



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.

Countries in African jurisdictions have their historical roots of insolvency law born from former colonial powers, which are still largely followed today. Countries such as Nigeria, Kenya, Botswana and Zambia as well as some East African countries have an English law tradition, whilst Angola and Mozambique have a civil law tradition based on Portuguese law. In West Africa the roots stem from French law which follows a civil law system, while in South Africa and Namibia there are mixed legal systems as both the Roman-Dutch law (civil law) and English law influenced their respective legal systems.

3

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 some insolvency law reforms, the countries especially affected by the crisis included Thailand and Indonesia. Thailand ended up overhauling its bankruptcy laws. Singapore now is a major player in East Asia and in October 2018 passed a new Insolvency, Restructuring and Dissolution Act to consolidate Singapore's corporate and personal insolvency and restructuring laws into a unified Act.

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.

The American Law Institute (ALI) has taken steps to assist with the resolution of international insolvency issues between North American Free Trade Agreement (NAFTA) countries of the US, Canada and Mexico. The ALI Transnational Insolvency Project was an initiative to improve co-operation in international insolvencies across the NAFTA States. Each country formed its own advisory group of experts who prepared an International Statement on their country's insolvency law as applicable to international cases. Stemming from this, the Principles of Cooperation among the NAFTA Countries were prepared and approved by the ALI Council and Members in 2000. There are NAFTA Principles which focus on insolvency of corporations and other legal entities engaged in commercial operations, and it concludes with a recommendation that each NAFTA country adopt the Model Law on Cross Border Insolvency. In the 1970s Canada and North America were working towards a bilateral insolvency treaty but they never reached an agreement, however they made more practical progress through both the States' adoption of Model Law which and Protocols which I think has been successful.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

2.5

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.

Voidable dispositions can be classified as either fraudulent conveyances (disposition of property without receiving adequate value in return) or preferences. A fraudulent conveyance is a disposition of property by the insolvent, usually in the form of a donation or undervalue transaction, that causes or increases the debtor's insolvency.

The preferences are characterised by the settlement of a pre-existing debt to a creditor, or by allowing such a creditor real security for a pre-existing unsecured debt, thereby improving the creditor's position once insolvency begins. The action Pauliana forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for the remedy in English law. If we are to consider the distribution rules in respect of payments to creditors we will see that they differ from State to State, however most systems will draw a distinction between secured and unsecured creditors. Secured creditors are those creditors who hold a valid form of security for their claims, while unsecured creditors do not. Within the secured creditors group we have preferential creditors and some systems will even grant employees of the company 'super preference' that enjoy priority over other priority creditors.

In cross-border insolvency, this remains as one of the most difficult aspects to deal with; lets take for example those States that are based on English law; the notion of a floating charge is commonplace, while this form of security is generally not known in civil law States. Many instruments are based on the principle that pre-acquired rights in terms of the general law of a particular State, such as the law relating to security, must be acknowledged during bankruptcy or insolvency. UNCITRAL has also finalised a Model Law on Secured Transactions (2016), which is an attempt at harmonise the rules relating to security interests around the world.

Some systems have statutory provisions in places for dealing with cross border insolvency dispensations and some States have none, but the local courts can be approached on an ad hoc basis for an order that may allow for a foreign insolvency representative to deal with the assets providing a remedy in the absence of statutory rules covering such support.

To conclude, I think that the treatment of these rules have varied in jurisdictions as there are different routes a State could have taken depending on whether their system is based on English Law or Civil Law, and from there we need to consider that cross-border transactions and business dealings are a more modern concept in its execution, so the law is evolving as national borders themselves

become increasingly irrelevant. International insolvencies are now the norm and not the exception that they once were.

It would be beneficial to elaborate on the importance of the rules.

3.5

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.

Due to globalisation, trade and movement of assets across borders, creditors will be in dealings with the estates of their debtors in a number of States in an effort to reclaim their debts. Wessels, the Dutch commentator says that the applicable law cannot be executed immediately without giving consideration to the international aspect of a given case. However, Wessels admits there are limitations to this statement, bringing Fletcher’s definition to the fore:

International insolvency or cross-border insolvency should be considered as a situation in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so 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. Over 200 years ago even the Founding Fathers of the USA declared in their Constitution that insolvency law is a federal question and not state law; as a common market with a free flow of goods and services requires a standardised regulation of insolvency matters.

Recognition of insolvency proceedings in one state (whether federal or national in nature) where the debtor holds assets at the commencement of proceedings in another state of the common market, cannot depend solely on the goodwill of the first state. The EU (where a common marketplace exists) has also realised this.

In modern times the majority of significant corporate collapses involve more than one State and that international insolvencies are therefore the norm and not the exception.

It should also be noted that most legal systems are ill-equipped when it comes to dealing with insolvencies with implications across national borders.

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.

Classic public international instruments are treaties and conventions to which States become signatories and as such bind themselves and affect their domestic law accordingly. As part of domestic laws enforceable in the courts, these may then form part of a State's "hard law" on insolvency.

Bilateral international insolvency conventions first started to appear in Europe back in the 13th Century, addressing absconding debtors and later gathering in assets. From the 19th century more modern forms of bilateral treaties or conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions involving their State, appeared.

European efforts at achieving multilateral international insolvency conventions were unsuccessful for many years, however there was a rare successful multilateral treaty, the Nordic Convention (1933), hailing from the Scandinavian region, that gained some traction. Then in 1949, the Council of Europe was founded to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.

In essence, more success has been achieved by the European Union, albeit not by way of Convention, rather by way of the European Insolvency Regulation (EIR) (2000) which has also influenced broader multilateral developments in international insolvency law. It has been reviewed and slightly amended over the years, and then recast following UK's exit from the EU.

There has been variable success in achieving hard law solutions to international insolvency law issues and much more success gained through the use of soft law options. The most successful soft law approach so far has been undertaken by UNCITRAL. In the mid-1990s, it developed a Model Law on Cross-border Insolvency and this initiative did not take the form of a treaty or convention, but rather that of a Model Law, draft legislation that UNCITRAL had recommended member States to adopt, with or without modification.

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

4

Marks awarded 12.5 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 typically done by way of court order and in this regard must be noted that some systems have specialised bankruptcy courts, such as the US, while on other systems the general courts decide such matters. Its also possible that the bankruptcy proceeding may be opened by way of a more informal process, which involves administrative tasks/arrangements outside the ambit of the courts. With formal insolvency some systems limit their contractual capacity to obtain new credit by requiring the consent of their estate representative in order to do so. In addition, in some instances a bankrupt individual is not allowed to take up certain positions, such as being a member of parliament or to serve as a director of a company or to be appointed as the officeholder in an insolvent estate.

Should Lobo consider an informal out-of-court workout arrangement with FPPL over a formal debt recovery option there are some drawbacks to consider. Firstly there is no mechanism in place preventing other creditors from approaching the courts and commencing an insolvency proceeding and secondly there is no way of binding dissenting creditors to any agreement reached. The advantages for Lobo of an informal insolvency arrangement would be that the cost is significantly lower in that the courts are not involved and there is no publicity regarding the fact the debtor company is experiencing financial difficulties.

If Lobo were to take the formal debt recovery route there is the benefit of a statutory moratorium preventing any legal proceedings being taken against the corporation and it may be possible to bind dissenting creditors to whatever workout is proposed by the officeholder or corporation itself. The drawbacks are that the publicity regarding the financial distress of the company will impact goodwill negatively and the formal mechanisms can be quite costly, particularly when there is court involvement.

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.

To alleviate the confusion around these issues some States have amended their domestic insolvency laws through provisions for the recognition and enforcement or the effects of a foreign insolvency proceeding. Some States have also provided for co-operation and co-ordination where there are concurrent proceedings.

It is important to consider the primary rule of private international law and the principle of universalism. That principle requires that the courts should so far as is consistent with justice and public policy, co-operate with the courts in the country of the principal liquidations to ensure that all the company's assets are distributed to its creditors under a single system of distribution.

The Model International Insolvency Co-operation Act 1989 was developed by the International Bar Association (IBA) which accepted the notion of concurrent proceedings and encouraged a primary proceed with supportive proceedings. In the case of FPPL, the two proceedings need to be somewhat compatible in nature, otherwise there runs the risk of unnecessary and avoidable capital losses for the creditors (Lobo). As mentioned above the principle of universalism ensures co-operation and co-ordination between the two courts/jurisdictions to ensure that the processes are carried out in the most efficient and equitable way to preserve the assets of the Company and protect the creditors.

Difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination include ensuring the principle of par conditio creditorum (equality between creditors) and the development if international insolvency instruments such as the Cross-Border Insolvency Concordat and the aforementioned Model International Insolvency Co-operation Act 1989 help alleviate these issues. It would be worthwhile for Encanto and Asgard jurisdictions to come together and agree upon a protocol to follow for the case at hand to ensure the proceedings are carried out smoothly and fairly.

There are other relevant international instruments to consider

3.5

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.

It is important to note here that the European Insolvency Regulation Recast would not apply with respect to the UK commenced Insolvency proceedings due to the proceedings being opened on June 30, 2022. The EIR Recast ceased its applicability in the UK once they left the European Union at 11pm on December 31, 2020. The consequences arising from this situation considering that Lobo is incorporated in another EU country and FPPL's major creditor under the EIR the state would be the centre of the debtor's main interest and as such its courts would be granted jurisdictional competence. The EIR allocates primary jurisdiction based on the COMI, but it also allows for the possibility of subsidiary territorial proceedings in other member States. This is allowed where a debtor has an 'establishment' (place of operations where the debtor carries out a non-transitory economic activity with human means and assets). This applies as we can see from the case for the major creditor but not for the minor creditor due to the UK's departure from the EU on December 31, 2020, as the EIR Recast no longer applies here.

Further information that would be required here would be firstly to understand and confirm where the Centre of Main Interest is for FPPL and to determine of the UK proceeding will be the primary proceeding. On top of this, we would need to determine whether the European country that Lobo wants to bring proceedings follows a civil or English law system. Finally, we would need to confirm if there are any treaties/conventions in place between the UK and European country that Lobo wants to bring proceedings against.

It would be beneficial to elaborate and consider matters such as the MLCBI.

3

Marks awarded 11 out of 15

* End of Assessment *

TOTAL MARKS 42/50

A very good paper that generally addresses the questions asked and substantiates its answers.