



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 10 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 with historical roots in civil law comprise of countries in continental Europe such as the Netherlands, France, Germany and Spain as well as countries whose legal systems were inherited from these colonial powers (e.g., countries in West Africa or Latin America). The insolvency laws in these countries are generally statutes-based such as the Schuldsaneringswet in the Netherlands, and the Insolvenzordnung in Germany. **There is scope for greater emphasis on the codified nature of the laws**

Countries whose insolvency law systems have historical roots in English law (in addition to England) include the United States of America (USA) and Australia, Nigeria, Kenya, Botswana and Zambia, i.e., countries with strong historic ties to England or which inherited their laws from England, a colonial power. These countries all have aspects of a common law system.]

2.5

Question 2.2 [maximum 3 marks]

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

[Universalism is the idea that there should only be one insolvency proceeding dealing with a debtor's estate worldwide such that no other insolvency proceeding or act affecting a debtor's assets would disturb the first proceeding.

Territorialism on the other hand is based on the idea that an insolvency proceeding may be commenced in each country where the debtor has assets but that such proceeding is limited within the country where the proceeding was opened.

Modified universalism could be seen as a compromise between universalism and territorialism in that the main proceeding is opened in the country where the debtor has its centre of main interest and is supported by secondary or ancillary proceedings in other countries. The courts at which the proceedings are held in these different countries are expected to co-operate with each other.]

There is some scope to elaborate

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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 different initiatives include treaties such as the Montevideo Treaties (1889) and (1940). The 1940 Montevideo Treaties have been ratified by fewer Latin American countries comprising of Argentina, Paraguay and Uruguay compared to the 1889 Treaty which was ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. The Montevideo Treaties provides for:

- (i) one set of proceedings in the commercial domicile of a debtor even if that debtor may trade in more than one State, and
- (ii) concurrent proceedings where a debtor has two or more "economically autonomous businesses" in different States.

The Havana Convention on Private International Law (1928) was between a greater number of states and include Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. It has been said that the Havana

Convention is more universalist than the Montevideo Treaties in that it contemplates a single proceeding in respect of a debtor's estate in all the contracting States. There may however be concurrent proceedings if a debtor's businesses operate entirely separately economically from each other but the Havana Convention does not provide for co-operation or co-ordination between the concurrent proceedings.]

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Marks awarded 9.5 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.

[It varies by jurisdiction whether the terms "bankruptcy" and "insolvency" may be used interchangeably so the statement would need to be qualified. For example, in Australia, "insolvency" refers to the insolvency of a company, whereas "bankruptcy" refers to the insolvency of an individual so the term may not be used interchangeably in Australia.

Fletcher in *The Law of Insolvency* suggests that "bankruptcy" is said to refer to the formal state of being put into a formal bankruptcy proceeding, whereas "insolvency" means the state of financial affairs of a debtor which can vary, for example, where the liability of a debtor exceed its assets (balance sheet insolvency) or where the debtor cannot pay his debts as they fall due (short-term or practical insolvency).

Sealy and Hooley specify certain differences between the aims of a bankruptcy/insolvency of a company as opposed to that of an individual:

- (i) for an individual, the aim is to protect the debtor from harassment by his creditors; enable the debtor to make a fresh start; to reduce indebtedness while taking the debtor's personal circumstances into consideration (i.e., the individual may be able to keep certain assets required to maintain himself/his dependents);
- (ii) for a company, the aim is to preserve the business/viable parts of the business and to impose personal liability on responsible persons to the extent appropriate.

Certain objectives apply to both companies and individuals alike, including:

- (i) ensuring *pari passu* distribution;
- (ii) ensuring secured creditors deal fairly with the debtor and other creditors;
- (iii) ensuring that reasons for the failure are investigated; and
- (iv) enabling reviewable transactions are reversed.]

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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 which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation include:

- (i) differences by jurisdiction in terms of methods for dealing with assets of insolvent estates situated in different countries (for example, some countries have statutory provisions to

deal with these, others rely on ad hoc approaches to the local courts for dealing with these situations);

- (ii) certain legal systems will not permit an individual to be subject to a collective insolvency proceeding, whereas this may be allowed under other systems;
- (iii) insolvency involving group companies are dealt with differently by different countries for example, an enterprise group may be dealt with in a single application in certain countries, but in others, in separate applications covering each entity within the group; and
- (iv) certain countries for example, England and Hong Kong, deal with the insolvency of banks, insurance and other deposit taking institutions separately given that the instability of these organisations may pose systematic risks to that country's financial system.

Given the above different approaches, it is not surprising that a single global cross-border insolvency dispensation has not been developed.]

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook
1.5

Question 3.3 [maximum 3 marks]

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

[In the context of international insolvency, “hard laws” are treaties and conventions to which States become signatories and consequently bind themselves and which consequently become part of the State's domestic laws which are enforceable court. These then form a State's hard laws on insolvency. One such successful example is the Nordic Convention (1933) which covers the Scandinavian region.

“Soft law” in contrast is not enforceable in a State's court but may nevertheless contribute to the development of international insolvency law as a whole. One example of a successful soft law approach is UNCITRAL's Model Law on Cross-border Insolvency (MLCBI), which is recommended (not mandated) for member states to adopt.

The prevailing view appears to be that soft law approaches have been more successful. Evidence for this is given by the number of States (around 50) that have adopted the MLCBI.]

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Marks awarded 11.5 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.

[There exists some English common law authority on the principle requiring English courts “so far as is consistent with justice and UK public policy, [to] co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution” (McGrath v Riddell). The American insolvent estate representative could rely on this.

The American insolvent estate representative would not be able to rely on section 426 of the Insolvency Act 1986 of the United Kingdom for co-operation by the courts of England as America has not been designated as a relevant country or territory for the purposes of section 426 of the Insolvency Act 1986.

As England and Wales have adopted the MLCBI in 2006, however, the American insolvent estate representative may use this as the basis to request assistance in order to deal with the assets of Norton Cars Inc situated in England, for example, by seeking recognition of the American liquidation in England.]

4

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 so the applicable cross-border insolvency law would be Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast).

EIR Recast designates the primary jurisdiction based on the centre of the debtor’s main interests (COMI), that is the “place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties”.

There is a rebuttable presumption that a debtor’s COMI is the location of its registered office, i.e., the USA where Norton Cars Inc appears to be registered. However, the facts of the question states that Norton Cars Inc shifted its COMI to Italy when England exited the EU. Based on this, it would appear that the main proceeding should be opened in Italy, where Norton Cars Inc has its COMI.]

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 because India, South Africa and Australia are not member states of the European Union and so EIR Recast would not apply.]

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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.)

[As insolvency procedure has been opened under Italian law, Italian law will apply to the conduct of the insolvency proceedings (*lex fori concursus*). However, EIR Recast also allows for subsidiary territorial proceedings in other member States (which includes the Netherlands) where the debtor has an establishment. An establishment means “any place of operations where the debtor carries out a non-transitory economic activity with human means and assets”. From the facts of the case, it appears that the company is operating through external branches of the company in the Netherlands, which would suggest that there is non-transitory economic activity with human means and assets in the Netherlands. This would enable secondary proceedings to be opened in the Netherlands but the effects of these secondary proceedings are limited to the company’s assets in the Netherlands only.

With regard to the real rights of security, these are rights in rem which is an exception set out in Article 8 of the EIR Recast to the principle that the *lex fori concursus* should govern the conduct of the insolvency. The laws of the Netherlands will therefore apply to the assets subject to real rights of security in the Netherlands.]

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- (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.)

[For insolvency proceedings in Australia, as Australia is not an EU member state, EIR Recast does not apply so an insolvency proceeding in Australia will be governed by Australian law, more specifically, the Corporations Act 2001. The real rights of security situated in Australia will similarly be governed by Australian law, more specifically, the Property Securities Act 2009.

As Australia has adopted the UNCITRAL MLCBI, the Italian insolvent estate representative may request co-operation from the Australian courts for example, in terms of recognition of the Italian proceeding by the Australian courts.]

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Marks awarded 15 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 46/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.