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.

Indeed a number of countries have their insolvency laws with historical roots in civil law while others have insolvency laws rooted in English law. Examples of the former are German, Netherlands, France and Latin American jurisdictions. Australia, England, United States of America and Malawi are examples of the latter. A survey of the laws of the countries falling in these two systems reveals that countries with historical roots in civil law are generally pro-creditor while countries with historical roots in English law are generally pro-debtor. The insolvency laws of Netherlands and United States demonstrate this distinction.

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 the approach to international insolvency matters according to which insolvency proceedings must be dealt with in one forum (the debtor's centre of main interest) and subject to a single system of law. All the assets of the debtor must be collected and handled by a single authority and all creditors must participate in a single proceeding. **There is scope to elaborate: this means that the law of the "main proceeding" will have worldwide effect, even outside the territorial jurisdiction of the State where the so-called main proceeding has been opened. It calls for so-called "unity of proceedings", allowing the law of the State where the "main proceeding" is opened (the *lex concursus*) to regulate the matter.**

According to modified universalism, while main proceedings may be commenced at the debtor's centre of main interest, the courts in the jurisdictions in which the debtor also has assets may exercise jurisdiction over the assets within their territory and such courts ought to cooperate with the court handling the main proceedings in order to achieve a fair and orderly distribution of assets to creditors. Territorialism, based on the notion that national laws are territorial, is the approach according to which every country's courts and laws are to be resorted to in dealing with insolvency proceedings commenced within their systems, which may lead to multiplicity of proceedings between a debtor and the creditors. **But that they should be territorially limited and restricted to property within the State where the proceedings are opened**

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.

Latin American countries have adopted certain international agreements for the resolution of international insolvency issues. Such agreements are the Havana Convention on Private International Law of 1928 (also known as the Bustamante Code) and the Montevideo Treaties of 1889 and 1940. These are treaties in the public international law sense. The main differences between them is that the Montevideo Conventions provides for the possibility of parallel/concurrent insolvency proceedings in different treaty states where the debtor has economically distinct establishments in those states, whereas, under the Havana Convention, a universal approach to insolvency proceedings is emphasized and cross-border insolvency proceedings are to be conducted in a single proceeding.

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

2.5

Marks awarded 6.5 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.

The term insolvency and bankruptcy may be used interchangeably. The terminology adopted by any given country is a matter of choice, as there is no requirement to adopt one or the other, or even to distinguish them. However, in practice, some states use the two terms differently. Most notably, in English law, the term "bankruptcy" applies to the insolvency of individuals (natural persons) where as companies are subject to corporate "insolvency". This is unlike the position un the US, where the term applies to both personal and corporate insolvency. No doubt, there are fundamental differences in the insolvency of individuals and that of corporate persons. For example, the laws of some countries allow the bankrupt person to retain possession of certain assets necessary for their survival/maintenance, an issue that does not arise in corporate insolvency. The insolvency of individuals and that of companies cannot therefore be treated as the same in all respects. Therefore, the use of the terms "bankruptcy" and "insolvency" for purposes of distinguishing the two types pf insolvency appears to be appropriate.

In terms of their characteristics, generally individual insolvency aims at protecting the bankrupt person from harassment by creditors, where as corporate insolvency is also aimed at preventing the winding up of the corporate person (where this is possible) in order to prevent resultant consequences such as job losses.

There is scope to elaborate with respect to differences and similarities, for example in relation to exempt property.

4

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.

It is difficult to develop a single global cross-border insolvency system for a number of reason. Firstly, the content of the laws of the various countries make it difficult to achieve uniformity of results. For example, while according the law of country A certain debts may be said to be validly discharged against the debtor, the discharge may not be valid under the law of B. In this example, whether the debt is still subsisting or not, will depend solely on the law that will be applied to resolve the matter. Secondly, in terms of jurisdiction over insolvency matters, the relevant factual connections that found jurisdiction vary from country to another. Some countries claim broader/more extensive jurisdiction over international insolvency matters than others, which creates room for uncertainty in jurisdiction over assets that are spread across several countries.

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

1

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.

In the context of international insolvency, hard law means laws that are in force and binding on state parties to various international instruments aimed at harmonising the handling of international insolvency matters. Examples of such instruments are the European Insolvency Regulation (2000) and the Latin Americas Montevideo Treaties. "Soft law" refers to non-binding instruments that have been prepared to serve as model laws, legislative and interpretative guides. They do not have the force of law in any country unless voluntarily adopted by a given country. An example is the UNICITRAL Model Law on Cross-border Insolvency (1997). Based on the continuously increasing number of countries adopting the model law and incorporating its provisions and principles in their domestic laws, the soft law approach to cross-border insolvency appears to be more successful than the use of hard law.

3

Marks awarded 8 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.

Since England has adopted the UNICITRAL Model Law on Cross-border Insolvency through its Cross-border Insolvency Regulations 2006, these will be resorted to request recognition for purposes of dealing with the assets in England (if at the time of application for recognition England had exited the EU).

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.

[Type answer here]
Take care to answer each sub-question

0

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. These countries's courts will not apply the EU(Recast) Insolvency Regulation when considering recognition of an EU Insolvency representative because the instrument does not apply in those countries, all of them being non-EU Member states.

1

Question 4.4 [Maximum 6 marks]

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

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

Italian law will apply to the insolvency proceedings in general, but Dutch law will apply with regard to the real rights of security situated in Netherlands because as a matter of the Recast Regulation (which is applicable in Italy) and general private international law, real property rights are subject to the law of the country in which the property is situated.

3

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

Australian law will apply to both the insolvency proceedings in Australia and real rights of security situated in Australia.

It would be beneficial to make reference to the Australian version of the UNCITRAL Model law

2.5

Marks awarded 8.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 32 /50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.