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 7 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 which have historical roots in English law, such as the UK, Australia and Singapore recognise the notion of a floating charge whereas this form of security is not generally recognised in countries which have historical roots in civil law such as the Netherlands, France and Germany.

Generally, countries whose insolvency laws have historical roots in the civil law are more inclined to take a territorial approach to jurisdiction whereas countries which have roots in the English common law are more closely aligned with universalism, albeit in their respective modified forms.

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.

Universalism is an approach that allows for only one main insolvency law to apply more than one insolvency proceedings in different jurisdictions, such that where the main proceedings in one jurisdiction (typically the debtor's centre of main interests) is commenced, the orders made under those main proceedings will have worldwide effect, even outside the territorial jurisdiction of that one State. The focus is on identifying where the debtor has its centre of main interests, which is most closely connected to the debtor's interests, so that the main proceedings and its outcome will bind and attach to all other assets outside of that jurisdiction.

Territorialism on the other hand, 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 a multiplicity of insolvency proceedings in many different States where the debtor's assets may be located. This approach is aligned with the idea that each state is only responsible for the assets within its jurisdiction and there will be no interference by other courts in relation to the assets within its jurisdiction.

Modified universalism is a blend of both concepts above, as many States have presently adopted an approach closer to territorialism. This concept of modified universalism allows for the "*main proceeding*" to be opened in the state where the centre of main interests has been determined, but the orders made in that state will be supported by secondary or ancillary proceedings in another State. In the case of modified universalism, the courts of the various states involved will have to cooperate with each other.

3

Question 2.3 [maximum 4 marks]

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

Some of the initiatives that have been made to assist with the resolution of international insolvency issues in Latin America include: (a) the Montevideo treaties; and (b) the Havana Convention on Private International Law (the Bustamante Code).

The Montevideo treaties include the Montevideo Treaty on International Commercial Law 1889 the Montevideo Treaty on International Commercial Terrestrial Law 1940 which includes provisions on Bankruptcy and the 1940 Montevideo Treaty on International Procedural Law which includes a section on Civil Meetings of Creditors.

Of the three, the 1889 treaty has gained the most traction and has been ratified by 6 States. It covers personal and corporate insolvency and allocates bankruptcy jurisdiction based on the debtor's commercial domicile. Specifically:

(a) Where the 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, one set of proceedings will be commenced in the commercial domicile; and

(b) Where 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.

The Havana Convention has been ratified by 15 Latin American States. Compared to the Montevideo Treaties above, the Havana Convention better facilitates an approach closer to universalism in that it provides that if the insolvent or bankrupt debtor has only one civil or commercial domicile, there can only be *one* preventive proceeding in insolvency or bankruptcy in respect of all his assets and liabilities in all other contracting States: Article 414.

However, given the necessary complications of a fully universalism-based approach, it allows for a modified universalism in that there may still be concurrent proceedings in other contracting States that contain commercial establishments that operate entirely separately from the debtor economically.

In that way, it is also similar to the Montevideo Treaties. The main difference is that while the Montevideo treaties expressly provides for the cooperation of other contracting states where the debtor has two or more economically autonomous businesses in different treaty States, the Havana Convention does not provide for any specific procedures for cooperation of concurrent proceedings in that scenario.

4

Marks awarded 9 out of 10

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

Question 3.1 [maximum 7 marks]

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

I disagree that the terms “bankruptcy” and “insolvency” may be used interchangeably.

A distinction may be made in that “insolvency” means the state of financial affairs of a debtor whereas “bankruptcy” refers to the formal state of being put into a formal bankruptcy proceeding.

That is a distinction of form and not just of substance as insolvency does not always lead to bankruptcy, as there may be informal arrangements, negotiations, or alternative restructuring solutions to address the financial challenges.

The other typical “distinction” made between the two terms, ie that “insolvency” is used in relation to a corporation whereas “bankruptcy” is used in relation to individuals. That distinction again is one of form and not just of substance. As Sealey and Hooley correctly identified, there are different purposes to be served when considering insolvency/bankruptcy proceedings as against a corporation compared to an individual.

For individuals, the objective is to protect the debtor from harassment by his creditors and ultimately enable the debtor to make a fresh start and reduce indebtedness, taking into account his personal circumstances. Therefore for individuals, some legal systems recognise the concept of exempt or excluded assets, whereas no such concession is made for corporations.

For corporations, individual wrongdoing and liabilities come to the fore. While the business may be preserved if it is viable, the continuation of the corporation itself is not a priority, and individuals who have abused the corporation will be made liable for the company’s state of indebtedness.

While there are similarities below, as Wood identified, these similarities do not detract from the differences above and it would be neater to properly distinguish between the two terms:

(a) Actions by creditors against the insolvent/bankrupt are stayed;
(b) Assets of the debtor are pooled so that they are available to creditors, generally;
(c) Creditors are paid off *pari passu* from that pool of assets, save for priority or secured creditors.

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.

Cross-border insolvency refers to situations where a financially distressed corporation or individual has assets and creditors in multiple jurisdictions. There are unavoidable challenges in unifying the approach between States in such circumstances given the inevitable diversity of legal systems and cultural differences across the different States involved.

Some of the key challenges include:

(a) The different legal systems: As of now, there are many competing and divergent legal systems that are difficult to reconcile. Some states take a more debtor-friendly approach while others are more pro-creditor. Further, some laws are governed by the common law while others by the civil law. Many countries also have different systems for ranking creditors’ claims and the treatment of secured and unsecured creditors. As the starting points for each legal system is at present at opposite ends, it will be difficult to harmonise these differences in a short period of time.

(b) Each State has conflicting public policies which will hinder any universal application of insolvency laws, for example, whether extra protection is given to employees, local key industries or public interests specific to that State.
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" refers to legally binding and enforceable rules and regulations, including treaties, conventions and international agreements. One such example is the Nordic Convention 1933 which facilities cross-border cooperation in the Nordic jurisdictions, and the Istanbul Convention, Council of Europe Treaty Series Number 136.

On the other hand, "soft law" refers to non-binding, voluntary guidelines or recommendations that do not create legally enforceable obligations. Compared to "hard law", soft law instruments are more flexible and can be adopted and adapted by each State.

"Soft law" has been the most successful in solving the challenges of international insolvency. One pertinent example is the UNCITRAL Model Law on Cross-Border Insolvency, which allows member States to adopt the form of the draft recommended legislation but also make the necessary modifications where needed. This flexibility has likely been key to its success.

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.

She may rely on the Cross-Border Insolvency Regulations 2006, which is based on the UNCITRAL Model Law on Cross-Border Insolvency and apply to Court to request recognition of the liquidation under American law.

It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.

2

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 is the EU Regulation on Insolvency Proceedings (Recast) 2015 (the "**EIR Recast**").

The main proceeding should be opened in the "centre of the debtor's main interests" ("COMI"), i.e. the place where the company conducts the administration of its interests on a regular basis and which is ascertainable by third parties: Art 3(1) of the EIR Recast.

The presumption is that the COMI is the place of the company's registered office which in this case is Italy, but this presumption only applies if the COMI was not moved within 3 months prior to the insolvency proceedings. That is not an issue here as it has been 3 years since Brexit and since the COMI was moved from England to Italy.

It does not matter that the main operations occurred in Germany, given that its management was directed from Italy as the Court will consider whether the company's "*actual centre of management and supervision and of the management of its interests*" (preamble of EIR Recast at [30]) is located in Italy. In this case, its management was directed from Italy.

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, as the EIR Recast only applies within the European Union and its member states.

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.)

As Italy and the Netherlands is part of the EU, this issue is governed by the EIR Recast.

Article 7.1 of the EIR Recast provides that "*the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened*".

However, where security rights are concerned, paragraph 68 of the preamble to the EIR Recast provides that:

The basis, validity and extent of rights in rem *should therefore normally be determined according to the* lex situs *and not be affected by the opening of insolvency proceedings. The proprietor of a right* in rem *should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security. Where assets are subject to rights* in rem *under the* lex situs *in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights* in rem *arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights* in rem *should be paid to the insolvency practitioner in the main insolvency proceedings.*

Therefore, Dutch law will apply to the real rights of security situated in the Netherlands, and the insolvency practitioner must take out an application in the Courts of Netherland.

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.)

As Australia is not part of the EU, the EIR Recast will not apply.

However, Australia has incorporated the Model Law into its domestic law through the Cross-Border Insolvency Act 200. Australian law will therefore apply.

There is some scope to elaborate
2.5
Marks awarded 12.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40/50

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