



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.

There are many countries in Africa such as Angola, Mozambique, and the Francophone countries that still follow the civil laws. However, there are some countries such as Nigeria, Kenya, Botswana, and Zambia, that follow the English Law. There are also some countries in Africa that have mixed legal systems as they have been influenced by both the civil and English Law.

To achieve a higher mark further detail and elaboration was needed.

1.5

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 first important event which resulted in reforms in insolvency laws in Eastern Asia was the 1998 financial crisis. This resulted in Thailand reforming some of its insolvency laws as well as reviewing and changing some of its bankruptcy laws.

The second development that gave rise to insolvency law reform in Eastern Asia was the increasing importance of Singapore in the region. As a result, in order to have a unified act, Singapore passed the Insolvency, Restructuring, and Dissolution Act in October 2018.

Take care to read the question more carefully and to phrase your response carefully in line with the question.

2.5

Question 2.3 [maximum 4 marks]

Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.

One of the earlier initiatives that had been taken by Canada and North America, would be in the 1970s, when they were trying to have a bilateral insolvency treaty between them. However, this was not successful as they were unable to agree on the treaty and it did not pass.

Although the treaty in the 1970s was not successful, both Canada and North America have been able to better respond to international insolvency issues between them by adopting the Model Law.

Lastly, one of the main initiatives that has been taken to assist with international insolvency law issues would be the NAFTA Principles by the ALI Transnational. These principals work to improve the co-operation and co-ordination between the NAFTA countries. However, they are focused on the insolvency of corporations and other legal entities working in commercial operations rather, and do not include insolvency of individuals, non-profit organizations, and 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

2

Marks awarded 6 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.

Both civil law and English law have laws regarding voidable dispositions, however, there are parts of the laws that do differ. The civil law systems use the action Pauliana as the basis of their law for voidable disposition, and the English law systems use the Act of Elizabeth of 1570 as its basis. Both acts aim to return the loss of goods, due to fraudulent activities, back to the creditors. However, one main difference is that the civil law does not take into account good faith, and therefore third parties are not protected from loss as a result of the Act. This would therefore result in all of assets or property under the fraud would be recovered even if it affects the third party. However, in English law, good faith is taken into account, and it is possible that not all of the amount if recovered as the third party may not have intentionally taken the property knowing that it was fraudulent activity. As a result, the civil law seems to be more strict in this matter, which is in line with its historical roots as well. As in the past, civil law has been known to be strict to debtors and more pro-creditor. This can be seen where debtors would pledge their bodies to the creditors, and would be executed or become a slave as a repayment of their debt. As can be seen from the Acts, English Law is more pro-debtor, which is also in line with its historical roots, as English law started the move from execution of the debtor, to the distribution of their assets instead.

I'd love to see you discuss the importance of the rules in more detail.

4

Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

This definition of international insolvency is limited because it is based on a national legal framework of insolvency law which would be regarded when a case has an

international aspect to it. However, there has to be a national legal framework for insolvency law for this to apply, but currently there isn't one. This can therefore make the definition misleading, and as such is a limitation of the definition.

The definition is also vague when it comes to how consideration should be given to international aspects of a case. As such, this can cause confusion as to how much consideration is enough and how to apply that for different cases.

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

4

Question 3.3 [maximum 5 marks]

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

The two main initiatives used as a source for cross-border insolvency law are The World Bank's Principles for Effective insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency.

The World Bank's Principles have been used by the International Monetary Fund and the World Bank when developing countries require bankruptcy reform, and would be referred to the Principles. This can be seen in the Middle East, where the countries in the Middle East worked closely with the World Bank, and their first step in reforming their insolvency laws, the comparative survey, was based on the World Bank's Principles.

The UNICTRAL Legislative Guide includes a wide range of aspects in insolvency law, and has therefore been referred to by many legal systems when creating new insolvency laws or reforming their insolvency laws. The Legislative Guide is often used along side the Principles as they form the best practice for insolvency laws.

This sub-question required you to consider the nature of treaties and conventions, to discuss various examples and to discuss the success or otherwise based upon those examples.

1.5

Marks awarded 9.5 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?

A formal insolvency proceeding would usually include the involvement of a court and would also place a stay on the debtor's activities. This is different from an informal insolvency arrangement as both parties can reach an agreement without the court getting involved.

The key advantage for Lobo for having an informal agreement with Flor would be that the cost of be significantly lower to have an informal agreement than a formal one, as the court would not need to be involved. Privacy is also relevant

However, if an informal approach is taken, it doesn't prevent other creditors of Flor who have also been affected from taking legal proceedings against Flor. This can be a disadvantage to Lobo as Lobo may have compromised if Flor in the informal proceeding, but the other creditor who has taken a formal proceeding may get their full return. It will also result in a stay in Flor's activities and which can result in a stay in the agreement which Flor and Lobo agreed on.

If Lobo takes a formal debt recovery option, the courts decision will be binding on both Flor and Lobo and would therefore be a more secure option.

It is also relevant to consider moratorium and binding dissenting creditors. Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

3

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

The insolvency representative would have to first identify what Encanto's insolvency laws pertaining to international insolvency are, and whether they do take into account an international aspect; concurrent insolvency proceedings. Another difficulty that could be faced would be determining which state, Encanto or Asgard, has more right over Flor's assets. This can be an issue since, if Flor has to repay Lobo and does not have the assets in Asgard, it may need to use some from Encanto, and so determining whether Encanto would be willing to agree to this, or if Asgard has more right to them can help in this issue.

The main international insolvency instrument which emphasizes on co-operation and co-ordination of two states would be the UNCITRAL Model Law. The UNCITRAL Model Law is an important insolvency instrument which has been adopted by many states and has been referred to when they are reforming or creating their insolvency laws. It is important that instruments such as the Model Law are created as it helps to create a more unified approach to international insolvency matters around the world.

It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

3

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.

Due to the UK's departure from the EU, the EIR Recast no longer applies to UK law. This means that the UK commenced insolvency proceedings will be dealt with using the domestic English laws instead. This would first require FPPL to register the fact that it has a presence in Europe and it also would nominate resident person/s to accept service of process and other formal notices for FPPL. Therefore, one piece of information which would be required would be evidence that FPPL has done this in order for the English domestic laws to apply to the insolvency proceedings of it.

FPPL would then also need to meet the three core requirements. The first one is that there must be a sufficient connection with England and Wales, and may have assets within the jurisdiction. As Lobo is one of FPPL's main creditors, and FPPL is incorporated throughout Europe, it may meet this requirement. However it

would need to be identified whether FPPL is incorporated in England or Wales, and whether Lobo is connected to these as well.

Secondly, there would have to be a benefit for those applying for the winding up order. Another piece of information which would have to be identified would be whether Lobo is applying for a winding up order for FPPL. If this is the case, it would also have to be determined if FPPL's winding up would have benefits for Lobo.

Lastly, one or more of the persons interested in the distribution of the assets would have to be persons whom the English court can exercise jurisdiction on. As Lobo is a company incorporated in a country in Europe it would fall into this category. If these requirements are met, then the English domestic law would apply to the insolvency proceedings of FPPL in Europe instead of foreign law.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 9.5 out of 15

* End of Assessment *

TOTAL MARKS 35/50

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