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.

[Every state having a developed legal system had some kind of bankruptcy and insolvency system which was also referred to as Collective Debt Collecting Procedure. The historical developments regarding Collective Debt Collecting Procedure could be traced through numerous significant developments under the English law:

1. **English Bankruptcy Act of 1542**: The Bankruptcy Act of 1952 provided for appointment of a body of commissioners for proceeding against the debtor after an application filed by the creditor, especially the creditors' who neglected to pay the debts or defrauded the creditors. Further, English Bankruptcy Act of 1952 contained two fundamental principles on which shaped the way of thinking of modern insolvency laws:
    a. Collective participation by creditors.
    b. a *pari passu* distribution of assets amongst the creditors.
    It would be beneficial to elaborate on this further.
2. **The Act of Elizabeth, 1570:** It was introduced during the reign of Queen Elizabeth and was the first law passed as a true bankruptcy law rather than a fraud prevention law. However, the act of 1570 did not contain provisions regarding discharge, but only focussed on different acts of bankruptcy. Under this act, the petitioners/creditors could file a petition before the Lord Chancellor for convening a bankruptcy meeting, thereafter, bankruptcy commissioners were appointed to supervise the process. The commissioners would examine the property and transactions of the debtor and the same were transferred to the commissioner appointed for supervising the process.
   It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.

3. **The Statue of Ann of 1705 and Law of 1883**: Statue of Ann of 1705 is considered an important legislation which shaped the modern insolvency law as it introduced the concept of statutory discharge. However, the concept of discharge was not an automatic discharge/entitlement as the commissioners had to confirm that the debtor has cooperated during the proceedings.
   Further, the law of 1883 was the foundation of English Bankruptcy law as it had a fair procedure with adequate supervision. The provisions of the act is present in the modern day insolvency laws. **It would be beneficial to elaborate upon modern 'fresh start' principles.**

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.

Various states across the globe adopted different measures to deal with the negative economic impact of the Covid-19 pandemic along with UK. UK adopted the special financial aid schemes, like other states along with other insolvency related reform measures to deal with the impact of COVID-19 pandemic.

Further, the **Corporate Insolvency and Governance Act, 2020** was passed which laid down various reforms to insolvency law, i.e., a new restructuring plan, new moratorium rules, the relaxation of wrongful trading liability along with suspension of winding-up petitions and statutory demands amongst others was introduced to deal with the negative economic fall out.

Further elaboration would improve the mark for this sub-question. While it does say 'briefly', the sub-question is for 3 marks.

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 and conventions are classic public international instruments to which the states become signatories and bind themselves which affect their domestic law accordingly.
International Insolvencies across the states are regulated by using multilateral approaches, i.e., by hard laws and soft laws which is used to influence its regulation. In case of Cross border insolvency matters/international insolvency matters, different states ratify treaties or conventions which import their domestic law principles to resolve the insolvency issues that have a connection with other states. However, if no treaty is ratified, then the different pertinent questions of forum, recognition and enforcement would be determined by the private international law principles of the state and it is the choice of insolvency law that would resolve the matter for the debtors, creditors and other parties involved.

Further, inter-governmental bodies such as UNCITRAL actively promotes soft law responses to international insolvency issues.

Further elaboration would improve the mark for this sub-question, particularly regarding 'soft law' concepts. While it does say 'briefly', the sub-question is for 4 marks.

2.5

Marks awarded 7 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 laws in any state but it is essential to find the main source of insolvency laws that can be applied. Generally, the main source of law is found in legislation or codes but they also rely on principles of common law (in case of common law countries) to fill the gaps and loopholes in the existing legislation and code.

Moreover, the insolvency provisions are present is a unified legislation in some jurisdictions covering all aspects of insolvency and bankruptcy whereas some jurisdictions have multiplicity of legislations which must be studied in conjunction with each other in order to understand the law as a whole, i.e., where the laws for individual bankruptcy is contained in one legislation while the laws related to winding up of companies is mentioned in a different legislation/statute.

Further, the legal principles forming the part of general laws also play a vital role in insolvency laws of any state/jurisdiction apart from the insolvency legislation of that particular jurisdiction. The major reason for the applicability of the legal principles of general law is because of the absence of the same in insolvency laws legislation.

For the purpose of interaction between different sources of insolvency law, they must be studied in conjunction with each other for the purpose of interpreting the law as whole.

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.

In an attempt to bring the "cross border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions:

1. In which jurisdictions 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)?

With respect to the aforementioned questions raised by the Fletcher, the insolvency proceedings could be opened concurrently in more than one State/Jurisdiction. Further, each state would apply its own laws (including its choice-of-law rules), and very limited or no extra territorial effect would be granted to foreign proceedings. Hence, as a result, various difficulties could be faced in trying to bring about co-operation and co-ordination between different states/jurisdictions.

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

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 plc* cross-border insolvency case in 1991, in which concurrent principle insolvency proceedings in the United States (Chapter 11 proceedings) and England (administration proceedings) were co-ordinated through an "Order and Protocol" approved by the courts in the respective states.

The aforementioned case involved two primary insolvency proceedings initiated by Single corporate debtor in the United States and United Kingdom respectively and the appointment of two different and separate insolvency representatives in the two states. It was agreed by judges of both the states that an insolvency agreement could resolve the conflict and facilitate the exchange of information. Thus, under the agreement, two goals were set for guiding the representatives, i.e., maximizing the value of the estate and harmonising the proceeding to minimise the expense, waste and jurisdictional conflict. It was agreed by the parties that the

United State courts would defer to the English proceedings, once the presence of certain criteria was determined.

The specifics included:

- Some of existing management would be retained in the interest of maintaining the debtor's going concern value but the English representative with the consent of the US representative would be allowed to select new and independent directors.
- The English representative should only incur debt or file a reorganisation plan with the consent of the US representative or the US Court.
- The English representative should give prior notice to the US representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to take "lesser" transactions.

Further, many issues were purposely left out of the agreement to be resolved during the course of the proceedings. Some of the issues, such as distribution matters, were later included in an extension of the agreement.

5

Marks awarded 14.5 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 insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June, 2020.
The European Insolvency Regulation Recast (EIR Recast) would apply as the same ceased to apply in UK only from 31st December 2020 following its exit from the European Union. Since the proceedings were initiated much before the aforementioned date, EIR Recast would be applicable in the present context.
The EIR recast regulates the applicable law in proceedings subject to the regulation. As per article 7.1, the law applicable to the insolvency proceedings and their effects shall be that of….the **'State of the opening of proceedings.'** (unless otherwise provided in the regulation).

Article 7 further addresses the law determining the conditions for the opening of those proceedings, their conduct and the closure of the proceedings.

Since the ***law of the State of the opening of proceedings*** will be applied as per the Recast Insolvency Regulation, thus, the Insolvency Act of 1986 (Section 426) would be applicable in the insolvency proceedings.

It would be beneficial to discuss secondary proceedings and matters pertaining to 'establishment'

4

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 in the UK on 18th June 2021, instead of 18th June 2020, then the European Insolvency Regulation Recast (EIR Recast) would not be applicable since the EIR Recast ceased to apply in the UK (from 11 pm on 31 December, 2020) following its exit from the European Union. The Recast Insolvency Regulation applies to insolvencies where the main proceedings were initiated prior to the expiry of the transitional period (11 pm on 31st December 2020.)

Further, if the insolvency proceeding commenced on 18th June 2021, the Corporate Insolvency and Governance Act 2020 would be applicable as a part of the insolvency reform measure following the COVID-19 pandemic.

It would be beneficial to also consider the MLCBI and relevant local laws further.

2

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?

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. The Insolvency Act of 1986 would be considered relevant to consider whether the minor creditor could commence the formal insolvency proceedings in the UK.

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.

1

Marks awarded 7 out of 15
TOTAL MARKS 38.5/50

*** End of Assessment ***