



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.

The distinction between civil law and English law is a salient and relevant one because many national or domestic legal systems are still based on one or the other. When analyzing the insolvency laws of various States, such foundations/historical roots will manifest in the variety of insolvency laws.

Accordingly, civil law systems, or countries, encompass countries such as France and the Netherlands/Holland, Germany, Spain and other various relevant continental European countries. It might be trite to say and very much a stereotype, but civil law systems, in this respect, are (relative to those systems that have their historical roots in English law) significantly more pro-creditor (and conversely, harsher towards debtors). **It would be beneficial to discuss more prominent distinctions, such as the application of common law in countries with historical English ties.** These systems can trace their origins back to Roman law.

On the other hand, England and Wales, the United States of America and Australia are prime examples of insolvency systems that have their historical roots in English law (Anglo-American (common law)). They tend to be, relative to the civil law systems, more debtor-friendly, and by extension, encompass liberal approaches to the concept of rescue and rehabilitation, and the ideas of "fresh starts" for debtors. **Elaboration regarding common law is warranted.**

Similarities between the two systems include the fact that the genesis of insolvency laws sprouted from individual debt-collecting procedures prior to the development of a collective bankruptcy procedure.

2.5

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 a principle or an approach that allows for more than one insolvency proceeding originating in different States to be dealt with under the provisions of a single insolvency law, usually in the State in which the debtor has its centre of main interests. Accordingly, the law of this main proceeding will have *universal* effect, and calls for a unity of proceedings and allowing for the law of that State where the main proceeding takes place to regulate the matter.

Territorialism, in contrast, is the principle that sets out that the consequences of a single insolvency proceeding will only apply to the State where the insolvency proceeding has been opened/has started and can (and will) lead to multiple different insolvency proceedings, in more than one state.

Finally, the principle of modified universalism is, as it names suggests, somewhat of a half-way point or consensus between the above two principles in that modified universalism sets out that the "main proceeding", originating from the State where the centre of main interests have been determined, is supported by secondary or ancillary proceedings in another State. Accordingly, courts dealing with proceedings within this paradigm are to co-operate with each other to achieve the best outcomes within the goals of each matter.

3

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.

Latin American States have achieved some of the most long-lasting multilateral agreements on managing international insolvency issues. A series of general treaties were concluded on private international law and commerce that included at least a chapter or section on bankruptcy/insolvency.

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.

There is scope to elaborate further in your own words

3

Marks awarded 8.5 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.

I would agree largely, but not absolutely, with the statement. Accordingly, I elaborate on my assertion within the context of those three points as follows:-

Some systems use each to mean slightly different things, for example in Australia, insolvency refers to the insolvency of a corporation whilst bankruptcy refers to the insolvency of an individual natural person. Insolvency sometimes means the state of financial affairs of a debtors, while bankruptcy refers to the formal state of being put into a formal bankruptcy proceeding (implying, rightly or wrongly, that the nadir means that there is no turning point for the debtor). Insolvency may refer to balance sheet insolvency or cash flow/commercial insolvency.

The essential characteristics of each or both of these situations include moratoriums against individual debt enforcement, the pooling of the debtors assets that are to be made available to creditors, and finally, the principle that creditors will be paid *pari passu*.

Wood’s discussion is relevant

Finally, whilst both corporate and individual insolvency share in the application of the *pari passu* distribution principle, the notable differences include, but are not limited to, the idea of exempt or excluded assets for individual insolvency in the case of maintenance of the individual, and whilst in the case of corporate insolvency, the goal is to preserve the business if possible, or parts of the business and to impose liability on wrongdoer directors, the goal of individual insolvency is to protect the debtor from harassment by his creditors and to enable to debtor to make a fresh start, especially to take the individual's personal circumstances into consideration/account.

6

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.

In short, the challenges can be summarized as different States having different insolvency laws and policies towards insolvency. Further, there are different cross-border insolvency rules being applied by different States. The issue here is divergent legal systems – even systems sharing the same historical roots in legal tradition might diverge on simple points, eg the different approaches in approaching rescue and rehabilitation between the USA and England (and Wales), in spite of both having their roots of insolvency law stemming from English law.

The current lack of an absolute universal recognition of insolvency proceedings from another State make it difficult for one jurisdiction to recognize foreign insolvency proceedings as well. Although there has been much achieved by the UNCITRAL Model Law on Cross-Border Insolvency, the options for each State to pick and choose aspects of the Model Law they wish to adopt may lead to potential conflicts and disputes as regards the legitimacy of foreign proceedings.

Different States have different rules determining the priority of claims, and these problems are compounded by globalization in which multinational corporations with varying sizes of companies within each jurisdiction, employing different nationalities of employees, paying different levels of tax, all stand in the way of smooth progression of cross-border insolvency issues.

Finally, whilst there has been some advancement in respect of the comity of international courts in respect of cross border insolvency proceedings, much remains to be done in terms of addressing the needs and goals of different stakeholders (who more often than not are located in different jurisdictions, with different goals) under a single umbrella which assumes perfect communication and cooperation between various insolvency courts in different States.

It would be beneficial for you to also consider Friman, Omar and Westbrook’s considerations and the issues listed by them which are relevant to this question

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.

Within the context of international insolvency, "hard law" is characterized by the *written* laws within each State, usually taking the form of classic public international law instruments such as treaties and conventions to which States become signatories, consequently binding themselves and affecting domestic legislation accordingly. On the other hand, "soft law" is characterized by private international law and the unification of, in which multilateral organisations such as the United Nations and the World Bank develop recommendations that relevant States have the option to adopt, with or without modification, as opposed to most, if not all "hard law" that provides for a "take it or leave it"; "all or nothing" approach.

The prime example of “successful” a hard law initiative is the European Insolvency Regulation (EIR) (2000), which gone further than even the Nordic Convention (1993) in achieving genuine multilateral management of international insolvency issues.

By contrast, the prime example of “successful” soft law in the same respect is that undertaken by UNCITRAL, which developed a Model Law on Cross-Border Insolvency (MLCBI). Given the current

number of States that have adopted the MLCBI in some shape or form, it appears that this has been far more successful than the most successful 'hard law' initiative.

3

Marks awarded 10.5 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 primary source of law governing cross-border insolvency recognition in England is the Cross-Border Insolvency Regulations 2006 (CBIR), adopting the UNCITRAL Model Law on Cross-Border Insolvency in 2006. The CBIR provides a framework for the recognition of foreign insolvency proceedings. In particular, Part 2 of the CBIR specifically deals with the recognition of foreign proceedings.

The insolvent estate representative is advised to submit a representation (request for recognition of foreign insolvency proceedings) to the High Court in England & Wales.

The European Insolvency Regulation (Recast) might or might not be relevant, if the insolvency proceedings were initiated prior to the UK's departure from the EU. The European Insolvency Regulation (Recast) applies, if the insolvency where the main proceedings were opened (in this case, America), prior to the expiry of the transitional period (that is 11pm on 31 December 2020).

If the English court is satisfied with the American insolvency proceedings, it may issue a recognition order. This order will grant the representative the authority to deal with Norton Cars Inc's assets in England.

The entire process could also involve an English insolvency practitioner (I am studying to be one ☺), in some shape or form.

It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.

2

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.

It goes without saying that this scenario is one in which involves Italy and Germany. On the basis that both Italy and Germany are members of the European Union, then the European Insolvency Regulation (Recast) (EIR) would be applicable. The EIR provides a framework for the recognition of insolvency proceedings among EU member states.

An updated version of the EIR is the Insolvency Regulation (EU) 2015/848. Accordingly, this applies when the main insolvency proceedings are being commenced within an EU member state, as is the case here (Italy or Germany).

The COMI is a key factor in determining jurisdiction under the EIR. The EIR generally dictates that the main insolvency proceedings should be opened in the member state where the debtor's COMI is located. Accordingly, the main proceeding should likely be commenced in Italy, as the COMI has been shifted there.

Given the complexities of each multinational corporation in the world however, it is necessary to account for the particulars of the company's operations, assets, and management structure to ensure that the genuine COMI of Norton Cars is in Italy. This analysis might need to be carried out by a global elite law firm that specializes in insolvency.

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?

The EU (Recast) Insolvency Regulation (Regulation (EU) 2015/848) applies within the European Union, including its member states only. Therefore, the respective relevant courts in India, South Africa, and Australia are not eligible to directly apply the EU (Recast) Insolvency Regulation.

Recognition of foreign insolvency proceedings outside the EU is often a matter of national law in each jurisdiction. Countries may have their own procedures and rules for recognizing and cooperating with foreign insolvency representatives. Some jurisdictions may have adopted the UNCITRAL Model Law on Cross-Border Insolvency, which provides a framework for cooperation between different countries in insolvency matters, which appears to be the case when consider the EU against these three other jurisdictions.

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.)

Since an insolvency procedure has been opened in terms of Italian law, the main insolvency proceeding would be governed by Italian law. The Italian appointed insolvent estate representative would oversee the administration of the assets, including those discovered in the Netherlands.

As the instant questions concerns Italy and the Netherlands, both of which are members of the EU, then the European Insolvency Regulation (EIR) (Recast) should be applicable for the recognition of the Italian proceedings in the Netherlands.

In particular to the real rights of security situated within the Netherlands then would be subject to Dutch law. This is because the law governing the creation, perfection, and enforcement of security interests typically follows the *lex situs* principle; this law is largely determined by the law of the location of the assets (here, the Netherlands). Accordingly, Dutch law would govern the validity, ranking, and enforcement of these security interests associated with the real rights of security.

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 an insolvency proceeding in Australia, the recognition and enforcement of the Italian insolvency proceeding would depend on Australian law. Obviously, Australia is not a member of the EU, and rather than the EIR (Recast), it is the Cross-Border Insolvency Act 2008 (Cth) that should be relevant for the recognition of foreign insolvency proceedings. Bilateral treaties or reciprocal arrangements between Italy and Australia may also impact the recognition process.

The real rights of security established in Australia would be subject to Australian law. As with my elaboration on the *lex situs* principle as it applies to the real rights of security above, Australian law would govern the validity, ranking, and enforcement of these security interests.

3

Marks awarded 13 out of 15

* End of Assessment *

TOTAL MARKS AWARDED 41/50

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