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.

Civil law countries are those whose legal system stemming from Roman Law and further on developed in medieval times (lex mercatoria) in countries such as France, Germany and other countries today forming the European Union (Continental Europe). Many other countries belong to the civil law countries, among them also some countries in Africa and most of the countries in Latin America due to the colonization era.

Fletcher reported that the roots of the bankruptcy law are to be found in the Roman law in legal institutions of *cessio bonorum*, *distractio bonorum*, *remission* and *dilation*. Generally, it can be said that civil law countries were historically more pro creditor oriented. In the addition, when it comes to the cross-border issues, civil law countries are regarded as more pro-territorial approach (although pure forms are rarely put in place in jurisdictions).

Common law countries are UK, USA, Australia and other countries which rely on UK traditions. Among other countries are for example some countries in Africa (such as Nigeria, Kenya, Botswana, Tanzania), India. There are however differences between the countries in both civil law and common law, for example USA has been traditionally pro-debtor oriented. UK has introduced the statutory discharge for the first time in 1705 (The Statute of Ann). UK's most important legislation act in modern times was Insolvency Act 1986, amended through Insolvency Act 2000 and the Enterprise Act 2002. USA's legislation regarding insolvency is the Bankruptcy Code 1978, with reforms in 2005 (BABCPA). Australia's legislation comprises two acts, Corporations Act 2001 and Bankruptcy Act 1966.

This answer also required a discussion of the common law aspect of English law.
2

Question 2.2 [maximum 3 marks]

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

The principle of **universalism** means that insolvent proceedings are administered by one organ (such as a court) in one country, usually where the debtor has its centre of main interests (COMI). All issues, claims, estate, are decided by that one single point. Once when insolvency proceedings are opened in this state, no other insolvency proceedings could be opened in other countries (universalism in purest form). This principle is connected well to globalism. However, the major negative characteristic of this system is that it creates uncertainty in domestic markets.

Territorialism, on the other hand, means that in each country where debtor has estate a separate insolvency proceeding can be opened. All questions, such as filling and recognition of claims, debtors' estate, powers of insolvency officer, distribution of estate, classes of creditors and their compensation (etc) are determined by local national law. Some of the problems with territorialism are the following: in some countries the debtor might be insolvent, while in other counties not; local creditors are in better position than foreign as they are closer and more familiar with the insolvency system and have more information. **There is scope to elaborate regarding territorial limits**

Universalism is not accepted in its purest form. Therefore, **modified universalism** appeared as a better solution. It relies on one single insolvency proceedings as the main one (where COMI for the debtors is), while providing the opportunity that secondary insolvency proceedings are opened in other

jurisdictions. In this system the actors of the main and secondary proceedings need to coordinate and cooperate among them, to achieve best and fair results.

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.

There are two treaties in place in Latin America: 1) The Montevideo Treaties (1889) and (1940) and Havana Convention on Private International Law (1928). The first Montevideo treaty has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay, while the second Montevideo treaty has been ratified by Argentina, Paraguay and Uruguay. The first Montevideo Treaty determines the bankruptcy jurisdiction based on the commercial domicile of the debtor. If a debtor is mainly involved in one country in its business and occasionally acts in another country, the jurisdiction would be in the main country of business. If there are two or more equally important business activities in more than one country, there can be concurrent insolvency proceedings in different countries.

Havana Convention was concluded between Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. Havana Convention introduces a wider effect of the commencement of insolvency proceedings in one country in other countries (extraterritorial effect). This convention, however, does not entail provision on cooperation and coordination of concurrent insolvency proceedings.

There is some scope to elaborate regarding differences

3.5

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) Bankruptcy may refer both to the state of the debtor – he has more liabilities then assets. Bankruptcy in addition may refer to the end of business of the debtor, unlike the rescue mechanisms and also it can refer to the formal proceedings against the debtor. Insolvency refers to financial aspect of the debtor – illiquidity or negative cash flow but can also refer in general to both end of business – sale of assets and rescue mechanisms. **There is some scope for further elaboration**

(ii) Essential characteristics are the following: 1) debtor cannot pay off his debts when due, 2) creditors collects their claims via the collective mechanism, 3) there is a control authority such as court, insolvency officer (administrator/trustee), bankruptcy agencies, creditors committee or similar organs and institutions, 4) creditors are segregated into classes with different priorities. **Pari passu principle is relevant. Wood raises a discussion of essential characteristics.**

(iii) While the terms bankruptcy and insolvency are often used as synonyms, there is a difference to be made between them. The term bankruptcy refers to the formal

proceedings with the aim to resolve debts towards creditors, i.e. the collective mechanism for debt collection against a debtor. Insolvency refers to the commercial aspect – a debtor has more debts then assets (negative balance sheet) or has a negative cash flow (cannot fulfil its monetary obligations when due). In some jurisdictions there are different set of rules for individuals and for business entities (such as China), while in the other the same act regulates both proceedings (for example in Spain). The term insolvency is sometimes used solely for corporations, while for individuals the term bankruptcy is more appropriate (for example in Australia). **There is scope to elaborate here with respect to different objectives including regarding exempt property etc.**

4.5

Question 3.2 [maximum 5 marks]

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

There are many differences in insolvency regimes in comparative law and therefore it is difficult to develop a global cross border solution. The following issues can be burdensome for the effective and fair insolvency administration over the debtor: the prerequisites for the opening of insolvency proceedings, which court or other organ should administer the proceedings, how are creditors differentiated in classes, which creditors have preferential claims, set-off and netting, different rules for the distribution of proceeds, material and procedural law which are applicable to the case, rules for voidable acts of the debtor.

Further on, Westbrooks refers to the following (9) challenges – recognition of a foreign representative, moratorium on creditor actions, creditor participation, executory contracts, coordination of creditor claims procedures, priorities and preferences, avoidance powers, discharges, conflict of laws.
It would be beneficial for you to also consider the matters raised by Friman, Omar

4.5

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 the binding regulations within a country or binding treaty which is ratified by the state, and it becomes the part of the internal binding law of the country. Soft law is a set of recommendations which derive its authority from the quality of its solutions and recommendations. Often soft law is based on the best practices and have a potential to influence countries (or regions) to adopt such set of recommendations. The example of the hard law would be English Insolvency Act or German Insolvenz Ordnung (Insolvency Act), while the example of soft law is UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), which appears to have the largest success among other attempts in the insolvency matter. Other example for soft law is Asian Principles of Business Restructuring (2020).

Several attempts to prescribe solutions for cross-border insolvencies were not successful, such as the Istanbul Convention (Convention on Certain International Aspects of Bankruptcy), while it has not been ratified by the sufficient number of countries in order to enter into the legal force. European Insolvency Regulation was more successful (EIR and EIR Recast), but it is worth noting that EIR does not longer have effect in the UK after Brexit.

As to the soft law, MLCBI was not the first attempt to resolve cross-border insolvency, while the Hague Conference on Private International Law provided the adoption of Model Treaty on Bankruptcy in 1925. This Model Treaty, however, was not ratified.

3

Marks awarded 12 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.

England has adopted the Model Law on Cross-Border Insolvency in 2006 (Cross Border Insolvency Regulations 2006 - CBIR). For the application of CBIR there is no need for the reciprocity. EIR and EIR Recast do not longer apply to England after the Brexit. Besides CBIR, Insolvency Act 1986 applies and the common law.

It seems that the USA liquidation proceedings would be characterized by the UK courts as non-main insolvency proceedings, having in mind that COMI was at the time in England. The American insolvent estate representative should file a request for the recognition of the foreign proceedings from USA.

An application for recognition shall be accompanied by:
(a)a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
(b)a certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representative.

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.

Italy and Germany are both EU countries, therefore EIR (2000) and EIR Recast (2015) applies to the case at hand. The centre of main interest (COMI) of the insolvent debtor should be determined, in order to answer the question regarding the jurisdiction of the main proceeding against the insolvent debtor. Article 3 of the EIR regulates that the centre of main interests of the insolvent debtor is the place where it conducts the administration of its interests of the regular basis, and which is ascertained by third parties. In the case of a company, COMI is to be understood as the place of its registered office. In the case at hand, as the administration of the company interest is made from Italy, it should be determined that COMI is in Italy (nevertheless its main operations from a business perspective are in Germany). Therefore, the main proceedings against the insolvent debtor should be opened in Italy.

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, as EIR and EIR Recast does not govern the recognition of foreign insolvency proceedings in states outside EU. Therefore, these countries should use their own legislation (and international treaties they adhered to) in solving the issue of the recognition of a foreign (EU) insolvency proceeding and the recognition of a foreign insolvency representative. Therefore, whether or not the insolvency representative is dully appointed within EIR Recast is not a matter that India, South Africa and Australia should decide, it has already been decided by a EU member state court.

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 both Italy and Netherlands are part of EU, EIR is applicable. Italian insolvency proceedings are the main insolvency proceedings, while in Netherlands the secondary insolvency proceedings may be opened. The effects of the secondary proceedings relate to the assets situated in Netherlands. Dutch law will be applicable law which governs the real rights of security situated in 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.)

Australian Corporations Act 2001 regulated the corporate insolvency proceedings. Australia has adopted the Model Law on Cross-Border Insolvency though the Cross-Border Insolvency Act (2008). Italian insolvency proceedings are the main proceedings, while in Australia the secondary proceedings may be opened. Australian law will be applicable to govern the real rights of security.

There is scope to elaborate

2

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41/50

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