INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the **best response** to this statement.

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an "executory contract" and its enforceability?

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the correct statement:

(a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

(a) This statement is untrue because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

Countries whose insolvency law systems have historical roots in civil law and those rooted in English law present distinct features due to their differing historical developments.

1. **Insolvency systems rooted in civil law**: These derive from Roman law, notably to Table 3 of the Twelve Tables, and were influenced over time by the principles of Lex Mercatoria. These systems generally lean towards a territorial approach in handling insolvency cases, focusing on resolving cases within their own jurisdiction.

   Unlike their English law counterparts, floating charge security is not common in civil law jurisdictions. Additionally, in civil law countries, foreign law is presumed to be a question of law and is applied as such, regardless of whether it is specifically pleaded by the parties involved.

2. **Insolvency law systems rooted in English law**: These principles developed later, with the first bankruptcy statutes emerging in the early 16th century. These systems tend towards a universalist approach, extending their jurisdictional reach in insolvency cases beyond their own borders.

   The concept of floating charge security, allowing creditors a security interest over a fluctuating pool of assets, is a common feature in these jurisdictions. Furthermore, in English law-based systems, foreign law is treated as a question of fact, meaning it is only considered in court proceedings if explicitly 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

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.

1. **Universalism:** The principle of universalism in insolvency law permits multiple insolvency proceedings originating in different states to be addressed by the insolvency law of one State, typically the State where the debtor has its centre of main interests (COMI). This approach allows the law of the "main proceeding" to have worldwide effect, advocating for "unity of proceedings" and enabling the primary legal system (the *lex concursus*) to govern the process.

2. **Territorialism**: On the other hand, territoralism allows for separate insolvency proceedings to be commenced in every State where the debtor has assets, but limits the scope of such proceedings to property within the State where those proceedings were opened. This can result in multiple, separate insolvency proceedings under the laws of different States.

3. **Modified universalism**: This approach arises from the lack of global consensus on universalism and the more territoralist approach adopted by many States. It combines elements of both universalism and territorialism. Under this approach, the "main proceeding" in the State where the debtor's COMI is located is supplemented by secondary or ancillary proceedings in other States, with courts from different jurisdictions expected 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.

To address international insolvency issues in Latin America, two key initiatives have been undertaken – the Montevideo Treaties (1889 and 1940) (*Montevideo*) and the Havana Convention on Private International Law (1928) (Bustamante Code) (*Havana*). The key differences between these initiatives include:

1. **Membership:** Different sets of states are members of each initiative:
    - The Montevideo Treaty on International Commercial Law (1889) has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. The Montevideo Treaty on International Commercial Terrestrial Law (1940) has been ratified by Argentina, Paraguay and Uruguay only.
    - On the other hand, more States have signed up to Havana (including Bolivia, Brazil, Chile and others) – but Argentina, Colombia, Mexico, Paraguay and Uruguay have not.

2. **Approach to insolvency proceedings**
    - Montevideo allows for the possibility of concurrent insolvency proceedings in different states, especially when a debtor operates economically autonomous businesses in those states. Montevideo does not accept that insolvency proceedings initiated in one Member State will have extraterritorial effect in another (as opposed to Havana).
    - In contrast, Havana advocates more strongly for a single proceeding with universal effect throughout its member states, except in cases of separate economic establishments in different states. Additionally, unlike Montevideo, it does not set out procedures for cooperation or coordination of any concurrent proceedings.

4

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.

The usage of the terms "bankruptcy" and "insolvency" varies depending on the legal jurisdiction and context. While these terms are often used interchangeably, there are nuances in their application, especially when considering corporate versus individual financial distress.

In some legal systems, "insolvency" and "bankruptcy" have distinct meanings. For instance, in England, "insolvency" typically refers to the financial state of a corporate entity, whereas "bankruptcy" is used to describe the financial state of an individual. However, in other jurisdictions, these terms may be used without such distinction. Generally, "insolvency" can be understood as the condition of a debtor who is unable to meet their financial obligations, while "bankruptcy" might refer to the formal legal process that a debtor undergoes when they are declared insolvent.

The key features of both "bankruptcy" and "insolvency" include a stay on individual creditor actions against the debtor, the pooling of the debtor's assets to repay creditors, and the proportionate repayment of creditors based on their claims, although this doesn't always include priority or secured creditors.

When considering corporate entities in contrast to individuals, some differences emerge. In the case of a corporation, the focus often lies on preserving the business or its viable parts, rather than the corporate entity itself. There's also an emphasis on the personal liability of directors and other responsible persons. Unlike with individuals, there's no concept of exempt or excluded assets in corporate bankruptcy/insolvency.

For individuals, the approach takes into account protection from creditor harassment and aims to reduce indebtedness through contributions from present and future income. Personal circumstances are also considered more closely in individual cases, which is not typically the focus in corporate insolvency or bankruptcy proceedings.

Elaboration is warranted including with respect to the essential characteristics discussed by Wood

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.

Cross-border insolvency faces several challenges that hinder the development of a single, global approach:

1. **Variability in legal systems:** Omar highlights the impact of different domestic norms on creditors' positions and priorities. This variability in national legal systems, from statutory frameworks to court-based remedies in the absence of legislation, poses significant challenges in harmonizing global insolvency laws.

2. **Defining insolvency:** Friman points out the difficulty in establishing a common definition of "insolvency" at an international level. The variation in interpretations—from long-term financial distress to short-term liquidity crises—complicates the development of a standardized approach to insolvency proceedings.

3. **Recognition and enforcement issues:** Fletcher's inquiry into which jurisdiction's laws should apply and the international effects of proceedings underscores the challenge in recognizing and enforcing insolvency decisions across borders. The absence of a global consensus on these matters leads to uncertainty and complexity.

4. **Conflict of laws and creditors' rights:** The conflict of laws, especially concerning creditors' rights and priorities in different jurisdictions, creates a complex landscape. Diverse rules on security, set-off, and title retention add to the intricacy in aligning these laws at an international level.

5. **Challenges in international cooperation:** Westbrook identifies nine crucial issues:

    a. Recognition of the office holder;

    b. Automatic stay/moratorium;

    c. Creditor participation;

    d. Executory contracts and how they are addressed;

    e. Co-ordination of claims procedure (proof of debt process in the UK);

    f. Priorities/preferences;

    g. Avoidance provision powers / antecedent transactions;

    h. Discharge of debt / corporate rescue; and

    i. Conflict of laws (as above).

    Harmonisation presents a potential solution, but many have questioned the feasibility of adopting such a model.

These challenges demonstrate the complexities involved in creating a cohesive and universally applicable cross-border insolvency framework.

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” and “soft law” represent two difference approaches to legal regulation and influence:

1. **Hard law:** This refers to legally binding agreements, such as treaties and conventions, adopted by states and incorporated into their domestic legal frameworks. These laws are enforceable in the courts of the signatory states.

    An example of this is the European Insolvency Regulation (*EIR*), particularly the 2015 recast (Regulation (EU) 2015/848), which provided binding rules for EU member states on jurisdiction and recognition of insolvency proceedings. However, hard law has had limited success in the field of international insolvency due to challenges in widespread ratification and implementation, as evidenced by the Istanbul Convention on Certain International Aspects of Bankruptcy which was not ratified sufficiently to enter into force.

2. **Soft law:** Soft law comprises non-binding guidelines, model laws, codes or recommendations provided by international bodies. While not legally enforceable, they significantly influence national legislation and international practice.

The UNCITRAL Model Law on Cross-Border Insolvency is a prime example, offering a framework for countries to adapt in their domestic insolvency laws. Its success is attributed to its wide adoption across various jurisdictions, aiding in harmonizing approaches to cross-border insolvency despite its non-binding nature.

In conclusion, hard laws in international insolvency, though legally binding, face challenges in global adoption, whereas soft laws, through their flexibility and adaptability, have been more effective in shaping and harmonizing international insolvency practices.

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]

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 American insolvent estate representative of Norton Cars Inc can utilize several legal avenues under English law for recognition and cooperation in managing the company's assets located in England:

1. **Cross Border Insolvency Regulations 2008 (incorporating the UNCITRAL Model Law on Cross-Border Insolvency into English law)**: This would be the primary mechanism for seeking recognition of the American insolvency proceedings in England. Pursuant to these Regulations, the American insolvent estate representative can seek assistance from the English Court (assuming the liquidation proceedings are "collective proceedings").

   Norton Cars' centre of main interests (*COMI*) was in England at the time of filing. As such, the American proceedings will be "foreign main proceedings" for these purposes and give rise to an automatic stay and the ability to request appropriate relief.

The Model Law facilitates cooperation between jurisdictions and provides a framework for recognizing foreign insolvency proceedings. However, as per Lord Collins' statement in *Rubin v Eurofinance SA*, it's important to note that this may not extend to the enforcement of foreign judgments against third parties.

2. **Common law principles:** The House of Lords decision in *McGrath v Riddell* also upholds the principle of comity and underscores the common law jurisdiction of English courts to cooperate with foreign insolvency proceedings. This includes directing ancillary liquidators to remit assets to the principal liquidator in the country of the main insolvency proceedings (i.e. the US), provided this is consistent with justice and UK public policy.

The USA is not a relevant country or territory for the purposes of section 426 of the Insolvency Act 1986, so that will not apply.

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.

1. The applicable legal sources are:

    a. **Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (*EIR Recast*) (as amended by way of Regulation 2021/2260 of 15 December 2021):** This regulation applies to EU Member States, including Italy and Germany.

    b. **National insolvency laws of Italy and Germany:** This includes, in the case of Germany, the *Insolvenzordnung (InsO)*.

2. **Jurisdiction for main insolvency proceedings:** According to the EIR Recast, the main insolvency proceedings should be opened in the Member State where the debtor's COMI is located. In the case of Norton Cars, since the COMI is in Italy, the main proceeding should be opened there.

    However, if significant business operations are in Germany (noting its subsidiary, Gladiator Manufacturing), "independent proceedings" (if opened prior to the Italian proceedings) / "secondary proceedings" (if opened subsequent to the Italian proceedings) could be opened there.

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) Insolvency Regulation does not have direct legal authority or applicability in countries outside of the European Union, such as India, South Africa or Australia.

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.)

Italian law would apply to the insolvency proceeding (given the main proceedings are taking place in that jurisdiction).

However, in cross-border insolvency cases, the law of the State where the assets are located (*lex situs*) usually applies to real property and security interests. Dutch law, i.e. the *Faillisementswet* of 1897, would therefore typically apply to these assets and the associated real rights of security.

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.)

Australian law would apply (see answer to Question 4.3). The Corporations Act 2001 (Cth) is the primary legislation for corporate insolvency and would be the relevant instrument for these purposes.

Australia has also adopted the UNCITRAL Model Law via the Cross-Border Insolvency Act 2008 (Cth), which facilitates cooperation between Australian courts and foreign insolvency practitioners and courts in cases involving cross-border insolvency. However, the Model Law respects the local laws relating to security interests, meaning Australian domestic law would primarily govern real rights of security on assets located within its jurisdiction.

3

Marks awarded 15 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 47/50

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