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 7 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 as follows:

Countries whose insolvency law systems have historical roots in..	Civil Law	English Law
Law & regulations	Jurisdictions adopting Civil Law tend to have more prescriptive insolvency laws which offer more detailed and specific rules and procedures.	Jurisdictions adopting English Common Law tend to have insolvency laws with more flexibility. This allows for development and adaptability as the case and economy develops.
Pro-Creditor or Pro-Debtor	The system is likely to be pro-creditor, placing emphasis on the interest of the creditors	The system recognizes the rights of debtor and balance it with the rights of the creditors. This allows for flexibility by allowing negotiation between the parties in the insolvency proceeding.
Court Discretion	Due to the prescriptive rules nature of Civil Law, the court discretion may be more limited as compared to the English Law	Due to the flexibilities offered within the English Law, this requires greater discretion by the court by considering the bigger picture with the ongoing economic circumstances

Some listing of relevant civil law countries and common law countries is also required.

2

Question 2.2 [maximum 3 marks]

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

Differences as follows:

	Universalism	Modified Universalism	Territorialism
Principle & Approach	The principle of universalism emphasizes a global or universal approach to the resolution of cross-border insolvency cases.	Modified universalism represents a more flexible approach that acknowledges the need for coordination among different jurisdictions but allows for certain	Territorialism, in contrast to universalism, emphasizes the importance of each jurisdiction dealing independently with insolvency matters based on the location of the debtor's assets.

		localized or ancillary proceedings.	
	Under universalism, there is a preference for a single, main insolvency proceeding that applies universally to the entire debtor's estate, regardless of its location. **COMI is also relevant to this discussion.**	It recognizes a "main proceeding" in the state where the debtor's center of main interests (COMI) is located, supported by secondary or ancillary proceedings in other states where the debtor has assets.	In a territorial approach, each jurisdiction may conduct its own insolvency proceedings without necessarily coordinating with other jurisdictions.
Application & Proceeding	It requires recognition and cooperation among different jurisdictions to ensure the effectiveness of the insolvency process on an international scale.	While the main proceeding is given primary importance, there is room for cooperation and recognition of ancillary proceedings to address specific local concerns or assets.	The focus is on protecting the interests of local creditors and managing assets within the jurisdiction where they are located.
Example	The UNCITRAL Model Law on Cross-Border Insolvency reflects a universalist approach by providing a framework for the recognition of foreign insolvency proceedings.	The UNCITRAL Model Law also incorporates elements of modified universalism by providing a framework for the recognition of both main and ancillary proceedings.	Some jurisdictions may adopt a more territorial approach when dealing with insolvency cases, particularly if they prioritize the protection of local creditors' interests over international coordination.

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This is a good discussion of the issues. At times there was scope to elaborate, for example with respect to the COMI comment above in blue.

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.

One initiative taken is the adoption of multilateral agreements/treaties to facilitate cooperation in cross-border insolvency matters and allows for simultaneous proceedings. Examples include:

1. Montevideo Treaties 1889;
2. Montevideo Treaties 1940;
3. Havana Convention on Private International Law 1928.

Difference between Montevideo Treaties 1889 and Montevideo Treaties 1940:

1. 1889 treaty is ratified by 6 Latin American States whereas 1940 treaty is ratified by 3 Latin American States.
2. 1889 treaty covers for personal and corporate insolvency whereas 1940 treaty covers additionally for bankruptcy and civil meetings of creditors.

Distinction between Havana Convention and the treaties:

1. Havana Convention's approach facilitates for a single proceeding to have extraterritorial effect in the region but does not cover the procedures for co-operation or co-ordination of concurrent proceedings

4

Marks awarded 8.5 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.

In the context of Malaysia, I do not agree with the statement. The factors distinguishing the term from the other are as follows:

	Bankruptcy	Insolvency
Meaning may be ascribed	Bankruptcy tends to refer to an individual (natural person) failing to meet his/her personal financial obligations.	Insolvency tends to refer to the financial distress state of an entity. The general rule apply would be either the balance sheet insolvency where the liabilities exceed the assets or commercial cash flow insolvency, failing to repay debt when due. As Friman say, a liquidity crisis (i.e. a short term inability to service debts) is sometimes considered sufficient for the commencement of insolvency proveedings
Essential characteristics	Bankruptcy typically involves court-supervised proceedings, providing a structured and legal framework for the resolution of financial difficulties. This tends to include provisions to protect debtors from aggressive	While court proceedings may not necessarily be involved, insolvency may prompt creditors to take legal actions to recover outstanding debts. The law also provide avenues for the corporation to negotiate and restructure for a win/win situation. Unless fraudulent acts is to be pursued or the corporation is not a

	creditor actions during the bankruptcy process. The debtor's personal assets are typically considered in bankruptcy proceedings.	private limited, the assets involved tend to be limited to that of corporation and not the officer of the corporation.
Differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual	Applicable Malaysian law for bankruptcy is the Bankruptcy Act 1967. The implication on credit rating/score on an individual may be more severe if the person is declared bankrupt as compared to an officer of a corporation undergoing insolvency proceedings	Applicable Malaysian law for insolvency: i. Companies Act 2016 ii. Companies (Winding Up) Rules 1972

This question required a more global consideration of the issue, beyond only Malaysia. It would have been beneficial to consider additional matters, such as the difference of exempt property.

3

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.

The legal systems, rules, procedures and principles regarding the insolvency are unique for every country. Complexity in determining which country's legal system holds jurisdiction over crossborder insolvency matter. Claims from different countries may compete and result in legal hearings on deciding where the proceedings should be held. These tend to be time-consuming and adding to legal costs.

There is also the recognition concern. An insolvency order issued by a court in one country may not be recognised in another jurisdiction. The consistent framework for recognition and enforcement would help this and making the process more efficient.

The qualifications and responsibilities of insolvency practitioners may differ from each other in every jurisdiction. This may result in disagreements on the appointment and duties of practitioners in cross-border proceedings.

Regulatory reporting obligations and requirements may differ among the countries. This complicates the sharing of information and increase compliance cost.

To simplify, according to Westbrook, there are nine key issues for universalism:

1. standing for recognition of) the foreign representative (as covered above);
2. moratorium on creditor actions;
3. creditor participation (as covered above);
4. executory contracts;
5. coordinated claims procedures

6. priorities and preferences
7. avoidance provision powers
8. discharges; and
9. conflict of law issues (as covered above)

It would be beneficial for you to also consider the matters raised by Friman and Omar

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.

Hard law refers to legally binding rules and regulations that are enforceable through the legal system for insolvency proceedings. These rules are typically codified in treaties, statutes, and regulations. Examples include European Insolvency Regulation (EIR) 2000 which allowed multilateral developments in international insolvency law and applies in all European Union member states except Denmark and United Kingdom; and Havana Convention on Private International Law 1928 in facilitating cross-border insolvency matters for Latin and Middle American States. **Success or otherwise needs to be considered**

Soft law refers to non-binding principles, guidelines, or recommendations that lack the force of law. While not legally enforceable, soft law can influence behavior, foster cooperation, and provide guidance in the absence of strict legal obligations. Example includes Model Law on Cross-border Insolvency (MLCBI) which may harmonise various domestic insolvency laws in addressing international insolvency issues and as a result, may form a better outlook to foreign investors in doing business in the states and seeking creditor protection.
Success or otherwise needs to be considered

2

Marks awarded 9.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The relevant cross-border source for recognition in England is likely to be the UNCITRAL Model Law on Cross-Border Insolvency. The American insolvent estate representative may use the Cross-Border Insolvency Regulations 2006 to seek recognition and assistance in coordination of the insolvency proceedings including dealing with the assets of Norton Cars Inc in England.

This sub-question requires greater elaboration, including with respect to s426 not applying and in relation to common law

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.

In this case, the American insolvent estate representative may refer to the European Insolvency Regulation (Recast) which governs cross-border insolvency proceedings involving member states within the European Union. In terms of the dealing of assets (if any) in England during the insolvency proceedings, as England is no longer part of the European Union hence EIR (Recast) is not applicable, the American insolvent estate representative may use the Cross-Border Insolvency Regulations 2006.

Greater elaboration is required, including with respect to Germany and Italy being members of the EU and also with respect to where main proceedings should be opened.

1

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 as EIR (Recast) apples only to the member states in European Union. The domestic legal frameworks or procedures for recognizing and dealing with foreign insolvency representatives for each of the Indian, South African or Australian court will need to be observed.

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.)

EIR (Recast) applies here. The regulation provides a framework for determining the applicable law to the insolvency proceeding. As the main insolvency proceeding is subject to the law of the member state where the debtor's Center of Main Interests (COMI) is located (i.e. Italy) hence the Italian law would apply to the proceeding.

Under the same regulation, the law governing rights would be the law of the state where the property is located. In this case, the real rights of security on assets in the Netherlands would be subject to Dutch law.

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 applies here for insolvency proceeding and the real rights of security. However the Italian insolvency procedure may seek recognition and cooperation with the Australian courts using UNCITRAL Model Law on Cross-Border Insolvency.

3

Marks awarded 10 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 35/50

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