



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.

[We can find various insolvency law systems in African jurisdictions. On the one hand, Nigeria, Kenya, Botswana and Zambia and countries in the Eastern part of Africa as Tanzania have an English law tradition, in comparison with Angola and Mozambique which have a civil law tradition based on Portuguese Law. Likewise, the francophone countries of West Africa are founded in civil law. There is scope to elaborate on mixed laws.]

Having said that we see that the historical roots of the civil law date back to Roman law and the Table 3 of the Twelve Tables dealt with the execution of judgements, whilst the roots of English law dates back to the sixteenth century in relation to personal insolvency, whilst legislation dealing with corporate insolvency law began with the enactment of the Companies Act on 1862. Then, the insolvency act of 1986 which was adopted after the Cork Report unified the legislations and covered both personal and corporate bankruptcy.

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 reforms, especially on Indonesia and Thailand.

According to the World Bank:

“Insolvency reform became a prominent policy topic for many Asian economies during and following the Asian financial and economic crisis of the late 1990s. The crisis and other economic factors rendered many corporations insolvent. At this time, the absence of effective, predictable and orderly ways to deal with insolvency was for the first time heavily felt by governments, corporations and creditors. Corporate restructuring and reorganization was necessary on a large scale, but the procedures in place at that time were ineffective and lacking. The existing insolvency procedures also hindered an inflow of necessary investments because creditors, having witnessed the crisis and the lack of proper creditor protection in these jurisdictions, were unforthcoming with new capital.” (The World Bank. “Forum for Asian Insolvency Reform (FAIR). July 28th, 2016. Consulted on November 11, 2022 from: <https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair>)

It would also be beneficial to address the question in your own words.

Thailand overhauled its bankruptcy laws whilst Singapore passed a new Insolvency, Restructuring and Dissolution Act in October 2018 to unify corporate and personal insolvency and restructuring laws, which came into force on July 30th, 2020.]

Another example is also warranted.

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.

[In the 1970’s, Canada and the United States tried to sign a bilateral insolvency treaty, however they didn’t reach an agreement. Despite this, they reached a successful and more practical solution by adopting the Model Law and protocols. It is important to mention than even before that, they had bilateral co-operation and coordination in place based on existing legislation and case law.

Another initiative was submitted by the American Law Institute to assist with the resolution of international insolvency issued between North American Free Trade Agreement (NAFTA) countries of the United States, Canada and Mexico. Their Insolvency Project seek to improve cooperation in international

insolvencies across the NAFTA States and in light of this project Principles of Cooperation among the NAFTA countries were prepared and approved in 2000. These principles focus mainly on insolvency of corporations and other legal entities engaged in commercial operations and excluded personal insolvency. These principles, among other things, recommended that each NAFTA country adopt the Model Law on Cross-Border Insolvency.]

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 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.

[Type your answer here]

Take care to provide an answer to all sub-questions.

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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.

[The definition is perceived to have limitations because it is connected to the existence of a national legal framework of insolvency law and this is not always the case as in cross border insolvency there are situations or circumstances that transcend the national legal system, and in consequence the domestic provisions cannot be immediately and exclusively be applied without taking into consideration the issues raised by the foreign elements of the case.

This is why the stakeholders and representative bodies have been launching initiatives to establish a clear and uniform rules relating cross border insolvency issues to issues of fraud or detrimental forum shopping that could arise as a consequence of a poor regulation in relation to cross border insolvency proceedings.]

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

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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.

Considering that after being signed and ratified by member states, conventions and treaties become part of the state's domestic laws and as such are enforceable in the courts, it is a successful way of establishing rules on international insolvency law.

From the 13th and 14th centuries, bilateral international insolvency conventions addressing absconding debtors and later gathering in assets appeared. From the 19th century, some other forms of bilateral treaties or conventions appeared addressing jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions involving their state. As an example, the Nordic Convention of 1933 which hails from the Scandinavian region was a rare successful multilateral treaty.

The Council of Europe concluded a Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe Treaty series No. 136 on 1990. IT was signed by 8 member states but not ratified by enough states for it to enter into force, however, it had an important influence on the development of the European Union response to the problems of international insolvencies among its member states.

On the other hand, the European Insolvency Regulation (EIR) (2000), which has been reviewed and amended until reaching Regulation 2021/2260 of 15 December 2021, on Insolvency Proceedings (Recast) (EIR Recast), also influenced broader multilateral developments in international insolvency law.

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

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Marks awarded 8 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?

Whilst the formal insolvency proceedings are commenced and governed under the insolvency law and include both liquidation and reorganization proceedings, the informal processes are not always regulated by the insolvency law and will generally constitute of voluntary negotiations between the debtor and some or all of its creditors with the objective of provide for some form of restructuring of the insolvent debtor. For these same reasons, the voluntary negotiations may depend on the existence of an insolvency law for their effectiveness, considering that the latter can provide indirect incentives or persuasive force to achieve a reorganization.

These voluntary negotiations are called in some jurisdictions "out of court workout". The disadvantages of these workouts or informal proceedings are the following: a) that there is no moratorium in place preventing other creditors from approaching the courts and commencing an insolvency proceeding; b) this agreement doesn't bind any creditor nor part of the agreement. On the other hand, the advantages of this type of proceedings or workout agreements are that the costs are significantly lower and there is no publicity of the financial difficulties of the debtor.

In comparison, the formal proceeding present some advantages such as: a) statutory moratorium preventing any legal proceedings against the debtor; b) possibility of binding dissenting creditors to the workouts proposed by the officer or the debtor. As

there are advantages, there always disadvantages such as the fact of the publicity of the financial distress of the company that could impact the goodwill of the corporation and the high costs of the proceeding.

In order to assess if in this particular case it is beneficial or not for the debtor to seek an informal workout instead of commencing a formal proceeding, we would need to have more information such as:

- 1. Does the States involve have insolvency legislation in place? If so, is there cross border cooperation recognized in such legislation between the States? Does the legislation permit out of court workouts and are they regulated in terms of pre-package or similar provisions?*
- 2. Does the legislation permit the involuntary reorganization request? If so, what are the requirements and does the creditor meets such requirement, for example, in terms of minimum debt required?*
- 3. Does the debtor have any collateral that could be given as part of the informal workout? Are there other main creditors involved? Are there any legal proceedings in place against the debtor that may affects its assets?*
- 4. Does the regulation establish priority credits? How does the credit of Lobo fall in this category? Does it have priority? Is it a secured or unsecured credit?*
- 5. A review of the financial statements of the debtor would be detrimental to decide.*

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.

The insolvency representative may face multiple difficulties because each State will apply its own laws, including its choice of law rules and in absence of cross border insolvency cooperation and coordination rules, no or very limited extraterritorial effect would be granted to foreign proceedings. In that sense, if any of the state were to apply a strict territorial approach in such scenario it would case difficulties in the proceedings because it would be difficult to reconcile the multiple national approaches to insolvency, if one of the states is pro debtor and the other pro-creditor, for example. Also, difficulties may arise for example if there is a distinction in the treatment of priority credits such as labour rights between the States policies, or in relation to the recognition of public claims, it would mean a competition between the states for the debtors' assets. Especially because in these proceedings there is likely to be a conflict between aspects of the procedural law and areas of substantive law and

a general situation of conflict of laws and differences in domestic norms that have a particular impact on the position of creditors and the priorities they have in the insolvency proceeding, presence of qualifications, security, set off and netting arrangements, retention of title causes and other means made available to creditors in national laws to protect title.

For example, one of the states could refuse to recognize a foreign decision or a specific credit will could give rise to the impossibility of liquidating the assets of the debtor in the other state.

In that line of thought, Westbrook has identified nine key issues in cross border cases:

- 1. Standing for the foreign representative'*
- 2. Moratorium on creditor actions'*
- 3. Creditor participation;*
- 4. Executory contracts;*
- 5. Coordinated claims procedures;*
- 6. Priorities and preferences;*
- 7. Avoidance provision powers;*
- 8. Discharges and*
- 9. Conflict o flaw issues.*

This is why is very important to have international best practice standards in place such as the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (UNCITRAL legislative guide on Insolvency), which addresses the cooperation and coordination in the case of multiple concurrent insolvency proceedings, because they would bring clarity whenever such difficulties arise and this will guarantee the effectiveness of the insolvency proceedings in place.

Elaboration regarding relevant international instruments is needed.

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 EIR recast regulates the applicable law in proceedings subject to the regulation and it states that the law applicable to insolvency proceedings and their effects shall be that of the state of the opening of proceedings, that in this case if the EIR recast would apply would mean that the applicable law would be that of the UK, however,

the European Insolvency Regulation Recast ceased to apply on 31 December 2020, following the UK's exit from the European Union and since the new proceeding was initiated post that exit on June 30, 2022, the EIR would not apply in this case. What is the consequence of this in terms of automatic recognition?

This is particularly important because the English court has jurisdiction to wind up a foreign company incorporated under the laws of a country different than the United Kingdom registered or not registered in the UK; the latter in circumstances where the company is dissolved or has ceased to carry on business or is carrying on business only for the purposes of winding up its affairs, if the company is unable to pay its debts or if the court is of opinion that is just and equitable that the company should be would up. In that sense, English law applies to matters of procedure and substance in an English winding up under the insolvency act 1986 including a foreign company.

The MLCBI should be considered.

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Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS 35.5/50

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