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.

Countries whose insolvency law systems have historical roots in civil law include continental European countries such as the Netherlands, France, Germany and Spain as well as countries that were or remain colonies/dependencies of these European states. The roots of civil law can be traced to Roman law with insolvency law in these European states further developed as a result of the *Lex Mercatoria*, being the customs and usages that developed between merchants on the continent and thus influenced the laws of the countries that had a more Roman or Germanic law character. The insolvency law systems of the civil law countries rely upon a comprehensive, codified set of legal statutes created by legislators.

Countries whose insolvency law systems have historical roots in English law (so-called 'common law' countries) include the United States, Australia and England itself as well as other countries that were or remain colonies/dependencies of Britain/the UK. English insolvency law developed by way of a number of different statutes which, over time, were subject to judicial interpretation which created legal precedents established by the courts (the 'common law').

Both civil law and common law countries may have unified insolvency legislation that deals with consumer (personal) and corporate bankruptcy in one and the same statute such as England in the common law world and Germany and Spain in the civil law world. In terms of their respective approach to jurisdiction, it is said that civil law countries are generally more inclined to take a territorial approach while common law countries tend to be more closely aligned with universalism. In practice, however, national States do not adopt either of these approaches in their purest form and this is where “modified universalism” and “modified territorialism” have their genesis.

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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 allows for more than one insolvency proceeding pending / originating in different states to be dealt with under the provisions of one insolvency law, for example in the state where the debtor has its centre of main interests (the "COMI"). This means that the law of the 'main proceeding' will have worldwide effect, even outside the territorial jurisdiction of the state where the so-called main proceeding has been opened. It calls for so-called “unity of proceedings”, allowing the law of the state where the “main proceeding” is opened (the *lex concursus*) to regulate the matter. All creditors worldwide should have the opportunity of participating in the proceedings with all claims being treated on an equal basis.

The principle of modified universalism is the approach whereby the 'main proceeding', opened in the state where the COMI has been determined, is supported by secondary or ancillary proceedings in another state. In such instances, the courts dealing with the respective proceedings are supposed to co-operate with each other.

The principle of territorialism prescribes that the consequences of an insolvency proceeding will only apply to the state where the insolvency proceeding has been opened and can lead to the insolvency laws of more than one state being involved.

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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.

In Latin America, a series of general treaties were concluded on private international law and commerce that included a chapter or title on bankruptcy or insolvency. These treaties, among different groups of Latin America states, are:

- The Montevideo Treaties (1889) and (1940); and
- Havana Convention on Private International Law (1928) (the "Bustamante Code").

Differences between the initiatives include the actual States that are members of the Montevideo Treaties and the Bustamante Code and the extent to which they allow for a single proceeding with universal effect throughout the member states.

The Bustamante Code is more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout its region. The Bustamante Code accepts that insolvency proceedings commenced in one member State will have extraterritorial effect in another member State. It enforces their courts' decrees from the time of their pronouncement, subject only to complying with local rules for registration or publicity.

The Montevideo Treaties allocates bankruptcy jurisdiction based on the debtor's commercial domicile where:

- a debtor has a commercial domicile in one treaty State, even if the debtor occasionally trades in more than one State or has branches or agents in another State, it provides for one set of proceedings in the commercial domicile; and
- the debtor has two or more economically autonomous businesses in different treaty States, it provides for the possibility of concurrent proceedings. When insolvency proceedings are open in one of the States, then a local creditor in the other State(s) containing an economically autonomous business may open bankruptcy proceedings in that State or take other civil action against the debtor.

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

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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.

For the reasons set out below, I agree with the statement that that the terms “bankruptcy” and “insolvency” may be used interchangeably in certain circumstances and in certain jurisdictions. However it is not the case that the terms are used interchangeably in all circumstances and in all jurisdictions.

For example in Australia “insolvency” is often used to refer to the insolvency of a corporation, whereas “bankruptcy” is often used to refer to the insolvency of an individual natural person. Although these terms carry the same meaning in some systems, one explanation is that “insolvency” sometimes means the state of financial affairs of a debtor, whilst “bankruptcy” refers to the formal state of being put into a formal bankruptcy proceeding. Insolvency itself may refer to the situation where the debtor cannot repay debts as they fall due by reason of a cash flow problem (cash flow or commercial insolvency) or where the liabilities of a debtor exceed the assets of a debtor (balance sheet insolvency).

Wood lists the following possible essential features of insolvency or bankruptcy law that are said to be universal principles, subject to notable exceptions and caveats:

- The "automatic stay" whereby actions by individual creditors against the bankrupt are frozen and thus individual pursuit is stayed (in favour of collective pursuit). This automatic stay signifies a moratorium against individual debt enforcement. This is the only truly universal feature according to Wood.
- Collective enforcement whereby the assets are pooled which become available to pay creditors. This feature has been eroded as a universal principle in that different states provide for different exceptions to this rule.
- Creditors are paid *pari passu*, that is, on a proportionate basis out of the available assets based on their claims. Wood terms this as a piece of ideology “which is nowhere honoured”, since priority creditors and secured creditors form exceptions to this rule in most, if not all, states.

In terms of the differences that may arise when a “bankruptcy” / “insolvency” involves a corporation rather than an individual, the commentators Sealy and Hooley distinguish as follows between the objectives of insolvency for individuals and corporations:

- Individuals:
to protect the debtor from harassment by his creditors;
to enable the debtor to make a fresh start – especially in less blameworthy cases (where insolvency has not been brought about by the actions or conduct of the debtor);
to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration.

- Corporations: where possible to preserve the business, or viable parts thereof – not necessarily the company; where personal liability has been abused, to impose personal liability on responsible persons.

While there are principals that apply to both, there are also important differences between the two. For example, it is only in relation to individuals that the notion of exempt or excluded assets will apply (this means that some systems allow the insolvent individual to keep some of the assets required to maintain him or herself and his or her dependents).

7

Question 3.2 [maximum 5 marks]

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

The main challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation are:

- distrust of foreign legal systems;
- the potential for uncertainty in domestic markets; and
- the absence of a global court, parliament or law.

It is for these reasons, among others, why there is no single set of insolvency rules that apply on a global basis. While the principle of universalism relates well to globalisation and the large multinational corporations that operate in international markets, it requires a very high level of trust in foreign legal systems and foreign insolvency proceedings (which does not currently exist), since a single insolvency proceeding would have to have extraterritorial effect. In order to be effective, a universal approach would also have to address difficult legal issues such as choice-of-law and priority rules.

Opponents of a single global cross-border insolvency dispensation point out the difficulty in establishing a single State (the "home" State) for the debtor where insolvency proceedings will exclusively be opened. According to opponents of a single global cross-border insolvency dispensation, this principle will create uncertainty in the domestic markets and that "home" country standards may be indeterminate (in particular when the debtor is a corporate group) and vulnerable to strategic manipulation.

The absence of a global court, parliament or law also makes it difficult to develop a single global cross-border insolvency dispensation
It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook1.5

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" in the context of international insolvency relates to binding laws enforceable in the courts. Examples include treaties and conventions to which states become signatories and as such bind themselves and affect their domestic law accordingly. For many years, efforts have been made in Europe at achieving multilateral international insolvency conventions but such efforts were largely unsuccessful (the Nordic Convention of 1933 being a notable exception). However, more recent success has been achieved by the European Union, albeit not by way of Convention, but by way of the European Insolvency Regulation (EIR) (2000) which binds all EU member states.

"Soft law" in the context of international insolvency relates to laws which were not imposed on states by way of binding treaties or conventions but which were adopted by states on a voluntary basis.

Arguably, such "soft law" initiatives have been more successful that the "hard law" options. A range of multilateral organisations (to be distinguished from States / governments working on treaties or conventions – "hard law" as above) have focused their efforts on this approach over recent decades.

The most successful "soft law" approach to date has been undertaken by the United Nations Commission on International Trade Law (UNCITRAL). In the mid-1990s, it developed a Model Law on

Cross-border Insolvency (MLCBI). This initiative did not take the form of a treaty or convention, but rather that of a Model Law, with draft legislation that UNCITRAL recommended member States to adopt, with or without modification. Given the number, economic size and geographic spread of States that are now adopting the MLCBI, it is gathering momentum as an influential response to international insolvency law.

3

Marks awarded 11.5 out of 15

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

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

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

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

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

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

Question 4.1 [Maximum 4 marks]

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

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

The main cross-border sources are:

- The UNCITRAL Model Law on Cross-Border Insolvency which England adopted in in 2006; and

- English common law principles including the principle of (modified) universalism and comity (and reciprocity). The principle of modified universalism requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.

Section 426 of the Insolvency Act 1986 only applies to "relevant" countries as listed which does not include the USA, so cannot be relied upon here.

4

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 to be used in a cross-border insolvency matter between Italy and Germany is the European Insolvency Regulation (EIR) (2000) which has subsequently been reviewed to become the current EIR (Recast) 2015, applicable since mid-2017.

The main proceeding should be opened in Italy as this is where it has its COMI (noting EIR Recast Art 3(1) which provides that the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."

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
Elaboration would be beneficial.

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 7 [6?] marks.)

The law of Italy as the location of the main proceedings will apply generally to the conduct of the insolvency in the absence of local proceedings in the Netherlands. However, in terms of the real rights of security, assuming this means the assets are secured, Article 8 of the EU regulation provides that to the extent that the law where the assets are situated protects the rights of a secured creditor and permits enforcement (notwithstanding the debtor's insolvency), these rights will trump any contrary provisions in the law of the main insolvency proceedings. In these circumstances, the law of the Netherlands would apply.

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(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 7 [6?] marks.)

The law of Australia will apply to an insolvency proceeding in Australia and the real rights of security situated in there, subject to the terms of the security instrument.
There is some scope to elaborate

2.5

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 44.5/50

An excellent paper - a thorough response that addresses the questions asked and mostly substantiates the answers well.