



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.

In African jurisdictions, the law on insolvency tends to follow their colonial influences. Several states, including Nigeria, Kenya, Botswana, Zambia and eastern Africa's Tanzania, tend to follow the English law tradition. On the other hand, Angola and Mozambique tend towards the civil law traditions based on the Portuguese influence. Countries in west Africa, such as Senegal and Mali, follow the French civil law system of insolvency. There are also states which follow a mixed legal system - this includes South Africa and Namibia, which have mixed legal systems such as Roman-Dutch law and English law.

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 Asian Financial Crisis in 1997/8 prompted several countries in East Asia to undertake reform. This crisis started on 2 July 1997 when Thailand floated its baht in order to alleviate pressures on its foreign debt. Although this policy was aimed at stimulating export revenues, it did not perform such a function and instead led to a contagion effect in other Asian countries. As a result, foreign investors lost confidence in the Asian markets and withdrew from their currency and asset markets. Two examples of reform initiatives are Indonesia and Thailand.

Following the financial fallout in Thailand, the government enacted the Establishment of Bankruptcy Court and Procedure for Bankruptcy Cases Act (the "Act") in 1999. Under the Act, bankruptcy cases must be heard by specialist bankruptcy courts. Previously, bankruptcy cases could be heard by any civil court. More importantly, the amendment to the Bankruptcy Act by the addition of Chapter 3/1 on corporate reorganisation which closely resembled the United States' Bankruptcy Code, Chapter 11. This availed companies of the option to pursue restructuring with an automatic moratorium which provides the debtor protection from actions commenced by the creditors.

For Indonesia, the government introduced amendments to the Bankruptcy Act at the behest of the International Monetary Fund in 1998. These amendments facilitated a mechanism with the opportunity for an insolvent debtor to discharge his inability to repay debt by allowing the creditors to recover their loans through asset seizure. In the context of the Asian Financial Crisis, the insolvent debtor was usually a domestic company, and the creditor, a foreign institution.

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.

In North America, the American Law Institute ("ALI") Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases in 2000 to facilitate the harmonisation and collaboration in dealing with international insolvency cases between members of the North American Free Trade Agreement ("NAFTA"), such as the United States, Canada and Mexico. The effort was successful in providing harmonisation between the NAFTA states. It was so successful that this was brought on at a global scale in the ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases in 2012. Further, the Principles of Cooperation among the NAFTA countries was rolled out as guiding principles which focus on corporate insolvency - these principles included general principles of cooperation and recognition, as well as procedural principles - which proved to be very helpful in coordinating cross-border corporate restructuring. However, a shortcoming with the Principles of Cooperation is the absence of standardised

principles of professional and ethical standards of international insolvency office holders. As there is increased harmonisation in other areas of insolvency law, it may be prudent for professional and ethical standards of the industry to be coordinated to maintain the quality and consistency of insolvency law in the region.

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 include conveyancing property at undervalue or providing unfair preferences in dealing with creditors. The former situation worsens the circumstances the insolvent debtor is in, while the latter scenario causes benefit to accrue to preferred creditors over the rest of the creditor pool.

*In the English law, the strongest historical influence lies in the Act (or Statute) of Elizabeth 1570. The policy intention behind the Act may be inferred from the language employed in the Act itself - this included describing debtors as an "fraudulent offender(s)" [emphasis added] who require "repression", and the creditors' interests were heavily guarded by a commission of "wise honest and discreet persons" who would extract any remaining value or assets from the debtor for the fulfilment of the debt owed. The Act sanctioned the committal of any act of bankruptcy by the trader (*i.e.*, akin to the modern day company), even if this invalidated all his subsequent dealings with innocent parties. This manifests itself in s 423 of the English Insolvency Act 1986, a provision that renders voidable transactions made with the intent to defraud creditors, even if the assets have been transferred abroad due to the transaction (*Orexim v Mahavar Port and anor* [2018] EWCA Civ 1660). Under s 424 of the English Insolvency Act 1986, the remedies available to the court restore the position in such a way as to protect the victims' interests.*

In the civil law tradition, an actio Pauliana that is a part of Roman Law (recorded in the Institutes of Justinian) has continued relevance. It is an action that lies against persons who were aware of fraudulent dispositions of debtors' assets to the detriment or prejudice of creditors, and permits creditors to take possession of a debtors' property pursuant to a judgment to bring an action against the holder of the alienated property, because the transaction / disposition of the property was tainted by fraud. In certain jurisdictions such as the Netherlands, Slovenia, Spain and France, an actio Pauliana has taken a different form - merely pure detriment to the general body of creditors justifies the avoidance of the transaction entirely. In other states such as Italy and Poland, actio Pauliana is part of general civil law (tort law) but also applicable by express reference to the civil law in the insolvency statute.

The main difference between the English and civil law approaches is that the English insolvency law confines the scope of its rule on transactions defrauding creditors to transactions / dispositions at an undervalue (i.e, the debtors' property was dealt with as a gift or for inadequate consideration). This stricter English approach may be traced back to the Cork Report, which recommended that transactions for "full consideration" be excluded. Contrastingly, there is no such prerequisite in other civil law traditions. Further, while English law requires the intent of putting assets beyond the creditors' reach or prejudicing their interest, the civil law generally requires only the debtors' intent to disadvantage a general body of creditors. By way of remedies, this culminates in remedial discretion in the English jurisdiction, while almost all other European jurisdictions with civil law provide for a claim to return or to reconveyance (i.e, to return the received). On either approach, these rules are important because they provide sufficient safeguard to the creditors against situations where debtors' assets / properties are fraudulently dealt with in order to avoid ceding them to the creditors.

There is scope to elaborate upon the importance of voidable transactions

4

Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

The definition operates on assumption that it presupposes a national legal framework of insolvency law. For instance, the definition provided by Fletcher that international

insolvency law is the situation in which “insolvency occurs in circumstances which in some way transcend the confines of a single legal system, commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures”. This exposes the difficulty with the Dutch commentator’s definition, which has not made clear what the geographical ambit is of the “body of rules” he refers to that “cannot be fully enforced”. For instance, the initial founding fathers of the United States considered that insolvency law was a federal question rather than a state level one (Friman).

Further, the underlying assumption in the definition is that the “body of rules” must stem from state-drawn lines. However, the modern situation is very different - the European Union’s efforts to consolidate and the porous nature of investments and markets mean that there is no way to isolate a “body of rules” from another state as easily as before.

The Dutch commentator’s definition is also vague in the phrase “international aspect of a given case”. While the cross-border nature of international insolvency is acknowledged by the phrase, it is unclear what form the “international aspect” should take and may arguably be too broad. For instance, to refine his definition, an “international aspect” may be qualified to be a material or relevant “international aspect”.

Crucially, the definition appears to provide a negative description of what international insolvency law is, rather than positively identify the content of international insolvency law. This shortcoming was likely influenced by the level of cooperation (and non-harmonisation) on international insolvency law issues of the time, but may not be reflective of the modern-day international insolvency law.

5

Question 3.3 [maximum 5 marks]

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

Treaties and conventions are laudable initiatives to establish a collaborative and consistent practice in international insolvency. There is scope to elaborate upon the nature of treaties and conventions.

In Europe, the multilateral treaty, the Nordic Convention on Bankruptcy (1933) between Norway, Denmark, Finland, Iceland and Sweden bound party states to recognise the majority of the order determined by the jurisdiction conducting the insolvency adjudication.

However, the challenge in treaties and conventions is amassing sufficient political will from various states to obtain their signatures and ratification. For instance, the

Convention on Certain International Aspects of Bankruptcy (i.e., the Istanbul Convention) was signed by 8 states in the European Union, but was not ratified by a sufficient number of member states for it to enter into force.

That said, while there are limitations to proceeding with treaties or conventions as a source of cross-border insolvency law, the mere fact that a treaty or convention is contemplated can start opening the conversation on key harmonisation or recognition measures across states.

Rather than by treaty or convention, the European Union has seen more success with regulations in the European Insolvency Regulation (2000) ("EIR") and the EIR Recast (2015). The approach that has seen the most success generally is "soft law" - for instance, the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law. The draft legislation was merely recommended to be adopted by states, with or without modification, and yet gained sizeable traction (Mevorach). Arguably, the binding nature of treaties and conventions may precipitate much more caution on the part of states in signing or ratifying them. This is the reason why "soft law", which operates to guide (rather than mandate) the adoption of mechanisms to recognise cross-border insolvency proceedings, has greater influence.

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

3.5

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 include insolvency proceedings and corporate rescue/restructuring programmes which generally require court intervention / sanction to proceed. Informal insolvency arrangements are usually voluntary reorganisation plans which are reached with the consent and mutual agreement of the debtor and creditor(s).

For Lobo, informal arrangements such as workouts are beneficial in providing more flexibility to deal with the existing debt obligations between Lobo and FPPL, and will more likely preserve Lobo's enterprise value even as restructuring is underway as it is generally more collaborative and generates less negative publicity. Costs are also relevant. The disadvantage to Lobo for pursuing an informal workout arrangement is the risk that FPPL commences proceedings against it - unlike formal restructuring arrangements, there is no automatic stay in proceedings brought by creditors against it and this might thwart restructuring efforts. The inability to bind dissenting creditors warrants elaboration, in addition to moratorium.

3.5

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 difficulty with this discovery is two-fold: (a) the court-supervised insolvency proceeding in Asgard may have been commenced without the court considering whether there ought to be recognition of the foreign insolvency proceedings (particularly if the moratorium should apply in Asgard by virtue of the earlier concurrent proceedings in Encanto); and (b) potential blind spot if there are any existing Mareva injunctions against related parties / counter-parties disposing with the assets held by Lobo in Asgard. Assuming that the UNCITRAL Model Laws are adopted as legislation by Asgard, Art 15 will allow a foreign insolvency representative to apply for recognition of the Encanto proceedings in Asgard. This is very useful to ensure that cross-border insolvency proceedings operate efficiently and to prevent any incentive for parties to transfer assets or judicial proceedings from one state to another in hopes of obtaining a more favourable legal position. Such benefits are enlarged because the UNCITRAL Model Laws do not require mutual recognition and it is generally widely adopted globally.

It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

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.

No, the EIR Recast would no longer apply to proceedings opened in the UK after 11pm on 31 December 2020. If the EIR Recast applied, then proceedings commenced in the UK would be recognised in all other member states of the European Union (except Denmark) without further formality. Given that the EIR Recast did not apply to the UK proceedings, the recognition of the English proceeding against FPPL opened on 30 June 2022 in another country in Europe will depend on the country's local law. If the country has adopted the UNCITRAL Model Law, an application may be taken out in that country to seek recognition of the English proceeding. The consequence of the lack of automatic recognition of the English proceeding in the European country is the non-applicability of the English law moratorium to preventing the commencement against a debtor. In other words, creditors like Lobo in the European country can race to enforce against any FPPL assets in its country or open main proceedings against FPPL in the other European country if it persuades the court that FPPL's COMI is in that state.

* End of Assessment *

TOTAL MARKS 42.5/50

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