



**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 12<sup>th</sup> 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 4 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.

The civil law system is based upon Roman Law and the concept that the debtor should be punished as part of the debt execution process. Historically this was done via a debtor pledging their own body for repayment of the debt. The debtor could be imprisoned, sentenced to death, or sold as a slave as repayment for the debt.

In comparison, English insolvency law, although historically was inhumane and debtors as they were seen as criminals is more a creditor based model (as opposed to the Roman law debtor based model) with the adoption of the historical concept of *pari passu* distribution among creditors and collective participation of creditors. Historically English insolvency law has prioritised the rights of creditors.

Generally speaking, countries with common law legal systems have adopted the English law model whereas civil law countries have adopted the Roman law model. **Elaboration is warranted regarding 'common law' and codification.**

**An alternative approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries of codification in civil jurisdictions.**

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.

Universalism adopts the concept that there should only be one insolvency proceeding commenced globally, and a global moratorium ought to be implemented for the duration of the proceedings. Creditors globally will participate in that one proceeding, as opposed to seeking to enforce or recover their debt in the jurisdiction the debtors' assets or interest are located. The relevant jurisdiction in which proceedings are commenced is where the debtors' main interests are located.

In comparison the principle of modified universalism does not impose a global moratorium for the duration of the insolvency proceedings, but rather adopts the concept that once insolvency proceedings are commenced in the State where the debtors main interests are located, other insolvency proceedings are commenced ancillary to those proceedings, aimed at supporting those proceedings and co-operating together.

Territorialism on the other hand does not see States co-operating, or the commencement of one insolvency proceeding but rather insolvency proceedings are commenced in every State the debtor has interests or assets and proceedings are limited to that State in which the proceedings are commenced.

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.

Latin American States have adopted a number of bankruptcy and insolvency treaties under private international law aimed at achieving a unified insolvency system. The treaties are *Montevideo Treaties* (1889) and (1940) Havana Convention on Private International Law (1929) (Bustamante Code). The differences in the Latin American treaties is the member states that have adopted the treaties and the extent to which they allow a single insolvency proceeding to be commenced with universal effect throughout the member State.

There is scope to elaborate

3.5

Marks awarded 8 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.

According to Fletcher, bankruptcy law was developed from Roman law procedures, in particular *cession bonorum* (assignment of property), *distractio bonorum* (forced liquidation of assets) and *remission and dilation* (composition with creditors). The Roman law procedures were developed from individual debt collection processes, which subsequently resulted in the development of debt collection mechanism, known as insolvency law and the declaration that a debtor is insolvent.

Insolvency law on the other hand is said to stem from Lex Mercatoria and the historical custom that developed between merchants in Europe.

Wood has developed what he considers the essential features of insolvency of bankruptcy law which are universal principles. Despite the differences between the terminology bankruptcy and insolvency, these characteristics are common between the two terms. The characteristics are as follows:

1. An automatic moratorium applies staying any further pursuit against the insolvent entity or individual.
2. Assets are pooled for the payment to creditors.
3. Creditors are paid *pari passu*.

Although the roots of the two terms differ, the underlying principles of both are such that the words can be used interchangeably. Many jurisdictions globally have adopted the terminology bankruptcy which applies to both corporate and individual insolvency and largely have legislation that governs both, without a distinction. This is consistent with the historical insolvency law which has developed over time which did not seek to distinguish between a debtor as an individual or a corporation. Conversely, where States do not distinguish between insolvency and bankruptcy via legislation, the term insolvency may refer to the financial affairs of a debtor and bankruptcy refers to the formal insolvency proceedings.

In modern insolvency law, some States have sought to distinguish between personal and corporate insolvency and adopt the terminology bankruptcy specifically for individual insolvency. Australia is an example where the terminology bankruptcy is used to describe the insolvency of an individual.



Despite the distinction that may be drawn between personal and corporate insolvency, the terms can be used interchangeably in jurisdictions where there is not specific domestic legislation that dictates what terminology is to be used as the principles underlying bankruptcy and insolvency are akin. Both bankruptcy and insolvency have common characteristics and objectives regardless of whether it is an insolvent individual or corporation by:

- ensuring the assets are preserved, realised and paid to creditors on a *pari passu* basis; and
- that investigations be undertaken by an independent third party into why the individual or corporate became insolvent.

**There are differences in objectives that warrant consideration. Also exempt property is a significant difference to discuss.**

4.5

### 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 primary difficulty in adopting a single global cross-border insolvency dispensation is due to the differing domestic legal systems, in particular as between civil and common law jurisdictions, or pro-debtor or pro-creditor-based systems. States are responsible for implementing domestic legislation which is essential to the operation of a single global cross-border insolvency dispensation. Absent uniform agreement amongst *all* States, any global international insolvency law would not be successfully implemented. Depending on whether the State is a pro-creditor or pro-debtor-based system, different features of the international insolvency law will be a priority, or important for States causing issues in implementing global international insolvency laws.

In addition, a number of other factors impact the successful implementation of a global international insolvency law, including:

- The lack of structure of domestic and international insolvency laws dealing with cross-border insolvency cases. The concept of universalism does not currently apply, and it is possible to have insolvency proceedings commenced in a number of States. Depending on the domestic legislation and primary jurisdiction the debtors' interests and assets are located, it may be *necessary* for a creditor to either commence multiple insolvency proceedings, or for a debtor to enter into formal insolvency in a number of jurisdictions.
- Many domestic insolvency laws are out-dated and have not been revised and updated to reflect modern global trade to be successfully applied in the global economy.

**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.

International insolvency laws are found in international treaties or conventions. Those treaties and conventions are not binding on States, unless and until a State becomes a signatory of that treaty or convention, binding the State. Once a State has signed a treaty and implemented domestic legislation to give effect to that treaty it is considered "hard law". That is a binding legislative instrument forming part of the domestic law of a State that is binding and enforceable on the consumers and corporations with assets or interests in that State. The success of hard law is entirely dependent on the response

by States and whether enough States sign and ratify a treaty or convention domestically giving global effect to it. Absent sufficient uptake by States, a treaty or convention has little utility. **It would be beneficial to provide examples and further discussion of their success or otherwise.**

In comparison, “soft law” is proposed solutions to international insolvency law issues, aimed at creating uniform international insolvency laws, consistent with the principle of universalism. Soft law is developed by multilateral organisations providing a solution to an international insolvency law issue. The UNITRAL developed draft legislation, or model law known as the Model Law on Cross-Border Insolvency which has been the most successful example of soft law and adopted as domestic legislation by a number of States, therefore becoming binding domestic law by a number of States.

Soft law implemented via domestic legislation does not require States to sign and ratify a treaty and subsequently implement domestic legislation to be successful (as is required by hard law).

**2.5**

**Marks awarded 8.5 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.

As a member state to the UNCITRAL Model Law on Cross-Border Insolvency the insolvency representative is able to seek recognition of the insolvency proceedings in the UK. Pursuant to section 426(5) of the *Insolvency Act 1986* (UK) the local court is authorised to “*apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction*”. The principle is aimed at achieving co-operation between courts exercising jurisdiction in relation to an insolvency proceedings. As a result, it is possible for the insolvency practitioner to either deal with the assets locally in the UK and seek the assistance of the

UK courts, or alternatively realise the assets with the intention of distributing to creditors under the laws of America. **The US is not designated in relation to s426. The common law is relevant**

1.5

**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.

As both Italy and Germany are member states to the European Union, the European Insolvency Regulation (EIR) (2000) is the relevant legal source governing the cross-border insolvency, in addition to the domestic insolvency legislation.

As the main operations of the entity are in Germany it would be the centre of Norton Cars Inc main interest and therefore the relevant jurisdiction for the insolvency proceedings to be commenced in. The cars were built and manufactured in Germany with all economic activity occurring in Germany. As Norton Cars Inc was only managed from Italy and no economic activity within Italy, or trading of goods or services, it would not have a sufficient basis to establish that Italy is its centre of main interest.

**Italy is the COMI and the relevant place for main proceedings. Elaboration is warranted.**

2

**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, as India, South Africa and Australia are not parties to the EU (Recast) Insolvency Regulation the legislation does not apply. India, South Africa and Australia all require the insolvency representative to apply to the local courts, under domestic legislation, seeking recognition of the insolvency proceedings. The EU (Recast) Insolvency Regulation is relevant to establish the entity has entered into formal insolvency proceedings and the authorised representative for the recognition application, however its relevance beyond that is limited and the legislation cannot be applied by Indian, South African or Australian courts.

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 7 marks.)

The *Fallissementswet* of 1897 is the domestic legislation in Netherlands that will apply for the bankruptcy of Norton Cars Inc. Further, as a member of the European Union, the *European Insolvency Regulation* (EIR) (2000) applies. As the proceedings were filed in Italy, Italy will be the centre of main interest, however as Norton Cars Inc has assets, including security interests over those assets in Netherlands, the insolvency representative will be able to open secondary or independent proceedings in Netherlands under the domestic insolvency laws for the purposes of realising the assets and paying the secured creditors.

**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 7 marks.)

Australia is a signatory to the UNCITRAL Model Law on Cross-Border Insolvency and has implemented domestic legislation in the *Cross-Border Insolvency Act 2008* (Cth) to give effect to this domestically. However, Norton Cars Inc will need to apply in Australia courts for recognition of the insolvency proceedings in Australia to subsequently take steps to realise the assets and pay any secured creditors. The *Corporations Act 2001* (Cth) **together with other Australian law** will govern the insolvency proceeding in Australia, including the rights of and distribution of the assets to secured creditors.

**3**

**Marks awarded 10.5 out of 15**

**\* End of Assessment \***

**TOTAL MARKS AWARDED 31/50**

**A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.**