SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the **best response** to this statement.

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an "executory contract" and its enforceability?

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve "hard law" treaties and conventions which become enforceable as part of a State's domestic law. Choose the correct statement:

(a) The statement is untrue since treaties and conventions are "soft law", not "hard law".

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

(a) This statement is untrue because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

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

(d) This statement is true because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

The US, India, Australia, Nigeria, Kenya, Botswana, Zambia and Tanzania have historical roots in English law. The countries with historical roots in English law tends to be more focused rehabilitation and reorganisation. It enables the debtor to reorganise their company so as to prevent liquidation. On the other hand, the debtor's assets will be liquidated and divided among creditors if they are unable to restructure their company. The courts will have more flexibility in their approach where the insolvency law system has historical roots in English law. **Elaboration regarding common law is warranted.**

Amsterdam, Angola and Mozambique insolvency law systems have historical roots in civil law. Insolvency procedures under civil law are strict and formal. This indicates that there is limited leeway for judgement and that the processes are precisely outlined by law.

2.5

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.

The idea of "universalism", or "universality", holds that there should be a single insolvency process that handles all of the debtor's assets and liabilities globally. Therefore, once the process is initiated, neither additional insolvency procedures nor any other means of asset execution by the debtor should be allowed. **There is scope to consider COMI here also.**

"Territorialism" is based on the idea that, while bankruptcy procedures may be filed in any State jurisdiction in which the debtor possesses assets, they ought to be geographically constrained to assets situated in the State in which the proceedings are filed.

"Modified universalism"- in this scenario, supplementary or auxiliary proceedings in a different state are used to support the main proceedings that are initiated in the state where the centre of main interest has been identified. The courts handling the various proceedings are expected to cooperate with one another in such cases.

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.

In Latin America the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) Bustamante Code) are the treaties managing international insolvency law issues in Latin American States.

Dobson indicated that a feature that is quite widespread in Latin American national insolvency laws is the discrimination against the foreign creditor. For Dobson, the Bustamante Code, also referred to as the Havana Convention of 1928, signifies – together with the Montevideo Treaties – a step towards a possible Pan-American Insolvency Law. Moreover, Dobson opinions that this disparity goes from full recognition (full extraterritoriality) in El Salvador to strict territoriality, with exception of specific Treaties, in Argentia.

Type answer here]

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

2.5

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.

I agree that the terms “bankruptcy” and “insolvency” may be used interchangeably. In some countries the “insolvency” is usually used to refer to the insolvency of a corporation, while “bankruptcy” is usually used to refer to the insolvency of an individual. Australia is an example of a country where the terms are used interchangeably.

“Insolvency” sometimes means that the state of the financial affairs of the debtor, whilst “bankruptcy” refers to the formal state of being put into a formal bankruptcy proceeding. Moreover, “Insolvency” may refer to the case where the liabilities of the debtor exceed the assets of a debtor (balance sheet insolvency) or where the debtor cannot repay its debts as they fall due by reason of a cash flow problem (cash flow or commercial insolvency).

Individual bankruptcy involves a natural person while corporate insolvency involves an artificially created legal persona in the form of a company. An individual is not dissolved after the bankruptcy as a company would after its affairs have been wound up.

Further consideration of essential characteristics and differences with respect to individual vs corporate is needed

3.5

Question 3.2 [maximum 5 marks]

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

The following are challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation:

(1) There is not a single set of insolvency rules that applies globally.
(2) There are different approaches and policies as well as differences in substantive or procedural rules;
(3) Domestic legal systems may be ill-equipped when it comes to dealing with insolvencies with implications across national borders;
(4) There may be differences in terminology in each jurisdiction;
(5) Choice of forum with respect to jurisdiction of the matter;
(6) The issue of recognition of the foreign proceedings; and
(7) Some jurisdictions have insolvency laws that are outdated and / or fragmented.

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, as it relates to international insolvency, refers to legally binding agreements that create the foundation for international insolvency procedures. Treaties, conventions, agreements between nations, as well as rules or guidelines published by international organisations, are examples of hard law instruments. Usually, these agreements set forth guidelines for jurisdiction, acceptance of overseas insolvency cases, and coordination between courts in various countries. An example of a successful hard law is the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast). **It would be beneficial to elaborate as to success or otherwise**

Soft law in the context of international insolvency, refers to non-legally binding instruments such as guidelines, suggestions, or principles created by international organisations or expert groups. Although soft law tools might be useful in establishing norms and encouraging collaboration, they do not give states legally binding responsibilities. An example of a successful soft law is the UNCITRAL Model Law on Cross-border Insolvency. **Why was it successful? Elaboration is warranted**

2.5

Marks awarded 8.5 out of 15

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

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

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

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

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

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

Question 4.1 [Maximum 4 marks]

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

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

The UNCITRAL Model Law on Cross-border Insolvency was adopted by both the US and UK. The UNCITRAL Model Law on Cross-border Insolvency was implemented in the UK in the Cross-Border Insolvency Regulations 2006 ("CBIR"). Section 1 of CBIR provides that The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain). The American insolvent estate representative can apply for recognition in England under CBIR. Schedule 1, Article 9, which provides that a foreign representative is entitled to apply directly to a court in Great Britain. Under Schedule 1, Article 15 (1) of the CBIR, a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. It may also be possible for the American insolvent estate representative to obtain recognition and assistance of the foreign insolvency proceedings in the UK under section 426 of the Insolvency Act 1986 or at common law.

S426 is not applicable as the US is not designated

3.5

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 UNCITRAL Model Law was not adopted by Italy or Germany, therefore it is not the appropriate legal source to be used in a cross-border insolvency matter between the two countries. Italy and Germany are EU member states, so the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings and the Recast Regulation on Insolvency (EU Recast Regulation on Insolvency) would be the appropriate legal sources to be used in a cross-border matter involving both countries.

As Norton Cars Inc shifted its COMI (centre of main interest) to Italy, the German courts would have to examine whether the Italian court would have had jurisdiction to commence the insolvency proceedings if German law were applied to determine the international jurisdiction of the Italian court. In their evaluation, the German courts are going to apply mainly the test applied by the Court of Justice in Schmid v Hertel case C-328/12 and decide international jurisdiction by employing Article 3 of the Regulation (EU) 2015/848, the EU Recast Regulation on Insolvency, the COMI test.

The jurisdiction of courts in cross-border insolvency proceedings can be determined using the COMI test. The primary criteria for establishing jurisdiction are the debtor's usual location or, in the case of a legal body, its registered office. The courts of a Member State of the European Union shall have jurisdiction over the insolvency proceedings if the debtor's habitual residence or registered office is situated there.

Considering that Norton Cars Inc is a legal entity its registered office will be the main factor in determining the jurisdiction of the court in the cross-border insolvency proceedings.

Moreover, Norton Cars Inc's management being directed from Italy, is indicative that its registered office is located there, therefore the Italian courts is likely to have jurisdiction over the proceedings.

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?

An Indian, South African or Australian court will not be eligible to apply the EU (Recast) Insolvency Regulations when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation. India, South Africa and Australia are not 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.)

The Italian insolvent estate representative will need to access the assets of the debtor (the insolvent company, Norton Cars Inc) for the benefit of the creditors. The UNCITRAL Model Law on Cross-border Insolvency was adopted by Italy and not by the Netherlands. Therefore, it is not the appropriate choice of law to apply. The Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) ("the Regulation (EU) 2015/848") is the appropriate choice of law as the Netherlands and Italy are both EU member states. Norton Cars Inc's centre of main interest is in Italy, and it has assets operating through its external branch in Netherlands, the Regulation (EU) 2015/848 sets out conflict of law rules in the insolvency proceedings.

Take care to answer the sub-question posed in full. This sub-questions asks which law will apply to insolvency proceedings with regard to real rights of security situated in the Netherlands. Dutch law would apply.

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.)

The Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) is not the appropriate choice of law with regards to an Insolvency proceeding in Australia and the real rights of security situated in there. Reason being, Australia is not

an EU member state. The UNICITRAL Model Law on Cross-border insolvency 1997 was adopted by both Australia and Italy, thus it will apply. The UNCITRAL Model Insolvency Law will recognise Italy as the centre of main interest, to enable the courts to determine where the foreign main proceedings is taking place and where, as a result its insolvency laws and procedures should be recognised.

Australian law would apply.
0.5

Marks awarded 8.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 33.5/50

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