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.

Countries whose insolvency law systems have historical roots in civil law include France, The Netherlands and Latin American countries for example, while countries whose insolvency law systems have historical roots in English law include England, the USA, Australia and India among others.

In contrast to countries with historical roots in English law, in terms of the evolution over time of insolvency concepts and practices, civil law countries have tended to remain more pro-creditor for slightly longer than countries with English or common law traditions, as their introductions of discharge in favour of debtors or similar concepts materialised at later dates than was the case in England where this started in 1705 with the Statute of Ann. By comparison, France started to relax the harshness of treatment towards debtors in 1935, and in Dutch law this started in 1897 with the introduction of moratoriums and "fresh starts". This is also reflected in modern times, where the USA system is deemed today to be in the lead in terms of a pro-debtor stance in the context of insolvency.

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.

The principle of universalism posits that in a multi-jurisdictional insolvency case, only one national insolvency law should govern proceedings in all other concerned jurisdictions concurrently in order to address all creditor's interests in a coherent manner, and that the one chosen system for this could be for example that of the jurisdiction which is the debtor's main place of business or centre of main interest (COMI).

In contrast, the principle of territorialism limits insolvency proceedings that take place in a particular jurisdiction, as well as their consequences, to the national boundaries of the state in question. In other words, the scope of the insolvency proceedings is only concerned with the debtor's business operations, assets and creditors that are located within the state. In theory universalism does not accommodate for the assets and liabilities of the debtor located in other countries that may be subject to insolvency proceedings there, nor of creditors in other countries that may also have claims.

Given that neither of the two conceptually opposed concepts of universalism and territorialism are fully applicable in practice, modified universalism seeks to provide a practical compromise, and proposes that the different domestic insolvency proceedings in question operate concurrently with the intention that the respective courts involved should communicate and coordinate in this process. In the concept of modified universalism, the jurisdiction of the COMI of the debtor is where the "main proceeding" takes place, with secondary proceedings taking place in the other jurisdictions that are in scope.

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.

The key initiatives in the context of international insolvency in Latin America are the Montevideo Treaty on International Commercial Law of 1889, the 1940 Montevideo Treaties on International Commercial Terrestrial Law and on International Procedural Law, and the 1928 Havanna Convention on Private International Law (also known as the Bustamante Code).

The 1889 Montevideo Treaty and 1928 Havanna convention were both quite widely ratified across Latin America, but not ratified by exactly the same countries. Only Bolivia and Peru are parties to both. The 1940 Montevideo Treaty was only ratified by Argentina, Paraguay and Uruguay who were also parties to the original 1889 Montevideo Treaty. Nonetheless these treaties and convention are deemed among the most successful initiatives in international insolvency cooperation and unification.

The 1889 Montevideo Treaty simplifies cross-border insolvency matters by stipulating the single jurisdiction of insolvency proceedings being that of the main commercial domicile of the debtor, unless the debtor operates independent enterprises in multiple states in which case multiple proceedings in those states can take place. The 1928 Havanna convention generally endorses a more universal approach to cross-border insolvency whereby proceedings in one jurisdiction may trigger consequences in other jurisdictions. The subsequent 1940 Montevideo Treaties introduced specific bankruptcy and meetings of creditors chapters.

4

Marks awarded 9 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 personally do not agree that “bankruptcy” and “insolvency” may be used interchangeably. While there are similarities and overlaps between the two concepts and while the words can have analogous or even synonymous meanings in different systems or contexts, this is not always the case as in the Australian terminology that assigns “bankruptcy” to individuals and “insolvency” to corporations. There are subtle but important differences and cross-border inconsistencies in this terminology therefore and too much potential for confusion, such that I believe the distinction should be made clear in an international insolvency context (i.e. beyond the confines of individual national systems that use one or the other word only, for example in a cross-border matter that requires clarity of terminology in order to attain some predictability of concepts and their consequences).

The meaning of “insolvency” can be somewhat generally distinguished from “bankruptcy” as being the pre-requisite technical state of not being able to meet liabilities that immediately precedes the state of being recognised as “bankrupt” such that insolvency proceedings are instigated, or in the old days, as per the origin of the word “bankrupt”, of having one’s trading bench broken by one’s disgruntled creditors.

The essential characteristics of the state of "insolvency" are the inability to pay one's debts as they come due (cash flow or commercial insolvency) or the durable state of one's liabilities exceeding one's assets (balance sheet insolvency). The essential characteristics of "bankruptcy" or in other words insolvency induced proceedings are that individual recovery actions by individual creditors are suspended to make way for collective proceedings. Assets are then restructured or liquidated in such a manner to pay creditors from the resulting available proceeds. **It would be beneficial to consider the matters raised by Wood**

The differences that may arise between proceedings pertaining to an insolvent corporation and those pertaining to a bankrupt individual are that, in some systems, there may be some assets of the bankrupt individual that are deemed exempted from proceedings and not made available for liquidation to pay creditors (e.g. the individual's home); whereas in the case of a corporation all assets are typically considered in scope of insolvency proceedings. Furthermore a fundamental difference is the objective of proceedings, which in the case of the individual is predominantly to protect him or her from undue pressure from creditors and to give an opportunity for a "fresh start". In the case of a corporation the objective is more oriented towards the preservation of the business as a going concern for socio-economic reasons including to preserve jobs.

5.5

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 multiple challenges that make it difficult to develop a single cross- border insolvency regime. Different countries have different cultural approaches to the age-old issues of unpaid debts and to the attitudes and traditions towards the treatment of debtors, the protection and position of creditors, the resolution of conflicts, the disposal of assets and distribution of proceeds. This includes some significant differences in terminologies of insolvency concepts, which make harmonisation challenging from the outset, such as the different possible meanings of the word "insolvency" itself as mentioned by Friman, in that it can mean durable balance sheet insolvency in some contexts but merely represent cash flow insolvency in other contexts.

The issue of territorialism does also create resistance at national levels to harmonise and/or to recognise insolvency laws, their proceeding and their consequences across borders. In theory, even without the obstacle of territorialism, it would still be challenging to develop a single cross-border insolvency system as matters of insolvency law often touch on many other aspects of general law such as property, securities or employment laws, which can often be contradictory or conflicting across borders, given that these domestic insolvency and general laws were historically mainly focused on addressing in-country matters from a purely domestic perspective, which greatly differ from jurisdiction to jurisdiction.

The issues of forum of proceedings, applicable law and cross-border enforcements, as highlighted by Fletcher's three key questions, also pose fundamental challenges to the establishment and smooth functioning of a single cross-border insolvency system.

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

1.5

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.

In the context of international insolvency, "hard law" refers to binding treaties and conventions between states that transpire into changes in their respective domestic laws, whereas "soft law" refers to guidelines, best practices and/or regulatory produced and promoted by international organisations or professional bodies to assist in the adoption of more harmonised insolvency practices across countries.

Attempts at international "hard law" approaches have often been unsuccessful especially in Europe, or not widely adopted such as the 1990 Istanbul Convention. However the Nordic Convention of 1933, the European Insolvency regulation (EIR) of 2000 and its subsequent EIR Recast of 2015 have been successful, for example in the context of providing mechanisms for uniform choice of law rules, that set the applicable law as that of the state where insolvency proceedings are first open and/or where they principally take place.

"Soft law" initiatives have tended to make more of a clear and lasting impact than "hard law" initiatives. The most prominent and widely adopted "soft law" initiative is the Model Law on Cross-Border Insolvency (MLCBI) of the United National Commission on International Trade Law (UNCITRAL). The MLCBI may be and has indeed been adopted by a large and growing number of countries since 1997 without the need for binding treaties and conventions, and with the possibility to modify it. It is making significant progress in advancing the harmonisation of international insolvency law via its proposals on uniform recognition laws and cross-border co-operation. In 2004 UNCITRAL also released its Legislative Guide on Insolvency Law which aims to provide guidance to countries that are preparing or modifying their own domestic insolvency laws.

Other notable "soft law" initiatives have been undertaken or are still ongoing by the World Bank (Principles for Effective Insolvency and Creditor / Debtor Regimes) and the European Union (Harmonisation of Insolvency Law), the International Bar Association, INSOL International and other professional bodies.

It would be beneficial to elaborate regarding hard law examples

2.5
Marks awarded 9.5 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.

You may use the UNCITRAL Model Law on Cross-Border Insolvency adopted in England in 2006 to request to deal with the assets in England.
This sub-question requires deeper consideration, including with respect to common law and the non-applicability of s426.

1.5

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 appropriate legal source for cross-border insolvency between two EU member states such as Italy and Germany is the European Insovency regulation, EIR (Recast) 2015. In this case the main proceedings should be opened in Italy as this is the jurisdiction of the COMI.
Further consideration of the EIR Recast would be beneficial

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?

Yes the EIR Recast provides for the recognition of insolvency proceedings outside the EU as India, South Africa and Australia are.

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.)

EIR Recast 2015

Take care to answer the specific sub-question posed and with sufficient detail. Dutch law would be applicable.

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.)

UNCITRAL Model Law on Cross-Border Insolvency

Take care to answer the specific sub-question posed and with sufficient detail. Australian law would be applicable.

0.5

Marks awarded 6.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 34/50

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