



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.

Most African countries insolvency law systems can be traced back to their colonial past and can therefore often be grouped together based on the former colonial power. An English law tradition can be traced back to countries such as Botswana, Nigeria, and Kenya, meanwhile traces of civil law based on Portugues Law can be found in Mozambique and Angola. Meanwhile hybrid legal systems including both civil and English law can be found in South Africa and Namibia as both were colonised by English and the Dutch at different periods.

There is scope to also consider countries with French law.

2

Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

The 1997 Asian financial crisis was a key impetus to insolvency law reform in the region, examples of such reforms were the updated Bankruptcy laws enacted as well as an update to the insolvency regime in Thailand.

More detail and a second example is needed.

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.

One of the initiatives created to assist with the resolution of international insolvency issues between Canada and North America is the American Law Institute's (ALI) Transnational Insolvency Project. More specifically, appended within this project is the "Guidelines Applicable to Court - to Court Communications in Cross-border Cases". This initiative has seen success, just recently in 2021 the ALI confirmed that the Guidelines Applicable to Court - to Court Communications in Cross-border Cases had been an integral part of the ongoing restructuring of LATAM Airlines group, a large cross-border airline restructuring, with the Grand Court of the Cayman Islands approving the insolvency protocol.

Another initiative undertaken to resolve insolvency issues between North America and Canada was the creation of a Protocol between the US and Canada in the Nortel Networks case. This Protocol facilitated co-operation and co-ordination that produced a joint electronic trial resulting in a favourable conclusion of a 2017 joint judge ruling for a payment plan to pay more than \$7bn to creditors of Nortel Networks.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks.

3.5

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.

Under both English and civil law voidable dispositions have been carved out as a highly important area of insolvency law. It's origins within civil law begin earlier with the actio Pauliana, an ancient Roman act designed to protect creditors from fraudulent legal transactions intended to devalue the debtor's estate. Meanwhile the idea of voidable dispositions was only formalised in English law with the Act of Elizabeth of 1570 providing a solution to this situation. with the introduction of the actio Pauliana creating the foundations of fraudulent conveyance law in civil law. Historically in ancient Rome the actio Pauliana could only be undertaken within a year of the transaction taking place, this differs from both modern day civil and English law systems in which the time is usually prescribed as the length of time from the commencement of proceedings. Additionally modern law increasingly makes a distinction in voidable disposition time limits for various factors such as fraudulent, preference or related party transactions.

A possible reason for the difference in importance placed on voidable dispositions between historical and modern insolvency law is the increased focus towards execution against the assets of the debtor rather than the execution against the person. Whether in Roman law where debtors could be sentenced to death for debt execution or in English law where debtors had their own specific prisons; much less focus was paid on the successful payment of the outstanding debt as was punishment towards the debtor in question.

One of the frameworks developed to help assist in the treatment of these rules is the UNCITRAL Legislative Guide on Insolvency Law, which provides suggestions on how to deal with the various measures of vulnerable/voidable transactions.

The central argument for the inclusion of voidable disposition rules in an insolvency system is the principle of pari passu distribution, as by its nature the existence of voidable transaction is disadvantageous to the other creditors as it diminishes the debtor's estate and does not provide equitable treatment to the creditors debtor.

This question required a greater discussion of the framework for, and importance of, voidable transactions.

4

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 explains that the definition proposed also has a shortcoming in that it is connected to the existence of national legal framework on insolvency law. Although it should be noted that with the increased momentum and adoption of the UNCITRAL MLCBI many countries have created a national framework of insolvency law, many states still do not have a framework for these matters. Furthermore, where a country does have a framework in place to address insolvency law it may not be unified across the country but instead may be only in place in one state or may be competing with other conflicting frameworks across the nation.

In this regard additional issues are created in the insolvency such as the creation of a potential situation where proceedings are commenced against the same debtor in multiple states creating additional needless losses to the creditor body and potentially harming attempts at potential restructuring efforts.

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

4

Question 3.3 [maximum 5 marks]

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

International treaties and conventions between countries have been shown to be an effective solution to solve cross border insolvency disputes and achieve success for creditors. In the case of a treaty States that bind themselves to them will affect their domestic law in line with the terms of the treaty and may then introduce measures of the treaty into the States “hard law”.

One of the most influential conventions in cross-border insolvency law was the Convention on Certain International Aspects of Bankruptcy, also known as the Istanbul Convention. Despite being signed by eight different member states the convention was not ratified by a significant number of states for it to be affected, despite this shortcoming the 1990 Istanbul Convention paved the way for the future European Insolvency Regulation (EIR) (2000) to be instituted. The EIR has generally been successful since its introduction by establishing a rule on the centre of the debtors' main interests (COMI). By using a framework of

modified universalism, it allows for the commencement of additional subsidiary proceedings in other treaty states where the debtor has an establishment in place that conducts economic activity.

Also, within Europe, the Nordic Convention on Bankruptcy (1933) is an effective solution to solving cross border insolvency disputes between Iceland, Denmark, Sweden, and Norway. Contrary to the EIR one of the core principles of the Nordic Convention is that the law of the country in which the initial insolvency proceedings is adjudicated determines almost all the future proceedings, this includes an immediate stay of proceedings in all member states and the recognition of a foreign insolvency administrator.

One of the longest lasting and successful international conventions is the Havana Convention on Private International Law (the Bustamante Code). Despite being concluded in 1928 the convention is still in existence today with 15 different member states having ratified the convention. In contrast to the Montevideo Treaties of South America, the Havana Convention takes a harder stance on the existence of a sole proceeding with universal recognition of member states while also providing for immediate recognition from the date of commencement.

Overall, all three of the treaties and conventions previously mentioned can be considered a success, in the case of the Nordic and Havana Convention they have stood the test of time in the face of evolving insolvency law legislation being developed over the last ~90 years proving that the founding principles of the conventions are still effective.

5

Marks awarded 13 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 proceedings are typically those characterized by court involvement and often a statutory set of measures, meanwhile informal insolvency proceedings are actions that are agreed upon by parties outside of the court. The primary disadvantages of any informal out-of-court workout that Lobo could engage in are that there is no moratorium in place to stop other potential creditors from petitioning to have FPPL place into an insolvency proceeding, which given that FPPL is struggling in Asgard means there is likely to be other creditors. Additionally, should another creditor join the informal arrangement with Lobo, the creditor cannot be bound to the agreement if they are dissenting, making it more difficult to arrive at a solution.

On the other hand, Lobo should consider that any informal arrangement entered with FPPL has the advantage of being much cheaper than any potential formal court proceeding they could take against FPPL. Additionally, if there are not significant issues that will prevent FPPL from making repayment, an informal process will likely allow Lobo to be repaid more quickly as opposed to having to wait through the court process. Finally, by engaging in an informal arrangement for repayment Lobo will retain goodwill with the management of FPPL that will likely allow their business relationship to continue, whereas by bringing a formal court proceeding future ties could be strained and may cause Lobo additional costs in having to look for a new business partner. Publicity is relevant.

Additional information required:

What state would Lobo seek to bring proceedings, Asgard or Encanto? Additionally, is the insolvency test in place for both states a cash flow test or a balance sheet test?

From the information provided it appears that FPPL is only facing cash flow insolvency in which case under a balance sheet test there may not be a case to bring formal insolvency proceedings against FPPL in any event.

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.

A difference in the interests of the insolvency proceedings may be one of the difficulties faced between the Asgardian and Encanto representatives. This may be due to a different approach to proceedings with one being pro-creditor and the other being a pro-debtor system that is more inclined to discharge existing debts.

An important part of cross border insolvency matter that the Asgardian representative will need to contend with is the effective communication with his corresponding representative for bringing actions. To prevent the duplication of proceeding they will need to effectively communicate otherwise needless costs will be incurred which will only reduce the debtor's estate.

Alternatively, one of the states could have bias to the interests of their state, for example the Encanto insolvency representative may have an unwillingness to recognise Asgard creditor claims to protect existing Encantan claims or the Encanto representative may be more opposed to bringing actions that close sections of FPPL's business in the hope of safeguarding Encantan jobs.

Two of the instruments that have been developed to solve issues such as these are the UNICITRAL Model Law Cross Border Insolvency and the International Bar Associations' Model International Insolvency Cooperation Act (1989) which both seek to coordinate insolvency proceedings by having a primary proceeding that will handle the relevant proceeding with scope for lesser auxiliary proceedings to also exist. By doing this they seek to minimize costs and maximise value for the creditor body and should therefore be considered important instruments to international insolvencies. As in the absence of these instruments less effective coordination and misalignment of jurisdictional goals will prevail causing harm to creditors.

Elaboration is warranted regarding other international instruments

4

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-

European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL 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.

Following the UK's withdrawal from the European Union, the EIR Recast no longer applies under UK laws to all insolvency proceedings in the UK commenced post 11pm on 31 December 2020. Therefore, as the UK proceeding against FFPL was opened in the UK on 30 June 2022, the EIR would not apply to this proceeding. Given this information should Lobo bring insolvency proceedings in another Europe an automatic stay on proceedings will not be automatically in effect and a separate concurrent proceeding against FFPL will begin. Also, if there is no cooperation Lobo will likely separately need to place a claim in the UK proceeding in addition to his new claim in the European proceeding. Furthermore, given that the proceedings have been open in the UK for a month, a freezing order will not have been obtained for the European nation (provided a recognition order has not been obtained) meaning that ample time will have passed for FFPL to dissipate its remaining liquid assets leaving little to recover for Lobo.

Additional information required:

Whether a recognition order has already been brought (from the UK) to the European country Lobo is considering bringing a proceeding in.

It would be beneficial to consider the MLCBI

3

Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS 39.5/50

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