



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 countries share a diverse general historical root. That explains the reason why each country may vary their root depending on their former colonial power. Countries such as Nigeria, Kenya, Botswana, Tanzania and Zambia, adopted English-like laws. Cameroon, Ivory Coast and other former French colonies have French laws. Same goes to Mozambique and Angola which share a Portuguese history and therefore law. However, there are some African countries that have moved away from their former colonies laws and are currently developing modern insolvency laws.]

There is scope to consider countries with mixed laws.

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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 that affected specially Indonesia and Thailand had a huge impact upon insolvency advancement. Thailand decided to create new laws and Singapore, one of the role model economy of the world, also decided to release new insolvency law. Despite not having a unified effort to have a single treaty that binds all Asian states, many important economies of the region, such as Australia, Japan, New Zealand, Philippines, Republic of Korea and Singapore, have decided to adopt de Model Law on Cross-Border Insolvency.]

3

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.

[In the 1970, Canada and United States tried to achieve a bilateral insolvency treaty but there was no agreement and it was rated as too ambitious. The American Law Institute (ALI) was an initiative to improve the coordination and cooperation between NAFTA states (USA, Canada and Mexico). As a result, it issued the Principles of Cooperation among the NAFTA Countries, which were approved in the 2000 and it specially focus on principles and only regulated companies (no individuals). These efforts conclude with a recommendation to adopt the Model Law, which was later accepted but the NAFTA states.]

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 7 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.

*[Both in civil law and in English law it became notorious that it was essential to have instruments to prevent different type of actions from the debtor that would end harming the state. That's why civil law developed the *actio Pauliana* which tries to roll back the fraudulent transaction that the debtor did to defraud their creditors. On the other hand, English law also developed some kind of defence mechanism in favour of the creditors, which started with the Act of Elizabeth of 1570. This different approach explains himself considering how they both developed as a system. Nowadays most (or all) systems have some kind of action to deal with voidable dispositions because it's very important to defend the estate, the creditors rights, equitable rights, prevent fraud, preventing the benefit of a single creditor, among others.]*

These are some of the most important aspects of insolvency law because one of the main goals is to try to pay each creditor their credit. If there wouldn't exist any of these instruments, there would not be any assurance that the debtor would not commit fraud or would not directly benefit one of the other creditors. By doing this, the debtor would probably have few assets that won't be enough for facing the insolvency procedure and would end with lots of creditors with huge pending debts that would remain unpaid. Therefore, creditors need the assurance that if they attend an insolvency procedure, there is possibility that their credit would be paid and therefore an increase trust in the system.]

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.

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.

[The definition has limitations because it implies that there is an existent set of domestic laws that would apply, if it was not for the international element. Therefore, it's a definition that refers to a sort of unknown but starting point element (national insolvency framework law) that varies depending to each case. It's also referred as a "set of rules" and this may differ depending on the definitions that each states gives. For example, there are some international insolvency work that does not refer to rules per se, but to principles. On the other side, Fletcher provides a definition, that exposes Wessels's limitation, in which its defined as a "situation" that transcend a single set of insolvency law, which doesn't intrinsically implies that we have a "primary" or starting point insolvency law to refer, but on the contrary states that a single set wouldn't be able to solve the situation.]

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Question 3.3 [maximum 5 marks]

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

[Treaties can be considered as the best way of establishing cross-border insolvency law. Treaties usually guarantees binding and enforce compliance of each signing state of the treaty. This means that if an international insolvency case arises, each state has a law in common that allows them to know the procedure, the definitions, the principles, the effects and which court would rule the case. On the other side, insolvency law guides has being really useful but faces some problems. The fact that it's a guide, and therefore each state needs to make their law accommodating to that guide, doesn't directy solve the problem and doesn't provides an unique law that rules the case, it only tells which domestic applies depending on the case. In other words, the guide transforms into a domestic law that tells how to act upon an international case, different to the treaties that can be a direct source of law. A perfect example of the success that treaties may arise it's the European Insolvency Regulation (EIR) (2000) and their future recasts.]

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

2.5

Marks awarded 11 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.

If you require additional information to answer these questions, briefly state what it is and why it is relevant.

Question 4.1 [Maximum 5 marks]

What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

*[Formal insolvency involves necessary **necessarily** a court of law and usually its procedure are determined by law. The most common or general kind of formal procedures are reorganisation and liquidation. The informal arrangements don't need a formal court to rule the agreement. These kinds of arrangements consist of one of the two parties to reach the other one to get to an agreement.*

The formal insolvency proceedings have some good advantages such as:

- a. An established procedure, which means, every party should know the rules in which the procedure would be developed.*
- b. The benefit of a statutory moratorium preventing any proceedings being taken against the corporation.*
- c. It binds dissenting creditors that refuses to reach an agreement.*

Some disadvantages are:

- a. The cost of these procedures.*
- b. The negative impact in the market caused by the publicity of the financial distress.*

The informal proceedings advantages are:

- a. Low cost for the procedure.*
- b. The bad financial situation doesn't go public.*
- c. The agreement may take less time to reach.*

The informal proceedings disadvantages are:

- a. The benefit of a statutory moratorium preventing any proceedings being taken against the corporation, which allows other debtors to go directly to a court.*
- b. There is no way of binding dissenting creditors to any agreement reached.]*

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.

[When there are two concurrent insolvency proceedings it would certainly cause different types of problems like, for example: determine which would be the applicable law, which court would rule the proceeding, the different treatment of assets, if the result of the procedure would bind all the debtors (including those that are not from the local state), among others. The different courts must refer to any sources of law to answer all these questions. In detail, the courts would need to have a constant communication and cooperation for it to be successful.]

For solving this issue, it would be necessary to know if Asgard or Encanto had signed any treaty or adopted the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) as part of their domestic laws. For example, in that case, there would not be necessary any reciprocity and it can be solved through that model.

In case that there isn't signed any treaty or any international instrument that facilitate the cooperation, there would need to check their local law to determine whether there is any regulation regarding the presence of an international element. This situation makes clear how important is to have a well-developed system to deal this kind of different procedures which, on the contrary, may encounter contradictory judgement from both courts. Creditors would be the most harmed in this kind of situation because, not only they need to wait for their credit to be paid (or not paid at all), they also would be confused about which procedure would ultimately protect their rights. Assets would also be on a difficult situation in which it's not clear which procedure would rule or the effects that are caused, among other undesirable effects for not having a well-developed international insolvency system.]

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

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 United Kingdom decided to no longer being a member of the European Union as of 31 of December 2020. As a result, the EIR Recast no longer applies to post-11pm 31 December 2020 proceedings in the UK. The Recast Insolvency Regulation applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (being 11pm on 31 December 2020). Therefore, the recast won't apply to this case because the insolvency procedure was opened after this date, on 30 June 2022.

However, the complete answer depends upon the regulation of the company, because the case does not specifies where is based-located and only states that has offices in the UK, Europe and non- European countries.

When the company its incorporated under a foreign law, the English court has jurisdiction to wind up the foreign company.

When a company was formed under foreign law, jurisdiction may also be established to wind up an "unregistered company".

When the international elements are foreign assets or foreign creditors, Liquidators have a duty to take into custody and under their control all the tangible and intangible property to which the company is entitled and of which it remains the legal owner.

When winding up under the Insolvency Act 1986, including of a foreign company, English law would apply for the procedure. This, however, may need other foreign law for establishing the actual claim where this claim is a debt ruled by foreign law.]

It would be beneficial to consider the MLCBI

3.5

Marks awarded 11 out of 15

* End of Assessment *

TOTAL MARKS 38/50

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