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 10 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 legal systems around the world can be divided into two major categories: a) countries with historical roots in civil law and b) countries with historical roots in English law, often known as common law. The major distinction between the two systems is that in common law countries, legal precedents or judicial opinions are used to make legal decisions. In contrast, codified statutes are used in civil law countries. Some examples of Common Law and Civil Law Countries are as follows:

Common Law/ English Law

a) United Kingdom: The Insolvency Act 1986, along with the Companies Act 2006 (Part 26A), outlines statutory processes for insolvent companies. The CA 2006 introduces provisions for a Restructuring Plan, and solvent or occasionally insolvent companies can use a Scheme of Arrangement governed by the CA 2006.

b) Australia: Rooted in English common law, Australia lacks a single unified Bankruptcy or Insolvency Act. Instead, various Acts address different aspects. The Corporation Act 2001 oversees corporate insolvency, and the Bankruptcy Act 1966 manages individual insolvency. Australia has also adopted UNCITRAL.

c) India: Influenced by English law, India's insolvency legislation historically separated companies and personal bankruptcy. The 2016 Insolvency and Bankruptcy Code replaced this, unifying the framework after multiple reform attempts.

d) Kenya: The Insolvency Act (No. 18 of 2015) is Kenya's primary legislation for insolvency, covering natural and legal persons, and unincorporated bodies. It consolidates insolvency laws, complemented by the 2016 Insolvency Regulations for full effect.

Civil Law:

a) France: The Ordonnance De Commerce of 1673 laid the foundation for French commercial and insolvency law, influencing the commercial codes of 1807 and 1838. The 1807 code was harsh on debtors as it allowed arrest and detention. Reforms in 1889 introduced judicial liquidation, and in 1935, treatments for bankrupts and managers of failed business were revised. The 1955 and 1967 revisions brought a reorganization procedure, leading to the 1985 Act, which broadly is in force.

b) Germany: Germany underwent bankruptcy law reforms in the 1990s, and the Insolvenzordnung (InsO), which became effective on 1 January 1999, is the current bankruptcy code in force in the country.

c) Spain: In Spain, insolvency is governed by a unified procedure applicable to both individuals and corporations, as outlined in the Spanish Insolvency Act of 2003. This legislation has undergone multiple amendments over the past 15 years.

d) Latin America: Latin America boasts one of the most unified insolvency systems globally. Recently, South American countries have signed the South American Nations Agreement, introducing a system of supra-national law similar to the European Union.

3

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.

To address issues in cross border insolvency, scholars suggest *amongst others* three approaches:

Universalism: Universalism advocates a singular global proceeding governed by one law catered around the centre of debtor's main interest. In essence, it promotes handling all aspects of debtor's insolvency by one court under one legal system. This implies that the law

governing the "main proceeding" will exert its influence globally, extending beyond the territorial boundaries of the state where the primary proceeding was initiated.

Territorialism: In contrast to Universalism, Territorialism supports multiple insolvency proceedings against the debtor in each jurisdiction where the assets are located. However, confines the effect of such proceedings to the national border of the State where the insolvency proceedings are taking place. This principle protects national interest (that is, the interest of local creditors) before any asset are transmitted to abroad.

Modified Universalism: Modified universalism embraces universalist principles but acknowledges a country's unilateral control over its territory and laws. It involves drafting insolvency laws with extraterritorial reach and occasional cooperation between local courts for the broader impact of its laws. The approach allows flexibility, either cooperative or independent, based on the specific circumstances of the insolvency case and the requesting system. **COMI should be discussed.**

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: Latin America has taken significant measures to address international insolvency challenges through enduring multilateral agreements. Notable among these are:

a) The Montevideo Treaty (1889 and 1940):
- The 1889 Treaty deals with personal and corporate insolvency, assigning jurisdiction based on the debtor's commercial domicile.
- It permits a single set of proceedings in the commercial domicile if the debtor occasionally conducts business in multiple states or has branches or agents in other states.
- In cases where the debtor has economically independent businesses in different treaty States, simultaneous proceedings are possible. Local creditors in States with economically autonomous businesses can initiate bankruptcy proceedings or take legal action against the debtor when insolvency proceedings are initiated in another state.

b) Havana Convention on Private International Law (1928) - Bustamante Code:
- Also known as the Bustamante Code, the Havana Convention supports a more universal approach to insolvency proceedings.
- It allows for a singular proceeding with universal impact across Havana Convention States, akin to the Montevideo Treaties.
- In cases of concurrent proceedings in Havana Convention States with economically separate commercial establishments, the Convention does not outline procedures for cooperation or coordination.
- The Havana Convention acknowledges the extraterritorial effect of insolvency proceedings initiated in one member state in another member state, enforcing court decrees from the time of pronouncement, contingent upon compliance with local registration or publicity rules.

It would be beneficial to explicitly state the differences, rather than describe each and leave it for the reader to discern.

2.5

Marks awarded 8 out of 10

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

Question 3.1 [maximum 7 marks]

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

The terms "bankruptcy" and "insolvency" are often used interchangeably. However, there are legal systems which uses these terms to imply different things. For example, in Australia "insolvency" refers to the insolvency of a corporation, whereas "bankruptcy" is used to refer to insolvency of an individual or a natural person.

Further, there are differences between the two terminologies, and their application is dependent on the legal and cultural context. In this regard, following may be considered:

a) The meaning ascribed to "Bankruptcy" and "Insolvency"

- Bankruptcy: "Bankruptcy" is a legal status of an individual or entity that cannot repay debts to creditors. It is a formal process initiated by the debtor or creditors through a court order, leading to the liquidation of assets to settle outstanding debts or the development of a plan to repay creditors over time.

- Insolvency – "Insolvency" refers to a state of financial distress indicating a debtor's inability to meet financial obligations as they become due. It doesn't necessarily imply a formal legal process. Insolvency can lead to bankruptcy, but it may also result in other debt resolution methods such as restructuring or reorganization.

b) Essential Characteristics of "Bankruptcy" and "Insolvency":

- Bankruptcy: Involves a formal legal process overseen by a court, including the liquidation of assets to pay off debts.

- Insolvency: Signifies a financial state where liabilities exceed assets, making it challenging to meet financial obligations. Insolvency may lead to bankruptcy, but it can also prompt alternative debt resolution strategies, such as debt restructuring or negotiation with creditors.

It would also be beneficial to consider the factors raised by Wood

c) Differences in Corporate and Individual Bankruptcy/Insolvency:

- Individuals: In personal finance, bankruptcy often involves liquidating assets or creating a repayment plan. **Exempt property and the objectives of personal insolvency are also relevant and different in the context of corporate insolvency**

- Corporations: Corporate bankruptcy involves complex processes, which focuses on reorganization/ revival of a corporation rather than liquidation. The goal is often to keep the business operational as 'going concern' and repay creditors over time, highlighting the distinction from individual bankruptcy.

5.5

Question 3.2 [maximum 5 marks]

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

Developing a single global cross-border insolvency dispensation regime faces several challenges, some of these challenges include:

a) Diverse Interpretations of “Insolvency”: Friman highlights the absence of a universally accepted definition for "insolvency" on an international scale. Traditionally, it refers to a state where the total liabilities exceed the measurable value of a debtor's assets, indicating a sustained negative net worth. However, some jurisdictions also recognize a short-term inability, such as a liquidity crisis, as sufficient to trigger "insolvency proceedings." Consequently, various procedures worldwide address non-payment of debt, but there is no globally accepted consolidation or explanation of the concept of "insolvency”, which itself possess a challenge to globally harmonise insolvency dispensation regime.

b) Conflict of laws: According to Omar, discrepancies in domestic norms significantly impact the position of creditors and the priorities they assert in insolvency cases. When a debtor faces creditors making claims in multiple states, conflicts of laws inevitably arise.

c) Diverse Legal Systems: Legal systems vary significantly across countries, with different approaches to insolvency laws, procedures, and priorities. Harmonizing these diverse legal frameworks poses a significant challenge.

d) Recognition of Foreign Proceedings and enforcement of judgments: With diverse domestic law and no common insolvency regime, recognition of foreign insolvency proceedings across jurisdictions can be challenging.

e) Different Priorities of Stakeholders: Creditors, debtors, and other stakeholders may have conflicting interests in cross-border insolvency cases. Balancing these diverse interests to create a fair and equitable resolution pose across the borders is a significant challenge. For instance, in one country crown debts are to be given priority, however in the other they fall at the bottom of the waterfall mechanism.

f) Lack of International Cooperation and coordination: - Insufficient cooperation between countries and their respective legal systems can impede the development of a global cross-border insolvency framework. The absence of a coordinated international effort hinders the establishment of common rules and procedures.

It would also be beneficial to consider Westbrook’s 9 principles.

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” refers to legally binding rules and regulations that are enforceable through legal mechanisms. These rules/ regulations are often codified in treaties, conventions, or statues. These treaties, conventions or statues are binding on the signatory States. For example, European Insolvency Regulation (EIR) (2000) is a hard law which has been successfully, applied for the purpose of Insolvency proceedings amongst the members State.

"Soft Law" refers to non-binding principles, guidelines, or best practices that lack the legal force of treaties or statutes. While not legally enforceable, soft law instruments aim to influence behaviour and encourage voluntary compliance. For instances, Guidelines issued by international organizations, such as the UNCITRAL Legislative Guide on Insolvency Law or principles developed by industry associations to promote cooperation and coordination in cross-border insolvency cases. **Elaboration regarding success is warranted**

2.5

Marks awarded 10.5 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 may use UNCITRAL Model Law on Cross Border Insolvency, 2006 (which has been adopted by England) to request recognition in terms of English Law to deal with the assets of Norton Cars situated in England. The UNCITRAL Model Law in Article 25 and 26 provided for Cooperation with foreign courts and foreign representatives. Further, beyond statutory provisions, the common law in England also recognises and respects foreign insolvency proceedings.

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.

Considering both Italy and Germany are members of European Union, the European Union Insolvency Regulation (Recast 2015) ("**EU (Recast) Insolvency Regulations, 2015**") will be the key legal source for governing the cross-border insolvency matter between Germany and Italy.
As per the Recast Regulations, the main insolvency proceedings are to be opened in the Member State where the debtor has the centre of its main interest (COMI).

Further, to protect the diversity of interest, the Recast Regulations, provides for initiation of secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effect of secondary insolvency proceedings is limited to the extent of assets located in that Member State.

Thus, as per the applicable law the main proceeding should be opened in Italy being the COMI and if required the secondary proceedings can be opened in Germany.

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, the EU (Recast) Insolvency Regulation applies to the recognition of insolvency proceedings within the European Union. Since, India, South Africa, and Australia are not EU members states, and as such, their courts cannot directly apply the EU (Recast) Insolvency Regulation.

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 applicable law to the insolvency proceedings with regard to the real rights of security situated in Netherlands will be EU Insolvency Regulation and the local laws of the Netherlands.

There is some scope to elaborate

2.5

(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.)

Since Australia is not an EU member, the applicable legal framework with regards to an insolvency proceeding in Australia will be the Cross Border Insolvency Act, 2008.

There is some scope to elaborate

2
Marks awarded 11.5 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.