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 10 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.

England, unsurprisingly has its historical roots in English law (governing both England and Wales), and the rules are set out extensively in the Insolvency Act 1986 covering both individual and corporate insolvency. The Statute of Malbridge 1267 introduced imprisonment for debtors, which was later abolished by the Debtors Act 1869. The English Bankruptcy Act 1542 is credited which bringing about two important principle of modern day insolvency tool (1) collective participation by creditors and (2) pari passu, which ensures that creditors to an estate are treated equally. [1]

American law in respect of insolvency was based on the Bankruptcy Code 1978 (civil law), is notorious for being pro-debtor and its law, which is federal, applies to all states. It does not have separate legislation for individuals and corporations, both are dealt with under the Code (and its various amends).

Individual and corporate insolvency is dealt with in two separate pieces of legislation under Australian law, the Bankruptcy Act 1966 and the Corporations act 2001 respectively. Australia, unsurprisingly, as commonwealth country has its roots in English law.

European countries have their routes entrenched in civil law.

Africa as a country formerly subject to English colonial powers has its laws largely based around the English system. India's insolvency laws too are deeply entrenched in an older version of English law distinguishing between individual and corporate insolvency.

Chinses insolvency laws are heavily rooted in civil code.

Italy has a Civil Code which is founded on civil law and can be traced back to Roman law and Table 3 of the Twelve Tables. The terms "bankruptcy" is derived from the Italian language and the term "banca rotta" which literally means "broken bench" and was born out of the scenario where a merchant who operated his business from a stall who could not pay his debt, had his business closed by breaking his stall.

This answer also required a discussion of the common law aspect of English law cf codified law

2

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 an approach that proposes the initiation of one proceeding in respect of the debtor's assets wherever located globally, and where the office holder is given the powers necessary to gain control over the assets. Modified universalism is, as the name suggests, based around a universal approach with the only difference being that other proceedings can also be commenced in another state with the requirement that those states cooperate with one another. Territorialism allows for the commencement of insolvency proceedings in any country where the debtor has assets.

Further elaboration was warranted

[1] Page 5 of Foundation Certificate in International insolvency law – Module 1 Guidance text – Introduction to International Insolvency

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.

South American countries are known to have one of the most unified systems in the world and have their laws rooted in civil law.[2] Treaties between the Latin American States include (1) the Montevideo Treaty (1889) (the "**1889 Treaty"**) and (1940) (the **"1940 Treaty"**) and (2) the Havana Convention on Private International Law (1928) (Bustamante Code) (the "Havana Convention"). The 1889 treaty was ratified by six countries while the 1940 treaty by only 3.

Both personal and corporate insolvency are provided for under the 1889 Treaty and it decides bankruptcy jurisdiction based on the debtor's commercial domicile in the following way: (1) where a debtor trades in more than on State or has branches or agents in other States, but has a commercial domicile in one State then the 1889 Treaty provides for one set of proceedings in the State where the commercial domicile is located and (2) if the debtor has more than one economically autonomous businesses in different States acting independently of one another, the 1889 Treaty provides that concurrent proceedings in both States can be commenced. When insolvency proceedings are open in one of the States, then a local creditor in another State containing an economically autonomous business may open bankruptcy proceedings in that State or take other civil action against the Debtor.[3]

The Havana Convention was concluded in 1928 between 15 Latin and Middle American States. The Havana Convention is leans towards a more unified and solitary proceedings as opposed to the two differing approaches under the 1889 Treaty. The main difference between the two treaties is that under the Havana convention, where there are concurrent proceedings, it does not provide procedures for co-operation of any concurrent proceeding. It accepts that insolvency proceedings commenced in one member State will have extraterritorial effects in another member State.[4]
It would also be beneficial to elaborate regarding differences with respect to ratifying states

3.5

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.

The terms "bankruptcy" and "insolvency" cannot be used interchangeably. Both terms will have different meanings dependent on the jurisdiction. For example in Denmark bankruptcy is a term used when referring to both individuals and companies.

[2] Page 11 of Foundation Certificate in International insolvency law – Module 1 Guidance text – Introduction to International Insolvency
[3] Page 60 of Foundation Certificate in International insolvency law – Module 1 Guidance text – Introduction to International Insolvency
[4] Paragrap 2, Page 62 of Foundation Certificate in International insolvency law – Module 1 Guidance text – Introduction to International Insolvency

Under English law, the term "bankruptcy" is only applicable to an individual in circumstances where a party owed a sum greater than GBP5,000 makes an application to court for the debtor to be made bankrupt, and the court grants the bankruptcy order. Under English law the term "Insolvency" is applicable to companies and corporations. In an English Court, in respect of an insolvent company, an application can be made by a person owed more than GBP750 for its winding up in circumstances where the Company is deemed to be unable to pay its debt as they fall due.

Depending on the jurisdiction, bankruptcy or insolvency will be determined by reference to either balance sheet insolvency, which means that on an analysis of a company's accounting books, the liabilities are greater than the assets, or cash flow insolvency, which is where a company is declared insolvent if it cannot pay its debts as they fall due.

There are certain exceptions made with respect to an individual's bankruptcy. Under English law for example, an individual's tools of trade are exempt from the rest of his estate, since the law recognises that the individual still needs to make a living and it can also assist the individual in repayment to creditors. Further in an individual bankruptcy certain assets such as household goods can be exempt or excluded from the estate.[5]

Further in respect of insolvent companies, they are "dissolved" in a way which is not applicable to an individual. Individuals who have been made bankrupt will be affected on a more personal level. Their credit score will be negatively affected, meaning they may have difficulty taking out a loan, credit card or mortgage, including not being able to assume certain positions of trust in public office, such as being a member of parliament. On the contrary, officers in a company will have their liability limited to the assets of the company, unless there has been a fraud element involved during their time as officer in a company.

It would be beneficial to elaborate further, for example with respect to different objectives of induvial vs corporate insolvency.

5.5

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.

The harmonisation of global cross border insolvency laws proves a challenge primarily because of the numerous cultural differences which underpin a country's approach to insolvency meaning that no one country's approach will be entirely aligned with another's and the respective laws will reflect those differences. A country's policy will have developed over hundreds of years, and be largely reflective of that country's history and political leaders and as a consequence, very unique in nature. Along with the differing policy considerations, each country also has its own set of rules in respect of general areas of law such as how it deals with security rights of the approach to labour issues.

Other differences revolve around how systems operate as a whole, whether it be pro-debtor or pro-creditor. Systems which adopt the same approach will find it easier to adopt laws of a similar nature to allow insolvency issues to be dealt with more easily than countries who do not. For example the USA is known for having a system which generally favours creditors.

Depending on which jurisdiction, the differences mean that in many cases there is a high degree of incompatibility. Further difficulties arise subject to the basis on which a country's legal system is

[5] Page 21 of Foundation Certificate in International insolvency law – Module 1 Guidance text – Introduction to International Insolvency

founded, be it civil law or English law (English common law). Where two countries both adopt an English law approach, it is easier to create channels through which countries can arrange their insolvency laws (and amendments) in such a way as to allow for cross border elements of insolvency to be resolved more easily.

Under English insolvency law both personal and corporate bankruptcy are dealt with under one piece of legislation, the Insolvency Act 1986, Spain adopts the same approach under the Spanish Insolvency Act 2003. India adopts an older version of the English approach which maintains the separation between personal and corporate bankruptcy.

Then there is the issue of terminology where different countries utilise the same words, but which have different meanings.

Many terms such as "secured creditor", "security interest", "liquidation" and "reorganization" may have fundamentally different meanings in different jurisdictions. An explanation of the use of the term in the Guide may assist in ensuring that the concepts discussed are clear and widely understood.[6]

The approach taken when deciding when someone is insolvent is also different. Two different approaches are when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets.

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

2

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.

Treaties and conventions to which countries become signatories, become domestic laws enforceable in court meaning that its citizen and entities become bound by them[7]. This is known as "hard law". An example of a successful multilateral treaty is the Nordic Bankruptcy Convention of 7 November 1933. According to the convention, a bankruptcy declared in one Nordic country is recognised in the other Nordic countries as automatically applying to the bankrupt's property in those countries. (Bankruptcy here refers to both individuals and corporates.)[8]

The European Insolvency Regulation 2000 has achieved success and influenced broader multilateral developments in international insolvency law achieving harmonisation of insolvency laws between Member States allowing for the insolvency process to work effectively.

The authors of "soft law" could be said to adopt a softer approach to implementation and harmonisation of insolvency laws, in that they does not require states to become signatories. They makes recommendations of what they consider to be in the best interests of those wishing to develop their insolvency regimes and leave it up to the Member State to decide (1) whether they wish to adopt the recommendations (2) the extent to which they wish to adopt the recommendations and (3) the way in which they adopt the recommendations.

[6] Legislative Guide on Insolvency Law

[7] Page 11 of Foundation Certificate in International insolvency law – Module 1 Guidance text – Introduction to International Insolvency

[8] Nordic Bankruptcy Convention | Practical Law (thomsonreuters.com)

A successful example of this is a Model Law on Cross-border Insolvency which was draft legislation authored by the United Nations Commission on International Trade Law. It has been adopted by a growing 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.

She should use section 426(5) of the Insolvency Act 1986 (UK) which authorises the local court to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling with its jurisdiction".[9]

S426 does not apply as the US is not designated. The MLCBI and common law are relevant

1

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.

[9] Page 51 of Foundation Certificate in International insolvency law – Module 1 Guidance text – Introduction to International Insolvency

In 1996 the European Union passed a Council Regulation on Insolvency Proceedings known as the European Insolvency Regulation "EIR" applicable between member states including as in our scenario, Italy and Germany. The EIR allocates primary jurisdiction based on the centre of the debtor's main interests, i.e. Italy. It does however allow for the possibility of subsidiary proceedings in other member states where the debtor has an establishment which is defined under the EIR as "any place of operations …" i.e. Germany. So in our scenario the main insolvency proceeding would be opened in Italy and the subsidiary proceeding in Germany.

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 is only applicable to Member States of the European Union.

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.)

EIR Recast

Elaboration is needed. The relevant answer is Dutch law

0.5

(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.)

UNCITRAL Model Law on Secured Transactions (2016)

Elaboration is needed. The relevant answer is Australia law

0.5

Marks awarded 7 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 34.5/50

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