



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 10 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 jurisdictions have their roots traced back to Roman law and Table 3 of the Twelve Tables and the debtor pledging their own body (i.e. could be imprisoned or sentenced to death in default) as a promise to repay the loan. It was then further developed as a result of *Lex Mercatoria*.

English law, on the other hand, did originate with the principle of imprisonment for non-repayment of debt.

One particular example of a practical difference in current times is the concept of a floating charge. A floating charge is a common concept in English law based systems but are generally not encountered in civil law systems.

Civil law systems are sometimes considered to be more territorial and English law systems more universally inclined, though this is not necessarily true with a growing convergence on “modified” universalism or territorialism.

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

1

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.

The principle of universalism is that there should only be a single insolvency proceeding covering a debtor’s worldwide estate. In order to facilitate this, the principle builds on the idea that the laws of 1 jurisdiction (such as where the debtor’s COMI is located) will govern the debtor’s insolvency no matter where such additional proceedings are brought.

At the other end of the spectrum, is the principle of territorialism which considers that proceedings should be brought under the laws of the territory where the debtor’s assets are located. If the debtor has assets in multiple territories then this principle would have proceedings brought in each of the relevant territories. Where multiple proceedings are brought, such proceedings would be restricted to only the assets in the relevant territory.

As somewhat of a compromise and in recognition of the practical realities of many of the worldwide insolvency laws, modified universalism arrives between the universalism and territorialism. It promotes the basis of a main proceeding supported by other ancillary proceedings with co-operation among the various jurisdictions and their courts. **Elaboration is warranted here**

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.

Two initiatives undertaken in Latin America are The Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code).

While each of the initiatives seeks to align on managing cross-border insolvency issues, there are differences. Notably, The Montevideo Treaties provide for a single set of proceedings only where a debtor has a commercial domicile in one state. If the debtor otherwise has two or more economically autonomous business in different states the treaties provide for concurrent proceedings i.e. proceedings can be opened in any of the states where the debtor has an economically autonomous business.

On the other hand, the Havana Convention takes an approach that seeks to unify proceedings within the treaty states by having a single proceeding that has extraterritorial effect throughout treaty states. Notwithstanding that, if a debtor has business units operation as stand-alone units there may be separate proceedings. In this scenario, the Havana Convention does not provide for co-operation or coordination between the separate proceedings.

Moreover, each initiative being a treaty, they differ with respect to the signatories which have joined the treaty.

4

Marks awarded 7.5 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 consideration of whether the words bankruptcy and insolvency are interchangeable demands a consideration in various contexts.

In everyday speech where precision is not a priority, I do agree. The dictionary (see dictionary.com) even refers to each in the definition of the other: bankruptcy is defined as “any insolvent debtor” and insolvent is defined as “pertaining to bankrupt persons or bankruptcy (bankrupt and insolvent each being linked through from bankruptcy and insolvency).

If considering the meaning of each word in a legal context the answer must be derived from the meanings ascribed in law. Here there is no clear answer and it depends on which jurisdiction’s perspective you consider this from. Some jurisdictions use only one of the terms, others use both terms and use them to mean different things. For example, in Australia insolvency refers to a corporation and bankruptcy refers to an individual. The reason for this because it might be said that insolvency refers to a financial state (e.g. under English law balance sheet or cashflow insolvency) and bankruptcy may refer to the act of being declared bankrupt, but this is not always the case.

According to Wood, the essential characteristics of bankruptcy and insolvency are an automatic stay (or moratorium) to the benefit of the debtor; a pooling of assets to be distributed to creditors; and the pool of assets to be distributed *pari passu* among creditors (subject to rights of priority).

There is a significant overlap between insolvency/bankruptcy of individuals and corporates, in particular, the principles referred to by Wood above, as well as the requirement to deal with secured creditors fairly and a requirement to investigate the reasons for failure and take appropriate action. Such actions may include setting aside transactions and clawing back assets.

In the case of corporates, there is commonly a desire to preserve such corporate as a going concern while treating creditors fairly. There is likely also to be an investigation into the running of the corporate and potential liability of its officers.

In the case of individuals, the end goal is often to allow the individual to make a fresh start, there is no possibility of 'dissolving' or 'winding-up' the individual as there is with a corporation.. There is also more likely to be formal arrangements that account for future income as well as the individuals estate at that time.

Greater elaboration regarding differences is warranted, including 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.

One problem starts at the outset of defining 'insolvency'. Under domestic rules, the test as to whether or not a business/person is insolvent varies in different jurisdictions; this is sometimes referred to as a lack of a common "insolvency language". The difficulty of reaching a consensus on what the insolvency trigger should be has largely led to working around this problem, rather than trying to confront it, by defining and referencing "insolvency proceedings".

Another difficulty arises with how different jurisdictions approach rights of debtors and creditors and whether they tend to favour one or the other. Various complex rules that may have been developed on a considerable period of time regarding factors impacting creditor rights (for example: security, trusts, retention of title, set-off and netting; and equitable subordination rules), these are referred to as domestic norms and would need to be converged. It would seem unlikely that such varied rights and obligations under so many jurisdictions could find a common ground.

Nine key issues encountered in cross-border insolvencies were identified by Westbrook:

1. recognition of a foreign representative (e.g. an English appointed administrator);
2. the alignment of moratoriums on creditor actions;
3. creditor participation;
4. executory contracts;
5. co-ordinating claims procedures across jurisdictions;
6. aligning priorities and preferences;
7. aligning avoidance provisions;
8. aligning discharges; and
9. conflict of law issues.

Another reason why a solution is difficult is that the legal systems across the world differ in structure and approach e.g. civil and common law jurisdictions.

Moreover, a single solution would requires the buy-in from a substantial majority. As soon as a cross-border insolvency occurred with a jurisdiction that what was not part of the solution the challenges currently faced would arise again.

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 are the laws that are binding on relevant parties, for example the legislation enacted by governments that are binding on their people and enforceable in its courts.

There does though exist formal guidelines and commitments that are perhaps not directly enforceable but still act as more than mere guidelines. For example, the state itself may have committed to agree to something but which is not enforceable until ‘hard law’ is enacted. Such ‘guidelines’ are often referred to as soft law. An example of soft law in international insolvency is the MLCBI, which is gaining traction and gains more and more influence as more countries adopt the model laws.

That is not to say that multi-state agreements cannot be hard law. In international insolvency, one example is the EIR Recast which has relatively successfully introduced common rules between states within the European Union.

3

Marks awarded 13.5 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.

The UNCITRAL Model Law as given effect in England under the Cross-Border Insolvency Regulations 2006 may be applicable. Under such legislation a foreign representative may seek the assistance of the English courts in connection with a foreign proceeding. The proceedings in the United States will

need to be “collective proceedings” and it is likely that they are; there is precedent for proceedings in the United States being recognised.

A court in a “relevant country” may apply to an English court under section 426 of the Insolvency Act 1986 for assistance with respect to insolvency law. The United States of America has not been designated a “relevant country”. Therefore section 426 of the Insolvency Act 1986 will not be applicable.

There may be grounds under English common law, however, this was limited in *Rubin and another v Eurofinance SA and others and New Cap Reinsurance Corporation (in liquidation) and another v Grant and others [2012] UKSC 46* which related to an application with respect to a US insolvency proceeding and said that an English court could not enforce the order of a foreign court if there was not jurisdiction to do so “in the eyes of the English court”. Nevertheless, there remains precedent for various circumstances where there may be grounds for an English court to recognise the proceedings in the United States and assist: for example, to remit asset realisation from secondary proceedings to the proceedings in the United States.

4

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 member states of the EU to which Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) applies (the Recast Insolvency Regulation).

Under the Recast Insolvency Regulation, main insolvency proceedings must be brought in the member state in which a company’s centre of main interests (COMI) is located. A company’s COMI is tested on the date when an application to open proceedings is filed (*Staubitz-Schreiber (C-1/04)*), there is a rebuttable presumption that the COMI will be in the principal place of business but should be where the company conducts its administration of a business and is (Article 3(1)). It is suggested that Norton Cars Inc’s administration is conducted from Italy and therefore Italy is the most likely COMI. Thought it is a complicated analysis for which more information would be required.

If COMI is considered to be in Italy then main proceedings will be opened there, but which will likely require secondary proceedings in Germany particularly if substantial assets are located there relating to its “main operations”.

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, those courts would need to apply their domestic legislation.

Some further elaboration would be beneficial as to the reasons for this

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.)

The Netherlands is a member of the EU and therefore Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) applies (the Recast Insolvency Regulation).

Main proceedings are open in Italy, but as the company is operating through a branch in The Netherlands then secondary proceedings may be opened in The Netherlands with respect to the assets situated in The Netherlands. While Dutch law (principally the Faillissementswet) will then apply to those proceedings and assets, the question of the scope of those assets (if there is any uncertainty) may be ruled on by either the Italian or Dutch court (applying their own law).

There is some scope to elaborate, such as with respect to the relevant provisions of the regulation

2.5

- (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 on Cross-Border Insolvency (Cross-Border Insolvency Act 2008) but Italy has not. Australia is not an EU member state and therefore the European Recast Insolvency Regulation does not apply.

An Australian court would apply the Model Law to the proceedings. Should it find that the Italian proceedings are a foreign main proceeding the court will take certain actions. Proceedings will then only be able to commence in Australia (under Australian law) with respect to any assets located in Australia. Therefore for any real rights of security situated in Australia, Australian law will apply, within the confines of the recognition of the foreign main proceedings in Italy.

3

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 45/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.