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: 202122-545.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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2021**. 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 **9 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

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1570. Select the **most accurate response** to this statement from (a) – (d) below.

(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 1.2

English insolvency law was not affected by the Covid-19 pandemic to date. Select the **most accurate response** to this statement from (a) – (d) below.

(a) This statement is correct since the UK decided to merely provide financial aid to financially troubled entities and individuals.

(b) This statement is correct since the legislative reform process in the UK is too slow to effect amendments to an elaborate piece of legislation such as its Insolvency Act of 1986.

(c) This statement is correct since the English insolvency law already provided special rules to deal with extreme socio-economic situations like those brought about by global disasters such as the Covid-19 pandemic.

(d) The statement is incorrect since the UK did review parts of its insolvency rules and amended some, amongst other things, to deal with the negative economic fall out of the pandemic.

Question 1.3

Since the Dutch insolvency system is rather outdated when compared with English or American insolvency / bankruptcy laws, it does not provide for a modern scheme of arrangement that could be used to reorganise or rescue a company in distress. Select the **most accurate response** to this statement from (a) – (d) below.

(a) This statement is correct since the Dutch insolvency system does not provide for a discharge of debt and without such a dispensation in place, a scheme of arrangement will not be functional.

(b) This statement is correct since the Dutch government has not approved such legislation yet.

(c) This statement is incorrect since the Dutch in fact introduced new legislation in this regard in 2000 already.

(d) This statement is incorrect since the Dutch quite recently adopted legislation in this regard and it became operational on 1 January 2021.

Question 1.4

There is no real need for the reform and establishment of a more uniform set of cross-border insolvency rules since the courts of the various States around the globe are well-equipped to deal with such issues by way of judicial discretion and since the broad rules of local insolvency legal systems are largely the same. Select the **most accurate response** to this statement from (a) – (d) below.

(a) This statement is correct since courts cooperating across jurisdictional borders are familiar with global insolvency principles.

(b) This statement is correct since courts across the globe are inclined to apply comity as a principle to assist foreign estate representatives to deal with cross-border insolvency matters in a coherent way.

(c) The statement is not correct since both local insolvency systems as well as cross-border insolvency rules differ quite significantly in many respects.

(d) This statement is correct since apart from the wide discretion that judges in general have, the UNCITRAL Model Law on Cross-Border Insolvency has been adopted by the majority of UN Member States, hence these rules are well-known to judges across the globe.

Question 1.5

Universalism has become the main approach regarding the application of cross-border insolvency rules around the globe since the majority of States follow a strict adherence to comity. Select the **most accurate response** to this statement from (a) – (d) below.

(a) The statement is not correct because very few States allow insolvent estate representatives to deal with assets of a foreign debtor situated in their own jurisdiction without some form of a (prior) local procedure to recognise the foreign insolvency proceeding.

(b) The statement is correct because universality has become the norm in the majority of States in cross-border insolvency matters since the introduction of the UNCITRAL Model Law on Cross-Border Insolvency in 1997.

(c) The statement is correct because the prevalent approach of modified territoriality amounts to a universal embracement of universalism amongst the majority of States around the globe.

(d) The statement is not correct because important international policy-making bodies such as the International Monetary Fund (IMF), the World Bank Group and the United Nations still support strong territoriality in cases of cross-border insolvency cases.

Question 1.6

A number of initiatives have been pursued in international insolvency in order to stimulate debate and to develop international best practice standards. Which of the following statements is **most accurate** regarding the World Bank's *Principles for Effective Insolvency and Creditor / Debtor Regimes*?

(a) They were developed in 2000 and are the international best practice standards for insolvency regimes.

(b) They were recently revised in 2021 and, together with the UNCITRAL Legislative Guide, form the international best practice standard for insolvency regimes.

(c) They were recently revised in 2020 and, together with the UNCITRAL Model Law on Cross- border Insolvency, form the international best practice standard for insolvency regimes.

(d) They were initially released in 2011 and are the international best practice standards for insolvency regimes.

Question 1.7

Which of the following **does not** focus on communication among States in international insolvencies?

(a) ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases.

(b) The JIN Guidelines.

(c) The JIN Modalities.

(d) The Nordic Convention 1933.

Question 1.8

Which of the following **best describes** the fundamental legal issues that arise in an international legal problem?

(a) Choice of forum, choice of law, and choice of jurisdiction.

(b) Choice of forum, recognition and effect accorded foreign proceedings in the same matter, and choice of law.

(c) Choice of effect, choice of recognition, and choice of law.

(d) Choice of forum, recognition and effect accorded foreign proceedings in the same matter, and choice of parties.

Question 1.9

Which of the following statements **best describes** the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*?

(a) It is not intended to be prescriptive and is intended to provide information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases could be facilitated by cross-border co-operation.

(b) It is prescriptive and provides information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases must be facilitated by cross-border co-operation.

(c) It is prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.

(d) It is not prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.

Question 1.10

What **best describes** the overriding objective of the ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases?

(a) To interfere with the independent exercise of jurisdiction by the relevant States' courts and ensure an effective outcome.

(b) In urgent situations only, to interfere with the independent exercise of jurisdiction by the relevant States' courts in order to ensure an effective outcome.

(c) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than one State through communications among the States involved.

(d) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than three States through communications among the States involved.

Marks awarded 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate three significant (historical) developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law.

1. The English Bankruptcy Act of 1542 promoted the appointment of a body of commissioners who could proceed against a defrauding debtor who had absconded or neglected to pay his debts on a creditor's application. It allowed compulsory administration and distribution of the debtor's assets on the basis of equality amongst all the creditors.
2. The Statue of Ann of 1705 first introduced the idea of a statutory discharge. Unlike modern times, it was not an automatic entitlement and the commissioners had to be satisfied that the debtor had conformed an co-operated during the proceedings.
3. The English Bankruptcy Act 1883 introduced the role of Official Receiver, who was responsible for administrating debtor's estate even before the commencement of bankruptcy procedure. His role was later extended to winding up proceedings instead of personal bankruptcy at the time of introduction.

It would be beneficial to elaborate on how these shaped modern insolvency law.

The question asked you to indicate significant developments, rather than legislations per se. You needed to identify developments that shaped the way of thinking with respect to modern insolvency law. You have identified collective participation by creditors. You have also made reference to "statutory discharge". It would be beneficial to elaborate with respect to fresh start. Other things to consider are the abolishment of imprisonment for debt or the introduction of formal regulatory structures.

2

Question 2.2 [maximum 3 marks]

Following the Covid-19 pandemic, States across the globe had to introduce measures to deal with the negative economic fall out of this pandemic. Briefly indicate three insolvency and insolvency-related measures so introduced in the UK.

The Corporate Insolvency and Governance Act 2020 was passed and examples of new measures (some are permanent and while some are temporary) are as follows :

1. A new restructuring plan was introduced to help viable companies struggling with debt obligations as Courts can sanction a plan if it is fair and equitable. The Plan would bind on all creditors, even for those who vote against it.
2. Service of statutory demands would be void if it was served on a company during the "relevant period", i.e. between 1 March 2020 and 30 September 2021.
3. Restrictions were imposed on winding-up petition where the unpaid debt is due to the pandemic. The Court would review winding-up petitions to determine the cause of non-payment and no order would be made in such cases.

3

Question 2.3 [maximum 4 marks]

Briefly explain the concept of treaties and "soft law" and indicate how these may be used to establish cross-border insolvency rules in States.

1. Treaties are public international instruments or written agreements between two or more countries which are formally approved and signed by their leaders. The States would be bound and their domestic law would be affected such that their domestic law should not be contradicted with the principles laid down in the treaties. However, it had not been very successful in Europe in using treaties to establish cross-border insolvency rules.
2. In contrary to hard law, soft law refers to quasi-legal instruments which do not have binding force legally or weaker binding force than traditional law. One of the most successful examples of soft law used to establish cross-border insolvency rules in States is the Model Law on Cross-border Insolvency (MLCBI). It is a model law and draft legislation that the States are recommended by UNCITRAL to adopt the same with or without modification.

4

Marks awarded 9 out of 10

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

Question 3.1 [maximum 5 marks]

Briefly discuss the various possible different sources of insolvency laws in any State and how they may interact with each other.

Hong Kong is taken as an example in this answer. Although it may not be a "State" being a part of the PRC, Hong Kong is having her own independent legal system and legislation.

The principal legislation in Hong Kong relating to corporate insolvencies is the Companies Ordinance (Cap. 32) and supplemented by the Companies (Winding Up) Rules (Cap. 32H). The Bankruptcy Ordinance (Cap. 6) is related mainly to personal bankruptcy while also applies to corporate insolvencies in certain provisions. Other legislations like Conveyancing and Property Ordinance (Cap. 219), Protection of Wages on Insolvency Ordinance (Cap. 380) and Transfer of Businesses (Protection of Creditors) Ordinance (Cap. 49), etc. are also relevant in considering specific aspects in insolvency cases.

Following the governance of the UK, Hong Kong is also adopting the common law approach. As an international financial center, insolvency issues are often considered in the Courts thus provided a wealth of case laws which laid down the principles to be followed. The principles in the abovementioned legislations are often referred and relied on in Courts' judgments.

However, the UNCITRAL Model Law on cross-border insolvency is not recognized in Hong Kong for the time being. In handling cross-border insolvency issues, the Courts would take pragmatic approach and recognize foreign decisions in considering steps to be taken in Hong Kong.

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider Hong Kong, rather you've been asked to consider the sources of laws in any State. This question requires you to consider different types of sources of law and how they interact.

2.5

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

The three pertinent questions/issues raised by Fletcher were :

1. In which jurisdictions may insolvency proceedings be opened?
   - Insolvency proceedings could be opened concurrently in more than one State, depending on which approach is adopted (universalism vs territorialism). Should universalism be adopted, there could be problem of whether certain judgment made in one State can be enforced in another. Should territorialism be adopted, there could be problem of multiple proceedings dealing with one single aspect of the case.

2. What country's law should be applied in respect of different aspects of the case?
   - In the proceedings commenced in one State, the laws of that State should be applied and applied with its own choice-of-law rules. With the introduction of model laws (such as UNCITRAL Model Law on Cross-Border Insolvency), insolvency proceedings are being dealt with a more unified manner and the Court's decision would be more recognized in other State.

3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?
   - Usually, very limited extraterritorial effects would be granted to foreign proceedings. However, with the help of solutions like the UNCITRAL Model Law, when a foreign proceedings should be accorded recognition could be determined.

5

Question 3.3 [maximum 5 marks]

It is said that "co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; by UNICTRAL in their *Practice Guide on Cross-border Insolvency Agreements*; and by the Judicial Insolvency Network in their *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters*…"

It is also said that "While court approval of such agreements for the purposes of co-ordinating insolvency proceedings is encouraged by the MLCBI, they in fact pre-date the Model Law."

Briefly discuss a prominent case law example for this last quotation.

A prominent case law example is the Maxwell Communications Corporation plc cross-border insolvency case in 1991.

As the UNCITRAL Practical Guide pointed out, in the absence of formal treaties or national legislation to address the problems arising from international insolvencies has encouraged insolvency practitioners to develop strategies and techniques for resolving conflicts arising when the Courts of different States attempt to apply different laws and enforce different requirements on the same set of parties.

In the Maxwell case, the company was placed into administration in England and contemporaneously into Chapter 11 proceedings in New York, with administrators and an examiner appointed respectively.

In view of the two separate proceedings against a single corporation, the judges in the two jurisdictions suggested that an insolvency agreement between the two administrations would help to resolve conflicts and facilitate the exchange of information.

There are two main goals set under the agreement, i.e. maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. Indeed, both goals would be for the best interest of the creditors, irrespective of their origins, as they could get the biggest possible return from the proceedings.

In determining the most appropriate forum, one court would have to be deferring to another. In the Maxwell case, the United States Court concluded that the law of the jurisdiction having the greatest interest in the outcome of the controversy, i.e. the English law, should govern.

Some examples of co-ordination between the parties in the Maxwell's agreement are :

1. The English insolvency representatives would only be allowed to select new and independent directors for Maxwell with the consent of the US counterpart;
2. The English insolvency representatives should only incur debt of file a reorganization plan with the consent of the US counterpart or the US court; and
3. The English insolvency representatives should give prior notice to the US counterpart before undertaking any major transaction on behalf of Maxwell.

As the MLCBI was adopted on 30 May 1997, the Maxwell case had shown that court approval for co-ordination agreements indeed pre-date the Model Law as the English and US Courts had endorsed the agreement having considered numerous issues and set out certain conditions.

5
Marks awarded 12.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Rydell Co Ltd (Rydell) is an incorporated company with offices in the UK and throughout Europe. Its centre of main interest (COMI) is in the UK. Rydell supplies engine parts for large vehicles, including airplanes, and has had a downturn in business due to border closures and travel restrictions throughout the Covid-19 pandemic.

Rydell's main creditor is Fernz Co Ltd (Fernz) which is incorporated in a country in Europe that is a member of the EU. Fernz is considering commencing proceedings or pursuing other options with respect to recovering unpaid debts from Rydell.

There are a number of other creditors owed money by Rydell, who are located throughout different countries in Europe which are all members of the European Union.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 7 marks]

An insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June 2020. A month later, Fernz was considering also opening proceedings in another country in Europe which was a member of the European Union.

Discuss if and how the European Insolvency Regulation Recast would apply. Also note what further information, if any, you might require to fully consider this question.

European Insolvency Regulation Recast applies to insolvencies beginning on or after 26 June 2017 and replaced and superseded the European Insolvency Regulation 2000. It sets out conflicts of law rules for insolvency proceedings concerning debtors based in the EU with operations in more than one member state (like Rydell), giving particular prominence to

insolvency proceedings begun in the member state in which a debtor has its centre of main interests.

UK ceased to be a member of the EU at 11pm on 31 January 2020. However, the European Insolvency Regulation Recast applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period, i.e. 11pm on 31 December 2020).

As Rydell was having its COMI in the UK, the European Insolvency Regulation Recast allocates jurisdictional competence to the courts of a member state (as UK then was), therefore the insolvency proceedings commenced by the minor creditor would be given particular prominence as it was opened before the expiry of the transitional period.
It would be beneficial to elaborate upon automatic recognition of such proceedings and judgments across the EU.
However, the European Insolvency Regulation Recast also allows for the possibility of subsidiary territorial proceedings in other member state (given Fernz is not commencing its proceedings in Denmark). This is possible as Rydell is also having its office throughout Europe, i.e. it has "establishment" being "any place of operations…where the debtor carries out a non-transitory economic activity with human means and assets" as defined in the European Insolvency Regulation Recast.

> **It would be beneficial to consider the need for further information as to whether Rydell has an establishment in the other country in Europe where the other proceedings were intended to be commenced by Fernz.**

It would be beneficial to consider specific provisions of the EIR Recast and their application.

5.5

Question 4.2 [maximum 3 marks]

How would your answer to 4.1 differ if the proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020? Also note what further information, if any, might become relevant.

As the proceedings were opened in the UK after expiry of the transitional period, the European Insolvency Regulation Recast would no longer be directly applicable and the situation is still currently unclear. Without a formal adoption of the European Insolvency Regulation Recast to the UK, insolvency proceedings in EU member states will no longer be automatically recognized in the UK and vice versa. Although foreign insolvency practitioners will be able to apply for recognition under UNCITRAL Model Law in the UK, the reverse does not apply.

Only a limited number of EU member states (e.g. Greece, Poland and Romania) have implemented UNCITRAL Model Law, which means insolvency practitioners from the UK could face significant obstacles in obtaining recognition in EU countries after Brexit.

It is therefore vital that we obtain a reciprocal agreement with the EU for the continued recognition of insolvency proceedings after Brexit, or ideally to maintain the application of EIR to the UK, or IPs could be forced to navigate the complexities of local laws to obtain recognition in EU member states.

3

Question 4.3 [maximum 5 marks]

Consider an alternative situation now. What if Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, and formal insolvency proceedings were opened in the UK on 18 June 2021? What UK domestic laws

would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK?

In view of the economic downturn caused by COVID-19 pandemic, the Corporate Insolvency and Governance Act 2020 came in force on 25 June 2020. It consists of permanent measures to update the UK insolvency regime and temporary measures to insolvency law and corporate governance to assist businesses during the pandemic.

Despite almost all of its provisions commenced on 26 June 2020, most of its temporary business protection measures have retrospective effect from 1 March 2020.

Under those temporary business protection measures, restrictions were imposed on winding-up petition where unpaid debt is due to COVID-19. As in the case of Rydell (being a supplier of engine parts for large vehicles including airplanes), they were unable to pay its debt due to border closures and travel restrictions during the pandemic.

The UK Court would review and determine the cause of non-payment. Should it be found that the debt was due to COVID-19, no winding-up order could be made if the petition was presented during the "relevant period" (which expires on 20 September 2021).

Modified rules were also applicable during extended period between 1 October 2021 to 31 March 2022. Winding-up petitions may only be presented for debt over £10,000, debtor has been given 21 days to respond with a repayment proposal and the debt is not related to COVID-19 (for commercial rents only).

It would be beneficial to also consider how jurisdiction could be established with respect to an unregistered company. S221(5) of the Insolvency Act should be considered together with concepts of 'sufficient connection'.

2.5
Marks awarded 11 out of 15

TOTAL MARKS 39.5/50

*** End of Assessment ***