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 civil law can be traced back to Roman law. Debt execution developed from debtor pledging his own body for the repayment of the loan and he could be imprisoned, sentenced to death, or sold as a slave to secure repayment of the debt. In English law, the word "bankrupt" appeared in the early 16th century, and initially did not provide for imprisonment.

There are number of ways to classify legal systems of the world but in general legal systems have an English law or Civil law.

Below there is a comparison of the two legal systems:

Anglo – American (common law systems)

English insolvency law, have roots to the Insolvency Act 1986, which is an example of unified insolvency legislation. The American insolvency law, has a bankruptcy code which is federal legislation and thus applying to all US states. Australia law is also based on English common law, however it has a number of acts dealing and does not have a single wide Bankruptcy or Insolvency act.

Continental European (civil law systems)

Dutch insolvency law has roots to civil law, which is very much pro-creditor, compared to the American insolvency law which is more pro-debtor.

French insolvency law, again has roots to civil law, and the 1807 code is said to been harsh toward debtors, since it allowed the arrest and detention of debtors.

Lastly, Germany and Spain have their roots based on the civil law.]

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 that there should only be one insolvency proceeding covering all the debtor's assets and debts worldwide and aims for a more efficient ways of cross-border insolvency issues. In other words, is aiming to have one universal insolvency proceeding that will be recognised. There is scope to discuss COMI in the context of universalism

Modified universalism is where universalism has not been reached, and the main proceeding opened in the State where the centre of main interests has been determined, is supported by secondary or ancillary proceedings in another State. In such cases courts dealing with proceedings are supposed to

co-operate. The modified universalism, looks for a more balance between efficiency and local autonomy.

Territorialism it refers that the consequence of an insolvency proceeding will only apply to the State where the insolvency proceeding has been opened and can lead to a plurality of insolvency proceedings. So, in each country for example the debtor has its assets, would need to open separate independent insolvency proceedings. This could lead to uncoordinated proceedings with multiple jurisdiction and result to many conflicted outcomes.] There is scope to elaborate regarding the proceedings being territorially limited

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 states, have achieved multilateral agreements on managing the international insolvency issues. Some initiatives of these are the following:

- The Montevideo Treaties (1889) and (1940) and
- Havana Convention on Private International law (1928_ (Bustatment Code)

One of the difference between these two initiates is the countries that were involved to ratified it, where the Montovideo is ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay and the 1940 ratified by Argentina, Paraguay and Uruguay, the Havana Convention, was concluded between Bolivia, Brazil, Chile, Cota Rica, Cuba, D. Rebuplic, Ecuador and other countries, and not ratified by countries that ratified the Montovideo such as Argentina Colombia, Paraguay and Uruguay.

Another difference is that the Havana Convention is more supportive than the Montevideo treaties of an approach that allows for a single proceed with universal effect throughout its region.

Lastly, the year of conclusion differs, where the Montevideo treaties concluded in 1889 and 1940 and Havana Convention in 1928]

4

Marks awarded 8 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.

[Although this term may be used interchangeably and there are closely related, they could have a different meaning when used. For example, bankruptcy is a legal status where someone is indeed bankrupt, and on the other hand insolvency can be used to describe a financial situation that may lead or not lead to bankruptcy. Therefore, I agree that these terms can be used interchangeably, however we need to be careful as in different situations have different meanings.

Some systems use both to mean slight different things. For example in Australia "insolvency" is often used to refer to the insolvency of a corporation whereas bankruptcy is often used to refer to the insolvency of an individual.

(i) In many systems bankruptcy and "insolvency" carry the same meaning. However, one explanation is that "insolvency" sometimes means the state of financial affairs of a debtor, whilst "bankruptcy" refer to the formal states of being put into a formal bankruptcy proceeding.

(ii) The essential characteristics of bankruptcy is that it involves formal legal process, where the insolvency relates to the state of the financials of the individual/corporation that may or may not lead to bankruptcy. It would be beneficial to also consider Wood's discussion

(iii) One of the main difference that can be found when involves a corporation rather than an individuals, is that in corporate it depends on the type of the insolvency the company could continue its operations. For example in Cyprus are receiverships/administrations.

In corporate insolvency, it has more legal complexities as it depends on the countries legal framework. For example in some jurisdictions someone can be protected if he/she is a director of a company, where in some others may be held personally liable. On the other hand in bankruptcy legal process is less complex..

Another difference that is common for companies that are insolvent is that there is a committee of inspection that represent the creditors and play a vital role in the insolvency process.] Exempt property is another difference

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.

There are many challenges that can arise in cross- border insolvency, however below I have outlined some of the main:

- One of the most basic issues is the co-ordination when involve multiple concurrent insolvency proceedings against the same debtor, and the fact that in some of the cases the debtor's affairs are connected to more than one jurisdiction. Also, on the same context there may be creditors in many parts of the world, that could create complexity.
- Another big challenge that can make it difficult to develop a single global cross-border insolvency is the different legal systems. National and international law on insolvency show a lack of structure, to deal with cross-border insolvency cases. An insolvency proceeding that opened in more that one State, each State would the apply on its own laws, making it difficult to have one approach everywhere.
- Political and/or economic differences could also be a barrier to cross border insolvency. For political, it could be that some countries for example there is a court judgement in USA and the debtor is in Cyprus, and the Cyprus court/government willingness is to protect the debtors. For Economic there are many parameters that could be taken in consideration such as the roles of creditors, and how the debtors are protected.
- Another difficulty, once the cross-border insolvency issues have started is the systems that are used, between pro-creditor and pro-debtor systems. In addition there are systems that may emphasise other interest that are important in domestic context (ie labour rights)

- Technology could also be another barrier for cross border insolvency with some countries willing to accommodate technology, especially in legal matters and others not. For example, sending creditors notices for a general meeting in some countries is acceptable to sent electronically, where in some countries it should be by post. If the case involves multiple countries this could make the insolvency proceedings challenging.]

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: It relates to when some countries or States become signatories and bind themselves and affect their domestic law accordingly. These rules and regulations are typically set out in treaties and conventions.

Examples of the hard law, that has been adopted or embodies in the domestic law of the relevant countries are, the The Nordic Convention Bankruptcy 1933 between Norway, Denmark, Finland, Iceland and Sweeden and Regulation (EU) 2015/848 of the European parliament, where once a judgment opening insolvency proceedings in one EU country, it must be recognised in all other EU countries with the same effect.

Soft law: Opposed to the hard law, the soft law relates to the being more influential than binding. It is where countries should follow the best practice and it is not legally enforceable.

One example of the soft law is the UNCITRAL Legislative Guide (2004). This guide is a best practice which can be used when countries revise their own insolvency legislation. Another is the Asian Principles of Restructuring. A project by the Asian Business Law Institute with the International Insolvency Institute. A project which aims to formulate common principles for in-court and out-court restructuring in ASEAN, Australia, China, Japan, India, South Korea.

While there has been a success in achieving hard law solutions to international insolvency law issues, more success has been gained through the use of soft law options.

3

Marks awarded 11 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.

[One source that the American insolvent estate representative that could use is the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) (implemented under the Cross-Border Insolvency Regulations 2006 (CBIR), in relation to the assistance required between UK and the USA. Under the Model law, assistance can be sought by the American representative in relation to the assets of Nortoc Cars Inc that are situated in England.

However, the Model law, does not provide automatic recognition of insolvency proceedings that have been opened within the US, but an application to Court is required to secure recognition. The overall purpose of the Model law is to provide effective mechanism for dealing with the cases of cross-border insolvency and protect and maximize the value of the debtors assets.

Therefore, in case Norton Cars Inc, can apply for recognition in England under the 2006 Insolvency regulations and the UNCITRAL Model that allows the US representative to apply to the English court for recognition.

Once the English court recognised the insolvency proceedings, it would then provide assistance and cooperation in the administration of the insolvency estate.]

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.

[Given that Norton Car Inc shifted its centre of main interest in Italy and their main operation in Germany, and therefore both countries are members of the European Union the appropriate legal source would be the European Insolvency regulation 2015 known as the "Recast".

The purpose of Recast is to ensure the efficient administration of insolvency proceeding involving an individual or business that they have activities or financial interests in another EU country.

Recast, allocates jurisdictional competence of the courts of a member State, within which is situated the "centre of the debtor's main interests" (COMI). While Recast allocates the primary jurisdiction based on the COMI, it does allow for the possibility of subsidiary territorial proceeding in other member States, and these are permitted where the debtor has an "establishment" Such subsidiary proceedings may be either independent proceedings or secondary proceedings.

In the given scenario, since Norton Cars shifted its COMI to Italy, COMI is there considered to be the place where the main insolvency proceedings should be opened. Once the main insolvency proceedings are opened in Italy, then these should be recognised in Germany under Recast since both states are members of the EU. In case there are UK proceedings involved, since the COMI was in England before transferring to Italy, Recast would not be applicable.]

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?

[EU Recast apply for the member states of EU, therefore Indian, South African or Australian court would not be eligible to apply and depending from the Indian, South African and Australian court if they want to recognise the EU insolvency representative.]

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.)

[Netherlands is one of the 27 member states of the EU, therefore, the EU recast would apply. Given that the insolvency proceeding has opened in Italy, and is governed by Italian law, therefore the procedure in the Netherlands should be accepted subject to the Italian law, since both countries are EU members.

Regarding the real rights of security, the principle of universality should apply, that there should only be one insolvency proceeding covering all the debtor's assets and debts worldwide.

The Italian insolvency representative, should in cooperation with the courts in the Netherlands, comply with the Dutch laws and procedures as well, if necessary.

Greater clarity and elaboration is needed. In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.

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 6 marks.)

[Australia has adopted the UNCITRAL Model law on cross border Insolvency. States members of the European Union have also adopted the UNCITRAL Model Law.

Therefore, since the proceedings have been opened in Italy, the Italian insolvent estate representative who appointed, should seek recognition from the Australian courts.

In regards to the real rights of security, this would be subject to Australian law, and the insolvent estate representative should comply with the Australian law and procedures, in respect to the assets located in Australia.]

3

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 39/50

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