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.

Generally, countries whose insolvency law systems have historical roots in civil law are pro-creditor and includes harsh punishment on defaulters. Civil law systems also tend to have heavy Court involvement whereby the Courts have significant supervision and direction on major decisions and on the insolvency proceeding.

Countries having historical roots in English law tend to favour "officials" to administer the assets of the debtor and fundamentally favour the collective participation of creditors and a pari-passu distribution. Creditors also have the power to vote and discuss on major decisions regarding the insolvency proceeding and administration.

A better approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries cf codification in civil jurisdictions.

1.5

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 is defined a concept that there should only be one insolvency proceeding covering all the debtors' assets and debts worldwide. There should only be one forum and jurisdiction and that the chosen state should be the debtors' centre of main interest (COMI). An advantage of universalism include lower cost due to limited involvement in Courts at other jurisdictions. A disadvantage of universalism is that it is difficult to establish the "home" state and there it may create uncertainty in domestic markets.

Whereas in Modified Universalism, the principle that the main proceeding will be opened in the state of COMI and supported by secondary proceedings in other State(s). In Modified Universalism, Courts are expected to cooperate with each other in the spirit of comity.

The Territorialism principle is defined as several insolvency proceedings that may be commenced concurrently in every State where the debtor holds assets. Proceedings following this principle are territorial restricted to the assets within the State. **They are also territorially limited.**

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.

Latin America states has undertaken several initiatives to resolve issues pertaining to international insolvency such as the Montevideo Treaties (1889) and (1940) and also the Havana Convention on Private International Law (1928) (Bustamante Code).

The Havana Convention allows for an approach whereby a single proceeding may be commenced with universal effect throughout the area as compared to the Montevideo Treaties.

However, there may be concurrent proceedings in States that adopt the Havana Convention that contain independent businesses that operate in separate economic aspects. As such, the Havana Convention follows a similar approach to the Montevideo Treaties whereby it provides for a single proceeding if the debtor is only occasionally trading in more than one State. It is worth noting that the Havana Convention does not provide sections/clauses for cooperation or coordination for concurrent proceedings.

In addition to the above, some Latin America states had also taken the initiative and interest of wanting to adopt the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI). The MLCBI provides a framework for the states to address international insolvency issues where various other States are involved. However, the level of adoption of the MLCBI varies among the Latin America States.

There is scope to elaborate regarding the differences.

3.5

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.

Despite often used interchangeably, bankruptcy and insolvency are not the same and carries different legal meanings and context. Bankruptcy is a legal status of an individual/corporation when it is unable to repay its debts. It is a legal declaration that the entity was unable to repay its debts and thus legal proceedings may be initiated by creditors on the debtor. On the other hand, the term Insolvency refers to a financial aspect whereby the entities liabilities exceeds its assets, indicating an eventual default in its financial obligations. Insolvency may lead to bankruptcy but may also lead to debt restructuring or voluntary arrangements with its creditors.

- **There is scope to elaborate here: Some systems use the term "insolvency" and others "bankruptcy". Some systems use both to mean slightly different things, for example in Australia 'insolvency' is often used to refer to the insolvency of a corporation whereas 'bankruptcy' is often used to refer to the insolvency of an individual natural person.**

Bankruptcy typically involves an estate administrator/trustee/liquidator to recover/manage the assets of the debtor and subsequently to be realised and distributed to the creditors. Pertaining Insolvency, its characteristic is derived from its definition (i.e. the financial situation whereby its liabilities exceed assets) and can be used as an indicator of an eventual default. Insolvency may lead to various legal proceedings such as bankruptcy proceedings, garnishee proceedings and seize and seizure proceedings. Insolvency may also lead to debt restructuring or an arrangements with its creditors with the supervision of Courts.

Differences that may arise when a bankruptcy/insolvency involves a corporation rather than an individual would be bankruptcy for individuals involve the relief of an individual from their debts usually through the liquidation of their assets to repay creditors followed by a discharge of obligations. Bankruptcy for corporations could also lead to the immediate liquidation of the corporation or the occurrence of a restructuring plan to rescue the corporation.
It would be beneficial to elaborate with respect to the different objectives

In corporation insolvency, the first step is to determine if the insolvency is a balance sheet insolvency or a cash-flow insolvency. This would then determine the type of measure to be utilized; a restructuring of debts or a winding-up process. Generally, there will be a need to preserve viable parts of the business to secure the maximum recovery for creditors.

Only in the aspect of individual insolvency that the concept of exempt or excluded assets will apply, allowing for the insolvent debtor to keep some assets to maintain him or his dependents as compared to a general corporate insolvency whereby the estate administrator/liquidator will take possession and control over all assets of the corporation.

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.

The most pertinent challenge would be the absence of a global international court and global insolvency law that governs specifically cross-border insolvency issues that we can refer to (albeit there are several hard/soft laws based on regions). As legal systems vary significantly in the international context depending on its historical law roots (Civil Law, English Law, Common Law), harmonising and obtaining consensus from all parties from diverse legal frameworks is a gigantic challenge.

From the onset, there is no clear definition of "Insolvency". Traditionally defined as a situation where the total liabilities exceed total assets, there are States that define Insolvency to include the inability to service short term liabilities (i.e. cash flow insolvency). Therefore, a situation might arise whereby a debtor is deemed insolvent in one State while still deemed solvent in another State during a cross-border insolvency context.

Besides that, conflict of laws would also affect insolvency law during a cross-border matter. Important aspects such as position of creditors, distribution priorities, moratorium, presence of security and national laws might differ from one State to another therefore causing difficulties in the cross-border context. The sovereignty and interest of states may also play a role as states tend to protect their sovereignty and interest. Therefore, any law or rules that may affect the same may not be adopted. A right balance between the importance of a unified international insolvency law and the interest of states may pose a big challenge.

Westbrook, has identified several key issues in cross-border cases such as recognition of foreign representative (whether one State will recognise an Order/Declaration of another State), priorities and preferences (in relation to distribution of assets/funds) that might differ between States as well as moratorium on creditor actions (the extent and criteria to which moratorium is granted to the defaulting debtor against incoming legal suits).

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 international insolvency law, there are two sub-categories, hard law and soft law that have varying degrees of enforcement and binding nature. Hard law are usually legally binding in nature and any violations may result in legal action/consequences. Therefore, compliance towards hard laws are mandatory. An example of a hard law in international insolvency law would be the signing/ratification of treaties and conventions such as the UNCITRAL Model

Law on Cross Border Insolvency and the European Insolvency Regulation (2000). **A rare success is the Nordic Treaty.**

Soft laws are non-legally binding and are usually influencer in nature in accordance to guidelines, frameworks, principles or concepts. An example of soft laws are the development of the UNCITRAL Legislative Guide on Insolvency Law and the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes.

The most successful "soft law" approach to date has been undertaken by UNCITRAL. In the mid-1990s, it developed a Model Law on Cross-border Insolvency (MLCBI). This initiative did not take the form of a treaty or convention, but rather that of a Model Law, draft legislation that UNCITRAL recommended member States to adopt, with or without modification

While there are successes of hard laws in resolving international insolvency conflicts, soft laws have gained more success in recent decades as it offers the flexibility and fluidity depending on the various aspects of the State (historical roots, culture, policy differences, interest).

In addressing international insolvency, both hard law and soft law play pivotal roles.

2
Marks awarded 12.5 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.

From the onset, Norton Cars Inc should first establish the Centre of Main Interest prior to filing the winding-up order as it's headquarters has shifted on a few occasions and, for the purpose of this question, when the headquarters were in England.

Notwithstanding the above, having filed for liquidation in America, Norton Cars Inc would have filed Chapter 7 of the Bankruptcy Code 1978. The American insolvent estate representative ("American Liquidator") would then have to obtain recognition of the American winding-up decree from the Courts of England. England adopts the UNCITRAL Model Law on Cross Border Insolvency ("MLCBI") and the American Liquidator may refer to the clauses in the MLCBI to obtain the same. The MLCBI mandates cooperation and communication of local courts to the maximum extent possible with foreign courts in spirit of comity.

Following the recognition of the winding-up of Norton Cars Inc in England, the American Liquidator should proceed to notify relevant parties via letters or advertisements of the winding-up of Norton Cars Inc in England such as statutory authorities, debtors, creditors, financial instituitions and etc.

Next, the American Liquidator should identify the assets of Norton Cars Inc and proceed to secure the same soonest possible. Where necessary, applications to the local courts to enter, seize, possess and eventually sell the asset may be required.

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.

Italy and Germany are part of the European Union and adopts the European Insolvency Regulation (EIR) 2000. As Norton Cars Inc has shifted its COMI to Italy, the EIR allocates jurisdictional competence to the local courts where COMI is situated. Therefore, the main insolvency proceeding should be initiated from Italy. The EIR does allow for ancilliary/secondary proceedings to proceed in other member states (in this case, Germany).

In addition to the above, local laws for both Italy and Germany should be referred to and considered by the insolvency administrator during proceedings and when dealing with the liquidation administration of the Company.

Being member states of the European Union and adoption of the EIR, there is a definitive framework and guideline provided to the insolvency administrator in that the EIR encourages cooperation and communication between its member states when dealing with cross border insolvency matters.

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 as both states are not members to the European Union.

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.)

Insolvency proceedings should be governed by Italian law as it was initiated in Italy and as an Italian insolvent estate representative was appointed. Following the same, recognition of the Italian winding-up order should be sought in the local courts in Netherlands.

In regards to the assets under lien, it should be dealt with in accordance to Netherland/Dutch Law however as both Italy and Netherland are part of the European Union, the European Insolvency Regulation (EIR) 2000 should also be considered on how to deal with the asset.

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.)

Similarly to the above, the main insolvency proceedings should be initiated and governed under Italian law followed by recognition of the winding-up order in the local courts of Australia.

In regards to the assets under lien held in Australia, it should be dealt with in accordance to the relevant Australian Law.

There is some scope to elaborate

2.5

Marks awarded 12 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.