



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 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

The historical roots of the various insolvency laws of African nations as a whole still follow those laws of their respective former colonial powers. West African nations' insolvency laws are based on civil law, in particular French civil law. Nigeria, Botswana, Zambia, Kenya, Tanzania and East African countries' insolvency laws have an English law tradition. Mozambique and Angola have a civil law tradition which is based on Portuguese law.

There is scope to elaborate on mixed law countries.

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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 in Eastern Asia resulted in insolvency law reforms, particularly in Thailand and

Indonesia. As a result of the crash, Thailand had an overhaul of its bankruptcy laws. In addition to this, in October 2018 Singapore passed a new Insolvency, Restructuring and Dissolution Act as a means of consolidating Singapore's personal and corporate insolvency laws into one unified Act. The Act came into force in July 2020. Singapore has become a large influence in insolvency and restructuring in East Asia.

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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.

There have been a number of initiatives undertaken in North America and Canada with regards to the resolution of international insolvency issues in the area. In the 1970s, the US and Canada worked towards a bilateral insolvency treaty, however they failed to reach agreement on it as it was too ambitious in scope. Following this, both countries have made more practical progress after their respective adoptions of the UNCITRAL Model Law on Cross-border Insolvency and through mechanisms such as Protocols.

The American Law Institute ("ALI") has assisted in the resolution of international insolvency issues between the NAFTA countries of the US, Mexico, and Canada. One such initiative was the ALI Transnational Insolvency Project which worked to improve cooperation in international insolvencies across the 3 nations. Advisory groups were formed from each of the US, Canada, and Mexico, and these groups prepared an International Statement on their countries' insolvency law as applicable to international cases. This initiative was a success and resulted in the Principles of Cooperation among the NAFTA countries being prepared and approved by the ALI Council and Members in 2000.

The NAFTA Principles are focused on the insolvency of corporations and other legal entities with commercial operations, and they exclude individual insolvency, the insolvency of non-profit organisations and of financial institutions.

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 8 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.

The difference in approaches regarding the treatment of voidable dispositions between English law and civil law jurisdictions is as a result of differing underlying rules in the jurisdictions. Voidable dispositions can be defined as either fraudulent conveyance (disposition of property without receiving adequate value in return) or preferences. Fraudulent conveyance refers to the disposal of property by the insolvent, normally by way of a donation of undervalue transaction, that results in an increase in the debtor's insolvency. Preferences can be defined as the settlement of a pre-existing debt to a creditor, or the affording of a real security for a pre-existing unsecured debt to a creditor, resulting in an improvement of the creditor's position once insolvency commences.

The payment of distributions to creditors differs between countries, but most systems will draw a distinction between secured and unsecured creditors. Secured creditors are those creditors who possess a valid form of security for their claims; unsecured creditors do not. Unsecured creditors can further be classified between preferential (priority) claims and concurrent claims. Priority claims are normally as a result of legislation and normally consist of amounts owing to employees (e.g., salary) or the State (e.g., unpaid taxes).

In a cross-border insolvency context, the differences in domestic approaches towards insolvency have resulted in difficulties in designing a proper cross-border insolvency dispensation.

In English law, the Act of Elizabeth of 1570 formed the basis of fraudulent conveyance law. The Act

was important in that it is said to be the first law designed specifically as a true bankruptcy statute rather than a law preventing fraud. The Act transferred jurisdiction of the supervision of the estate to the Lord Chancellor, a change from the commissioners per the Bankruptcy Act of 1542. Following an 'act of bankruptcy' by the debtor, a bankruptcy proceeding could be opened by a creditor. Creditors could then petition the Lord Chancellor to convene a bankruptcy meeting and have bankruptcy commissioners appointed. The commissioners would then examine the transactions and property of the debtor and the debtor would be obligated to transfer their property to the commissioners.

In civil law, the actio Pauliana formed the basis of fraudulent conveyance law. In practice, the legislation detail in dealing with these matters may differ regarding the requirements for the remedies to be applied.

The United Nations Commission on International Trade Law (UNCITRAL) completed a Model Law on Cross-Border Insolvency (MLCBI) in 1997 which aimed to address the challenges arising in a cross-border insolvency context. The UN recommended that all member States review their cross-border insolvency legislation to determine whether it meets the objectives of a modern and efficient insolvency system, bearing in mind that need for an internationally harmonized legislation governing cross-border insolvencies.

[You needed to discuss the importance of the voidable transaction rules in detail.](#)

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 concedes that his definition of international insolvency law has its limitations as it is connected to the existence of a national legal framework of insolvency law. Many domestic legal systems are ill-equipped with regards to dealing with insolvencies and this has implications across national borders. The standard of insolvency laws in many countries is relatively low, with many laws being outdated (perhaps due to their colonial past) or not otherwise suited to modern trade and investment. For these reasons, Wessels' definition has some limitations.

Wessels further highlights limitations in defining 'international insolvency law', proposing that international insolvency law should be considered as a situation '... in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case.' (Wessels, supra). Examples of this are the founding fathers of the US declaring in their Constitution that insolvency law is a federal question, rather than a state question and the EU creating a common market between nation States. The recognition of insolvency proceedings in one state where the debtor holds assets at the commencement of the insolvency proceedings in another state cannot depend solely on the goodwill of the first state. In the modern world, the communication and interaction between individuals, businesses and States has resulted in cross-border insolvency issues as national borders are becoming increasingly irrelevant.

This is answered well. It would also be beneficial to consider comments regarding Fletcher in detail.

4.5

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.

Treaties and conventions have been used as instruments in cross-border insolvency law, with varying degrees of success over the years. Treaties and conventions act as public international instruments in that States bind themselves in signing the treaties and affect their domestic laws accordingly.

Bilateral international insolvency conventions began in Europe from the 13th and 14th centuries with a view to addressing absconding debtors and later collecting assets. More modern treaties and

conventions arose in the 19th century, addressing topics such as jurisdiction, recognition and enforcement related to bankruptcy, winding up and arrangements. European efforts at achieving multilateral international insolvency agreements were unsuccessful for many years.

The Nordic

Convention of 1933 was one rare successful multilateral treaty that arose. It would be beneficial to explain treaties / conventions at the outset.

The Council of Europe (currently with 47 member countries) was founded in 1949 and is based in

Strasbourg, France. Its purpose is to develop common and democratic principles based on the

European Convention on Human Rights and other texts on the protection of individuals. In 1990, it

hosted the Istanbul Convention, Council of Europe Treaty Series No 136, a convention on certain

international aspects of bankruptcy. The Treaty was signed by 8 member states only, and so was not

ratified by a sufficient number to be entered into force. Notwithstanding this, it has an important

influence on the development of an EU response to the international insolvency problems amongst

its member States.

The EU has had success not by way of Convention but by way of the European Insolvency Regulation (EIR) (2000) which has also had an influence on broader multilateral developments in international insolvency law. The EIR (2000) has since been reviewed and slightly amended by way of the European Union Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast).

3.5

Marks awarded 11.5 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?

The main differences between formal insolvency proceedings and informal insolvency arrangements are that formal insolvency proceedings are those commenced under the insolvency law and governed by that law. Formal insolvency proceedings generally include both liquidation and reorganisation or rescue proceedings. In contrast to this, informal insolvency arrangements are not always governed by the insolvency law and often involve voluntary negotiations between the debtor and some or all of its creditors. Informal insolvency arrangements have developed through the banking and commercial sectors and usually allow for some form of restructuring of the insolvent debtor. Although informal arrangements are not regulated by an insolvency law, the effectiveness of the voluntary negotiations depends on the existence of an insolvency law, which provides indirect incentives or persuasive forces to facilitate a reorganisation.

The main advantages of informal insolvency arrangements for Lobo with regards to FPPL are that i) the cost would be significantly lower without involvement of the courts and ii) there would be no publicity regarding FPPL’s financial difficulties, albeit this factor would be less relevant for Lobo here. Some disadvantages of informal arrangements would be that i) there would be no moratorium in place preventing other creditors of FPPL from commencing insolvency proceedings, a factor which would also affect Lobo’s stake as a creditor of FPPL given these proceedings might be commenced in another jurisdiction (resulting in potential cross-border insolvency issues arising) and ii) any agreement reached between FPPL and Lobo would not be legally binding. It would be beneficial to note it would not be binding on dissenting creditors.

In contrast, formal debt recovery options have the advantage that i) there is a statutory moratorium in place for FPPL which would prevent any legal proceedings to be taken against them and ii) any agreement reached between FPPL and Lobo would be legally binding. The main disadvantage for Lobo associated with the formal insolvency

proceedings in this instance would be the significantly higher expense related to court involvement in the insolvency proceedings.

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.

There are numerous difficulties that may arise for the insolvency representative pertaining to co operation and co-ordination with the concurrent insolvency proceeding. Both Asgard and Encanto are separate states with their own domestic insolvency laws, which are likely to contrast with one another.

The standard of insolvency laws in many countries is relatively low, with many states having outdated laws that are not suited to modern day trade and investment, such as the cross-border commercial activities that FPPL engages in in both nations. The Asgardian insolvency representative will face difficulties in reconciling the national approaches to insolvency in both Asgard and Encanto, with issues such as a pro-debtor vs. pro-creditor system, labour rights and an unwillingness to recognise foreign public claims all coming into play. The insolvency representatives in both Asgard and Encanto will be competing with regards to FPPL's assets and this will result in challenges for both sides.

Some international insolvency instruments that have been developed to assist with respect to the difficulties detailed above are: The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes, the UNCITRAL Legislative Guide on Insolvency and the Bankruptcy and fresh start: stigma on failure and legal consequences of bankruptcy project launched by the European Commission.

Probably the most important of the above-mentioned international insolvency instruments is the UNCITRAL Legislative Guide on Insolvency. The Legislative Guide was designed to be used by member States of the United Nations when modifying their existing insolvency laws. The Legislative Guide sets uniform standards and approaches to insolvency laws and has set the tone for an approach to insolvency laws globally that is coherent and uniform. The Guide addresses a wide spectrum of features of insolvency law and has been expanded in the years subsequent to its publishing in 2004 to include Part Three insolvency of enterprise groups and Part Four directors' obligations in the period approaching insolvency, including those directors of enterprise group companies.

Elaboration is warranted regarding international instruments.

2

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 European Insolvency Regulation Recast would not apply with respect to the UK commenced insolvency proceedings as the proceedings were opened on 30 June 2022, and the EIR Recast ceased its applicability in the UK following the UK's exit from the European Union on 31 December 2020.

The consequences of this are that, given that Lobo is incorporated in another European country and is FPPL's major creditor, under the EIR this other European state would be the 'centre of the debtor's main interest' (COMI) and as such its courts would be allocated jurisdictional competence. Although the EIR allocates primary jurisdiction based on the COMI, it also allows for the possibility of subsidiary

territorial proceedings in other member States. This is permitted in the instance where a debtor has an 'establishment', i.e., a place of operations where the debtor carries out a non-transitory economic activity with human means and assets, which would be the case for the UK as FPPL has offices there. However, the subsidiary territorial proceedings would not be applicable in the case of the UK minor creditor due to the UK's departure from the EU in December 2020, meaning the EIR Recast no longer applies.

I would not require any further information to establish whether the EIR Recast would apply with respect to the UK commenced insolvency proceedings because the proceedings were opened on 30 June 2022 and hence the EIR Recast was no longer applicable in the UK following its departure from the EU in December 2020.

It would be beneficial to consider the MLCBI

3

Marks awarded 9.5 out of 15

* End of Assessment *

TOTAL MARKS 39/50

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