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 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.

Historically, countries whose insolvency law systems rooted in civil law have been said to have been harsher towards debtors than those with systems rooted in English law. Civil law systems also do not recognise certain common law security rights such as floating charges.

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.

0.5

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.

Under the principle of universalism, multiple insolvency proceedings commenced against the debtor in different states will be governed by the law of the "main proceeding", which may be in the state where the debtor has its centre of main interests. In other words, the law of the "main proceeding" has worldwide effect. **This would benefit from reconsideration, universalism suggests there should be only one proceeding.**

Under the principle of modified universalism, the "main proceeding" (likely commenced where the debtor has its centre of main interests) does not have worldwide effect, but is instead supported by secondary or ancillary insolvency proceedings in other states. The courts dealing with the secondary or ancillary proceedings will cooperate with the court dealing with the main proceedings.

Under the principle of territorialism, insolvency proceedings commenced in a state will only have effect in that state and not in others where parallel insolvency proceedings have been commenced. **Elaboration is warranted**

1.5

Question 2.3 [maximum 4 marks]

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

The Latin American states have entered into multilateral agreements on managing international insolvency issues, namely in the form of the Montevideo Treaties of 1889 and 1940 and the Havana Convention on Private International Law of 1928.

The Montevideo Treaties allow for a single set of insolvency proceedings in one treaty state where the debtor has a commercial domicile, notwithstanding that it occasionally trades or has branches or agents in other treaty states. However, concurrent proceedings are permitted if the debtor has two or more economically autonomous businesses in different treaty states. In the latter case, where there are insolvency proceedings in one of the states, creditors in the other states with economically autonomous businesses can also open insolvency proceedings or other civil actions against the debtor in that state.

The Havana Convention also provides for a single set of insolvency proceedings in the commercial domicile of the debtor which has universal effect across the treaty states. It permits concurrent proceedings where the debtor has commercial establishments in different treaty states which are entirely separate operations economically, but contains no provision for cooperation or coordination between such concurrent proceedings.

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

2.5

Marks awarded 4.5 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.

"bankruptcy" and "insolvency" are not necessarily interchangeable terms. in many jurisdictions such as England, "bankruptcy" is taken to refer to personal insolvency, whereas "insolvency" is taken to refer to corporate insolvency. This is not universal – in the United States, "bankruptcy" is the terminology used for both personal and corporate insolvency.

However, what "bankruptcy" and "insolvency" have in common is that they both refer to the system of laws governing a state of affairs where a debtor is unable to pay its debts. The common essential characteristics include a moratorium against actions against the debtor by individual creditors, a pooling of the debtor's assets to pay the creditors, and a *pari passu* distribution to creditors.

The key difference between "bankruptcy" in the sense of personal insolvency and corporate insolvency is that the goal of the personal bankruptcy regime is to protect the debtor from creditors, allow the debtor to have a fresh start and reduce his indebtedness through contributions while taking into account his personal circumstances. Bankruptcy ends in the discharge of the debtor from his debts. On the other hand, corporate insolvency may result in liquidation, which leads to the dissolution of the company as an entity. **There is scope to elaborate regarding exempt property. This is a 7 mark question and elaboration is needed.**

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 challenges arising in cross-border insolvency include:

1. The differences in national legal frameworks relating to insolvency law as well as substantive law, which can lead to uncertainty in the treatment of rights and encourage forum shopping.
2. The territorial limits of a state's enforcement of its jurisdiction, and the concomitant risk of multiple insolvency proceedings being commenced in different states against the same debtor.
3. Outdated or otherwise unsuitable laws in many countries which cannot properly deal with cross-border insolvency issues.

4. A lack of cooperation and coordination between different jurisdictions where parallel insolvency proceedings have been commenced.

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook. This is a 5 mark question and elaboration is warranted.

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 binding and enforceable rules, and in the context of international insolvency it includes a state's domestic insolvency laws and regulations, which may be affected by treaties and conventions which the state is party to. Examples include the Nordic Convention (1933) and the EIR Recast. Such treaties are usually only effective as between member states. They may not come into effect at all if they are not ratified by enough states. Even if they do come into effect, an in sufficient number of ratifications may mean that they do not apply widely enough to be effective in resolving international insolvency issues.

"Soft law" solutions do not take the form of treaties or conventions. Instead, they may take the form of legislative guides and model legislation aimed at encouraging states to voluntarily amend their domestic laws to unify their approaches to insolvency. One example is the UNCITRAL Model Law on Cross-Border Insolvency, which has emerged as a successful solution to resolving international insolvency issues given that it has been adopted by a large number of states.

3

Marks awarded 10.5 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.

The American insolvent estate representative may request for recognition through the following avenues:

1. Under the UNCITRAL Model Law on Cross-Border Insolvency, which has been implemented in the United Kingdom pursuant to the Cross-Border Insolvency Regulations 2006.
2. Alternatively, through the common law jurisdiction of the English courts to grant assistance to foreign insolvency proceedings.

Section 426 of the Insolvency Act 1986 is not available to the American insolvent estate representative because the US is not a scheduled country under the Act. The EIR Recast is also not applicable since the US is not a member of the EU to begin with.

4

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 EIR Recast is applicable between Italy and Germany, given that both are members of the European Union. Pursuant to Art 3.1 of the EIR Recast, the state where the debtor's centre of main interests is situated shall have the jurisdiction to open the main insolvency proceedings. The centre of main interests is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

Norton Cars Inc is assumed to have shifted its COMI to Italy, and in any case Italy is where its management is directed, *ie*, where its interests are administered on a regular basis, as ascertainable by third parties. Thus, the main proceeding should be opened in Italy.

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. The Regulation only applies as between EU members.

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.)

Under Art 7 of the EIR Recast, Italian law will apply to the insolvency proceeding, but pursuant to Art 8, which provides that the opening of insolvency proceedings will not affect third party rights in rem, Dutch law will continue to apply to the real rights of security situated in the Netherlands.

Some elaboration would be beneficial

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.)

Australian law will apply to any concurrent insolvency proceeding commenced in Australia since the EIR Recast does not apply to Australia. Australian law will also govern the real rights of security situated there.

Some elaboration would be beneficial

2.5

Marks awarded 14 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.