



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 9 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.

As a result of the European colonisation's impact on the social, economic, religious, and political structures of African countries, the historical roots of the continent's insolvency law systems are irrevocably linked to that of their colonizers. The roots of the legal systems in South Africa and Namibia are particularly interesting due to the Dutch, German and English control of those jurisdictions at various points in history leading to a mixed legal system of both Roman-Dutch law (civil law) and English law.

In contrast, there are several countries that follow a singular law tradition specially linked to civil law, such as the French colonized countries in West Africa which act in accordance with French law and Angola and Mozambique with Portuguese law. Furthermore, Nigeria, Kenya, Botswana, Zambia, and Tanzania have legal roots tied to English law.

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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 triggered long-lasting affects on the region in many aspects, especially in Indonesia and Thailand. The crisis gave rise to insolvency law reform in Thailand, which saw the country's bankruptcy laws re-examined and thereafter modernized.

Some noteworthy reform initiatives are as follows:

- *Judicial Insolvency Network (JIN), Guidelines for communication between Courts in Cross-Border Insolvency Matters (2016)*
- *Asian Business Law Institute and International Insolvency Institute, Joint Project to develop Asian Principles of Business Restructuring*

It would be beneficial to elaborate on reforms that took place in specific nations in response to the crisis.

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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.

Comparable with Europe, the proximity between North American countries is bound to lead to international cross-border insolvency issues. In an effort to resolve these issues, several initiatives have been launched to encourage communication and uniformity within certain aspects of international insolvency law.

The adoption of the UNCITRAL Model Law on Cross-Border Insolvency (1997) by many North American countries and its focus on the importance of cooperation regarding recognition and coordination of parallel insolvency proceedings between the States has set a framework from which various initiatives have developed. There are three initiatives which stand out:

- *American Law Institute (ALI) Transnational Insolvency Project to develop the ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2000).*
 - *The initiative focused on international insolvency issues in the United States, Canada, and Mexico.*
 - *It was put in place to accompany the UNCITRAL Model Law on Cross-Border Insolvency (1997).*

- **ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).**
 - *The initiative was developed to tackle a more worldwide approach to international insolvency issues compared to the ALI Transnational Insolvency Project (2000)*
 - *The success of the initiative has found itself displayed in its recent role in assisting with cross-border airline restructuring.*
- **Judicial Insolvency Network (JIN), Guidelines for communication between Courts in Cross-Border Insolvency Matters (2016).**
 - *The adoption of the Guidelines by courts in North America, Asia and the United Kingdom signifies its efficacy.*

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.

*An important aspect of the historical progress of debt collection and insolvency law is the departure from execution against the person towards a dispensation of execution against the Insolvency estate. Civil law is heavily rooted in Roman law and with regard to debt execution, the initial practice saw debtors giving their bodies. This method of debt execution would have resulted in death (creditors cutting up and distributing the body), slavery, or imprisonment for repayment of their debt. The following procedures of Roman law can be noted essential to the development of civil law: *cessio bonorum* (assignment of property); *distraction bonorum* (forced liquidation of assets); *remission and dilation* (composition with creditors). The aforementioned procedures formed the framework from which civil law countries developed debt collection methods when debtors were found to be insolvent.*

On the other hand, English law only began imprisoning debtors by the end of the 13th century, as a result of the Statute of Marlbridge of 1267. This form of debt

execution was thereafter eliminated by the Debtors Act of 1869 and in its place came the first English Bankruptcy Act of 1542 which brought about the establishment of a regulator in the form of a body of commissioners and legal possession being taken of the debtors' assets. The 1542 Act also noted two principles which modern insolvency laws are based; the collective participation by creditors; the *pari passu* principle which states equal and fair distribution among creditors of the Insolvency estate.

This question required consideration of the historical roots of this aspect of insolvency law, voidable transactions: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law. It also required consideration of the classification and importance of voidable transactions.

1

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.

Wessels definition of international insolvency law falls short because of its initial limitation of requiring one national legal framework of international insolvency to be in place in order to be fully applicable. Furthermore, Fletchers definition of "international insolvency" or "cross-border insolvency" highlights these limitations when it states that international insolvency law "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 foreign elements of the case."

An additional limitation is that Wessels definition leans on the belief that international instruments such as the UNCITRAL Model Law on Cross-Border Insolvency (1997) which create coordination of concurrent proceedings have not been implemented. Moreover, Fletchers' definition leans toward the recognition that multilateral arrangements, such as The Montevideo Treaties (1889) and (1940), are more likely to be successfully adopted "among states which are regionally grouped in such a way that functional interaction takes place constantly, and at many levels."

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.

*The Nordic Convention on Bankruptcy (1933): the convention was signed by Norway, Denmark, Finland, Iceland and Sweden. The Nordic Convention recognises the law of the *Lex rei situs* as the jurisdiction which determines the majority of the effects of the insolvency proceedings in all member States. Moreover, the rules state that there is a stay in proceedings and an insolvency administrator is recognised widely which garners assistance from the member States' courts. In conclusion, the convention was broadly considered a success multilateral convention as the member States were able to come to an agreement to a uniform application of the same insolvency law procedures with permittance of concurrent proceedings and it continues to be in effect.*

The Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHAADA): Although the Treaty was signed in 1993 by Benin, Burkina Faso, Central African Republic, Ivory Coast, Congo and many other African countries, it only took effect in 1995. The Treaty concentrated on the cross-border insolvency law in Sub Saharan African region with the goal of uniting the domestic laws of its member States. The success of the treated and it's positive impact on regional coordination is illustrated with all of its member States agreed adoption of the UNCITRAL Model Law on Cross-Border Insolvency (1997).

The Montevideo Treaty on International Commercial Law (1889): The Treaty was ratified by Argentina, Bolivia, Columbia, Paraguay, Peru, and Uruguay and encompasses both personal and corporate insolvency. It decides importance of jurisdiction according to the debtors' commercial domiciliation which then determines where the set of proceedings will commence. In parallel, concurrent proceedings are accepted when the debtor has multiple economically self-supporting companies in different member States.

The Istanbul Convention, Council of Europe Treaty Series No 136: The 1990 convention concluded with 8 member States signed however it is one of the many failed conventions as there were not enough members in order for it to be ratified. Nevertheless, it began discussion which later had a significant impact on the EU's continued development to resolve issues in international insolvency.

Model Treaty on Bankruptcy (1925): During the Hague Conference on Private Law, the 1925 Treaty was an initiative which was discussed but never adopted. However, the conversations that developed when creating the 1925 Treaty contributed to further discussions on regulations surrounding international

insolvency law and the potential proceedings view of the importance of the Lex rei situs.

The sub-question also required consideration of the broad nature of treaties/conventions and a summary of their broad success or otherwise.

3.5

Marks awarded 9.5 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 those that are commenced in accordance with insolvency law and wholly governed by that law's regulations. Examples of these proceedings include liquidation and reorganization.

"Informal" insolvency arrangements can be both non-regulated and regulated by insolvency law and tend to involve voluntary communication and further negotiations between the debtor and the creditor(s) outside of court.

The advantages of an informal insolvency arrangement:

- The Informality of the arrangement allows it to be formed out of the courts which can lessen the overall cost of actions which would in turn.***
- The details of the FPPL' financial struggles will be less public due to the nature of the communication between FPPL and Lobo alone.***

- *If a successful restructuring of FPPL's financials, the company can continue to operate.*

Costs are also relevant

The disadvantages of an informal insolvency arrangement:

- *Formal proceedings are commonly viewed as safer due to the legal rules put in place to protect the Lobo's interest.*
- *There is no moratorium put in place for FPPL which would prevent the commencement of insolvency proceedings by additional creditors.*
- *If the financial struggles of FPPL are unrecoverable to be restructured, a formal insolvency proceeding would begin, therefore the informal arrangement and FPPL/Lobo's effort would have been fruitless.*
- *There are no legal regulations in place to bind Lobo to any agreement reached.*

Ability to bind dissenting creditors is also relevant.

Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

3.5

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 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) states:

"[t]he absence of formal treaties or domestic legislation to address the problems arising from international insolvencies has encouraged insolvency practitioners to develop, on a case-by-case basis, strategies and techniques for resolving the conflicts that arise when the courts of different States attempt to apply different laws and enforce different requirements upon the same set of parties. The terms and duration of agreements vary, and amendment or modification in the course of the proceedings takes account of the changing dynamics of multinational insolvency to facilitate solutions for unique problems that arise in the course of the proceedings."

*In that regard, the difficulties that the insolvency representative would experience would be influenced by the existence of any multilateral treaties or conventions put in place regarding cross-border insolvency law. If similar regional treaties such as the Montevideo Treaties (1899) and (1940) applied to Encanto and Asgard or if both States adopted the UNCITRAL Model Law on Cross-Border Insolvency (1995) these difficulties would be minimized. In certain instances, States will allow local courts to be approached on an *ad hoc* basis. Therefore, if applicable Asgard could allow the foreign Encanto insolvency representative to deal with both FPPL's assets in Asgard and Encanto.*

Examples of the difficulties for the insolvency representative:

- The insolvency representative must be appointed in accordance with the rules and regulations of that of the relevant State.*
- If there is not legal insolvency cooperation between Asgard and Encanto it would be difficult for the insolvency representative to determine how to realize assets in either jurisdiction.*
- In some States without multilateral adoption of international insolvency law, a single application may be made for a single company regardless of differing incorporation and registration jurisdiction. Therefore, the proceeding already commenced against FPPL in Encanto would be the sole proceeding allowed and the Encanto insolvency representative could not gain recognition in Asgard to access the assets in that jurisdiction.*

A discussion of relevant international instruments is warranted, including but not limited to the MLCBI you mention above.

2.5

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.

The European Insolvency Regulation (Recast) is the most recent multilateral instrument on international insolvency law within the European Union as it was officially implemented by the European Parliament in 2015. The EIR Recast no longer applies in the UK as of 31 December 2020 as a result of the UK's exit from the European Union. As a consequence, the EIR Recast would not apply with respect to the UK commencement of insolvency proceedings against FPPL in another

country in Europe as it commenced on 30 June 2022, after the UK's exit from the EU. The Recast solely continues to apply to insolvency proceedings where the main proceedings were opened in the UK prior to the expiry of the transitional period before the UK's exit.

Article 7 of the EIR Recast (2015) states that "[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of ... the 'State of the opening proceedings'." and further "the conditions for the opening of those proceedings, their conduct and their closure." Therefore, if the proceeding had commenced prior to the UK's exit, according to the EIR Recast, the insolvency law in the UK would be applicable to insolvency proceedings in the UK and in another country in Europe as proposed in the scenario.

In this scenario, the UK insolvency representative would need to lean on the UNCITRAL Model Law on Cross-Border Insolvency (2006). England, Wales, and several member States in the EU have adopted the insolvency instrument.

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Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 37.5/50

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