INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

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

Question 1.3

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

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Insolvency law systems tend to be classified as either having historical roots from "English Common Law" or "Civil Law", with the biggest difference relating to whether or not a system adopts a more codified or case law legal system. English Common Law places reliance on precedence and historical judicial decisions whereas "Civil Law" adopts a rule-based approach to law.

The roots of "Civil Law" are largely formulated from the Roman law. Examples of English Common Law systems includes English, American and Australian insolvency laws. Whereas systems which have historical roots in civil law include Dutch, French, German and Spanish insolvency law.

It has been noted that English Common Law systems tend to be more inclined to pursue a universalism approach to jurisdiction whereas Civil Law systems prefer a territorial approach.

It should however be noted that classification of insolvency law systems as having historical roots from "English Common Law", or "Civil Law" is highly aggregated. These systems encompass a broad range of principles which have been modified and implemented differently over many years. As such insolvency law systems should be assessed individually to accurately understand the nuances of each system.

3

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 principle of universalism, modified universalism and territorialism all relate to different approaches to how cross-border insolvency cases are handled. These different principles use jurisdiction as a main factor when undergoing insolvency proceedings.

The "Universalism" principle adopts an all-inclusive approach where there should only be one insolvency proceeding which accounts for all of a debtor's assets and debts worldwide. As such, the main jurisdiction, being the centre of debtor's interests, will have full coverage of all assets and debts worldwide, regardless of jurisdiction. All creditors would have the opportunity to participate in the same proceedings and would be covered by the same applicable principles of insolvency.

The "Territorialism" approach opposes the Universalism principle as it follows the approach that insolvency proceedings are within the bounds of each state in which the proceedings are undertaken. Therefore, multiple proceedings may be undertaken simultaneously, with each proceeding being confined to the debtors' assets and debts within the specified state.

The "Modified Universalism" principal is an adaptation of the Universalism and Territorialism principle and is based off the concept that there would be a primary insolvency proceeding in the centre of main interest, with secondary proceedings supporting the primary proceeding. Therefore, courts would be working together throughout the proceedings.

3

Question 2.3 [maximum 4 marks]

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

Latin America have undertaking multilateral agreements for solving international insolvency issues. The Montevideo (1889 and 1940) and Havana Convention (1928) on Private International Law treaties had been entered into by multiple Latin American countries in an attempt to establish a guideline to international bankruptcy or insolvency.

The 1989 Montevideo treaty covers both individual and corporate insolvency and is based off the premise that insolvency proceedings should be based on the debtor's commercial domicile. If an entity is commercially domiciled in one state and occasionally performs economic activities in other states, then the proceeding should be held in the commercially domiciled state exclusively and all the debtors' assets and debts should be considered in that state regardless of jurisdiction. Should an entity have two or more entities which are completely autonomous to one another and in different states, local creditors in the other state may undertake separate proceedings against the debtors' separate entities. As such these treaties provides procedures for co-operation between proceedings which are run concurrently.

The Havana Convention is more supportive of a universal approach to international insolvency proceedings than the Montevideo treaty. It has similar guidelines based on where an entity is commercially domiciled and similar view on the treatment of autonomous economic activities. The biggest difference is that the Havana Convention does not provide procedures for co-operation of any concurrent proceedings. It should also be noted that there are different countries who have adopted each treaty and as such each country will apply the principals set out to the treaty they have adopted.

4

Marks awarded 10 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 "Insolvency" and "Bankruptcy" are often used interchangeably; however, the definition of each term is dependent on where the terms are used. Different countries may have different interpretations of each term. For example, in Australia the term "Bankruptcy" is associated to an individual whereas the term "Insolvency" is associated with a corporation. An alternative interpretation of each includes "insolvency" being the state of financial affairs whereas "bankruptcy" is the state of formally being put into bankruptcy.

The essential characteristics of "bankruptcy" and "insolvency" can be noted below:

1. At the point of insolvency or bankruptcy, the actions of each individual creditor against the debtor are stayed.
2. The assets of the debtors are pooled and treated as a collective source of funds/ resources to satisfy all creditor positions.
3. The disposition of recoveries are pari passu, and prorated based on each individual creditors claim.

It would be beneficial to reference Wood

These proceedings are often set out differently depending on whether the debtor is an individual or a corporation, with the objective of achieving the following:

1. Corporations: the objective would be to preserve the company, or part thereof, which may include proceedings against individuals who may have abused their powers and as such the corporation would undertake action against the individual in their personal capacity.
2. Individuals: the objective would be to protect the individual (debtor) from harassment form creditors. In essence, proceedings would be undertaken to assist the debtor with a fresh start through assistance in reducing indebtedness by making contributions from the individual current and future estate. Individual may also be protected against complete disposition of resources in order for the individual to support themselves and their dependants.

One common characteristic between both proceedings against individuals and corporations would be the distribution of recoveries pari passu, the fair treatment of debtors by creditors, to reclaim dispositions that had been distributed unfairly and to investigate the reason for having to undergo the proceeding.

7

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 most fundamental difficulty in developing a single global cross-border insolvency system is that there is not a global court which is able to deal with these proceedings. This is largely as a result of the difficulties in determining an international insolvency language which is understood globally. As previously mentioned, there are different interpretations of the term insolvency and its applicability to different type of debtors. Additionally, different countries/ jurisdictions have different norms when considering creditor positions and the priorities which should be asserted within insolvency proceedings. These differences may be attributed to different domestic laws, cultural norms and the current state of the local economy/ economic activities.

In addition to the above, further difficulties may include recognition of foreign representation, difficulties in enforcing moratorium on individual creditor claims globally as well as difficulties as a result of language barriers and communication platforms when communicating with creditors.
It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook

2.5

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by “hard law” and what is meant by “soft law” in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of “hard” and “soft” laws in providing solutions to the challenges of international insolvency.

“Hard Law” refers to legally binding guidelines which are enforceable by legal action, whereas “Soft Law” refers to guidelines and codes which are not compulsory, however parties may elect to adopt these guidelines. Examples of Soft law would be the United Nations Commission for International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency which are guidelines designed to assist states in developing international insolvency best practises. This would be an example of soft law which is not enforceable. On the other hand, an example of Hard Law would be the European Insolvency Regulation (EIR), which when adopted is enforceable.

It has been noted that there has been varying success when it comes to hard law in international insolvency proceedings, with more success noted through soft law. The EIR has been adopted by many

jurisdictions and has bridged the gap between different insolvency laws in different states. Thereby achieve achieving a more global standard (which may involve slight adaptations) of insolvency guidelines.

There is some scope to elaborate regarding success.

3

Marks awarded 12.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The main piece of legislation which guides insolvency in England is the Insolvency Act of 1986. In 2006 England adopted the UNCITRAL Model Law on Cross Border Insolvency, as such these would be suggested sources in order to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

It should also be noted that both the United States of America and England had participated in the inaugural Judicial Insolvency Network (JIN) in October of 2016. At the conference members contributed to the drafting of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency matters. As such these guidelines would provide a useful source for requesting recognition in terms of English Law.

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.

When considering the cross-border insolvency matter between Italy and Germany the European Insolvency Regulation (Recast) ("EIR") needs to be considered. **Why? Elaboration is warranted** The EIR allocates jurisdictional rights based on the entities centre of main interests ("COMI"). Therefore, the insolvency matter will have a primary (main) jurisdiction in Italy, given that this is Norton Cars COMI. It should however be noted that as Germany has the "main operations" of the company it would be acknowledged that Germany is a place of operation where human means and assets are utilised for economic activity which in turn means the German operation meets the definition of and "establishment" in terms of the EIR. The EIR permits subsidiary territorial proceedings in these jurisdictions, which could be independent proceedings or secondary proceedings depending on when the proceeding is undertaken.

3.5

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?

The EIR (Recast) had undergone amendments in December 2021. Amendments included the recognition of insolvency proceedings outside of the EU. As such, the foreign court would 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.

0.5

Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

The European Insolvency Regulation ("EIR") (Recast) allocates jurisdictional rights based on the entities centre of main interests ("COMI"). Therefore, as the COMI moved to Italy, the insolvency procedure had been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. It should however be noted that Netherlands meets the definition of an "establishment" in terms of the EIR (Recast) as it is a place of operation where human means and assets are utilised for economic activity. The EIR permits subsidiary territorial proceedings in these jurisdictions, which could be independent proceedings or secondary proceedings depending on when the proceeding is undertaken. As the assets had been identified post undergoing the Italian insolvency procedure, this would be a secondary proceeding.

Take care to answer the sub-question posed.

1

(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 there are Australian assets which are not part of the EU, these assets could be subject to an insolvency proceeding in Australia. Should such a proceeding be undertaken the Australian Corporations Act 2001 would be applicable as this proceeding relates to a corporate insolvency. This Australian law is based on English Common Law and Australia has adopted the UNCITRAL Model Law on Cross Border Insolvency. Therefore, cooperation and coordination as a strategy to address international insolvency matters will be applied.

3

Marks awarded 10 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41.5 /50

A very good paper that generally addresses the questions asked and substantiates its answers.