAFTA Principles of Cooperation adopted in 2000. Also, the three NAFTA countries have incorporated the UNCITRAL Model Law on Cross-Border Insolvency.

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 6.5 out of 10

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

Question 3.1 [maximum 5 marks]

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

Voidable dispositions on civil law systems are derived from the *actio pauliana*, meanwhile in English law systems the Act of Elizabeth of 1540 is the origin. This

*is a first difference that explains an historical divergence of this institution. Is important to note that the *actio pauliana*, an institution from ancient Rome is way older than the Act of Elizabeth, and on civil law systems, the *actio pauliana* is a general action used in contracts beyond the insolvency law.*

*For example, in Chile, a civil law country, we have the *actio pauliana* on the Civil Code, and applies for contracts and general civil matters. The insolvency voidable dispositions are incorporated on the Insolvency Law (Ley 20.720), thus is a special regulation. The voidable dispositions in the Chilean Insolvency Law distinct between dispositions for corporations and for individuals. The dispositions for corporations are regulated in the Insolvency Law and for individuals, the Insolvency law regulates only the dispositions applicable to gratuitous contracts celebrated before the commencement of the insolvency proceeding. For non-gratuitous contracts, the Insolvency Laws remits to general rules of the Civil Code. The importance of the voidable dispositions in an insolvency system is because of the collective nature of the process. Voidable dispositions serves as a disincentive to creditors for continuing individual debt-collecting measures. Also discourages the debtor to make transactions before the commencement of the proceeding that affects the estate, diminishing the payments to creditors.*

There is scope to elaborate in relation to the importance of voidable transactions.

3.5

Question 3.2 [maximum 5 marks]

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

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

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

Wessels, the author that made the definition, says that this definition is limited because is connected to the existence of a national legal framework of insolvency law. The main issue is that international insolvency law cannot be explained without a reference to national bodies of rules, and on this way, is not a self-contained definition. Another definition provided by Fletcher also notes the foreign elements, indicating that the domestic insolvency law provisions cannot be immediately and exclusively applied.

This characteristic of the international insolvency law demands for a national insolvency law capable of addressing the issues that arises, and that explains the development of supra national insolvency regulations, as in the European Union, or the treatment of insolvency issues as a federal matter in the United States. Modern times with a globalized world, globalized trade with multinational companies and an easy flow of goods and people demands rules to coordination and cooperation between the states to address these issues.

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Question 3.3 [maximum 5 marks]

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

Treaties and conventions are public international law instruments that binds the signatory States and affects their domestic law. It forms hard law, because they are enforceable in the national courts.

The success of a treaty relies in great part in their grade of adoption by the States. If the treaty or convention is adopted by a limited number of States, the effect for resolve the issues that arise is also limited. For example, in 1970 the United States and Canada tried to sign a treaty on insolvency, but failed due to the ambitiousness. Successful treaties have at least five countries, as the Nordic Convention of 1933. Other successful treaties that comprehend a significant number of States are the Havana Convention of 1928 that leads to Bustamante Code and the OHADA treaty in 1993.

Despite the conventions and treaties have the advantage to be hard law and enforceable, I think a most successful approach in modern times is achieved through soft law instruments, as the UNCITRAL Model Law on Cross-Border Insolvency, not only because it can be incorporated to States internal law and also be enforceable, but also for the harmonization effect that the soft law provides. Even states without the UMLCBI incorporated have similar provisions in their internal law, so we can say these states are "UMLCBI-like".¹

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

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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,

¹ See, for example, article 742 of the Spanish Insolvency Law. Although Spain has not incorporated the Model Law, the redaction is similar to Chapter III of the Model Law.

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?

On most cases, the formal insolvency proceedings are held before a court and are governed by law. An informal insolvency arrangement of agreement doesn't need the involvement of the courts, at least in first stages. As the informal agreements are private, this give more freedom to the negotiations to restructuring debts. So, an advantage of formal proceeding is the support from the court and binding to formal rules, that guarantees a result. In case of informal proceeding, the advantage is the freedom that is given to the parties. As disadvantages, I can name the more bounded time in formal proceedings and more demanding requisites or pre-requisites to opt for these formal proceedings. In the case of informal proceedings, a disadvantage is the agreement could be broken without consequences to the defaulting parties. Also, the agreement could not be enforceable.

It would be beneficial to also consider matters such as the absence of moratorium and the inability to bind dissenting creditors in an informal workout. 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.

One difficulty is that the proceeding is opened in Asgard, but the main offices and the center of main interest are located in Encanto. So, the main insolvency proceeding, if we use the terminology of the UNCITRAL Model Law, is the proceeding located in Encanto. For an effective insolvency management is necessary a coordination between both proceedings. If a treaty, protocol or other instrument between Asgard and Encanto doesn't exist, the coordination would be very difficult, because the recognition of the foreign proceeding in each country would be through the general rules, and in most cases these rules are bureaucratic and time-consuming. The ideal scenario would be that both States have incorporated the UNCITRAL Model Law, as is a body of rules that covers both recognition of a foreign proceeding and the cooperation and coordination of the courts and the insolvency representatives. Another solution is a protocol of coordination and cooperation between the two proceedings, using, for example, the ABA or the JIN Guidelines on cooperation and coordination.

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

4

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 the opening date of the UK proceeding, the EIR recast doesn't apply. Considering that, we need to know in which country Lobo is incorporated and in which country is considering to open proceedings, to see what internal law would apply and if there some treaty, conventions or soft law that can be applied. The United Kingdom have incorporated the UNCITRAL Model Law, so this is an advantage in advance to seek the recognition of proceedings and to guide the cooperation and coordination between the courts. Also, as Lobo is incorporated in Europe, it can appear on an insolvency proceeding opening in EU under the rules of the EIR Recast.

It would be beneficial to find out more information re the MLCBI.

3.5

Marks awarded 10.5 out of 15

*** End of Assessment ***

A very good paper that generally addresses the questions asked and substantiates its answers.

TOTAL MARKS AWARDED 37.5/50