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 which shaped thinking concerning modern insolvency law include:

(1) Principle of collective participation by creditors introduced under the English Bankruptcy Act of 1542 (which sought to ensure administration and distribution of assets on the basis of equality of creditors)
(2) *Pari passu* distribution of available assets amongst creditors under the English Bankruptcy Act of 1542
(3) the 'notion of statutory discharge of debt' under the Statute of Ann of 1705

It would be beneficial to elaborate on how this shaped modern concepts of insolvency law by discussing 'fresh start'

The law of 1883 also laid down important principles for setting up machinery to deal with bankruptcy and established a fair process with sufficient supervision.

2.5

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.

In order to deal with the negative economic fall out of the Covid-19 pandemic, the UK passed the Corporate Insolvency and Governance Act 2020 (CIGA) to introduce the following insolvency related measures:

(1) Suspension of statutory demands if the demands were served in a specific period;
(2) Limitations on winding-up petitions in case the non-payment of debt was due to Covid-19; and
(3) Easing wrongful trading liability – it removed risk of personal liability for wrong trading for a certain period.

Other than the above measures, the CIGA also brought in an insolvency related measure by introducing a new restructuring plan which allowed cross-class cram down of creditors and new moratorium against creditor actions against debtors to allow them to pursue restructuring plans (Shalchi, Ali and Conway, Lorraine, "New business support measures: Corporate Insolvency and Governance Act 2020" at <<https://commonslibrary.parliament.uk/research-briefings/cbp-8971/>>, accessed 14 November 2021).

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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 or conventions are public international law instruments, which States become signatories to, thereby making it binding domestically. Once a State becomes a signatory to a treaty or convention and imports it domestically, it basically becomes a part of "hard law" that is binding and enforceable in its domestic courts.

An example of a successful multilateral convention relating to cross-border insolvency issues is the Nordic Convention of 1933 between Scandinavian countries like Norway, Denmark, Finland, Iceland and Sweden. Under the Nordic Convention, the law of the place or the home State where insolvency is initiated has a determining role in other member States. Other examples of treaties or conventions relating to cross-border insolvency issues include the Istanbul Convention (Council of Europe Treaty Series No 136) which was concluded in 1990 (it was not ratified by enough members to enter into force).

"Soft law" options on cross-border insolvency issues have achieved more success than "hard law" alternatives. "Soft law" is used to refer to initiatives by multilateral organisations which have laid down recommendatory principles for States to adopt in their insolvency regimes. What differentiates these from hard law, is that they merely provide recommendations and are not binding on the State. A prominent example of a "soft-law" initiative is the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-border Insolvency (MLCBI). Various countries have adopted UNCITRAL's MLCBI.

4

Marks awarded 9.5 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.

The different sources of insolvency laws in any State can be:

- **Unified domestic insolvency statute** - a single unified statute covering bankruptcy related issues. Examples include US' Bankruptcy Code of 1978;
- **Multiple statutes** - in certain jurisdictions there may be different statutes dealing with personal and corporate insolvency. For example, Australia has different statutes for personal and corporate insolvency;
- **Related general law** - even laws which are not technically insolvency law such as law relating to enforcement or security or title over properties also play a role in insolvency proceedings;
- **Common law principles in case of common law jurisdictions** – common law jurisdictions may rely on common law principles to deal with issues which aren't covered under the insolvency legislation;
- **Treaties or conventions** that the concerned State has entered into with respect to cross-border insolvency related issues; and
- **Private international law principles** in relation to cross-border insolvency related issues.

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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 questions posed by Fletcher in relation to convergence of "cross-border" and "insolvency" issues are:

(1) Which jurisdiction should insolvency proceedings be initiated in?

(2) Which country's law should apply to different aspects of an insolvency case?
(3) What international effects (such as enforcement issues) will be given to insolvency proceedings at a particular forum?

In case of an insolvency proceeding which has cross-border elements, for example one in which the debtor's centre of main interest lies in country A but which also has assets and creditors in another country B, the first question becomes relevant. In such a fact scenario, the first question becomes relevant to determine whether the insolvency proceedings should be initiated in country A or B.

Now let's assume insolvency proceedings are initiated in A, but the debtor's credit agreement is governed by laws of country B. In that case, the second question becomes relevant to determine whether law of country B should be applied for determining the validity of claim under the credit agreement.

Lastly, in case the insolvency representative appointed in country A wants to take control of the debtor's assets in country B, the third question would become relevant to determine whether the insolvency proceedings of country A will be recognized in country B.

Therefore, the three questions posed by Fletcher highlight the key issues and difficulties that come up in case of cross-border insolvencies, as discussed above.

In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State, each State would apply its own laws? What cooperation difficulties does this raise ?

3.5

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 of cross-border insolvency agreements which pre-dates the MLCBI is 1991 Maxwell Communications Corporation plc cross-border insolvency case which involved concurrent insolvency proceedings in the United States and the UK.

The US proceedings were under Chapter 11 and there were administration proceedings in the UK. Insolvency representatives were appointed in both jurisdictions. The US and UK court proposed that the insolvency representatives enter into an agreement to ensure exchange of information and co-operation between the two proceedings.

An agreement was entered into by the UK and US insolvency representatives which was approved by both UK and US courts. The agreement's objective was to minimize conflict and expenses and maximisation of value of the estate. Some of the issues covered in the agreement included:

- Retaining of existing management to run the debtor as a going concern while allowing the UK insolvency representative the right to appoint independent directors with the consent of the US insolvency representative;
- US court to defer to UK court, provided certain criteria was met
- UK representative to only file a reorganization plan with the consent of US insolvency representative or the US court
- Prior notice to be given to US representative in case any major transaction was being undertaken by the UK representative.

A second agreement was entered into at a later stage to deal with issues relating to distribution amongst creditors and conclusion of the proceedings. (*UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*)

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Marks awarded 13.5 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.

The European Insolvency Regulation Recast (EIR Recast) would be applicable to these facts. This is because even though UK is no longer a member of the European Union (EU), the EIR Recast still applies to insolvencies where the main proceedings were initiated prior to 11 pm on 31 December 2020.

According to Article 3(1) of the EIR Recast, the State where the debtor's COMI lies has the jurisdiction to start main insolvency proceedings. Here, since Rydell's COMI s in the UK, that makes the UK insolvency proceedings "main proceedings" and since the main insolvency proceedings were initiated before 31 December 2020, the EIR Recast will be applicable.

Moreover, Article 19 of EIR Recast provides for automatic recognition of the main proceedings in all other member States of the EU. Therefore, the UK proceedings would have automatic recognition in other member States of the EU where other creditors of Rydell are situated.

However, the EIR Recast does allow secondary insolvency proceedings to be opened in the States where the debtor has an establishment. Therefore, Fernz can open secondary insolvency proceedings in another member State of the EU as long as Rydell has an establishment in such country. The effect of the secondary insolvency proceeding will be limited to the debtor's assets located in the State's jurisdiction (Article 3(2) of the EIR Recast).

Article 36 of the EIR Recast also gives an option to the insolvency practitioner of the main insolvency proceeding to give an undertaking (that it will comply with the laws of the relevant country for distribution of assets which would have been applicable in case a secondary insolvency proceeding was permitted) to request to avoid secondary insolvency proceedings. This request is then considered by a court of the jurisdiction which is considering initiation of secondary insolvency proceedings.

Further information which would be helpful in considering this question would be:

- Whether Rydell has an "establishment" (defined as a place of operation where Rydell carries out non-transitory economic activity with human means and assets under Article 2(10) of the EIR Recast) in the country where Fernz wants to initiate insolvency proceedings
- whether the insolvency proceedings initiated in UK benefit from any of the relaxations given to insolvency proceedings in the UK under Corporate Insolvency and Governance Act 2020

7

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.

If the proceeding were opened in the UK on 18 June 2021, then the EIR Recast would not apply as it would not meet the criteria of it being a main insolvency proceeding initiated before 31 December 2020.

The insolvency proceedings in the UK would not be automatically recognized by other member States of the European Union (EU).

The other jurisdictions in the EU where Fernz is seeking to initiate insolvency proceedings would then rely on their general insolvency rules and principles regarding treatment and recognition of foreign insolvency proceedings in countries which are not a member of the EU.

Recognition and the manner in which the UK insolvency proceedings will be treated by other member States of the EU (where Fernz may try to initiate proceedings) will depend on whether the member State has adopted the UNCITRAL Model Law on Cross-Border Insolvency, and their domestic law relating to recognition of foreign insolvency judgments.

Further information which may be relevant:

- whether the jurisdiction in which Fernz is seeking to initiate insolvency proceedings is a signatory to UNCITRAL's Model Law on Cross-Border Insolvency

This is well answered.
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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?

Part V of UK's Insolvency Act of 1986 deals with winding-up of unregistered companies (including a foreign company). According to Section 221(5) of UK's Insolvency Act of 1986, UK courts can order winding-up of an "unregistered company" if the following conditions are met:

- the company has dissolved, ceased carrying on its business or is only carrying on its business for winding-up its affairs;
- the company is not able to pay its debt; and
- if the court believes that it would be just and equitable that the company be wound up.

The UK court also needs to be convinced that the matter has a "sufficient connection" with UK.

Three core requirements which are considered while looking at winding-up proceedings of an unregistered company are:

- there should be a sufficient connection with the UK, which does not necessarily require presence of assets in the UK;
- a reasonable possibility that if a winding-up order is issued, it will be beneficial to those who are seeking to wind-up the company; and
- court should have jurisdiction over one or more persons interested in the distribution of assets of the company.

In such a scenario, UK's law would apply with respect to the substance and procedural aspects. In case of a foreign law governed claim, it may refer to the foreign law in relation to the validity of the claim.

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Marks awarded 15 out of 15
TOTAL MARKS 48/50

Well done!

*** End of Assessment ***