



**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 5 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.

[Comparison is as under:

- A. Countries with historical roots in Civil law:  
France, Germany, and Italy are examples of the countries whose insolvency law systems have historical roots in Civil law. Such laws give priority to the maximum realisation of debt to the creditors. These are written laws/ codes but also gives importance to the judges in formal insolvency proceedings.
- B. Countries with Historical roots in English law:  
UK, USA, and Canada are examples of the countries whose insolvency law systems have their historical roots in English law. These laws have roots in Common law tradition and are based on the judicial decisions. Both sides argue their case and judges invariably apply existing law. These systems rely more on the concept of resolution of insolvency wherever possible and liquidation if only the last option.]

3

**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.

[we can discuss the differences of these principles while dealing with a cross border insolvency situation as under:

In Universalism the main target is to have a single and unified insolvency proceedings at the place where the debtor has its centre of main interest (COMI) and the decision there will have worldwide effect. While in modified universalism it allows for primary insolvency proceedings in one jurisdiction ( mainly in centre of main interest of the debtor) and secondary proceedings in other relevant jurisdictions and in Territorialism exclusive emphasis is given on exclusive jurisdiction of individual countries within their territories.

Universalism approach encourages cooperation and recognition of foreign proceedings. In modified universalism, primary proceedings are the focal point for asset distribution while secondary proceedings in other jurisdiction provide support. But in territorialism cooperation and recognition for other territories seems rare. ] **Elaboration is needed with respect to territorialism and modified universalism**

1.5

**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.

[In Latin America, many initiatives have been undertaken to handle international insolvency issues. We can discuss these initiatives and differences between those initiates as under:

1. The UNICITRAL Model Law on Cross Border Insolvency  
The UNICITRAL Model Law suggests a global framework for cross-border Insolvency, and it has been adopted by some of the Latin American countries.
2. Latin America Cross-Border Insolvency Cooperation Framework (FLAR).  
FLAR is regional cooperation framework and is specific to Altin America. It promotes coordination among member countries.

The main difference between these initiatives is in their scope and their reach. The UNICITRAL MLCBI offers a broader and bigger cross border insolvency resolution framework with member countries across the globe while FLAR is a region specific to Latin American member countries of FLAR network.]

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

0.5

Marks awarded 5 out of 10

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

**Question 3.1 [maximum 7 marks]**

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

[The terms “bankruptcy” and “insolvency” seems related concepts but are not fully interchangeable. Both the terms “bankruptcy” and “insolvency” have different meanings, and both have different implications. Let’s discuss these aspects as below:

**1. Meaning:**

**Bankruptcy:** Bankruptcy is a legal status which is applicable to individual natural person as well as on corporations. This legal status involves a formal legal process under supervision of some authority / court and is undertaken in situations where either debtor applies for grant of such status when he fails to replay his debt / financial commitment in time or applied by creditor through formal legal process and seeks intervention of the court / legal system to recovery of his dues. Bankruptcy process aims to provide for legal framework for the resolution of the debtor (individual or corporation) or fresh start and fair treatment to the creditors for maximising their recovery.

**Insolvency:** Insolvency is a wider financial state. Insolvency may be a balance sheet insolvency i.e a situation where liabilities are more than assets of the debtor and may be a cash flow insolvency or commercial insolvency wherein financial obligations are not fulfilled on the date when they become due by the debtor being individual, or corporation. Insolvency may not lead to a formal bankruptcy process always.

**There is scope to elaborate regarding different meanings in different jurisdictions**

**2. Essential characteristics:**

**Bankruptcy:** Bankruptcy proceedings essentially involve legal proceedings, court supervision and then distribution of debtors’ assets among eligible creditors according to the applicable law of the land. In almost all systems protection to the debtor is available from further / simultaneous legal actions by creditors once bankruptcy proceeding starts.

**Insolvency:** Insolvency is a financial state and may not involve legal proceedings or involvement of court leading to a bankruptcy status. Insolvent debtor whether individual or corporation may negotiate the debt terms and get restructuring done.

**It would be beneficial to consider the matters raised by Wood**

**3. Difference in Corporate and Individual insolvency/bankruptcy:**

**Corporate Bankruptcy:** In most of the systems, when we deal in an insolvency / bankruptcy of a corporation the focus remains on the resolution / restructuring of the corporate debtor so



that it can remain a going concern. The focus is on preserving the business, maximise the returns to the creditors while preparing the resolution plan for the corporate debtor. Shareholders/ management are typically not made personally liable unless they have done something to defraud the creditors intentionally.

Individual Insolvency/bankruptcy: In most of the systems there are different provisions for dealing with individual insolvency than for dealing with corporations. In individual matters, while preparing the resolution plan, the focus is on giving debtor a fresh start and distribute the assets among eligible creditors.

Hence, we can conclude that these terms i.e. bankruptcy and insolvency are related concepts but are not fully interchangeable.]

**Exempt property is relevant and warrants further consideration**

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.

[Following are some of the challenges that may arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation:

1. Legal systems: The insolvency laws differ from country to country depending upon their roots. Some countries have their laws based on civil law and some have roots in common law/English law. Some countries believe that creditors should have control on debtor and others believe that debtors should continue to exercise control.
2. Cultural and economic differences: these aspects play crucial roles. What is acceptable in one country may be considered unethical in another country.
3. Legal autonomy and sovereignty: Countries value their own legal systems and may not accept a global set of rules to be applied in their country.
4. Recognition and cooperation: Even after adopting Model laws sometimes it becomes difficult to enforce in cross-border insolvency situation due to involvement of local courts of foreign land.
5. Regulatory issues: ensuring uniformity in global framework is difficult. ]

**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.

[ In the context of international insolvency, “Hard law” means legally enforceable agreements, laws, rules and regulations. These are typically international treaties and conventions.

“Soft Law” means non-binding and recommendatory guidelines/principles. These are not enforceable.

Examples :

Hard Law: European Insolvency Regulation (200) and EIR Recast are good examples of hard law. It is signed among member of European states in European parliament.

Soft Law example is UNICITRAL Model Law on Cross-Border Insolvency.

**Soft law solutions like UNICITRAL MLCBI have achieved more success than hard laws.] Elaboration is warranted, in particular with respect to considerations pertaining to success or otherwise**

**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.

[We can advise the American Insolvent estate representative as under:

1. Since the liquidation application has been filed under American law while headquarters of Norton are still there in England and situation is before Brexit, the American Insolvent estate representative should apply to relevant courts in England under Cross Border Insolvency Regulation 2006 (CBIR). Before exiting from EU, EIR was applicable but since American is not in Europe, the best applicable law in CBIR 2006. This CBIR 2006 also implement UNICITRAL MLCBI.
2. The American representative can apply to English court for recognition of American liquidation proceedings. English courts will examine and may grant certain powers and privileges to American representative to deal with assets of Norton in England.
3. Of course, the American representative has to apply in writing and have to follow the English procedures, so it is advisable to her that she should engage an Insolvency expert in England in order to get appropriate co-operation, communication and recognition. ]

**It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.**

**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.

[Appropriate legal source(s) to be used in cross-border insolvency matter between Italy and Germany where COMI has been shifted to Italy, management from Italy and main operations transpired in Germany should be as under:

1. European Insolvency Regulation (EIR)
2. Local insolvency law of Italy and
3. Local Insolvency law of Germany.

This is because apart from local laws to be used for insolvency proceedings for local business, the EIR will help in coordination, communication and recognition of matters involving cross-border insolvency issues.

The next issue is to advise on where the main proceedings should be opened. We can discuss it as under:

According to EIR, the centre of main interest (COMI) is key factor in deciding where the main insolvency proceedings should be started. Here, since COMI has been shifted to Italy, so Italy would be appropriate location for main insolvency proceedings, whereas secondary proceedings can be started in other European countries. However, the fact that main operations has been shifted to Germany could also be an important aspect to be seen by European courts where to start the main proceedings.

Therefore, within the Europe, proceedings can be handled keeping EIR provisions, but since the stress of NORTON is worldwide, the local laws of other countries such as America, Australia, India, and South Africa would be applicable for local insolvency and help can be taken from UNICITRAL MLCBI with local insolvency experts in these countries for cross border insolvency issues.]

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, an Indian, south African or Australian court would not be eligible to apply the EU(Recast) regulations for recognition of EU insolvency representative appointed in terms of EU regulations because EU (Recast) is specific and applies to EU member countries.

However, the recognition of such appointed representative would depend on the local insolvency laws & regulations of these countries and the extent of their adoption of UNICITRAL MLCBI.]

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.)

[In this situation insolvency proceedings have been started in Italy and Italian insolvency estate representative and it is also known that Norton's assets are situated in Netherlands. Since both Italy and Netherlands are member states of European Union, therefore EU(Recast) would apply for cross-border insolvency issues between Italy and Netherland. Regarding real rights of security situated in the Netherlands, the conflict of laws rules under EIR would be applicable. According to EIR the Dutch law would apply for the real rights of security on assets situated there in the Netherlands. Hence, the duly appointed Italian insolvency representative will have to apply the applicable provisions of EIR and communicate/coordinate with Dutch courts/legal system for the treatment of assets and real rights situated in the Netherlands.]

**There is some scope to elaborate**  
**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.)

[In this matter insolvency proceedings have been started in Italy and assets have been discovered in Australia also with real rights in security. Here, conflict of law rules will apply. Since Australia has adopted UNICITRAL MLCBI which provides for a framework for dealing with cross-border insolvency issues, this Model law would be relevant to apply here. This model law provides for cooperation, communication among different jurisdictions and provides for recognition of foreign insolvency representatives. Regarding real rights of securities situated in Australia the local laws of Australia would apply. Hence, the duly appointed Italian Insolvency representative would have to consider relevant provisions of UNICITRAL MLCBI and coordinate with Austrian legal system for the treatment of assets and real rights.]

**3**  
**Marks awarded 12.5 out of 15**

**\* End of Assessment \***

**TOTAL MARKS 31/50**

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