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.

[Civil law systems have origins that are pro-creditorType answer here]

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

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/Universality focuses on a single legal system (usually that of the Centre of Main Interest), with insolvency in other jurisdictions following (or being subject to) the law of the COMI. True universalism envisions only a single insolvency proceeding covering the debtor's assets wherever located. The "main" proceeding has universal effect, regardless of the country/jurisdiction. Territoriality focuses on the laws of individual jurisdictions, with each jurisdiction's insolvency proceeding applying only to that jurisdiction. There is therefore no "main" proceeding, and multiple different proceedings will have to be commenced in every jurisdiction. Modified universalism refers to the practical version of universality, given the intractable problems of creating a global insolvency system. Modified universalism focuses on the law of the COMI, which is considered the "main" proceeding, and insolvency proceedings opened in other jurisdictions are ancillary to the "main" proceedings. Courts across jurisdictions take heed of the decisions of other courts in other jurisdictions, and those of the COMI court in particular.

3

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 states have adopted multilateral agreements that include sections on cross-border insolvency; the two Montevideo Treaties and the Bustamante Code. As between the two Montevideo Treaties, the 1889 version has been ratified by more Latin American countries, whereas the 1940 version has only been ratified by three countries. The 1940 version is therefore only applicable when Argentina, Paraguay, and Uruguay are the only countries involved. As compared to the Bustamante Code, different countries have signed. Only Bolivia and Peru are parties to the 1889 Montevideo Treaty and the Bustamante Code, resulting in limited overlap. In terms of operation, the 1889 Montevideo Treaty follows the principle of universality if the debtor is only domiciled in one treaty state, but allows for concurrent proceedings if the debtor has multiple autonomous businesses across several treaty states. The Bustamante Code more closely follows the principle of universality in that it provides for a single proceeding throughout treaty states, but also allows for concurrent proceedings if the debtor has entirely separate establishments in different states.

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 disagree with this statement, but mostly because my jurisdiction does not regard the two terms as being interchangeable. I accept that this might be the case in different jurisdictions and depending on the language used. Insolvency refers to the insolvency of a corporation, whereas bankruptcy refers to the bankruptcy of a natural person/human being. However, in other jurisdictions, insolvency might refer to a financial status (for example, balance sheet insolvent or cash-flow insolvent), whereas bankruptcy refers to the applicable legal proceedings. As for essential characteristics, Wood identifies shared principles: (1) individual actions against the debtor are subject to a moratorium; (2) there is at least some degree of asset pooling for distribution, subject to exceptions; and (3) distribution is generally on a *pari passu* basis, again subject to exceptions. For my part, I can add that another essential characteristic is that insolvency and bankruptcy are generally matters which the state has some interest in and oversight over. This might be through the judicial or quasi-judicial process, or at least through some formal administrative body. Sealy and Hooley identify distinguishing features between insolvency for corporations and bankruptcy for individuals, in terms of the objectives of each regime. Whilst insolvency seeks to preserve the business to the extent possible and might seek to attach personal liability if the corporate form/separation of legal personality has been abused, bankruptcy for individuals is more rehabilitative and seeks to find a fair way to deal with the debtor's liabilities while ensuring that they may still contribute productively to society. Very broadly speaking, it is likely to be easier to cause a company to enter into insolvency than to cause a person to become a bankrupt, because the very purpose of the corporate form is to undertake liability. Another practical difference is likely to be the availability of rescue mechanisms. While a corporation may be temporarily managed by insolvency practitioners to try to find a viable solution, while a bankrupt cannot.
Exempt property is also relevant

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.

Global consensus is impossible due to differences in values, culture, and political outlook. There is no universal legal authority or enforcement body to facilitate a single global cross-border insolvency dispensation. Different states may have different public policy approaches towards insolvency; some might be pro-debtor while others might be pro-creditor. Different states might prioritise different groups of people, such as employee-creditors, over other types of creditors. Different states may also be underpinned by fundamentally different legal traditions, for example, the common law concept of a trust, which can ringfence property from insolvency, or the concept of a floating charge, might not exist in other jurisdictions. Other political differences between different state may also come in the way of judicial cooperation and recognition.
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 in the international insolvency context essentially refers to binding treaties and conventions between different states. Such treaties and conventions become hard law when ratified and taken into the domestic law of the state (be it by monism or dualism). Soft law refers to non-binding instruments, typically model laws, promulgated by some institution or by some consensus. Whether or not hard law or soft law can be regarded as successful depends on the metric applied. In the course materials, success is measured by adoption rate or how widespread the instrument has been accepted. In such case, soft law is likely to be more successful as it simply provides some framework or starting point, and countries may decide how precisely they want to adopt the framework. This is more comfortable from a sovereignty perspective. For example, the UNCITRAL Model Law on Cross-border Insolvency has been widely adopted, and the Asian Principles of Business Restructuring covers a promising number of jurisdictions. However, if success is measured by uniformity of implementation and functionality as a cross-border mechanism, hard law solutions are more successful but limited in scope.

Some elaboration is warranted, for example regarding hard law examples and success

2

Marks awarded 9.5 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 main legislation is the Model Law in the Cross-Border Insolvency Regulations 2006. The common law is of course relevant to interpretation and application. The UK Insolvency Act 1986 is less relevant as the USA is not a country recognised under s 426 of that act. Even though the EIR will still be applicable as this situation is pre-Brexit, the EIR is not relevant to the American insolvency.

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 EU Insolvency Regulation is applicable as between Italy and Germany. As the COMI is located in Italy, the Italian courts are the place where the main proceeding should be opened. Subsidiary proceedings may be opened in Germany, as Norton Cars has an establishment in Germany.

There is scope to elaborate

3

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. Though it is possible that they might *consider* (not apply) the EIR for their domestic law.
It would be beneficial to explain your reasoning

0.5

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.)

The EIR and Dutch law will apply to the real rights of security. If the property itself is situated in the Netherlands, it is governed by Dutch law per Art 5 of the EIR.

Elaboration is warranted

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.)

Australian law will apply.

Elaboration is warranted

2

Marks awarded 11.5 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.