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 like the Netherlands, France, Germany, and Spain have historical roots in civil law while countries like Australia, USA and England have historical roots in English law.

While Spain has a system that cannot be identified as pro-debtor or pro-creditor yet, because ultimately both debtors and creditors are adversely affected, the USA system is well known as a pro-debtor system.

Also, differences exist regarding informal rescue procedures or out-of-court proceedings. While the French bankruptcy law provides two types of out-of-court proceedings (ad hoc and conciliation), the Australian law does not prescribe informal rescue procedures, only formal processes, although there is scope for informal reorganization depending on the applicable consent threshold in the underlying debt documents.

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

**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.

The principle of universalism states that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide. This principle allows for more than one insolvency proceeding pending in different States to be dealt with under one insolvency law, which means that the law of the "main proceeding" will have worldwide effect, allowing that law to regulate the matter in other States. **There is scope to also discuss COMI here.**

Principle of modified universalism states the existence of two procedures: (i) the main proceeding, that may be opened where the centre of main interests has been determinated, and (ii) the secondary or ancillary proceeding in other state, to support the main proceeding. In this case, the courts dealing with the respective proceedings are supposed to co-operate with each other.

The principle of territorialism is based in the premise that insolvency proceedings may be commenced in every State where the debtor holds assets, and that the consequences of each insolvency proceeding will only apply to the state where the insolvency proceeding has been opened, leading to a plurality of procedures with effects limited to each State.

**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.

A series of general treaties were concluded on private international law and commerce that included a chapter or title on bankruptcy or insolvency, to manage international insolvency issued. These are: (i) The Montevideo Treaties (1889 and 1940) and (ii) Havana Convention on Private International Law (1928).

It is important to take into consideration that the Havana Convention has more member States than the Montevideo Treaties.

Regarding the differences, the 1889 treaty covers personal and corporate insolvency and allocates bankruptcy jurisdiction based on the debtor's commercial domicile, while the Havana Convention allows for a single proceeding with universal effect throughout its region. The Havana Convention accepts that insolvency proceedings commenced in one member State will have extraterritorial effects in another member State.
Another difference lies in that the Montevideo Treaties do not allow different proceedings in other States, it only provides for one set of proceedings in the commercial domicile of the debtor. Instead, the Havana Convention contemplates that there may be concurrent proceedings in Havana Convention States that contain commercial establishments operation entirely separately economically, but do not provide procedures for co-operation or co-ordination of any concurrent proceeding.

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

**3.5**

**Marks awarded 8 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 meaning of Insolvency and Bankruptcy depends on the context. While, in Australia, "insolvency" is often used to refer to the insolvency of a corporation, whereas "bankruptcy" is often used to refer to the insolvency of an individual natural person; in other contexts "insolvency" means the state of financial affairs of a debtor, while "bankruptcy" refers to the formal state of being put into formal bankruptcy proceeding.
Also, Insolvency itself may refer to the situation where the liabilities of a debtor exceed the assets of a debtor (balance sheet insolvency) or where the debtor cannot repay debts as they fall due by reason of a cash flow problem (cash flow or commercial insolvency).

I do not agree with the statement that the terms "bankruptcy" and "insolvency" may be used interchangeably because I consider that each term refers to a different situation of the debtor. The debtor can be in an insolvent situation (ex. Balance sheet insolvency or cash flow insolvency) but not yet in a bankruptcy situation (formal state of being put into formal bankruptcy proceeding). So that, it is imprecise to use these terms as synonyms.

According to Wood, the essential characteristics of "bankruptcy" and "insolvency" are:

(i) actions by individual creditors against the debtor are frozen and referred to the automatic stay or moratorium against individual debt enforcement. This is the only truly universal feature according to Wood.
(ii) The assets are pooled which become available to pay creditors.
(iii) Creditors are paid pari passu (on a proportionate basis out of the available assets based on their claims).

Some differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual, according to Sealy and Hooley, lie in the objective of the procedure. That way, the insolvency that involves a corporation has as objective to preserve the business or viable parts thereof (not necessarily the company) and impose personal liability on responsible persons.

**Exempt property is also a relevant consideration**

**6**

**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.

Some of the challenges that arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation are conflict-of-law issues, creditor participation, and priorities and preferences.

Regarding creditor participation, it is an issue because the requirements and formalities for the creditors to participate in the insolvency proceeding are different in each State, which makes it difficult for States to renounce their regulation to increase the standard or decrease it due to global dispensation, creating new barriers to entry to the procedure. This is linked to the conflict-of-law issue and the reluctance of states to agree to apply foreign regulations (compatible or incompatible with domestic law) on their territory.

Also, regarding the priorities and preferences, it is difficult to establish at a global level what will enjoy priorities or preferences in insolvency procedures, since the states have determined them taking into consideration the local legal culture, basic rights, security rights, and the political, social and economic situation of each state, which is difficult to unify due to the vast difference between each state in this matters and especially the political, social and economic situation of each state.

In conclusion, the different reality of each country, both in economic development and legislative development, as well as its social situation, and its fear of applying foreign regulations, make it difficult to develop a single global dispensation, because what may be applicable in practice in one country, it may not occur in another due to cultural and/or socioeconomic issues.

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

**2.5**

**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, in the context of international insolvency, means treaties and conventions to which States become signatories and as such bind themselves and affect their domestic law accordingly, becoming part of domestic laws enforceables in the courts. A successful example of hard law is the Europen Insolvency Regulation (EIR) (2000) which has also influenced broader multilateral developments in international insolvency law, despite a series of later modifications.

For his side, soft law, in the context of international insolvency, are regulations created by international and multilateral organizations that are non-binding for States, they are not part of their domestic law, so they cannot be enforceables in the courts. They are recommendations formulated by expert organizations, to which States may or may not adhere, with or without modifications. The most successful "soft law" approach to date has been the "Model Law on Cross-border Insolvency"

(MLCBI), which takes the form of a Model Law, draft legislation that UNCITRAL recommended member States.

There has been variable success in achieving hard law solutions to international insolvency law issues, being more success the use of soft law options, given the numbers, economic size, and geographic spread of States that are adopting soft law regulations, gathering momentum as an influential response to international insolvency law.

**3**

**Marks awarded 11.5 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.

England adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) in 2006, and USA in 2005. As USA and England are member states, the Model Law applies in this situation.

The MLCBI contains as key principles co-operation and co-ordination, which places obligations on both courts and insolvency representatives in the different States to communicate and co-operate to the maximum extent possible. The MLCBI mandates a local court or insolvency representative to co-operate with foreign courts or foreign representatives.

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

The appropriate legal source to be used in this case is the European Insolvency Regulation (EIR) because both Italy and Germany are member States.

According to EIR, the main proceeding should be opened in Italy because that is the country in which is situated the "centre of debtor's main interests" because Italy is the place where the debtor conducts the administration of its interests on a regular basis. Also, the EIR allows the possibility of subsidiary territorial proceedings in other member States where the debtor has an "establishment", so a secondary procedure could be started in Germany since there it operates.

**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?

Yes, an Indian, South African or Australian court be eligible to apply the EU (Recast) because the EIR Recast extended the provisions on the "centre of debtor's main interests", recognizing the existence of insolvency proceedings outside the European Union for the purposes of co-ordinating proceedings both inside and outside the European Union.

**0.5**

**Question 4.4 [Maximum 6 marks]**

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

Italian law will apply to the insolvency proceeding since there is where the insolvency procedure has been opened. However, regarding real rights of security situated in the Netherlands will apply the Dutch law.
It is important to take into consideration that over and above insolvency legislation, many legal principles forming part of the general law will have an effect in insolvency, as the rules that regulate real rights or rights of real security, and general local law will prevail over insolvency law, unless otherwise established.

**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.)

If the insolvency proceeding has been opened in Australia, the Australian law will apply to both insolvency proceeding and real rights of security situated in there. This is the application of domestic law because there is no cross-border component in this situation.

**Further consideration of the explanation is warranted**

**2**

**Marks awarded 11.5 out of 15**

*** End of Assessment ***

**TOTAL MARKS 41/50**

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