



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 7 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.

[India is a country where its insolvency laws are rooted from English law, The English Insolvency law's is regulated by the Insolvency Act 1986, the insolvency act is an example of unified insolvency legislation and deals with consumer and corporate bankruptcy, The Netherlands, The Dutch insolvency law and most South American countries ie Brazil on the other are rooted by a civil law system, a distinction between the two can be made that Civil law system countries try to rehabilitate distressed business's whereas English law countries focus on individual creditor rights.]

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

1.5

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 where its believed that only one insolvency proceeding should occur, the insolvency proceeding should take place in the state where the debtors main interests are located, the proceeding should encompass all the debtors assets irrespective of where they are located, Modified universalism is where the proceeding is opened in the state where the debtors main interests are located and supported by secondary or ancillary proceedings, the proceedings allow for deviations to accommodate local laws and interests. The principle of territorialism is where the insolvency proceedings will only apply to the state where the proceedings were opened, this can lead to many proceedings taking place The insolvency of a debtors assets with be handled within borders independently.]

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.

[UNCITRAL model law on cross border Insolvency, provides a frame work for the recognition and coordination of cross border insolvency proceedings, some Latin American countries have adopted the model law to enhance co operation and communication in cross border insolvency,]

A discussion of the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code) was needed.

0

Marks awarded 4.5 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 is a legal status or process that occurs when an individual or a business is unable to repay its debts and seeks legal protection from creditors, insolvency refers to the financial condition of being unable to meet one's obligations as and when they become due mainly in the ensuing 6 months. It is a broader financial state than bankruptcy. Bankruptcy often involves formal legal proceedings initiated by the debtor or creditors to resolve the financial difficulties, either through liquidation or a structured reorganization. Insolvency may not always result in a formal legal process like bankruptcy. It is a financial state that can be addressed through various means, including negotiations, debt restructuring, or other out-of-court settlements. Bankruptcy Involves a formal legal process, often initiated by the debtor or creditors, Results in a legal declaration of the debtor's inability to meet financial obligations, May lead to the liquidation of assets or a court-supervised reorganization plan. Insolvency on the other hand represents a financial condition where liabilities exceed assets, making it difficult to meet financial obligations, Can be resolved through various means, including negotiations, debt restructuring, or legal processes like bankruptcy. Corporation Insolvency Involves a legal process that may include liquidation or reorganization of a company's assets, The focus is often on preserving the business as a going concern or maximizing creditor returns, Formal procedures like Chapter 11 in the United States or chapter 6 in South Africa allow companies to restructure and continue operations. Individual Insolvency aims to provide relief for individuals overwhelmed by debt, either through liquidation or a structured repayment plan, the focus may be on providing individuals with a fresh start or a reasonable path to repay debts]

There is scope to elaborate, for example with respect to exempt property and Wood's consideration of essential features. It is also relevant that in some countries, such as Australia, insolvency refers to corporate financial distress and bankruptcy refers to individual financial distress.

4

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 numerous challenges that can arise in cross border insolvencies that make it difficult to develop a single global cross border insolvency dispensation, without a universal legal framework, efforts to streamline cross-border insolvency proceedings face significant obstacles, within regions, inconsistencies in insolvency laws exist, making it difficult to establish standardized procedures. The lack of consistency complicates efforts to create a seamless global dispensation. Recognition and enforcement issues, this is due to the different legal standards and procedures, creditors may face difficulties in asserting their rights in foreign jurisdiction which could lead to delays and inefficiencies, Creditor and Priority and rights, Creditor rights and priorities can vary, and different legal systems afford different levels of protection to creditors, Developing a global dispensation requires reconciling these differences to establish a fair and universally acceptable hierarchy of creditor claims. Diverse Legal Systems, Countries have different legal traditions, such as civil law and common law systems, with distinct approaches to insolvency and legal proceedings, Harmonizing laws and procedures becomes complex, as legal concepts, priorities, and processes differ significantly]

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 laws are legally binding, providing a clear and enforceable framework for cross-border insolvency, they offer a level of legal certainty, as parties can rely on specific provisions and mechanisms outlined in the laws. Achieving widespread ratification and adoption of hard laws can be a lengthy process, and not all countries may be willing to adopt uniform legal frameworks. Hard laws can be less adaptable to changing circumstances and may not easily accommodate the diverse legal traditions across jurisdictions. Soft laws provide flexibility, allowing for adaptation to different legal systems and practices, they encourage voluntary cooperation and coordination among jurisdictions, fostering a spirit of goodwill and collaboration. Lack of legal enforceability can lead to inconsistent application, and adherence to soft law principles relies on the willingness of jurisdictions to voluntarily comply. Soft law may lack the authoritative force needed to compel reluctant jurisdictions to adopt recommended practices. The effectiveness of hard and soft laws in addressing the challenges of international insolvency depends on various factors, including the degree of international cooperation, the willingness of jurisdictions to adopt uniform standards, and the specific features of each legal system. A balanced approach that combines the enforceability of hard law with the flexibility and cooperation-promoting aspects of soft law may offer a more comprehensive solution to the complex issues of cross-border insolvency. Refining international insolvency frameworks will likely involve a combination of both hard and soft law elements]

Examples of hard and soft laws are required, together with a greater consideration of the success of the different laws.

2.5

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.

[In the context described, where Norton Cars Inc has filed for liquidation in the USA but the company's main place of business and headquarters were previously located in England, and considering that the COMI has moved to Italy post-Brexit, the applicable English cross-border source for recognition in terms of English law is likely to be the Cross-Border Insolvency Regulations 2006. The Cross-Border Insolvency Regulations 2006 in the United Kingdom is based on the UNCITRAL Model Law on Cross-Border Insolvency and provides a framework for the recognition of foreign insolvency proceedings. The Model Law is designed to facilitate cooperation and coordination between jurisdictions in cross-border insolvency cases. In this scenario, the American insolvent estate representative may use the Cross-Border Insolvency Regulations 2006 to request recognition of the American insolvency proceedings in England. The representative would typically apply to the English court for recognition, and upon recognition, the proceedings would be treated as a foreign main proceeding]

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.

[In a cross-border insolvency matter between Italy and Germany, the appropriate legal source to be used is the European Union Regulation on Insolvency Proceedings (Regulation (EU) 2015/848), commonly known as the Recast EU Insolvency Regulation. This Regulation is designed to provide a unified and harmonized framework for the recognition and coordination of insolvency proceedings within the European Union. The Recast EU Insolvency Regulation governs cross-border insolvency proceedings involving EU member states, including Italy and Germany, It establishes rules for determining jurisdiction, recognition, and cooperation among the member states. The Regulation sets out the principle that the main insolvency proceedings should be opened in the member state where the debtor's Center of Main Interest (COMI) is located. In cross-border insolvency, the location of the debtor's COMI is a crucial factor in determining jurisdiction for the main insolvency proceedings, the main operations are transpiring in Germany with management directed from Italy, then the COMI is likely in Italy. Therefore, the appropriate approach would be to open the main insolvency proceedings in Italy. The Recast EU Insolvency Regulation allows for coordination between main and secondary proceedings in different member states. Secondary proceedings may be opened in other member states where the debtor has an establishment]

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, Recast EU Insolvency Regulation is applicable within the European Union and does not extend its jurisdiction to courts outside the EU member states]

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.)

[The EU Regulation on Insolvency Proceedings, commonly known as the Recast EU Insolvency Regulation, provides rules for such situations, The insolvency proceedings would be subject to Italian law, as the main proceedings are opened in the jurisdiction where the debtor's Center of Main Interest (COMI) is located. In this case, assuming the COMI is in Italy, Italian law governs the insolvency proceedings. The law governing the real rights of security situated in the Netherlands would typically be determined by the lex situs principle, which means the law of the place where the assets are located. The Italian insolvency representative would need to seek recognition of the main insolvency proceedings in the Netherlands and cooperate with Dutch authorities, The assets are subject to real rights of security in the Netherlands would involve navigating Dutch law, including any rules regarding the enforcement or realization of secured assets. The Italian insolvency representative would need to coordinate with Dutch authorities and navigate Dutch law in addressing the secured assets in the Netherlands]

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.)

[An insolvency procedure has been opened in terms of Italian law, and assets of Norton Cars Inc are discovered in Australia, subject to real rights of security established in terms of Australian law, the applicable law for the insolvency proceedings in Australia and the real rights of security would be determined by Australian law, The law governing the real rights of security situated in Australia would typically be determined by the lex situs principle, which means the law of the place where the assets are located, the Italian insolvency representative would need to seek recognition of the main insolvency proceedings in Australia and cooperate with Australian authorities, Dealing with assets subject to real rights of security in Australia would involve navigating Australian law, including any rules regarding the enforcement or realization of secured assets. The applicable law for the insolvency proceedings in Australia is Italian law as the main proceedings are opened in Italy. With respect to the real rights of security situated in Australia, the applicable law would be determined by the lex situs principle, which is Australian law. The Italian insolvency representative would need to coordinate with Australian authorities and navigate Australian law in addressing the secured assets in Australia]

3

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 32.5/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.