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.

For countries whose insolvency law systems have historical roots in civil law, their systems tend (generally) to be pro-creditor, oftentimes providing for the harsh treatment toward debtors. This followed from the fact that bankruptcy law originating as a result of the lex mercatoria began as a collective debt-collection mechanism. On the other hand, countries whose insolvency law systems have historical roots in English law appear to have had greater provision for the discharge of debts, as seen from the statutory discharge provision in the Statute of Ann and the Chapter 11 provisions in the US Bankruptcy Act. This indicates that they may possess a more pro-debtor slant than their civil law counterparts. Finally, the two groups of countries may differ in terms of how their systems deal with security rights, labour issues or the terminology employed for the purposes of insolvency law.

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 the idea that only a single insolvency proceeding pertaining to all of a debtor's assets and debts worldwide ought to take place. In other words, only one place (ie, one forum) should be granted jurisidiction over the insolvency proceedings. This is, in theory, a simpler and consolidated approach with lower costs, but it faces choice-of-law, jurisdiction and priority issues. **It would be beneficial to elaborate further**

Territorialism is the idea that insolvency proceedings should be allowed to be brought in every jurisdiction in which a debtor has assets, but each set of proceedings ought to be limited to the assets within the jurisdiction in which proceedings are brought. Under this approach, multiple sets of proceedings may be brought at the same time. This approach has been said to give greater effect to the interests of local creditors, who may not be able to participate in foreign insolvency proceedings. However, there are greater costs involved. Creditors may also face the problem of a debtor being declared insolvent in one jurisdiction but not in another.

Modified universalism is somewhat of a midpoint between the two approaches, where the "main proceeding" is opened in the jurisdiction where the COMI is, while being supported by secondary proceedings in other jurisdictions. Thus, it allows for multiple sets of proceedings, but only in the context of buttressing the primary insolvency proceedings in the jurisdiction of the COMI.

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.

They are the Montevideo Treaties and the Havana Convention on Private International Law. The Montevideo Treaties help to determine bankruptcy jurisdiction in two main scenarios. First, one set of proceedings is to be started in a debtor's commercial domicile where this domicile is in a single

treaty jurisdiction, even if the debtor in question occasionally trades in other states or has branches or agents elsewhere. Second, concurrent proceedings are allowed where a debtor has two or more economically autonomous businesses in different treaty jurisdictions. The Havana Convention on Private International Law has similar provisions, except in the case where there are concurrent proceedings, where the Havana Convention does not provide further guidance on the cooperation or coordination of those proceedings.

There are further differences which should be discussed, including different ratifying States

2.5

Marks awarded 6.5 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.

I disagree that the terms "bankruptcy" and "insolvency" may be used interchangeably, although this answer may change with respect to specific legal systems. The two terms may differ in terms of (a) the entity involved and (b) the legal concepts evoked. First, in some jurisdictions, "bankruptcy" is used to refer to the insolvency of a natural person while "insolvency" is used to refer to the insolvency of a corporate entity. According to the Guidance Text, Australia is one such example. This distinction is important because the objectives of insolvency can be rather different for natural persons and for corporations. For natural persons, insolvency aims to prevent the debtor from being harassed by his creditors and to allow him to make a fresh start while doing justice to his creditors. For corporations, the aim would be to make the most of the business, especially when it remains viable as a going concern. Second, "bankruptcy" can refer to the formal state of being placed in formal bankruptcy proceedings, ie, formal proceedings have been started against the entity in question. "Insolvency" may then refer simply to the fact that the entity's financial affairs have reached a point where it cannot repay its debts (evidenced either by way of balance sheet insolvency or cash flow insolvency).

Wood lists three possible essential features of insolvency/bankruptcy law:

- The automatic stay of enforcement by individual creditors, which will prevent a frantic rush by creditors to enforce their debts against the insolvent debtor;
- The general pool of assets for distribution to the creditors; and
- The payment of (unsecured) creditors on a pari passu basis.

That being said, the essential characteristic of "bankruptcy" and "insolvency" is likely to simply be the inability of an entity, whether a corporation or a natural person, to pay its or his debts.

As stated above, the main difference which arises when a bankruptcy/insolvency involves a corporation rather than a natural person is the objective of the entire insolvency proceedings. For natural persons, insolvency aims to prevent the debtor from being harassed by his creditors and to allow him to make a fresh start while doing justice to his creditors. This is also important because in many jurisdictions, the label of a "bankrupt" can also be accompanied by much social stigma. For corporations, the aim would be to make the most of the business, especially when it remains viable as a going concern. **Elaboration is warranted with respect to exempt property**

6.5

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.

First, developing a single global cross-border insolvency dispensation requires each State to agree to align its domestic legislation in the same manner. This is not a simple task given that each State may have its own reasons (of a political, policy or legal nature) to structure its insolvency laws in a certain way, which includes its approach toward the enforcement and recognition of foreign insolvency proceedings/judgments. Other States may not have the infrastructure or resources to adhere to higher insolvency standards. All of these issues present obstacles for the cooperation and coordination between States.

Second, another issue stems from the multitude of treaties and supranational bodies which are already in place. The implementation of a single global cross-border insolvency dispensation will have to work out how they fit in this patchwork of existing structures.

Third, the content of such a single global cross-border insolvency dispensation will be difficult to agree upon. In addition to each State's view on which approaches are best, there are many soft law projects which each present different proposals for consideration. Coming to an agreement after considering all of these proposals will take much time.

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook

1.5

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of "hard" and "soft" laws in providing solutions to the challenges of international insolvency.

Hard law refers to legal instruments which have the binding force of law. In other words, the obligations in such laws are legally enforceable. In the context of international insolvency, these are generally treaties and conventions, such as the Nordic Convention and the EIR Recast. The EIR Recast has generally been seen as a success insofar as it applied to quite a large number of cross-border cases but served mainly to facilitate the legal pluralism present in the host of European insolvency laws. On the other hand, soft law refers to laws which do not have any legally binding force. States therefore may adopt and follow them on a voluntary basis. The main and most successful example of soft law in the context of international insolvency is the UNCITRAL Model Law on Cross-border Insolvency. This is a piece of draft legislation which countries can adopt with or without modifications. Currently, the Model Law has been adopted in 59 States in a total of 62 jurisdictions, according to the UN website. The success of the Model Law may be traced to the fact that it allows countries the flexibility to adopt it with modifications, which may ameliorate the difficulties which come with negotiating a hard law instrument, which will require extensive discussions and the agreement of all contracting party States.

3

Marks awarded 11 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The American insolvent estate representative can use the Cross-Border Insolvency Regulations 2006 which stipulates, at s 2, that the UNCITRAL Model Law shall have the force of law in the UK as stated in Schedule 1 of the Regulations. As Italy is the COMI, the proceedings in the USA constitute "foreign non-main proceedings", pursuant to Article 2(h) of Schedule 1. This is because Norton Cars Inc has an "establishment" in the USA, given that it has a place of operations there with non-transitory economic activity. According to Article 15, the American insolvent estate representative, as a foreign representative, may apply to the court for recognition of the foreign proceeding in the USA. This has to be accompanied by the relevant documents as stated in Article 15(2) and (3).

Alternatively, the American insolvent estate representative can seek recognition under the English common law rules (see *McGrath v Riddell*).
It would also be beneficial to explain why s426 is not applicable.

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.

The appropriate legal source is likely to be the European Insolvency Regulation (EIR) Recast. **Why? Elaboration is warranted**. Based on the EIR Recast, primary jurisdiction is accorded to the State where the COMI is situated. However, subsidiary proceedings may be mounted in other member States, where the debtor has an "establishment", defined as a place of operations where the debtor carries out a non-transitory economic activity with human means and assets. Given that the COMI is Italy here, the main proceeding should be opened in Italy. According to Article 7, the applicable law will be Italian law. However, given that its main operations transpired in Germany, secondary proceedings

should also be opened in Germany supplementing the main proceedings. According to Article 35, the applicable law for those secondary insolvency proceedings will be German law.

3.5

Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

No. The EU (Recast) Insolvency Regulation only provides for the recognition of representatives by courts of the Member States.

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.)

According to Article 7 of the EU (Recast) Insolvency Regulation, which is likely the applicable legal source to be used with regard to the insolvency proceeding in Italy, the applicable law is that of the member State within the territory of which such proceedings are opened. In other words, Italian law will apply.

Given that Article 8 states that the opening of such insolvency proceedings will not affect the rights in rem of creditors or third parties in respect of assets, Dutch law will still apply to the real rights of security.

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.)

Italy has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. As such, an insolvency proceeding which commenced in Australia and the real rights of security situated therein will likely be governed by Australian law (as the law of the State in which the asset is situated and the law of the State in which the proceedings are commenced).

There is some scope to elaborate

2.5

Marks awarded 12.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 38/50

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