



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.

Regulation of insolvency in Africa reflects the regulation of respective colonial states. Countries that were English colonies (Nigeria, Kenya, Botswana, Zambia, Tanzania) have a common law tradition. Countries which were civil-law countries colonies (for example, Angola and Mozambique) follow civil law tradition.¹

There is scope to discuss mixed law in certain countries.

2

Question 2.2 [maximum 3 marks]

¹ Foundation Certificate in International Insolvency Law, Module 1 Guidance Text. Introduction to International Insolvency Law, Section 4.1.2.3, page 10.

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.

Important events or developments: 1998 financial crisis in East Asia, development of Singapore as a leading economy in East Asia.

Examples of reforms: Singapore Insolvency, Restructuring and Dissolution Act of 2018, insolvency law reforms in Thailand.²

There is scope to elaborate

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.

Such initiatives include the activities of the American Law Institute which has developed ALI NAFTA Principles, work of Canada and the USA over a bilateral insolvency treaty (not successful).

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

1.5

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.

One of the reasons for different approaches towards cross-border insolvency is related to different historical development of this institution in common law and civil law countries. While the civil law tradition of insolvency stems from

² Foundation Certificate in International Insolvency Law, Module 1 Guidance Text. Introduction to International Insolvency Law, Section 4.1.2.3, pages 11-12.

the Roman law and Lex Mercatoria,³ in common-law countries bankruptcy law developed independently of the Roman law and the Lex Mercatoria and at first was based on an assumption that non-payment of debts is an offence or quasi-offence which is punished by imprisonment⁴ or compulsory sequestration.⁵

The differences in development of the regulation of international insolvency are reflected in English and continental law approaches to voidable dispositions.

Generally, voidable dispositions are fraudulent conveyances (dispositions of property at an unfairly inadequate value in return) or granting a preference to a creditor who would not normally have a preference. Voidable dispositions prevent equitable treatment of creditors. It is important to have a detailed regulation of voidable dispositions in order to prevent unfair creditors from satisfying their claims at the expense of the other creditors. The key differences between approaches to regulation of voidable dispositions lies in the criteria for determining such dispositions.

As regards historical roots of why voidable dispositions are regulated in different ways, regulation in civil law countries was based on the "Actio Pauliana", whilst in English law the Act of Elizabeth of 1571 was the basis of regulation of fraudulent conveyances. The "Actio Pauliana" applied in order to challenge transactions which appeared to be lawful at the first glance but which actually aimed at "securing" debtor's property from being included in the bankruptcy estate once bankruptcy would open. Such transactions were called transactions conducted "in fraudem creditorum". Legal remedy of a voidable disposition under the "Actio Pauliana" consisted in treating such transaction as tort (or offence). Should the proceeds from the bankruptcy estate be insufficient, such tort gave rise to a claim against debtor. In addition, the "Actio Pauliana" provided for returning of the property, transferred on the basis of a fraudulent disposition, to the bankruptcy estate.

It seems from the "Actio Pauliana" that an objective side of the transaction rather than parties' intentions served as the main criterion to seek remedy under this lawsuit.

To the opposite, common law focuses on the fraudulent intention while determining whether the disposition is fraudulent.

The Act of Elizabeth of 1571 was taken in response to increased number of fraudulent bankruptcies and aimed at classifying a debtor departing from his dwelling to defraud his creditors as bankrupt and provided for entrusting bankruptcy estate and payments to an independent commissioner.⁶ According to the Act of Elizabeth, fraudulent intention is a key criterion to determine a fraudulent disposition. So if someone acts with the intention to defraud a

³ Foundation Certificate in International Insolvency Law, Module 1 Guidance Text. Introduction to International Insolvency Law, Section 4.1.1, page 4.

⁴ See Statute of Marlbridge of 1267, in particular, Chapter 23, which is often referred to as the Waste Act 1267.

⁵ See English Bankruptcy Act of 1542.

⁶ The Early History of English Bankruptcy. University of Pennsylvania Law Review. Volume 67, January 1919, No. 1. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7675&context=penn_law_review

creditor, unless a transaction was made bona fide and for good consideration, it would be void.

5

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 related to the existence of a national framework of bankruptcy law only (the so-called “domestic dimension”⁷). At the same time, nowadays there are various types of international sources regulating international bankruptcy represented by both “hard” law (e.g. Nordic Convention of 1933), supranational regulations (e.g. the European Insolvency Regulation) and “soft” law (e.g. UNCITRAL Model Law on Cross-Border Insolvency).

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

3.5

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.

Conventions have been a source of international insolvency law since 13 century. Conventions were bilateral (e.g. in Europe) and multilateral (e.g. Nordic Convention of 1933). However, they are regarded as less efficient than other sources of cross-border insolvency, such as the European Insolvency Regulation which is now effective in most EU member States.⁸ Fletcher claims that only regional conventions⁹ (among the countries closely connected by a common market) might prove efficient.

⁷ Foundation Certificate in International Insolvency Law, Module 1 Guidance Text. Introduction to International Insolvency Law, Section 6.1.2, page 44.

⁸ Foundation Certificate in International Insolvency Law, Module 1 Guidance Text. Introduction to International Insolvency Law, Section 6.1.3.2, pages 46-47.

⁹ Foundation Certificate in International Insolvency Law, Module 1 Guidance Text. Introduction to International Insolvency Law, Section 6.4.1, page 59.

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

2.5

Marks awarded 11 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 is initiated under applicable bankruptcy law. It includes both rescue and liquidation procedures. Formal insolvency involves appointment of a bankruptcy manager and it is usually supervised by court. To the contrary, informal insolvency is an "out-of-court" work out of debts through voluntary negotiations between a debtor and a creditor.¹⁰

Key advantages of informal insolvency for Lobo:

1. In case the parties reach an agreement to restructure the FPPL's debt and FPPL complies with it, Lobo will receive regular payments under the new payment schedule. To the contrary, formal debt recovery options (under Lobo's separate claim or in terms of insolvency) is relied to a lengthy procedure which may take from several months to several years during which Lobo will not be repaid even in part.
2. The parties are flexible in the ways though which they may arrange FPPL's debts. In case FPPL has any valuable assets in Asgard or in Encanto, the parties are flexible in arranging the debt by transferring possession to such valuable assets in favour of Lobo as debt repayment.
3. **Costs and privacy should be considered.**

Key disadvantages on informal insolvency for Lobo:

1. In case FPPL does not have any valuable assets in Asgard and has other creditors, only formal procedure of debt collection would prove efficient since Lobo will be able to enforce court judgement in Encanto where FPPL seems to have assets.

¹⁰ Foundation Certificate in International Insolvency Law, Module 1 Guidance Text. Introduction to International Insolvency Law, Section 4.2.2, page 17.

2. Informal insolvency may prove inefficient because it implies a fiduciary element and FPPL may use voluntary negotiations to prolong the payment deadline without a real intent to pay.

Required additional information to answer this question:

1. Are there valuable assets in Asgard: in order to assess perspectives of flexible negotiations in terms of an informal bankruptcy as well as necessity to enforce court judgement in Asgard or in Encanto;
2. Does Lobo have any other creditors in Asgard: in order to assess perspectives of successful performance of the out-of-court restructuring of FPPL's debt. In case there are other creditors, an out-of-court restructuring may prove inefficient should other creditors not participate in approval of a restructuring plan.

It would be beneficial to also consider matters such as 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.

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.

Insolvency court of Encanto may refuse to recognize powers of the Asgardian insolvency representative and thus deny any further co-operation. Furthermore, Encanto bankruptcy court may refuse to enforce bankruptcy judgements and register Asgardian creditors' claims without their filing formal claims to Encanto court. Consequently, such claim may be considered as late and not registered, depriving Lobo of its rights to participate in Encanto bankruptcy and from receiving payment pari passu with other registered creditors. In addition, Encanto's court may treat Lobo's claim under Encanto applicable law and it will lead to a different qualification of Lobo's claim in a bankruptcy case than originally was in Asgardian insolvency.

The following international insolvency instruments have been developed to assist in respect of those difficulties:

- *Co-operation following a protocol (the Maxwell case);*
- *Harmonisation (cross-border insolvency issues will continue to arise if there are fundamental differences between the regulation of insolvency in different States);*
- *Soft law (e.g. UNCITRAL Model Law on Cross-Border Insolvency) and enactment of model laws by the states;*

- **Treaties and conventions.** Elaboration on international instruments is 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.

The European Insolvency Regulation Recast would not apply with respect to the UK commenced insolvency proceedings. The EIR Recast ceased to apply in the UK from 11 PM on 31 December 2020 due to the UK exit from the EU. Thus, the European insolvency court will not be able to apply EIR Recast to FPPL's bankruptcy in the UK.

In case Lobo decides to open proceedings in another European country, Section 426 of the Insolvency Act of 1986 will apply should Lobo seek assistance of the English court with respect to the secondary insolvency proceedings. It is important to notice that the Insolvency Act of 1986 explicitly extends to the insolvency proceedings for the "relevant" countries only, whilst recognition of insolvency proceedings in the other countries would be governed by common law principles.

*Should the bankruptcy proceedings in another country be recognised as principal by the English court, the latter may entrust the realisation of assets in the UK bankruptcy case to the foreign principal liquidator for distribution (See, for example *McGrath v Riddell*).*

Requested further information: whether an insolvency in another European country can be considered as principal liquidation compared to the UK where bankruptcy was started just by a minor creditor.

It would also be beneficial to consider the MLCBI

3.5

Marks awarded 9.5 out of 15

* End of Assessment *

TOTAL MARKS 36.5/50

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