



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.

Civil law systems (e.g. France) historically developed, at least in part, from Roman law,¹ whereas common law systems historically developed from English common law. In terms of bankruptcy, Fletcher has identified roots from Roman law within civil law systems, including the concept of forced liquidation of assets (*distractio bonorum*).² English common law has developed with various historical statutes, such as the Statute of Ann 1705 (which provided for discharge) and, more recently, the Insolvency Act 1986.³ **Statute is technically separate from common law precedent.** A distinction between the systems is that common law is far more case-law-based, whereas civil law systems have a code which is applied, with far less emphasis (if at all) upon precedents derived from case law. **This is an excellent point**

It would be beneficial to list further examples of countries within each category
1.5

Question 2.2 [maximum 3 marks]

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

Universalism is the theory that in an insolvency situation the relevant debtor's debts and assets, across the globe, should be subject to one insolvency proceeding only.⁴ Modified universalism is where a 'main proceeding' is opened in a state which has been determined to be the Centre of Main Interest and which, in turn, is assisted with secondary proceedings in other states.⁵ Territorialism encapsulates the opposing view of universalism, in that insolvency processes can be commenced in multiple states and be limited, in terms of territory, to the various states in which they are commenced.⁶

There is some scope to elaborate, for example with respect to forum in universalism

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.

Various treaties have been adopted in Latin America on commerce that have incorporated a chapter on insolvency, including the Montevideo Treaties (1889 and 1940), as well as the Havana Convention on Private International Law (1928).⁷ The Havana Convention is more beneficial than the Montevideo Treaties in respect of enabling a single proceeding with universal application in the region affected by the treaty – in particular, Article 414 provides that if a commercial debtor has only one civil or commercial domicile there can only be one preventive proceeding in insolvency.⁸ That being said, concurrent proceedings in Havana Convention States can arise where there are commercial establishments which operate in economic separation, such that the Convention, in this respect, has a similar approach to the Montevideo Treaties of enabling a single proceeding where the debtor

¹ Module 1 Guidance Text, p 4.

² Ibid.

³ Ibid 6.

⁴ Ibid, p 37

⁵ Ibid, p 40

⁶ Ibid, 38.

⁷ Ibid, 59.

⁸ Ibid, 61 – content paraphrased.

intermittently trades in more than a single State, or only has agents or branches in another state which is a contracting state.⁹

There is scope to elaborate for example with respect to the different members of the different agreements

3

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 with this statement, despite the fact that the two words are, as Fletcher points out, synonymous in many systems,¹⁰ (but not all systems). The two words can mean different things in different legal systems. For example, in Australia an insolvency of a corporation is generally referred to as “insolvency” but “bankruptcy” is generally the term used in respect of insolvency proceedings in the context of a natural person, or individual.¹¹ Similarly, an explanation, regarding differences between the words, can be advanced which is that sometimes “insolvency” refers to the debtor’s state of financial affairs, whereas “bankruptcy” denotes the formal state of being placed into formal bankruptcy proceedings.¹² Subtle differences in terminology can take into account differences in objectives, as regards insolvency for individuals vis-à-vis corporations, such as Seal and Hooley’s distinctions, including that, in respect of individuals, the objectives of the proceedings include protecting individual debtors from harassment, to enable the individual to make a fresh start, and so on, whereas in the context of corporations the emphasis is, of course, preservation of the business, or sustainable components of it, and not necessarily the company.¹³ In that regard, there is utility in using the two words to mean different things, rather than the two words being purely synonymous. Etymologically speaking, this would also accord with the origins of “bankruptcy” as having a more personal dimension – *banca rotta* – the Italian for “break the bench”.¹⁴

Elaboration is warranted for this 7 mark essay sub-question, including with respect to essential characteristics, such as those identified by Wood, and differences such as with respect to exempt property.

5.5

Question 3.2 [maximum 5 marks]

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

Various difficulties arise, which have been identified by Westbrook, including:

⁹ Ibid.

¹⁰ Ibid, 18

¹¹ Ibid, p 18.

¹² Ibid.

¹³ Ibid.

¹⁴ Reference to the Italian obtained from the Guidance Text, p 4.

1. Standing;
2. Moratorium on actions by creditors;
3. Participation by creditors;
4. Contracts which are executory;
5. Claims procedures which are co-ordinated;
6. Preferences and priorities;
7. Powers on avoidance provisions
8. Discharges; and
9. Issues on conflict of laws.¹⁵

Other issues include differences in definition of ‘insolvency’ across different systems (*e.g.* Friman on common insolvency language), and differing approaches in national law (*e.g.* civil contra common law and systems being more or less pro creditor etc).¹⁶

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.

Hard law generally refers to binding legal obligations within a state’s legal system which can be enforced on the parties within that system (including creditors and debtors), whereas soft law does not have the same normative quality, but is still capable of having legal effects – an example being the UNCITRAL Model Law – which has no legal effect unless adopted by the legal system of a state which chooses to adopt the Model law.¹⁷ An example of hard law would be the **Insolvency Act 1986** (England & Wales).

This warrants elaboration.

2.5

Marks awarded 13 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.

¹⁵ Paraphrased from Guidance Text, 42.

¹⁶ Ibid, 41.

¹⁷ Ibid, 47.

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.

The main applicable English law provision is the **Cross-Border Insolvency Regulations 2006** (SI 2006/1030) ('**CBIR**'), which adopted the UNCITRAL Model Law within the legal system of England & Wales. Under the **CBIR, Reg 2** the Model Law, as contained within **Schedule 1** of the **CBIR** has the force of law within England & Wales. Norton Cars Inc could, therefore, apply under the **CBIR, Sch 1, Chapter II** (more specifically, **Article 9** thereof) as a foreign representative. **Schedule 1, Chapter II, Article 13(1)** also states, in that regard that "...foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under British insolvency law as creditors in Great Britain." Furthermore, Norton Cars could seek recognition of the liquidation proceedings under American law via the **CBIR, Schedule 1, Article 15**. Given that the question states that the HQ is still in England at the time of these proceedings I suspect that the US proceedings would be a foreign proceeding, rather than a foreign main proceeding (as per **Article 17**).

This sub-question also required you to identify common law and refer to the non-applicability of s426.

2.5

Question 4.2 [Maximum 4 marks]

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

Given that Italy and Germany are obviously both EU member states the appropriate source of law would be **Regulation (EU) 2015/848**, governing international insolvencies within the Union. Pursuant to that provision, **Article 3** stipulates that the Court of the Member State where the COMI is located shall have jurisdiction to open insolvency proceedings which are termed 'main insolvency proceedings', and that:

"The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."

Accordingly, given that the COMI is in Italy, and the company's management is directed from Italy, proceedings should be opened in Italy under **Article 3** and not Germany.

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 EU Regulation cannot have the effect of unilaterally imposing its requirements on third (*i.e.* Non-EU) countries.

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 in respect of the proceeding, as per **Article 7** of the Regulation. Moreover, **Article 20** ensures that the Italian judgment opening proceedings must be recognised in the Netherlands. However, as per **Article 21(3)**, *“In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action, in particular with regard to procedures for the realisation of assets”*. So, on that basis, there may be the application of Dutch law in respect of the real rights of security.

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 insolvency proceeding and also the real rights of security situated there. Australia is obviously not a Member State of the EU and not bound by the **Regulation**. Similarly, the law applicable to the real rights of security would be Australian law.

There is scope to elaborate with respect to the MLCBI

2.5

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41/50

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