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.

1. The 1570 Act, or the Act of Elizabeth was the first law designed specifically as a true bankruptcy statute, rather than a fraud prevention law – it allowed for a proceeding to be opened by a creditor following an 'act of bankruptcy' by the debtor. The appointment of the bankruptcy commissioners under this act could be seen as similar to the modern liquidator.**How so?**
2. The Statute of Ann of 1705 introduced the notion of a statutory discharge. A statutory discharge is a continued to be applied in modern insolvencies. **It would be beneficial to elaborate regarding modern thinking of 'fresh start'**
3. The three principles to a good bankruptcy law by Joseph Chamberlain which was developed into the 1883 Act set up the mechanics for dealing with bankruptcy matters which remains in force in present day insolvency law. **It would be beneficial to elaborate and explain the development and how it shaped modern insolvency law**

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.

1. Allowing for the application of a moratorium
2. Introduction of cross-class cramdowns which allow for the courts to sanction a restructuring plan if it deems the plan to be fair and equitable
3. Prohibition of the use of ipso-facto clauses when the companies enters insolvency procedure, a moratorium or restructuring.

There is scope to elaborate. While the sub-question says 'briefly' it is for 3 marks.

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.

A treaty is public international instrument which a state can become a signatory to and bind themselves under the terms of the treaty. This will impact their domestic laws accordingly. An example of a treaty is the Nordic Convention of 1933

Soft law works as more of a legislative guide and is not prescriptive in nature – accordingly it is a way to influence the regulation of States by creating a framework that States may follow as States may choose to adopt them with or without modification. A good example of this in the UNCITRAL Model Law on Cross-border Insolvency.

More detail would have improved the mark awarded for this sub-question.

3

Marks awarded 8 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.

I have chosen to describe the sources of insolvency law in Australia.

Australia's insolvency law is based on English common law – there is no unified regulation and there are separate regulations for corporate and individual insolvency. The Corporations Act of 2001 regulates corporate insolvency while the Bankruptcy Act 1966 regulates individual insolvency.

Australia has also adopted the UNCITRAL Model Law on Cross-Border Insolvency

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider Australia, 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. You need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations), common law where it applies, general non-insolvency laws etc

1.5

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.

1. In which jurisdictions may insolvency proceedings be opened? This question relates to a matter of forum (i.e when a court can and will hear and determine the matter). In an insolvency matter where assets and creditors are in multiple jurisdictions – multiple proceedings may be commenced in differing jurisdictions as each jurisdiction may be able to establish forum based on the provisions of their local laws. **What difficulties may arise as a result of concurrent proceedings?**
2. What country's law should be applied in respect of different aspects of the case? This question relates to the choice of law. In most cases, the domestic law would likely be the most appropriate law to be used (in the case of English common law this is the presumption unless challenged), however in cases where a foreign law is more beneficial to one party – they may choose to argue in that a foreign law be applied to the case.
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)? In a cross border insolvency, the matter of recognition will need to be considered when a foreign judgement needs to be enforced. The foreign party must consider the impact of the judgement they have received and if it can be appropriately recognised in the jurisdictions they will to enforce/act in.

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.

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

There were concurrent principal insolvency proceedings in this case in the United States and England. To facilitate the exchange of information and to resolve any conflicts that may arise between those two proceedings, the parties voluntarily agreed to an "order and protocol" agreement with 2 main goals namely to maximise the value of the estate and to harmonise proceedings to minimise expense, waste and jurisdictional conflict.
What can be seen here is that while at the time there was no guidance around cooperation between district court systems, both courts in this case saw the benefit of having an agreement to ensure harmonisation between the proceedings – this could have set the stage for the development of the guidelines we have to day around cross border cooperation.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.3 asks for a brief note, it is for 5 marks.

3

Marks awarded 8.5 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.

I first establish that if Fernz's proceeding were to be opened after 11pm on 31 December 2020, the EIR Recast would not apply as the transitional period of the UK's exit from the European Union would have ended.

Accordingly, I am working on the assumption that the proceeding will be opened before 31 December 2020 – and thus the EIR Recast would apply **The date provided is 18 June 2020**

Under that assumption, I first examine what the primary jurisdiction is. Under the EIR Recast, the primary jurisdiction will be the COMI for the proceedings. As Rydell's COMI is the UK – the primary jurisdiction will be the UK.

The EIR Recast will allow Fernz to open a proceeding in another European Union member state – however this will be a subsidiary proceeding. As it would have been opened subsequent to the UK proceeding – it would be deemed a secondary proceeding.
It would be beneficial to discuss 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"

With respect to choice on law, Article 7.1 of the EIR Recast prescribes that the choice of law for Fernz's proceeding will be the State of the opening of proceedings – therefore the choice of law in Fern'z proceeding will be the local law of the State of Fernz's choosing.

Assuming the proceedings are opened, under the EIR Recast, there will be a duty to co-operate and communicate under the proceedings and any following enforcement (if any).

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.

If the proceedings were opened on 18 June 2021, the EIR Recast would not be applicable. This is because the transitional period would have ended.

Accordingly, if the relevant European jurisdiction agrees to that there is an appropriate forum for Fernz's proceeding and there is a need for recognition and assistance from the UK courts-reliance can be placed on the UNCITRAL Model Law on Cross Border Insolvency.

It would 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 minor creditor will need to consider if the provisions of the Insolvency Act 1986 to determine if the UK is the appropriate forum to commence those insolvency proceedings.

If appropriate forum is established – under English Common Law, the choice of law would automatically be English law, however either party may choose to invoke the 'choice of law' matter for deliberation if they feel there is an advantage for this matter to be heard under a foreign law.

The Corporate Insolvency and Governance Act 2020 may also have provisions which would be relevant to this case as Rydell may use the moratorium provisions as a defence to any proceedings the minor creditor may launch.

Finally, the minor creditor would need to consider the enforceability of any judgement and recognition of the UK proceedings in the European Union as the COMI of Rydell is in Europe and there is likely to be significant assets in Europe. The UK remains a signatory to the UNCITRAL Model Law on Cross Border Insolvency, hence those provisions (as it relates to recognition in Europe) may also be relevant.

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

1

Marks awarded 8 out of 15

TOTAL MARKS 34.5 /50

*** End of Assessment ***