INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

**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.

Countries whose insolvency law systems which have their historical roots in English law include England & Wales, Australia, India and African countries such as Nigeria, Kenya, Botswana and Zambia which were former English colonies. Whilst countries whose insolvency law systems have historical roots in civil law systems include European countries (Netherlands, France, Germany and Spain) and African countries such as Angola and Mozambique (which have a civil law tradition based on Portuguese law).

**This answer also required a discussion of the common law aspect of English law.**

**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 a principle that allows for more than one insolvency proceeding pending / originating in different jurisdictions to be dealt with under the provisions of one insolvency law, for instance in the jurisdiction where the debtor has its centre of main interests (COMI) (though there could be other approaches). This means that the law of the "main proceeding" will have worldwide effect, even outside the territorial jurisdiction of the State where the so-called main proceeding has been opened. It calls for so-called "unity of proceedings", allowing the law of the State where the "main proceeding" is opened to regulate the matter.

On the other hand, territorialism is a principle that prescribes that the consequences of an insolvency proceeding will only apply to the State where the insolvency proceeding has been opened and this can lead to a plurality or multiplicity of insolvency proceedings running concurrently in relation to the same debtor. **There is scope to elaborate regarding the proceedings being territorially limited and restricted to property within the State where the proceedings are opened**

Since a global consensus regarding universalism has not been and is unlikely to be reached, most states are closer to the approach of modified universalism, where the "main proceeding" opened in the State where the COMI has been determined, is supported by secondary or ancillary proceedings in another State. In such instances, courts dealing with the respective proceedings are expected to co-operate with each other.

**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.

Latin America States have adopted a series of general treaties to resolve international insolvency issues namely, the Montevideo Treaties (i.e., Montevideo Treaty on International Commercial Law (1889), the Montevideo Treaty on International Commercial Terrestrial Law (1940) and the

Montevideo Treaty on International Procedural Law (1940)) and the Havana Convention on Private International Law (1928) (Bustamante Code).

One key difference between the Montevideo Treaties and the Havana Convention is that the Havana Convention is seen to be more supportive of an approach which allows for a single proceeding with universal effect amongst the contracting States. The Havana Convention accepts that insolvency proceedings commenced in one member State will have extraterritorial effect in another member State. However, it should be noted that there may be concurrent proceedings in Havana Convention States that contain commercial establishments operating entirely separately economically. In such a scenario, the Havana Convention unlike the Montevideo Treaties does not provide for judicial co-operation and coordination of any concurrent insolvency proceedings.

**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.

The statement is accurate to the extent that the terms "bankruptcy" and "insolvency" are used as synonyms in many systems. However, it is noteworthy that this is not always the case and there may be distinctions between the way in which the terms are used. For one, some systems including Singapore and Australia use the term "insolvency" to refer to the insolvency of a corporation, whereas "bankruptcy" is often used to refer to the insolvency of an individual natural person. Additionally, in some contexts, "insolvency" may refer to the state of financial affairs of a debtor (i.e., balance sheet or cash flow insolvency), whilst "bankruptcy" refers to the formal state of being put into a formal bankruptcy proceeding.

The essential characteristics of insolvency or bankruptcy are as follows: 1) there is a moratorium against individual debt enforcement which means that actions by individual creditors against the bankrupt are frozen; 2) the assets of the bankrupt are typically pooled and become available to pay creditors (though different States have provided for exceptions to this rule); 3) creditors are paid *pari passu* (with the exception of priority creditors and secured creditors).

In the case of insolvency for individuals, the general objective is to protect the debtor from harassment by creditors to enable the debtor to make a fresh start and to allow the debtor to reduce his indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration. On the other hand, in the case of corporations, the general objective is to preserve the business (or viable parts of it) and to impose personal liability on responsible persons (e.g., directors / officers of the company) where statutory or fiduciary duties have been breached. This fundamental difference in objectives results in the notion of exempt or excluded assets which applies in some jurisdictions exclusively in relation to individual insolvencies.

7

**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.

**First**, both national and international laws on insolvency traditionally show a lack of structure, both formally and informally, to deal with cross-border insolvency cases. The standard of insolvency law in many countries is also relatively low.

**Second**, it is difficult to reconcile the various national approaches to insolvency. For instance, whilst some jurisdictions are pro-creditor, others might be pro-debtor. Additionally, some systems may give more weight to certain interests over others (for example, labour rights) or show a reluctance to recognise the foreign claims (for taxes, social security etc) or a desire to protect local creditors. Additionally, the differences between domestic insolvency laws also poses a significant challenge. For instance, there are various meanings of the term "insolvency" and a plethora of insolvency proceedings that may be encountered in different systems to deal with unpaid debt.

**Third**, there are plethora of issues that regularly present themselves in cross-border cases including: standing for the foreign representative; moratorium on creditor actions; creditor participation; executory contracts; co-ordinated claims procedures; priorities and preferences; avoidance provision powers; discharges and conflict-of-law issues.

**Lastly**, States are typically more willing to export than import insolvency proceedings.

**It would be beneficial to make reference to Omar and Westbrook**

**4.5**

**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" refers to legal binding instruments which seek to regulate international insolvencies whilst "soft law" refers to non-binding instruments which seek to influence the regulation of international insolvencies.

Examples of "hard law" include treaties and conventions to which States become signatories and thereby bind themselves and affect their domestic law accordingly. As the domestic law would then be enforceable in the courts, these would form part of the State's "hard law" on insolvency. Successful examples of "hard law" include the Nordic Convention (1993) and the European Insolvency Regulation (EIR) (2000). The most successful example of "soft law" would be the Model Law on Cross-Border Insolvency, which was draft legislation that UNCITRAL recommended member States adopt, with or without modification.

**There is some scope to elaborate in your discussion of success**

**2.5**

**Marks awarded 14 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 American insolvent estate representative will be able to rely on the UNCITRAL Model Law on Cross-Border Insolvency as incorporated into UK law (with minor amendments) by the Cross Border Insolvency Regulations 2006 SI 2006/1030 (CBIR) to seek recognition of insolvent estate representative and the terms of the American liquidation order. The representative can also seek the assistance of the English Court to permit him to deal with the assets of Norton Cars situated in England under the CBIR.

**It would be beneficial to note that S 426 is not applicable as the US is not designated**

**2**

**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.

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast) would be the appropriate legal source here. The EIR Recast provides for the recognition and enforcement of cross border insolvency proceedings between EU member states. The main proceeding should be opened in Italy where the COMI of the debtor lies).

**It would be beneficial to elaborate upon why this is the case.**

**3**

**Question 4.3 [Maximum 1 mark]**

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

No, the EIR Recast is a binding piece of EU legislation and it is therefore only directly applicable in all Member States, with the exception of Denmark.

**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.)

The law of Italy will apply to the insolvency proceeding whilst the law of Netherlands will apply with regard to the real rights of security 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.)

Australian law will apply in both instances.

**There is some scope to elaborate**

**2**

**Marks awarded 10.5 out of 15**

*** End of Assessment ***

**TOTAL MARKS 41.5/50**

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