



**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 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.

Both civil law and common law-based systems of insolvency proceedings come from harsh roots in dealing with debtors, but they have each evolved unique local characteristics. Civil insolvency law comes from the Roman law of executing judgments, whereby the debtor literally pledged their body to repay a loan. Procedures to collectively collect on a debt like the assignment of property, forced asset liquidation and compositions with creditors are elements that are still present in many civil law insolvency systems today, but as execution against a debtor's assets and not against their person.

English insolvency law had a similarly long period of imprisoning debtors and viewing them as criminals or quasi-criminals if fraud was involved. A difference is that the English system of collective debt collection began with compulsory administration and equal distribution among creditors in 1542, and then evolved in 1570 to bring in state administration and supervision by the Lord Chancellor. The English system brought in the notion of a statutory discharge of debt in 1705 for debtors who cooperated with the insolvency process, unlike the "fresh start" in civil systems which came much later.

**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 in insolvency law describes a system where insolvency proceedings can be commenced in different states but where the matters will all be dealt with under the same law; for example, the jurisdiction can be chosen based on law where the debtor's centre of main interests exists. This would give effect to the law of the main proceeding in all related insolvency matters worldwide, which allows all creditors worldwide to be treated equally and able to participate in the proceedings equally. It also leads to simplification in a globalized world of international markets.

Territorialism is more protective of domestic insolvency regimes, and so only the law of the state or jurisdiction where the insolvency proceeding has begun can apply to that proceeding. This can potentially lead to a multiplicity of insolvency proceedings in respect of the same debtor because the results of the insolvency stay within that one jurisdiction's borders and laws. This respects local sovereignty over insolvency proceedings but creates challenges in getting orders recognized and enforced globally, which will lead to more costs and time spent for creditors. **There is scope to elaborate with respect to territorial limits**

A pragmatic, modified approach to universalism is becoming more common, even if it is not standardized in a great measure as many states are still closer to territorialism. Modified universalism allows the main proceeding opened in one state to be supported by secondary proceedings in other states. The courts in these respective proceedings will apply principles of comity and reciprocity to

cooperate with each other. There are other permutations of this approach with cooperative aspects that are formalized in contracts and protocols as well. **There is scope to elaborate re COMI**

2

**Question 2.3 [maximum 4 marks]**

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

Latin America and South America is one of the most unified jurisdictions when it comes to international insolvency because of early treaties governing private international law that also contained bankruptcy jurisdiction. Six states signed onto the Montevideo Treaty in 1889 covering personal and corporate insolvency and three of those states signed onto the additional Treaty in 1940. The 1889 Treaty requires a debtor domiciled and operating primarily in one jurisdiction to carry out one set of proceedings there, and if the debtor has two or more economically autonomous businesses operating in different Treaty states parties, then concurrent proceedings are possible.

Even more states are parties to the Havana Convention/Bustamante Code concluded in 1928, which provides more support than the Montevideo Treaties for a single insolvency proceeding to have extraterritorial effect throughout the region. It does this by introducing private international law provisions on the "Unity of Bankruptcy or Insolvency" that allow a debtor to *only* have one proceeding if it is domiciled in one place. It is similar to the Montevideo Treaties in that there may be concurrent proceedings against a debtor with commercially separate operations in other states.

**An more thorough examination of differences between the agreements is warranted**

The most recent regional achievement is how many states signed onto the Union of South American Nations agreement, which aims to be similar to the European Union supra-national structure. Many states follow a more universalist approach and allow one proceeding to have effect throughout other member states.

2

**Marks awarded 6 out of 10**

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

**Question 3.1 [maximum 7 marks]**

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

I agree with the idea that bankruptcy and insolvency can be used interchangeably to describe the process of collective, court-supervised debt collection against a debtor. Insolvency in the course materials is described as the situation when a debtor cannot pay its debts or when its liabilities exceed its assets, whereas the term bankruptcy should be used when the debtor is formally under bankruptcy proceedings.

In my jurisdiction, bankruptcy is more often used for individuals or lower value corporate claims where the goal is liquidation of assets for the repayment of creditors who may not have any relationship to each other. Insolvency refers to a court-supervised process that has other elements like the involvement of an insolvency representative, partial or whole share or asset sales, restructuring/reorganization with a view to maintain the business as a going concern, and proposals



to creditors. It has more connotations of dealing with corporate debts and relationships. Another difference is that a bankruptcy will likely lead to a fresh start or statutory discharge as against an individual, which allows them to start with a clean debt record after some time has elapsed (even if a credit rating takes longer to recover). For a corporation, a discharge is not meaningful because the primary concern is how to keep the business going or wind it up efficiently in a way that will see the creditors made whole. An insolvency also has more considerations for how to handle and punish fraud if it arises, since usually the directors and officers are not personally liable in the same way as a personal bankrupt would be in the same system. Overall, I think these terms can be used interchangeably, as most people will come to understand that there are differences in the systems that apply to individuals and corporations regardless of which term is used.

**This is a 7 mark sub-question and there is scope for elaboration, including with respect to essential characteristics 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.

Generally, cross-border insolvency proceedings begin for many reasons, but among the most common are that a debtor's real property and assets are located, or its business is conducted (through agents or subsidiaries), in more than one jurisdiction. This could potentially be dealt with through private international law regimes domestically, but that is not the entire answer where states espouse different doctrines on universality, territoriality or modified approaches as discussed above, and where many states have insolvency laws that are woefully inadequate for cross-border trade and business issues.

Another issue that can arise is how parties can reconcile the interests of creditors and debtors when some systems prioritize one group over the other. There are even systems where labour rights take priority over all other claims, like in France, or other issues where public policy issues take precedence over creditors' rights. Not only are the interests different from country to country, but the language used to explain insolvency differs as well even within systems that have the same English or civil law history! Thresholds for commencing a proceeding or the nature of debts involved vary widely. Westbrook has identified nine key issues (see materials, page 42) in cross-border cases to encourage harmonization, but domestic law is still the major obstacle. **This sub-question required you to set out these issues identified by Westbrook.**

The UNCITRAL Model Law on Cross-Border Insolvency aspires to remedy issues that international investors or creditors would face in insolvency proceedings under systems where local creditors rely on local protections or where domestic law is outdated or not well suited for cross-border matters. The Model Law can be incorporated into domestic law in a way that updates a state's private international law so that substantive and procedural issues are simplified and unified globally to a better degree. It also provides a degree of familiarity to practitioners so that they will better understand the expected outcomes of an insolvency proceeding in a Model Law state.

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

**2.5**

**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.

In the context of international insolvency law, hard law is binding law with obligations that are enforceable against a party, whereas soft law is a body of principles, practices and norms that are not strictly enforceable (or in some cases even codified). Hard law takes the form of treaties or conventions to which states are signatories and/or have ratified the treaty and brought it into its domestic law. In the case of the EU, there are European legislative and regulatory instruments that have influenced international insolvency law, like the EIR Recast. This approach has been more effective in the EU circumstances than drafting treaties that have had very few signatories and not come into force.

Soft law comes in many more forms, from norms published by working groups like the Hague Conference on Private International Law, the IBA's various attempts at recognition laws (MIICA and the Concordat), the UNCITRAL Model Law (MLCBI) and other UNCITRAL insolvency practice guides and agreements. These approaches allow states to incorporate elements of global practice as it develops or is proposed, without the threat of treaty obligations being enforced or sanctions enacted. Some states will review the elements of these Model Law or restatements of norms and incorporate elements without wholesale ratification to ensure that they are striking the best possible balance. The reality in international trade law is that investors want flexibility and certainty at the same time, which soft law can provide.

**3**

**Marks awarded 9.5 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.

(Assuming that this is happening after January 1, 2021.) To have the US insolvency recognized in the UK, Norton Cars would want to consider following in the steps of the *Maxwell Communication Corporation plc* case where there were concurrent insolvency proceedings in both the US and UK. These proceedings were coordinated by an "Order and Protocol" that helped to harmonize the two proceedings and retain value in the debtor as a going concern in one jurisdiction with certain management. Given Norton's global reach, it is likely still a viable business in some sectors and countries but it requires a coordinated reorganization to ensure it is able to continue to meet its obligations. Of course, the representative would also want to have due regard to the domestic laws, including the UK 1986 *Insolvency Act* (as amended by other UK laws), section 426(5), the UNCITRAL Model Law as it has been adopted in the UK in 2006, and the guidance of the House of Lords in *McGrath v Riddell* and *Rubin v Eurofinance SA* as related to common law jurisdiction of recognition and enforcement. **The US is not designated in relation to s426**

**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.

4.2

Because Italy and Germany are both EU Member States, the EIR Recast applies to them both, which will facilitate cross-border cooperation on the insolvency. As regards where the main proceeding should be commenced, under the EIR Recast, Art. 3(1), the COMI is generally the best indicator of where a proceeding should be started, which means that Norton Cars should still commence its main proceeding in Italy under Italian law. A subsidiary proceeding can still be commenced in Germany given that Norton Cars has an "establishment" there which operates in a non-transitory fashion. EIR Recast, Arts. 8-18 will also be helpful for explaining how to handle situations like employment rights of workers in Germany.

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, they are not EU Member states and as such the Regulation does not apply to them.

1

**Question 4.4 [Maximum 6 marks]**

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

- (a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

As The Netherlands is an EU Member state, the EIR Recast will apply and as such, Italian law will apply unless a subsidiary proceeding is commenced. Art 7.1 states that the law applying to the insolvency proceeding and its effects is the law of the state where the proceeding is opened, but Arts. 8-18 deal with rights of property *in rem* and immoveable property (if that is what is meant by "real rights of security"). There is a chance that domestic Dutch law could apply as sometimes non-bankruptcy laws can impact proceedings where "real rights" of security exist.

**In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.**

1.5

- (b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

Australia has adopted the UNCITRAL Model Law and so parties should be guided by the coordination and cooperation provisions in Arts. 25-26 in cross-border insolvency matters. Parties should be mindful that domestic real security rights in Australia may impact any of the Italian insolvency proceeding and that Australia's domestic system is still not unified and so parties should consult the Corporations Act 2001 for corporate insolvency provisions.

**Elaboration is warranted**

1.5

**Marks awarded 11 out of 15**

**\* End of Assessment \***

**TOTAL MARKS AWARDED 34.5/50**

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