



42/50 = 84%

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

RESIT ASSESSMENT: SEPTEMBER 2023

(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. The final submission date for this assessment is 21 September 2023. Please provide the completed assessment back to Sanrie Lawrenson via email at Sanrie.Lawrenson@insol.org by no later than 23:00 (11 pm) GMT on 21 September 2023. No submissions can be made after this time, no matter the circumstances.**
- 6. When submitting your assessment you will be required to confirm / certify via email 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.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] **9 marks**

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

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the best response to this statement.

- (a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.**
- (b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.**
- (c) This statement is true, although the word "bankruptcy" is not an English phrase.**
- (d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.**

Question 1.2

Which of the following best describes an "executory contract" and its enforceability?

- (a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.**
- (b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.**

- (c) **An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.**
- (d) **An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.**

Question 1.3

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 a 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 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the most accurate response to this:

- (a) **This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.**
- (b) **This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.**

- (c) **This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.**
- (d) **This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.**

Question 1.5

Private international law may involve "hard law" treaties and conventions which become enforceable as part of a State's domestic law. Choose the correct statement:

- (a) **The statement is untrue since treaties and conventions are "soft law", not "hard law".**
- (b) **This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.**
- (c) **This statement is true and is why there has been great success with treaties and conventions.**
- (d) **This statement is untrue because treaties and conventions are public international law, not private international law.**

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the best response to this question:

- (a) **The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.**
- (b) **Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.**
- (c) **The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.**
- (d) **The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.**

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies 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, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these 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 untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.**

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the best response to this statement:

- (a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.**
- (b) This statement is untrue because African nations all have a civil law tradition.**
- (c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.**
- (d) This statement is true because African States each chose to adopt English insolvency laws in modern times.**

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 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.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) 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.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the best response to this statement:

(a) This statement is untrue because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks] **2 marks**

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

Common law jurisdictions (i.e. those based on the English common law system) are able to develop their insolvency through judge-made law, which enables more flexibility in adaption to individual circumstances and macro-economic developments. For example, in circumstances in which there has been an absence of legislative development, this enables the judiciary to adapt the law (within established parameters) to novel and developing situations. A good example of this is, in Hong Kong, where despite considerable discussion around updating the legislative framework for insolvency processes, the existing laws are somewhat out of date, which led to a lacuna in the ability to recognise foreign proceedings - but the application of common law principles has given the HK Courts flexibility to incorporate principles and/or enable applications to be granted to circumstances that, on the face of the legislation, might not have been immediately available.

*Civil law systems (i.e. those of Continental Europe), are stricter with respect to the application of legislation and arguably less adaptive. However, it is worth noting that this stricter application of legislation can also create a greater degree of certainty as to what the law of insolvency is and how it will be applied to both debtor persons and companies. **Example countries?***

Question 2.2 [maximum 3 marks] **3 marks**

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

The principle of universalism propounds that there should be only one insolvency proceeding, worldwide, relevant to a particular debtor's assets and debts. Ideally, this would involve there being only one jurisdiction that has power to deal with the matter, and that would be the place where the debtor's interests are most centrally located. Under this approach, the insolvency practitioner appointed to the proceeding would have the ability to control and obtain all the debtor's assets, no matter where in the world those assets are located.

Conversely, the principle of territorialism suggests that insolvency proceedings should be brought in each jurisdiction in which the debtor holds assets - but that they should be territorially restricted to property within that State. This approach is focused on local interest and creditors which operate within the domestic market. A strict approach to territorialism causes difficulties, however, in the context of a cross-border insolvency proceeding.

Meanwhile, modified universalism sits somewhere in the middle. This approach places the “main proceeding” of the insolvency procedure in the place determined to be the centre of main interests, and the wider process is then supported by secondary proceedings that may be conducted outside of the jurisdiction. Under such an approach, the Courts of different jurisdictions are intended to cooperate with each other with respect to the management of the proceeding.

Question 2.3 [maximum 4 marks] **2 marks**

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

In 2008 the Constitutive Treaty of the South American Union (UNASUR) was signed and by 2011 9 countries had signed the agreement. That agreement aimed to establish a system of supra-national law along the lines of the European Union. However, many countries have subsequently renounced the treaty including Brazil and Argentina and continental bankruptcy law reforms are therefore not presently in progress. The most significant changes to national insolvency law were enacted in Brazil in 2020 and were aimed at modernizing the bankruptcy framework. These amendments include the introduction of measure related to recognition of foreign proceedings and provisions for DIP financing.

- ***These treaties, among different groups of Latin America States, are: The Montevideo Treaties (1889) and (1940); Havana Convention on Private International Law (1928) (Bustamante Code)***
- ***Differences include the actual States that are members of the Montevideo Treaties (1889) and (1940) and the Bustamante Code (1928).***
- ***Also, they differ in the extent to which they allow for a single proceeding with universal effect throughout the member States.***

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks] **6 marks**

It is said that the terms “bankruptcy” and “insolvency” may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to “bankruptcy” and “insolvency”, (ii) the essential characteristics of “bankruptcy” and “insolvency” and (iii) any differences that may arise when a “bankruptcy” / “insolvency” involves a corporation rather than an individual.

While insolvency and bankruptcy are used synonymously in various insolvency systems, there are certain differences that are worth noting. As a general observation, bankruptcy commonly refers to a legal process or court order as to the bankrupt estate

of a debtor, while insolvency often concerns procedures relevant to, commonly, corporations, in a state of financial distress.

Insolvency is concerned with circumstances where (i) the liabilities of a debtor exceed the assets of a debtor (commonly referred to as balance sheet insolvency); and/or where a debtor cannot pay its debts as and when they fall due (referred to commonly as cash flow or commercial insolvency). In these circumstances, in certain jurisdictions, there are legal procedures available to creditors that enable them to seek recourse against the debtor with the Court's assistance or supervision (such as, for example, winding up procedures, or the appointment of insolvency practitioners to enable the collection and enforcement of the debtor's assets for distribution amongst creditors) - and these processes involve, for example, matters of "priority" arising from the debt. In particular, corporate insolvency procedures place certain creditors in a higher priority for repayment of their debt, such as employees, government debts, and/or secured or unsecured creditors, etc.

In certain jurisdictions, such as, for example, Australia and the Cayman Islands, the term insolvency is used within the context of corporations (rather than individuals), and formal and informal insolvency procedures exist in order to ensure as a matter of priority, that the interests of creditors are protected (i.e. a pro-creditor jurisdiction such as the Cayman Islands) and in other jurisdictions, more concerned with the protection of debtors (i.e. pro-debtor jurisdiction such as the US).

With respect to bankruptcy, this is commonly used in relation to proceedings or procedures that exist for the purposes of dealing with individuals in financial distress. One obvious difference in this regard is that individuals are of course not "dissolved" after bankruptcy in the same way a company is following the completion of a corporate insolvency process. Another difference is the consequence of a bankruptcy procedure on a person versus a corporation. Notably, an individual might become limited in their ability to enter contracts, obtain new credit, take up certain positions, travel overseas, etc. (Similarly, in a corporate context, there are consequences for directors of companies in circumstances where they take or fail to take certain steps when the company is on the brink of insolvency.) Further, where a bankrupt individual is concerned, certain rehabilitation procedures allow for the discharge of the individual debtor, which enables them to continue without the burden of the pre-bankrupt debt. Corporations cannot be "rehabilitated" in this way and are instead liquidated and/or dissolved.

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Question 3.2 [maximum 5 marks] **5 marks**

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

There are numerous challenges that arise in cross-border insolvency proceedings.

1. No common insolvency language. *Each jurisdiction that becomes relevant to an insolvency proceeding (i.e. due to assets and/or interests being located in that jurisdiction) will have its own domestic laws with respect to dealing how that State deals with bankrupt or insolvent persons and companies. In this regard, there is no “common insolvency language” that dictates how both Courts (and insolvency practitioners) may: (i) procedurally approach and manage insolvency proceedings, (ii) the rights of creditors and debtors and the priority of debts, (iii) the approach to asset recovery, (iv) the consequences of insolvency, and (v) (inter alia) even how insolvency is determined.*
2. Conflict of laws. *As identified in point 1 above, the differences between the domestic laws, regulations and approaches taken by different States to insolvency proceedings inevitably gives rise to a conflict of laws, and flowing from this, the powers of insolvency practitioners, debtors and creditors. This conflict might be made more complex given the presence of security, set-off and netting arrangement and other means in domestic laws that protect the interests of creditors.*
3. Recognition of foreign proceedings. *Flowing from points 1 and 2 above, in order for an insolvency practitioner to take steps in a foreign jurisdiction to, for example, liquidate assets, distribute funds, etc., they need to apply for foreign recognition in that jurisdiction, the process of which varies across jurisdictions. This also requires determination of which place is the “foreign main proceeding” and which will be the secondary or ancillary jurisdictions for the purposes of the insolvency process and will be particularly important in circumstances where there are claims in the Courts of different jurisdictions.*
4. Treaties and conventions. *Another challenge is whether the jurisdictions that are relevant to a proceeding have adopted international treaties or conventions with respect to the approach to insolvency proceedings. In circumstances where, for example, the Model Law, has been adopted or acceded to by both States, there will be greater harmony between the systems and approaches taken. If they are not, there may be more complicated differences as between the systems, and whether, for example, the Courts will cooperate in relation to the matter.*
5. Interplay with domestic laws. *In addition, insolvency and bankruptcy gives rises to other matters of domestic law that can create complexities. Insolvency procedures do not operate in a vacuum; they are part of the broader legal framework in place and therefore different issues will arise from time to time when other domestic laws are engaged.*

Question 3.3 [maximum 3 marks] **3 marks**

Briefly discuss what is meant by “hard law” and what is meant by “soft law” in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of “hard” and “soft” laws in providing solutions to the challenges of international insolvency.

Essentially, hard law refers to the domestic legislation of a State that is strictly applied and enforced in that State. Soft law refers to international law (such as treaties or conventions, be it in the context of public or private international law) which seeks to bring further uniformity across states or seeks to encourage the inclusion of certain rights or rules across jurisdictions. However, in order for soft law to be strictly applied in any jurisdiction, the soft law must be first acceded to or adopted (with or without amendment) in the domestic legislation of a State before it will be binding on parties (though it might nonetheless be influential).

The most successful soft law approach to date is the UNCITRAL Model Law on Cross-border Insolvency (MLCBI). The Model Law, rather than being presented as a more typical treaty or convention, instead was draft legislation recommended by UNCTIRAL for the adoption by member states (with or without modification). This model is gathering momentum and has influenced international insolvency law.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks] **2 marks**

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The Insolvency Act 1986 is the critical English legislation that deals with insolvency, including cross-border insolvency procedures. This Act gives English Courts jurisdiction to wind up a company that was formed in another State but that has carried on business in England (ss 220-221).

The Insolvency Act 1986 gives the English Courts power to recognise foreign insolvency proceedings (s 426). In particular, English Courts are permitted to "recognise" the authority of a foreign liquidator and enable the foreign liquidator to carry out its functions in England to, for example, gain control over local assets. Section 426 allows English Courts in any part of the UK and in "relevant countries", to request assistance from the UK Court in relation to insolvency proceedings. **S 426 is not applicable - US not designated**

Generally speaking, English law will apply to matters of procedure and substance with respect to a cross-border proceedings, but foreign law may be relevant and applied in certain circumstances.

As part of its cross-border legal framework, England also adopted the UNCTRAL Model Law on Cross Border Insolvency (incorporated by the Cross-Border Insolvency Regulations 2006). Notwithstanding this, section 426 of the Insolvency Act still applies to relevant countries, and common law principles continue to apply as well.

Question 4.2 [Maximum 4 marks] 4 marks

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

Insolvency proceedings in the EU (i.e. applicable to Germany and Italy) are governed by the European Insolvency Regulation (EIR) as recast in 2015 and amended by Regulation 2021/2260 in 2021, which became effective in January 2022.

The EIR provides that the primary jurisdiction for the resolution of the insolvency proceedings is the centre of the debtor's main interests (COMI).

COMI is determined by reference to the place where the debtor regularly administers its interests, and which can be ascertained by third parties. It is not merely the debtor's intention but also the creditors' perception of where the debtor administers its interests.

In this example, Italy appears to be its COMI based on its management centre and likely where persons would therefore consider to be the place where the company administers its interests.

However, under the EIR, subsidiary territorial proceedings are also permitted in other member states. On this basis, subsidiary proceedings (which could be either independent or secondary to the main proceedings) could be brought in Germany given that that Germany is where the majority of the manufacturing takes place and is therefore likely an "establishment", meaning any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets.

Question 4.3 [Maximum 1 mark] **1 mark**

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

The UK ceased to be a member of the EU on 31 January 2020 and consequently the EU Recast no longer applies to post-31 December 2020 proceedings in the UK. The Recast Insolvency Regulation applies to insolvencies where the main proceedings were opened before 31 December 2020.

Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 7 marks.) 2 marks

In principle EU Ins Reg will apply and law of Lex Concursus (Italy) will probably be the main proceeding

As the insolvency procedure has been open under Italian law, and concern an Italian estate, Italian law will apply to the proceeding.

However, the real rights of security in respect of assets situated in the Netherlands will be subject to Dutch law, insofar as such rights are likely to fall outside of the insolvent estate (as it is a secured asset and therefore the security documentation, etc., will likely be governed by the laws of the Netherlands.

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 7 marks.) 3 marks

Australia has statutory provisions similar to section 426 of the Insolvency Act 1986 (UK), which are contained in sections 580-581 of the Corporations Act (Cth) and permit cooperation between Australia and foreign courts in "external administration" matters - including liquidations.

Section 581(4) provides that: "The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter."

If a main proceeding were outside of Australia, Australian Courts have the power respond to a request from a foreign Court seeking assistance in relation to that foreign proceedings.

*** End of Assessment ***