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.

Significant developments in relation to debt collecting in the English law that shaped modern insolvency law include the following:

1570 Act of Elizabeth is said to be the first law designated specifically as a true bankruptcy statue, **How is this a significant development regarding debt collection procedures? In what way did it shape modern insolvency law thinking?**

The 1542 English Bankruptcy Act (the "1542 Act") provided for compulsory sequestration, so creditors can make an application to the court to have a person declared insolvent. Compulsory sequestration is still a key part of insolvency law today as collective participation. The 1542 Act also allowed the appointment of a commissioner, on a creditor's application, that the commissioner could proceed against the debtor this is still evidenced today in modern insolvency law in a pari passsu distribution of assets available.

The Statute of Ann of 1705 introduced a key piece of modern insolvency, statutory discharge. In accordance with the Statute of Ann 1705 discharge was not an automatic entitlement and the commissioners had to confirm that the conformed and cooperated during proceedings. **It would be beneficial to elaborate regarding modern thinking regarding 'fresh start'**

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.

The UK introduced specific insolvency related measures in light of the Covid-19 pandemic. Specific measures introduced in the UK. The Corporate Insolvency and Governance Act 2020 (the "2020 Act") introduced:

A moratorium on enforcement of claims was introduced, the moratorium provides a company's directors time while they explore restructuring options. The moratorium is available for an initial 20 days, and can be extended up to 12 months from the date of filing with the consent of pre-moratorium creditors.

The 2020 Act introduced a flexible restructuring plan procedure that the court may sanction if there is less than 75% of a creditor class.

The 2020 Act details restrictions on termination clauses of supply contacts suppliers are not allowed to automatically terminate contracts if the counterparty enters insolvency or restructuring procedures. The supplier can only terminate the contract if the liquidator, company or court consents.

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

To regulate international insolvency a multilateral approach is considered by way of binding hard laws or influencing regulations through soft laws. Soft laws offer a more flexible approach than hard laws that are viewed as compulsory.

In developing international insolvency soft laws in the form of treaties and recommended legislation through organisations such as the United Nations Commission on International Trade Law (UNICITRAL) have proven more successful apposed to hard laws.

The Model Treaty on Bankruptcy 1925, while never ratified significantly contributed to regulating international insolvency law by allocating jurisdictions in respect of corporation to the court where the statutory registered seat was located.

The UNICITRAL Legislative Guide on Insolvency Law (2004) provides guidance provides objectives and principles that should be reflected in a State's insolvency laws.

The Model Law on Cross-border Insolvency was a soft law to assist states in relation to corporate insolvency with creditors in more than one state.

Soft laws give member states more freedom and encourage adoption of legislation.

The sub-question also required you to explain treaties. This was required in greater detail than referring to 'hard laws' generally

2.5

Marks awarded 7.5 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.

In Australia there are different laws for individual bankruptcy and winding up companies.

In Australian individual bankruptcy legislation is governed by the Bankruptcy Regulations 2021 and the Insolvency Practice Rules (Bankruptcy) 2016 while winding up companies is governed by the Corporations Act 2001.

Furthermore, general legal principles forming general law such as rights of ownership will have an impact on the insolvency laws.

Australia's Insolvency Law Reform Act 2016 aligns the standards for corporate insolvency practitioners and personal bankruptcy practitioners.

Furthermore, the Australian government temporary debt relief measures, designed to support bankruptcy due to the economic impacts of COVID-19. The temporary measures include an increase to the minimum debt to trigger a bankruptcy, the amount of time to respond to a bankruptcy notice and people can apply for a 6 month relief from creditors, increased from 21 days.

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. You have raised some aspects of legislation and general law.

2.5

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

(3) In which jurisdictions may insolvency proceedings be opened?

Fletcher details that insolvency proceedings could be opened concurrently in more than one State, each of the States apply their own laws and laws outside the states territory would be granted. This can lead to difficulties in cross-border insolvency proceedings. Whether a proceeding can be heard will require consideration of the connection of a jurisdiction. While foreign proceedings are in progress, issues may come before the local court, the effect of any foreign proceedings must be considered before the local court can hear the matter.

(2) What country's law should be applied in respect of different aspects of the case?

In a common law system such as the Cayman Islands, the choice of law only arise if parties choose change the law otherwise the law of the jurisdiction will apply. Proof of foreign law will need to be proven as to why it is the applicable law.

(3) What international effects will be accorded to proceedings conducts at a particular forum (including issues of enforcement)?

The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements with Guide to Enactment (2018) will need to be considered.

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.

The January 1992 Maxwell Communications Corporation plc ("Maxwell") cross-border insolvency case in 1991, is an example of a case law where the court approval of an agreement for the purpose of co-ordinating insolvency proceedings.

Maxwell, an English holding company with 80% of Maxwell's assets in the United States. Although Maxwell's assets were in the United States Maxwell's debt was in England. Although Maxwell filed a chapter 11 in the United States the directors faced personal liability in England under English law for trading while insolvent, Maxwell obtained an order to put the company into administration in the UK.

The US court appointed an examiner to "harmonise the two proceedings so as to permit a reorganisation under US law which would maximise the return to creditors". The UK court approved the Maxwell Protocol. The protocol facilitated for a successful restructuring.

The protocol was the first cross-border insolvency case of two proceedings. Protocols and two jurisdictions working together will ultimately reduce the costs to the company of the insolvency proceedings and benefit the creditors.

Specifics from the case included that some existing management would be retained in the interest of the debtors going concern value. The English insolvency practitioners were allowed to pick new directors with the United Stated insolvency practitioners consent. **There is some scope to elaborate.**

The UK insolvency representative would only incur debt or file a reorganisation plan with the US's consent. Additionally, the UK insolvency practitioner would seek approval of any major transactions.

4.5
Marks awarded 12 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Rydell Co Ltd (Rydell) is an incorporated company with offices in the UK and throughout Europe. Its centre of main interest (COMI) is in the UK. Rydell supplies engine parts for large vehicles, including airplanes, and has had a downturn in business due to border closures and travel restrictions throughout the Covid-19 pandemic.

Rydell's main creditor is Fernz Co Ltd (Fernz) which is incorporated in a country in Europe that is a member of the EU. Fernz is considering commencing proceedings or pursuing other options with respect to recovering unpaid debts from Rydell.

There are a number of other creditors owed money by Rydell, who are located throughout different countries in Europe which are all members of the European Union.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 7 marks]

An insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June 2020. A month later, Fernz was considering also opening proceedings in another country in Europe which was a member of the European Union.

Discuss if and how the European Insolvency Regulation Recast would apply. Also note what further information, if any, you might require to fully consider this question.

Following the UK's exit from the EU at 11pm on 31 January 2020 the EIR Recase no longer applies to new proceedings in the UK. In the case of Rydell this is not the case as the proceedings began on 18 June 2020 before the UK exited the EU, as such, the Recast Insolvency Regulation apply as the insolvency was opened prior to the expiry of the transitional period being 31 December 2020.

Prior to the UK leaving the EU Article 3 of Recast Insolvency Regulation allocation to open main insolvency proceedings to the courts of the member states where a debtor has a centre

of main interests and Article 19 provides for automatic recognition of proceedings in member states.

The European Insolvency Regulation Recast regulated that the applicable law in proceedings subject to the Regulation states that "the law applicable to insolvency proceedings and their effects shall be that of the State of the opening of proceedings", for this reason Fernz would not be able to open proceedings in another EU member country.

The minor creditor's proceedings will be recognised as the main proceedings and subsequent proceedings will be the secondary proceedings.

Further elaboration is warranted regarding 'establishment' required with respect to secondary proceedings.

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.

As the cut off of 31 January 2020 has passed these is no EU mechanism that will be obliged to apply. As such, the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) will be relied upon if the proceedings began on 18 June 2021. EU Member State insolvency officeholders can apply for recognition of appointment in the UK.

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

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?

We refer to the English domestic law on the insolvency of companies where there is an international dimension, but where the matter is outside the EIR Recast.

As is the case with Rydell, jurisdictions may be established to windup an unregistered company, a company formed under a foreign law. Section 221(5) Insolvency Act 1986 provides for a court order winding-up of unregistered companies in the following circumstances:

- A dissolved company;
- A Company that is unable to pay debt (as is the case here); and
- If is the court's opinion that it is just and equitable to wind up.

As such, as Rydell is unable to pay debts.

Additionally Rydell would have to satisfy the relevant principal underpinning this approach consist of the 3 core requirements:

- There must be sufficient connection to England and Wales;
- There must be benefit in a winding up order to those that made it; and
- At least one beneficiary of an asset distribution the court must be able to exercise jurisdiction.

Rydell will satisfy all 3 principals in this case, so this is the appropriate UK way.

5
Marks awarded 11.5 out of 15
TOTAL MARKS 41 /50

*** End of Assessment ***