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.

Many national legal systems are based on either civil law or English law (common law).

The roots of civil law originated from Roman law, and it is understood that debt execution developed from the debtor pledging his own body to repay his debt; and failing which the debtor could be imprisoned, sentenced to death or sold as slave. Then, the following procedures gradually gave rise to the introduction of collective debt collecting mechanisms (i.e. key element of insolvency laws nowadays):-

- cession bonorum, i.e. assignment of property
- distractio bonorum, i.e. forced liquidation of assets
- remission and dilatio, i.e. composition of creditors

Declaring bankrupt was not an option for all individuals who experienced financial difficulties, and there was a time ordinary work-class debtors could not seek such measure. Eventually, different forms of insolvency laws began to introduce in various parts of Europe between the 13th and 17th century; and rather than disrupting the debtor's place of business (which was the case during the medieval time in Italy), the concept of debt collection eventually evolved, switching from execution *against the debtor* towards a dispensation of execution *against the assets of the debtor*.

With that having said, the concept of 'rehabilitation' (or fresh start) and abolishment of imprisonment for non-payment of debt were not introduced to many of these countries until much later days.

On the contrary, there was no imprisonment for debt under English law in the first place until the Statue of Marlbridge was introduced in 1267. A significant development was noted when the English Bankruptcy Act of 1542 provided a form of compulsory sequestration for dishonest and absconding debtor (who would be considered criminal-like at the time). It was under this 1542 Act that the two fundamental principles of 'collective participation by creditors' and '*pari passu* distribution of available assets' were introduced.

Similar to various European States, individual debt-collecting procedures were first introduced before collective procedures became available. The Act of Elizabeth, introduced in 1570, is said to be the first law specifically as a true bankruptcy statute. The Act of Elizabeth provided jurisdiction of the supervision of insolvency estate to the Lord Chancellor. It is understood that upon an act of bankruptcy by the debtor, creditors might then take out a petition with the Lord Chancellor to convene a bankruptcy meeting at which bankruptcy commissioners were to be appointed to supervise the bankruptcy processes.

Also, statutory discharge was not an automatic entitlement until the Statute of Ann was introduced in 1705, and it would require the commissioners to confirm that the debtor had co-operated during his bankruptcy before discharge is granted.

An alternative 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

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" suggests that there ought to be one insolvency proceeding only (likely where the centre of the debtor's interests is located) to deal with all the assets and debts of the debtor worldwide. In other words, it is said that no other insolvency proceedings should be commenced to execute the debtor' assets, and all creditors, regardless their whereabouts, should have the opportunity to put forward their respective claims and be treated on an equal basis. Since the insolvency proceeding is asked to be dealt with under one set of insolvency laws, it will require trust in foreign legal systems and that the choice-of-law and priority rules be determined in advance.

On the contrary, since insolvency proceedings may be opened in multiple States where the debtor has assets in different jurisdictions, it is more than likely to have multiple insolvency proceedings against the same debtor at the same time, resulting in implication of multiple sets of insolvency laws. As such, "territorialism" is believed to protect the interests of local creditors as their rights are likely to be addressed before residual assets belonging to the debtor are remitted abroad. **A discussion of territorial limits is warranted**

As opposed to the above two approaches, "modified universalism" suggests that the 'main insolvency proceeding' ought to be opened in the State where the debtor has his/her/its centre of main interests, and courts dealing with secondary or ancillary proceedings in other State(s) should work with each other to arrive at an optimal outcome in the interest of creditors.

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.

Latin American States have an established history on managing international insolvency issues. The following general treaties among different groups of Latin and Middle American States were concluded:-

(i) The Montevideo Treaty on International Commercial Law (1889)
(ii) The Montevideo Treaty on International Commercial Terrestrial Law (1940)
(iii) The Montevideo Treaty on International Procedural Law (1940)
(iv) Havana Convention on Private International Law (1928) (also known as Bustamante Code)

The Montevideo Treaty on International Commercial Law (1889) was ratified by six Latin American States, namely (i) Argentina, (ii) Bolivia, (iii) Columbia, (iv) Paraguay, (v) Peru, and (vi) Uruguay; whereas the two 1940 Montevideo Treaties were ratified by three of the original treaty States only, namely (i) Argentina, (ii) Paraguay, and (iii) Uruguay.

In 1928, the Bustamante Code was concluded among fifteen Latin and Middle American States. Whilst Bolivia and Peru are also parties in both 1889 Montevideo Treaty and the Bustamante Code, it should be highlighted that five major Latin American States did not ratify and are not parties to the Bustmante Code and they include (i) Argentina, (ii) Colombia, (iii) Mexico, (iv) Paraguay, and (v) Uruguay.

Another difference, which derives from the question of whom these member States are, is the extent to which the above Treaties allow for a single proceeding to give extraterritorial effect in another member State. In the event that there are concurrent proceedings, the Bustamante Code does not prescribe the procedures for these concurrent proceedings to co-operate or co-ordinate.

There is some scope to elaborate on differences

3.5
Marks awarded 7 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

It is said that the terms "bankruptcy" and "insolvency" may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to "bankruptcy" and "insolvency", (ii) the essential characteristics of "bankruptcy" and "insolvency" and (iii) any differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

Some systems use the terms "insolvency" and "bankruptcy" interchangeably and as synonyms, whilst others may give slightly different meaning to these two terms. Take Australia as an example, "bankruptcy" is more often used to refer to the insolvent state of a natural person, as opposed to "insolvency" for a corporation.

However, "insolvency" is often understood as a kind of the state of financial affairs of a debtor. Generally speaking, "insolvency" can be interpreted as either (A) a debtor who cannot meet his/her/its repayment obligations when the same are demanded, mature or fall due (i.e. cash fow insolvency), or (B) when liabilities of a debtor exceed the value of his/her/its assets (i.e. balance sheet insolvency). In the event the debtor is a natural person, sometimes it can be referred to 'personal insolvency'. If the debtor is a corporation, however, it is then called 'corporate insolvency'.

At the same time, although "bankruptcy" may also be used to describe the aforementioned, the latter is often accepted as an official (or formal) state of one having been adjudged bankrupt by the court or a declaration of inability to meet repayment obligations when they fall due.

Therefore, I do not agree that the two terms may be used interchangeably. Rather, I consider their use on a case-by-case basis.

Separately, It was once suggested that the following features are essential characteristics of "insolvency" and "bankruptcy":-

(a) Automatic stay of all legal actions by individual creditors against the bankrupt. This is really a moratorium against individual debt enforcement.
(b) Pooling of all assets of the bankrupt (rather than piecemeal seizure of assets by individual creditors).
(c) Creditors will be distributed with assets of the bankrupt on a *pari passu* basis in accordance with their respective claims filed against the insolvency estate.

In the event a "bankruptcy" or "insolvency" involves a corporation instead of a natural person, efforts may be given to preserve particular stream(s) or part(s) of business that appear to be profitable or beneficial to the insolvency estate if remain viable. Also, personal liability may be imposed on persons responsible for deliberately causing the failure of that corporation and/or conducting of acts that are

detrimental to the interest of creditors when the corporation was insolvent. Also, unlike personal insolvency, a corporation will not be able to make contributions from its present and future income to reduce its indebtedness (since the corporation would have ceased all of its operations). Further, unlike personal insolvency in which the bankrupt can have a 'fresh start', a corporation that undergoes insolvency processes will likely end up being dissolved. Additionally, some systems do allow insolvency representatives to have discretion for bankrupts to keep some or certain of their assets; however, this will not be so in the case of corporate insolvency.

There is some scope to elaborate regarding different objectives

6.5

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.

Substantive differences in policies, legal system, legislatures and procedural rules

Socio-economic and cultural gap

Stakeholders with varying expectation

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook. This is a 5 mark essay sub-question.

0.5

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.

Treaties and conventions are examples of public international instruments to which the relevant States that become signatories must bind themselves and affect their respective domestic law in accordance to the same. As such, they are said to be "hard law" for these relevant States.

Despite the multilateral Scandinavian –based treaty, Nordic Convention, that was signed in 1933, European countries had not experienced success on achieving multilateral international solvency conventions for many years, with one of the reasons being not able to be ratified by sufficient number of member States for any of such conventions to enter into force. Nevertheless, it did alert the 10uropean Union to the issues of international insolvencies across Europe and among its member States. So, eventually, the European Insolvency Regulation (EIR) took effect in year of 2000 and has been adopted into the Regulation (EU) 2015/848 of the European Parliament and of the Council of Insolvency Proceedings (Recast) (EIR Recast).

At the same time, it appears that more success has been attained by way of the "soft law" option, with instruments relating to the same are not binding on domestic laws of the relevant member States.

It is accepted that the most prominent "soft law" initiative was the Model Law on Cross-border Insolvency (MLCBI) undertaken by the United Nations Commission on International Trade Law (UNCITRAL), who recommended its member States to adopt the MLCBI with or without modification, Considering the number and economic size of the member States participating, it is said that the MLCBI has been making a significant influence to the development of international insolvency law.

3

Marks awarded 10 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.

UNCITRAL Model Law on Cross-Border Insolvency

Insolvency Act 1986 s.426

This question requires greater elaboration. By way of example, it would be beneficial to note that s426 is not applicable as the US is not designated and to make reference to common law

0.5

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 main proceeding should be opened in Italy where the centre of main interests of Norton Cars Inc. is.

European Insolvency Regulation

Greater elaboration is required

2

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

Greater elaboration is required

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.)

Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (i.e. JIN Guidelines).

UNCITRAL Model Law on Secured Transactions (2016)

Greater elaboration is required. Dutch law would be applicable

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.)

Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (i.e. JIN Guidelines).

UNCITRAL Model Law on Secured Transactions (2016)

Greater elaboration is required. Australian law would be applicable

0.5

Marks awarded 4.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 31.5/50

A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.