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 English law provided for different legislation for corporations and individual bankruptcy, however there has been attempts at law reform.
The civil law a unified legislation for both companies and personal bankruptcy, the system was pro-creditors No discharge was allowed unless creditors agreed.

This question required you to list a number of countries with English law historical roots and a number of countries with civil law historical roots and to discuss and compare them.

0.5

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.

There is a broad consent that harmonisation of national insolvency laws is necessary, and principles can support harmonisation and seeking solutions to problems in cross-border insolvency. The first principle universalism requires all involved jurisdictions in their respective insolvency proceedings to abandon their authority, unite and apply one insolvency law of a foreign jurisdiction where the debtor has its centre of main interests – for the greater benefit of all creditors.

Territorialism – in some instances other states do not want to cooperate with or don't have a formal process to recognize a foreign proceeding. Therefore, the principle allows the State where insolvency has been opened to apply its own laws ,for the advantage of creditors in its jurisdiction, leading to multiple insolvency proceedings and laws of more than one state.

Modified universalism allows for the benefits of both regimes. The insolvency proceedings opened where the debtor has its centre of main interests, allows support or cooperation by other States in secondary insolvency proceedings during, but states are not forced to cooperate.

Example, Hong Kong also can invoke the provisions that protect the creditors within its borders by utilizing the company's assets within the territory. Similar to territoriality, not all countries agree with the concept of universalism, which provides Hong Kong with a huge benefit. Hong Kong's position as a major center of international business has created many multinational corporations in the territory and even more international lending.

3

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.

Union of South American Agreement which aims to establish a system of supra-law with European Union. The initiatives undertaken in assisting with international insolvency issues were achieved through multilateral agreements, where a number of general treaties were concluded on private international law and commerce, namely; The Montevideo Treaties (1889) and (1940); and
Havana Convention on Private International Law (1928) (Bustamante Code). The difference between the initiatives is the actual States that are members of the Montevideo Treaties (1889) and the Bustamante Code (1928),including the extent to which they allow for a single proceeding with universal effect throughout the member States.

In Latin America we see that for long it followed to the territoriality theory in cross-border insolvency cases, with each state asserting sovereignty. However with the increasing need for cooperation, administrative arrangements were implemented including the model law on cross-border insolvencies developed in 1997 by the UNCITRAL to foster procedural and administrative coordination among courts.

4

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.

Yes, I agree it may be used interchangeably for individuals and corporations. **Why? Elaboration and explanation is warranted. It would be beneficial to consider how the terms are used in different jurisdictions.** Bankruptcy as a collective debt procedure is a result of the debtor's inability to pay. Therefore, the concepts or characteristics of bankruptcy found in the procedure based on the Roman Law are;

1. Assignment of property (*cession bonorum*);
2. Forced liquidation of assets (*distractio bonorum*); and
3. Compositions with creditors (*remission and dilatio*). The bankruptcy process influenced the establishment of insolvency law, which was thoroughly categorized to address some of the problems in bankruptcy and develop a legal system that is transparent, provided just and equitable distribution, while protecting the interests of creditors when a debtor that is found to be insolvent, however, also rescuing the businesses in financial difficulty and to a certain degree try preserve jobs.
4. Therefore, the important characteristics of insolvency are collective participation of creditors and a *pari passu* distribution of the available tangible and intangible assets among the creditors.

5. The difference at one stage and in certain States only corporations could be declared bankrupt as opposed to individual persons. Bankruptcy started as debt collecting process that favoured only creditors in the beginning, there was imprisonment for the debt owed. Compared to insolvency it sought to protect the interests of all parties involved or rather seeks a fair process. Bankruptcy applies only to individuals and sole traders with unlimited liability. Insolvency applies to businesses as well as individuals. **Exempt property is a relevant difference. Also it would be beneficial to consider the different objectives that apply.**

However, we see Fletcher's describing between the two terms by stating that insolvency was used to describe a factual position (i.e. liabilities exceeding the assets) while bankruptcy was used to describe a legal condition or status *Fletcher The Law of Insolvency (2009) 6-7*

4

Question 3.2 [maximum 5 marks]

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

There is no universal solution to the design of an insolvency law because States differ greatly in their needs, as do their laws on other issues of key importance to insolvency, such as security interests,2 property and contract rights, remedies and enforcement procedures. An example, of a company

situated in one jurisdiction becomes insolvent, are creditors in that jurisdiction be allowed to initiate insolvency proceedings while the group company still solvent and this deals with the issue of enforcement procedures. On the hand, if a group company is insolvent, will the be one or separate proceedings in the various States where its subsidiaries are located. There might not be a universal solution, however, with adoption of UNCITRAL – it addresses most insolvency law issues raised above. Some laws favour stronger recognition and enforcement of creditor rights. And other laws are pro-debtor which is more liberal - lean towards giving the debtor more control over the proceedings, while yet others seek to strike a balance in the middle.

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 is a binding international legal system in a respective State. While Soft law is in non-binding, however, it is used in international relations by States to influence the regulations of a legal system. Hard law provides enforceable rights in court, rules with detailed terms that all parties to uniformly follow. Soft law specifies the objectives that states are keen to support the economic, environmental, cultural, social, and human rights areas. Both are used to resolve insolvency issues with other States in cross-border insolvency through treaties and conventions. **The success?**

Examples together with a consideration of success is needed.

1.5

Marks awarded 8 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

We find the legal systems of the common law jurisdictions of the US, England and Wales, as well as the civil law jurisdiction in the Netherlands. Although the US is a leading and influential force in all aspects of global insolvency law. Its liberal "fresh start"
Both America and England have adopted the UNCITRAL Model Law on Cross-Border Insolvency. Therefore, recognition may be granted if the foreign representative applies to the court in England for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
(a) A certified copy of the decision commencing the foreign proceeding and
appointing the foreign representative;
(b) A certificate from the foreign court affirming the existence of the foreign
proceeding and of the appointment of the foreign representative; or
(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other
evidence acceptable to the American court of the existence of the foreign proceeding and of the appointment of the foreign representative.
Norton Cars Inc. still had economic activity or interest in USA and therefore insolvency proceedings can be commenced in more than one state, since USA has a single Unifed Bankruptcy Code of 1978.The UNCITRAL Model Law can provide for relief required if foreign representative is recognized in a State recognizing foreign main proceedings in order to deal with those local assets.
Private international law comes into play with debtors' affairs connected in more than one state. The representative of the proceedings under the American law of the enacting State is authorized to act in a foreign State on behalf of a proceeding perhaps with a universalism approach – if there is more than one proceeding pending in different States.
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.

The applicable law to be used in these proceedings, for Italy and Germany would be the European Insolvency Regulation 2015 (the EIR), as they are both part of EU member States.
Therefore, the foreign main proceedings will take place in Italy, since England exited the EU and the EIR no longer applies to UK – which England is part of.
In this case, the EIR allocates competence to the primary jurisdiction, which is Italy, within which the debtor has the centre of its main interests and provides for automatic recognition of those proceedings by the courts of other Member States. Any further proceedings in other Member States where the debtor has an "establishment" are secondary to those main insolvency proceedings and relate only to assets in that secondary Member State in Germany in this case.

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?

No, they are not part of the EU member states.

1

Question 4.4 [Maximum 6 marks]

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

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

EU legislation has a direct impact on Dutch insolvency law. As per the publication from Baker & McKenzie in Netherlands, the leading principle of Dutch bankruptcy law is the paritas creditorum, which means that all creditors have an equal right to the debtor's assets and that the proceeds of the bankrupt estate are distributed among them pro rata parte.
However, there are creditors to whom the principle of paritas creditorum does not apply:

- Creditors that hold a security interest; and
- Creditors that have a preference by virtue of law.

Take care to answer the sub-question directly and with clarity.

1.5

(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.)

The Australian system is based on the principle of a non-interventionist court, an administrator who would typically be a professional persona and largely creditor-oriented proceedings. However, with the economic activities across countries and the focus on reorganization - Australia, The Model Law reflects a universal approach to cross-border insolvency. It is based on the principle that the domestic courts of each jurisdiction should endeavour to cooperate with the courts of other countries in cross-border insolvency cases focusing on the use a negotiation of cross-border agreements.

For Australian regulatory system: Martin "Common-Law Bankruptcy Systems" 397; Mason "Insolvency Law in Australia" 463 (hereafter referred to as Mason "Insolvency Law in Australia")

It would be beneficial for your answer to recognise that the Australian version of the UNCITRAL Model Law will probably apply and allow for recognition of the Italian estate representative but the real rights of security will be dealt with by Australian law.

1

Marks awarded 9.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 33/50

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