INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

# 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 8 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.

Broadly, countries whose insolvency law systems have historical roots in civil law have tended to be more pro-creditor and more supportive of territorialism or modified territorialism, while

countries whose insolvency systems have historical roots in English law have tended to be more pro-debtor and more supportive of universalism or modified universalism. In addition, unlike courts in civil law jurisdictions, there is room (to varying degrees) for courts in jurisdictions that have roots in English law to fill gaps in legislation (including legislation governing or relating to insolvency) with common law principles. A further difference is how the courts of civil law tradition and the courts of common law tradition deal with choice of law in a cross-border insolvency matter: courts in the former category generally approach foreign law as a question of law which applies regardless of whether any party raises the foreign law, while courts belonging to the latter category generally consider foreign law to be a question of fact to be asserted and proven.

**It would also be beneficial to list examples of countries in each category**

**1.5**

**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.

Briefly, universalism in the insolvency context is the notion that there should be only one set of insolvency proceedings opened in respect of one debtor, no matter whether its assets are situated in more than one jurisdiction, its debts and obligations have been incurred in more than one jurisdiction or governed by foreign law, or whether foreign creditors are involved. Theoretically, this should encourage the maximisation of the pool of assets available for distribution, and allow all creditors of the same debtor to participate in the same insolvency proceeding and all creditors of the same class to be treated similarly regardless of where they are situated. Today, this notion is still very much an ideal, as there is no unified system of insolvency law applicable in every jurisdiction. At the other end of the spectrum is territorialism, which does not discourage the commencement or continuation of insolvency proceedings in different jurisdictions in respect of the same debtor having assets situated, or debts and obligations arising, in more than one jurisdiction. Generally, instead of ensuring the fair treatment of all creditors of a debtor wherever they may be situated and wherever their debts arose, territorialism prioritises the protection of the rights and interests of local creditors.

Operating in the reality that different jurisdictions have different legal frameworks for dealing with insolvencies, modified universalism accepts that the insolvency of a debtor can give rise to insolvency proceedings in more than one jurisdiction. However, there should be a main proceeding, which is to be commenced in the jurisdiction where the debtor's centre of main interests is, with other proceedings existing to support the main proceeding.

**There is scope to elaborate on matters of forum, COMI and territorial limits.**

**2**

**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.

One group of initiatives comprise the Montevideo Treaty on International Commercial Law (1889) and the Montevideo Treaty on International Commercial Terrestrial Law (1940). The other initiative is the 1928 Havana Convention on Private International Law (the Bustamante Code). One difference lies in their membership as each instrument has a different group of Latin American States as members. Another difference is the extent to which the different instruments allow for only one insolvency proceeding to be commenced in respect of an insolvent or bankrupt debtor regardless of the debtor's assets and liabilities in the member States.

**4**

**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.

The terms "bankruptcy" and "insolvency" *may* be used interchangeably, but this depends on the jurisdiction and the context in which these terms are used.

In some jurisdictions such as the United States, "bankruptcy" can refer to personal or corporate insolvency. However, in jurisdictions such as Australia, "bankruptcy" is a term used more to describe the insolvency of natural persons, while "insolvency" is a term used more in the context of corporations.

"Bankruptcy" could also connote the formal process of placing the financial or business affairs of a debtor under the administration of an independent third-party professional (e.g., a trustee), with the eventual discharge of the debtor's debts incurred pre-bankruptcy, if discharge is provided for in the jurisdiction in question. In contrast, "insolvency" does not carry the same connotations and can simply refer to the state of a debtor's financial affairs. What can result from a debtor's "insolvency" could be liquidation / bankruptcy or rehabilitation / reorganisation.

Whether "bankruptcy" or "insolvency", it has been observed[1] that this branch of law has the following essential characteristics. First, it provides for the stay of creditor action to prevent individual creditors from stealing a march on the rest of the creditors in the enforcement of debts against the debtor's assets. Second, the assets of a debtor are pooled together and realised for the benefit of all creditors, though there can be exceptions depending on the insolvency law of the jurisdiction in question. Third, out of the net proceeds realised from the debtor's assets, creditors should be paid dividends in proportion to their debts, though this can also be subject to exceptions depending on the insolvency law of the jurisdiction in question.
**Pari passu principles warrant elaboration**

Whether or not the term "bankruptcy" is used in the context of corporations, the bankruptcy/insolvency of natural persons versus corporations has important differences. Evidently, while corporations placed under liquidation as a consequence of a bankruptcy/insolvency event could eventually be dissolved and cease thereafter to exist, the equivalent does not result in the bankruptcy/insolvency of a natural person. In most jurisdictions, the termination of a natural person's bankruptcy/insolvency results in the discharge of debts so that the discharged bankrupt could "start afresh", unless the bankruptcy/insolvency was annulled or set aside. Another important difference lies in the scope of assets of a debtor to be managed in the bankruptcy/insolvency estate. In the case of natural persons, their bankruptcy/insolvency may involve the setting aside of some assets / types of assets for their maintenance and maintenance of their dependants. There is no equivalent notion in the context of the bankruptcy/insolvency of corporations.
**The objectives of each are also different and some elaboration in this respect would be beneficial.**

**6**

**Question 3.2 [maximum 5 marks]**

[1] P R Wood, *Principles of International Insolvency* (Sweet & Maxwell, 2007), p 3.

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

Different jurisdictions have different legal systems. Broadly, jurisdictions can be categorised into one of two types: those following the civil law tradition and those following the common law legal system. These differences largely mirror the political history of a jurisdiction, such as whether it has inherited the legal system of its colonial master. The two legal systems have very different approaches to law-making (e.g., whether sources of law can be only legislative) as well as evidence and procedure (e.g., whether foreign law is a question of fact or law). Evidently, the substantive law of a given area could also be different in the two legal systems. For e.g., unlike common law jurisdictions, civil law jurisdictions do not recognise floating charges as a form of security. Insolvency law, being essentially a branch of law that deals with the existing rights and obligations between a debtor and its/his/her creditors, take on the differences pre-existing in general law, evidence and procedure, etc. Layered onto that are different approaches towards multiplicity of insolvency proceedings (whether more universalism-centric or more territorialism-centric) and discharge of debts (whether more pro-debtor or more pro-debtor).

Jurisdictions sharing the same legal tradition/system can also have very different insolvency laws, procedures and approaches. Consider, for example, countries in continental Europe and South America are largely civil law countries, but their insolvency laws, procedures and approaches are quite different given the different treaties and other instruments that apply in these two economic zones.

Even the definition of "insolvency" is not uniform across jurisdictions. Some use the term "insolvency" to mean the situation where a debtor's total liabilities exceed total assets. Others use the term to mean also the situation where a debtor is unable to pay its debts as and when they fall due, which is more a cash-flow concept.

And just as there is no uniform legal system for insolvency adopted by all jurisdictions, there is no single court overseeing all insolvency proceedings, which adds to the difficulties in developing a single global cross-border insolvency dispensation.

**It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook 1**

**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 comprises instruments such as treaties and conventions entered into by States. When ratified by a State, the treaty or convention ratified becomes part of the domestic law of the State. An example of hard law in the context of international insolvency is the Nordic Convention on Bankruptcy (1933) where Denmark, Finland, Iceland, Norway and Sweden are members.

Soft law results from the efforts of non-State/government multilateral organisations in promulgating and promoting a set of principles or guidelines, which can influence how a State approaches a given area of law. When adopted by States, with or without modifications, soft law become part of domestic law. An example of soft law in the context of international insolvency law is the Model Law on Cross-Border Insolvency (MLCBI) promulgated by the United Nations Commission on International Trade Law (UNCITRAL).

While hard laws in the international insolvency context has had some successes, they tend to be region-focused (e.g., the Nordic Convention, the Bustamante Code), where the bilateral or multilateral treaties or conventions concluded have typically been among States in the same economic zone having similar economic interests. In contrast, soft law, framed more as principles or guidelines of general application or international best practices, lends itself to more widespread adoption. For example, the MLCBI alone has been adopted by more than 40 jurisdictions to date.

**3**
**Marks awarded 10 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.

As it is assumed for this part of the questions that Norton Cars Inc had filed for liquidation in terms of American law at the time when the headquarters were still in England, based on the facts in the hypothetical, UK was still part of the European Union. This meant that the applicable English cross-border sources of law that the American insolvent estate representative *may* use to request recognition in terms of English law in order to deal with the assets of Norton Cars Inc situated in England are: (i) the Insolvency Act 1986; (ii) the Cross-Border Insolvency Regulations 2006 which adopted the UNICTRAL Model Law on Cross-Border Insolvency; (iii) applicable English common law / case precedents interpreting the relevant provisions in the Insolvency Act 1986 and the Cross-Border Insolvency Regulations 2006; (iv) the European Insolvency Regulation 2000 (or the European Insolvency Regulation (Recast) 2015, if recognition was sought at a time in the period mid-2017 to 31 December 2020, 11 PM).
**It would be beneficial to note that S 426 is not applicable as the US is not designated**

**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(s) to be used in a cross-border insolvency matter between Italy and Germany would be: (i) the European Insolvency Regulation (Recast) by way of Regulation 2015/848 (if the proceeding to address the cross-border insolvency matter between Italy and Germany commenced at a time after 31 December 2020 and before January 2022); or (ii) the European Insolvency Regulation (Recast) by way of Regulation 2021/2260 (if the proceeding to address the cross-border insolvency matter between Italy and German commenced at a time after January 2022). The proceeding to address the cross-border insolvency matter between Italy and Germany could have commenced at any time after 31 December 2020 when Norton Cars Inc shifted its COMI to Italy.

As the management of Norton Cars Inc was directed from Italy and the company's COMI was moved from England to Italy when England exited the EU, the main proceeding should be opened in Italy.

**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 none of these courts belong to jurisdictions which are members of the EU (Recast) Insolvency Regulation.

**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 could be a proceeding commenced in the Netherlands for recognition of the insolvency procedure opened in terms of Italian law and the Italian insolvent estate representative. The law that will apply to the insolvency proceeding could be: (i) the European Insolvency Regulation (Recast) by way of Regulation 2015/848 (if the proceeding commenced at a time after 31 December 2020 and before January 2022); or (ii) the European Insolvency Regulation (Recast) by way of Regulation 2021/2260 (if the proceeding commenced at a time after January 2022). Dutch law with regard to the real rights of security will also apply.

**3**

(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 could be a proceeding commenced in Australia for recognition of the insolvency procedure opened in terms of Italian law and the Italian insolvent estate representative. The law that will apply could be the Australian Cross-border Insolvency Act 2008 (Cth) where the UNICTRAL Model Law on Cross-Border Insolvency (MLCBI) as adopted applies, or the relevant provisions in the Australian Corporations Act 2001 (Cth) where the MLCBI as adopted in the Cross-Border Insolvency Act 2008 (Cth) does not apply. Australian law with regard to the real rights of security will also apply.

**3**

**Marks awarded 14 out of 15**

*** End of Assessment ***

**TOTAL MARKS AWARDED 39.5/50**

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