



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.

Though African countries have developed their own legal systems, body of rules and regulations are still imbued with their former colonial powers influence. For example, African States that were former British colonies which countries are these? are Common-law tradition countries and French-speaking African countries which countries are these? have civil-law system, mainly inspired from the French system. There are also remains of Portuguese law or Dutch law in the former colonies of these two countries which countries are these?. Of course, the same applies to insolvency law. However, some African countries (English law and Civil law tradition) are reunited in OHADA - OHBLA which is an organization that aims to harmonize domestic laws of its member in business law. In 2015, all the members of OHBLA adopted the UNCITRAL Model Law.

There is scope to elaborate.

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 financial crisis of the late 1990's that touched South East Asian countries, mainly Thailand, Indonesia, Malaysia and Taiwan, caused many reforms in insolvency law in these countries.

For example, Thailand totally changed its insolvency law system after the crisis.

Since then, Singapore also became one the leading role-player in the matter in the region. In 2018, Singapore recently implemented a new Act to unify individual and corporate regulations into one Act.

Also, under the influence of the UN and UNCITRAL, many Eastern Asia States adopted the UNCITRAL Model law on cross-border insolvency.

More recently, two associations published a report named "Corporate Restructuring and Insolvency in Asia" which lists the different existing insolvency frameworks across Asian countries.

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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.

The USA, Canada and Mexico are part of a free trade agreement which was first the NAFTA and since 1st July 2020 a new agreement named the CUSMA is in force. The existence of such agreement shows the deep commercial relationships between these 3 countries and hence the need to have a regulation that deals with international insolvency cases.

In the 1970's, there was an attempt of bilateral treaty between the United States of America (USA) and Canada on the resolution of international insolvency cases. However, this initiative never succeeded.

Then in the early 2000, the USA, Canada and Mexico all adopted the UNCITRAL Model Law on Cross-Border Insolvency which was a first step to resolve international insolvency.

In the absence of a regulation specially about these issues, professionals signed case by case protocols which turned out to be practical solutions and successful solutions. One of the most famous examples is the Nortel case.

Finally, the American Law Institute (ALI) created a working group "The ALI Transnational Insolvency Project" that led to the adoption of "Principles of cooperation among the NAFTA Countries" also known as the NAFTA Principles of 2000. These principles promote cooperation and coordination in cross-border cases under 27 procedural principles.

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 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.

Did not have time to answer, I am sorry.

Policy considerations, pro-debtor or pro-creditor approaches.

Unfortunately, you did not seem to have time for this sub-question

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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.

Did not have time to answer, I am sorry.

Unfortunately, you did not seem to have time for this sub-question

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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 or conventions are public international law tools used by sovereign States to rule cross border situations. As such, if we look at the pyramid of norms of Kelsen, conventions and treaties are above national laws. Consequently, they will be more efficient and known abroad.

One of the most successful tool is the European Union Regulation on Insolvency of 2015 which allocates jurisdiction and applicable law for all European cross-border cases.

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

2.5

Marks awarded 2.5 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 often public proceedings commenced with a decision of a court. An insolvency practitioner is usually appointed. Informal insolvency arrangements are mainly contractual negotiations about repayment of debts that doesn't necessarily involve the tribunal intervention, or just at the end of negotiations to seal the deal.

For Lobo, on the one hand, an out-of-court workout will be a quicker and easier solution, there is no need of much formalities other than a written contract. The

informal arrangement is purely a private agreement between two corporations. So any solution is possible as long it is legal. Also, because it is not a formal insolvency proceeding, the assets of the debtor are not pooled, and creditors are not collectively treated.

One the other hand, an informal insolvency agreement can not prevent other creditors who are not paid to take actions before court to ask for commencement of a proceeding, which could annihilate the effect of the amicable agreement.

It would be beneficial to also consider matters such as privacy, the absence of moratorium and the inability to bind dissenting creditors in an informal workout. 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.

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 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 facts described there are two insolvency proceedings opened at the same time for the same debtor. The question is about the co-existence of two collective proceedings for one single estate.

If the Encanto law on insolvency is based on universalism theory, then it means that under Encanto's law it's only possible to have one single proceeding for every assets of the debtor, no matter their location. In this case, the insolvency representative appointed in Asgard will have a lot of difficulties, if not impossible, to obtain the recognition of the Asgardian decision.

However, if the Encanto insolvency law applies territorialism theory, then it means that there can be multiple insolvency concurrent proceedings at the same time and no cooperation between proceedings because they would both be territorially limited.

International insolvency instruments on cross border insolvency are crucial to solve issues about concurrent proceedings. To enhance the efficiency of insolvency proceedings, the recognition of decision, effects of these decisions and limitation of powers must be well determined. Moreover, efficiency of cross-border restructuring cases lies on coordination and cooperation between insolvency representatives.

In the European Union (EU), the European Insolvency Regulation Recast of 2015 specifically deals with this issue of concurrent proceedings in different states of the EU. This regulation applies the "modified universalism" theory under which there can be many insolvency proceedings at the same time, but always a main proceeding

opened in the State of the center of main interest (COMI) and possibility of secondary proceedings where there is an establishment for instance (Article 3 of the EIR).

This question required you to 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. This required discussion of different laws, and territorial approaches, together with consideration of international insolvency instruments developed to assist liquidators appointed in concurrent insolvency proceedings. Reference to additional international insolvency instruments is also warranted.

2.5

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.

The proceeding was opened after 31st January 2020. So, it was after the departure of the UK from the EU. This means that the European Insolvency Regulation Recast (EIR) doesn't apply to the UK commenced proceeding. Consequently, there won't be automatic recognition of the UK commenced proceeding in other Member States of the EU, as in any other European country outside the EU.

The insolvency professional appointed in the UK will have to ask for recognition in each State where it will be necessary and the professional will have to follow private international rules on recognition and enforcement of each states.

For Lobo, in order to know if a proceeding can be opened in another European States, Member States or not, the creditor must look at private international rules if the state where it's seeking the opening. Would the court of this country have jurisdiction to open an insolvency proceeding and would it be recognized by the UK proceeding. In some cases, it could be less efficient to take actions to open another insolvency proceeding. It's even more true if the creditor seeks to open a proceeding in a country where the debtor has no asset.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 8.5 out of 15

* End of Assessment *

TOTAL MARKS 28.5/50

A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.