



**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 12<sup>th</sup> 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.

Countries whose insolvency law systems have historical roots in civil law and those with historical roots in English law differ in various aspects.

Firstly, civil law systems have their origins in Roman law, which has a highly codified system. As such, such countries have their legal rules systematically written in legal codes – these include countries such as Germany, France, and Japan. On the other hand, English law-rooted jurisdictions are based on court-made rules, evolving from judicial decisions over time. Such countries include the UK, and often include former British colonies. **It would be beneficial to list some relevant countries**

Secondly, civil law system insolvency proceedings are governed by comprehensive statutes set forth in their legal code. There are many detailed regulations and procedures that are followed by the courts. On the other hand, insolvency proceedings may be less codified and more reliant on historical precedent in common law systems. Thus, though there are statutes and regulations which dictate the flow of proceedings, judges often have discretion and leeway as to defining how proceedings occur.

Thirdly, judges play different roles. In civil law proceedings, courts play a largely administrative role, where insolvency practitioners manage proceedings. On the other hand, judges not only oversee, but also make important decisions in the insolvency proceedings in common law jurisdictions, with case law guiding their decisions.

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 and territoriality are the two main approaches popularly set forth to deal with cross-border insolvency. Modified universalism, on the other hand, strikes an intermediate, pragmatic approach between the two.

Universalism advocates for a single, global insolvency proceeding, where one court would oversee the entire process, involving the debtor's global assets. Territorialism is the opposite – that each jurisdiction would independently handle insolvency proceedings for assets located within its own borders. Modified universalism balances global efficiency with local interests – acknowledging that primary proceedings ought to take place in a debtor's home jurisdiction (where the debtor's main interests lie), but also allows for secondary proceedings in jurisdictions where there are significant debtor assets or operations. **There is scope to elaborate here, for example with respect to COMI**

Crucially, there also lies an important distinction for creditors. Under universalism, creditors from all jurisdictions are treated equally under the laws of the state where the proceeding is held. Under territorialism, however, this may lead to inconsistent outcomes for creditors that are located in different jurisdictions, and creditors may have issues enforcing or gaining recognition of foreign orders if assets are located in a different jurisdiction. Thus, modified universalism appears to strike an appropriate balance, where there is sufficient mutual recognition, with consideration being made for local rights and legal peculiarities.

2

**Question 2.3 [maximum 4 marks]**

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

The initiatives undertaken in Latin America to assist with the resolution of international insolvency largely take the form of multilateral agreements. These treaties are in the form of the Montevideo Treaties (1889) and (1940), and the Havana Convention on Private International Law (1928) (Bustamante Code).

The 1889 Montevideo Treaty covers personal and corporate insolvency. Particularly, it allocates bankruptcy jurisdiction. On the other hand, the 1940 Treaty concerns Title VIII on Bankruptcy.

The Havana Convention on the other hand centralises bankruptcy or insolvency proceedings – its focus is on providing a single proceeding. However, the Havana Convention does not provide procedures for cooperation or coordination of concurrent proceedings. Yet, at the same time, where there has been a proceeding commenced, it enforces the courts' decrees from the time of their pronouncement, subject only to local rules of registration or publicity.

**There is scope to elaborate for example with respect to the different members of the different agreements**

**3**

**Marks awarded 7 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.

The terms “bankruptcy” and “insolvency” are related and often used interchangeably – however, I contend that as a matter of legal precision, such use is mistaken. Both concepts are distinct in legal proceedings and play especial importance because their applications may vary significantly.

First turning to definitions and general characteristics, insolvency refers to a financial state where the debtor is unable to service debts as they mature, or when liabilities exceed the value of assets. On the other hand, bankruptcy is a formal legal process that recognises that an entity is unable to meet debt obligations. Insolvency does not automatically lead to a legal declaration of bankruptcy, and rather involves an assessment of assets and liabilities that *may* lead to various legal proceedings to resolve such an issue. Bankruptcy is a legal position that may lead to liquidation or re-organisation of assets, affecting the legal rights and obligations of all parties involved.

Second, turning to essential characteristics, insolvency is a state of financial distress, rather than a legal status. Thus, while indicating financial trouble, it does not automatically in itself trigger legal proceedings, though leaving the entity in such a state in itself may lead to legal proceedings. The key issue is the lack of liquidity, the inability to pay debts as they become due. On the other hand, bankruptcy is a formal legal status that is declared by the court or initiated through legal filing. Bankruptcy triggers a structured process for resolving debt, which could lead to a reorganisation or (in corporate bankruptcy) or liquidation. As compared to insolvency, bankruptcy proceedings are



public and thereby may have significant legal and financial consequences for the debtor. **It would be beneficial to consider the matters raised by Wood**

Third, there are differences when the entity in focus is in insolvency/declared bankrupt. Most crucially, there remains a possibility for an individual to receive a discharge of debts, freeing the person from specific obligations after going through the formal bankruptcy proceedings. On the other hand, corporations do not enjoy such discharge. If the business continues, it must still address its restructured debts, and will not otherwise be freed of such debts.

**Exempt property and the objectives of individual vs corporate insolvency are also relevant**

**5.5**

**Question 3.2 [maximum 5 marks]**

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

There are several challenges that would arise in cross-border insolvency, thereby rendering the development of a single cross-border insolvency dispensation incredibly challenging. Of particular focus, these are (1) the choice of words, (2) the differences in the positions that creditors and debtors find themselves in in each jurisdiction, and (3) various miscellaneous technical differences between each local system.

Firstly, choice of words is a challenge because “insolvency” deals with a plethora of situations, broadly when an entity (be it a corporation or natural person’s) liabilities exceed its assets. However, exactly when this state triggers insolvency regulation differs from jurisdiction to jurisdiction, as insolvency is measured for a wide variety of situations, such as long- or short-term debts. This issue is further complicated as many cross-border treaties and agreements do not attempt to define such a state of “insolvency”, rather, leaving it to local jurisdictions to determine. Thus, ensuring that the financial state the debtor is in “counts” as insolvency across the various jurisdictions in which proceedings are desired to be opened in is a difficulty when dealing with cross-border insolvencies.

Secondly, the starting position of creditors and debtors in each state vary. As a matter of default legislation and local custom, countries have put both parties in different starting positions, which mean a complicated matrix grid of decision-making when acting for parties in cross-border matters. Parties would have to make trade-offs in terms of which priorities are asserted across the various matters, depending on the degree of universalism and territoriality that is being enforced in the local system of systems. Thus, managing such various interests is another challenge.

Thirdly, Westbrook states several other technical differences that parties in cross-border insolvencies must resolve for successful insolvencies to complete. These include: standing for foreign representatives, moratoriums on creditor actions, creditor participation, executory contracts, coordinated claims procedures, priorities and preferences, avoidance provision powers, discharges, and conflict of law issues. Obviously, this entails a complex resolution of each issue in each jurisdiction to which the debtor and creditors are involved in, which result in lengthy discover and negotiation processes.

**5**

**Question 3.3 [maximum 3 marks]**

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

“Hard law” and “soft law” represent different categories of legal instruments with varying degrees of enforceability and influence.

Hard law refers to legally binding agreements or regulations with clear obligations and consequences for non-compliance. These are often formal legal instruments – such as treaties and conventions, enacted by sovereign states or international organisations, through formal domestic adoption processes. An example of this would be the European Union’s Regulation on Insolvency Proceedings. Such “hard law” can be effective due to their binding nature, though to reach such a state of effectiveness, it requires states to be willing to enter into such agreements, which often has a high threshold, followed by the continuing challenge of harmonising legal systems. Thus, the main challenge with such instruments is achieving consensus and ratification across countries with diverse traditions.

Soft law, on the other hand, encompasses non-binding instruments. These include guidelines, principles, and recommendations. These are generally agreements or instruments that have persuasive authority, but do not have any formal mechanisms of enforceability. The UN Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency is an example of soft law. “Soft law’s” effectiveness is limited to be highly influential in shaping practices and harmonising approaches, which often time a more pragmatic solution compared to hard laws. Their success relies instead on widespread acceptance and implementation within national legal systems. Thus, the main challenge is that they serve merely as a template, and not rather as a fixed method of harmonisation – rather, relying entirely on the willingness of jurisdictions to conform.

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 American insolvent estate representative ought to consider the following English cross-border insolvency sources.

Firstly, the Cross-Border Insolvency Regulations 2006, which implements the UNCITRAL Model Law on Cross-Border Insolvency. This provides the legal framework for the recognition and assistance of foreign insolvency proceedings. The representative would have to apply to the English court for recognition of the American insolvency proceedings under such regulations, which would ideally result in the grant of powers to deal with assets located in England.

Secondly, the Insolvency Act 1986, particularly sections 426 and 427 which deal with cooperation with courts in other jurisdictions in insolvency matters. This may assist in facilitating cooperation between the jurisdictions. **S426 does not apply as the US is not designated**

Thirdly, there may also be transitional provisions of the EU's Insolvency Regulation that still apply because Norton moved its headquarters to England before the UK's exit from the EU. Thus, there is a possibility that the American proceedings could be recognised as secondary proceedings under the EU Insolvency Regulation.

#### **Common law is also relevant**

**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.

With its COMI in Italy, the appropriate legal source will be European. Namely, the European Union Insolvency Regulation (Recast) 2015/848. This applies to EU member states. COMI is determined under the Regulation by the place that the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties. **It is relevant to discuss how Germany and Italy are both EU members and explain that as the reason the EIR Recast applies.**

The main insolvency proceedings should be located in the country where the COMI is located – which in this case is Italy. These proceedings have universal scope and aim to encompass all the debtor's assets. Italian law would be applicable for the main proceeding – its framework would be used to determine the specific procedures and effects of the insolvency.

If there are establishments in Germany, where there is non-transitory economic activity, secondary insolvency proceedings can be opened there. Such proceedings are limited to the assets located in the jurisdiction and are aimed at protecting the interest of local creditors.

**3**

#### **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?

Yes.

**The answer is no. Further consideration and elaboration is warranted also.**

**0**

**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.)

EU Insolvency Regulation (Recast) 2015/848 is applicable as the primary legal framework governing cross-border insolvency matters within the EU. As both Italy and the Netherlands are EU member states, this regulation applies.

Article 8 of the EU Insolvency Regulation states that the law of the country where the asset is located governs the rights in rem of third parties. Thus, Dutch law would apply.

While insolvency proceedings of Norton are governed by Italian law under the EU Insolvency Regulation, the real rights of security on assets located in the Netherlands are subject to Dutch law.

**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 7 marks.)

The primary insolvency proceedings are opened under Italian law – however, the recognition and effect of such proceedings differ from above, because it is dependent on whether Australian law recognises foreign insolvency proceedings.

Australia has adopted the UNCITRAL Model Law on Cross-Border Insolvency, providing a framework for recognition of foreign insolvency proceedings. Thus, the Italian insolvency representative may apply to Australian courts for recognition of Italian proceedings.

The real rights of security over assets located in Australia will be governed by Australian law.

**3**

**Marks awarded 11.5 out of 15**

**\* End of Assessment \***

**TOTAL MARKS 39/50**

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