



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.

Countries whose insolvency law systems have historical roots in English law include England, the United States of America, Australia and India. Countries whose insolvency law systems have historical roots in civil law include The Netherlands, France, Germany and Spain. Many South American countries are also civil law countries. African countries largely follow the laws of their respective former colonial powers, meaning some have an English law tradition and some have a civil law tradition. However, some African countries have a mixed legal system.

This answer also required a discussion of the common law aspect of English law in greater detail, and in comparison with codification.

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 or universality is about there being only one insolvency proceeding in a single forum covering all of the debtor's assets and debts worldwide or, if there is not a single forum, a worldwide or single insolvency law whereby the law in the State where the debtor has its centre of main interests, in which a "main proceeding" is commenced, has worldwide effect. As stated in Part 5.2.2 of the Guidance Text:

"Whatever the approach, it is based on the premise that all the debtor's assets should be included in the insolvency proceeding and the officeholder should be provided with the tools to control and obtain all the assets. All creditors worldwide should have the opportunity of participating in the proceedings with all claims being treated on an equal basis."

By comparison, as stated in Part 5.2.3 of the Guidance Text:

"The principle of territorialism is diametrically opposed to the principle of universalism and is based on the premise that insolvency proceedings may be commenced in every State / jurisdiction where the debtor holds assets, but that they should be territoriality limited and restricted to property within the State where the proceedings are opened. In terms of this principle, it would be possible to have multiple insolvency proceedings running concurrently in regard to the same debtor ..."

With respect to modified universalism, as stated in Part 5.2.4.3 of the Guidance Text:

"Since global consensus regarding universalism has not been (and probably never will be) reached and many States are closer to an approach based on territoriality, the notion of "modified universalism" has emerged. Where this approach is adopted, the "main proceeding", opened in the State where the centre of main interests has been determined, is supported by secondary or ancillary proceedings in another State. In such instances, the courts dealing with the respective proceedings are supposed to co-operate with each other."

You have provided a reasonable summary. It would be beneficial to elaborate further in your own words.

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.

There are several treaties or conventions – the Montevideo Treaty on International Commercial Law (1889), the Montevideo Treaty on International Commercial Terrestrial Law (1940), the Montevideo Treaty on International Procedural Law (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code).

As summarised in Part 6.4.2.1 of the Guidance Text, the 1889 Treaty covers personal and corporate insolvency and allocates bankruptcy jurisdiction based on the debtor’s commercial domicile (including providing for the possibility of concurrent proceedings where the debtor has two or more economically autonomous businesses in different treaty States).

As stated in Part 6.4.2.2 of the Guidance Text:

“The Havana Convention is more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout its region ...

...

Nevertheless, there may be concurrent proceedings in Havana Convention States that contain commercial establishments operating entirely separately economically. It therefore adopts a similar approach to the Montevideo Treaties of providing for a single proceeding if the debtor is only occasionally trading in more than one State, or only has branches or agents in another contracting State. However, where there are concurrent proceedings, the Havana Convention does not provide procedures for co-operation or co-ordination of any concurrent proceeding.”

Further, as stated in Part 4.1.2.3 of the Guidance Text:

“... All the South American countries have also recently signed up to the Union of South American Nations agreement, which aims to establish a system of supra-national laws along the lines of the European Union ...”

Greater elaboration is needed with respect to relevant differences

2

Marks awarded 6.5 out of 10

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

Question 3.1 [maximum 7 marks]

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

I do not agree that the terms “bankruptcy” and “insolvency” may be used interchangeably.

Principally that is because they can have different meanings. As stated in Part 4.2.2.1 of the Guidance Text:

“... Firstly, it must be noted that some systems use the term “insolvency” and others “bankruptcy”. Some systems use both to mean slightly different things, for example, in Australia “insolvency” is often used to refer to the insolvency of a corporation, whereas “bankruptcy” is often used to refer to the insolvency of an individual natural person ...

There is scope to elaboration regarding different meanings ascribed to the terms

That said, as summarised in Part 4.2.2.1 of the Guidance Text, Wood lists certain possible essential features of both insolvency and bankruptcy that are said to be universal principles (although he goes on to discredit them to some extent as well). These are:

actions by individual creditors against the bankrupt are frozen;
the assets are pooled which become available to pay creditors; and
creditors are paid parri passu.

Other universal principles, identified by Sealy and Hooley (see Part 4.2.2.1 of the Guidance Text) are to ensure that secured creditors deal fairly towards the debtor and other creditors, to investigate reasons for failure, to reclaim voidable dispositions where the insolvent debtor improperly dealt with assets.

However, there are also differences between the objectives of bankruptcy or insolvency for individuals and corporations that were identified by Sealy and Hooley (see Part 4.2.2.1 of the Guidance Text):

the objectives for individuals are to protect the debtor from harassment by his creditors, to enable the debtor to make a fresh start and to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration;
the objectives for companies are, where possible, to preserve the business or viable parts thereof, not necessarily the company, and, where personal liability has been abused, to impose personal responsibility on responsible persons.

Furthermore, there are pertinent differences between bankruptcy or insolvency for individuals and corporations. For example, as stated in Part 4.2.2.1 of the Guidance Text:

“... it is only in relation to individuals that the notion of exempt or excluded assets will apply (this means that some systems will allow the insolvent individual to keep some of the assets required to maintain himself or herself and his or her dependents).”

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.

The challenges include the non-existence of a global insolvency law system and a global court to deal with cross-border insolvency law matters, the difficulty in defining the term “insolvency” at an international level and the differences in the manner in which creditors can assert priorities (see Part 5.3 of the Guidance Text).

Westbrook (at Part 5.3 of the Guidance Text) has identified the following nine key issues in cross-border cases:

standing for (recognition) of the foreign representative;
moratorium on creditor actions;
creditor participation;
executory contracts;
co-ordinated claims procedures;
priorities and preferences;
avoidance provision powers;
discharges; and
conflict-of-law issues.

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

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.

“Hard law” means treaties and conventions which States become signatories to and as such bind themselves and affect their domestic law accordingly: Part 6.1.3.2 of the Guidance Text. Examples of “hard law” include the Nordic Convention (1933), the Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention and the European Insolvency Regulation (EIR) (2000). “Hard law” has had varying success as it requires a sufficient number of States to ratify it.

More success has been gained through the use of “soft law”, which is where multilateral organisations work towards the progressive unification of private international law, rather than States and governments working on treaties and conventions: Part 6.1.3.3 of the Guidance Text. The most successful “soft law” approach to date has been the development by United Nations Commission on International Trade Law of the Model Law on Cross-Border Insolvency.

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.

Section 426 of the Insolvency Act 1986, if the United States is listed as a relevant country. **It is not.** Otherwise England has adopted the UNCITRAL Model Law on Cross-Border Insolvency and common law principles still apply as well, including the decision of the House of Lords in *McGrath v Riddell*.

3

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 appropriate legal source is the European Insolvency Regulation 2000 (EIR) (as amended).

Elaboration is needed as to your reasoning why this is the case.

As stated in Part 6.4.3.3 of the Guidance Text:

“The EIR allocates jurisdictional competence to the courts of a member State within which is situated the “centre of the debtor’s main interests” (COMI). While the EIR allocates primary jurisdiction based on the centre of the debtor’s main interests (main proceedings), it does allow for the possibility of subsidiary territorial proceedings in other member States. These are permitted where the debtor has an “establishment”. An establishment is defined as meaning “any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets”. Such subsidiary proceedings may be either “independent proceedings”, opened prior to the main proceedings, or “secondary proceedings”, opened subsequent to the bankruptcy adjudication in the State of the centre of the main interests.”

As the COMI for Norton Cars Inc is in Italy, the main proceeding should be opened in Italy. However, as its main operations transpired in Germany, it may be that subsidiary proceedings can be commenced in Germany if Norton Cars Inc has an “establishment” in Germany.

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?

No. The EU (Recast) Insolvency Regulation only 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 Netherlands is part of the European Union and so the insolvency proceedings and the real rights of security will be regulated by both the European Insolvency Regulation 2000 (EIR) (as amended) and the Dutch Scheme of Arrangement (or the *Wet Homologatie Onderhands Akkoord*).

There is some scope to elaborate and explain your answer.

2.5

- (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 Corporations Act 2001 regulates corporate insolvency in Australia and any corporate insolvency proceedings. The real rights of security will be regulated by both the Corporations Act 2001 and the Personal Property Securities Act 2009.

Why is this the case? Some elaboration is warranted.

2.5

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41/50

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