



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 civil law include The Netherlands, France, Germany, Spain, Angola, Mozambique, and many of the countries in Latin America. Historically, their insolvency law systems were considered to favor creditors and were especially harsh toward debtors. Early civil law systems imprisoned debtors for insolvency or sold the debtor into slavery to repay his debt.

In contrast, countries whose insolvency law systems have historical roots in English law are considered to favor debtors by including a statutory discharge of the debtor's debts as part of the insolvency proceeding. Countries with English law roots include England, USA, Australia, Nigeria, Kenya, Botswana, and India.

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

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.

The principles of universalism, modified universalism, and territorialism are points on the spectrum regarding which courts have (or do not have) insolvency jurisdiction, choice of law, authority of the estate representative, creditors' rights, and extra-territorial enforcement of court orders and judgments.

The principal of universalism proposes jurisdiction for only one insolvency proceeding, which is the forum where the center of the debtor's main interests is located. Proceedings in another forum are unnecessary and unauthorized. The home forum provides the general insolvency law for the proceeding. All creditors, wherever located, may participate in this single proceeding. Judgments and orders of the home court are enforceable in foreign States. The advantage of universality is, with only one formal proceeding, the costs are lower than proceedings in multiple jurisdictions. Universality is difficult to achieve because it requires States to agree to defer to a foreign court for application of foreign laws regarding the rights of local creditors.

The principal of modified universalism provides a more pragmatic approach by recognizing that universalism is difficult to achieve. Modified universalism calls for the main proceeding to be opened in the forum where the center of the debtor's main interests is located (just as in universalism). The difference is that modified universalism recognizes that secondary or ancillary proceedings may be opened in other forums to support the main proceeding. The courts in all forums should communicate and cooperate.

The principal of territorialism, on the other hand, promotes insolvency proceedings in multiple jurisdictions, running concurrently, with each forum determining the rights of stakeholders according to its local laws, and enforcement of such judgments and orders is restricted to the local jurisdiction. The estate representative's authority does not extend beyond the boundaries of the local jurisdiction's borders. The advantage of territoriality is protection of local creditors (who may have more difficulty protecting their interests in a foreign jurisdiction). However, this approach is more expensive than universality, especially for a financially distressed debtor involved in multiple proceedings. In addition,

creditors located in the State in which debtor's most valuable assets are located may obtain an unfair advantage over creditors located in another State in which debtor holds assets of lower value.

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.

Below are significant initiatives undertaken in Latin America to assist with the resolution of international insolvency issues.

The Montevideo Treaty on International Commercial Law (1889), which covers both individual and corporate debtors, determines jurisdiction of insolvency proceedings according to the debtor's commercial domicile. Where a debtor has only one commercial domicile (one economically autonomous business), only the forum in which the commercial domicile is located has jurisdiction for debtor's insolvency proceeding, even if assets and/or creditors are located in other states. Where the debtor has more than one commercial domicile in different treaty states, insolvency proceedings may be opened in such states, resulting in concurrent proceedings.

The Havana Convention on Private International Law (1928) (Bustamante Code) adopts a similar jurisdictional scheme with respect to civil or commercial domicile and when concurrent proceedings are allowed. The Havana Convention does not, however, provide for co-operation or co-ordination between or among the concurrent proceedings. On the other hand, the Havana Convention provides for extraterritorial effect of court decrees from the time of entry, provided that certain registration or publicity rules are followed.

There are additional differences which should be considered, including ratification by different states.

2.5

Marks awarded 7.5 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.

As discussed below, the terms "bankruptcy" and "insolvency" may have different connotations around the world, depending on the local culture and historical roots of the local insolvency law. I use these terms according to their general definitions described below.

The term "bankruptcy" generally refers to the state of the debtor (individual or corporation) being put into a formal proceeding to adjust the debtor-creditor relationships. In Australia, the term "bankruptcy" refers to the insolvency of a natural person, but not a corporation.

The term "insolvency" generally refers to the financial condition of the debtor (individual or corporation) in which the debtor's debts exceed its assets and/or the debtor is unable to pay its debts

as such debts come due. In Australia, the term “insolvency” refers to the insolvency of a corporation, but not an individual.

This 7 mark question required a number of additional issues to be addressed, including essential characteristics and differences between individual and corporate insolvency.

2

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.

In a cross-border context, there will be at least two separate States with sufficient jurisdiction over the debtor, the assets, and/or the creditors to assert that its own law should govern determination of insolvency disputes. Each State may have some level of domestic insolvency law, but the root of their respective systems (civil law or common law) may be substantially different, leading to a tendency toward pro-debtor or pro-creditor dynamics that are incompatible with the other State’s laws. In addition, one or more of the competing States may have little or no insolvency law with respect to cross-border cases. There is no global insolvency court and no international insolvency language.

Specific difficulties presented in a cross-border context include the likelihood that the two States have different substantive and procedural law regarding commencement of formal insolvency proceedings and uncertainty whether a local court will recognize foreign concurrent insolvency proceedings, foreign estate representatives, and orders and judgments of a foreign court.

A concise list of specific cross-border issues identified by J.L. Westbrook are the following.

- (1) standing for (recognition of) the foreign representative;
- (2) moratorium on creditor actions;
- (3) creditor participation;
- (4) executory contracts;
- (5) co-ordinated claims procedures;
- (6) priorities and preferences;
- (7) avoidance provision powers;
- (8) discharges; and
- (9) conflict-of-law issues.

J.L. Westbrook, “Developments in Transnational Bankruptcy”, (1995) 39, *St Louis University Law Journal* 753, Pp. 753 – 757.

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.

The term “hard law” refers to legal instruments, such as treaties and conventions, that States adopt/sign and that form part of each signatory State’s domestic insolvency law as it relates to public international law. An example of successful hard law is the European Insolvency Regulation (EIR) (2000) in the European Union. The EIR has been slightly amended and the current instrument is the

EIR Recast (2015). In addition to being binding on the member states, the EIR has been a significant influence in international insolvency law outside the European Union.

In contrast, the term “soft law” refers to efforts toward more uniform international insolvency laws by promoting model laws or draft legislation that may be adopted by a State, with or without modification. Soft law affects private, rather than public, international law, and has in general been more successful in effecting change. The most successful soft law regarding international insolvency law has been the UNCITRAL Model Law on Cross-Border Insolvency, drafted in 1997. **There is some scope to elaborate regarding this success.**

3

Marks awarded 9.5 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.

Norton Cars has commenced an insolvency proceeding in the USA to liquidate the company, including its assets located in England. According to the factual scenario, Norton Cars’ headquarters was still in England at this time, which means this scenario occurred before England exited the European Union. Therefore, at the relevant time, England was still a part of the European Union.

Under those facts, I would advise the American insolvent estate representative to review the Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast) as the operative multilateral instrument on international insolvencies within the European Union. Although USA is not a signatory to the EIR Recast, England was a signatory while it was a member of the European Union. England would, therefore, recognize the American insolvency proceeding as a subsidiary territorial proceeding because Norton Cars has an

“establishment” (defined as a place of operations where the debtor carries out a non-transitory economic activity with humans means and assets) located in the USA. Under the EIR Recast, England would recognize the existence of insolvency proceedings outside the EU, for example, in the USA, and adhere to principles of co-operation and co-ordination.

Consideration should be given to the MLCBI, common law and s426.

1

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.

Italy and Germany are both members of the European Union and therefore subject to the EIR Recast, which is the legal source to be used in a cross-border insolvency matter between Italy and Germany. Under the EIR Recast, Italy has primary jurisdiction for opening insolvency proceedings and conducting the main proceedings because Italy is Norton Cars’ centre of its main interests.

Germany, as the location of Norton Cars’ main manufacturing operations, would have jurisdiction under the EIR Recast for secondary, territorial proceedings because Norton Cars maintains an establishment in Germany.

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?

An Indian, South African, or Australian court would apply its own domestic insolvency law with respect to recognition of an EU insolvency representative.

It would be beneficial to directly answer the question posed.

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 insolvency proceeding opened in Italy will apply Italian insolvency law. However, the Italian court must determine the secured claims of the holders of real rights of security to assets situated in the Netherlands under Dutch law.

There is scope to elaborate

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 insolvency proceeding opened in Australia will apply Australian insolvency law, including Australian law regarding the secured claims of the holders of real rights of security to assets situated in Australia.

There is scope to elaborate

2.5

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 37/50

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