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 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.

(b) This statement is true because globalisation makes the principle of universalism redundant.

(c) 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.

ANSWER:
Civil Insolvency law systems are more common in the European continent and former colonies of European continental countries. Examples of countries using these systems are Spain, Netherlands, France and Germany. Further examples consist of colonies or former colonies of civil territories such the majority of Latin America and some African countries such as Angola and Mozambique.

Common law systems are typically Anglo-American, emanating in origin from England. Some examples include the United States, UK and Australia. Former colonies such as and also much of the English-speaking Caribbean.

Some countries may have mixed common law and civil law systems such as South Africa and St. Lucia, which reflects their colonial backgrounds which have been shared by civil law and common law countries at various points.

No country, whether civil or common law jurisdiction is going to be exactly the same in its approach due to the particular customary, legal, historical and cultural realities of each jurisdiction. Notwithstanding this, civil law countries and common law countries may share some features.

One such example is that some commentators state that civil law systems are more likely take a territorial approach when it comes to jurisdiction and common law countries are more closely aligned with universalism although it is important to note that this is not a 'black and white' distinction.

It would be beneficial to elaborate and emphasise the common law component to countries which are historically English based.

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.

ANSWER: Universalism is the principle that a creditor should be able to enforce automatically against a debtor's assets in all jurisdictions in which the debtor has assets. This is done by one law having operational effect worldwide. This one law is typically in the jurisdiction where the debtor has his main economic interests – known as the centre of main interests (COMI).

Territorialism is the idea that the insolvency proceeding in one country should not apply to other territories. This idea favours an approach where there are separate insolvency proceedings in each jurisdiction where the debtor has assets.

Modified universalism could be said to be a more 'realistic' form of universalism. It recognizes that most states have an approach that is closer to territoriality. Modified universalism supposes that instead of one insolvency proceeding having automatic application in all territories in which the debtor

has assets, the main insolvency proceeding can be supported by secondary/ancillary proceedings in other jurisdictions.

There is some scope to elaborate in parts. While the question says 'briefly' it is for 3 marks.

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.

ANSWER: There are two initiatives of major note in Latin America to assist with international insolvency issues.
The first of these have been the Montevideo treaties. There were three separate treaties which have been ratified by different countries. These are:

a. the 1889 treaty on international commercial law;
b. the 1940 international treaty on international commercial law; and
c. the 1940 treaty on international procedural law.

The Montevideo treaties specific that the bankruptcy jurisdiction will be in the location of the debtor's domicile unless the debtor has two separate and economically automonous businesses in separate jurisdictions. If there are separate two businesses as described, the Montevideo treaties allow for concurrent proceedings.

The second of these initiatives is the Havana Convention on private international law of 1928. This differs primarily from the Montevideo treaties in that it can be said to more supportive of a universalism approach with Article 414 specifying that one proceeding will take effect in all contracting states to the treaty if the debtor has only one domicile. Chapter II of the Havana Convention enforces insolvency proceedings in one member state in another member state subject to the member state's court rules for registration of the insolvency proceedings.

The Havana convention and the Montevideo convention are similar in that they both provide for one singular insolvency proceeding even if the debtor occasionally trades in other jurisdictions or has other branches/agents in other jurisdictions (that are party to the Convention).

However, the primary difference is the two conventions approaches to concurrent proceedings. Under the Montevideo treaties, insolvency proceedings being open in one jurisdiction which has ratified the treaty means that a local creditor in another jurisdiction which has ratified the particular treaty may open bankruptcy proceedings/take civil action against that debtor if that debtor has a separate business in that jurisdiction.

This differs from the Havana Convention where there is no co-ordination of concurrent proceedings.

It would be beneficial to also discuss the different signatories to the relevant agreements.

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.

ANSWER:

i. Yes, I agree that the terms may generally be used interchangeably customarily but not without further qualification. In many territories insolvency and bankruptcy can be used to mean the same thing. However, there are some jurisdictions where that is not the case for example Australia. Insolvency in Australia refers to corporations with bankruptcy referred to individuals. A strict definition of both terms may be that insolvency is a financial state where due to some reason whether it be a cashflow issue or too many liabilities, debts cannot be repaid whereas bankruptcy is a legal process that a debtor undertakes due to being insolvent. The aforementioned being said, the context in which either term is used is the most important element in determining what exactly is meant.

ii. Taking the term (which may be interchangeable) of insolvency/bankruptcy to mean the stage at which there are legal proceedings, the common feature of insolvency and the one feature that is truly universal is that individual actions by creditors against the insolvent will be stayed. This feature is to allow each creditor to get at least something from the available assets of the debtor. While the theory of parri Passau (a proportionate payment of the assets of the debtor are paid to each creditor) is true of and is a feature of insolvency in theory, the reality is that there are usually priority creditors and creditors which are paid by order of their security charges on the assets of the debtor. Similarly, another essential feature in theory which differs in practice due to the law in different jurisdictions is that the assets of a debtor are pooled together to prevent individual seizure of the debtor’s assets by creditors. Therefore, a search for the essential parts of insolvency may ironically reveal one of the truly essential elements of insolvency proceedings – which is that the individual laws relating to insolvency differ due to the legal technicalities in each jurisdiction.

iii. Insolvency against an individual can be said to be more lenient. Insolvency for individuals is typically focused on allowing the debtor to have a second chance by allowing them to make contributions towards the debt from the debtor’s other income source. In some cases for insolvency proceedings against an individual, certain assets will be off limits so as to allow the individual to keep some assets to maintain him or herself. Some of these assets may be the debtor’s personal home or vehicle or pension plans. The aim is to prevent harassment of the debtor while still facilitating the debtor paying off their debts. Insolvency for companies is not necessarily about preserving the business, unless it is necessary for the realization of the debts. In some situations, such as a breach of director duty or negligent spending, personal liability can be imposed on the responsible persons within the company.

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

6

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.

ANSWER: At a starting point, the term insolvency already does not mean the same thing in different jurisdictions. Insolvency in some jurisdictions refers to the situation where the combined total of all outstanding liabilities exceeds the measurable value of all of the debtor's assets whereas in others it makes reference to a liquidity crisis or a short-term inability to service debts.

There are also differences because many systems of the world are based on a civil law legacy whereas other systems are based on a common law legacy. This is part of the second problem which is essentially a conflict of laws between the insolvency proceedings in the various states in a cross-border insolvency proceeding.

Additionally, and contemporaneously, there are nine issues in cross border cases generally, which have been defined by J L Westbrook in his article "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of Central Court" (2018) 96 Texas Law Review, - 1473. These are: standing for recognition of the foreign representative, moratorium on creditor actions, creditor participation, executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance provision powers, discharges; and conflict-of-law issues.

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.

ANSWER: Hard laws are the legal sources which actually bind the courts of a jurisdiction in insolvency proceedings. Any given insolvency act or code of a jurisdiction as well as common law sources which fill the gaps or lacunae in lesgilation are examples of Hard KAW. **At times proof reading is required.** Hard law may also compirse treaties and conventions which are ratified into the domestic law of a jurisdiction such as the Montevideo convention or the Havana Convention, both in Latin America are examples of such treaties. A recent example of a successful hard law has been the European Insolvency Regulation which applies throughout Europe.

Soft law refers to legal sources which do not bind jurisdictions but instead provides guidance to jurisdictions both in interpretation and drafting of their individual insolvency laws. Soft law such as the UNCITRAL Model law on Cross-Border insolvency can heavily influence jurisdictions in drafting their hard law legislation. This model law in particular is an example of a very successful form of soft law given the large number of States which have drafted their legislation based on the model law.

A combination of hard law and soft law sources are necessary for the effective functioning of an international insolvency framework.

3

Marks awarded 14 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.

ANSWER: The United Kingdom has adopted the UNCITRAL model law into its domestic law as of 2006 by the Cross Border Insolvency Regulations 2006 SI 2006/1030 (CBIR). This is the best tool by which the American insolvent estate representative may seek recognition in the United Kingdom.

The United States has also adopted the model law almost exactly word for word into Chapter 15 of its Federal Bankruptcy Code. It should be noted however that this would not make an operational difference in the present scenario as there are no requirements in the CBIR for a jurisdiction in which there are insolvency proceedings to have adopted the model law in order for those proceedings to have recognition in the United Kingdom.

Therefore, the American insolvent estate representative may apply to the English courts for recognition of the insolvency proceedings in the USA.

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.

ANSWER: The European Insolvency regulation is the operational legal source for a cross-border insolvency matter between Germany and Italy.

The regulation's purpose is not the harmonisation of law across the member states of the European Union but the determination of which member state will commence the insolvency proceedings. The regulations stipulate that whichever member country has the COMI will be the only jurisdiction to open the main proceedings. The law of the jurisdiction with the COMI of the debtor will apply across all other EU member states meaning the other EU member

In the present instance, this means that the insolvency law of Italy will apply as that is where the COMI is. Insolvency proceedings will be brought in the courts of Italy, under Italian law, against Norton Cars and those proceedings will have application to Norton's cars assets in Germany which in this case would be Gladiator Manufacturing Ltd.

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?

ANSWER: No, because neither of those three countries have ratified the EU (Recast) Insolvency Regulations into their domestic law. The recognition of any foreign proceedings in those three countries will depend on those country's individual hard law insolvency rules.

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.)

ANSWER: The Netherlands being, being bound by the EIR, would still be wedded to the rule that the law of the jurisdiction in which there is the COMI is the one which must apply to the whole proceedings.

How this effects the secured assets in the Netherlands is that the ranking of the various secured in the Netherlands would follow the law of the COMI and the place where the main insolvency proceeding is brought – in this instance Italy.

Although the EIR does allow for the Netherlands to bring their own proceedings as well, the most cost effective and less confusing solution would be for recognition of the Italian proceedings in Netherlands courts.

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.

0.5

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

ANSWER: Australia has enacted the UNCITRAL Model law on cross border insolvency proceedings. This is thus the law that would apply to the proceedings in Australia in general.

However, when it comes to treatment of creditors within the Australian proceedings, the ranking of the securities will be subject to the laws of Australia. Article 13 of the Model Law (as enacted in

Australia) specifies that foreign creditors have the same rights as a proceeding under Australian insolvency but that this does not affect the ranking of claims in a proceeding under Australian law.

Recognition of the Italian proceedings can take place in Australia. There is nothing preventing concurrent proceedings from being brought in Australia but the aforementioned on the ranking of secured assets being subject to Australian law must be considered.

3

Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40/50

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