



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.

The insolvency law regimes of African jurisdictions have varied historical roots, and may largely be traced from the legal systems each jurisdiction inherited from their former colonial powers.

These include:

- 1. A civil law system in countries such as Angola and Mozambique.*
- 2. A mixed legal system in countries such as South Africa and Namibia arising from Roman-Dutch law and English law influences.*
- 3. A common law system, particularly for former English colonies such as Ghana, Kenya, Botswana and Zambia.*

(see: <https://www.lexafrica.com/wp-content/uploads/2022/05/Guide-to-Insolvency-and-Business-Restructuring-in-Africa-Digital.pdf>)

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.

Key events in East Asia include the 1997/98 financial crisis which began in Thailand after the collapse of the Thai baht. This affected several South and North East Asian countries.

I highlight two examples in relation to Thai and Indonesia insolvency reform:

- 1. Thailand: In August 1998, the Thai government convened the Corporate Debt Restructuring Advisory Committee to formulate a response to the Asian financial crisis. The Bankruptcy Act of 1998 was enacted, introducing the Central Bankruptcy Court in 1999 to deal with the large influx of insolvency applications arising from the financial crisis.*
- 2. Indonesia: In 1998, the Indonesian Bankruptcy Act introduced an amendment that allowed debtors to request a moratorium on outstanding debts, on grounds that the debtor is preparing a composition in full or partial discharge of the debt owed to unsecured creditors (Article 212 Indonesian Bankruptcy Act). A Commercial Court to process and expedite bankruptcy petitions was also introduced. (see Indonesian Bankruptcy Law: Revisited, Wijantini, Indonesian Bankruptcy Law (2008) Vol 1 No 2 at 177 to 185)*

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.

I highlight the following:

- 1. The American Law Institute Transnational Insolvency Project ("ALITIP") was a project which aimed to improve co-operation in international insolvencies across signatories to the North American Free Trade Agreement ("NAFTA"). The Principles of Cooperation among the NAFTA Countries was developed and, amongst other recommendations, urged each NAFTA country to adopt the Model Law on Cross-border Insolvency. That Canada, Mexico and USA have since done so can be viewed as a success of this initiative.*
- 2. The ALITIP also introduced the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-border Cases (2000) for international insolvencies amongst the NAFTA states.*

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 8 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.

Rules providing for voidable dispositions are important as they protect the collective interests of the creditors. The operative principle underlying voidable dispositions is "that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies" (UNCITRAL Legislative Guide on Insolvency Law 2004 at para 151). Conversely, where an imperilled debtor attempts to dissipate his assets from his creditors, or when the proactive creditor acts pre-emptively to procure a preferential disposition in his favour, the pool of assets available for the satisfaction of the debtor's debts may be minimized to the detriment of other similarly-situated creditors. Rules providing for voidable dispositions thus attempt to reverse such attempts so to ensure the equitable treatment of the other creditors in the distribution of the debtor's assets. In so doing, voidable disposition rules also have a deterrent effect against individual remedies. This then serves as and facilitates "a code of fair commercial conduct" between creditors (Legislative Guide at paragraph 152) There is some scope to elaborate on the nature of voidable transactions.

The English and civil law traditions, however, differ in their approaches to voidable dispositions (even if those underlying principles remain broadly similar).

The actio Pauliana is the basis for fraudulent conveyance law in many civil law systems and has its roots in Roman Law. Relative to the voidable disposition provisions in the English tradition, the actio Pauliana has more general and broader applications. The broader application of the actio Pauliana accords with the fact that the bankruptcy regime in the civil law system "started off as a collective debt-collecting mechanism that favoured creditors"; with the rehabilitation of debtors and abolishment of imprisonment for debt arriving at a later stage (Guidance Text at p 5). In the context of Dutch Insolvency laws, the Guidance Text also sets out that "[b]efore the

introduction of *schuldsanering*, Dutch law was typical of many West-European countries in being very much pro-creditor - no discharge was allowed unless creditors agreed.

The genesis of voidable dispositions in English Law systems is the 1570 'Act of Elizabeth'. English legal systems generally provide two types of avoidance actions, the fraudulent conveyance/transaction (in which property is disposed in circumstances that increases/causes the debtor's insolvency), or unfair preferences (which improve the creditor's position relative to other creditors once insolvency commences). The more constrained nature of the English legal system perhaps reflects its relatively more pro-debtor stance.

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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.

This definition is perceived to have limitations because "it is connected to the existence of a national legal framework of insolvency law" (Guidance Text at p 34). In other words, it presumes that there is an applicable (national) law in the first case (and therefore goes on to state what this applicable law cannot do insofar as a state's jurisdictional enforcement powers ends with its national borders). This may be contrasted to Fletcher's definition, in which cross-border insolvency is described as a situation in which "an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the a [sic] single set of domestic insolvency law provisions cannot immediately and exclusively applied without regard to issues raised by the foreign elements of the case". Indeed, Fletcher's definition places "international insolvency law" on a more amorphous and nebulous perch. This may accord better with the reality that there is no one uniform set of insolvency rules that apply from jurisdiction to jurisdiction.

In the same vein, Friman's observations (that follow immediately from Fletcher's in the Guidance Text, p 34) on the USA's stance that insolvency law is a matter of federal law and not state law is analogous - again, there is no one overarching set of laws (which binds every jurisdiction) in the international sphere.

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

Treaties may become a source of a state's 'hard' insolvency law once it is ratified and received into said state's domestic law. These instruments generally seek to provide a common basis to which the questions of appropriate forum, recognition and enforcement and choice of law may be resolved in cross-border insolvencies. Such treaties may operate at the bilateral or multilateral level, and may span across specific regions/continents or have global reach.

In this connection, the extent to which such treaties are viewed as a successful way to establish such rules largely depends on their reach. International law instruments such as treaties ultimately operate on the basis of assent (as opposed to municipal laws, to which the private individual does not necessarily/direct give consent to be bound by); and to that extent, a key measure of a treaties' effectiveness is whether it can establish a common consensus of rules amongst its 'target audience'. Some of these instruments even provide for a minimum number of ratifying countries before entry-into-force. For instance, in the European context, the 1990 Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention) was only signed by 8 member states and only one ratification (Cyprus in 1994; see <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=136>), which did not meet the minimum of three ratifications before entry-into-force. Conversely (and alluding to the 'involuntary' nature of municipal laws mentioned earlier); the European Union appears to have considerable success through regulation such as the European Insolvency Regulation (2000) and its subsequent recast.

*The 'hard' law approach embodied by treaties may also be contrasted to 'soft law' options, which the *Guidance Text* notes has gained more traction. The most notable example is the UNCITRAL Model Law on Cross-border Insolvency ("the Model Law"), which did not take the form of a treaty but simply a draft piece of legislation designed to assist UNCITRAL member states equip their insolvency laws with a modern, harmonized and fair framework. A testament to its wide-adoption and success is evident from the fact that legislation based on the Model Law has been adopted in 53 States in a total of 56 jurisdictions, and the fact that a compilation of case law could be released in 2021 by UNCITRAL (see *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency*) attests to its success.*

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

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 difference between 'formal' and 'informal' insolvency arrangements is that the former is commenced under the insolvency law and generally involve court sanction. The latter need not always be regulated by insolvency law, and can be resolved via negotiations between the debtors and the creditors. That said, it is noted that "these voluntary negotiations nevertheless depend for their effectiveness upon the existence of an insolvency law, which can provide indirect incentives or persuasive force to achieve reorganization", perhaps at the pain of court-enforced penalties (Guidance Text at pp 17 and 18).

To this, the key advantages and disadvantages Lobo should consider to informal out-of-court workout arrangements are set out in the table below:

| Advantages | Disadvantages |
|--|---|
| <i>Flexibility; particularly when parties can reach commercially-saavy solutions that may not be within the court's expertise</i> | <i>The inability to rely on statutory mechanisms such as moratoriums</i> |
| <i>Speed (without being encumbered by the court process, particularly considering the cross-border nature of FPPL's business)</i> | <i>Dissenting creditors cannot be bound to any agreement reached due to its contractual nature</i> |

| | |
|---|--|
| Costs (obviating the need to pay court fees) | |
| Confidentiality, which has knock-on effects on consumer/investor confidence in Lobo | |

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.

The difficulties that may arise for the insolvency representative may include:

- 1. Issues of terminology; the foundational issue of whether the two jurisdictions share a common definition for the term "insolvency" may hinder cross-border discussions. To this, it is noted that "international conventions and other instruments do not even attempt to provide a proper definition" due to the amorphous nature of the term (Guidance text at p 41)*
- 2. Conflict of laws: difficulties in determining the applicable law to the proceedings (particularly as the different jurisdictions may, at the prior level, already have different choice-of-law rules), and issues which naturally arise when the decisions of the respective jurisdictions conflict.*

Certain international insolvency instruments that may address these difficulties include:

- 1. The UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law"), which was developed with the end to promoting international harmonization of legislation governing cross-border insolvencies. In particular, the Model Law mandates that "a local court of insolvency representative... co-operate with foreign courts or foreign representatives" (Arts 25 to 26; Guidance Text at pp 56 to 57).*
- 2. The Judicial Insolvency Network, which seeks to improve the efficiency of parallel proceedings "by enhancing co-ordination and cooperation amongst [member] courts". I note the JIN Modalities, which sets out the mechanics for what is essentially a common basis for cross-court communication (Guidance Text at p 58)*

Generally, the development of these international insolvency instruments is indeed important as they seek to resolve the difficulties set out in the first paragraph above. Linking this back to previous discussions about the varied legal traditions that underpin domestic insolvency regimes, the common goal of harmonization that these international insolvency instruments seek to promote can encourage and facilitate the more efficient and just resolution of cross-border disputes in an increasingly globalized world.

There are additional international instruments that should be considered.

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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.

*Notably, the EIRR ceased to apply in the UK on 1pm on 31 December 2020 following Brexit. The insolvency proceeding opened in the UK on 30 June 2022 would therefore *not* fall under the EIRR. The consequence of this is that English domestic insolvency laws apply to the UK proceedings, which rules differ from that of the EIRR. The minor creditor may not therefore have the benefit of the uniform choice of law rules that are set out in the EIRR Art 7.1: “the law applicable to insolvency proceedings and their effects shall be that of ... the ‘State of the opening of proceedings’”.*

More information regarding the UK domestic insolvency laws and that of the EIRR is necessary to elaborate fully on the consequences of this change.

It would be beneficial to discuss information regarding MLCBI adoption that would be useful to know.

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Marks awarded 12.5 out of 15

* End of Assessment *

TOTAL MARKS 43.5/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.