



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 historical roots of a country's insolvency law system naturally have an effect on the country's approach to dealing with insolvencies of individuals and businesses. Country's insolvency law roots can broadly be categorised as coming either from an English law or civil law tradition, or alternatively having elements of both.

The English common law system relies heavily on legal precedent developed by courts and an adversarial approach in resolving disputes, while the civil law system is more legislation-based with a more inquisitorial approach. An example of this in the context of private international law is that in English common law systems, parties must invoke choice of law issues, failing which the law of forum is applicable. In civil law jurisdictions, on the other hand, foreign law is presumed to be a question of law to be applied whether or not it is pleaded by the parties.

In civil law countries, such as those in Continental Europe, insolvency laws were historically decidedly pro-creditor, reflecting their Roman law roots which focused on a fair collective debt collection procedure for creditors. It was only in the 19th and 20th centuries that many Continental European states introduced the concept of a discharge for debtors. English law was the first to introduce the concept of a statutory discharge for debtors, through the Statute of Ann of 1705. Today, the USA's insolvency law system is seen as being an example of a pro-debtor system. The USA system has its roots in English law, although there are undoubtedly civil law influences too. After reforms in civil law countries in the last two centuries, it is no longer accurate to distinguish between civil law countries as being more pro-creditor than countries with insolvency law roots in English law.

Lastly, in the context of international law, it has been said that civil law countries align more closely with the principles of territorialism while English law countries are more aligned with universalism.

It would also be beneficial to list a number of civil law countries and common law countries. You have only referenced the USA.

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, modified universalism and territorialism, are different international law theories that imply different approaches to dealing with cross-border issues in private international law, including in cross-border insolvencies, which we will focus on in this question.

Universalism, in the context of cross-border insolvency, implies that there should be one set of rules applicable to a particular debtor's insolvency proceedings, no matter where the creditors and assets of the debtor are located. There may be various means of choosing the laws that are applicable to the debtor's insolvency proceedings. For instance, the laws of the country in which the debtor's centre of main interests (COMI) are located may be chosen to apply universally. Universalism has the advantage that all creditors are treated equally, no matter where they are located, but on the other hand, requires that the COMI country has a functional legal system that is trusted. There is also the further potential drawback that there is less certainty over the law that will be applicable to a particular case, which has adverse effects on trade.

Territorialism can be said to be the opposite of universalism, whereby for a particular debtor, insolvency proceedings must be initiated in each state where the debtor has assets and/or creditors. In each insolvency proceeding the laws of that state will apply. While this offers greater certainty for

creditors in that they know that the assets located in a particular country are subject to that country's insolvency laws, it may result in situations where there are sufficient assets in one country to fully repay a debtor's creditors in that country, while in another state there may be insufficient assets to satisfy creditors claims. This results in unequal treatment of creditors in different places.

Due to the world that we live in, where each state has their own laws and governments, and one cannot always rely on states to co-operate. Territorialism is easier to implement in practice. A middle-ground between universalism and territorialism is Modified Universalism, in which there is still a "home country" where the main insolvency proceedings are instituted, while ancillary proceedings run in other states where the debtor has interests. Under modified universalism, the main proceedings may be recognised in other states and courts and states must co-operate with each other to ensure as fair treatment of creditors as possible.

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.

Certain Latin American States have entered into various treaties that specifically address cross-border insolvency issues. These treaties include the Montevideo Treaty on International Commercial Law of 1889, the Montevideo Treaty on International Commercial Terrestrial Law and the Montevideo Treaty on International Procedural Law of 1940, as well as the Havana Convention on Private International Law of 1928 (the Bustamente Code).

Only certain Latin American states have ratified these treaties. For example, Argentina, Paraguay, and Uruguay are the sole ratifiers of the 1940 Montevideo Treaties, while the Bustamente Code has gained approval from various Central and South American states, but excluding Argentina, Paraguay, and Uruguay.

The 1898 Montevideo Treaty, ratified by Argentina, Paraguay, and others, addresses personal and corporate insolvency, establishing rules for the allocation of jurisdiction in insolvency proceedings. If a debtor has a commercial domicile in one treaty state but engages in trade across multiple states, insolvency proceedings will occur in the debtor's commercial domicile. Conversely, if the debtor operates separate businesses in different treaty states, insolvency proceedings may occur concurrently in those states.

Similar to the Montevideo Treaty, the Bustamente Code provides that a single proceeding has universal effect in all treaty states when the debtor possesses only one civil or commercial domicile. Concurrent proceedings are also allowed in different states if the debtor maintains separate commercial establishments in treaty states. However, a distinction between the two treaties lies in the fact that the Bustamente Code lacks provisions for cooperation between states' courts during concurrent proceedings.

Despite this difference, the Bustamente Code does allow for insolvency proceedings initiated in one treaty state to be recognised in another treaty state.

4

Marks awarded 9 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.

Depending on the context, the words “bankruptcy” and “insolvency” may be seen as synonymous. Although the meaning of “bankruptcy” and “insolvency” may overlap in some instances, I would argue that they are subtly different in certain respects.

(i) What meaning may be ascribed to “bankruptcy” and “insolvency”

A common distinction that is made between these two words is that “insolvency” is often said describe an individual or corporation financial status, particularly of being in financial distress. While “bankruptcy” describes the legal status of an individual or corporation resulting from their insolvency.

While this distinction is made in certain contexts, in some countries these two words are seen as synonymous and then again in others, such as Australia, the word insolvency refers typically to the insolvency of a corporation, while bankruptcy refers to the insolvency of a natural person.

(ii) The essential characteristics of bankruptcy and insolvency

“Insolvency”, when describing the financial status of an individual or entity may refer to balance sheet (or factual) insolvency, whereby the person’s liabilities exceed their assets or cashflow (or commercial) insolvency, whereby the person is unable to meet their payment obligations as they fall due. “Insolvency” therefore describes a state of financial distress of either an individual or a corporation where they are unable to pay their creditors in full.

“Bankruptcy”, on the other hand, where it is referring to a person’s legal status, describes a formal legal proceeding which is usually initiated by a court order. Usually bankruptcy proceedings will allow for all claims against the bankrupt entity to “crystallise” on a certain date and for creditors to be paid proportionately from the proceeds of the entity’s assets, although certain creditors may rank ahead of others in respect of the proceeds of certain assets.

It would also be beneficial to refer to Wood in relation to this issue

(iii) Differences between corporate and individual “bankruptcy” / “insolvency”

In both individual and corporate insolvency / bankruptcy proceedings, a primary objective is that creditors must be treated fairly and obtain their proportionate share of the debtor’s assets, subject to preferences that certain creditors may have resulting from security agreements or as a result of statutory provisions. Furthermore, another commonality is that the trustee / liquidator / administrator of an insolvent estate of an individual or corporation is provided with powers to set aside voidable dispositions of assets which would, for instance, have resulted in certain creditors being unduly preferred.

Where an individual is bankrupt, certain other considerations, such as protecting that individual from harassment from creditors, and providing the individual with a fresh start (provided that the individual is not at fault or at least, less so) are also seen as important. In the case of individual insolvencies, the individual’s livelihood and ability to survive must also be taken into account, which is why certain assets which are essential to the individual’s survival are excluded from their estate which is made available to creditors.

Under corporate insolvencies, the emphasis is on a fair and efficient process which also allows for the viable parts of a financially distressed business to be rescued. Where individuals are culpable in having caused the corporate insolvency through unlawful or wrongful conduct, liability is imposed on those individuals, including criminal proceedings in some circumstances.

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.

There are various challenges that make it difficult to develop a single global cross-border insolvency dispensation. Below I will discuss the following challenging aspects – (i) differing legal systems and difficulties in choosing which laws apply; (ii) difficulty in international co-operation; (iii) differing levels of resources available in countries.

Legal systems in different countries have different roots, and therefore the rules regarding insolvency in different countries vary. Westbrook, has identified nine key issues in cross-border cases and lists conflict of law issues as being one of those. **It is important to list the 9 issues** One challenge therefore in developing a single global cross-border insolvency dispensation, is choosing whose rules to apply. This is made more difficult by the fact that different parties are likely to be favoured depending on which rules are applied in particular insolvency proceedings. Certain countries may be more debtor friendly than others, or their insolvency laws may emphasise different objectives in insolvency proceedings. For instance, in a more pro-debtor regime, the emphasis may be on rehabilitation of the debtor, while conversely, some systems may emphasis that the debtor should be held responsible for creditors' losses. These differences in approach make it difficult to impose a universal set of insolvency laws that would apply across countries, or alternately to at least impose rules that decide whose rules apply in which circumstances.

Apart from the difficulties in choosing which rules should apply in a cross-border insolvency dispensation, as is the case in various realms of international law where vastly different cultures and worldviews are required to work together, it is not always easy to get legal systems to co-operate in recognising foreign insolvency proceedings and/or enforcing foreign judgments. This may be done through multilateral treaties, but not all countries are necessarily willing to agree to such treaties.

A further challenge in cross-border insolvencies is that not all countries have the same level of resources to commit to their legal systems and specifically to resolve insolvency matters. A developed country and creditors in a developed country may be suspicious of, or find it difficult to trust, the insolvency proceedings initiated in a country which may have less resources and where the insolvency practitioners in those countries may be perceived as having less skill or training to handle complex matters.

You raise some very relevant considerations. It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook in detail.

4.5

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.

In the context of international law and also specifically international insolvency, soft law and hard law refer to different legal rules that may apply to cross-border insolvencies. Generally, “hard law” refers to legally binding rules that must be adhered to, while “soft law” refers to guidelines that are more flexible and are not legally enforceable.

An example of “hard law” in the context of international insolvency are multilateral treaties such as the European Insolvency Regulation (EIR) (2000) which applies across the EU states. This has been an

example of “hard law” that has had success in developing a cross-border insolvency framework. In the EU, which is an existing free trade area, it is arguably easier to achieve multilateral co-operation in order to make hard law work effectively, than it may be in other parts of the world.

Arguably the most successful “soft law” approach has been that undertaken by UNCITRAL, in formulating the Legislative Guide on Insolvency Law, as well as developing a Model Law on Cross-Border Insolvency that has been adopted by various states across the world and therefore has had greater influence than any “hard law”, whose influence, in the context of insolvency, has often been limited to geographical areas.

3

Marks awarded 13.5 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 applicable sources of English law that apply are relevant case law and legislation, in particular, the UK Cross-Border Insolvency Regulations of 2006, which provide for the UNCITRAL Model Law to have force of law in the UK.

The insolvent estate representative must submit an application pursuant to the provisions of Part 2 of the Cross-Border Insolvency Regulations in order to be granted recognition by English courts.

This sub-question required greater elaboration and detail.

2.5

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.

EU (Recast) Insolvency Regulation.

Take care to answer each sub-question in full with sufficient detail and explanation.

1

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, as neither of those countries are members of the EU. At most, the EU (Recast) Insolvency Regulation may have persuasive value for the courts of India, South Africa and Australia.

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 7 marks.)

The law of the Netherlands will apply in respect of real rights of security located in the Netherlands.

Take care to answer each sub-question in full with sufficient detail and explanation.

2

- (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.)

The law of Australia will apply in respect of real rights of security located in Australia.

Take care to answer each sub-question in full with sufficient detail and explanation.

2

Marks awarded 8.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40/50

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

