



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.

Many of the African countries' insolvency systems are still based on the systems of their old colonial masters. There is therefore a wide mix of systems to be found across the African continent: countries colonised by England (e.g., Kenya, Tanzania) tend to have more English-law based systems, whilst countries colonised by Portugal (e.g., Mozambique, Angola) tend to have more civil-law based systems based on the Portuguese law. Countries colonised by France (especially in West Africa e.g., Guinea, Ivory Coast) also have civil law based systems, albeit rooted in the French system.

Some countries have modernised and developed their own insolvency systems over time. In addition, countries such as Namibia and South Africa (which had multiple colonial powers over the years) have mixed systems based in both English and civil/Roman-Dutch law.

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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.

A large-scale financial crisis in the late 1990s (particularly in 1998) led to a wide reform of Thailand's domestic insolvency system.

Another example of a reform initiative in East Asia is the recent adoption by Singapore of an "omnibus" act governing various aspects of personal and corporate insolvency law as well as restructuring law, known as the Insolvency, Restructuring and Dissolution Act. This Act was passed in October 2018 and came into force in July 2020.

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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.

[Note: I have assumed that this question should read "issues between the United States and Canada" on the basis that Canada is part of North America]

Canada and the US have a history of co-operation on the basis of comity. In the 1970s, the two jurisdictions attempted to agree a bilateral treaty governing insolvency issues, but this was unsuccessful.

Since that time, the American Law Institute (ALI) has engaged in projects across the NAFTA states (US, Canada, Mexico). A key output in this area is the Principles of Co-operation (focussing on insolvency of corporations and other legal persons, rather than natural persons), which were agreed and approved in 2000 following the ALI Transnational Insolvency Project. This project involved expert groups in each country agreeing an International Statement of that country's domestic law (as it pertains to international insolvency issues), which then formed the basis of the Principles of Co-operation.

These Principles of Co-operation recommend that each of the three NAFTA states adopt the UNCITRAL Model Law. This has since been done in 2000 (by Mexico) and 2005 (by the US and Canada). Thus, this recommendation in the Principles of Co-operations has been successful.

Subsequently, the ALI appointed experts to consider the potential application of the Principles of Co-operation worldwide. This gave rise to the 2012 report titled

“Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases.”

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 9 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

Voidable dispositions arise in situations where a pre-insolvency transaction is, on certain policy grounds, set aside and the proceeds of that transaction are paid back into the insolvent estate for distribution to the creditors in accordance with the relevant statutory or other waterfall. There is scope to elaborate regarding context / framework

*The existence of voidable dispositions arises in the English law by virtue of the 1570 Act of Elizabeth. However, in the civil law systems, the basis for voiding certain dispositions is the *actio Pauliana* (originating in the Roman law).*

The rules regarding voidable dispositions are an integral part of the framework of consequences or effects of the insolvency proceeding. These fit into an analysis of a particular regime insofar as they help to identify the similarities and differences in the various systems, whether based on civil law or English law (or some other system such as a hybrid or mixed system).

Laws relating to voidable dispositions are important in the context of insolvency as they have critical policy underpinnings, including reclaiming for the insolvent estate assets which have been improperly dealt with or paid away by the debtor (whether in a fraudulent scheme, or by way of an undue preference being afforded to one creditor, to the detriment of other creditors). The ability to investigate and in certain circumstances avoid particular transactions is one of the key remedies available to

insolvency office-holders to ensure that the assets of the insolvent debtor are dealt with fairly and in keeping with the relevant domestic principles for their distribution.

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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’s definition of international insolvency law above is limited insofar as it is dependent on and refers to the existence of national insolvency laws.

*Fletcher’s definition (which is pointed to by Wessels as an indicator of the limitation) highlights this when it states that international insolvency occurs where *inter alia* “... a single set of domestic insolvency law provisions cannot be immediately and exclusively applied ...”.*

The limitation is seen in practice in a globalised world, in which it is easier than ever to trade across borders and traditional markers of a “local market” (such as exchange control regulations, or the jurisdiction of a particular court) are largely absent or at least greatly reduced. As such, insolvencies (particularly large-scale and complex corporate insolvencies) tend more and more towards being international in nature rather than being purely domestic.

On this basis, it is essential to have a system in which the relevant rules can be determined and applied. Failure to have this system in place means that a situation could result in which there are multiple parallel insolvency proceedings, all purporting to deal with the same assets. This would mean that creditors are placed in an artificial hierarchy, in terms of which those creditors who happen to be in the jurisdiction to first deal with the estate are benefitted, to the prejudice of the creditors in all the other states. It can also result in a mirrored situation where a creditor, or a debtor company “forum shops”, that is, selects the most desirable country in which to proceed with its bankruptcy proceedings.

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Question 3.3 [maximum 5 marks]

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

Treaties and conventions are forms of 'soft law', in which multiple states (often grouped by geographic proximity such as the European Union or NAFTA, but also potentially across the world or grouped by relevant subject area) agree certain principles in supra-national law in relation to particular issues. Treaties are of particular relevance in areas where international co-operation is common, such as in international insolvency.

Broadly, treaties and conventions can have different aims such as harmonising the domestic law of the various states which are party to the treaty, providing for uniformity in domestic law regarding recognition and choice of law, or creating mechanisms to enhance cross-border enforcement mechanisms.

Treaties and conventions are effective where they create obligations to amend domestic law (or are incorporated by states into their domestic law willingly), as this creates a consistent approach dealing with the relevant aspect across the jurisdictions which have altered their domestic law in this way. However, treaties and conventions also have limitations insofar as they are not automatically binding in nature (i.e., positive steps to amend the domestic law in accordance with the relevant treaty is required) so they are often slow to be adopted, or not adopted at all by some countries.

This question required you to also consider a number of examples of treaties / conventions and to consider their success or otherwise.

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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?

Formal insolvency proceedings are proceedings which occur under the insolvency laws of the relevant country. They are regulated by the laws of the particular country and are typically comprised of liquidation and restructuring/reorganisation.

On the other hand, informal insolvency arrangements or steps typically take the form of commercial negotiations between a debtor and some or all of its creditors, in which the debtor seeks to avoid formal mechanisms by reaching a negotiated agreement as regards repayment of the debts owing (e.g., a compromise, issuing of further security, renegotiations of the terms of a loan, etc.). Informal insolvency mechanisms are sometimes not regulated, but the existence of the formal mechanisms serves as a deterrent to the debtor, such that if the debtor does not successfully negotiate a compromise it will (usually) be subject to the formal insolvency proceedings in the particular state. Informal insolvency can also constitute administrative steps (i.e., the insolvency proceeding is done outside of the Court in Asgard).

Advantages of an informal process for Lobo would be that it is potentially swifter to achieve resolution and repayment of the necessary debt (especially since most of the factors leading to FPPL’s insolvency in Asgard such as staffing difficulties are temporary in nature). In addition, an informal process would allow Lobo to leverage off the fact that FPPL is a viable business in Encanto. Depending on the nature of the formal proceeding, such proceeding may well halt or significantly impact FPPL’s business. In circumstances where parts of FPPL’s business are profitable, it makes logical sense to preserve those elements of the business which may not be possible in a formal insolvency proceeding (again, this would depend on the nature of the formal proceeding concerned). Elaboration is warranted eg. Re costs and publicity issues.

Disadvantages of an informal proceeding include that there is little by way of enforcement outside of the standard remedies, if a refinancing or other arrangement is negotiated but not adhered to. Depending on the nature of the arrangement, it may be possible for Lobo to preserve its right as creditor to pursue a formal proceeding, but that will in essence mean that the time and cost of the informal process has been wasted. Another major disadvantage (albeit it may be of less concern here given that FPPL is solvent in Encanto) is that Lobo risks having another creditor commence the proceedings in Encanto, which could increase Lobo’s time and expense in proving a claim (since it would require to brief counsel etc. in Encanto rather than in its home state of Asgard). Lobo may also have different rights and remedies available as a matter of Encantan law compared to as a matter of Asgardian law. Elaboration is

warranted eg. Regarding ability to bind dissenting creditors and application of moratorium.

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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.

In the absence of formal treaty between Asgard and Encanto (whether bilateral or multilateral), it is possible that the IRs in each jurisdiction would be working “against” one another in the sense that each may be taking steps detrimental to the other’s work. In addition, it is possible that each IR would “claim” the same assets, leading to direct conflict between the two proceedings.

Even if no direct areas of conflict arise as highlighted above, in the absence of a co-operative and collaborative approach, the IR is likely to experience difficulty in accurately determining the extent and location of the assets in FPPL’s estate, the totality of creditors and other essential information.

Various international instruments have been developed to ameliorate the risk of these problems arising. These include (assuming that Asgard and Encanto are member states) treaties such as the EIR (recast), the ALI Nafta Guidelines and so on. Elaboration is warranted. Such international insolvency instruments are essential to ensuring that insolvency is administered in a fair and efficient manner, without undue benefit (or detriment) to certain creditors. The existence of various international instruments allows the legal framework of insolvency to “catch up” with the commercial reality that business is seldom conducted within a single jurisdiction in a modern globalised world.

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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 EIR (Recast) will not apply to the UK-commenced insolvency proceeding on the basis that it commenced in the UK post-Brexit (i.e., after 11pm on 31 December 2020).

The consequences of the non-application of the EIR (Recast) means that recognition and enforcement of the European proceeding will be determined in England by reference to s426 of the Companies Act.

It may be that the subsequently commenced European proceedings remain governed by the EIR (Recast). In that context, it will be necessary to determine which state is FPPL's COMI (centre of main interest) in order to determine the main proceeding. To determine the COMI of FPPL, we would need to know where it conducts the administration of its interests on a regular basis, so that we can determine whether the test met in EIR (Recast) Art 3(1) is met with regard to the particular jurisdictions concerned.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 9.5 out of 15

*** End of Assessment ***

MARKS AWARDED 39 out of 50

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