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.

Legal systems typically have roots in either civil law or English law.

The roots of civil law can be traced back to Roman law, whereby a debtor would pledge his own body for the repayment of the loan, the non-repayment of the same often resulting in imprisonment, or sentenced to death. English law also provided for imprisonment for debt, however it was introduced much later (in the thirteenth century) when compared to civil law.

Between the 13th and 17th century, civil law and English law jurisdictions implemented some form of bankruptcy legislation. Individual debt collecting procedures progressed into the development of collective debt procedures. Debt collection changed from execution against the debtor's body, towards an execution against the debtor'sassets. Discharge of debt was not introduced in English law or civil law until much later in history.

The French insolvency law was historically typical of that of a civil law and western European country in that it was pro-creditor, with a harsh treatment towards debtors. Treatment towards debtors however was reformed in 1935.

Similar to France, the Netherlands was also historically a pro-creditor system. Before Schuldsaneringswet, all creditors would have to agree in order for a debtor's debt to be extinguished.

The USA's legal system is derived from English law. The USA has implemented unified legislation which deals with bankruptcy/insolvency, under the 1978 Bankruptcy code. This is a federal legislation. The US system is viewed as a pro-creditor system, due to its discharge of debt treatment.

Australia on the other hand, whilst also deriving from English law, does not have one unified legislation in regards to bankruptcy. It has a number of Acts which deal with either personal or corporate insolvency.

This answer also required a discussion of the common law aspect of English law in greater detail, and in comparison with codification.
2

Question 2.2 [maximum 3 marks]

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

i) Universalism is a cooperative cross boarder approach, which allows for multiple insolvency proceedings to be dealt with under one insolvency law. The law of the main proceeding (where the debtor has its centre of main interest) will be effective worldwide. The proceedings would include all of a debtors worldwide assets, with creditors having the opportunity to participate fairly no matter their jurisdiction.

ii) Territorialism is opposed to universalism, whereby the insolvency proceedings will only apply to the State they were started in. This may result in multiple proceedings in different states. **It would be beneficial to elaborate regarding territorial limits**

iii) Modified universalism has emerged as a middle ground to universalism and territorialism, whereby the main proceedings are commenced in the state where the centre of main interest is, and secondary proceedings are started in other states. The law of the main proceedings is not effective worldwide, but the respective courts should cooperate 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.

Certain states in Latin America have ratified treaties/agreements in the aim to resolve cross boarder insolvency issues. The Montevideo Treaty 1889 allocates the bankruptcy jurisdiction based on the debtors commercial domicile. If the debtor is domiciled in one jurisdiction and trades occasionally in other, the proceedings will be held in the commercial domicile. However, where there are two commercial businesses in different treaty states, the treaty provides for possible concurrent proceedings in the other state.

The Havana Convention on the other hand is more supportive in that allows for a single proceeding with universal effect throughout its region. Similar to the approach of the Montevideo Treaty, there will be a single proceeding if the debtor trades mainly in one state, and has branches or occasionally trades in other states. However where there are two business which are trading completely separately economically, the Havana Convention will allow for separate concurrent proceedings. The Havana Convention does not provide any guidelines for these concurrent proceedings.

There is scope to elaborate for example with respect to the different members of the different agreements
3
Marks awarded 7.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

It is said that the terms “bankruptcy” and “insolvency” may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to “bankruptcy” and “insolvency”, (ii) the essential characteristics of “bankruptcy” and “insolvency” and (iii) any differences that may arise when a “bankruptcy” / “insolvency” involves a corporation rather than an individual.

I do not think that bankruptcy and insolvency can be used interchangeably. Insolvency is often defined as the state of a debtor’s finances, i.e. when a person or corporation is balance sheet insolvent, or cash flow insolvent. Bankruptcy on the other hand is the legal process when a corporation or individual is formally declared insolvent and put into a formal proceeding.

There are similarities and differences when it comes to individual and corporate insolvency/bankruptcy. The similarities being that i) creditor actions against the debtor are stayed on the commencement of proceedings, ii) the debtor’s assets are pooled, and distributed pari passu (where possible) amongst creditors, and iii) investigations are carried out with respect to reasons for insolvency, including the reversal of any antecedent transactions, transactions at an undervalue or preference transactions.

Individual insolvency/bankruptcy protects the debtor further aggravation from creditors. Individual insolvency allows for the debtor to make a fresh start, whilst reducing the debt owed by making contributions from past and future income. In an individual insolvency, there are also excluded assets which do not form a part of the insolvent's estate, for example the marital home. There is no such concept of excluded assets in a corporate insolvency.

In corporate insolvency, there is a focus of preserving the valuable parts of the business. A corporation could either end up dissolved (a concept which cannot happen to an individual) or "rescued".

There is some scope to elaborate, for example with respect to attributed meanings across different jurisdictions. But this sub-question is answered well.

6

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.

One of the main challenges in developing a single cross border insolvency dispensation is that certain systems are pro-creditor, whereas others are pro-debtor. There are still certain systems that do not allow for discharge of debt, or is very difficult to obtain. In order to develop one single insolvency dispensation, there would need to be a unified approach as to whether the dispensation is pro-creditor or pro-debtor.

Another challenge is that certain parts of the law are not generally dealt with in insolvency legislation, however are fundamental to that jurisdictions insolvency law. An example of this is security, which is dealt with in other parts of a jurisdictions law, but not in insolvency legislation. Floating charge security is found in jurisdictions which are based on English law, however this type of security does not tend to exist in civil law jurisdictions. This makes the concept of a single-cross border insolvency dispensation difficult, because the types of security will have to be dealt within that legislation.

Another challenge to a single cross-border insolvency dispensation would be the ranking of creditors and the payment of distributions. In a system with subordination of claims, certain creditors, for example priority creditors, are paid in full (or in part in some cases) before the next ranking of creditors receive any distribution from the estate. However, different jurisdictions have different definitions of priority creditors. For example, in some jurisdictions, taxes are considered a priority claim, where in other jurisdictions it is not. Differences between the make up of certain creditor pools/priorities and the order of distribution will be one of the main challenges in a single cross-border insolvency dispensation.

Another challenge would be in the dealing of contracts, for example employment contracts. Some jurisdictions are influenced by the socio-economic issues in that jurisdiction, and may require that employment contracts are dealt with in a certain way. In some jurisdictions, these contracts are terminated at the commencement of the proceedings, or these contracts can be transferred to a new employer. There would need to be a universal agreement as to how employment contracts are dealt with in order to implement a single cross border insolvency dispensation.

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook2

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 generally refers to obligations which, if adopted by a State are binding and affects their domestic law, and can be legally enforced by a court. An example of this in the context of international insolvency are when States ratify international insolvency treaties or sign up to and become signatories to convention. These form parts of a State’s “Hard law” on insolvency.

Hard law solutions to cross border insolvency in the form of treaties and conventions have not historically had much success. These treaties/conventions rely on a sufficient number of member states ratifying them in order to be enforced. An example of this is the 1990 Istanbul Convention, which whilst signed by eight member states, it was not ratified by enough states in order to enforce it.

More success gained through “soft law” in international insolvency. Soft law influences and governs a State’s regulations. A successful example of this is UNCITRAL developing a Model Law on Cross border Insolvency. This model law assists states in developing a framework for dealing with cross border insolvencies. It recommended member states adopt this with or without modification. It has proved successful, which is evidenced by the number of states and adopting it.

3

Marks awarded 11 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 following sources can be replied upon:

i) the House of Lords decision in McGrath v Riddell, which set out 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 assets are distributed to its creditors under a single distribution system".

ii) Chapter IV of the Model Law on Cross Border Insolvency, which England has adopted. This model law instructs courts to cooperate with courts/representatives in other jurisdictions.

iii) ALI – III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012). The aim of these guidelines is to promote coordination and harmonisation in cross border proceedings.

iv) Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016). This is a "network for insolvency judges from across the world with the aim of providing judicial thought leadership developing best practices and facilitating communication and cooperation amongst national courts in cross-border insolvency and restructuring matters".

It would be beneficial to elaborate with respect to s426 being non-applicable

3.5

Question 4.2 [Maximum 4 marks]

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

The main proceedings should be opened in Italy, as the centre of main interest is located in Italy. Secondary proceedings could be started in Germany.

Given that Italy and Germany are both in the European Union, EIR Recast will apply. Article 7.1 of the EIR Recast states that "the law applicable to insolvency proceedings and their effect shall be that of the State of the opening of the proceedings". The Italian legal proceedings and Italian law will therefore govern any proceedings that happen in Germany.

4

Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

No, the EU Recast only applies to that of a member state. India, South Africa and Australia are not member states, so cannot apply EU Recast.

1

Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where

the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

The law of the Italian insolvency proceedings will apply, as both Italy and the Netherlands are EU member states. Article 7.1 of the EIR Recast states that "the law applicable to insolvency proceedings and their effect shall be that of the State of the opening of the proceedings". The Italian legal proceedings will therefore govern any proceedings that happen in the Netherlands.

The rights of security however would be dealt with under Dutch law, as would have been provided for under Dutch law.

There is some scope to elaborate

3

(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.)

EU Recast will not apply because Australia is not a member state of the European Union. There is therefore no legislation which governs/instructs which law will apply. Its most likely that Australian proceedings will be started and governed by Australian law. Furthermore, as the security would have been provided under Australian law, Australian law will govern the security.

It would be beneficial to refer to the MLCBI also

2

Marks awarded 13.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 42/50

A very good paper that generally addresses the questions asked and substantiates its answers.