INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the **best response** to this statement.

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an "executory contract" and its enforceability?

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the correct statement:

(a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

(a) This statement is untrue because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

Civil law is historically rooted in Roman law and Common law is historically rooted in English law. Civil law is prevalent in Continental Europe, Latin America, parts of Africa and Asia while Common law is prevalent in the United Kingdom, North America, and Australia. When comparing the two systems, the court has a larger role within Civil law systems, by appointing an insolvency practitioner, and having a more active role in decision making, while creditors and shareholders have less decision-making power. Creditor committees are less prevalent within the Civil law system as the court takes the lead in the decision-making process. In Common law systems creditors and shareholders play a larger role in decision making through the use of a creditor committee, with the court acting as an adjudicator. Additionally, in civil law systems, the court looks for ways to rehabilitate or revive the company, while in common law systems, liquidation and wind up of the company is more prevalent than saving or rehabilitating the company.

Deeper consideration of common law vs codification is needed

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 a principle that states that an insolvency proceeding should cover all the debtor's assets and liabilities worldwide under the provisions of one insolvency law. Since universalism is unlikely to ever occur, a modified approach to universalism was created, where the main proceeding is held in the State of the debtors centre of main interests are. Secondary proceedings will then occur in other States where debtors have ancillary interests. Territorialism is the opposite approach to universalism. The principle of territorialism states that an insolvency proceeding will only apply to the State in which the proceeding was opened and will be judged under the respective insolvency law of that State. Additional proceedings may occur in other States, but will be will be judged under their own respective insolvency law, creating a disjointed approach when compared to universalism.

There is scope for elaboration, for example with respect to forum for universalism and with respect to territorial limits in territorialism

2

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.

Numerous initiatives have been undertaken by Latin American countries to bring a more unified approach between States. The Montevideo Treaties of 1889 and 1940, and the Havana Convention on Private International Law of 1928 are two initiatives that have been used to resolve international insolvency law issues to bring a more unified approach to insolvency law in Latin America. The Montevideo Treaties covers personal and corporate insolvency and allocates the bankruptcy jurisdiction to where the debtor is commercially domiciled. Under the Montevideo Treaties, either one set of proceedings will be held in the debtor's commercially domiciled State, or if the debtor has two economically autonomous businesses in different treaty States, concurrent proceedings may occur. Under the Havana Convention on Private International Law it takes a more unified approach and allows for a single proceeding to be held for all member States. Though, concurrent proceedings

may occur under all member States of the Havana Convention, these proceedings would not co-operate or co-ordinate with each other. The key difference between these two initiatives is that under the Montevideo Treaties, there is co-operation amongst member States when concurrent proceedings are held, whereas the Havana Convention provides no co-operation and co-ordination with concurrent proceedings, and pushes for a more unified approach, where the proceeding held within the commercially domiciled State covers all member States and the effects of the proceeding will effect all member States in which the debtor is domiciled.

There is scope to elaborate for example with respect to the different members of the different agreements

3

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.

In some States, the term bankruptcy is used when describing the insolvency of a natural person, whereas insolvency is used to describe the insolvency of a corporation, though I believe that insolvency and bankruptcy should not be used interchangeably. This is because a company or natural person may be insolvent at one point in time but may be able to devise a plan to remediate the issue to avoid entering bankruptcy. In my opinion, bankruptcy is the act of declaring and entering a formal bankruptcy proceeding. In short form, insolvency describes the situation that a corporation or natural person may be in prior to entering bankruptcy and bankruptcy describes the act of entering into a formal proceeding related to the bankruptcy. The key characteristic to differentiate insolvency and bankruptcy is that insolvency is the financial condition a corporation or natural person is in, while bankruptcy is the formal proceeding of realising assets to pay creditors and either dissolve the corporation or provide the natural person a fresh start once all assets have been realised and distributed to creditors. One key difference between individual and corporate bankruptcy is that when an individual enters bankruptcy, they are not "dissolved", whereas a corporation in bankruptcy will be wound up and "dissolved" once all its affairs have been concluded. Additionally, when looking at the estate and what it would comprise of when comparing individual and corporate bankruptcy, some assets may be exempt from the estate in an individual bankruptcy proceeding, whereas in a corporation, all assets held are apart of the estate to be realised and distributed.

Elaboration is warranted. It is a 7 mark essay question and further discussion is required, including with respect to essential characteristics.

4

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 many challenges that arise from a single global cross-border insolvency dispensation. Each State has their own legal systems with differing laws within insolvency, such as common law systems and civil law systems. Each system prioritizes stakeholders differently and how decisions are made

within an insolvency proceeding. Gaining recognition in different States could also become a problem as other States may not recognize insolvency proceedings that have been opened elsewhere, which could cause disfunction and inefficiencies within the already opened proceeding. Additionally, the speed at which insolvency proceedings progress differ from State to State, which makes it difficult to have one global proceeding to occur amongst differing States. In addition to this, language barriers are also an issue to have a global proceeding. Numerous translations would have to occur depending on which States are involved. With all these challenges in place, it becomes quite difficult to have a singular global insolvency proceeding for a debtor. The best approach would be to use a modified universalism approach, where having a primary proceeding, along with secondary proceedings being held in foreign States would be the best approach and would circumvent some of the difficulties in having a single global cross-border insolvency proceeding.

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

1

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 relates to enforceable laws and regulations set out by the government. Soft law relates to principles, guidelines, and best practices that have been laid out by various organizations. Some hard law examples include the UNCITRAL Model Law and the European Union Insolvency Regulation (EIR Recast). These hard laws have been a success in bringing a more streamlined and effective approach when it comes to international insolvency by providing co-ordination and co-operation amongst States that have adopted these laws. UNCITRAL Model Law has been adopted by numerous countries such as the United Kingdom, Canada, Australia, the United States, Mexico, parts of Asia, as well as parts of Africa. The EIR Recast has been adopted by all EU member States and also provides co-operation and co-ordination amongst member States within the European Union. For soft law, organisations such as INSOL International have created best practices and guidelines dealing with cross-border insolvency cases and how to best approach these cases. Though soft law is not law binding, it provides practical guidelines and best practices that insolvency practitioners can use and implement in their practice.

Elaboration is warranted regarding success or otherwise.

2.5

Marks awarded 7.5 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 most applicable cross-border source that the American insolvent estate representative may use to request recognition in terms of English Law to deal with the assets situated in England would be the UNCITRAL Model Law on Cross-border Insolvency (MLCBI).To gain recognition in England, the American insolvent estate representative would have to apply for recognition with the English court to open a foreign proceeding against Norton Cars. Once recognition has been received, an English representative will co-ordinate and co-operate with the American insolvent estate representative by helping realise the assets held in England and assist with the proceedings.

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.

The appropriate legal source to be used in a cross-border insolvency matter between Italy and Germany would be the European Union Insolvency Regulation (EIR Recast) as both countries are within the European Union. The EIR Recast rules can be used to determine the recognition and jurisdiction of the insolvency proceeding between member States within the European Union. The main proceeding should be held in Italy as its COMI moved from England to Italy. Under the EIR Recast, secondary proceedings could be opened in Germany as well, as the main operations preside there. Once this proceeding has been opened, both the main proceeding in Italy and the secondary proceeding would work together in order to provide a more efficient and streamlined process in the liquidation of Norton Cars. Under the EIR Recast, recognition for the decisions made within the insolvency process in Italy would automatically apply in Germany and no additional recognition would be required in Germany, which would aid the efficiency of the liquidation process.

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. This is because India, South Africa, and Australia are not apart of the European Union. The EIR Recast only applies to the European Union and its member States in order to provide a more streamlined process in the insolvency proceedings held within 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.)

As Italy is listed as the COMI for Norton Cars, the applicable law related to the insolvency proceeding will be Italian law, as the Insolvency proceeding was opened in Italy. Regarding the real rights of security, the law that would govern this would be the Netherlands as the assets are located in the Netherlands.

There is scope to elaborate

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.)

As Italy is listed as the COMI for Norton Cars, the insolvency proceeding within Australia would be under Italian law. Additionally, the main proceeding is being held in Italy, and the proceeding within Australia would then be listed as a secondary proceeding and would further support that Italian law would be used under the insolvency proceeding held within Australia. When it comes to the real rights of security, Australian law would be used as this is where the assets are located.

There is scope to elaborate

2

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 33.5/50

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