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 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.

Civil law roots link back to Roman law, where the debtor could pledge his/her own body for the repayment of the loan. This debt execution meant the individual could be sentenced to death, imprisoned or even sold as a slave in order to assure the repayment of the debt. Due to developments of/through insolvency law, countries which had more Germanic or Roman law character, have laws that were influenced as a result of Lex Mercatoria. Civil law systems a prevalent in European countries such as the Netherlands, France, Germany and Spain. English law, other the other hand, only introduced the option of imprisonment for debt with the Statute of Marlbridge of 1267 and the term "bankrupt" only came around in the early 16th century. Under English law and through the development of insolvency, allowed for individual debt-collecting procedures before a collective bankruptcy procedure was developed. English law which is also known as "common law" is found more Anglo-American countries, such as the UK and America, plus Australia.

There is scope to elaborate regarding the 'common law' aspect of English 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.

Universalism implies that there should only be one insolvency proceeding used to cover all the debtor's assets and debts worldwide. Territorialism is the opposite where it allows for insolvency proceedings to be commenced in every jurisdiction or state in which the debtor holds assets. Modified universalism comes in when national States do not adopt universalism in it's purest form. The main difference usually has to do with the jurisdictions relating to COMI. For example, universalism would assume that the State where the debtor has its COMI would be insolvency laws that are followed, territorialism would be mean that each State where a proceeding is opened will follow their own laws and then modified universalism would mean that the main proceeding would be opened in the State which is the COMI and all other proceedings will be used to support the main and co-operate together.

This is a satisfactory answer. There is some scope to elaborate at times, for instance with respect to the territorial limits of territorialism.

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.

Under private international law, a series of general treaties were developed to help manage the international insolvency issues. These initiatives/treaties are The Montevideo Treaties (1889) and (1940), and the Havana Convention on Private International Law (1928), both include a chapter or title on insolvency.
The Montevideo Treaty on International Commercial Law (1889) covers 6 countries, and the Montevideo Treaty on International Commercial Terrestrial Law (1940) is only ratified by 3 of the original states in the 1889 treaty and, also contains a title on Bankruptcy. If any international insolvency issues arise between any 2 or more of the Montevideo Treaty States, the issues will be carefully analysed to determine which treaties may apply. The 1889 Treaty covers both personal and cooperate insolvency.

The Havana Convention on Private International Law (the Bustamante Code) was formed in 1928 between 15 Latin and Middle American States. With this law there may be concurrent proceedings within the States that include commercial establishments operating entirely separately economically. The law, however, does not stipulate procedures for co-operation or co-ordination of any concurrent proceeding.
The main differences between these initiatives are the member States covered within the treaties and the extent to which a single proceeding with the universal effect throughout the member States in allowed, for example, the Montevideo treaties are less supportive of this.

4

Marks awarded 9 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

It is said that the terms "bankruptcy" and "insolvency" may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to "bankruptcy" and "insolvency", (ii) the essential characteristics of "bankruptcy" and "insolvency" and (iii) any differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

Yes, I agree with this statement due to the historical roots of the words, but also by definition, the term bankruptcy is usually referred to as the formal state of insolvency, i.e. by law the person or entity is declared as bankrupt.
Insolvency refers to when a debtor is unable to pay their debts at maturity or when liabilities exceed the value of assets. As mentioned previously, bankruptcy can refer to the formal state of being insolvent. The term bankrupt supposedly also first came to light in Italy when merchants who could not pay debts, their creditors closed their businesses by breaking their benches or counter's.
The essential characteristics of "bankruptcy" and "insolvency" relate to the inability to pay debts. In some systems insolvency" refers to a debtors state of financial affairs and bankruptcy relates to being put into a formal bankruptcy proceeding.
Some countries use the terms collectively, for example, in Australia they use "insolvency" to refer to the insolvency of a corporation and use "bankruptcy" to refer to an individual natural person as being insolvent. Some countries use only one term, and some use them as synonyms.

Elaboration is needed, including with respect to essential characteristics and differences. One relevant difference, for example, is exempt property .Another is the objectives of individual vs corporate insolvency

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.

There are a few challenges when dealing with cross-border insolvency as insolvency law standards are relatively low in many countries. Whilst many systems have some similarities, man laws are outdated and not suited for modern day investment and trade. Another difficulty is that on a national level, there are various approaches each jurisdiction take in insolvency.
Friman believes the main problem is finding a common language in insolvency. Due to the various views on the definition of insolvency, finding a common definition may be quite difficult. Difficult enough that even international conventions and instruments rather not attempt to define insolvency but to focus on defining "insolvency proceedings."

According to Westbrook, there are nine key issues with cross-border insolvency. These are standing for/recognition of the 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. The idea of harmonisation could offer a solution towards single global cross border insolvency, however, the feasibility is questioned and the prospect appear debatable.
It is believed that the fundamental differences between the legal systems and the laws of countries are the main problem for cross-border insolvency and the biggest obstacle towards a solution of having a single global dispensation.

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" refers to having binding laws in order to regulate international insolvency, for example, "international law" is used to govern States domestically within the public category, and private international law, which is also a domestic law governs parties within States. A non-commercial example within public international law that surrounds the law of human rights is the United Nations International Bill of Human Rights, a "supra-national" instrument. If a country accedes to the protocols and covenants, these are imported into its domestic laws, and this has had variable success.
Soft law" on the other hand has had more success than "hard law" and seeks to influence its regulations of international insolvency. A successful example of "soft law" was done by UNCITRAL. It developed the MLCBI in the mid-1990s, which took the form of draft legislation that UNCITRAL advocated for member States to adopt, allowing for modification or not. teeing as it has been used by various multilateral organisations. Due to the widespread adoption of MLCBI, it is seen as an influential response to international insolvency law and therefore a possible aide to current/future challenges.
There is scope to elaborate with respect to the various successes of hard law and examples of hard law.

3

Marks awarded 11.5 out of 15

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

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

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

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

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

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

Question 4.1 [Maximum 4 marks]

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

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

The American insolvent estate representative can use the source of McGrath v Riddel, which can be classed as a case of co-operation and co-ordination with foreign insolvency proceedings. This case, which took place in the House of Lords, identifies that with private international law and (modified) universalism which is the basis of English cross-border insolvency law, the English courts should co-operate with the courts in America (country of primary liquidation) to guarantee that all of the company's assets are dispersed to its creditors with a single system of distribution. Although an appeal was allowed in this case based on the Insolvency Act 1986 (UK), it is stated that through the implementation of a universal scheme of pari passu distribution, in principle, the English courts/liquidators should agree to the terms, in this case that would be handing over the assets to the American representative. This shows that although there is room to appeal judgements, that this case favours Norton Cars Inc as it is a similar situation upon which the final judgment was already set.
Elaboration is warranted with respect to s426 and the MLCBI

1.5

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 EIR Recast is the law that would be used in a cross-border insolvency matter due to these two countries being a part of the European Union. The main proceeding should be opened in Italy as the EIR typically allocates jurisdictional competence to member State courts who have COMI. As Norton also has operations within Germany, with this law, they could be allowed to open a subsidiary territorial proceeding. The EU JudgeCo Guidelines can also be used between the two member states in order to improve communication between the courts.

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, due to them not being EU member States. Similarly, when the UK left the EU, the EIR Recast ceased to apply to the UK.

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 Faillissementswet is the Dutch law that covers the bankruptcy of both individuals and businesses.

It would be beneficial to elaborate as to why Dutch law is applicable

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.)

The Corporations Act 2001 permit for co-operation between Australian and foreign courts in liquidations, also termed as "external administration" matters. With this law, parties can make use of the recognition and enforcement provisions, especially where Model Law (as adopted) does not apply.

It would be beneficial to elaborate upon why Australian law is applicable

2.5

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40.5/50

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