



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 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. 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 **11 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

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.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 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.

One way to classify the legal systems of the world is by having English law or Civil law. Countries such as the United Kingdom, Australia and the USA have roots in English law.

Countries such as Netherlands, France and Germany have historical roots in Civil law.

These differ based on the variety of insolvency laws and terminology used.

This answer also required a discussion of the common law aspect of English law.

2

Question 2.2 [maximum 3 marks]

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

Universalism is an approach that allows for more than one insolvency proceedings originating in different States to be dealt with under the provision of one insolvency law e.g., in the State where the debtor has its COMI.

Modified universalism allows for a main proceeding in the State where COMI has been determined, supported by secondary proceedings in another State.

Territorialism prescribes that the consequences of an insolvency proceeding will only apply to the State where the insolvency proceeding has been opened.

There is scope to elaborate further. While the question says 'briefly' it is for 3 marks.

2

Question 2.3 [maximum 4 marks]

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

Some initiatives undertaken to assist with the resolution of international insolvency issues in Latin America include:

- The Montevideo Treaties (1889) and (1940); and
- Havana Convention on Private International Law (1928) (Bustamante Code).

Bolivia and Peru are parties to both initiatives. However, other Latin States are parties to just one of the initiatives.

The Havana convention is more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout its region.

However, it also adopts a similar approach to the Montevideo Treaties of providing for a single proceeding if the debtor is only occasionally trading in more than one State, or only has branches or agents in another contracting State.

Where there are concurrent proceedings, the Havana Convention does not provide procedures for co-operation or co-ordination of any concurrent proceeding.

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

3.5

Marks awarded 7.5 out of 10

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

Question 3.1 [maximum 7 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.

Bankruptcy and insolvency – meaning and characteristics

The word ‘bankruptcy’ is said to come from the Italian banca rotta, meaning ‘break the bench’ referring to a situation where a merchant could not pay their debt and their creditors closed his business by breaking the bench. Bankruptcy refers to an individual or entity unable to pay the debts owed to creditors. The purpose of bankruptcy is to provide a reasonable way of distributing debtor’s assets among creditors and discharge the debtor from their outstanding debts.

Insolvency on the other hand could be used as a wider financial term and refers to the event of an individual or entity unable to meet its financial obligations as they become due e.g. when liabilities exceed assets (balance sheet insolvent).

Insolvency would not necessarily lead to bankruptcy, and it can result in other financial arrangements such as restructuring.

Bankruptcy is usually associated with a formal legal process, whilst insolvency may or may not involve that.

It would also be beneficial to consider the use of the terms across jurisdictions, and the terms being afforded different meaning in some countries

Corporation vs Individual

Individual bankruptcy/insolvency involves personal assets and liabilities whilst corporate bankruptcy/insolvency deals with assets of the corporation in question.

Furthermore, the laws that govern individual bankruptcy/insolvency vary to those that govern corporations’ bankruptcy/ insolvency.

The aim of an individual insolvency/bankruptcy is to provide the insolvent/bankrupt person with a new financial start whilst corporate bankruptcy/insolvency focuses on restructuring/liquidation of the corporation to satisfy creditor claims.

Overall, bankruptcy and insolvency share a common theme of financial distress, but they are not precisely interchangeable. Bankruptcy is a formal legal process whilst insolvency is a broader financial condition. The terms can also have distinguished implications when applied to individuals versus corporations, reflecting the distinct legal frameworks governing personal and corporate financial distress.

There is scope to elaborate, for example with respect to excluded assets.

4.5

Question 3.2 [maximum 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.

One of the main challenges in developing a single global cross-border insolvency dispensation is that there is not a single set of insolvency rules that applies globally. All States have developed a legal system to deal with bankruptcy and insolvency but there are differences in approach and policy (such as pro-creditor vs pro-debtor) as well as differences in substantive and procedural rules.

Furthermore, essential areas of the general law also differ between different States e.g., common law and civil law traditions. Determining which jurisdiction has the authority to administer cross-border insolvency proceedings can also be challenging.

Some States have statutory provisions in place to deal with assets of insolvent estates whilst in other States, the local courts can be approached on an ad-hoc basis for an order to allow a foreign insolvency representative to deal with assets in the local jurisdiction.

Another challenge to consider is cultural and economic differences between States, which may impact the willingness to cooperate in cross-border insolvency cases.

Lastly, not all States recognise foreign insolvency proceedings and there is no universal framework for automatic recognition of such proceedings across jurisdictions.

All of the above complicate the dispensation of rules governing cross-border insolvency.

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook

1.5

Question 3.3 [maximum 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.

Hard law is legally binding and has direct and enforceable impact on the parties involved. This legislation is typically codified in treaties, conventions, or statutes.

On the other hand, soft law consists of non-binding principles, guidelines or best practices that do not create legally enforceable obligations. Soft law instruments can be issued by international organisations and would rely on the cooperation and goodwill of the States for implementation.

Whilst the success of hard law has been variable in achieving solutions to international insolvency law issues, soft law has achieved much more success in that area. Subsequently, a range of multilateral organisations have focussed their efforts on the soft law approach recently. The most successful of these soft law approaches has been undertaken by UNCITRAL, which developed a Model Law on Cross-border Insolvency (MLCBI).

Examples should also be provided for hard law. Further elaboration is warranted.

2

Marks awarded 8 out of 15

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]

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 American insolvent estate representative may use the following English cross-border sources to request recognition in terms of English law:

- UNCITRAL Model Law on cross-border insolvency – as England has adopted the Model Law.
- Common law recognition – English common law recognises foreign insolvency proceedings and the representative can seek recognition through common law to demonstrate the American liquidation proceedings and valid in England.
- Bilateral treaties – the representative should explore bilateral treaties between the USA and the UK to see if there are specific provisions regarding recognition of foreign insolvency proceedings.

It would also be beneficial to note that s426 is not applicable, and why.

3

Question 4.2 [Maximum 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.

Appropriate legal sources to be used in a cross-border insolvency matter between Germany and Italy:

- European Insolvency Regulation (EIR), EU (Recast) and its amendments – as both Germany and Italy are members of the European Union, this is a key legal source and provides a harmonized framework for cross-border insolvency proceeding within the European Union. The jurisdiction for proceedings would be determined based on the debtor's COMI i.e. Italy. As COMI is the place where the debtor conducts its administration and business affairs, if Norton Cars Inc's COMI has shifted to Italy, the main insolvency proceeding should be opened in Italy.
- The insolvency proceedings may still be subject to the local laws of Italy and Germany, so these should also be considered in conjunction with the EIR.

4

Question 4.3 [Maximum 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?

No, Indian, South African, or Australian courts are not eligible to apply the EU (Recast) Insolvency and Recognition would depend on the domestic laws and regulations of each non-EU country.

1

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 6 marks.)

For the insolvency proceedings, this is subject to the law of the State where the insolvency proceedings are opened i.e. per the scenario above, the insolvency procedure should be conducted under Italian law.

For real rights of securities situated in Netherlands, the applicable law would be determined by the conflict of laws rules of the Netherlands. If the assets are established under Dutch law, then Dutch law would apply to the enforcements of those security rights.

3

- (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 6 marks.)

In this scenario, the insolvency proceedings would be determined by Australian law and the EIR does not apply to non-EU countries. Therefore, the insolvency proceedings should be subject to Australian law.

In Australia, the law of real rights of security is governed by the Personal Property Securities Act 2009 and revolves around the concept of security interests. If the assets are established under Australian law, then Australian law would apply to the enforcements of those security rights.

3

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 38.5/50

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