



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.

Insolvency law systems in African jurisdictions have their roots in the countries that colonised them. The English insolvency law system was adopted in its former colonies like Nigeria, Kenya, Botswana, Zambia and Tanzania. Former civil law colonies include Angola and Mozambique which are based on Portuguese civil law, while the Francophone influence is apparent in West Africa in countries like Senegal having followed the insolvency law from France.¹

There is scope to elaborate regarding mixed law countries.

2

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.

¹ <http://www.lexafrica.com/wp-content/uploads/2016/09/LEX-Africa-Guide-to-insolvency-in-Africa.pdf>.

The 1998 financial crisis of East Asia gave rise to a review of the insolvency law in Thailand.² **How so?**

In October 2018 Singapore unified its corporate and personal insolvency regime by passing a new Act namely the Insolvency, Restructuring and Dissolution Act. It was done in an effort to make Singapore a more attractive financial hub.³

There is scope to elaborate.

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 American Law Institute Transnational Insolvency Project developed the ALI NAFTA Guidelines applicable to court- to- court insolvencies involving the United States of America, Canada and Mexico. It was a project whose purpose was to improve cooperation across the NAFTA states. The success of this initiative resulted in the development of the ALI III Global Principles for Cooperation in International Insolvency cases as well as the Global Guidelines Applicable to Court- to- Court communications in cross-border cases (2012).⁴ The development of the guidelines to have effect beyond North America is a success in itself.

The ALI-III Global Guidelines Applicable to Court-to-Court Communications in Cross-Border cases, played a significant role in resolving international insolvency law issues in cross-border airline restructuring cases. A case in point was the restructuring of the LATAM Airlines Group, where a cross-border insolvency protocol was approved by the Grand Court of the Cayman Islands in July 2020.⁵

Another example of a success was the *Nortel's Network Case*, where the parties relied on the Protocol during the conduct of the concurrent insolvency proceedings in Canada and the United States of America.⁶

There is some scope to elaborate.

3.5

Marks awarded 8 out of 10

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

Question 3.1 [maximum 5 marks]

² R Tomasic, *Insolvency in East Asia*, (Ashgate, 2006).

³ <https://www.herbertsmithfreehills.com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill>.

⁴ I F Fletcher and B Wessels. "Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases" (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012), p xvii.

⁵ Fletcher and Wessels, supra note 4, p 21.

⁶ <http://www.ontariocourts.ca/scj/files/judgements/2015ONSC2987.pdf>.

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.

Historically, the *actio Pauliana* of the Roman law developed into a civil law remedy for fraudulent dispositions and is considered as the foundation for voidable dispositions in civil law jurisdictions. The Act of Elizabeth of 1571 was historically considered as the foundation in common law jurisdictions addressing voidable dispositions. The Act of Elizabeth came into being later than the *actio Pauliana*.⁷

In cross-border insolvency proceedings, avoidance rules are important tools available to increase creditor recoveries and hence ensure that the body of creditors participate in the estate of the debtor. The avoidance powers are used to return funds that were improperly transferred prior to the commencement of the bankruptcy proceedings.

It would be beneficial to elaborate on the nature of voidable transactions and their importance.

The Centre of Main Interest (COMI) principle is often applied in the law of international insolvency, where concurrent proceedings are on-going. The principle originated in the European Union's insolvency regime and is now applied in civil and common law jurisdictions internationally.⁸ COMI is used to determine the jurisdiction of courts in insolvencies of an international nature as well as the applicable law and its effect on avoidance actions.

It has been suggested that only a universal COMI rule for the extraterritorial application of avoidance powers may prevent the piecemeal application of a particular bankruptcy regime and reduce the extent of fraudulent activity that transferors and transferees may use to remove otherwise avoidable transfers from the range of avoidance prosecution in any jurisdiction.⁹

The doctrine of international Comity is another rule employed in international insolvency. It is defined as the recognition which a nation gives within its territory, to the legislative, executive or judicial act of another nation.¹⁰

Such rules are important in insolvency for the following reasons.

- They ensure the equitable treatment of all creditors by preventing favouritism when the debtor makes preferential dispositions at the expense of other creditors,
- They help prevent a sudden loss of value for the business entity just before the insolvency proceedings begin.

⁷ Andre Boraine, "Avoidance Provisions in a Local and Cross-Border Context: A Comparative Overview". (Insol International, Technical Series Issue no 7, December 2008. P 2).

⁸ David Molton *et al*, "The Long (or Not so Long) Arm of Avoidance Claims: The Issue of Extraterritorial Application", October 2016, Insol International Technical Series Issue no. 33.

⁹ *Idem* footnote 8, p11.

¹⁰ *Idem* footnote 8, p8.

- The rules create a framework for encouraging out of court settlements because creditors will be aware that last minute transactions or seizures are susceptible to being set-aside. With such knowledge creditors are more likely to work with debtors to avoid court intervention.

2.5

Question 3.2 [maximum 5 marks]

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

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

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

The definition is perceived to have limitations for the following reasons.

- The definition is connected to the existence of a national legal framework on insolvency law. Most domestic systems are not equipped to deal with insolvencies of an international nature.
- There is a real risk of capital losses in concurrent insolvency proceedings where there is no coordination and cooperation of the different legal systems.
- The definition does not assist in determining which law will determine questions arising such as security rights and priority claims in insolvency.
- There is a risk of fraud and forum shopping.
- Creditors unable to participate in the assets is against the principle of global insolvency being equality between creditors.

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

4

Question 3.3 [maximum 5 marks]

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

Treaties and Conventions provide for uniform choice of law rules. They are an example of public international instruments which upon signature bind states and affect their domestic law. The Havana Convention on Private International Law (Bustamante Code) is an example. It allows for a single proceeding with a universal effect in all the member States.¹¹The Convention provides for a single proceeding if the debtor is only occasionally trading in more than 1 State¹². Its one disadvantage is that in the case of concurrent proceedings, the Convention does not provide for procedures for cooperation or coordination of the concurrent proceedings.

Another example of a Convention which establishes rules under cross-border insolvency cases amongst its members is the Nordic Convention concluded in 1933. It promotes the principle of universality of a nominated insolvency regime of its members, whilst permitting concurrent proceedings in limited circumstances. It recognises the extraterritorial effect law of the of the place where proceedings commence, applying to all member States.¹³ The Convention provides for an immediate stay of action and recognition of foreign insolvency practitioners within the member States. The practitioner may request for assistance from the courts or local authorities in respect of property situated in that territory.

Treaties and Conventions have provided for the easier application of International Insolvency rules like the application of the Comity rule in the Nordic Convention and the application of the extraterritorial principle in both the Havana and Nordic Conventions.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. There was scope to elaborate upon the examples of treaties/conventions and their success of otherwise

3.5

Marks awarded 10 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]

¹¹ <http://www.oas.org/en/sla/dil/inter-american-treaties-A-31-Bustamante-Code-signatories.asp>.

¹² Article 415.

¹³ Article 1

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 as follows.

- Formal insolvency proceedings are commenced under the Insolvency law usually through a court order for winding up. It includes liquidation and re-organisation proceedings. Informal insolvencies on the other hand are not strictly regulated by insolvency law. They generally involve voluntary negotiations between a debtor and creditors.

The key advantages and disadvantages of out of court arrangements as compared to formal proceedings are as follows.

- They facilitate an early response from creditors which is not always the case under formal proceedings, hence avoiding the stigma often attached to insolvencies for debtors.
- Court processes tend to be slow and may result in the diminishing of the value of the debtor’s assets to the detriment of creditors.
- There is the possible availability of rescue financing for distressed companies with the minimal role of the courts under a formal process other than to approve the finance, which speeds up reorganisation.
- Negotiation costs associated with approving a re-organisation plan requiring the unanimous consent of creditors, the diminishing value of the assets because of the inability of the debtor to raise finance and keep employees and suppliers may make the out of court arrangements fail.
- The tax treatment of haircuts in corporate re-organisation may discourage FPPL from participating and cooperating in the out of court settlement. If tax legislation treats the out of court settlement as an income and not exemption this could worsen the financial position of FPPL thereby making reorganisation informally unattractive.
- Informal out of court arrangements do not provide an automatic stay of proceedings unless provided for in the insolvency law.¹⁴

It would be beneficial to also consider matters such as 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.

4

Question 4.2 [Maximum 5 marks]

¹⁴ Aurelio Gurrea-Martinez, “Insolvency Law in Emerging Markets”, (Working Paper 3/2020, Ibero-American Institute for Law and Finance) p.15

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 coordination 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 position of the Insolvency representative with respect to his recognition in Encanto and powers to deal with assets and other related matters including cooperation and coordination of the proceedings will depend on the rules of Encanto which would be found either in local legislation, a Treaty or Convention, supranational legislation that applies or common law principles from international law like Comity.¹⁵

Some of the issues the insolvency representative would have to tackle have been identified by Westbrook to include¹⁶

- Recognition of the representative in Encanto. There is a presumption against extraterritoriality, that is the representative's automatic recognition in Encanto, in the absence of a Treaty or Convention between Encanto and Asgard. Encanto would therefore apply its own choice of law. This would affect the representative's powers to bring together foreign assets into the estate of FPPL for the benefit of the body of creditors.
- Participation of foreign creditors. Whether they can participate in Encanto and the priority given to their claims.
- Due to the concurrent actions, the possibility of a moratorium in creditors' claims in Encanto.

The Nordic Convention on Bankruptcy (1933) resolves the issue of choice of law rules by recognising the law of the place of commencement of insolvency proceedings as determining all the effects of the order on all member States without the need for further formalities.

The UNCITRAL Model Law on Cross-Border Insolvency places obligations on States and Insolvency Representatives in different States to communicate and cooperate.¹⁷

The Judicial Insolvency Network Guidelines' objective is to improve the efficiency and effectiveness of concurrent insolvency proceedings, by embracing cooperation and coordination between courts.¹⁸

¹⁵ Andre Boraine, "Avoidance Provisions in a Local and Cross-Border Context: A Comparative Overview". (Insol International, Technical Series Issue no 7, December 2008. P 2).

¹⁶ J L Westbrook, "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court" (2018) 96 *Texas Law Review*, p 1473.

¹⁷ Article 25-26.

¹⁸ <https://www.jin-global.org/jin-guidelines.html>.

The Havana Treaty allows for a single proceeding with a universal effect and is binding on the signatories. It however does not provide procedures for cooperation and coordination in concurrent procedures.¹⁹

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.

The European Insolvency Regulation Recast would not apply in the United Kingdom as it ceased to apply on the 31 December 2020 after the United Kingdom exited from the European Union.²⁰ The consequence is that English domestic law on the insolvency of companies would apply. English law would apply to the procedure of initiating insolvency proceedings but may adopt foreign law to establish the validity of a claim for a debt governed by foreign law. More information is therefore required on English Insolvency law.

The United Kingdom's own private international law principles will determine the forum, recognition and enforcement and the choice of insolvency law that will resolve issues for FPPL and its Creditors.

Despite the European Insolvency Regulation Recast's non- applicability in the United Kingdom, English Courts have recognised their duty to cooperate with foreign courts in certain situations to ensure that a company's assets are distributed to its creditors under a single system of distribution. This was acknowledged in the case of McGrath v Riddell.²¹

It would be beneficial to consider the MLCBI

3.5

Marks awarded 11.5 out of 15

* End of Assessment *

TOTAL MARKS AWARDED 39.5/50

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

¹⁹ Article 414.

²⁰ <https://www.legislation.gov.uk/uksi/2019/146/contents>.

²¹ [2008] UKHL 21