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 8 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.

The insolvency system based on civil law has the following main characteristics: (i) Its primary mission and vision are focused on rehabilitating the debtor to maintain the viability of the company as an economic unit and preserve employment sources; (ii) Creditors play a more active and direct role, particularly in decision-making; (iii) Supervisory bodies are often appointed by creditors to oversee the insolvency proceedings; (iv) It is a procedure known as a "collective debt collecting procedure," aiming to achieve a balance between the debtor and creditors through conciliatory agreements or negotiations.

On the other hand, the insolvency system based on English law has the following main features: (i) It is a procedure that allows creditors to retain control of the debtor's assets, seeking to maximize the recovery of their debts; (ii) This system is characterized by a greater involvement of the State when the law does not specifically address certain issues, granting the court authority to provide solutions in the absence of legal provisions; (iii) The system prefers creditors to recover the highest possible amount of their credits, and the law presumes facts are as stated unless proven otherwise; (iv) This system is more accommodating to foreign procedures, where specialized representatives or liquidators may be appointed to manage assets and distribute income among creditors.

In conclusion, the differences are evident: while civil law gives preference to keeping the business operational, focusing on the rehabilitation and continuity of the debtor, English law aims to maximize creditor recovery through the liquidation and sale of the company and its assets.

You raise some interesting and relevant points. To achieve a higher mark you also needed to list examples of countries that fall within each category and discuss the significant different with respect to common law vs codification

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.

The concept of universalism, a single insolvency proceeding under the jurisdiction of the location where the debtor has its principal place of business. This procedure encompasses the debtor, its debts, and assets, with no possibility of another proceeding being initiated against the debtor's assets, even if located outside the jurisdiction where the insolvency proceeding was initiated. It is a process in which all creditors of the debtor, regardless of their country of residence, have an equal opportunity to participate in claiming their debts. A key characteristic is that all the debtor's assets are included in the insolvency proceeding, and the officeholder must provide the necessary tools to maintain control over these assets. The goal of this procedure is cost reduction; however, parties must have full confidence in the legal system of the country where the insolvency proceeding takes place. **Forum and COMI warrant discussion**

The principle of modified universalism stems from the recognition that the application of universalism may not be feasible worldwide. Nonetheless, states align with this principle and endeavour to incorporate cooperation among states in their insolvency procedures. While initiating an insolvency proceeding under the jurisdiction of the debtor's principal place of business, covering the debtor, its debts, and assets, and in the event that any of these are not within the jurisdiction of said proceeding,

support from secondary laws or procedures will be sought to facilitate the orderly liquidation of the trader. The objective is to prevent prejudice to creditors, fostering cooperation irrespective of whether there is an expedited insolvency proceeding in place or not.

*In stark contrast to the principle of universalism, the principle of territorialism advocates for the initiation of insolvency proceedings in each state or jurisdiction where the debtor has assets. This results in the debtor being subjected to two or more insolvency proceedings simultaneously under different laws. Additionally, each asset is governed by the law of its location and follows its fate under local legislation. Similarly, this causes creditors to invest greater financial resources if assets within their jurisdiction are insufficient to obtain payment for their debts. Consequently, they may need to pursue their claims in other jurisdictions to recover the total amount of their credits. These proceedings may encounter complications such as incompatible legislation or a lack of cooperation between states.***There is scope to elaborate regarding territorial limitations**

2

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.

The main initiative that I managed to identify throughout the text, and which, in my opinion, is the most suitable for the issue of insolvency globally, not just in Latin America, is the implementation of UNCITRAL's Model Law. This initiative is aimed at encouraging states to enact new legislation or adapt existing insolvency laws to ensure that more states have harmonized, modern, and effective legislation for insolvency and cross-border insolvency proceedings.

Specifically for Latin America, when analyzing the region, it is noted that South America has one of the most unified systems in the world, with a review of insolvency laws underway. However, each state maintains its own regulations, with some being more supportive than others. Nevertheless, from the reading, it is evident that Latin American countries are undertaking initiatives to enhance the efficiency and effectiveness of insolvency proceedings. These initiatives include reforms to their legislation to facilitate debt restructuring processes and promote engagement with international creditors.

This answer required consideration of the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code)

0.5
Marks awarded 4 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 my opinion, the terms "bankruptcy" and "insolvency" cannot be used interchangeably.

(i) Meaning of "bankruptcy" and "insolvency":

The definition of "bankruptcy" stems from the trader's inability to meet payment obligations to creditors, leading to the orderly liquidation of assets. In this process, the proceeds from asset sales are used to fully or partially satisfy creditors.

On the other hand, the definition of "insolvency" pertains to the trader's liquidity, lacking sufficient cash flow to meet payment obligations. Without the need to sell the entirety of their assets, the trader seeks an agreement with creditors to restructure debts, incorporating elements such as a discount, a grace period, or a combination thereof, aiming to maintain business viability.

There is scope to elaborate regarding meaning, including with respect to the different terminology in different jurisdictions

(ii) Key characteristics of "bankruptcy" and "insolvency":

Bankruptcy: It is a definitive process, akin to the demise of the trader, as the business is sold as a productive unit or in parts. The trader is left without assets to continue operating but achieves payment to creditors.
Insolvency: It is a temporary process wherein, through agreements with creditors, the form and payment of credits are reorganized without an immediate need for liquidation. It implies financial restructuring while preserving business viability and employment sources.
It would be beneficial to consider Wood's references to essential characteristics
(iii) Differences when involving a corporation instead of an individual:

The insolvency procedure for natural persons aims to rectify their financial situation through the settlement of debts with each of their creditors, thereby achieving a fresh start. For the majority of natural persons, their primary concern is the safeguarding of assets necessary for their subsistence, such as the residential property and real or personal property required for the continuation of their profession, which constitutes a central concern.

So, a primary distinction is that some states do not have specific legislation applicable separately to corporations and individuals; the same legislation applies to both.

Individual insolvency has specific characteristics such as rights, obligations, and responsibilities as a debtor individually. Negotiations can occur to establish a payment plan, there is a discharge of debts, and a specific timeframe for payment is established. **Exempt property is relevant**

Corporate insolvency entails specific characteristics tied to its corporate purpose and limitations faced by its shareholders and directors. This process seeks business rescue, may involve pre-arranged agreements prior to insolvency filing, provides the benefit of a legal moratorium, envisions the creation of committees formed by certain creditors with potential common interests, and may result in a discharge of debts. Notably, corporations are governed by special legislation, such as that applicable to banks and financial institutions.
Elaboration is warranted, including with respect to the objectives of corporate vs individual insolvency

4.5

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.

The challenges in developing a cross-border insolvency procedure can be summarized as follows:

Recognition of Procedures in Other Countries:

The first challenge lies in the recognition of procedures in other countries to enable effective and functional cooperation between jurisdictions. Non-recognition results in delays in the administration of justice and detriment to the debtor's estate in achieving an orderly liquidation or restructuring. This situation leads to unequal treatment of creditors, putting them at a disadvantage when it comes to receiving payment for their credits. Conversely, cooperation between jurisdictions facilitates a more expedited procedure and provides greater security for creditors.

Effective Control of Assets for the Benefit of Creditors:

A critical challenge is to ensure proper control of assets for the benefit of creditors. Cross-border cooperation instills confidence that the debtor will not dissipate their assets, and, at the appropriate time, creditors could recover the amount of their credits through the sale of assets. Even when the main procedure is not conducted where the asset is located, the challenge is to ensure that the representative of the trader has influence in both the main and ancillary procedures, maintaining control of the assets to ensure creditors receive their due payment.

Coordination of Creditor Claims and Executory Contracts:

Another challenge involves coordinating creditor claims and executory contracts, ensuring that resolutions issued in one jurisdiction are recognized and enforced in another.

Avoidance of Conflict of Laws:

Finally, a significant challenge is to avoid conflicts of laws and their application in the procedure. This entails determining the jurisdiction for initiating the insolvency procedure and appointing a representative for the trader who can safeguard the interests of creditors, striving for equal treatment. At the conclusion of the procedure, the goal is to ensure that the trader can obtain a discharge.
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: Refers to binding and applicable rules or legislations for the governed. It pertains to formal laws, and in the context of international insolvency, can be found in international treaties, conventions, or specialized procedures for cross-border insolvency cases.

Soft Law: Refers to criteria, recommendations that are non-binding, but due to the origin of the subscriber, can influence decision-making, such as within a cooperative framework. In the realm of international insolvency, soft law may include guidelines, best practices, and recommendations presented by international organizations, industry groups, or expert committees.

Examples of Hard Law:

European Insolvency Regulation (EIR)

Istanbul Convention

Examples of Soft Law:

The Hague Conference on Private International Law
UNCITRAL Model Law
UNIDROIT
Elaboration is warranted with respect to success or otherwise

2

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.

England adopted the UNCITRAL Model Law in 2006, so in order to request recognition in that state, it is necessary:

Firstly, we must ensure that there is a "sufficient connection" with England, which could be assets.

Another important point is that there must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for a winding-up order.

One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.
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 legal sources that we must apply regarding German insolvency law should be the Insolvency Code (Insolvenzordnung or InsO). European Insolvency Regulation.

Firstly, Commence the insolvency proceedings in the country where the debtor's COMI is located.
This sub-question requires you to consider the EIR Recast in greater detail and to apply the facts to determine the appropriate country, being Italy.

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.
Elaboration is warranted.

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.)

The "WET HOMOLOGATIE ONDERHANDS AKKOORD" refers to the Dutch law that introduced a legal framework for the approval of extrajudicial restructuring plans. In English, it is commonly known as the "Act on Confirmation of Extrajudicial Restructuring Plans" or simply the "Dutch Scheme." The law is designed to facilitate the restructuring of companies facing financial difficulties outside of formal insolvency proceedings.
It would be beneficial to elaborate and explain why Dutch law is the answer

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 adopted the UNCITRAL Model Law on Cross-Border Insolvency.
Elaboration is needed

0.5

Marks awarded 5.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 26.5/50

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