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 6 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.

One group of countries are the Anglo-American, which includes England, the United States and Australia which have the historical roots in English law. English law specifically has one unified insolvency legislation for personal and corporates. However these include duplicated rules for each side for the most part.
It should be noted that Australia does not have one unified code but instead has multiple Acts.
Previously UK colonised areas in Africa also have the more English roots in their insolvency laws.

For Continental Europe, these are overall civil law systems. **It would be beneficial to name some relevant countries**
They are based on what the common practices of merchants on the continent were. As a result, these tended to have more harsh rules towards the debtors (in comparison with English law) with risks of imprisonment or being sentenced to death.
It should be noted that English law did not initially have imprisonment for debt as part of insolvency law but this did develop in the thirteenth century. For the non-payment of debt, imprisonment no longer became part of law in the 1800s.

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 allows for one insolvency law to cover insolvency proceedings in multiple states with a centre of main interest. The modified version allows proceedings to be supported by secondary/tertiary proceedings in other areas rather than mostly all in one area. These both use the provision of the same laws to cover the proceedings.
Territorialism relates to the insolvency proceeding only applying where the case has been opened. Insolvency laws of different jurisdictions can become involved in each State that the insolvency proceedings take place.
Territorialism tends to cost more due to the proceedings being incurred in the different laws of different jurisdictions but universalism is deemed to be more impractical to put into practice.
With territorialism, a debtor can be insolvent in one area but not another whereas universalism considers the position as a whole.

There is some scope to elaborate

3

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 overall more civil law based, likely due to the previous links with continental Europe.
One of the initiatives undertaken is the Union of South American Nations which each South American country signed up to be more in line with the EU where there is a law that applies to all countries.

Apart from this, there have been multiple private law treaties and agreements that have been implemented over the years.
The Havana Convention specifically applies to an increased number of South American countries and allows a single proceeding in respect of all assets/liabilities of contracting states. This is not the case with treaties such as the Montevideo Treaty. **Elaboration is warranted** This only had a few of the South American countries that ratified in comparison so international insolvency with more than two jurisdictions would mean that there would need to be more consideration on what treaties and laws apply.
If there are concurrent proceedings however, the Havana Convention does not have cooperative procedures in this scenario. **Elaboration is warranted**

There is scope to elaborate for example with respect to the different members of the different agreements
3
Marks awarded 7.5 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 overall do not necessarily agree with the statement.
As a whole, bankruptcy is a legal process compared to insolvency which is a state that an individual or company is in.
More specifically with regard to bankruptcy, this is when an individual (or sole trader) can no longer pay their debts on time and either they file for bankruptcy themselves or someone else does (usually a creditor).
It should be noted specifically for individuals, it may in some situations be in the best interest to be declared bankrupt as this will mean that any actual/potential creditors will no longer be able to take further legal action against them. There can be more time to consider what assets are available, if any, to be able to solve debts. This is especially relevant where there is unlimited liability.
On a separate note, bankruptcy is not exactly the same as insolvency in that it is a type of insolvency, but it is not insolvency itself (there are other types).
When someone files for bankruptcy, this means that you are insolvent. However, there are other ways of dealing with insolvency other than bankruptcy.
Insolvency covers a wider umbrella of actions and classifications.
For example, there can be cash flow insolvency and balance sheet insolvency.
Cash flow insolvency: there is not enough cash flowing through to meet obligations as they arise.
Balance sheet insolvency: there are fewer total assets than total liabilities (more specifically debts).

Other ways to deal with insolvency may include:
- Going into administration or liquidation;
- Sell any assets that are possible to sell;
- Negotiate payment terms with creditors and debtors;

- Consider any unnecessary expenses or areas where income can be increased for an increase in cash (e.g. price increase of products or discounts to attract more purchases).

For administration or liquidation, this would apply to companies rather than individuals. For the most part, when insolvency is mentioned, it tends to be in relation to a company rather than an individual.
Elaboration is warranted, including with respect to essential characteristics and differences between corporate and individual insolvency

2.5

Question 3.2 [maximum 5 marks]

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

One challenge is the origin of the laws in different countries as they do not all originate from the same place. There is no global law that applies to all countries at this stage, with many countries having slight clashes on how insolvencies would be dealt with in a cross-border insolvency.
For example, the difference of origin in English law and civil law (that is mostly used in areas such as continental Europe). The difference has meant that aligning these laws requires more thought and consideration. On a higher level for example, English law does not always have a written constitution whereas in civil law, this is always the case. Freedom of contract is generally extensive under English based law in comparison with civil law which tends to require certain provisions being entered into.

Policies are also different in different jurisdictions as well as their own cross-border insolvency rules. While there are efforts to align the laws, this would also be costly for each country involved. It would also take considerable time which some may argue should be used for other matters. In addition, it would have to be considered as to which laws and policies are best implemented to everyone.
It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook

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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 tends to refer to treaties and conventions that countries have to adhere to. Whereas soft law is more of a suggestion that countries are recommended to follow.
While hard law can be more forceful with making countries follow the rules, this can also discourage new countries from joining in (e.g. with treaties) if they will require to change a significant amount of their laws to join in or it will create a great cost.
Soft law is more lenient and leads to no consequences if countries don't perform what is suggested, it encourages more countries to make smaller changes which may ultimately lead to more countries gradually aligning with a universal law. This however, will take a significant amount of time either way.
An example of soft law is the Model Law on Cross-Border Insolvency where draft legislation was produced that was encouraged for companies to consider and implement into their own. These could also be adjusted to the country's preference.
An example of hard law is the European Insolvency regulation 2000 which has been adjusted over time but applies to all EU member states.

3

Marks awarded 6.5 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.

Private international law would be relevant in this case.
It should be noted as to whether the American court has jurisdiction to wind up a company in England and if the American court would recognise the wind up.
The source that could be used to assist with this scenario could be the decision made during McGrath vs Riddell. English courts should cooperate with the American courts and insolvent estate representative. A single system of distribution should be agreed to and enacted for the assets of the company rather than being split into English and American processes.
A related source can be section 426 of the Insolvency Act 1986 in the UK. A scheme of pari passu distribution to ordinary unsecured creditors in an option. This is subject to whether the principal winding up country is a relevant country. To be a relevant country, it must either be the Channel Islands/Isle of Man or designated by the Secretary of State by order made by statutory instrument.
The US is not designated

The assets of the company can therefore be made to be distributed under a single system, subject to the agreement of both sides, and the laws used can be either the English law or the American law. This is subject to procedure and substance with the English law.
Elaboration with respect to the MLCBI is warranted

1.5

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.

Countries within the EU aim for effective communication between courts of different EU countries. For example, what can be used as a reference is EU Insolvency Regulation 2015. This determines the proper jurisdiction for a debtor's insolvency proceedings.
It is noted in this law that there may be a secondary insolvency proceeding in another member state to where the main insolvency proceeding takes place per section 34.
Per section 3, the place where the main interests of the debtors is held is deemed to be where the main insolvency proceedings should take place. In this case, even though management was directed from Italy, the main operations happened in Germany so this would likely be the main place that has the debt and assets and where the main proceedings could occur. A secondary proceeding could be opened in Italy.
There is also some consideration as to whether the proceedings would be court based or not. If the proceeding would not be court based, the insolvency practitioner can examine requests for opening proceedings in other States.
If this is court based, it should be noted that other parties such as creditors can subsequently challenge the opening of the main proceeding.

It is noted that Germany has adopted the UNCITRAL Model Law and while the Italian law doesn't explicitly state it, this has been acknowledged in their laws.
An alternative approach to this question would be to recognize that both Italy and Germany are EU members subject to the EIR Recast, to consider the Recast and specifically relevant provisions and to determine Italy, as the COMI, is the place for the main proceedings to be commenced.

1.5

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?

The regulation relates to all of the creditors of the company. If there are creditors within these States, then these courts will be eligible to apply.
This sub-question requires recognition that these countries are not EU members and consideration of the regulation in that respect.

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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.)

It has been noted that in the absence of an applicable treaty, foreign non-EU insolvency proceedings will not be recognised in the Netherlands. However, as the representative is from Italy

and the laws of Italy are referred to, the European Insolvency Regulation would apply due to EU member state applications. The Model Law is also refenced.

It is noted that Dutch civil law allows for security rights to be based on the time of creation. Within the law, secured creditors can enforce their security rights as if there were no insolvency proceedings taking place.

It may be that secondary proceedings should be opened in the Netherlands if deemed appropriate.

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.)

For Australia, they have the Cross-Border Insolvency Act 2008. The Model Law is referenced within. Noted within the law, an application for foreign recognition would need support identifying all foreign proceedings of the debtor known to the Italian representative.

The law also notes that a foreign representative can apply for a proceeding in Australia.

For Australia, security interest can be enforced during liquidation but employee claims take priority (i.e. for salary and leave entitlements).

Elaboration is warranted

2.5

Marks awarded 7 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 27/50

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