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 insolvency law systems that have historical roots in civil law tends to be codified (such as the Argentinian Bankruptcy Law, the Dutch Insolvency Law and the French Insolvency Law) while the insolvency law systems that have historical roots in English Law tends to attribute a greater value to the precedent (for instance, under English law the precedents play a very relevant role). This also explained why in insolvency law systems with historical roots in English Law, courts have more discretion to handle the proceedings and to apply the law than the courts belonging to an insolvency law system which roots in civil law. Moreover, the insolvency law systems with historical roots in civil law also tends to unify legislation applicable to insolvency proceedings while insolvency law systems with historical roots in English Law tend to fragment the insolvency law. With respect to inspectable transactions carried out by the debtor, in the insolvency law systems with historical roots in civil law the concept of voidable contracts developed from the *actio pauliana* and in English law such concept developed from an act of Elizabeth in the 1570. Finally, with respect to securities, in insolvency law systems that have historical roots in English Law there are gloating charge while these securities are not common in insolvency law systems that have historical roots in civil law.

It would be beneficial to list further examples of countries that fall into each category

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.

According to the principle of universalism, all debtor's assets and debts worldwide should be covered in a single proceeding. Moreover, that single proceeding shall be handled by the competent Court of the only forum with jurisdiction over the case. By contrast, the principle of territorialism suggest that insolvency proceedings may be brought in every jurisdiction where the debtor's assets are located. Therefore, there could be multiple insolvency proceedings related to the same debtor but confined to different assets according to the place (jurisdiction) where the assets are located. Finally, modified universalism implies the existence of a "main proceeding" opened in a State where the debtor has it main centre of interest (as it would occur according to the principle of universalism), but then such proceeding is supported by secondary proceeding in another State(s), which shall cooperate which each other.

There is scope to elaborate, for example with respect to the role of COMI in universalism

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.

The main two initiatives undertaken in the Americas to uniformly resolve international insolvency issues are the Montevideo Treaties of 1889 and 1940 and the Bustamante Code of 1928. There are several differences between these two initiatives.

First, with respect to the signatories. On the one hand, the Montevideo Treaty on International Commercial Law (1889) has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. However, the Montevideo Treaty of 1940 has been ratified by less signatories that its predecessor, as it has been ratified by Argentina, Paraguay and Uruguay. Both Montevideo treaties have provisions related to insolvency proceedings. On the other hand, the Bustamante Code has been ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba and Dominican Republic, Ecuador, El Salvador, Guatemala, Haití, Honduras, Nicaragua, Panamá, Perú and Venezuela.
Secondly, there are differences between those initiatives regarding the approach to international insolvency proceedings. In this regard, the Bustamante Code is more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout its region.

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.

From my perspective, only for the sake of uniformity bankruptcy and insolvency could be used interchangeably. Under argentine law, insolvency is a general term that refers to the financial and economic situation that faces a debtor under which cannot meet its obligations on due time and form. This broad term includes both the voluntary reorganization proceedings (thru which the creditor aims to restructure its debt) and the bankruptcy proceedings which exclusively aims to sell the debtor's assets thru the intervention of a trustee appointed by the competent Court. With the aforementioned meaning, the terms "insolvency, "voluntary reorganization proceeding" and "bankruptcy" can equally be used to refer to corporation and individuals.

This is a 7 marks question which requires consideration in greater detail, including with respect to the essential characteristics of insolvency/bankruptcy and differences when involving an individual as opposed to a company

1.5

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.

I believe there are several challenges arising in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation. For instance, there are some policy considerations that must be address from the outset. Will the cross-border insolvency dispensation adopt a pro-debtor or a pro-creditor approach? But also, would the States be willing to accept the universalism principle or even the moderated universalism principle? Moreover, how will States with a multiplicity of internal legislation addressing insolvency deal a single global cross-border insolvency dispensation adopted at a national level? Will this single global cross-border insolvency dispensation address individual and corporate insolvency in the same way? Will it address the specific situation of insolvency affecting consumers? Besides this challenges, there are also issues related to who, in which conditions and before which Court is entitled to bring its debtor to an insolvency proceedings, which are the effects that insolvency has on the debtor (person and/or corporation) as well as on its assets,

which are the compromised assets, the liabilities that could face de individual debtor, the consumer debtor and the corporation debtor (as well as its officers), which are the voidable transactions executed by the debtor that could be challenged by the creditors and/or the trustee and to which extent will the State intervene in the proceedings. Finally, there are also divergent approaches regarding the distribution of the earnings produced by the selling of the debtor's assets, who should bare the cost of the proceedings, and which are the conditions under which the debtor will be discharged. Generally, these issues are of a deep concern for States as they are directly related with their national public policy related to social, economic and political matters.

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.

In the context of international law, "hard law" involves instruments (treaties or conventions) that are "supra-national" and, therefore, binding for the States. However, for an instrument to reach the status of "supra-national" it has to be voluntarily ratified by the State in order to be imported to its domestic law principles. Moreover, a certain threshold of signatories is normally set as a condition for the instrument to enter into force. Besides, in most cases, the ratifying party cannot adjust the provisions of the treaty as it has to ratify it "as it is". Some examples of this classic public international instrument are the Nordic Convention (1933), the Istanbul Convention (1990) and the European Insolvency regulation (2000).

By contrast, In the context of international law, "soft law" involves instruments that are not intended to be ratified by States. Therefore, there these instruments are not binding for the States, there is not a threshold of signatories and there is not a date in which the instrument comes into force. These characteristics partially explain the fact that these instruments have been more successful than the classic public international instrument in archiving unification on national insolvency laws. In this regard, the States have more freedom to model their national law taking into consideration the soft law. Some examples of "soft law" are the Model Treaty on Bankruptcy (1925), the Model Law on Cross-Border insolvency (mid-1990s) and the UNCITRAL Legislative Guide on Insolvency (2004).

3

Marks awarded 7 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 English Court has jurisdiction to wind up a foreign company such as Norton Cars Inc which was incorporated in the United States under the Companies Act 2006 (UK). I have assumed that Norton Cars Inc has complied with the requirement to register its presence in England and have also nominate a resident person or persons to accept service of process and other formal notices on its behalf. My assumption is based on the fact that Norton Cars Inc have moved its headquarters to England. However, if Norton Cars Inc haven't registered in England, it nevertheless would still be able to resort to an England court to request the recognition of the insolvency proceedings filed before the United States under the Insolvency Act (1986).
Having addressed the first threshold of jurisdiction is now important to address the conditions under which (if possible) the English Court would recognize the liquidation filed in the United States to deal with the assets of Norton Cars Inc situated in England. Therefore, is relevant to refer to the House of Lords decision in *McGrath v. Riddell* in which it was stated that: *"[t]he primary rule of private international law…applicable to this case is the principle of (modified) universalism, which has been the golden thread running through England cross-border insolvency law since the eighteenth century. That principle requires that English Courts should, so far as is consistent with justice and UK policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution".* This approach was later confirmed by the Supreme Court in *Rubin v. Eurofinance S.A.* (2012) as it was concluded that: *"[t]he law relating to the enforcement of foreign judgements and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law".* To sum up, I will advise the American insolvent estate representative to base it case on the following English sources: (i) to justify the jurisdiction of the English Court, I would quote the Companies Act 2006 (UK) provided that the Norton Cars Inc has complied with the requirement to register its presence in England and have also nominate a resident person or persons to accept service of process and other formal notices on its behalf. Otherwise, I would ground the English Court jurisdiction on the Insolvency Act (1986); (ii) to justify the request of recognition of the insolvency proceedings brought before the American Court I would quote case law *McGrath v. Riddell* as well as case law *Rubin v. Eurofinance S.A.*
It's great that you have considered the common law. Greater discussion of the MLCBI and non-applicability of s426 is warranted.

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 appropriate legal source to be used in a cross-border insolvency matter between Italy and Germany would be the EIR (Recast), as both countries are part of the EU. Considering that the EIR allocates jurisdictional competence to the courts of the member State within which is situated the "centre of de debtor's main interest" (COMI), I would conclude that in this case the competent courts would be the Germans courts. This is due to the fact that the company has its main operations in Germany. Moreover, as the EIR (Recast) allows for the possibility of subsidiary territorial proceedings in other member States as long as the debtor has an "establishment", I would suggest bringing a subsidiary territorial proceeding in Italy where the management of the debtor is directed from.

The COMI is in Italy

3

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, because they are not part of the EU.

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 insolvency proceeding in the Netherlands would be governed by the European Insolvency Regulation (recast). The real right of security situated in the Netherlands would be governed by the national law of such State.

There is 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.)

The insolvency proceeding in Australia would be governed by the UNCITRAL Model Law on Cross-border insolvency which was adopted by Australia in 2006. The real right of security situated in Australia would be governed by the Australian law.

There is scope to elaborate.

2.5

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 35 /50

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