



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 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.

[The African countries still follow the laws of the respective former colonial powers.

- 1. Nigeria, Kenya, Botswana, Zambia, and countries in the Eastern part of Africa as Tanzania, have an English law tradition.*
- 2. Angola & Mozambique have a civil law tradition based on Portuguese law.*
- 3. Francophone countries of West Africa have a civil French law.*
- 4. South Africa has a mixed Roman-Dutch (civil law) & English law.]*

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 financial crisis in East Asia on 1998 (which affected mainly on Indonesia & Thailand) gave rise to some insolvency law reforms as follow:

- *Thailand bankruptcy law.*
- *Singapore Restructuring and Dissolution Act.]*

Elaboration is needed to achieve a higher mark.

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.

[

1. Bilateral insolvency treaty 1970:

It was too ambitious in scope and they failed to reach an agreement.

2. ALI Transnational Insolvency Project 2000:

- *They prepared the principles of cooperation among the NAFTA Countries (USA, Canada & Mexico) and the said principles were approved by all participating countries.*
- *They excluded the insolvency of individuals (natural persons), and non-profit organizations, and financial institutions.*
- *The provided a recommendation to adopt the MLCBI by each NAFTA country.]*

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

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.

[A different methods exist in dealing with the assets of insolvent estates that are located in another foreign states, that is, states where the insolvency proceeding has not yet been commenced.

Some systems have statutory provisions for dealing with such situations. However, in some other states there is no statutory dispensation, but the local courts can be approached on an ad hoc basis for an order that may allow for a foreign insolvency representation to deal with assets in the local jurisdiction. In common law system, the courts can be approached to assist in providing a remedy in the absence of statutory rules covering such support, or where legislation exist but a lacuna arises due to a gap in the legislation provisions.in this content the rules of private international law may also find application, or there may be a treaty or convention regulating how these situations should be dealt with.

It worth also to mention that voidable dispositions can be classified as either fraudulent conveyances (disposition of property without receiving adequate value in return) or preferences. A fraudulent conveyance entails a disposition of property by the insolvent, usually in the form of a donation or undervalue transaction, that causes or increases the debtor's insolvency. Preferences are characterised by the settlement of pre-existing debt to a creditor, or by affording such a creditor real security for a pre-existing unsecured debt, thereby improving the creditor's position once insolvency commences.

The actio Pauliana forms the basis of fraudulent conveyance law in civil law systems. Whilst the Act of Elizabeth of 1570 forms the basis for the remedy in English law. In practice, legislation dealing with these matters may differ in detail regarding the requirements for the remedies to be applied.]

This question also needed you to discuss the importance of the voidable transaction provisions.

3

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.

[

- it is connected to the existence of a national legal framework of insolvency law.***

- *The definition treated and limited international insolvency law as a body of rules which is considered as a situation which in some way transcend the confines of a single legal system and can not be exclusively applied without regard to the issues raised by the foreign elements of the case.]*

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.

[

- 1) *Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues such as the Montevideo Treaties and Havana Convention on Private International Law.*
- 2) *In North America, there were various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada. The bilateral insolvency treaty 1970 was too ambitious in scope and they failed to reach an agreement. However, ALI Transnational Insolvency Project 2000 made the following contributions:*
 - *They prepared the principles of cooperation among the NAFTA Countries (USA, Canada & Mexico) and the said principles were approved by all participating countries.*
 - *They excluded the insolvency of individuals (natural persons), and non-profit organizations, and financial institutions.*
 - *The provided a recommendation to adopt the MLCBI by each NAFTA country.*
- 3) *In Europe, bilateral international insolvency conventions appeared from the 13th and 14th centuries addressing absconding debtors and later gathering in assets. The European efforts at achieving international insolvency convention were unsuccessful for many years. More success has been achieved by the European Union- EIR Recast.*
- 4) *The Hague Conference was established in the 19th Century to work on unification of private international law. The Model Treaty on Bankruptcy at 1925 was an initiative step and has contributed to the international deliberations on regulating international insolvency. It also coordinates its activities with the UNIDROIT & UNCITRAL (especially in the preparation of the UNCITRAL Legislative Guide on Insolvency Law 2004.*
- 5) *The most successful approach has been undertaken by the UNCITRAL through developing the MLCBI, 1990. It was not taken in a form of treaty or convention, but rather that of Model Law drafting legislation that UNCITRAL recommended member States to adopt, with or without modification. 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.]

You also needed to provide a context or framework for the treatment of these rules in insolvency systems. This could have been done by briefly explaining the nature of voidable dispositions.

4

Marks awarded 10.5 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?

[Most legal systems contains rules on various types of proceeding that can be initiated to resolve a debtor's financial difficulties. These proceedings take a number of different forms and might be described as "formal" and "informal". Elaboration on the difference between formal and informal is warranted. The below points summarize the advantages and disadvantages that Lobo should consider regarding any out-of-court workout arrangement that it could enter with FPPL:

First: The Advantages:

- 1. This type can be entered into relatively easily.***
- 2. This type will not be legally binding on any party.***
- 3. Lobo will not be legally obligated and can start the formal proceeding at any time. This depends upon any contractual agreement.***
- 4. Flexibility and ease of adaptation. It allows Lobo & FPPL to reach agreement with a wide variety of contents.***
- 5. The ease of negotiation as it provides better environment for negotiation.***

6. *It is a shorter process compared to the formal insolvency procedures that can take more than 2-3 years.*
7. *It is more private than the formal proceeding, and less prone to unwanted publicity and speculations.*
8. *It has lower cost in terms of time and money comparing to the formal proceedings.*

So, the main advantages are: confidentiality, timing, lower cost, and ease of negotiations.

Second: The Disadvantages:

1. *It requires the FPPL's consent, while in formal proceeding it will be possible to act without the consent of FPPL.*
2. *Doesn't give attention to any possible fraudulent behaviour that might be conducted by FPPL.*
3. *The informal agreement might be questioned as Avoidance Actions if other creditors go into formal insolvency proceedings against FPPL.]*

It would be beneficial to consider that there is no moratorium on all creditors and there is publicity.

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.

3.5

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.

[Below are the 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:

1. *Identifying, taking control over and realising assets that are located in Encanto. Shall Encanto adopted the MLCBI, or if it is subject to any comprehensive treaty (such as Nordic), or if it is subject to EIR Recast, then it would be a bit easy for the representative to grant the cooperation and coordination from the Encanto's court.*
2. *Obtaining information from the directors of FPPL who are located in Encanto and not willing to cooperate or assist the representative.*

3. Obtaining a recognition in Encanto and relief by way of stay on proceedings, executing against assets ..etc.

Being adopted MLCBI by Encanto and Asgard, or being in any insolvency treaty or convention (as Nordic or EIR Recast), there would be a lot of facilities and supports that the insolvency representative would enjoy and which affect positively on conducting the work].

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

3.5

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against 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 UK 14 departure from the EU on 31 Jan 2020, the EIR Recast is no longer applies to post 11pm 31 Dec 2020 proceedings in the UK. The issue became more complicated by the impact of the UK leaving the EU.

The ability of the administrator will depend upon the extent to which the appointment of the administrator is recognized in the foreign state in which the assets are situated. One of the great benefits of EU regulation was that it worked across the EU for both the inward-bound (where any member state officeholder was automatically recognised in the UK) and outward-bound (where the UK officeholder was recognized in the other member states) insolvencies. The EU regulation doesn't apply to UK insolvencies after Brexit. Therefore, the previous automatic recognition across the EU of UK insolvency proceeding no longer applies to insolvencies commenced after 01 Jan 2021.

Therefore, neither the proceeding by a creditor against FPPL in UK is automatically recognized in the other EU state, nor the proceeding that would be taken by Lobo in the other EU State will get the automatic recognition in UK.

The recast Brussels Regulation (Judgment Regulation) requires the courts of any EU Member States to recognise and enforce the judgements of courts in the other Member states (subject to some relatively minor exceptions). Prior to Brexit this had both an "inward-bound" and an "outward-bound" element in that the English and Welsh courts would recognise and enforce judgements from the other Member States and the courts in those other Member States would do the same with English and Welsh court judgements. Again, the effect of Brexit is that these reciprocal rights have been

lost. Again, any UK officeholder wishing to enforce a UK judgement in any Member State will have to follow the local laws for enforcement and EU Member State officeholder will have similar challenges in asking the UK courts to enforcement their judgements.

The Foreign Judgements (Reciprocal Enforcement) Act 1933 relates to any judgement made by a "recognized court". The 1933 Act only applies to judgements of courts in jurisdictions which have entered into a reciprocal arrangement with the UK. These include, amongst others, Australia, parts of Canada, India and Israel. The 1933 Act operates by permitting a judgement creditor (for a sum of money) from a recognized court overseas to register the judgement with the High Court. Once registered it has the same status as, and may be enforced as, a judgment of the English and Welsh court.]

The possibilities on how to deal with such situation are listed below:

1) The UNCITRAL MLCBI:

This was incorporated into the UK law, with minor amendment, by the Cross Border Insolvency Regulations 2006 (CBIR). There are no reciprocity provisions in the CBIR and so there is no real limit on the "inward-bound" consequences for cross border insolvency. In such case, insolvency practitioners from the other EU State may apply to the court in UK to be recognized in the jurisdiction. However, the "outward-bound" benefits for the UK insolvency practitioners are limited to the other state and whether, or not, the other state has adopted the MLCBI.

The major disadvantage of MLCBI is that the recognition of the foreign insolvency proceedings is not automatic (compared to EU Recast).

The UK administrator will be required to submit an application to the local court (in the other EU State) in accordance with the local law on recognition of overseas officeholders.

Unfortunately, there is no consistent approach across EU Member States for such recognition which necessarily now involves increased time and costs. Such additional delay and expenses did not happen whilst the UK was in the EU.

The effect of Brexit is that the EU Regulation is no longer be available for UK officeholders when their insolvencies, which commence after Brexit, involve assets in other Member States. The "outward-bound" aspect of the EU Regulation has been lost. To similar effect, the flipside of this is that "inward-bound" EU officeholders, in relation to proceedings commenced after Brexit, are no longer automatically recognized by the UK courts although recognition is relatively straightforward under the terms of the CBIR.

2) The other alternative is the common law jurisdiction to grant assistance to foreign insolvency proceedings in the other EU State. English common law requires that (taken the view of fairness between creditor), ideally, insolvency proceedings should have universal application, and that there should be a single insolvency in which all creditors are entitled to prove. Such system would avoid the need for officeholders to be appointed in parallel proceedings in multiple jurisdictions. It would recognise the overseas officeholder and provide the same remedies to that officeholder as if such equivalent proceedings had commenced in the UK.

5

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL 38/50

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