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.

Generally speaking, Roman law principles formed the backbone of the many civil law countries whilst English law spread throughout the common law states.

Countries with insolvency law systems that have roots in civil law include the Netherlands, France, Germany, Italy and Spain (most continental European countries). These include foundations which historically were harsh towards debtors, allowing for the arrest and detention of debtors (e.g. the 1807 Code under French insolvency law). Likewise, Dutch insolvency law was historically very pro-creditor. However, recent developments have introduced more debtor-friendly systems such as the *Schuldsaneringswet* which allows for a fresh start in Dutch bankruptcy law.

Countries with English law systems include England & Wales, Australia and U.S.A. These countries tend to have a single unified Bankruptcy or Insolvency Act (Insolvency Act 1986 in E&W and the Bankruptcy Code 1978, though note that Australia does not have a single unified insolvency code). Systems such as chapter 11 have been historically regarded as liberal and pro-debtor, permitting for a fresh starts.

This question also required consideration of the adoption of common law precedent in English based countries cf codification in civil jurisdictions.

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.

Universalism ("unity of proceedings") considers that that there should only be one insolvency proceeding covering all of a debtor's assets and debts worldwide. It is an approach that allows for more than one insolvency proceeding pending or originating in different jurisdictions to be dealt with under the provisions of one insolvency law (for example, in the jurisdiction where the debtor has its COMI). The implications are that the law of the main proceeding will have worldwide effect and recognition, even outside the territorial jurisdiction of the State where the main proceeding was opened (i.e. extraterritorial effect).

Conversely, territorialism is an approach that 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 plurality or multiplicity of insolvency proceedings. **There is scope to elaborate upon territorial limits**

Modified universalism emerged as many States remained closer to the concept of territoriality. Under this approach the "main proceeding", opened in the State where the COMI has been determined, will be supported by secondary or ancillary proceedings. In such instances, the courts will be encouraged to co-operate with each other.

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.

It is said that the law of South America is one of the most unified systems in the world. The Latin American States have achieved some of the most long-lasting multilateral agreements in managing international insolvency issues. The two key treaties that have been concluded on private international law are:

1. **The Montevideo Treaties (1889) and (1940):** This treaty covers personal and corporate insolvency. It allocates bankruptcy jurisdiction based on the debtor's commercial domicile. For instance, where the debtor has a commercial domicile in one treaty State, even if it occasionally trades in other States, it provides for one set of proceedings in the commercial domicile. Where the debtor has two or more economically autonomous businesses in different treaty States, it provides the possibility of concurrent proceedings.
2. **The Havana Convention on Private International Law**: This is more supportive than the Montevideo Treaties as an approach. It allows for a single proceeding with universal effect throughout its region and for concurrent proceedings that contain establishments operating separately. However, where there are concurrent proceedings, the Havana Convention does not provide procedures for co-operation or co-ordination of any concurrent proceeding.

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

All South American countries have also recently signed up to the Union of South American Nations agreement, which aims to establish a system of supra national law along the lines of the EU.

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.

The terms Insolvency and Bankruptcy may be used interchangeably, however there are some subtle differences, particularly when using these terms in different jurisdictions. The term 'bankruptcy' was first used between the 13th and 17th century and stems from the Italian 'banca rotta' (meaning breaking the bench). It referred to situations where a merchant who operated his business in the medieval market place could not pay his debt and his creditors would close his business. As such, it was associated with individual debt-collecting procedures.

Over time, and with the development of English insolvency law, the term 'Insolvency' started being more commonly used, particularly in anglo-saxon jurisdictions. Today some systems use one term over the other, or some systems use the terms differently. For instance, 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. In other states, like the US, the key distinction between the two terms is that insolvency describes the financial state of being unable to pay debts over time, and bankruptcy describes the legal process when a person or corporate has been declared insolvent.

Essential features of insolvency and bankruptcy which are common across States and embedded in the insolvency law of different jurisdictions include the following, as listed by Wood[1]: (i) action by individual creditors against the bankrupt are frozen (i.e. stay), (ii) the assets are pooled which become available to pay creditors, and (iii) creditors are paid pari passu.

Some key distinguishing features between individual and corporate insolvency are as follows, as identified by Sealy and Hooley[2]:

Individuals: protect the debtor from harassment by his/her creditors; to enable the debtor to make a fresh start; to reduce indebtedness by making contributions from present and future income to the estate, while also taking into consideration the debtors personal circumstances.

Corporations: where possible to preserve the business, or viable parts thereof. Where management of the Company has been abused, impose personal liability on directors.

There are a set of common principles in both, including: ensuring pari passu distributions as far as possible, except where creditors have priority; investigate failures and reclaim voidable dispositions. However, the notion of exempt and excluded assets will only apply in respect of individual (natural persons) insolvency.

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.

Although all States with a developed legal system have some form of bankruptcy / insolvency systems / debt collecting procedures, there are wide differences in approaches, policies and procedural rules. Certain aspects of insolvency law are affected by local legal culture, basic rights, socio-economic policies and politics. Aspects of insolvency beginning from how insolvency is defined, to how insolvency procedures are commenced to how distributions should be made and voidable transactions addressed will differ greatly from one State to the next.

As such, in situations where there are cross-border aspects to an insolvency dealing with the insolvency across borders will be difficult and may result in conflicting outcomes. This is further complicated by a lack of a uniform approach globally to deal with cross-border matters.

Some scholars explain that the problems in addressing cross-border insolvency cases, already starts in finding a common definition for 'insolvency'.

There are also key differences, arising from domestic norms, impacting the position of creditors and priorities they assert in insolvency, as explained by Omar[3]. One example could be the enforcement of secured assets across different States (this can be common in situations where a multinational company has granted security over assets located in various local subsidiaries). Dealing with the distribution rules in respect of payment to secured creditors in such situations will be challenging, given the important differences between the types of real security found in various States, whether States reserve a "prescribed part" to be distributed to secured creditors and whether states recognise any contractual subordination.

[1] P.R. Wood, *Principles of International Insolvency (Sweet and Maxwell Ltd, 2007)*
[2] In M. A. Clarke et al, *Commercial Law (Oxford University Press, 2017)*
[3] P.J. Omar, "The Landscape of International Insolvency" (2002)

Westbrook[4], a strong proponent of universalism, has identified 9 key issues in cross-border cases, spanning from moratoriums on creditor actions that are available, to how executory contracts are dealt with, to the avoidance provision powers of practitioners and discharge laws. **It would be beneficial to list them all.**

4

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.

International insolvency is regulated by a combination of "hard" and "soft" law. "Hard law" in the context of international insolvency refers to binding legal instruments, such as treaties and conventions that have been adopted to form part of a State's insolvency laws. International insolvency hard laws have had a variable degree of success, partly because implementing common insolvency proceedings into differing State laws is challenging (as explained at question 3.2 above). Successful examples include the Nordic Convention 1933 across the Scandinavian region, and most recently the EIR 2000, particularly the EIR Recast 2021 which become effective for most EU States in January 2022. International insolvency hard law approaches have generally been more successful across smaller regions.

"Soft law" on the other hand, refers to multilateral organisations which work to recommend draft legislation to States that are members. The most successful "soft" law approach to date has been undertaken by UNCITRAL in the mid-1990s with the development of a Model Law on Cross-border Insolvency. 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 14 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]

[4] J.L. Westbrooke, "Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court" (2018) *96 Texas Law Review*

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 key source will be the MLCBI, which provides for recognition and relief, as well as promotes cooperation and coordination. The UK has adopted the MLCBL as implemented by the CBIR 2006. On that basis, the American estate representative can apply to the English court for recognition of the American proceedings.

The treatment by the English court will depend on whether the English court recognises the American proceedings as 'foreign main proceedings' (being insolvency proceedings opened where the debtor has its COMI) or foreign non-main proceedings (being insolvency proceedings opened where the debtor does not have its COMI but does have an establishment). On the facts it would likely be the latter.

There is scope to elaborate with respect to the non-applicability of s426.

3

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 most appropriate legal source on cross-border insolvency in this scenario would be the EIR Recast, which regulates the applicable law in proceedings subject to the Regulation in the EU. In particular, Article 7 addresses the law determining "the conditions for opening of those proceedings, their conduct and their closure". Articles 8 to 18 then guide on matters such as rights in rem, set-off, immoveable property, employment etc. Reference may also be made to the European Guidelines on Communication and Cooperation 2007, which contain non-binding rules for international insolvencies subject to the EIR.

The law of the country where the 'main proceedings' are opened will be allocated primary jurisdiction. This is based on where the Norton Cars would be considered to have its centre of main interest (COMI). Under the EIR Recast Article 3(1), COMI is defined as 'the place where the debtor conducts the administration of its interest on a regular basis and which is ascertainably by third parties'. On the facts it could be argued that COMI is in Germany if it cannot be ascertained by third parties that administration is directed from Italy. Given the dual-management approach for Norton Cars, it may be possible that under the EIR Recast, secondary proceedings are recognised in Italy.

The COMI is in Italy

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?

No, as the EIR Recast only applies to EU member states. They will likely look to apply the MLCBI to the extent adopted.

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.)

On the assumption that NC's COMI is in Italy, Italy would be considered the State with primary jurisdiction for the insolvency proceedings. However, in order to protect the assets in the Netherlands and ensure they can form part of NC's estate, the Italian representative would apply under EIR Recast to the Dutch Court for recognition of the Italian proceedings. In particular, it may ask to stay any potential action taken by creditors in respect to those real security rights, as well as to recognise any proceedings from the Italian Court. Dutch law will continue to apply in respect of the security documents.

There is scope to elaborate with respect to the EU regulation

2.5

(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.)

Without any recognition, Australian law would apply in respect of the real rights of security. The Italian IP may seek recognition from the Australian courts of the Italian proceedings under MLCBI. There could also be scope for cooperation under the MLCBI on the basis that both Italy and Australia have adopted it. Ultimately, if the Australian courts don't recognise the proceedings, and creditors have not contractually agreed to forbear from taking any action in respect of the security rights, they may attempt to enforce in Australia.

3

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 43.5/50

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