SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the **best response** to this statement.

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an "executory contract" and its enforceability?

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve "hard law" treaties and conventions which become enforceable as part of a State's domestic law. Choose the correct statement:

(a) The statement is untrue since treaties and conventions are "soft law", not "hard law".

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

(a) This statement is untrue because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

The legal system in the United Kingdom (UK) is an example of a system rooted in English Law. The UK has one primary piece of legislation, the Insolvency Act 1986 regulating insolvency law which covers both corporate and personal bankruptcy. However, the promulgation of the Insolvency Act 2000 and the Enterprise Act 2002 have resulted in amendments to the Insolvency Act. Furthermore, in 2020 the Corporate Insolvency and Governance Act was passed outlining reforms to insolvency law in the UK like *inter alia* the introduction of new moratorium rules and the suspension of winding up petitions.

On the other hand, in the Netherlands, a country with a legal system based on civil law in the past, ordinances were applied. The Faillisementswet of 1897 provides for individual and corporate bankruptcy. However due to the work of the research commission, Commissie van Onderzoek, the Schuldsaneringswet was implemented which brought an end to the era of "no discharge unless creditors agreed" and ushered in a new era that makes provision for a "fresh start" for bankrupts.

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

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.

The concept of universality/universalism proposes that insolvency proceedings that have been initiated in different States should be subject to/ handled using the insolvency law or provisions of one State.

Modified universalism is an approach that allows for the main proceedings initiated in one State to be supported by secondary proceedings in another State. The success of this approach requires the co-operation of the Courts dealing with the matters.

In the alternative, territorialism proposes that the law of each State in which insolvency proceedings are initiated should govern the said proceedings in that State without any extraterritorial effect on the ongoing proceedings in another State.

Elaboration is warranted with respect to this 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.

Latin American countries have developed treaties on private international law that have included provisions on bankruptcy and insolvency namely the Montevideo Treaties of 1889 and 1940 and the Havana Convention on Private International Law of 1928 also known as the Bustamante Code. The 1889 Montevideo Treaty speaks to individual/personal insolvency and corporate insolvency and utilises the subject debtor's commercial domicile to assign the

bankruptcy jurisdiction. The Bustamante Code unlike the Montevideo Treaties offers more support to a universal approach that allows for a single proceeding having a “universal effect” throughout the Member States. The 1940 Montevideo Treaty also has a Title VIII on bankruptcy. Furthermore, these initiatives also differ in the States that have ratified them for example, Argentina, Colombia, Paraguay and Uruguay have ratified one or both Montevideo Treaties, but the said countries have not ratified the Bustamante Code.

4

Marks awarded 7 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.

I do not agree that “bankruptcy” and “insolvency” can be used interchangeably because the meaning that is sometimes prescribed to “insolvency” speaks to the status of the debtor’s financial affairs and the debtor being unable to meet his debts as they become due. In certain jurisdictions, this is also a prerequisite to “bankruptcy” which in this instance speaks to the commencement of formal proceedings to declare an individual/corporation bankrupt. **It would be beneficial to elaborate further on the different use in different jurisdictions**

According to Wood, the essential characteristics of bankruptcy and insolvency are as follows:

(i) Automatic stay of proceedings against the debtor which bars individual debt enforcement and facilitates the collective debt procedure which binds all creditors;
(ii) Pooling of assets for the benefit of the debtor’s creditors;
(iii) Pari passu payments to creditors which dictate that except for particular situations, creditors rank equally and are to be paid accordingly.

(Wood P.R., *Principles of International Insolvency*, Sweet and Maxwell (2007), p 3.

In certain States, the objective of insolvency for individuals is based on the concept of rehabilitation and ultimately discharge. This concept of rehabilitation usually involves the discharge of some of the debtor’s unpaid debts the focus of which is to provide the debtor with a clean slate or a “fresh start” without the obligation to satisfy pre-bankruptcy debts. On the other hand, previously corporations were not thought to be rehabilitated and as such, they are usually dissolved following the winding-up process. However, the idea and practice of corporate rescue is now becoming more normalised. It is also important to note that the concept of having assets excluded or exempt from seizure only applies in instances where the debtor is an individual or natural person.

6

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

(i) the low standard of the domestic insolvency regime of the relevant States: the laws maybe antiquated and not suited to the realities of modern globalised trade economies which require provisions that address modern needs such as co-operation and co-ordination in cross-border insolvency matters;

(ii) the differences in each state's approach to insolvency law: States may have systems geared towards a pro-debtor or pro-creditor approach meaning that the relevant states would prioritise the interests of the opposing parties. Furthermore, public policy considerations like protecting the interests of local creditors may also make States reluctant to co-operate with foreign States ;

(iii) the differences in procedural and substantive law: the fact that insolvency proceedings can affect not only procedural law but substantive law can naturally cause clashes or difficulties in a cross-border context.

(iv) the differences in the definition of "insolvency" and "bankruptcy" applied by respective States.

In addition to this, Westbrook has also identified the following nine (9) key issues in cross-border cases which undoubtedly contribute to the aforementioned difficulties particularly the differences in each State's approach thereto:

(a) standing/recognition of the foreign representative;
(b) moratorium on creditor actions;
(c) creditor participation;
(d) executory contracts;
(e) co-ordinated claims procedures;
(f) priorities and preferences;
(g) avoidance provision powers;
(h) discharges; and
(i) conflict-of-law issues.

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 refers to classic legal instruments and laws that bind States to perform certain obligations which can be legally enforced. Hard law usually takes the form of treaties and/or conventions which States sign and ratify thereby affecting that State's domestic law. On the other hand, soft law in this context usually takes the form of resolutions, agreements and declarations that are not legally binding such as: the UNCITRAL Legislative Guide on Insolvency Law (2004) and UNCITRAL's Model Law on Cross-border Insolvency.

Hard and soft laws have had varying success in providing solutions to the challenges of international insolvency. With respect to hard law, Europe has seen some success achieved by the European Union via the European Insolvency Regulation (EIR) 2000 which has influenced multilateral developments in the sector. Even more success has been achieved by using soft law particularly UNCITRAL's Model Law on Cross-border Insolvency given the number of States which have been adopting it.

There is some scope to elaborate

3
Marks awarded 14 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.

England has amended its domestic laws to address cross-border issues such as the recognition and enforcement of foreign insolvency proceedings. Accordingly, you may utilise Section 426 (4) and (5) of the Insolvency Act 1986 (UK) to request recognition in terms of English Law to deal with the assets of the subject company situate in England. The section gives the English court the power to consent to the request of a foreign country to remit the relevant assets situate in England to the foreign liquidator. **This section does not apply as the US is not designated** You may also utilise English common law particularly, the case of *McGrath v Riddell [2008] UKHL 21* at [30] also known as *HIH Casualty and General Insurance Ltd, Re; McMahon v McGrath*, which not only confirmed the interpretation of the aforementioned sections of the legislation but in which, Lord Hoffmann opined that the principle of modified universalism requires that the English Courts co-operate with the courts in the country of the main proceedings to facilitate the distribution of assets under one system.
The MLCBI is relevant

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 proper legal sources to be used in a cross-border insolvency matter between Italy and Germany is the European Union Regulation 205/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (European Insolvency Regulation (EIR) Recast) which was amended in mid-2017 and later amended once more in December 2021 by Regulation 2021/2260.

Pursuant to Article 3 (1) of the EIR Recast, the centre of the debtor's main interests (COMI) shall have the jurisdiction to open main insolvency proceedings. However, it is important to note that the Article 3 (1) also provides that for a company, the place of the registered office is presumed to be its COMI where there is no proof to the contrary and if the registered office wasn't moved to another member State within 3 months prior to the request for the commencement of insolvency proceedings.

This therefore means that the main proceeding should be opened in Italy provided that the registered office of Norton Cars Inc did not move from England to Italy within the 3-month period prior to the request for the commencement of insolvency proceedings. Although, the company's main operations transpired in Germany, this would not be the COMI in this instance as per the EIR Recast.

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, an Indian, South African or Australian court will not 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. These countries have adopted the UNCITRAL Model Law on Cross Border Insolvency.

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.)

Netherlands is a member State of the European Union and as such, EIR Recast would be applicable in this instance. Further thereto, Article 35 of the EIR Recast provides that the law applicable to secondary insolvency proceedings shall be that of the Member State within the territory of which the secondary insolvency proceedings are opened. This therefore means that Dutch law is applicable to the insolvency proceeding and with regard to the real rights of security in the Netherlands.

There is some additional consideration relevant to this question. In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.

2

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

Australia has adopted the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) through the passage of its Cross Border Insolvency Act 2008 which would be applicable in this instance. Section 6 of the Cross Border Insolvency Act 2008 (the Act) provides that the Model Law with the modifications set out in Part 2 of the Act has force of law in Australia. Further thereto, Article 11 of the Model Law states that *"the sole fact that an application pursuant to the present Law is made to a court in this State by a foreign representative does not subject the foreign representative of the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application*". Accordingly, Australian Law will apply with regards to the insolvency proceeding in Australia and the real rights of security situate there.

There is some additional consideration relevant to this question.

2.5

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41.5/50

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