



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 6 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.

Civil law systems rely on written legal codes that define the rules and principles of law in a specific area. Common law systems, on the other hand, rely on judicial decisions and legal precedents. This means that civil law systems have more rigid and predetermined laws than common law systems.

In the area of insolvency law, countries that have historical roots in civil law tend to favour the debtor more than countries that have historical roots in English law. For example, in France, the main objective of insolvency proceedings is to rescue the debtor and allow them to keep running their business. In contrast, in the United States, the main objective of insolvency proceedings is to increase the value of the debtor's assets for the benefit of creditors.

Another difference between civil law and common law systems is the role of the judiciary in insolvency proceedings. In civil law systems, the judiciary has a more active role in the management of insolvency proceedings, while in common law systems, the role of the judiciary is more limited. For example, in France, the court appoints an administrator to oversee the debtor's affairs during the insolvency proceedings. In contrast, in the United States, the debtor usually remains in charge of their business during the bankruptcy process.

Further examples of relevant countries in each category would be beneficial

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.

In the context of international insolvency law, the term universalism refers to the idea that a single set of rules and procedures should govern cross-border insolvencies, unrelatedly to local jurisdictions or business structures. **There is scope to consider forum and COMI here**

Modified universalism is a form of universalism in which still aims for maintain an international approach, e.g., by setting up a single court, but some allowing for some flexibility. Involved parties from involved states (primary, secondary and ancillary proceedings) are given a forum to co-operate and negotiate. **Again, there is scope to consider COMI here**

The principle of territorialism is the opposite of universalism and stipulates that the effects of an insolvency proceeding will be limited to the jurisdiction in which the insolvency proceeding was initiated, which can lead to multiple insolvency proceedings, lacks efficiency (such as duplication or fragmentation) and may be considered as unfair.

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.

Some Latin American countries, such as Chile, Colombia, Mexico, and Peru, have adopted the UNCITRAL Model Law on Cross-Border Insolvency, which is a legal framework that facilitates cooperation and coordination between courts and insolvency professionals from different countries, and allows access and recognition of foreign insolvency cases.

Another development in the field of insolvency law and practice in Latin America is the establishment of the Latin American Association of Insolvency Specialists (ALI), a regional organization that encourages the study, research, and dissemination of insolvency topics in Latin America. ALI also organizes events, publications, and exchanges of experiences and best practices among its members.

Moreover, Latin American countries have been involved in the International Insolvency Institute (III), which is a global network of leading experts, academics, and judges with knowledge and experience in international insolvency matters. III aims to improve the law and practice of domestic and international insolvencies and restructurings, and to support valuable research and analysis in the international insolvency field. III also organizes activities and projects on various insolvency issues, such as the book *Financial Institutions in Distress: Recovery, Resolution, Recognition*.

This answer required consideration of the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code)

0.5

Marks awarded 5.5 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” are both related to debt, but they are not synonyms. They have different meanings and implications, depending on the context and the subject.

Bankruptcy is a court-supervised process that allows debtors to get rid of their debts and start fresh. Insolvency is a financial state that means being unable to pay one’s debts. **There are different further meanings in different jurisdictions**

Bankruptcy has some key features that make it different from insolvency. First, bankruptcy can be voluntary or involuntary, meaning that a debtor can decide to file for bankruptcy, or a creditor can force a debtor into bankruptcy if they owe more than a certain amount. Second, bankruptcy is overseen by a court, which appoints a trustee to manage the liquidation or reorganization of the debtor’s assets and liabilities. Third, bankruptcy offers relief from debts, either by erasing them completely or by restructuring them into a repayment plan. Fourth, bankruptcy has consequences for the debtor’s credit history, reputation, and future borrowing ability. **Some of these matters differ in different jurisdictions. It would be beneficial to consider universal characteristics raised by Wood**

Insolvency, on the other hand, has some different features. First, insolvency is not a legal process, but a financial condition. It can be measured by two tests: the cash-flow test and the balance-sheet test. The cash-flow test checks whether a debtor can pay their debts as they become due, while the balance-sheet test checks whether a debtor’s assets are enough to cover their liabilities. Second, insolvency does not necessarily result in bankruptcy, but it can be a sign of financial trouble and a trigger for creditors to act. Third, insolvency does not offer relief from debts, but it can be a reason for seeking debt solutions, such as debt consolidation, debt settlement, or debt management. Fourth,

insolvency does not have a direct impact on the debtor's credit history, but it can affect their credit rating and borrowing capacity.

Bankruptcy and insolvency may also have different implications when they involve a corporation rather than an individual. For a corporation, bankruptcy can be a way of dealing with insolvency and continuing its operations, while for an individual, bankruptcy can be a way of ending insolvency and starting over. For a corporation, insolvency can be a temporary or permanent situation, depending on the nature and extent of its debts and assets, while for an individual, insolvency can be a chronic or acute problem, depending on their income and expenses. For a corporation, bankruptcy and insolvency can affect its shareholders, employees, customers, suppliers, and creditors, while for an individual, bankruptcy and insolvency can affect their family, friends, employers, and lenders.

It would be beneficial to consider different objectives further and differences such as exempt property

4

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.

Different countries have different legal systems and cultures that may affect how they deal with debt, insolvency, and restructuring. For example, some countries may be more lenient or strict with debtors or creditors, while others may try to balance their interests. Some countries may try to save the debtor's business and the jobs of employees, while others may prefer to sell the assets and pay the creditors.

Different countries also have different insolvency laws that may not be compatible or consistent with each other, which may cause problems and conflicts in cross-border insolvency cases. For example, some countries may have different ways of defining and determining insolvency, different kinds of insolvency proceedings and their consequences, different rules for ordering and paying claims, and different roles and duties of insolvency professionals.

Another challenge in cross-border insolvency cases is the difficulty and uncertainty of deciding which country has the authority and the power to deal with the insolvency of a debtor, and whether other countries will respect and cooperate with that decision. For example, some countries may have different methods and criteria for finding out the main location of a debtor's business, which is the main factor for deciding jurisdiction and recognition under the UNCITRAL Model Law on Cross-Border Insolvency. Some countries may also have different conditions and processes for accepting or rejecting foreign insolvency proceedings, which may affect the collaboration and coordination among courts and insolvency professionals.

A further challenge in cross-border insolvency cases is the possibility of misuse and manipulation by debtors or creditors, which may harm the fairness and efficiency of insolvency. For example, some debtors may try to change or move their main location of business to a more favourable country, or to exploit the differences in insolvency laws among different countries. Some creditors may also try to pursue their claims in multiple countries, or to disrupt the foreign insolvency proceedings of the debtor.

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

2

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of

international insolvency. In your answer you should also provide examples and discuss the varying success of “hard” and “soft” laws in providing solutions to the challenges of international insolvency.

The term “hard law” means legally enforceable rules and regulations that courts can apply. The term “soft law” means non-enforceable instruments that are not legally binding but are meant to influence the conduct of parties involved in international insolvency proceedings.

Hard law examples in international insolvency are the UNCITRAL Model Law on cross-border insolvency and the European Union’s regulation on insolvency proceedings. These laws aim to provide a consistent framework for cross-border insolvency proceedings and to promote cooperation between courts in different countries.

Soft law instruments, on the other hand, are contained in legally non-binding texts and often come from standard-setting organizations such as UNCITRAL and the World Bank. Soft law instruments are used in various ways in international insolvency law practice, for example in insolvency protocols dealing with issues of cross-border cooperation and communication. Soft law instruments can supplement existing hard law, be a substitute for hard law, or conflict with hard law (or even soft law).

The effectiveness of hard and soft laws in addressing the challenges of international insolvency varies. Hard law instruments have the benefit of being legally binding and enforceable, which can help ensure adherence to the rules and regulations governing cross-border insolvency proceedings. However, hard law instruments can be hard to put into practice due to differences in legal systems and cultural norms between countries.

Soft law instruments, on the other hand, offer more flexibility than hard law. They allow for less politicized compromises and are developed faster and at lower cost. However, the non-binding nature of soft law instruments means that they may not be respected by parties involved in international insolvency proceedings, and their effectiveness depends on the willingness of parties to follow them.

At times your answer confuses hard and soft law, such as with respect to the MLCBI

2

Marks awarded 8 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.

If Norton Cars Inc goes bankrupt in the US, its US bankruptcy trustee can ask for recognition in England under the CBIR, which is how the UK applies the UNCITRAL Model Law on Cross-Border Insolvency.

The CBIR sets out the rules for how courts and bankruptcy trustees can work together when a debtor has assets or creditors in different countries. Under the CBIR, a bankruptcy trustee who is appointed in a foreign country (in this case, the US liquidation) can apply to the English court to recognise the foreign bankruptcy.

If the foreign bankruptcy is recognised, the foreign trustee will have some powers and can also ask the court for more help. This could include giving the foreign trustee the authority to manage or sell some or all the debtor's assets that are in England.

It's important to remember that recognition under the CBIR is not automatic and the foreign trustee will have to make an application to the English court. The court will then decide whether to recognise the foreign bankruptcy based on the evidence and the conditions of the CBIR.

It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider 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 EU's Insolvency Regulation (EU 2015/848) is the relevant legal source for a cross-border bankruptcy case between Italy and Germany. This regulation establishes the criteria for opening bankruptcy proceedings within the EU, gives automatic recognition to bankruptcy proceedings across the EU, and makes sure that the bankruptcy proceedings can be applied.

The regulation identifies the "centre of main interests" (COMI) as the place where the debtor manages its affairs on a regular basis, and which can be verified by third parties¹. For Norton Cars Inc, since the COMI was moved to Italy and its management is based in Italy, the main bankruptcy proceedings should be started in Italy.

However, additional bankruptcy proceedings could be started in Germany, where Norton Cars Inc has its main activities. These additional proceedings are restricted to the assets that are in that member state.

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?

Indian, South African, or Australian courts are not eligible to apply 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.)

Italian law will apply to the bankruptcy case opened in Italy for Norton Cars Inc. This is because the company's main place of business (COMI) is in Italy, and according to the EU's Insolvency Regulation (EU 2015/848), the law of the country where the COMI is located applies to the bankruptcy case.

For the security rights that were created under Dutch law on the assets that are in the Netherlands, Dutch law would apply⁴⁵. This is because, according to the EU Insolvency Regulation, the effects of bankruptcy case on a legal dispute about an asset or a right that the debtor has lost are determined only by the law of the country where that legal dispute is happening. Therefore, the security rights, which are rights over property, would be subject to Dutch law.

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.)

Italian law will apply to the bankruptcy case opened in Italy for Norton Cars Inc. This is because the company's main place of business (COMI) is in Italy. **Further elaboration is necessary**

For the security rights that were created under Australian law on the assets that are in Australia, Australian law would apply. This is because, usually, the law of the country where the assets are located (lex situs) determines issues related to security rights.

2

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 31.5/50

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