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 10 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.

Three significant developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law are assignment of property; forced liquidation of assets; and compositions with creditors which would have developed from individual debt collection and contributed towards the development of modern insolvency law.

It would be beneficial to instead consider the significant historical developments such as discharge which has shaped modern insolvency concepts of fresh start, the abolishment of imprisonment for debt and the modern insolvency concept that insolvency is not a criminal act, and the introduction of formal insolvency proceedings and the modern management of insolvency processes.

.5

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.

Three insolvency and insolvency-related measures introduced in the UK to deal with the negative economic fall out of the pandemic include:

The Corporate Insolvency and Governance Act 2020 was passed and includes:

a. New restructuring Plan
b. New Moratorium Rules
c. Relaxation of wrongful trading liability

In addition to the three measures above, the Corporate Insolvency and Governance Act 2020 also include: Suspension of winding-up petitions and statutory demands.

Further elaboration would have improved your mark for this sub-question.

2

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.

Treaties are formal agreements between States and are therefore binding, **It would be beneficial to address the need for signatures** while soft law can be viewed as a more relaxed approach and can be considered non-binding.

Treaties can be used to establish cross-border insolvency rules in States as States agree at an outset on procedures that will have an effect on their local law, and as such become part of their 'hard law'. This will allow for set rules and laws when dealing with cross-border insolvency matters which allows for unified laws for the States.

However, implementation of treaties may be difficult and time consuming in getting States to come to one set of agreement.

Soft law on the other hand can be used to establish cross-border insolvency rules as it is a more flexible option and avoids hard commitment and can be seen as a faster route to legal commitment such as with the UNCITRAL Model Law on Cross-Border Insolvency.

3
Marks awarded 5.5 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.

There are various sources of insolvency law that can be adopted in different States.

Using England as an example, the Insolvency Act 1986 (the "Act") is the main legislation which regulates insolvency law, which represents an example of legislation that deals with personal and corporate bankruptcy.

The Act has resulted in amending aspects in the Insolvency Act 2000 and aspects within the Enterprise Act 2002. Similarly, the Debt Relief Order which impacts individuals was introduced in 2009, along with other insolvency related reform as a result of the 2020 COVID-19 pandemic, which lead to the Corporate Insolvency and Governance Act 2020.

In addition to above, England and Wales adopted UNCITRAL Model Law on Cross-Border Insolvency in 2006; and, can the insolvency laws in the UK can gain influence from rules and regulations such as the Insolvency Rules and Insolvency Practitioners Regulations; and, while no longer part of the European Union ("EU"), aspects of the EU Insolvency Regulations will still apply to cross-border insolvency matters between the UK and EU States.

Finally, the UK's insolvency law can also be influenced from common law case president resulting from court judgements.

With his in mind, it is evident that the insolvency laws in the UK are influenced from many different sources, that all interact with each other under various circumstances – from corporations to individuals to impacts from global influences such as the pandemic and globalization on a whole which results in international trade and cross-border transactions.

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider the UK, 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.
It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.
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 pertinent questions or issues raised by Fletcher are:

1) In which jurisdiction may insolvency proceedings be opened?
2) What country’s law should be applied in respect of different aspects of the case?
3) What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

The above questions take into consideration the fact that insolvency proceedings could be opened concurrently in multiple states and each with its own laws. It further assumes that there will be limited extraterritorial effects from foreign proceedings.

The questions are important in highlighting the major issues faced in cross-border insolvency matters as assessed below.

Jurisdiction

The question of what jurisdiction arises from the matter of where the debtor, the creditor and the assets are located, and whether the jurisdiction of the proceedings will recognize the jurisdiction of the assets, or creditors. For example, where a creditor is located in one jurisdiction, but the debtor is registered in another. Would the creditor’s jurisdiction be the appropriate territory to bring proceedings? What if there are no assets in the creditor’s jurisdiction OR even the debtor’s jurisdiction? Another consideration may be the jurisdiction that the contractual obligations are governed.

Law to be applied

Secondly, where there are cross-border insolvency proceedings, a major issue is determining which law governs which aspects of the case. For example, if there are several creditors in different territories, will one particular law govern all cases? Does the law allow for co-operation and communication between the courts?

Courts will also need to determine whether it will draw upon influences of judgements on other cases, and determine which law to apply. For example, under a common law system, case precedent is often used, unless a party to the proceedings invoke foreign law or judgement.

Forum

Finally, the third question addresses forum. This can be seen through the term ’forum shopping’ whereby litigants choose to be heard in the court thought to be the most favourable for a judgement. For example, some jurisdictions/courts are more ‘plaintiff friendly’, or in this case, some courts/jurisdictions are easier in relation to enforcement.

The question is used to address the matter of whether a court has the ability to, and whether it will hear and determine a particular matter, and often involves an examination of the jurisdiction of the parties to the proceedings.

Foreign judgements raise the issue of the court that passed the judgement, and whether the judgement can be enforced in the domestic court.

There is scope to elaborate regarding choice of law issues.

4.5

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 pls cross-border insolvency case in 1991 (the "Maxwell Case").

In the Maxwell case, there were concurrent proceedings under Chapter 11 in the United States parallel to administration proceedings in England, which were co-ordinated through an 'Order and Protocol'. This Order and Protocol was approved by the courts in their respective states.

The two proceedings were initiated by one single debtor and involved the appointment of two separate insolvency representatives in both states – each with their own, but similar responsibilities. In the case, both the US and the England courts agreed that it will be more efficient for there to be an insolvency agreement between both representatives which may seek to resolve conflicts and facilitate the exchange of information.

The main goals of the agreement are to maximize value within the estate and to harmonize the proceedings in an effort to reduce costs, reduce duplication of effort and avoid jurisdictional conflicts.

Within the agreement, the US court deferred to the English proceedings, with certain specifications, namely that there would be some of the management team maintained to run the debtor as a going concern, but with the inclusion of directors elected with the consent of the representatives. Furthermore, the agreement stated that the English representative can incur debt or file reorganization plans with the consent of their US counterpart. The English representative is also stipulated to notify the US counterpart prior to undertaking any major transactions.

While this agreement was made and executed prior to the MLCBI, it provides a great example of how co-ordination agreements can be used as 'Protocols' in cross-border insolvency proceedings. However, for the agreements to be effective, they are agreed upon by the representatives prior to submission to the courts for approval.

5

Marks awarded 12 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.

Under the European Insolvency Regulation ("EIR") (Recast) ("EIR Recast"), which became its current form in 2015 and became effective in mid-2017, it is stated that the applicable law governing the proceedings will be that of the state in which the proceedings were opened.

Under the former EIR, for jurisdictional purposes, the primary or main proceedings was allocated to the centre of the debtor's main interest ("COMI"), being where the debtor conducts substantially its administration of its interest on a regular basis and which is ascertainable by third parties (Article 3(1) EIR Recast).

It also allows for sub proceedings to be commenced in territories where the debtor also has an establishment, being a place of operation and economic activity. The sub proceedings can either be independent from the main proceedings or secondary proceedings. To determine whether it is independent or secondary, is dependent on whether the sub proceedings commenced prior to the main (independent), or whether is commenced subsequently (secondary).

In relation to the case above, with the COMI being the UK, and a minor creditor opening proceedings against Rydell in the UK, the minor creditor's proceedings will be considered the main proceedings under EIR Recast.

Similarly, due to the timing of the proceedings, the UK fell under the EU, and the EIR Recast would therefore apply in this case, making the proceedings which Fernz commence to be considered as a secondary proceeding.

Although Fernz will not be under the primary proceedings, the EIR Recast includes provisions for rights in rem against property, detrimental acts, where there may be immovable property, and set-offs. Furthermore, the EIR Recast promotes co-operational and co-ordination between the courts in the EU of which the UK is (at the time) a part of.

It would be beneficial to discuss in further detail how such secondary proceedings are permitted where the debtor has an "establishment". An establishment is defined as meaning "any place of operations … where the debtor carries out a non-transitory economic activity with human means and assets"

It would also be beneficial to consider in further detail 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.

4.5

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.

The European Insolvency Regulation (Recast) ceased application in the UK as at 11pm on 31 December 2020 following the UK's exit from the European Union on 31 January 2020. The EIR Recast would only apply whereby proceedings commenced prior to or during the transitional period between 31 January 2020 to 31 December 2020.

This will mean that the EIR Recast would not take effect at the proposed time of 18 June 2021. and should Fernz wish to conduct proceedings in a European territory, will need to consider how the UK proceedings will be recognized in a European State. Notwithstanding, the EIR Recast included areas of amendment such as hybrid proceedings, expanding on the COMI and recognition of insolvency proceedings outside of the EU.

It should also be noted that if Fernz commences proceedings in the EU, thereby causing proceedings to be within, and outside of the UK (and equally, within, and outside the EU), the UK's Insolvency Act 1986 does allow for recognition and cooperation with foreign insolvency proceedings.

It would also be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCBI and if not what laws would need to be considered in those countries.

2.5

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?

The domestic UK laws which would be relevant to consider in the case of whether the minor creditor could commence formal insolvency proceedings in the UK is the UK's Insolvency Act 1986 ("Insolvency Act").

Under the Insolvency Act, the English Court will have jurisdictional right to wind-up a company formed in another state where that company has carried on business in the UK, although it may be unregistered in the UK. The consideration here is whether 'it has carried on business in the UK' applies. Given that the creditor is in the UK and the nature of Rydell's business, it may be possible to make this assumption.

Although the Insolvency Act allows for recognition and cooperation with foreign insolvency proceedings, under the Insolvency Act, the UK Court may defer the authority to the foreign liquidator.

Considering the major creditor is Fernz, which may commence foreign proceedings and the claim of the minority creditor may be lesser, the UK court may take the approach to defer authority to the foreign liquidator and the foreign Court.

It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

1.5

Marks awarded 8.5 out of 15

TOTAL MARKS 36/50

*** End of Assessment ***