



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 former colonial powers had great influence in the law systems and legislation adopted by African countries. In most cases, the former colonies tend to maintain the law system (Civil or English Law) that was previously adopted by the countries by which they were colonized.

As an example, Nigeria, Kenya, and Namibia were colonized by British countries and still adopt the English Law system. On the other hand, Angola and Mozambique, which had Portugal as their former colonial master, follow the Civil Law system. Also, there are countries like South Africa that adopt mixed legal systems due to the influence of both English and Civil Law of the former colonial powers.

Globalization changed the economic and international relations among countries. Thus, part of the legislation imported from the former colonies have shown to be outdated and not suited to respond to the questions arising from these changes. In this sense, several African countries have renewed its legislation and adhered to treaties and conventions seeking improvement in the regulations and harmonization of

commercial law applied within African countries. In this context, one can mention as an example the signature in 1993, by sub-Saharan African countries, of a treaty proposed by the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA).

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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.

In 1998 Eastern Asia was subject to a great financial crisis, what led to a reform in their legislation, especially relating to insolvency matters. As a factual implication of the financial crisis undertaken by Asian countries, Thailand and Singapore insolvency laws were all reviewed. There is scope to elaborate

Also, several Asian countries adopted the provisions of UNCITRAL as means to update and harmonise the respective commercial laws.

Recently, the International Insolvency Institute and the Asian Business Law Institute have been developing a document containing "Asian Principles of Business Restructuring". A report mapping the reorganisation regimes had already been published as a result of such project.

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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.

United States of America and Canada have achieved great progress in establishing regulations about cross border insolvency between both countries, since they both have established cooperation and coordination mechanisms even prior to adhering to instruments aimed at governing this specific matter.

Nowadays, United States of America and Canada are signatory parties do Protocols and incorporated the UNCITRAL Model Law provisions in their respective legal systems.

Also, United States of America, Canada and Mexico, as members of the North American Free Trade Agreement (NAFTA) have been engaged in regulating the (corporation) insolvency matters among the NAFTA signatory countries. This led to the draft of Principles of Cooperation among the NAFTA Countries, which contains provisions of general principles (e.g. cooperation and recognition issues) and procedural principles (e.g. automatic stay) and recommendations for legislation or international agreements.

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

2.5

Marks awarded 7.5 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 main difference between Civil and English systems in regard to insolvency law can be traced to the historical roots of each system. Thus, the idea of discharge might differ depending on the Law system adopted by the country in question.

*Insolvency regulations in Civil Law systems have its origins in the principles of Roman Law and the Twelve Tables (Table n. 3) that had provisions about debt execution. At this stage, Civil Law adopted a pro-creditor policy, since severe measures could be undertaken against debtors, among them: enforcement of the pledge of the debtor's own body, imprisonment, death sentence and enslavement. Later, customs and usages of the merchants (*Lex Mercatoria*) further developed the regulations on insolvency. Nonetheless, it was only from 13th century onward that European countries started to develop laws on bankruptcy and that the debt liability was transferred from the debtor's body to the debtor's assets.*

On its turn, insolvency regulations in English Law started to develop especially after the 16th century through Statutes and Acts. Alike the Civil Law, in its origins English Law also adopted a pro-creditor policy. Among the measures that could be undertaken against debtors provided in the English Bankrupt Act of 1542, one can mention: proceed against fleeing debtors, barricade debtors in their houses, promote the compulsory administration and distributions of the debtor's assets through the so-called commissioners. In 1570, an Act was rendered by Queen Elizabeth I, that among other provisions, created the "Lord Chancellor", who was responsible for the supervision of the debtor's assets. The idea of discharge appeared only in 1705 in the Statute of Ann. In 1883, the figure of the Official Receiver was introduced in the insolvency legislation - this was the person who would be responsible for the debtor's

assets before the bankruptcy proceeding or before an agreement was undertaken between debtors and creditors. It was around this time that the idea of a supervised and fair proceeding also became part of the principles governing the bankruptcy under English Law.

Besides the differences due to the historical roots of the Civil and English Law systems, the approach towards the discharge of debtors depends on various other elements alike the adoption of a policy pro-debtor/pro-creditor, cultural and political issues, the material and procedural laws that apply to insolvency, among others.

*You need to discuss the historical roots of voidable transactions in civil and common law systems: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law.*

The rules concerning the discharge of debtors are important in an insolvency context because (i) the going concern value of the Debtor itself (if talking about a company) and/or the debtor's assets tend to be better priced rather than when an individual sale is performed; and (ii) the maintenance of the Debtor's activities is beneficial for the economy and the company's stakeholders since the jobs will be preserved as well as the production chain. You needed to consider the importance of voidable transactions.

In regard to item (ii) above, one of the principles of insolvency in Brazil is the restructuring of the indebtedness and the maintenance of the business, ensuring the interest of the workers and creditors, to promote and develop the economy (Brazilian Bankruptcy Act art 47).

Unfortunately, you seem to have misread the question. Voidable transactions were the relevant issue, not discharge.

0.5

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.

According to the excerpt above, international insolvency law has the following limitations: (i) cannot be fully enforced; and (ii) cannot be executed immediately

without consideration to the international aspect of the case. What are the limitations of the definition? Take care to read the question posed.

In regard to the allegations that international insolvency law cannot be fully enforced nor executed without consideration to the international aspect of the case, it is worth to highlight that despite the fact that there is not a unified court that may enforce international insolvency law, there are several instruments of international law that are considered as “hard law” and bind the signatory parties (e.g. treaties and conventions). In this case, such instruments may also provide sanctions to which the signing countries may be subject in case they do not act accordingly.

Despite that, due to the fact that there is not a single set of laws that apply to all countries, debtors and creditors may face several difficulties when dealing with cross-border insolvency. According to Westbrook, there are nine key issues in cross-border insolvency: (i) standing for (recognition of) the foreign representative; (ii) moratorium on creditor actions; (iii) creditor participation; (iv) executory contracts; (v) co-ordinated claims procedures; (vi) priorities and preferences; (vii) avoidance provision powers; (viii) discharges; and (ix) conflict of law.¹

2.5

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 are considered multilateral instruments of Public International Law. Hence, such instruments govern the relations between different States, that may adapt or modify domestic regulations in order to adjust to the provisions of the treaties and conventions to which the State is a signatory party.

Since the content of treaties and conventions bind the signatory States and that these States alter the domestic laws accordingly, they are considered as being “hard law”, which means they are not model laws that might or might not be followed, but rather instruments with mandatory provisions.

Treaties and conventions can be considered a successful way to establish rules on cross-border insolvency law. As an example of such success, one can mention the Montevideo Treaties and the Havana Convention on Private International Law (Bustamante Code) signed by several South American countries.

Despite the success of treaties and conventions in regard to establishing regulations on cross-border insolvency, some States might prefer to adhere to more flexible instruments, as UNCITRAL, that, as a soft law, may be adapted to the factual situation

¹ JL Westbrook, “Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court” (2018) 96 Texas Law Review, p. 1473.

of the country. Further, it is worth to highlight that only the signatory parties to the treaties or convention are bind by the provisions therein.

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

3

Marks awarded 6 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 subject to court supervisions and usually encompass liquidation and reorganization/rescue proceedings that are governed and commenced under an insolvency law. On its turn, "informal" insolvency proceedings can be understood as voluntary negotiations between creditors and debtors that might or might not be governed by insolvency law.

The insolvency proceedings considered to be "formal" usually provide for means to protect the debtor's assets, persuade creditors to negotiate and bind dissident creditors to the terms of the negotiations undertaken (e.g. stay of enforcement proceedings, fresh start provisions, among others). In case, FPPL has business in more than one State, as a rule only the "formal" proceedings could be understood as insolvency proceedings for the purposes of international cooperation and coordination between jurisdictions. Despite that, the "formal" proceeding usually is time-consuming and the filing of a "formal" insolvency proceeding also carries a stigma that might not be beneficial for the business activities (e.g. it becomes harder for debtors to obtain loans and finance their activities through banks and engage in new business).

On the other hand, since there are usually no provisions about “informal” insolvency proceedings, probably there will be no incentives for the negotiations to occur, including no support for cooperation and coordination with foreign jurisdictions. Notwithstanding, this might be a quicker proceeding for creditors and debtors to settle the liabilities and probably will not have any impacts on the image of FPPL in the market.

It would be beneficial to consider costs, publicity, moratorium and ability to bind dissenting creditors.

2.5

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 coordination 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 first issue arising from the scenario above is the fact that Asgard and Encanto might not be signatories to treaties or conventions nor have adhered to instruments of soft law on cross-border insolvency. Thus, it is not clear whether the jurisdictions even have provisions on the matter, what can cause difficulties in obtaining the recognition of the foreign representative and proceeding and also the cooperation and coordination deemed necessary when there are two or more concurrent insolvency proceedings due to the differences in the Law systems, procedural and material law, policies adopted (pro-debtor/pro-creditor), priorities and preferences held by creditors, stay of creditors actions against the debtors’ assets, etc.

In case Asgard and Encanto are signatory parties to a treaty, convention or other binding international instrument, countries should observe the domestic principles and legislation that were included in the respective legal systems due to such treaties and/or conventions.

In case, there are no domestic law on cross-border insolvency, both jurisdictions should look to the guidelines available, among them European Guidelines on Communication and Cooperation (2007), ALI Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to Court Communication in Cross Border Cases, (2012), EU JudgeCO Principels and EU Cross-Border Insolvency JudgeCO Guidelines (2015); and Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

There is some scope to elaborate.

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.

UK ceased to be a member of the European Union on January 21, 2021 at 11 pm and the European Insolvency Regulation Recast (EIR Recast) does not apply to the insolvency proceedings filed after December 31, 2020. Thus, the EIR Recast would not apply to the proceeding filed by a minor creditor of FPPL in UK.

In this scenario, in case the UK country and the European country are signatory parties to a treaty, convention or other binding international instrument, countries should observe the domestic principles and legislation that were included in the respective legal systems due to such treaties and/or conventions.

Nonetheless, if the country in the UK referred by the question above is either England or Wales, the provisions of UNCITRAL and principles of the common law may be applied to the case to solve any questions arising from cross-border matters.

There is scope to elaborate.

4.5

Marks awarded 12 out of 15

* End of Assessment *

TOTAL MARKS 35.5/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.