



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.

*African countries largely retain the laws imported from former colonial powers. For example, a large number of countries **which countries?** in the Eastern part of Africa have English law roots whereas number of countries in West Africa **which countries?** use a civil law based system, particularly French law. Other countries use a combination of Civil and English law due to the historical influence of different colonial powers (such as South Africa which incorporates both Roman-Dutch civil law and English law).*

2

Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

The 1998 financial crisis in East Asia gave rise to insolvency law reform in the region, particularly so in Indonesia and Thailand. Thailand overhauled its bankruptcy laws as a result of this crisis. Singapore is a more recent example of a country implementing insolvency law reform in East Asia. In October 2018, Singapore passed new legislation consolidating corporate and personal insolvency and restructuring laws into a unified Act. The Restructuring and Dissolution Act came into force on 30 July 2020.

3

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.

Critically, Canada and the United States have adopted the Model Law which has assisted with the resolution of their cross border insolvency matters between Canada and North America. They have also adopted a number of protocols or Cross-border Agreements. One example of an initiative undertaken to assist with the resolution of international insolvency matters between North America and Canada is the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) that was developed by the American Law Institute Transnational Insolvency Project.

Another example of an initiative employed to assist in the resolution of international insolvency issues is the Judicial Insolvency Network. Judges from the US and Canada (in addition to a number of other countries) participated in a conference in 2016 and contributed to drafting the Guidelines for Communication and Cooperation between Courts in Cross-Border insolvency Matters.

The successful adoption of a Protocol approved by relevant US and Canadian Courts in the Nortel Networks case which involved the distribution of USD \$7.3b in funds is demonstrative of the success of the various initiatives involving Canada and North America.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks.

3.5

Marks awarded 8.5 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 ability to void or reverse certain transactions is an essential component of any effective insolvency regime. Investigating and reversing certain transactions which took place prior to the commencement of insolvency has a range of purposes which include preventing unequal or preferential treatment of creditors, preventing fraud and preventing a sudden loss of value for the business entity prior to the commencement of supervision being imposed on the commencement of insolvency.

Different jurisdictions will have different approaches to dealing with voidable transactions, which in part may have arisen due to the historical context in which the laws of countries developed. Different cultures have different ways of responding to issues, driven by various policy considerations which follows through into the expression of their respective laws and how they are developed over time. The same holds true for insolvency law and more specifically, with respect to voidable transactions.

The action Pauliana forms the historical basis of fraudulent conveyance law in civil law systems and the Act of Elizabeth of 1507 is the basis for the remedy in English law. It is possible that an increase in the prevalence of fraudulent transactions, caused by economic strife occurring at different stages in each systems history resulted in the varied development of each systems differing responses.

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

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.

Fundamentally, there is no single set of insolvency laws that apply globally and states have different approaches, policies and substantive and procedural rules. There

are a range of differing means and mechanisms that states employ in order to attempt to resolve transnational insolvency issues, each of which forms part of the concept of “international insolvency law”. However, these mechanisms are invariably tied to national legal frameworks. Accordingly, Wessels, the relevant Dutch commentator, conceded that the above definition of international insolvency law has limitations as it is connected to the existence of a national legal framework of insolvency law.

As identified by Fletcher, international insolvency occurs in circumstances which transcend the confines of a single legal system, such that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case. Again, the same limitations are apparent, being the inherent connection with domestic insolvency law.

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.

States ratify or enter into treaties or conventions as a means of resolving insolvency issues that arise between them. By becoming a signatory to a treaty and binding the state, each party’s domestic laws may be affected accordingly. By varying the domestic laws, the impact of treaties is such that the agreed approach will become enforceable in the courts of the respective jurisdictions and so become “hard law” and ultimately form a source of international insolvency law.

There are many instances of treaties resulting in a successful way of establishing rules (although obtaining an actual agreement in the first instance may be challenging). By way of example, a series of general treaties were concluded on private international law, which included material on bankruptcy or insolvency, were achieved in Latin American states. Such treaties include the Montevideo Treaties (1889) and (1940), in addition to the Havana Convention on Private International Law. The long lasting nature of these multilateral agreements is testament to their success. However, treaties also have their limitations. In the case of the the Montevideo Treaty on International Commercial Terrestrial Law (1940), ratification by only three on the original treaty states means that careful analysis may be necessary when approaching application.

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

4

Marks awarded 13 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.

If you require additional information to answer these questions, briefly state what it is and why it is relevant.

Question 4.1 [Maximum 5 marks]

What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

The main differences between "formal" insolvency proceedings and "informal" insolvency arrangements are that "formal" proceedings are commenced and are governed under law and will generally include liquidation and reorganisation or rescue proceedings whereas informal insolvency proceedings are not always governed by law and proceed by way of voluntary discussions between creditors and debtors.

Key advantages that Lobo should consider when determining whether to engage in out of court arrangements are that an informal agreement may result in an agreement in a cost efficient manner due to avoiding the often protracted court process. Further, the FPPL will not suffer negative publicity which is invariably tied to insolvency proceedings. By opting for an informal arrangement, Lobo retain in a long standing successful business relationship which might not be possible if court proceedings are commenced against FPPL.

However, Lobo should also be conscious of the potential disadvantages of an informal arrangement. In particular, no moratorium will be imposed. As a result, other creditors may commence proceedings against FPPL. Further, there is no way for Lobo to bind creditors who do not agree with a particular informal arrangement.

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.

4.5

Question 4.2 [Maximum 5 marks]

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

One difficulty that may arise is the inconsistency of laws as between Asgard and Encanto. In essence, how one jurisdiction might deal with a particular issue may not be the same as how it is dealt with in the other jurisdiction leading to inconsistency of approaches. Further, it may be that there is no, or very limited, extraterritorial effect of the laws of Encanto upon Asgard (or vice versa). Accordingly, enforcement of any determinations made in either state, may be useless in the other due to lack of recognition resulting in each state competing for FPPLs assets.

The UNCITRAL Legislative Guide on Insolvency Law (2004) and the World Bank Principles for effective Insolvency and Creditor Debtor Regimes are both examples of international instruments designed to facilitate co-operation and co-ordination between states involved in cross-border insolvency matters and to remedy the difficulties that may arise. The development of these multilateral instruments has been of significant importance to resolving such issues. The universal adoption of a consistent approach between states is considered to be a potential solution to the efficient resolution of international insolvency matters.

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

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.

The European Insolvency Regulation (“EIR”) Recast ceased to apply in the UK following its exit from the European Union, more specifically, from 11pm on 31 December 2020. Accordingly, the EIR would not apply to the proceedings against FPPL as they were commenced after 31 December 2020.

The EIR allocates jurisdictional competence to the courts of member states where the centre of the debtor’s main interests are located. As the EIT would not apply to the UK proceeding, the existence of concurrent proceedings with no agreed multilateral instrument determining which jurisdiction is the primary state to commence or continue proceedings may cause inefficiencies and unfair treatment of creditors of FPPL in each state. Further, issues of obtaining recognition and relief by way of a stay on proceedings, execution against assets may arise. Finally, issues of which laws to apply in the matter should Lobo decide to commence proceedings against FPPL.

It would be beneficial to consider the MLCBI.

3.5

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 42.5/50
Excellent Paper