



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.

The US and Australian insolvency regimes have historical roots in English law, whereas European countries such as the Netherlands and France are examples of civil law systems. Insolvency regimes with historical roots in English law are generally viewed as more pro-debtor when compared to their civil law counterparts, providing for a wider variety of relief and discharge processes. One example of a difference between these types of insolvency regimes is that it is sometimes said that civil law countries are more inclined to take a predominantly territorial approach to jurisdiction while English/common law countries are more aligned with universalism. Another example is that proof of foreign law, an issue that arises in the context of cross-border insolvencies, is a question of fact in common law countries whereas in civil law systems it is presumed to be a question of law.

This answer also required a discussion of the common law aspect of English law in greater detail, and in comparison with codification.

2

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 dictates that there should only be one law and one 'main' proceeding, having extra-territorial effect, covering (all of the debtor's assets and debts globally. The proper jurisdiction of such a proceeding may be based on where the centre of the debtor's interests is located.

A modified form of universalism proposes that the main proceeding is 'supported' by secondary or ancillary proceedings in the foreign jurisdiction(s) through cooperation with the main proceeding.

Elaboration re COMI here would be beneficial

Territorialism (as the name implies) proposes that the consequences of an insolvency proceeding in one jurisdiction should be limited to assets, debts, creditors, etc. in that jurisdiction. That is, for example, stand-alone proceedings may be commenced in every jurisdiction where the debtor holds assets and the law of that jurisdiction apply to those assets.

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.

1. The Montevideo Treaties (1889) and (1940): The Montevideo Treaty on International Commercial Law (1889) has been ratified by 6 South American countries. The 1889 treaty covers personal and corporate insolvency and allocates bankruptcy jurisdiction based on the debtor's commercial domicile. 3 of those countries (Argentina, Paraguay and Uruguay) also ratified the 1940 treaties: the Montevideo Treaty on International Commercial Terrestrial Law (1940) (containing Title VIII on Bankruptcy) and the Montevideo Treaty on International Procedural Law (containing Title IV on Civil Meetings of Creditors).

2. The Havana Convention on Private International Law (1928) (i.e. the Bustamante Code): 14 Latin American countries (and Haiti) concluded the treaty which is considered more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout the region, although there may be concurrent proceedings in Havana Convention States that contain commercial establishments operating entirely and separately economically.

It would be beneficial to explicitly state the differences, rather than describe each and leave it for the reader to discern.

2.5

Marks awarded 7 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

It is said that the terms “bankruptcy” and “insolvency” may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to “bankruptcy” and “insolvency”, (ii) the essential characteristics of “bankruptcy” and “insolvency” and (iii) any differences that may arise when a “bankruptcy” / “insolvency” involves a corporation rather than an individual.

I do not agree. "Bankruptcy" and "insolvency" cannot necessarily be used interchangeably. In some countries, such as Australia, bankruptcy refers to individuals only while insolvency refers to companies, and a different law applies (cf. England, the US). With that said, both terms inevitably refer to collective debt-collection mechanisms for the benefit of creditors of a person or entity who can no longer pay his/her/its debts.

Etymologically speaking, the word "bankruptcy" stems from the Italian "banca rotta", which means to "broken bench", a reference to the medieval practice of creditors breaking the bench or counter of a merchant who could not pay his debts. "Insolvency" is antonymic of solvency, that is, the ability to pay what one owes (from the Latin "solvens" meaning loosening, releasing or fulfilling).

Key differences arise when we are dealing with the bankruptcy or insolvency of an individual as opposed to a corporation. For individuals, the objectives include protecting the debtor from unlawful harassment from creditors and in certain circumstances to enable the debtor to eventually make a "fresh start". For corporations, the objectives include preserving (to the extent possible) the business and where there has been fraud or misconduct, to impose personal liability (and recover from) responsible persons (often prior management).

This is a 7 mark question which warrants elaboration including with respect to essential characteristics and differences such as exempt property

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Question 3.2 [maximum 5 marks]

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

In a cross-border context, it is often difficult to reconcile the various differences (in substantive law and procedurally) to the national approaches to insolvency across the different jurisdictions involved. For example, there may be differences in the rules with respect to the definition of insolvency or bankruptcy, certain types of contracts (such as leases, the purchase of real estate or contracts of

employment) and the availability of corporate rescue, restructuring and debtor-in-possession regimes.

It is difficult to develop a single global cross-border insolvency dispensation process because national approaches often differ based on the historical roots of the jurisdiction, political pressures, cultural values and the development / status of the jurisdiction's economy and regulations. Just like criminal laws vary significantly across the globe, the domestic laws and procedures which provide for collective debt-collection mechanisms vary (and conflict).

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.

"Soft law" doesn't have "teeth". It is often described as aspirational because it is not enforceable and there is no obligation to adopt it (unratified treaties, for example). "Hard law", on the other hand, refers to enforceable law in force. **Elaboration is needed.**

"Hard law" is (for obvious reasons) effective (for example, the European Union's European Insolvency Regulation), but wider international efforts to propagate "hard law" on cross-border insolvency have generally not been successful because it is innately difficult to consistently apply (and politically achieve) one set of rules around the world to jurisdictions which may differ significantly in their historical roots, cultural values and ideologies.

Practically, more success has been gained internationally through "soft law" options. The most successful "soft law" approach is considered to be UNCITRAL's Model Law on Cross-border Insolvency (MLCBI), not a treaty or convention, but rather draft legislation that UNCITRAL recommended member States to adopt, with or without modification.

1.5
Marks awarded 7 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.

Foreign insolvency proceedings can be recognised (and enforced) in the UK under its Cross-Border Insolvency Regulations ("UK CBIR"), the UK's implementation of the UNCITRAL Model Law on Cross-Border Insolvency.

In order to obtain a recognition order under the UK CBIR, it must be demonstrated that:

1. the foreign proceedings are "foreign proceedings" within the meaning of the Model Law.
2. the applicant is a "foreign representative" for the purposes of the Model Law.
3. for recognition as "foreign main proceedings", it must be demonstrated that the foreign proceedings are opened where the debtor has its centre of main interests ("COMI"); and
4. there are no public policy reasons why the recognition should not be granted.

Obviously, number 3 above is a problem given that the company's COMI is in Italy. Nevertheless, recognition can still be sought under the UK CBIR of the American insolvency but not as "foreign main proceedings" and the relief available in those circumstances (such as a stay of any proceedings in the UK) won't be automatic.

If it can be demonstrated however that it is necessary to protect the assets of the company or the interests of the creditors, then the Court may grant orders: (1) suspending the right to transfer, encumber or otherwise dispose of any of the company's UK assets; (2) entrusting the administration or realisation of all or part of the company's UK assets located UK to you; and/or (3) entrusting the distribution of all or part of the company's UK assets to you provided that the UK court is satisfied that the interests of creditors in the UK are adequately protected.

It might be worth seeking an order in the American insolvency proceedings which requests the aid and assistance of the UK court of the liquidation, which will likely be helpful when approaching the UK Court for recognition. This was successfully obtained recently in the US case *Re Astora Women's Health LLC* where subsequently the UK court found that the US court's order was sufficient evidence to oblige the UK court to recognise the American proceedings, subject to considerations around public policy (UK judgment: [2022] EWHC 2412 (Ch)).

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.

Italy and Germany are both EU member states, meaning that the European Insolvency Regulation ("EIR") is applicable. The EIR provides for (for example) automatic recognition of insolvency judgments and, subject to certain exceptions, empowers insolvency representatives to exercise powers granted in one member state in all other member states i.e. the main proceedings have universal scope in the EU.

Under the EIR, proceedings should be commenced in the company's COMI. Article 3 of the EIR provides that the COMI should correspond to the place "where the debtor conducts the administration of its interests on a regular basis which is ascertainable by third parties". In the case of the company, the place of the registered office is presumed to be the COMI in the absence of proof to the contrary but only if the registered office has not been moved in the 3-month period before the request to open insolvency proceedings (EIR Article 3).

In the European Court of Justice case of *Interedil*, an Italian company had moved to and registered in England (when it was still in the EU). The court decided among other things that when the place of the central board of a company is not at the place of its registered office, the existence of assets and agreements regarding these assets in another member state (other than the state of its registered office) can only lead to a rebutting of the presumption when, from a complete assessment of all the relevant factors in a way that it is ascertainable by third parties, it becomes clear that the actual centre of management and control is in that other member state (see also EIR Preamble paragraph 30).

Ultimately, it will require a closer examination of the facts in order to determine whether the company's COMI is actually in Italy or in Germany. If the fact that the company's management was directed from Italy was apparent to third parties, there are good grounds to open the proceedings 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. The EIR (Recast) only binds European member states.

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 would usually apply to assets held by the company in other member states (see Article 7 of the EIR). However, assuming the rights of security are in immoveable property (i.e. real

property), the law of the Netherlands in relation to those rights will govern the treatment of those rights (see, eg, Article 8 or 11 of the EIR).

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.)

Australian law will apply to the real rights of security located in Australia. The Italian insolvent estate representative can however seek recognition of the Italian insolvency proceedings as a foreign main proceeding in Australia, noting that Australia has adopted the UNICTRAL Model Law (with certain modifications, see the Cross-border Insolvency Act 2008) and relief.

3

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 36/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.