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]**

**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.

["Civil law" countries whose insolvency law is derived from Roman law as further modified by the customs and usages which had been solidified between merchants in Continental Europe evolved from a relatively draconian and creditor-focused approach to more a more rehabilitative approach involving the concept of discharge. There was also a progression from individual, debt-collection procedures by creditors, to a system of collective, ordered participation. Civil law include countries in Continental Europe such as the Netherlands and France, as well as former colonies of those nations such as Angola and Mozambique. English law followed a similar trajectory both in terms of ameliorating harshness towards debtors and moving from individual to collective recovery in insolvency. Indeed, English law introduced the concept of statutory discharge as early as 1705. Countries whose insolvency law systems have historical roots in English law are the United Kingdom and its former colonies including the United States of America and Australia]

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

**2**

**Question 2.2 [maximum 3 marks]**

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

[Universalism is a principle whereunder an insolvency proceeding begun in one jurisdiction is recognised and its determinations applied and enforced across other jurisdictions. Essentially, a system whereunder a single proceeding and its associated legal rules are "universally" applied across territories. **There is scope to consider forum and COMI further here**

Territorialism by contrast, rigidly adheres to the principle of sovereignty, and contemplates an insolvency proceeding and its associated legal rules having effect only upon the assets located within that territory. Thus, territoriality contemplates multiple insolvency proceedings where the debtor's assets are located in multiple territories.

Modified universalism acknowledges the sovereignty of nations over the assets within their territories. However, it contemplates a "main" insolvency proceeding which would be commenced in the territory in which the debtor's centre of operations is located, and which main proceeding is supported by ancillary proceedings in the other territories in which the debtor operates.]

**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.

[Many countries within Latin America have concluded the Montevideo Treaties (1889 and 1940) and the Havana Convention on Private International Law (1928) – treaties on private international law which involved bankruptcy or insolvency.

The 1889 Montevideo Treaty reflects the principle of universalism in that where a debtor has is main centre of business in one treaty state, even if there is occasional trade in another or others, there will be one set of insolvency proceedings in the state in which there is the main centre of business. However, it contemplates concurrent proceedings where a debtor has several economically

autonomous businesses in different treaty states. This treaty was concluded among Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay.

There are two 1940 Montevideo Treaties but they have only been ratified by Argentina, Paraguay and Uruguay.
The Havana Convention also reflects universalism, emphasising that where there is only one commercial domicile, there can be only one insolvency proceeding in that domicile, which will govern the disposal of the assets of the debtor across all states party to the Havana Convention. As such, the determinations made in that insolvency proceeding are of immediate extraterritorial effect.

This treaty was concluded among Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.]

**It would be beneficial to more explicitly compare and state the differences between the agreements, rather than describe each and leave it for the reader to discern.**

**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 do not entirely disagree with the statement as there are legal systems in which the two terms are indeed used interchangeably. In others, such as Australia, the distinction is that "bankruptcy" is often used to refer to the insolvency of an individual, while "insolvency" is used to refer to that of a corporation.

However, in many systems, "insolvency" refers to a state where a person (natural or artificial) is deemed incapable of satisfying their obligations to creditors as and when they call due, either under "balance sheet insolvency" where liabilities exceed the assets of the debtor, or "cash flow" insolvency where there are insufficient liquid assets to discharge current liabilities.

Seay and Hooley note that different considerations arise in insolvency regimes where the debtor is a corporation from when it is an individual. The differences reflect the humanity and feelings of the individual – in an individual insolvency, the regime aims to protect the debtor from harassment by their creditors; and aims to enable the debtor to be rehabilitated by the process, so as to make a fresh start. With corporations, there is more of a focus on commercial viability, and the business, or those aspects of it which are commercially viable are preserved even if thus means the end of the corporation itself.]

**This is a 7 mark sub-question and there is scope for elaboration, including with respect to essential characteristics and further differences such as ecempt property**

**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.

[Westbrook identifies 9 key issues in cross-border cases which affect the extent to which a unified insolvency dispensation may be developed and implemented:
Standing of the foreign representative, moratorium on creditor actions, executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance provision powers, discharges, and conflict of laws issues.

Some challenges relate to the fact that different legal regimes have different central aims of their insolvency laws. They may be creditor focused or debtor focused. Thus, where decisions made in one jurisdiction conflict with the central aim of another, it is challenging for the latter jurisdiction to give effect to that decision.

Westbrook's list reflects the fact that there may be different approaches to the key considerations that underpin any insolvency regime. Thus even where the countries involved have a similar central aim, there may still be conflicts which are difficult to resolve as to how they are given effect. For example the nature and scope of avoidance provisions and preferences, which mean that a transaction which legitimately reduces the pool of assets available for distribution in one jurisdiction may not be recognised in another.

These differences may be resolved if there are shared choice of laws principles so that it is clear which jurisdiction's law will apply to a particular issue. However, as reflected by the last item in Westbrook's list, there may not necessarily be uniformity in this area either.]
**It would be beneficial for you to also consider the matters raised by Friman, Omar**

**4.5**

**Question 3.3 [maximum 3 marks]**

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of "hard" and "soft" laws in providing solutions to the challenges of international insolvency.

["Hard law" refers to express and binding legal obligations dealing with a particular issue, as under a treaty. Conversely, "soft law" refers to codified understandings which may *inform* the development of law or policy.

Hard law is effective in producing uniform legal results and is a critical part of economic harmonisation. Successful examples in the area of international insolvency include the Montevideo Treaties and Havana Conventions which harmonised cross-border insolvency principles among signatory Latin American states, and the European Insolvency Regulation which did the same among the members of the European Union.

However, the degree of political alignment required to enable harmonisation via soft law is difficult to attain outside of geopolitical unions. Thus, considerable success has been obtained by the use of soft law, which being less prescriptive allows for greater *conceptual* consensus. A great example is the Model Law on Cross-Border Insolvency developed by the United Nations Commission on International Trade Law. In basing their legislation on the common framework, countries who employ the Model Law are able to achieve progressive unification while adhering to their respective sovereign objectives.]

3
Marks awarded 12 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 and Wales have adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006. Thus, the representative may consult the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation for guidance on negotiating a cross-border agreement between the Unites States and the United Kingdom. There is precedent for this in the case of Maxwell Communication Corporation plc where concurrent proceedings between these jurisdictions were coordinated by means of such an agreement.

More directly, the representative should apply the Insolvency Act – the domestic legislation which governs insolvencies within that jurisdiction and specifically addresses the recognition of foreign insolvency representatives.

Finally, common law principles of private international law in the United Kingdom must be consulted in order to resolve questions as to which country's law will determine questions of title.
**It would be beneficial to note that S 426 is not applicable as the US is not designated**

3.5

**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.

[The European Insolvency Regulation (EIR) will be applied as both countries are member States of the European Union. Under the EIR, the main proceeding will be commenced in the member state within which is situated the "centre of the debtor's main interests" or COMI. Since this is Italy, it is in Italy that the main proceedings should be commenced, with the possibility of commencing subsidiary proceedings in Germany since it is clear that there is an "establishment" in Germany, as Norton Cars Inc has its main operations in Germany, easily meeting the definition of "establishment": a "place of operations … where the debtor carries out a non-transitory economic activity with human means and assets".]

**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?

[An Indian, South African or Australian Court can apply the EU (Recast) Insolvency Regulation since the EIR Recast recognises the existence of insolvency proceedings outside the European Union in order to facilitate the coordination of proceedings between EU member states and states outside the European Union.]

**0.5**

**Question 4.4 [Maximum 6 marks]**

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

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 7 marks.)

[Principles of sovereignty will usually dictate that as a matter of private international law, the law of the state in which real property is located determines the rights of holders of security over that land. Thus the Courts in the Netherlands will consider Dutch law to be applicable to the security holder's rights. The extent to which the Italian representative can interfere with the rights of security holders in the Netherlands will be influenced by the EIR (Recast) which will regulate the recognition of the Italian proceedings in the Netherlands.]

**Elaboration is warranted**

**2**

(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 7 marks.)

[Principles of sovereignty will usually dictate that as a matter of private international law, the law of the state in which real property is located determines the rights of holders of security over that land. Thus the Courts in the Australia will consider Australian law to be applicable to the security holder's rights. The extent to which the Italian representative can interfere with the rights of security

holders in Australia, and the level of coordination of the Australian and Italian proceedings will be influenced by the UNCITRAL Model Law on Cross Border Insolvency which has been adopted by Australia and will regulate the recognition of the Italian proceedings in Australia.]

**Elaboration is warranted**

**2**

**Marks awarded 12 out of 15**

*** End of Assessment ***

**TOTAL MARKS AWARDED 40.5/50**

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