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 10 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.

Countries with roots in common law are ordinarily former English colonies such as the United States, Botswana, Malawi, Ghana, Kenya and Commonwealth states, whilst civil law foundation can be found in former continental European colonies such as Mali, Mozambique and Angola.

Common law is generally uncodified and relies on a collection of statutes and the principle of *stare decisis* or precedent which are shaped by legislative decisions which can be relied upon as authority in subsequent similar scenarios. In contrast, civil law is codified whereby the law of a country has a comprehensive set of legal codes which are continuously updated to make provision for various legal scenarios. Although most of the abovementioned former colonies' legal systems evolved to a certain extent by way of adoption of modernized legislation with varying degrees of success, the departure point, being either common or civil law, remains quite discernible upon encounter.

3

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 and territorialism refer to two opposing schools of thought in international jurisprudence. In the instance of insolvency proceedings, universalism on one hand refer to the idea that only a single insolvency proceeding commenced in a single forum should have jurisdiction over a debtor's assets wherever it may be located, which jurisdiction and set of applicable law is recognized globally. **There is scope to elaborate, for example with respect to COMI.**

Territorialism on the other hand refers to the idea that insolvency proceedings commenced in a certain jurisdiction is confined to said jurisdiction and that separate and concurrent insolvency proceedings should be commenced in each jurisdiction where the debtor's assets are located.

Modified universalism reaches a middle ground between the above opposing schools of thought. Modified universalism relates to the notion of co-operation between different jurisdictions, whereby a single jurisdiction wherein the debtor's centre of main interest is located shall commence insolvency proceedings, whilst secondary, additional or supplementary proceedings may be commenced in different jurisdictions. **There is scope to elaborate, for example with respect to COMI.**

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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 taken considerable strides creating instruments geared towards regulating cross-border insolvency issues between participating countries. The 1889 and 1940 Montevideo Treaties as well as the Havana Convention on Private International Law 1928 provide a (albeit slightly confusing) framework which deals with cross-border insolvency issues that may arise between the participating countries.

Aside from the difference in ratifying member-states, there are a couple of notable differences. Whilst both the Montevideo Treaties and the Havana Convention provide for a single proceeding in instances where a commercial entity occasionally trades in the jurisdiction of a member-state, the Havana

Convention does not provide procedures for co-operation and co-ordination in concurrent proceedings where there are a surplus funds available in one proceeding whilst a concurrent proceeding is pending in another member-state. As opposed to the Montevideo treaties which make provision for co-operation and co-ordination in concurrent proceedings.

4
Marks awarded 9 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.

Bankruptcy and insolvency can be used interchangeably in layman terms, as both fundamentally refers to a state of affairs wherein a debtor (being either a person or a corporation) in question is unable to pay its debts as and when it becomes due and payable, or when said debtor's liabilities exceed its assets.

However, for a legal professional the two terms should be distinguished from one another. In certain jurisdictions like South Africa ascribe the term "insolvent" to the financial state of affairs of a person or a corporation whereby the person or corporation's liabilities exceed its assets (termed factual insolvency) or in the instance that the person or corporation has insufficient liquidity settle its debts as it becomes due and payable (termed commercial insolvency), whilst "bankruptcy" in the US refers to the actual legal procedure for dealing with insolvent persons or corporations.

Despite the difference in terminology, according to Wood the key characteristics of bankruptcy or insolvency law is that legal actions/enforcement by singular creditors are frozen whereafter that all the debtor's assets are pooled together to be realized to be distributed *pari passu* to the general body of creditors subject to a certain hierarchy of creditors or "payment waterfall".

On the other hand, certain jurisdictions like Australia might refer to "insolvency" with reference to a corporation whilst "bankruptcy" refers to a person, as opposed to South African law makes no mention of the term "bankruptcy". In the former instance, the distinction between personal bankruptcy and corporate insolvency comes to light in the eventual objective of the proceeding in question. In the case of personal bankruptcy, the objective is to enable a person to make a fresh start subsequent to the conclusion of the process, whilst corporate insolvency is geared towards saving viable portions of a business and imposing sanctions on persons guilty of misuse of the corporation as a separate legal entity.

There is scope to elaborate further regarding differences, including with respect to exempt property
5.5

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 doctrine of state sovereignty in terms of which a state governs its own legislation in accordance with a societal objective is a substantial hurdle to overcome in seeking a single cross-border insolvency

system, as sovereign states (aside from the states belonging to the European Union) are generally hesitant to allow external international bodies and/or foreign countries to determine their legislation and encroach upon the state's ultimate sovereignty.

The varying standard of insolvency laws is also a factor to consider, as quite frankly, certain insolvency law systems are more developed than others as these provide *inter alia* better recovery mechanisms as well as more intricate precedents to rely upon. Consolidating foreign more sophisticated insolvency legislation with a less sophisticated counterpart in such a way that a domestic court can rule upon questions relating to more or lesser developed legislation will be a difficult task.

Another issue which impedes the development of a single global cross-border insolvency system, is the question on how to reconcile various states' doctrinal perspectives on insolvency entrenched in their insolvency legislation. Certain states' legislation favour a pro-creditor approach, in that the rights of the creditors are protected, as opposed to a pro-debtor approach, wherein the debtor's interest in is protected to a larger extent. Other states might favour doctrinal interests such as protection of labour rights or mitigation of shareholders' liability towards a corporation's debts. Obtaining worldwide consensus on these policy considerations would be extremely difficult.

General conflict of law on the hierarchy of creditors' rights and interests is also a major factor obstacle to overcome. Essentially not all legislation provides for an identical "payment waterfall" in insolvency scenarios and what costs right security rights are subject to.

Historical insolvency law roots would also be a barrier to overcome as certain countries have legislative roots in common law, whilst others have roots in civil law. Finding suitable middle-ground between these different approaches to legislation in general would be difficult.

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

2

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.

One basic distinction between "hard law" and "soft law", is that hard law is to a certain extent binding, or at least aims to be binding, on member states once they have ratified a legal instrument which contains fairly accurate, detailed and precise language intended to consistently govern relationships between member states or to be incorporated into a member state's domestic laws. International treaties and conventions, such as the Montevideo treaties and, more recently, the European Insolvency Regulation Recast, the latter of which achieved considerable success in governing insolvency proceedings within EU member-states are good examples of "hard law" instruments.

"Soft law" on the other hand sets forth broader principles and values which are not intended to be legally binding *per se* but rather mutually agreed upon aspirations included in recommendations, guidelines and frameworks published by international organisations which subscribing states or juristic academic intend to strive to and taper their domestic laws towards. Soft law influence law as opposed to setting law. A relevant modern example of soft law is the UNCITRAL Model Law on Cross Border Insolvency ("the Model Law") which is essentially a guideline in the form of draft legislation which a subscribing state can domesticate into its own insolvency law.

There is scope to elaborate regarding the success of the Model Law

2

Marks awarded 9.5 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.

The American representative cannot make use of Section 426(4) of the UK Insolvency Act 1984, as US Courts are not from a "designated country". Instead, the American representative along with the liquidating US Court may rely on common law doctrines of comity and universality to petition an English Court for recognition. However, since the UNCITRAL Model Law on Cross Border Insolvency ("the Model Law") was incorporated into the English law by the Cross-Border Insolvency Regulations 2006, the American representative may apply in terms of Article 17 to English court for recognition of the foreign insolvency proceeding.

Considering that Norton Cars Inc's Centre of Main Interest ("COMI") is located in England, the US proceeding will be dealt with as a foreign non-main proceeding. Should the English court recognize the foreign non-main proceeding, the American representative may approach an English Court in terms of Article 21 for the relief set out therein.

4

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 concept of the centre of main interest ("COMI") is a central tenet in the European Insolvency Regulation Recast ("EIR Recast") and UNCITRAL Model Law on Cross Border Insolvency ("the Model Law"), which aims to deal with jurisdictional questions.

Considering that both Italy and Germany are member states of the European Union and accordingly adopted and bound themselves the European Insolvency Regulation Recast ("EIR Recast"), the EIR Recast seems the most effective way of dealing with insolvency matters between the aforementioned countries.

EIR Recast codified the concept of in Article 3(1) by providing that a corporation's COMI is located where the corporation "conducts the administration of its interest on a regular basis and which is ascertainable by third parties". This subsection goes on to provide a rebuttable presumption that a company or legal person's COMI is located where its registered office is located. However, this presumption does not apply in the instance where a company or legal person has moved its registered office within the preceding 3-months.

Recital 27 of the "EIR Recast" places an obligation on a court to carefully examine at its own motion whether the centre of a debtor's main interest is actually located in its jurisdiction. Recitals 28 to 31 goes on to provide certain factors that might be taken into account when a court determines jurisdiction. These factors include whether a corporation's COMI is readily ascertainable and whether creditors were informed of a COMI shift.

In the instance of Norton Cars Inc., the Italian court will examine all the facts surrounding the COMI and determine in accordance with Article 4(1) of the EIR whether or not the court has the necessary jurisdiction to rule upon the particular cross-border insolvency proceeding. Should the Italian court be satisfied, it may proceed to commence insolvency proceedings in terms of Article 3(1), which insolvency proceedings would be recognised in Germany in accordance with Articles 9 and 10 of the EIR.

Should the German court initiate insolvency proceedings due to Norton Cars Inc. having a "establishment" in Germany, Article 3(2) denotes that such an insolvency proceeding would only have an effect on assets located within Germany. However, should the German court wind-up Gladiator Manufacturing Ltd, being a separate legal entity, then the Chapter 5 EIR Recast provisions relating to group companies would be considered.

4

Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

Yes, non-EU courts may attribute recognition of the representative duly appointed in terms of the EIR Recast on a case-by-case basis upon application within their own jurisdictions, insofar as their own domestic legislation will allow. However, such recognition would not be reciprocated in the EU in terms of the EIR Recast.

No, it is not applicable outside EU

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 principle of *lex concursus* as enshrined in the EIR Recast dictates that the law of the state wherein the insolvency proceedings have been commenced. However Recital 68 and Article 8 of the EIR Recast excludes real security rights *in rem* and dictates that these assets should be dealt with in accordance with the domestic jurisdiction wherein the asset over which the creditor holds security is located ("*lex situs").*

Therefore in respect of real asset securities located in the Netherlands, Dutch Law would apply and the creditor would be afforded the opportunity to realize the security in accordance with Dutch Law towards settlement of the claim.

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.)

Australia is not a member-state of the EIR Recast and therefore has no duty towards acknowledging the Italian insolvency proceeding in terms of the EIR Recast. In any event, according to the CJEU judgment in Ralph Schmid v Lilly Hertel the Italian representative cannot rely on the fact that Article 8 only has an effect on "member states" of the EIR Recast

Australia adopted and domesticated the UNCITRAL Model Law on Cross Border Insolvency ("the Model Law"), however, real security rights will also be dealt with in accordance with the applicable Australian law.

3

Marks awarded 14.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 43/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.