



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 globalization 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 center 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 consider foreign law as a question of law and it is applied regardless of whether it is pleased or not while for countries whose insolvency systems have historical roots in English Law apply the law of the forum and issues of the choice of law to be applied only arise where the parties to the proceedings invoke them. ¹]

A better approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries of codification in civil jurisdictions.

1

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.

[The principle of universalism calls for one insolvency proceeding covering all the debtor's assets worldwide and the insolvency office holder enabled with the tools to control and obtain all the assets, with all creditors having the opportunity to participate in the proceedings and all their claims treated equally. **There is scope to elaborate here regarding COMI.** While the principle of territorialism allows for multiple proceedings against the same debtor running concurrently limiting the rights of the creditors and the powers of the insolvency office holder to the state where the proceedings are opened. However, modified universalism aims at having a bit of universalism and territorialism by allowing a main proceeding to be opened in a state where the center of the main interest has been determined which may be supported by secondary or ancillary proceedings in another state allowing for cooperation between the courts. ²]

2.5

Question 2.3 [maximum 4 marks]

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

[Latin America has one of the most unified systems in the world with all the countries in South America signing up to the Union of South American Nations Agreement which aims at having a supra-national law along the lines of the European Union. They also have one of the most long-lasting multilateral agreements like the Montevideo treaties of 1889 and 1940 and the Havana Convention on Private International Law of 1928. However, the later convention is more supportive of a single proceeding with a universal effect than the Montevideo treaties than the Montevideo treaties. ³]

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

3

Marks awarded 6.5 out of 10

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

¹ Foundation Certificate in International Insolvency Law, Module 1, Guidance Text, Introduction to International Insolvency Law 2023/2023. Pg. 45

² Supra, Pgs. 37,38 and 48

³ Supra Pg. 11 and 61

Question 3.1 [maximum 7 marks]

It is said that the terms “bankruptcy” and “insolvency” may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to “bankruptcy” and “insolvency”, (ii) the essential characteristics of “bankruptcy” and “insolvency” and (iii) any differences that may arise when a “bankruptcy” / “insolvency” involves a corporation rather than an individual.

[I do agree that the terms bankruptcy and Insolvency may be used interchangeably. However, this depends on the jurisdiction and the law applicable.

Black’s Law Dictionary defines bankruptcy as the quality, state, or condition of being without enough money to pay back what one owns while insolvency is defined as failure to meet obligations.⁴

Insolvency can be a state of financial affairs of the debtor while bankruptcy is a formal state of being put into a formal bankruptcy proceeding.⁵ Most jurisdictions use the term bankruptcy in relation to individuals and insolvency in relation to corporate entities.

While the term insolvency relates to both individuals and companies. Insolvency has been defined broadly as the inability to meet one's debts either because of a lack of available cash at the relevant time or more fundamentally because the total liabilities exceed the assets that can be made available to them. While bankruptcy focuses on the individual, insolvency looks at the individual or corporation, the creditor, and the society. However, balancing the interests of all these parties is a matter of policy.⁶)

The Key difference is that in bankruptcy proceedings, protect the debtor from harassment by his creditors to enable the debtor to make a fresh start and reduce on his indebtedness while taking cognizance of his personal circumstances. Some items of the bankruptcy are protected and may not be brought to the pool for all creditors to share. Some of these include personal items like clothes and assets of dependants.⁷ While where a company or corporation is involved all the assets that the company owns are affected by the insolvency proceedings and the insolvency office holder is expected to collect all of them for the benefit of all the creditors. However, what is constant is that the creditors of individuals and corporations all get fair treatment in the order of priority]

Essential characteristics warrant further discussion

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.

The following issues contribute to the challenges to having a global cross-border dispensation;

- a) The lack of a global court to handle insolvency matters hence leaving the only option available to countries as cooperation and coordination where there are concurrent insolvency proceedings.

⁴ Black’s Law Dictionary 11th Edition.

⁵ Foundation Certificate in International Insolvency Law, Module 1, Guidance Text, Introduction to International Insolvency Law 2023/2023 Pg. 18

⁶ Tolmie, F. , “Corporate and Personal Insolvency Law,” 2nd Ed. 9781135336233 at <https://books.google.co.ug/books?id=fH2NAgAAQBAJ> Pg. 3

⁷ Foundation Certificate in International Insolvency Law, Module 1, Guidance Text, Introduction to International Insolvency Law 2023/2023Pg. 19

b) Many of the national and international laws on insolvency lack structure both formally and informally with cross-border cases. While many states are adopting the UNCITRAL Model Law on Cross Border Insolvency others are hesitant to adopt the same. Therefore where a debtor has assets in such jurisdictions it becomes complicated to deal with the assets.

c) Most countries have outdated laws or the laws do not support modern-day trading for example some cross-border laws have aspects of reciprocity and yet have no reciprocating arrangements with any state and end up hindering debtors from other jurisdictions that have adopted the UNCITRAL MLCBI.

d) Lack of cooperation and coordination where there are concurrent proceedings. Some insolvency laws are affected by the laws of the country in terms of jurisdiction, and the rights to consider first and they focus on protecting these rights over the rights of the foreign creditors. There by hesitating on coordinating and cooperating.

d) Some systems emphasize issues that may be more relevant in a domestic sense as is the case in France

e) Unwillingness to prioritize foreign creditors over local creditors in terms of benefiting from the assets of the debtor⁸.]

Until all countries harmonise their laws to fit within the guidelines of UNCITRAL MLCBI it will be hard to have a global cross border dispensation.

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

2

Question 3.3 [maximum 3 marks]

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

[Hard law is a law that is legally binding in terms of enforceability and these include conventions and treaties. However, for them to be legally binding on the parties they have to be ratified and domesticated into the domestic law like the United Nations International Bill of Human Rights which consists of the Declaration of Human Rights, and the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights and it's two protocols while soft law is made of non-binding guidelines or principles an example is the UNCITRAL Model Law on Cross Border Insolvency that is merely a guideline for states as they amend or formulate their cross border laws.

Many countries in a bid to resolve international insolvency issues have ratified or acceded to treaties and conventions which they have domesticated. It should be noted that the success of either hard or soft law is dependent on the willingness of the countries to cooperate and coordinate.⁹

The European Insolvency Regulation of 2000 was the most successful hard law as it influenced border multilateral developments in international insolvency law while the most successful soft law has been the UNCITRAL Model Law on Cross Border Insolvency which has been adopted by a number of states.

3

Marks awarded 10.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business

⁸ Supra 36,37

⁹ Supra 45,46,47

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.

[England and Wales adopted the UNCITRAL Model Law on Cross Border Insolvency in 2006 while it was adopted by America in 2005. Therefore the estate representative will proceed under the Cross Border Insolvency Regulations of 2006 of England and Wales and apply for recognition of the proceedings.]

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.

[The applicable Law is the European Union Regulations 2015/848 of the European Parliament and the Council of 20th May 2015 on insolvency proceedings also known as the EIR Recast. The main proceedings should be in Italy since it holds the COMI and the management is directed from there.]

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, they would not be eligible because the EU (Recast) applies to members of the European Union.

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 law of the state where the proceedings were commenced would dictate. Therefore the Italian law would prevail while the domestic laws in the Netherlands and Australia would apply.]

There is scope to elaborate, also Australia is not relevant to this sub-question.

1.5

- (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.)

[The law of Australia will apply as the Recast does not apply to Australia.]

There is scope to elaborate and the MLCBI warrants consideration

1.5

Marks awarded 10 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 34/50

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