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.

Insolvency law systems with historical roots in civil law evolved from roman law and were initially rather harsh on individual debtors, as persons. Later became collective creditor actions against the assets of the debtor. The key principles involved assignment of property, forced liquidation of assets and composition of creditors. Initially the insolvency procedures favoured creditors and debt discharge was only introduced at the later stage. The Dutch insolvency legislation is an example of the one based on civil law.
On the other hand, English law based insolvency law systems developed applying a principle of debtors being considered criminals, having a commissioner (later replaced by the Lord Chancellor) with rights to proceed against the debtor. Discharge was only introduced in the 18'th century (by the Statute of Ann). The insolvency legislation of England and Australia are examples of the one based on English law.

This answer also required a discussion of the common law aspect of English law in greater detail, and in comparison with codification.
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.

With cross border insolvency, several issues may arise that need to be addressed. These result from dealing with a debtor that has activities in multiple states, has assets in several states and likely has creditors in several states. Every state is likely to have differing legal systems, and these have interrelated legal acts (for example labour law, securities law, general company legislation). Therefore, consideration has to be given to the applicable jurisdiction, applicable law and the recognition and enforceability of the judgements.

The two opposing approaches to cross border insolvency are universalism and territorialism.

Under universalism, it is expected that only one insolvency proceedings will be opened worldwide (where the debtor's centre of main interests is), where all assets of the debtor are considered against the claims of all creditors (who then satisfied on a proportionality basis, as much as possible). This likely to lead to transparency, cost savings and fairness.

Under the approach of Territorialism, the legal systems of the involved States are respected, and the relevant political and social preferences are addressed. Several separate insolvency proceedings are opened in the involved states dealing only with assets and debts in the particular State. This approach may lead to disadvantages to foreign creditors. **There is scope to elaborate regarding territorial limits**

Under the modified universalism approach the main proceeding are opened in the state where the COMI of the debtor is with secondary proceeding opened in other states. Subsequently a detailed consideration is applied to the recognition and enforceability of the decisions, to the fairness of the distribution of the assets and to treating creditors equally.

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 a successful record of cooperation in cross border insolvency matters. The following treaties were concluded:

- Havana Convention on Private international law (1928) – Bustamate Code and the
- Montevideo treaties (1889) and (1940)

As far as the Montevideo treaties are concerned, not the same countries signed the two treaties and so careful consideration has to be given to which treaty applies in the particular insolvency. The 1889 treaty allows for concurrent proceedings in case the debtor has autonomous businesses in more than one states.

The Havana convention is more supporting than the Montevideo treaties of a single insolvency proceeding covering all states that are signatories to the treaty. Contrary to the Montevideo treaties, the Havana convention does not provide for rules of cooperation in case of parallel proceeding.

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

3

Marks awarded 7.5 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.

Bankruptcy started off as a collective debt collecting mechanism aimed at debtors that did not pay their debts. Their business was destroyed (their "bench was broken") and often the debtor was personally physically punished. Only at a later evolution the focus moved to the business of the debtor solely. With this evolution, the possibility of a discharge also appeared and grew on importance.

However, individual debtors (natural persons) also run a risk of not being able to pay their debts. It is often the case that Bankruptcy refers to a situation, when an individual debtor/natural person is indebted and Insolvency to a situation, when the indebted debtor is a legal entity/a corporation (for example in Australia).
On the other hand, often Insolvency refers to a financial situation of the debtor and Bankruptcy to the formal proceedings initiated against the debtor.
In many systems the two terms are used as having the same meaning and interchangeably.

The characteristic of such an insolvency (state of the financial affairs of the debtor) can be that the debtor is not able to pay its debts (cash flow insolvency) as they mature, or the liabilities of the debtor exceed its assets (balance sheet insolvency).

It would be beneficial to consider additional matters, such as those raised by Wood

The differences between an insolvency of a corporation and individual can be listed as follows:

- A corporation is likely to discontinue its existence in its pre insolvency form after the bankruptcy proceedings are completed. It is likely to be restructured, possibly operating in a different form

(market segment, product, size, geography…) or ceases operations. Contrary, an individual is certainly going to be discharged and have a fresh start, with her/his pre bankruptcy debts forgotten.

- Certain assets of an individual have to be excluded from the estate that is subject to potential distribution, as these are necessary to maintain the individual's (and his/her dependants') standard of living. No such exemption applies to corporations.
- An individual is likely to have the opportunity to apply a "restructuring plan" in that the current and future income may be applied to cover the debts going forward, even after the bankruptcy proceedings are completed.
- In case of corporations, these have a management and responsible persons that can be held personally liable for the events leading to the insolvency.
- A broader list of stakeholders is likely to be present in a case of a corporate insolvency, including for example employees, that are potentially subject to special treatment.

Elaboration is warranted, including with respect to objectives

In my personal view the two terms (insolvency and bankruptcy) can be used interchangeably, as there is ample understanding of the meaning of these words and there is alignment on the key principles governing the situations, the process and expected results. In many languages there are no corresponding two expressions for this situation (debtor not being able to pay and creditors having a right to recover their receivable via a fair and transparent process…) or there may other relevant terminology applicable. In my view it is more important that the relevant community constantly evolves towards a joint understanding of the principles, as the importance of cross border insolvency process is growing with the growing need for globalization (and cross border business).

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.

I have already briefly touched on these under Question 2.2 above.

There certainly are local preferences applicable to every state, which may lead to a reluctance on individual state level to open up to accepting standardised cross border insolvency set up, including choice of law, jurisdiction and enforcement aspects. These include protection of the local business community, protection of the local socio-economic aspects like employment, and similar.

Another challenge is the selection of language that can facilitate international communication in cross border insolvency cases. The ability to apply foreign language at a necessary level is limited in some states.

Local non insolvency legislation has evolved from many roots, being Roman, German, English etc. This non insolvency legislation is strongly embedded in the states' life (most importantly business life) and so applying a unified global insolvency approach will likely be incompatible with the existing non insolvency legal environment. Adaptation requires workarounds and exceptions and therefore a great deal of will.

While there is likely to be a common, globally accepted approach to insolvency, the detailed aspects may be treated differently in individual states:

- Meaning of insolvency (cash flow or just balance sheet? How long should be the debtor unable to be pay its debt?)
- Liquidate or rescue the debtor?
- Pro-creditor or pro debtor focused?

- Who can commence the proceedings, Creditors? Debtor? Court?
- Detailed definition of the moratorium. How long? What action? Which stakeholders (state, employees). What if the debtor is a financial institution and public's money is in question?
- Powers of insolvency practitioner/administrator. Need for his/her accreditation. Who appoints and supervises?
- Details of avoidable dispositions. How long back? Who are "related" parties?
- Role of the creditors. With a committee? What size? What is their authority – just advise or approve?
- Categories of creditors – who can be secured and their standing.
- Rehabilitation process and preference

  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 is implemented in the legal system of the state and regulates the particular topic (in our case the insolvency process) while soft law aims to influence the insolvency process and is not enacted in the particular state's legal system.

Treaties and conventions among states on the insolvency proceedings, covering for example the recognition of decisions, are considered to be Hard law, as these are embedded into the state's legal system. The Nordic Convention (1933) is a successful example of such a treaty.

A more successful harmonisation tool is application of soft law. For example, the UNCITRAL model law on cross borer insolvency. As a model law, it offers its users an example of the aspects, principles and wording to be applied in setting up or benchmarking the local insolvency environment. States are able to adopt the model or just apply selected aspects of it on their journey. Many states are using the UNCITRAL MLOCBI to benchmark their existing legal frameworks and possibly adopt certain elements of it. This, while certainly beneficial for the long-term harmonization process, creates short term variability in the individual state insolvency systems and requires tight cooperation in cased of cross border insolvency.

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.

The American insolvent estate representative should request recognition in terms of English Law by referring to the Common law principles and/or the 2006 Insolvency regulations (the adopted UNCITRAL Model Law on cross border insolvency).

This sub-question requires greater elaboration, including with respect to the non-applicability of s426
2.5

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.

As both Italy and Germany are EU member states, the EIR (Recast) 2015 would apply here. EIR allows the primary proceedings to be opened in the state where the COMI is. As the COMI is in Italy, the main proceedings should be opened in Italy with a possibility to open secondary proceedings (opened after the primary proceedings) in Germany as the debtor carries out non transitory activities there.

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. The Indian, South African and Australian courts will apply their local insolvency regulation. The EU insolvency representative will have to apply to the Indian, South African and Australian courts for recognition as foreign representative. This is likely to be granted if India, South Africa and Australia adopted the UNCITRAL Model Law on Cross Border Insolvency.

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.)

The EIR (Recast) 2015 will apply to the insolvency proceedings.

Greater elaboration is required. Dutch law is applicable to the real rights of security situated in the Netherlands

0.5

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

Corporations Act 2001 would apply, which is based on the adopted UNCITRAL Model Law on Cross border Insolvency.

Greater elaboration is required. Australian law is applicable to the real rights of security situated in the Australia

0.5

Marks awarded 8.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 36/50

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