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.

Insolvency laws in countries with civil law systems, like France and Germany, are based on a set of written rules and laws. These systems focus on the collective rights of all creditors and have strict, formal procedures. They originated from Roman law practices.

In contrast, countries with insolvency laws rooted in English law, such as the UK and the USA, rely on past court decisions and legal precedents. These systems are more flexible, often focus on individual creditor's rights, and evolved from early English debt collection laws.

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.

Universalism in insolvency law means handling a bankrupt entity's assets and debts as one unified process, no matter where the assets are located. This principle suggests one insolvency proceeding in one country should apply globally.

Modified Universalism is a more practical version. It still aims for coordination globally but accepts multiple proceedings in different countries. The main proceeding is in the country where the debtor's main interests are, while other countries can have secondary proceedings.

Territorialism is the opposite of universalism. Each country handles the insolvency of assets within its borders independently. If a company goes bankrupt, each country where it has assets deals with those assets separately, without considering proceedings in other countries.

There is scope to elaborate with respect to your answer to this sub-question

2

Question 2.3 [maximum 4 marks]

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

In Latin America, there are a few ways to handle international insolvency issues:

- Cross-Border Insolvency Protocols: These are special agreements for each case that help countries work together on insolvency issues. They're unique to each situation.
- Regional Treaties: Some Latin American countries have treaties with each other to manage insolvency across borders. These treaties help with cooperation but aren't used the same way in every country. **Elaboration is needed here**
- UNCITRAL Model Law: This is a set of guidelines from the United Nations that some Latin American countries use to handle insolvency cases that involve more than one country. Each country decides how much of these guidelines to use.

- Local Law Reforms: Countries in Latin America sometimes change their own laws to better handle international insolvency, often using global standards as a guide. But these changes vary a lot from country to country.

This answer required consideration of the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code)

0.5
Marks awarded 5.5 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.

The terms "bankruptcy" and "insolvency" are often used as if they mean the same thing, but they actually have different definitions and implications, especially when it comes to individuals versus corporations.

"Insolvency" is a financial state where a person or a company can't pay their debts when they are due. It's about cash flow and the balance sheet. Where "bankruptcy" is a legal process that starts when an insolvent person or business seeks relief from their debts. It involves legal proceedings that formally declare the debtor as insolvent.

Considering their essential characteristics, insolvency is a financial status. It's not a legal process. A person or company can be insolvent without going bankrupt, possibly avoiding bankruptcy through debt restructuring or negotiations with creditors. Bankruptcy is a legal state that usually happens because of insolvency. It involves court proceedings and leads to the legal resolution of debts, either through discharge or restructuring.

For corporations, bankruptcy often means complex restructuring. Businesses have various stakeholders like creditors, shareholders, and employees to consider. Corporate insolvency might lead to reorganization (for example, Chapter 11 in the U.S.) or liquidation (like Chapter 7 in the U.S.), focusing on either continuing business operations or winding down. In contrast, personal bankruptcy focuses more on discharging or restructuring individual debts. It's about giving people a fresh start, free from overwhelming debt, and might include liquidating personal assests or setting up repayment plans.

This question required elaboration, including with respect to the essential characteristics of bankruptcy /insolvency.

4.5

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.

Creating a global, unified approach presents several significant challenges, mainly due to the varied nature of legal systems and economic policies across countries.

Firstly, the diversity in legal systems is a major obstacle. Countries are divided between common law and civil law systems, each with distinct methods for handling insolvency. This division makes harmonizing these approaches into a single global framework difficult.

Moreover, every country has its own set of insolvency laws, shaped by local economic policies and cultural attitudes towards debt. These laws differ greatly in how they treat creditors, debtors, and insolvency procedures. Integrating such diverse laws into one universal set of rules is a complex task.

Another problem is the recognition and enforcement of foreign insolvency proceedings. Countries disagree on whether to accept decisions made by courts in other countries.

The way creditors are treated varies widely from one jurisdiction to another. Some countries prioritize secured creditors, while others may give preference to employees or unsecured creditors.

Lastly, the economic implications of a global insolvency framework are significant, especially for countries with less stable economies. Insolvency laws are closely tied to a nation's economic structure, and a one-size-fits-all approach could have unintended consequences on global economic dynamics.

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 insolvency, "hard law" and "soft law" refer to different types of legal frameworks.

"Hard law" consists of formal legal instruments, like treaties and conventions, that are legally binding upon the countries that sign them. An example in international insolvency is the European Union's Insolvency Regulation, which binds EU member states to a set of rules governing cross-border insolvency. The success of hard laws like this depends on the willingness of countries to commit legally to the terms, which can be challenging due to differences in national insolvency laws and economic policies.

"Soft law" includes guidelines, principles, and model laws that are not legally binding but aim to influence and harmonize practices. The UNCITRAL Model Law on Cross-Border Insolvency is an example. It's a template that countries can adapt and adopt into their legal systems. Soft laws are often more flexible and can be more successful in international contexts because they allow for adaptation to local conditions. However, their non-binding nature means their implementation can vary widely and depends on voluntary cooperation between countries.

3

Marks awarded 10 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.

If Norton Cars Inc has filed for liquidation in the USA while its headquarters were still in England, here's how I would approach it:

- We need to find out if Norton Cars Inc's main business area (COMI) was in England when it filed for liquidation. If it was, then the English courts might take the lead in the insolvency process. Knowing this helps us plan how to get the insolvency recognized in England.
- Use the UNCITRAL Model Law on Cross-Border Insolvency as it provides a mechanism for dealing with cross-border insolvency cases. We should use it to seek recognition of the American insolvency proceedings in England, especially since the UK has adopted it.
- Refer to the English Insolvency Act: The Insolvency Act 1986 of England and Wales includes provisions for recognizing foreign insolvency proceedings. We need to understand how these provisions apply to Norton Cars Inc, particularly for assets located in England. **More specificity is required.**
- Review English Case Lawas previous court decisions in the UK can offer insights into how English courts may respond to our request for recognition. Analyzing these cases will help us anticipate potential challenges.
- Address the Situation of Gladiator Manufacturing Ltd. For the subsidiary in Germany, we need to consider how the liquidation of Norton Cars Inc affects it. This might involve separate proceedings in Germany or coordinating with the main proceedings, depending on how

integrated Gladiator is with Norton Cars Inc. Consulting with legal experts in German insolvency law will be crucial here.

And personally not being a lawyer, I would always consult Experts in English Law. To navigate the UK legal system effectively, consulting with legal experts specializing in English insolvency law is essential. They can provide specific advice and ensure compliance with legal procedures.

It would be beneficial to note that S 426 is not applicable as the US is not designated

3

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.

In handling the cross-border insolvency of Norton Cars Inc, with its COMI in Italy and main operations in Germany, I would rely on the European Union's Insolvency Regulation as the guiding legal source. This regulation is crucial in managing insolvency cases that span across EU member states.

I would initiate the main insolvency proceeding in Italy, as that's where Norton Cars Inc's COMI is currently located. According to the EU Insolvency Regulation, the main proceeding should take place in the member state where the debtor's central administration occurs, which in this case is Italy.

Given the significant operations of Norton Cars Inc in Germany, I would also consider opening secondary proceedings there. These are important for dealing with the assets located within Germany and are a standard procedure when a company has substantial business activities in another EU member state.

My approach would ensure that the proceedings in Italy and Germany are well-coordinated, as the EU Insolvency Regulation facilitates such collaboration. This is essential for an efficient and fair resolution, keeping in mind the interests of creditors and stakeholders in both countries.

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, courts in India, South Africa, or Australia can't use the EU (Recast) Insolvency Regulation. This rule only works in countries that are part of the European Union. Since India, South Africa, and

Australia are not in the EU, they have to use their own laws to recognize an insolvency representative from 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.)

In the Netherlands, the insolvency process will be governed by Italian law, as the proceedings were initiated in Italy. However, for the security rights on assets in the Netherlands, Dutch law will apply. This follows the principles of the EU Insolvency Regulation, which allows recognition of the main insolvency proceedings across the EU but respects the local laws of each member state for security interests and claims.

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.)

In Australia, while the insolvency process itself follows Italian law, the situation regarding security rights on assets is guided by local Australian law. Here, the UNCITRAL Model Law on Cross-Border Insolvency might come into play, which Australia has adopted. This Model Law provides a framework for recognizing foreign insolvency proceedings but typically respects the domestic laws of the non-EU country regarding security interests and local creditor rights. Therefore, in Australia, the handling of secured assets would be subject to Australian legal provisions.

3

Marks awarded 13.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 37/50

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