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.

Countries can have their insolvency law systems based in a variety of different historical roots. Many national and domestic legal systems are based on either Civil Law or English Law.

Countries who have their historical roots in civil law trace back to Roman Law including *cession bonorum* (assignment of property), *distractio bonorum* (forced liquidation of assets), and *remission* and *dilatio* (compositions with creditors) . In Roman law, debt execution would include the Debtor pledging their physical body for repayment of the loan (i.e. Debtor's prison). Insolvency law rooted in civil law continued to develop as merchants from those areas influenced countries they interacted with in trade and thus countries formed a more Roman or Germanic law (which is considered to be civil law). Some countries that are considered to be rooted in civil law are the Dutch insolvency system, the French insolvency system, the German insolvency system, and the Spanish insolvency system.

Countries that are based in English law are typically countries that were colonies and therefore inherited their laws from the former colonial masters (England). English insolvency began to form around the 16th century (approximately eight centuries after the Romans were developing their system). This system originally did not provide for imprisonment of debt like civil law but that was later introduced in its development. Some countries that follow the English form of insolvency law include the United Kingdom, America, Australia, some parts of Africa (Africa is a mix of countries that follow English law, civil law, and Portuguese law), and India.

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.

The main difference between universalism and territorialism is that both universalism and the newer modified universalism are rooted in the goal of globalization and a having single procedures for insolvency, regardless of location compared to territorialism which focuses on each location where the debtor may operate or have assets having a separate proceeding.

Universalism seeks to have one insolvency procedure that encompasses all assets of a debtor regardless of location and that once the insolvency procedure is opened, no other execution on assets can be started in any other location. This would require a consensus of the forum jurisdiction for the proceeding (typically based on the debtors centre of interest). It also requires that the officeholder / or person managing the insolvency must be given the tools and corporation in order to collect and administer assets across different locations. This gives creditors the ability be treated on an equal basis to all creditors.

In contrast, the principal of modified universalism was formed because global consensus regarding universalism is likely to never be reached. This modified approach has a main proceeding opened where the main centre of interest is and then supplemental proceedings can be opened in other locations where there are assets. However, unlike territorialism, modified universalism requires the co-operation of the other courts holding respective supplemental proceedings.

Territorialism is the opposite to universalism and is the principal that the outcome and determinations in an insolvency proceeding will only apply to the state in which those proceedings were adjudicated. This means that there could be multiple insolvency proceedings ongoing at the same time which could potentially have different outcomes. **Territorial limitations should be considered**

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.

Over the years there have been numerous initiatives that have been undertaken to assist with the resolution of international insolvency issues in Latin America. Latin America is known for having implemented some of the most long-lasting multilateral agreements on international insolvency issues. These include, the Montevideo Treaties and the Havana Convention of Private International Law.

The Montevideo Treaties were signed in both 1889 and 1940, however not all states adopted and implemented both treaties. The 1889 treaty covers personal and business / corporate insolvency proceedings and focuses on allocation of domicile for jurisdiction. The 1889 treaty provides for one set of proceedings even if the debtor occasionally does business in other states or has branches or agents in other states but allows for concurrent proceedings in different states if the debtor has two or more economically autonomous businesses in different states. The 1940 treaty contains international procedure and sets up the civil meeting of creditors in insolvency proceedings.

The Havana Convention of Private International Law concluded in 1928 and included some of the same countries who also follow the Montevideo Treaties. The Havana Convention differs from the Montevideo Treaties in that the Havana Convention supports a more unified approach with a single proceeding with universal affect throughout its region. The Havana Convention does take a similar approach for businesses allowing for concurrent proceedings in Havana Convention States that contain businesses operating separately in an economic sense.

4

Marks awarded 8 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 think I mostly disagree with the idea that the terms “bankruptcy” and “insolvency” can be used interchangeably.

The first distinction to me as to why they aren’t able to be interchangeable is the essential characteristics and the meaning ascribed to both a bankruptcy and an insolvency. I believe in a sense that all bankruptcies are require insolvency but that a debtor can be insolvent without there being a bankruptcy. Bankruptcy is the proceeding and procedure in which a Debtor who is insolvent is able to either liquidate or reorganize in order to create a plan to satisfy their debt and / or discharge debt they are unable to pay. Bankruptcy is the mechanism that can be initiated to resolve the Debtor’s financial difficulties. A Debtor is insolvent when they are unable to pay their debts and other liabilities

as they become due. A Debtor becomes insolvent the moment they can no longer pay their debts regardless of whether or not they have sought help with that debt.

To that point, insolvency can include both formal proceedings (like a bankruptcy) and informal proceedings such as work out negotiations with certain creditors. Those negotiations are not governed by insolvency laws but rather banking, commercial, and contract laws.

In some places, the use of bankruptcy and insolvency hinders on what entity or person is insolvent. In Australia, insolvency is used in reference to corporation and bankruptcy is used in reference to an individual. I think this goes to another distinction between an insolvency and bankruptcy. For an individual, the entire goal of bankruptcy is to have debts discharged. However, businesses do not aim for discharge but rather aim to either wind down operations or reorganize to continue operations. Therefore, when the goal for a corporation is not a discharge, then a bankruptcy doesn't really fit the situation that they are in.

Finally, the law and protections I think show why they are not interchangeable. In a bankruptcy, many countries have some sort of stay that goes into affect protecting the estate from any further claims against the assets in the bankruptcy and from collection of debts that get discharged. When a person or business is insolvent, then there are no additional protections afforded to them and proceedings can be brought for collection.

An alternative approach to this question would be to systematically consider each of the issues set out in the question. There is scope to elaborate, for example with respect to the differences between individual and corporate insolvency.

3

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.

There are numerous challenges that are faced in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation. One of these is just the sheer number of countries that would need to agree to single system. Each of those countries have different viewpoints (pro-debtor or pro-creditor) and different ideas as to what acceptable practices are. Things such as culture, ethics, structure, government, and morals differ between each country which impacts the laws that a country would be in support of. Laws of this nature would also have to go beyond just insolvency and create a uniform law of choice-of-law, procedure, and priority. To this point, even something as simple as the language of laws and different elements of insolvency are different between countries and would be difficult to create a uniform language.

The other difficulty is that in order to implement a uniform cross-border insolvency regime, many states would have conflicting domestic laws. This could cause an unequal outcome of procedures if a bankruptcy is brought solely in one location v. a case involving international law. This would require a high level of trust in the foreign proceedings.

Additionally, there are difficulties such as developing the criteria for where these proceedings should be opened and that there can be the development of strategic manipulation in order to get the most beneficial law – i.e. a company moves assets out of foreign jurisdictions to avoid evoking the international laws.

It would be beneficial for you to also consider the matters raised by Friman, 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.

Two ways that insolvency law is influenced is through hard law that is binding and soft law that is recommendations.

Hard law is a binding form of law which influence insolvency law. This included treaties, international agreements, or customary laws. These are authoritative and prescriptive to international law. Hard law has had variable success in creating solutions to international insolvency problems.

Soft law is the non-binding rules of international law. These help the development of hard law by being a starting point for the formation or reformation of later binding laws and are helpful to interpret international law. Soft law is critical to international insolvency as it is the only opportunity where both state-actors and law makers along with non-state actors such as practicing attorneys, judges, and court staff are able to come together to discuss and formulate the ideal model for the law and legislation. Soft law has had more success in finding solutions for international insolvency issues. One example of this is the UNCITRAL which is deemed the most successful soft law approach to date. **Elaboration is required, for example with respect to hard law examples and success and with respect to which UNCITRAL example(s) are relevant with respect to soft law.**

2

Marks awarded 7 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.

At the time any judgment would have been entered, the EU rules would not apply since the UK had left the EU and no other agreement or treaty exists between England and the US for purposes of enforcing a judgment. In England, we would look to the UNCITRAL MLCBI as that has been adopted by England and that is the country in which you are seeking to enforce the judgment. The key principal of those laws is for there to be co-operation and co-ordination for enforcement.

Additionally, we must look to the Insolvency Act of 1986 which deals with winding up companies formed under foreign laws. There, it lays out framework for whether or not England can

recognize the wind up judgment for a foreign court. This includes if the company is dissolved or has ceased operations, the company is unable to pay its debts, and the court is of the opinion it is just and equitable that the company should be wound up. This can be applied to any company that has sufficient connection with England. Courts look to see that there is a sufficient connection with England, that there is a reasonable possibility that benefits were be for those who are applying for the wind-up order, and one or more persons interested in the distribution of assets are persons whom the court has jurisdiction over.

Here, there is sufficient connection with England for the company and there are likely to be assets in England since the headquarters is still located in England. Because these criteria are met, the English courts can take the judgment and wind up order for the corporation and enforce it in their courts.

It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.

2

Question 4.2 [Maximum 4 marks]

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

First, the likely place the proceeding should be opened is in Germany. This is because likely due to the operations being out of Germany, most of the assets and debts are likely tied to Germany and while management is in Italy, that isn't where the main nucleus of the business is. In this situation you would need to look to German insolvency law to determine what laws to apply for the international insolvency piece. Germany follows the Insolvenzordung which is a unified insolvency legislation. Because the COMI is in Germany, the insolvency is allowed to be filed there.

COMI is in Italy. This sub-question requires further consideration of the EIR Recast.

0.5

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?

When considering the recognition of an EU insolvency representative, each of those three countries would look to their own insolvency laws to determine eligibility not the EU (Recast) as they are not 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.)

For the Netherlands items, you would first need to look to the law of the Netherlands and determine whether or not they recognize the foreign proceeding. The Netherlands are a member of the EU and so is Italy, therefore the EU Insolvency Regulation would apply in this situation.

Greater elaboration and consideration of the regulation is required for this sub-question

1.5

(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.)

For the Australian items, you would first need to look at the law and determine whether or not they recognize the foreign proceeding. Australia is not a member of the EU like Italy so a different set of rules applies. Here, Australia follows the UNCITRAL Model Laws which was codified through the Cross-Border Insolvency Act of 2008. Under these laws, Australia will cooperate with foreign courts and will recognize the jurisdiction of the court where the COMI is located i.e. Italy.

3

Marks awarded 8 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 33/50

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