



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 still largely follow the laws of their respective former colonial power. For example, countries in the Eastern part of Africa such as Tanzania follows English law while Angola follow civil law based on Portuguese law and West African countries follow civil law base on French law.

On the other hand, some countries such as South Africa have a mixed legal system.

However, several African states have started introducing modern legislations.

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 aftermath of 1998 financial crises gave rise to the insolvency law reformed resulting in Thailand overhauling their bankruptcy laws.

Singapore is becoming a major player in the region and passed a new insolvency act in October 2018 to consolidate Singapore's corporate and individual and restructuring laws. It came into force on 30 July 2020.

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.

The following initiatives were undertaken to assist with the resolution of international insolvency issues between North America Canada.

Initially there bilateral co-operation and co-ordination base on existing legislation and long-standing case law around commodity. Although they failed to reach a bilateral trade agreement in the 1970s, progress has since has been made though both countries adoption of Model law and protocols.

Principal co-operation among the NAFTA counties which include North America and Canada was prepared and approved by the American Law Institute (ALI) council and member in 2000.

The NAFTA principles focuses on insolvency of corporations but exclude individual, non-for-profit organisation and financial institutions. Additional principles address moratorium, information sharing, sharing of value, national treatment, and adjustment of distributions. It also includes recommendations for each NAFTA country adopt the model law on cross-border insolvency, automatic stays, notice to creditors, priority claims, binding effects of re-organisation plans, adoption of procedural principal 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

3

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.

Voidable disposition is where the debtor improperly disposed of the assets. It can become the subject of investigation and if certain conditions are met these transactions can be set aside and any benefit received will be re-couped for distribution to the creditors. **There is scope to elaborate here.**

The possible reason for the difference in approach is, in civil law country it was developed because of the actio paulina, while the Act of Elizabeth 1570 is the basis of English Law.

Actio paulina or civil law, specially focus on reversing fraudulent transactions undertaken to defraud creditors. The delict covers a wide variety of act on behalf of the debtor, with the intention to limit the creditor's ability to collect.

The Act of Elizabeth 1570 or English law holds the company's directors personally liable to the company for the disposition or misapplication of assets.

These rules are important because it ensure equitable treatment of all creditors. Also, it can encourage out-of-court settlement because with the seizure of assets, creditors will be aware that the assets are susceptible to being set aside there will be happy to come to a settlement arrangement with the debtors.

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

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 reasons why the definition have limitation are:

The definition is based on the notion of a national (local) legal framework of insolvency law. However, it is now customary for debtors to hold investments and assets in multiple jurisdictions and the current marketplace has given rise to transactional or cross-border cases of insolvency.

Also, the capital market has been greatly deregulated and foreign exchange controls continue to be relaxed.

Moreover, majority of corporate collapses involved more than one jurisdiction resulting in international insolvencies becoming the norm.

In addition, there has been a significant increase in co-ordination and co-operation between the courts across varying jurisdictions which help in lessening the occurrence of multiple insolvency proceedings against the same debtor.

There is some scope to elaborate, for example by discussing other definitions and comments such as by Fletcher.

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 bind the countries that sign on to them and affect the domestic laws. In many instances they go on to form the country's hard law on insolvency.

They can be viewed as a successful way of establishing rules because it can be seen as a measure to ensure recognition, winding up, arrangement and enforcement of claims between countries covered in these agreements.

For example, UNCITRAL has been influential across countries in the United Nations in promoting soft law responses to international insolvency issues. While the European Union by way of convention has influenced broader multinational developments in international Regulation (2000).

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. I'd like to see you discuss a number of treaties/ conventions and their success or otherwise.

2.5

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]

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 difference between formal insolvency proceeding and informal insolvency arrangements is formal proceedings occur in the court and in governed by insolvency law. Whereas informal insolvency arrangements involve out of court negotiations between the creditor and the debtor.

Regarding Lobo's case, they should consider the following advantages and disadvantages when deciding between informal out-of-court work out arrangement and formal debt recovery.

Informal out-of-court workout arrangement

If Lobo opts to go with the informal out-of-court workout arrangement it will be less costly, compared to the cost of court involvement. However, any agreement FPPL and Lobo enter will not be binding on the other creditors, who may opt to open a formal proceeding thereby resulting in an automatic stay on all creditor's agreement which includes any agreement with Lobo.

Formal debt recovery

If Lobo opts for formal debt recovery it will prevent other creditors from opening any insolvency proceedings and decisions handed down to the court is binding on all creditors. However the involvement of the court can be quite costly. **Publicity should also be considered.**

4.5

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.

The difficulty that may arise for the insolvency representation for Lobo since concurrent insolvency proceeding has commenced against FPPL is, both Encanto and Asgard has varying approaches when it comes to insolvency. However, we will need understand where these countries are located to the exact difficulties the representative will encounter. For example, if Asgard was a part of France they will emphasise the interest of labour rights which will be more exacerbated by the fact that they are currently experiencing staff issues. Whereas if I was to assume that Encanto follows UNCTRAL they will prioritise the creditors and therefore posing a problem for the Insolvency Representative.

There is also a risk that Encanto will not recognise Asgard and as a result will accept claims, leaving the creditors of Asgard at a financial loss again I will need to understand where the countries are located to confirm this. However, given the many countries have adopted the UNCITRAL Model law the risk of this is low.

Some instruments that have been developed to assist:

European Guidelines on Communication and Co-operation (2007) - This contains non-binding rules which may not be a feasible option for Asgard who is seeking enforcement of their claim in another jurisdiction. Also, as mentioned above we will need more information on where both Asgard and Encanto are located because this guideline only applies to European countries.

Ali-III Global Principals for Co-operation in International Insolvency Cases and Global Guideline Applicable to Court-to-Court Communication in Cross Border Case (2012) – This would be important as this seeks to enhance co-ordinate and harmonisation without interfering with the independence of the Courts in each jurisdiction. However, this is only applicable to NAFTA member and without knowing where Encanto and Asgard are located I will be unable to conclude if this instrument is applicable and therefore helpful.

Judicial Insolvency Network, Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters (2016) – This can be considered important and useful because it is a network of judges from across the world with the aim of providing judicial leadership, best practices and facilitate communication and co-operation amongst the courts. However, they focus primarily on the mechanics interacting, receiving and engaging in communication and not technical matters such as insolvency proceedings.

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.

Effective 11pm on 31 December 2020 European Insolvency Regulation Recast ceased to apply to the UK following their exit from the European union.

Base on this Lobo through their Insolvency representative can communicate with the Court in the United Kingdom regarding the minor creditors' proceedings to maximise the benefits to the creditors. As UNCTRAL Model Law mandate the local court, being the United Kingdom to co-operate with the foreign court (Europe).

Given that Lobo is considering opening proceeding one month after the initial proceeding that it is still ongoing and the European Insolvency will not apply, however Lobo will have the option to submit their claims since the assets has not yet been distributed to the creditors.

5

Marks awarded 14.5 out of 15

*** End of Assessment ***

TOTAL MARKS 42.5/50

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