



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.

African jurisdictions have various insolvency law systems that have the following historical roots:

- The English law tradition is found in Nigeria, Kenya, Botswana, Zambia and Tanzania in the eastern part of Africa;*
- There is a civil law tradition based on Portuguese law in Mozambique and Angola;*
- French law was found in the Francophone counties of West Africa;*
- Both Roman-Dutch law (civil law) and English law have mixed legal systems that have influenced South Africa and Namibia's legal systems.*

Most African countries follow the laws of their former colonial powers but recently noting African countries are introducing modern insolvency legislation into their framework.

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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 had a significantly impact on East Asian countries in particular Indonesia and Thailand which give rise to some reforms in insolvency law. There are two reform initiatives:

- 1. Thailand overhauled its bankruptcy laws allowing for corporate restructuring similar to Chapter 11 procedures available in US.*
- 2. Singapore made two reforms: Restructuring and Dissolution Act to consolidate its corporate and personal insolvency and restructuring laws into a unified Act in effect on 30 July 2020.*

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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.

Between America and Canada, there are experts and professional body tried to assist with the resolution of international insolvency issues, such in 1970, a bilateral insolvency treaty was introduced and failed due to its scope was hard to reach an agreement between two countries. Subsequently, Model Law was adopted through mechanisms such Protocols.

The ALI Transactional Insolvency Project was also another initial to improve cooperation in international insolvencies between North American and Canada as well as other NAFTA States. The Principles of Cooperation among the NATFA Countries were prepared and approved by the ALI Council and Members in 2000 which focus on corporation insolvency and other legal entities in commercial operations except individual insolvency.

Each NAFTA country adopt the Model Law on Cross-border insolvency addressed by Recommendations for Legislation or International Agreement. There are other recommendations automatically stays: notice to creditors; priority claims; binding effect of reorganisation plans; adoption of procedural principles that cannot be implemented under existing domestic laws; and simplified authentication of documents.

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 9 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 voidable disposition could result from a fraudulent conveyance or preference. This requires the application of remedies in insolvency law systems. There is scope to elaborate here.

The treatment of voidable disposition could vary as a result of different approaches in various jurisdictions. Historical reasons play a significant role in these varied approaches to insolvency laws. The actio Pauliana, which forms the basis for fraudulent conveyance law in civil law systems, is an action in Roman law intended to protect creditors from fraudulent legal transactions, specifically those designed to reduce a debtor's estate through transfers to third parties. Under Civil Law, in order to secure repayment of a debt owed to creditors, the insolvent individual could be imprisoned, sentenced to death or sold as a slave.

In the early days of English law, individual debt-collection procedures did not involve imprisonment. Additional bankruptcy acts were provided by the Elizabethan Act of 1570, but no discharge provision was included, which was only introduced at a later stage. Creditors can initiate bankruptcy proceedings, then appoint bankruptcy commissioners who supervise the process. They examine the debtor's transactions and property, and the debtor is obliged to transfer their property to the commissioners.

Further developments after the 1570 Act, as an example, the Statute of Ann of 1705 was a critical piece of insolvency legislation which introduced a statutory discharge. Later, Official Receiver was introduced in 1883, which entails administering the debtor's estate. During these developments, a few of the principles of insolvency law were developed:

- *The debtor's assets belong to creditors and are subject to interference and control.*
- *Official supervision and control of the administration*
- *An independent examination of the debtor's conduct and circumstances leading to the debtor's insolvency*

The aforementioned development and principles provided foundations for a fair procedure to discourage dishonesty in modern insolvency law. There is scope to elaborate regarding the importance of the rules.

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' definition has limitations in addressing the following issues

- *It is limited because it is dependent on the existence of a legal framework at the national level and domestic law are insufficient to deal with cross board insolvencies.*
- *As insolvency proceedings should not entirely depend on the goodwill of the first state, international insolvency law requires an overarching, standardized regulation;*
- *The modern business environment is characterized by multinational communication and interactions that lead to transnational or cross-border insolvency,*
- *Most domestic legal systems are not well-equipped to handle cross-border insolvencies. A country's enforcement jurisdiction normally ends at its national borders.*

- *Risks may arise where multiple insolvency proceedings against a single debtor are brought in different jurisdictions. The result may be losses for certain creditors, challenges to equality between creditors, and detrimental forum shopping in cross-border insolvency proceedings.*

This is well answered. I'd have loved to see you discuss Fletcher's comments in further detail.

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.

With respect to international insolvency matters, which can be viewed as a subset of international trade law, various States have ratified or acceded to treaties or conventions that entail principles to resolve insolvency issues involving another country. As such, conventions and treaties are international instruments that are enforceable in domestic courts as part of the "hard law" on insolvency.

There are examples of conventions or treaties that appeared in history attempting to resolve international insolvency matters. However, based on the outcome of these examples, they do not appear to be a mixed success: A deeper consideration of success is warranted.

- *Insolvency conventions addressing absconding debtors and asset gathering came into existence in the 13th and 14th centuries. During the 19th century, European countries introduced modern forms of bilateral treaties or conventions related to bankruptcy, winding up, arrangements, and compositions, such as the Nordic Convention (1933).*
- *Although these multilateral international insolvency conventions have been attempted, they have not been successful. In 1949, the Council of Europe was established with 47 member countries with the aim of developing democratic principles throughout Europe based on the European Convention on Human Rights and other reference texts on the protection of individuals in France.*
- *Istanbul Convention, Treaty Series No 136 of the Council of Europe, was not ratified by a majority of its members and has not been enforced.*
- *The conventions and treaties described above play a significant role in the development of how international insolvencies are handled. Through its European Insolvency Regulation (EIR)(2000), the European Union has made significant progress in international insolvency law.*

3.5

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?

There are several main differences between "formal" and "informal" insolvency processes:

Typically, formal insolvency proceedings begin under insolvency law and are governed by that law, which includes liquidation, reorganization, and rescue proceedings;

Informal arrangements are not always regulated or governed by insolvency law and are highly dependent on voluntary negotiations between the debtor and creditor(s).

The advantages and disadvantages for Lobo to enter into an informal insolvency arrangement with FPPL are as follows:

- Due to the absence of a court process, time and costs are saved***
- No public announcement regarding FPPL's financial difficulties, which may negatively affect FPPT's goodwill***
- Since the agreement reached is only binding between FPPL and Lobo, terms can be flexible, such as deferrals or extensions of payments, discharges of some debt (taking a haircut), and debt equity swaps.***

- *A formal insolvency proceeding can always be initiated by Lobo if a formal insolvency arrangement fails. An effective negotiations strategy could be based on this.*
- *There is no moratorium preventing other creditors from approaching the courts and filing insolvency petitions. Once other creditors commenced formal insolvency proceedings, an informal insolvency agreement between FPPT and Lobo would be terminated or voidable.*
- *The agreement between FPPL and Lobo, which cannot bind dissenting creditors.*

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.

As a concurrent insolvency proceeding commenced against FPPL in Encanto (a different jurisdiction), Lobo may encounter the following difficulties in a formal insolvency proceeding. This cross-border situation may result in a lack of coordination and cooperation between the courts in different countries:

- *Lobo's proceedings could be in competition with another insolvency proceeding already commenced in Encanto. A conflict may result, such as when one creditor wants to place FPPL into liquidation, while another prefers a corporate rescue/restructuring approach, which could lead to unnecessary losses for creditors;*
- *It is difficult to predict which law will be adopted to govern issues such as security rights and priority payments in FPPL. This causes conflict interest between the creditors who should rank first or which one is "only the fittest".* would survive;
- *The Asgardian representative may have difficulties obtaining information and assets of FPPL in Encanto.*

- *The principle of equality between creditors may be challenged given some creditors may not be able to participate in the distribution of assets as well as risk of fraud and detrimental forum shopping.*

General speaking, as the national and international laws on insolvency lack of structure both formally and informally to deal with multiple jurisdiction insolvency matters and are hard to reconcile the various national approaches to insolvency.

Despite of the above difficulties, a number of initiatives have been taken for the purposes of providing international best practices standards. There are following international instruments are achieving some success in resolving international insolvency issues to facilitate a better cooperation and co-ordination such as:

- *Treaties or conventions available between Asgard and Encanto*
- *The IBA Cross-Border Insolvency Concordat (1996) accepts concurrent plenary proceedings.*
- *UNCITRAL Model Law*
- *European Insolvency Regulations (Recast)*
- *European Guidelines on Communication and Cooperation (2007)*
- *ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court to Court Communication in Cross-Boarder Case (2012)*
- *EU JudgeCo Principles and EU Cross-broader Insolvency JudgeCo Guidelines (2015)*
- *Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016)*

These international insolvency instruments play significant roles in facilitating the cooperation and coordination in the international insolvency environments and give respective guidance in:

- *Assisting in the administration of concurrent proceedings*
- *Ensuring a single debtor's insolvency estate is administrated fairly and efficiently for the best interest of creditors*
- *Strengthening efficient and effective communication between courts*
- *Enhancing co-ordination and cooperation amongst courts under whose supervision proceedings are being conducted*

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.

There is a proceeding against FFPL was opened in UK on 30 June 2022, the EIR Recast does not apply to this UK proceedings as from 11pm 31 December 2020, UK existed from the European Union.

If Lobo is considering opening proceedings in another country in Europe. There are considerations need to be made and further information need to be sought:

Three key questions may be relevant for English court to consider where a matter has an international element:

- The choice of forum to exercise jurisdiction in a matter*
- The recognition and effect accorded foreign proceedings in the same matter; and*
- The choice of law to apply in the matter*

We need to seek further information to determine as to how this matter will be considered by English domestic law

- Registered in UK or a foreign country and whether it has "sufficient connection" with England and Wales*
- Locations of its assets and creditors and centre of main interest*
- Solvency position of FPPL's respective business in each jurisdiction*
- Whether the UK may have adopted UNICTRAL Model Law when Lobo proceedings*
- Given the proceedings in UK initiated by a minor creditor, what is the likelihood of a settlement between this FPPL and this minor creditor*

The English court have jurisdiction to wind-up FPPL even if it is formed in another state and has carried on business in England even FPPL has not complied with the requirements to register in England. If Lobo commenced the proceedings in Europe, the English court could recognise winding-up proceedings for that foreign company and allow the foreign liquidator to gain control over local assets. English law applies to matters of procedure and substance, and Lobo's claim is properly governed by foreign law.

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Marks awarded 15 out of 15

*** End of Assessment ***

TOTAL MARKS: 43.5/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.