



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 insolvency law systems which have historical roots in English law are often countries which were colonised by the United Kingdom. Examples are Malaysia, Singapore, Hong Kong, South Africa.

Countries with insolvency law systems which have historical roots in civil law are countries with ties to other European countries. Examples are the Netherlands, France, Germany, Spain.

The difference between the two is that for countries with historical roots in English law, past legal precedents or judicial decisions are relevant and/or important in determining the cases at hand. Whereas for countries with historical roots in civil law, codified statutes or legislations are more important.

3

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” refers to a principle that there should only be one main insolvency proceedings covering all of the debtor’s assets and debts worldwide. There may be more than one insolvency proceedings originating in different jurisdictions, but they ought to be dealt with under the provisions of the insolvency laws of the State where the debtor has its centre of main interests.

“Territorialism” refers to a principle where insolvency proceedings may be commenced in every State where the debtor holds assets. The consequence is that there can be plurality or multiplicity of insolvency proceedings. **Territorial limitations warrant elaboration**

“Modified Universalism” refers to a principle where a “main insolvency proceeding” has been commenced in the State where the debtor has its centre of main interests, but such proceeding is supported by secondary insolvency proceedings in another State.

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 2 important treaties in respect of International Insolvency issues in Latin America, and they are as follows:

- A. Montevideo Treaties of 1889 and 1940
- B. Havana Convention on Private International Law of 1928

Both Treaties provide that there should be one set of single insolvency proceedings in the commercial domicile of a debtor even if that debtor occasionally trades in more than one contracting State.

However, the difference is as follows:

- (i) The member or contracting States in respect of both Treaties are different.
- (ii) Where there are concurrent proceedings, the Havana Convention does not provide procedures for co-operation or co-ordination of any concurrent proceedings.

4

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.

I agree with this statement because many countries have legal systems which use the term “insolvency” while some other countries use the term “bankruptcy”, both term for the same meaning.

Some countries even use both terms interchangeably within the same legal system. An example is Malaysia, where its legislation on the insolvency of an individual natural person is known as the “Insolvency Act 1967” (formerly known as the “Bankruptcy Act 1967”). However, the preamble of the Act states that it is “*an Act relating to the insolvency and bankruptcy of an individual ...*”

Notwithstanding, the term “bankruptcy” is often understood as the formal state of putting one into formal bankruptcy proceedings. Whereas the term “insolvency” is often understood as reference to the state of financial affairs of a debtor.

The essential characteristics of both “bankruptcy” and “insolvency” are explained by Wood and they are as follows:

- a. First, there is a moratorium against individual debt enforcement.
- b. Second, the assets of the debtor who is bankrupt or insolvent are pooled together to be distributed to pay creditors.
- c. Third, all creditors of the debtor who is bankrupt or insolvent will be paid on equal footing, i.e. *pari passu*.

The difference that may arise when a “bankruptcy” or “insolvency” involves a corporation is the objective which Sealy and Hooley distinguishes them as follows:

Bankruptcy	Insolvency
a. To protect the debtor from harassment by his creditors	a. To preserve the business or any viable parts of it

<p>b. To enable the debtor to make a fresh start</p> <p>c. To reduce the debtor's indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into considerations</p>	<p>b. To impose personal liability on the persons responsible that led to the</p>
--	---

Elaboration is warranted, for example with respect to differences pertaining to exempt property

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.

- a. First, as Friman noted, one of the difficulties lies in finding a common insolvency language.
- b. Second, as Omar noted, another difficulty is the conflict of law and difference in domestic norms and systems, and the difficulty in reconciling each one of them with another.
- c. Third, as Westbrook noted, there are 9 key issues that make it difficult. They are as follows:
 - (i) Standing (locus standi) for recognition of the foreign representative;
 - (ii) Moratorium on creditor actions
 - (iii) Creditor participation
 - (iv) Executory contracts
 - (v) Co-ordinated claims procedures
 - (vi) Priorities and preferences
 - (vii) Avoidance provision powers
 - (viii) Discharges
 - (ix) Conflicts of law
- d. Fourth, the lack of a global uniform approach to deal with cross-border insolvency is also a factor.

Take care to elaborate on these essay questions

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” refers to international regulations that are legally binding on contracting States. Examples of “hard laws” include treaties and conventions. **Specific examples are required**

“Soft law” refers to international guidelines, codes of conducts and non-binding resolutions. An example of a “soft law” is UNCITRAL’s Model Law on Cross-border Insolvency (“Model Law”).

The use of “soft law” is more successful as compared to the use of “hard law” as many countries are now adopting the Model Law and the use of the Model Law is gaining momentum.

This question required greater elaboration

1.5

Marks awarded 12.5 out of 15

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

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company’s main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The applicable English law is the UK’s Cross-Border Insolvency Regulation 2006 which sets out the legal provisions on the UK’s adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

The Insolvency Act 1986 would also be applicable as it deals with insolvency within the United Kingdom (i.e. Nottingham, England)

As the UK is no longer part of the European Union, the European Insolvency Regulation (Recast) 2015 is no longer applicable in the UK.

Further elaboration is warranted, including with respect to s426 and 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 European Insolvency Regulation (Recast) is the applicable legislation as both Italy and Germany are member States of the EU.

The main insolvency proceedings should be opened in Italy. This is in light of Article 3.1 of the European Insolvency Regulation (Recast) which provides that *“The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties”*

While Norton Cars Inc’s main operations transpired in Germany, its management was directed from Italy. Hence, Italy is the place where Norton Cars Inc conducts the administration of its interests on a regular basis.

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, the EU (Recast) Insolvency Regulation is only applicable to member States of the EU, and neither India, South Africa and Australia are a member State of the EU.

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.)

As the Netherlands are also a member State of the EU, the European Insolvency Regulation (Recast) would be applicable.

The Dutch’s domestic legislation – Faillissementswet of 1897 would also be applicable.

Elaboration is warranted

2

- (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.)

Australia’s Corporations Act 2001 would be applicable.

Australia’s Cross-Border Insolvency Act 2008 would also be applicable since Australia adopted UNCITRAL Model Law on Cross-Border Insolvency.

Elaboration is warranted

2

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 45/50

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