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.

The roots of civil law jurisdictions trace back to Roman law and Table 3 of the Twelve Tables. They were further developed as a result of *Lex Mercatoria*.

On the other hand, English law principles of insolvency arise much later. The first bankruptcy statutes were first implemented in the early part of 16th century.

Countries whose insolvency law systems have historical roots in civil law have the following tendencies/approaches:

- Generally more inclined to take a "territorial" approach
- Form of floating charge security not commonplace
- Foreign law is presumed to be a question of law to be applied regardless of whether it is pleaded by the parties or not

Countries whose insolvency law systems have historical roots in English law have the following tendencies/approaches:

- Generally more inclined to take a "universalist" approach to jurisdiction
- Notion of floating charge security commonplace
- Foreign law is a question of fact and will only arise if pleaded by the parties

Another approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries cf codification in civil jurisdictions.
1.5

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.

Key differences as follows:

Universalism

- Approach that allows for more than one insolvency proceeding originating in different states to be dealt with under the provisions of one universal insolvency law. **There is scope to elaborate regarding forum**

Modified Universalism

- Similar to universalism, but provides for a "main proceeding" opened in the State where COMI has been determined, supported by secondary or ancillary (territorial) proceedings in another state.

Territorialism

- Prescribes that separate insolvency proceedings may be commenced in every state/jurisdiction where the Debtor holds assets, but that they should be territorially limited

to property within the State where those proceedings were opened. Can lead to various different proceedings.

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.

Initiatives relating to the resolution of international insolvency issues in Latin America include The Montevideo Treaties 1889 and 1940 ("Montevideo") and the Havana Convention on Private International Law 1928 ("Havana").

Important differences between these initiatives include:

- More jurisdictions have signed up to Havana (over than Montevideo
- Havana is more supportive of an approach that allows for a single proceeding with universal effect
- While Havana permits concurrent proceedings (where states contain commercial establishments operating entirely separately economically) it does not provide procedures for cooperation or coordination of any concurrent proceedings. Montevideo, on the other hand, does.
- Havana accepts that insolvency proceedings commenced in one member State will have exterritorial effect in another member state. Montevideo, on the other hand, doe note.

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Marks awarded 8 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.

As a matter of terminology, whether this statement is correct or incorrect depends on the jurisdiction in question. If the statement relates to a difference between individual vs corporate insolvency, whilst there are similarities between the two, there are also clear differences in approach.

Different systems have varying approaches on how they use the terms "bankruptcy" and "insolvency". Some systems use those terms to mean different things, e.g. in England, "insolvency" is used to refer to the insolvency of a corporate entity, whereas "bankruptcy" is used to refer to the insolvency of an individual. Other jurisdictions use the terms interchangeably. One explanation for such difference is that "insolvency" may often be considered as the state of affairs of a debtor, while "bankruptcy" may refer to the formal state of being placed in a formal bankruptcy process.

The essential characteristics of "bankruptcy" and "insolvency" are said to include:

- Actions by individual creditors against a bankrupt corporate entity/individual are stayed (automatically by nature of the process);
- Assets of a bankrupt corporate entity/individual are pooled in order to pay creditors;

- Creditors are paid pari passu, i.e. on a proportionate basis out of the available assets based on their claims (though note this does not take into account priority/secured creditors).

Differences that may arise in respect of a corporate entity rather than an individual include:

- The priority is the preservation of the business or viable parts thereof, but not necessarily the corporate entity itself (as opposed to a focus on protecting the person in the case of an individual)
- A focus on investigating personal liability of wrongdoers/responsible persons (i.e. directors and other stakeholders)
- No concept of exempt/excluded assets
- The different focus of approach on individuals includes protection from harassment from creditors and an ability to reduce indebtedness by making contributions from present and future income, whilst also taking personal circumstances into account

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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 significant challenges in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

One example of these challenges is the difficulty in establishing a common language:

- There is no universally agreed common language of what "insolvency" is – this is usually defined in the domestic context.
- Traditionally, as is the case in the UK, this is (amongst others) determined by a test of whether outstanding liabilities exceed a person's assets.
- Beyond this general view there is further complexity – i.e. how short term liquidity issues should be accounted for or how contingent liabilities should be calculated.
- The result is that international conventions / instruments focus themselves on whether the debtor has entered into an "insolvency proceeding" (in an attempt to move away from reaching a common view on "insolvency" altogether).

Another example of these challenges relates to "conflicts of laws", i.e. where a debtor faces creditors asserting claims in more than one state. Such a "conflict" may be made even more challenging by nature of different approaches to security, set-off, netting arrangements and retention of title in domestic law.

Nine key challenges in this regard that have been highlighted by commentated include:

- Recognition of the office holder;
- Automatic stay/moratorium;
- Creditor participation;
- Executory contracts and how they are addressed;
- Co-ordination of claims procedure (proof of debt process in the UK);
- Priorities/preferences;
- Avoidance provision powers / antecedent transactions;
- Discharge of debt / corporate rescue; and
- Conflict of laws (as above).

Harmonisation of law, framework and language is the obvious solution, but the feasibility of that approach is doubted.

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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"

- this approach is rooted in legally binding instruments
- one example is in the form of treaties and conventions that are implemented into domestic law
- this approach has had varying degrees of success over the years, with the most notable being the successful EIR Recast. **There is scope to elaborate**

"Soft law"

- this approach includes codes, recommendations and non-binding instruments that may or may not be implemented
- one example is in the form of the UNCITRAL Model Law on Cross Border Insolvency
- this approach has had varying degrees of success - the Model Law in particular is gathering increasing momentum as an appropriate way to deal with international insolvency law **There is scope to elaborate**

2.5
Marks awarded 14.5 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.

Recognition in order to deal with assets situated in England may be requested as follows:

- Under the Cross Border Insolvency Regulations 2006:
    - under these regulations (implemented to give effect to the Model Law in Great Britain), the foreign representative can seek assistance from the British Courts.
    - this assumes the relevant proceedings are "collective proceedings" (likely to be satisfied by a US "liquidation")
    - the proceedings in the US will be deemed "foreign non-main proceedings" (given COMI was in England at the time of filing).
- Under English common law:
    - common law contains a robust principle of comity and the British Courts will largely look to assist foreign office holders where circumstances fall outside of established cross-border insolvency regimes
    - the nature and extent of such co-operation will depend on the activity in question and conflict with domestic English law

s. 426 of the Insolvency Act 1986 does not apply here as the USA is not a "relevant country" for these purposes.

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 EIR Recast 2015 will govern this cross-border insolvency matter, noting each of Italy and Germany are member states for the purposes of that legislation.

The EIR Recast 2015 allocates jurisdictional competence to the courts of the member State within which is situated the debtor's COMI. This is considered the main proceedings.

Subsidiary territorial proceedings in other member States are also possible. These are permitted where the debtor has an establishment (being a place of operations where non-transitory economic activity with human means and assets is carried out).

Subsidiary / establishment proceedings may either be "independent proceedings" if opened prior to the main proceedings, or secondary proceedings of opened subsequent to the main proceedings.

Applying this to the facts at hand:

- the main proceedings should be opened in Italy (where COMI is located)
- subsidiary proceedings (whether independent or secondary) may be opened in Germany, noting the operations taking place there.

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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.

There is scope to elaborate here

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.)

Italian law will apply to the insolvency proceedings given the main proceedings are taking place in that jurisdiction.

The Italian insolvent estate representative will be entitled to deal with assets in the Netherlands by way of obtaining recognition in the Netherlands (secondary proceedings) and subsequently requesting relief from the Dutch courts to deal in those assets.

As a general principle, local law will apply to assets subject to real rights of security in the relevant jurisdiction. The *Faillisementswet* (or other relevant Dutch law(s)) will therefore apply to the real rights of security situated in the Netherlands.

There is scope to elaborate regarding your reasoning

2

(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.)

Australia has adopted the UNCITRAL Model Law on Cross Border Insolvency, which promotes co-operation and coordination in the context of recognition and enforcement of concurrent foreign insolvency proceedings. The Italian insolvent estate representative may therefore seek the assistance of the Australian courts in dealing with assets located in Australia.

The relevant Australian law(s) will apply to insolvency proceedings in Australia.

As a general principle, local law will apply to assets subject to real rights of security in the relevant jurisdiction. The relevant Australian laws will therefore also apply to real rights of security situated in Australia.

3

Marks awarded 13.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 46/50

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