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.

[- The English Bankruptcy Act was introduced in 1542 and allowed for debtors who were dishonest or try to escape or run away from their obligatory duties to be sequestered. Distributions of assets to creditors would be equally distributed. **It would be beneficial to elaborate and clearly state the development and how it shaped the way of thinking concerning modern insolvency law.**

- The Act of Elizabeth was introduced in 1570, which allows the creditor to open a bankruptcy proceeding against the debtor where the debtor fails to meet its demands and thus committing an act of bankruptcy. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

- The Statue of Ann was introduced in 1705 and provided for the statutory of discharge. This allowed for protection of debtors and a move away from a pro-creditor system. It has to be proved that the debtor co-operated with the legal system for the discharge to be entertained] **It would be beneficial to elaborate regarding modern concepts of fresh start.**

1.5

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.

[Corporate Insolvency and Governance Act 2020 was introduced in June 2020 and provided:

- for new restructuring tools (a new restructuring plan) to give companies the best chance of survival due to the pandemic by using elements from a scheme of arrangement procedure and the US Chapter 11 procedures.
- for a moratorium for companies that are likely to become insolvent. The moratorium would allow companies that are likely to become insolvent to obtain a payment holiday period in which they could seek to restructure or arrangement without creditor legal actions
- temporary bans on filing insolvency proceedings and statutory demands 1 March 2020 until 30 June 2020, where Covid-19 has had a financial effect on the debtor.
- temporarily suspends parts of the local insolvency law to aid directors by suspending the personal liability threat for wrongful trading so to that normal trading can continue through emergencies and to protect companies from creditors legal actions.
- Amends Company Law legislation to provide entities with temporary lifts on company filings and annual general meetings

Source: INSOL International – World Bank Group Global Guide]

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.

[- Soft law is used to describe agreements, principles and defined international instruments and statements of expected behaviour that are not legally binding and cannot thus be enforced.
- Treaties are agreements between Countries (States) which is binding at international law, can also be described as hard law, and is enforceable.

Providing territories with **soft laws** (guidance or suggested laws) to use as a guidance to evolve or restructure their insolvency laws and proceedings is great tool. As this allows the territories to implement their own insolvency laws that would best apply to their environment and in conjunction with other laws of the territories. This allows a soft adoption of already established insolvency laws. The best example of this is UNICTRAL that developed the Model Law on Cross-Border Insolvency. This soft law initiative has proven very successful as more and more countries are using to develop their own insolvency laws.

While soft law approach has seen more success, come hard law/treaties have seen success internationally like the Nordic Convention (1933), and the Istanbul Convention, Council of Europe treaty Series 136 which binds a number of international countries legally to standardised insolvency proceedings or laws. Creating a more universal insolvency approach when dealing with cross border cases for the countries bound by the treaties or conventions.]

4
Marks awarded 8.5 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.

[States will layout their insolvency laws into legislation or codes. These could be a unified piece of legislation like USA (Bankruptcy Code 1978) and England (Insolvency Ac of 1986).

States could have several separate legislations that would need to supplement each other. In order to obtain a full picture of the insolvency laws, these separate legislations would need to be looked at together, like is done in Australia. The laws for individual insolvency and laws for corporate insolvency are contained in different statues.

For states that’s uses a system with roots in common law, may also refer to common law principles with regards to any gaps in the insolvency laws. Furthermore, gaps in insolvency laws of certain states needs to refer to their General laws or non-insolvency laws for important legislation that does have impact on their insolvency law codes and legislation, an example would be rights of ownership or rights of real security.

]**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.

[- Fletcher asks the question "In which jurisdictions may Insolvency proceedings be opened?"

- Fletcher also asks the question "What country's law should be applied in respect of different aspects of the case?"
- Lastly, Fletcher asks the question "What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?" For states within similar regions

Usually cross-border insolvency cases can give rise to insolvency proceedings being opened or started simultaneously in multiple states with minimum extraterritorial effect, quickly causing the situation to become very complex as the core issues now, is to have the different states co-ordinate with each other even where the multi international legislations conflict each other.

For states within similar regions, multilateral agreements are very effective for states with that are grouped together and have constant interaction with each other through trade and business etc.

Due to most states domestic laws not being og a high standard and due its limitations, when cross border issues arises that touches on multi states legal systems, conflicts arises and it causes issues namely, which jurisdiction would the insolvency matter be raised in, its recognition and its effect that comes into play and which choice of law is applied to the insolvency case.

]

There is scope to elaborate upon choice of law concerns

4

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.

[The insolvency (bankruptcy) case of Maxwell Communications Corporation plc ("Maxwell") filed for Chapter 11 reorganisation proceedings in the United States of America ("USA"), and administration proceedings in England in 1991 to take full advantage of the prospects for reorganization. These were co-ordinated and approved through the courts of England and the USA. This matter predates the MLCBI that came in 1997.

The two insolvency proceedings resulted in the appointment of two separate insolvency representatives in each of the states. These representatives were authorised by their respective courts to work together, and this was enforced by a Protocol, which was the agreement between the insolvency representatives (the examiner/ administrators of the USA and the administrators of England)

The protocol or agreement provided for the sharing of information and for the resolution of conflicts between the two administrators.

The two main objectives under the agreement was to maximize the realisation of the estate assets and to ensure the proceedings could run smoothly to minimise expenses and conflicts.

The bilateral agreement included some of the following: the English representative could only incur debt or do a filing of reorganisation plan, or incur a major transaction on behalf of the debtor with approval of USA representative.

Certain matters were left out of the initial agreement, and only added in at later stage via an extension or amendment of the agreement e.g. distributions of assets.

]

This answer displays a good understanding. There is some scope to elaborate.

4

Marks awarded 13 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.

[The European Insolvency Regulation ("EIS") Recast will be applied here. The EIR Recast was adopted in 2015 and took effect two years later in 2017.

The first question that would arise is, where is the "centre of the main interest" ("COMI") of the debtor? EIR Recast applies to a debtor having its COMI within a Member State of the EU.

(note that under UK law, the EIR recast applies to main proceedings opened in the UK before 31 December 2020 11pm, this is due to the UK ceasing to be a member of the EU from 31 January 2020) **Further application to the facts of the case would be beneficial.**

Once it is established where the COMI is, this will be the jurisdiction where the main insolvency proceeding is opened. This is a crucial to determine as it depicts which state law is applicable and is critical in determining the assortment of corporate restructuring procedures available.

Rydell is incorporated in the UK which makes the COMI likely to be in the UK. Furthermore the creditor has opened insolvency proceedings in the UK by a minor creditor, thus the main insolvency proceeding would be in the UK and the UK insolvency laws applies to the main proceeding.

Under EIR Recast, provisions are made for subsidiary proceedings to be made in other EU states, which would run concurrently with the main insolvency proceeding. These are only permitted where the debtor has an establishment or place of operations where it carries out permanent economic activity **Elaboration regarding what is required for an establishment would be beneficial**

Rydell has offices in other EU member states, this could meat the criteria to open a subsidiary proceeding in that EU member state. However it should be determined if they carry out economic activity and that it is an establishment for purposes of the EIR recast criteria.

Under EIR Recast Fern cannot open a subsidiary insolvency proceeding in a EU state where Rydell has no establishment.]

It would be beneficial to make reference to specific relevant articles under the EIR Recast.

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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.

[Following on from Q4.1, The first question that would arise is, where is the “centre of the main interest” (“COMI”) of the debtor?

EIR Recast applies to a debtor having its COMI within a Member State of the EU. (note that under UK law, the EIR recast applies to main insolvency proceedings opened in the UK before 31 December 2020 11pm, this is due to the UK ceasing to be a member of the EU from 31 January 2020.

As the creditor opened insolvency proceeding on 18 June 2021, the EIR Recast will not apply. UK Insolvency laws would need to be applied to the proceeding opened in the UK.

For a proceeding opened by Fern in the EU country, a Cross Border Insolvency will arise and states will have to look to international insolvency cross border methods to navigate the case. EIR will be applied to cross border insolvency matters between the UK and the EU state.]

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 3 marks. It would be beneficial, for example to discuss the MLCBI etc.

1.5

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 laws that one would look to within the UK is the Insolvency Act 1986, which provides for co-operation between courts on insolvency matters.

A Cross Border Insolvency will arise and states will have to look to international insolvency cross border methods to navigate the case. EIR will be applied to cross border insolvency matters between the UK and the EU state.]

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 5 marks. It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

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Marks awarded 7 out of 15
TOTAL MARKS 38.5/50

*** End of Assessment ***