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**.

Commented [DB1]: Please read and comply with the instructions. This may seem like a small thing, but if you don't do it I have to do it!

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 9 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 (historical) developments regarding debt collection procedures in English law are listed and explained below:
1. The English Bankruptcy Act of 1542;
2. The 1570 Act; and
3. The Statute of Ann of 1705.

The English Bankruptcy Act of 1542 provided for the form of compulsory sequestration to be enforced on dishonest / absconding debtors and the appointment of a body of commissioners whereby upon the submission of a creditors' application, the body of commissioners could proceed against a trade debtor who had ignored the payment of a debt / defrauded his debtors. This fundamental principle against fraudulent debtors of applying a compulsory administration and distribution on the basis of equality amongst all creditors helped shape the modern insolvency law of having shared participation by creditors and a pari-passu distribution among the creditors of the available assets remaining.

The 1570 Act, known as the Act of Elizabeth, allowed for the transfer of jurisdiction of the supervision of the estate from the body of commissioners (as introduced in the Bankruptcy Act of 1542 and explained above) to the Lord Chancellor. Creditors could then open an "act of bankruptcy" against a debtor by petitioning to the Lord Chancellor to convene a bankruptcy meeting and appoint bankruptcy commissioners to supervise the proceeding (i.e. by examining the debtors' transactions and property and the debtor was then obliged to transfer his/her property to the bankruptcy commissioners and could summon person to appear for questioning and have the ability to commit those debtors to prison). This Act however did not contain any discharge provisions. This helped shape the modern insolvency law of forming a true bankruptcy statute of creditors petitioning to the applicable courts to obtain a judgement for debts owed and introduced the notion of public examination against debtors.

The Statute of Ann of 1705 introduced the notion of a statutory discharge, whereby the discharge and was not an automatic entitlement but required confirmation from the commissioners that the debtor had conformed to cooperating during the bankruptcy proceedings (which was not existent prior to the 18th century). This helped shape the modern insolvency law by discharging debtors of their proceedings brought upon by creditors to the court.

3

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.

Following the Covid-19 pandemic, three insolvency-related measures introduced in the UK include:

1. Temporarily raising the current debt thresholds in connection to a winding up petition to £10,000 or more in order to protect small businesses from creditors seeking to wind up the company with relativity small debts.

2. Temporarily suspending the serving of statutory demands and the voiding of statutory demands served on a company between 1 March 2020 and 30 September 2021.
3. A permanent measure introduced whereby a new restructuring plan can be created in order to help viable companies with problematic debt obligations which has the ability to be sanctioned by the courts, given it is fair and equitable and thus can be imposed on creditors by the courts.

More detail would have improved the mark awarded for this sub-question. It would be beneficial, for example, to elaborate upon the means of introduction of these measures.
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 form part of a State's 'hard law' on insolvency through the State's becoming signatories to public international instruments which in turn binds those States to affect their domestic laws (i.e. a multilateral approach that seeks regulating international insolvencies). States will look to the use of treaties or conventions for importation into their domestic law principles to resolve cross border insolvency issues in connection to another State. For example, in 1990, even though the Council of Europe Treaty Series No 136 (which was a convention on certain international aspects of bankruptcy referred to as the Istanbul Convention) was not passed in order for it to be in full effect, it was an integral step toward the development of the European Union's response to cross border insolvency issues amongst its member states.

More success has been obtained via the use of 'soft law' solutions, which is a multilateral approach that seeks the influence of regulating international insolvencies. Currently, the most successful 'soft law' approach has been the States' adoption of the Model Law on Cross-border Insolvency ("MLCBI"). The MLCBI was developed in the mid-1990's by the United Nations Commission on International Trade Law ("UNCITRAL"). As an incentive formed through the application of Model Law for States to adopt, with or without modification. The MLCBI is gaining momentum across the States as a response to cross border insolvency law.

4
Marks awarded 9 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.

English insolvency law – The Insolvency Act 1986 is the main piece of legislation that governs English insolvency law and applies to England and Wales. England and Wales deal with personal and corporate bankruptcies through this same Act, conveying that this Act is an example of a unified insolvency legislation between England and Wales.

American insolvency law – The Bankruptcy Code of 1978 governs the American bankruptcy law and an example of interacting with different states is through Chapter 15 of the Code, whereby this chapter includes the adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency (replacing the former section 304 of the Code which dealt with international insolvency).

Australian insolvency law – The Corporations Act 2001 regulates the corporate insolvency in Australia and its interactions with different states is that the Act is based off English common law. Further, Australia has also adopted the UNCITRAL Model Law on Cross-Border Insolvency.

French insolvency Law – Chapter XI of the Ordonnanace de Commerce of 1673 was integral to French insolvency law as is formed the foundation of the later French insolvency law for the commercial codes of 1807 and 1838 and the interaction between States is that it also formed the basis of Napoleonic insolvency codes in a number of States.

Africa – African countries such as Nigeria, Kenya, Botswana, Zambia and other countries in East Africa such as Tanzania are based off English insolvency law (i.e. the Insolvency Act 1986).

Your answer could have instead been structured to discuss the sources of law across all States and to recognise how and why there may be differences between certain States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

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.

The three pertinent questions raised by Fletcher are as follows and are also discussed:

1. In which jurisdictions may insolvency proceedings be opened? This alludes to whether a court can and will determine the matter, requiring examination of the details of the parties/dispute in the jurisdiction. The court will firstly determine the commencement order, which results in the liquidation of a corporation. During the course of the local insolvency matter, foreign elements may arise (such as assets in different States or the requirement to examine corporate officers in different States).

2. What country's law should be applied in respect of different aspects of the case? Should the local court decide to hear matter, it will have to decide upon the law to apply, as different systems of law adopt different approaches. **It would be beneficial to elaborate on choice of law concerns.**

3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)? This raises the query of 'recognition' and 'enforcement' or 'effect' where there is a foreign judgement issued on the same matter. Foreign judgements raise questions concerning the court that issued the judgement, the type of judgement and what its effect will be.

Elaboration is warranted.

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 obtaining court approval for a protocol (or cross-border insolvency agreement) encouraged by the MLCBI and pre-dates Model Law is the Maxwell Communications Corporation pie cross-border insolvency case in 1991 (“Maxwell Case”). An “Order and Protocol” was used to coordinate the concurrent insolvency proceedings in the United States (Chapter 11 proceedings) and England (administration proceedings) (the “Two Insolvency Proceedings”). A single debtor had initiated the Two Insolvency Proceedings and therefore the two separately appointed Judges from each State conferred to their counsels to suggest the use of an insolvency agreement between the Two Insolvency Proceedings to resolve conflicts and facilitate the exchange of information.

Under the insolvency agreement, two goals were set as a means of guidance by the Judges: maximizing the value of the estate and harmonising the proceedings to minimise expense, waste and jurisdictional conflict. It was agreed by the parties that the United States court would defer to the English proceedings, once it was determined that certain criteria were present, including but not limited to:

- allowing some existing management being retained in the interests of maintaining the debtor's going concern value, however, the English insolvency representatives would be allowed, provided consent was granted by their United States counterpart, to select new and independent directors;
- the English insolvency representatives should only incur debt or file a reorganisation plan by having obtained the consent of the United States insolvency representatives or the United States court; and
- the English insolvency representatives were to give prior notice to the United States insolvency representatives prior to undertaking any major transactions on behalf of the debtor but had the ability to pre-authorise and undertake "lesser" transactions.

Other issues were intentionally left out of the Protocol and were to be resolved through proceedings, such as distribution matters, which were later included in an extension of the Protocol.

The Maxwell Case conveys how the differing insolvency representatives, in effect, voluntarily put in place a workable structure to co-ordinate a complex international insolvency and obtained approval of the respective courts.

The response provided above references a summary in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp. 128-129.

5
Marks awarded 10 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**") will apply to the proceedings to be opened by Fernz if it is to occur prior to 11pm on 31 December 2020 under UK law, which is the transitional period granted by the UK in its departure from the European Union to insolvencies.

Assuming that Fernz is to initiate proceedings prior to 31 December 2020, the EIR Recast dictates the law applicable to the proposed proceedings (i.e. English Law in this matter per Article 7.1 on the EIR Recast). Article 3(1) of the EIR Recast states "The centre of main interests ("**COMI**") shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties", therefore, the primary jurisdiction for the opening of the proceedings will be the UK, due to Rydell Co Ltd ("**Rydell**") having its COMI in the UK and thus the UK courts will have primary jurisdictional competence over any cross-border insolvency, as opposed to Europe, which is the country of incorporation for Fernz Co Ltd ("**Fernz**"). **It would be beneficial to discuss 'automatic recognition' under the EIR Recast.**

The EIR Recast does allow for a subsidiary proceeding to occur in the case where a debtor has an 'establishment' (i.e. place of operation where the debtor carries out non-transitory economic activity with human means and assets). In this case, Fernz can seek to open a secondary proceeding subsequently to the bankruptcy adjudication of the proceeding in the UK, provided that Rydell had an establishment in the UK, where Fernz was incorporated.

Therefore, in order to fully consider this question, the following information would be required:

- at what date is Fernz going to initiate its proceedings against Rydell in order to understand whether or not the EIR (Recast) will apply; and
- whether Rydell has an establishment in Europe so that Fernz can initiate secondary proceedings subsequent to the bankruptcy adjudication of the proceeding in the UK.

6

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.

Due to the UK's departure from the EU occurring on 31 January 2020, the response written for question 4.1 would differ as the EIR Recast would not apply to proceedings opened post 11pm on 31 December 2020. From 31 December 2020 onward, the Insolvency (Amendment) (EU Exit) Regulations 2019 ("**Exit Regulations**") is the existing jurisdiction in the UK and therefore Fernz will be subject to opening a proceeding in the UK. The effect of the new Exit Regulations is that:

There will be no automatic recognition of the proceeding in the UK and an application to the UK court will be required (. This raises further questions as to whether Fernz will need to seek recognition in the UK so that if Rydell does have an establishment in the UK, then recognition will be required in the UK in order to claim against Rydell's potential UK based assets. It would therefore be important to understand the nature of Rydell's establishment in the UK.

Have you considered the possible application of the MLCBI?

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?

In a situation where Rydell was unregistered with its COMI in a European country which was a member of the European Union and the formal insolvency proceedings were opened in the UK on 18 June 2021, then the matter will fall outside the scope of the EIR (Recast) [as explained in question 4.2] and additionally, UK (English) domestic laws will be applied as Rydell is an unregistered company in the UK.

In the case of an 'unregistered company', which is a company formed under foreign law, the minor creditor will defer to section 221(5) of the Insolvency Act 1986, which allows for a court ordered winding-up of Rydell, being an unregistered company, in the following scenarios:

a) if Rydell has either dissolved, ceased to carry on business, or is carrying on business only to wind up its affairs;
b) if Rydell is unable to pay its debts;
c) if the court is of opinion that it is just and equitable that Rydell should be wound up.

From the above, option b) is most applicable to the minor creditor, however it will need to be proven that Rydell cannot pay all of its debts prior to undergoing an insolvency proceeding

and that the court is provided with sufficient evidence to show that Rydell should be wound up due to pressing creditor demands and its inability to satisfy same (which appears to be the case as the questions states that Rydell has a number of other creditors owed money by from various countries in Europe which are all members of the European Union).

The need for 'sufficient connection' should be considered.

3
Marks awarded 11 out of 15
TOTAL MARKS 39/50

*** End of Assessment ***