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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Disclosure: All answers have relied extensively on INSOL International's Foundational Certificate in International Insolvency 2023/2024 Guidance Texts, as per honesty statement disclosure requirements.

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 that have insolvency laws rooted in civil law had its origins in the 3rd Table of the Twelve Tables, which specified executions of judgment that pertained to using one's body (as a debtor) for draconian consequences in the event of default to secure repayment. These include incarceration, death and even slavery. Subsequent development on the law was also spurred on by the Lex Mercatoria, which as the name suggests, were usages and customs that applied to continental merchants.

Countries that have insolvency laws rooted in English law saw similar punitive actions applied against debtors through incarceration through the Statute of Malbridge of 1267.

Another broad comparison is the colonial histories of these countries, with countries such as Botswana, India and Kenya steeped in English Law while Mozambique and most Latin American countries are largely influenced by civil law. These are not firm rules, however, as countries such as South Africa (a former British colony) have been influenced by both laws.

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

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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 premised on the approach that various insolvency proceedings which may be ongoing in or were filed in multiple jurisdictions can be addressed under the guidance of one primary insolvency law, such that it will cover the entirety of a debtor's assets and liabilities globally.

In its ideal form, wherein a sole forum will have jurisdiction over all insolvency proceedings, the necessary means by which all of a debtor's assets may be obtained and directed will be made available, with all claims being given the opportunity to join the proceedings pari passu. **There is also scope to consider COMI here**

Territorialism, on the other hand, takes an almost complete opposite view and highlights the importance (and relevance) of local court proceedings. In this case, there is a preference for local creditors to be given priority prior to assets being shared for distribution abroad. This creates a strong bias towards territorial limitation and, as such, considers that insolvency proceedings are largely independent of each other, may be commenced independently and are nearly entirely restricted to property that is located inside a State's borders.

Modified universalism is, as suggested by the term, an amalgamation of both. In this case, multiple proceedings occur, albeit led by one main proceeding where the COMI ('Centre of Main Interests') is

determined. Other (secondary) proceedings support the main proceeding, with all courts cooperating to ensure optimal outcomes. In this case, the difference is that modified universalism takes into account the relevant advantages of universalism while acknowledging the importance of local court proceedings, with the necessary cooperation considered.

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 American countries are a great example of states which have had a long history of attempting to harmonize international insolvency regulations through multilateral agreements. These go as far back as 1889 when the Montevideo Treaty on International Commercial Law was executed by 5 states. What followed was a series of treaties such as the Bustamante Code of 1928, the Montevideo Treaty on International Terrestrial Law and the Montevideo Treaty on International Procedural Law, both of 1940.

One key difference that should be highlighted is that not all countries ratified each of these multilateral agreements, which have varying mechanics. Another difference is that The Bustamante Code, also known as the Havana Convention on Private International Law, is also more explicit in having one proceeding (but does not state cooperative procedures in the event of parallel proceedings) while it does align with the Montevideo Treaties in acknowledging that proceedings amongst states have extraterritorial effects.

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.

I believe that the 2 terms are not necessarily interchangeable as these pertain to different specifics, even though the reality is far more dynamic especially in a business context as not all enterprise owners may be aware that there is a distinction.

Insolvency can be defined as a state wherein an entity, such as a corporation, or an individual has the following essential characteristics: liabilities which are greater than the total fair value of assets owned or one where there is an inability to disburse payments for debt service in the short-term.

It would be beneficial to consider the essential characteristics discussed by Wood

Bankruptcy, strictly speaking, can be defined as a state wherein an entity, such as a corporation or an individual has the following essential characteristic/s: undergoing applicable formal proceedings in a state such as Chapter 11 in the United States.

Differences between corporations and individuals are rather intuitive. One of the most straightforward is that an individual cannot be 'liquidated' as opposed to a corporation, hence there is a greater focus on rehabilitation for the former (a greater focus on allowing for a 'fresh start'). Safeguarding against harassment is also of greater importance to an individual.

Insolvency for corporations, on the other hand, highlights greater importance on retaining the portions of a business that can operate as a going concern. In addition, levying the necessary legal consequences for abuse of power, if any, on behalf of corporate officers / directors is also a key aspect of insolvency for corporations.

This is a 7 mark essay question which required some further elaboration, for example with respect to essential characteristics and further differences such as exempt property

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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. Focus on domestic interests.

States are not static entities that merely exist to organize constituents and each is unique on its own. This is reflected even in the mere definitions specified by respective insolvency laws. Procedural and substantive rules, policies and approaches also have distinctions, especially on whether the state has historically leaned towards a 'pro-creditor' or 'pro-debtor stance'.

Domestic interests are also a key consideration when understanding the feasibility of a single cross-border insolvency dispensation. France's focus on the welfare of workers, for example, is a clear distinction, as well as fiscal policies which may push back on recognition by insulating its local lenders and economy. This can be in sharp contrast when compared to areas such as the European Union, in which markets are more integrated. This just further highlights the nuances which can be encountered in specific states, relative to others.

Beyond this, Westbrook touches on 9 primary issues[1] which are essential but also become a source of contention amongst various jurisdictions. Sample challenges arise from queries relative to the application of moratoriums, technicalities on discharges, coordination on claims and specifics on executory contracts, among others.

Elaboration is needed with respect to Westbrook's principles. It would be beneficial for you to also consider the matters raised by Friman and Omar

2.5

[1]*1INSOL Foundation Certificate in International insolvency Law 2023/2024, Module 1 Guidance Text*

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 the application of executed conventions, treaties or regulations into the domestic laws of a specific state. In such cases, States align themselves with said agreements through the development of relevant domestic laws that are enforced locally. States therefore become obligated to abide. Examples include the European Insolvency Regulation, which applies specifically to EU member states. The success of hard law is contingent on the willingness of states to bind themselves through these agreements and there have been examples of successful applications such as in South America, which has a historic record of cooperation amongst various states.

In contract, soft law refers to initiatives which attempt to give sway to the policies of states by creating frameworks that align with generally accepted international consensus and or best practices, as

illustrated by model laws. The Model Law on Cross-border Insolvency, which came about through the efforts of the UNCITRAL, is an excellent example. **It would be beneficial to elaborate upon its success**

2.5

Marks awarded 9 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.

There are a number of options available in terms of sources that may be used to request recognition in terms of English law. These are the Cross Border Insolvency Regulations 2006 SI2006/1030 (also known as the CBIR, in which the UK applied Model Law implementation), Section 426 of the Act and even the jurisdiction of common law in giving access for insolvency proceedings from other countries. If the timing of the insolvency was prior to Brexit (31 December, 2020), there is also the EU Regulation on Insolvency Proceedings. Hence, there are multiple sources available to for American insolvent estate representative. **S426 does not assist as the US is not designated**

Taking this a step further, reference may be made to Wells and Aconley who share their views that CBIR recognition must follow that a foreign proceeding commencement and subsequent foreign representative appointment be taken merely as 'a matter of fact', with the said representative being given standing to submit an application. In addition, that main proceedings in the COMI leads to an automatic stay and that discretionary relief, with certain limitations on its application, be made available. There have also been past cases that illustrate recognition in English courts and may be useful. These include the Thai Airways application for recognition under the CBIR and, for common law, that of Rubin vs. Eurofinance (2012).[1]"

[1]*Wells, P. and Aconley, L. HOW TO GET RECOGNISED: CROSS-BORDER RECOGNITION OF INSOLVENCY AND RESTRUCTURING PROECEDINGS POST BREXIT, In Butterworths Journal of International Banking and Financial Law, March 2021, (pp. 187-190)*

3

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 EIR Recast, which governs EU states such as Italy and Germany, would be the applicable legal source in this case, aside from the necessary provisions which are necessary to consider per the domestic laws – the Italian Bankruptcy Act and the German Insolvency Code, respectively. It is of importance that the country of main proceeding is noted, which is fundamentally driven by the COMI (Italy, in this case) and as "any place of operations where the debtor carries out a non-transitory economic activity..[1]"

[1]*REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast) Article 2 (10)*

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. Amendments relative to the EIR recast have considered the possibility of insolvency proceedings that may occur beyond the borders of the European Union, primarily driven by the need for collaboration across multiple proceedings across both member and non-member states.
This sub-question needs further consideration of these counties not being EU Members and the consequences of same

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.)

In similar fashion to the previous question, member states of the European Union are subject to the EIR Recast's provision indicating that the COMI's courts shall have jurisdictional competence over proceedings. This is especially apparent given the Netherland operations as an 'establishment', which "carries out.. non-transitory economic activity with human means and assets[1]" purpose as an establishment. This, of course, takes into account the application of best practices on coordination and cooperation relative to the specifics of The Dutch Bankruptcy Act ('Faillissementswet').

[1]*REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast) Article 2 (10)*

In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.

1.5

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

Australia has adopted the Model Law, although it should be noted that there are also provisions for the purpose of 'aid and auxiliary'[1], which specifies cooperation with foreign proceedings. Even though the domestic laws of Australia shall apply for real rights of security, recognition for cooperation as per the aforementioned will be done per the provisions of the Australian Corporations Act 2001 (Cth) and the Cross-Border Insolvency Act 2008 (Cth), among other applicable domestic regulations.

[1]*The Model Law on Cross-Border Insolvency Turns 25, by Atkins, Scott (2022)*

3

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 38.5/50

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