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. They were recently revised in 2021 and, together with the UNCITRAL Legislative Guide, form the international best practice standard for insolvency regimes.

(b) 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.

(c) 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 developments regarding debt collection procedures in English law that shape the way of thinking concerning modern insolvency law are:

- *Statute of Ann of 1705 – an important piece of legislation which introduced the principles of statutory discharge.* ***It would be beneficial to elaborate as to how this shaped modern insolvency law principles such as 'fresh start'***

- *The late 19th century; the appointment of Joseph Chamberlain as president of the board. – Chamberlain set out the three principles essential to a good bankruptcy (which were 1. The assets of the debtor in each insolvency case belonged to the creditors and creditors should be in full control. 2. The trustee should be subject to official supervision and control. 3. An independent examination of the debtor's conduct and circumstances leading to his insolvency.*

- *The law of 1883; is viewed as the foundation of the present system of the English bankruptcy law., with the aim of the act being a fair procedure with adequate supervision and means to discourage dishonesty.*

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.

The Corporate Insolvency and Government Act 2020 was passed to deal with the negative economic fall out of the COVID-19 pandemic.

The legislation sets out certain reforms to insolvency law that introduced a new restructuring plan. Which are: 1) implementation of Moratorium rules, 2) the relaxation of wrongful trading liability and 3) the suspension of winding up petitions and statutory demands.

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

2.5

Question 2.3 [maximum 4 marks] (pg.45)

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 are classic public international instruments that countries/ states sign which binds the signatories/states. Treaties affect domestic law, which is enforceable in courts. Therefore, treaties can become a part of a state's hard law.

On the other hand, soft law is used by a range of multilateral organisations to influence action amongst the state or states, for decades. The most successful soft-law approach to date is that taken by the UNICITRAL. Which instead of partaking in a

treaty, they are instead it developed a Model Law on Cross-Border insolvency, a draft legislation which recommended member states to adopt with or without modification.

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

3.5
Marks awarded 8.5 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.

Insolvency laws in a stated can come from various sources. In more recent times, insolvency rules can be found in legislations and codes. However, some states, specifically those that are still based on the common law will use the common law to fill any gaps that it may have in the state's legislation which regards insolvency.

As mention before, states' insolvency rules can be found in codes and legislation. This legislation or code will be a single unified piece of bankruptcy legislation. In the U.S.A the single piece of legislation that governs insolvency in that country is Bankruptcy Code 1978. In the BVI, where I work, is governed by the BVI Insolvency Act, 2003. In both instances, in the BVI and the U.S., these laws are considered federal or laws of the state. In some instances, a multiplicity of legislation exists, and these must be applied in conjunction with the other. An example of this happening is where the laws for individual bankruptcy is contained in one statute while the laws relating to the winding up of companies is contained in another or different statue

Another source of law would be general law. It isn't that many legal principles within the general law, will also have an effect insolvency. Rules which are usually not found in insolvency legislation, but they have a huge impact on insolvency law generally. For example rules that regulate the vesting of real rights such as ownership, or rights of real security.

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.

Professor Flether asks 3 important questions as it relates to bringing the cross-border aspect and insolvency together, which I will answer concurrently.:

Fletcher asked firstly, "In which jurisdiction may insolvency proceeding be opened?" Insolvency proceedings can be possibly opened concurrently in more than one state. The choice of forum raises questions of jurisdiction; whether a court in a specific jurisdiction will hear and determine the matter.

Secondly, he asked "Which system must rule elements of diversity?" In answering this question, each state would apply its own laws. The local court when determine if they will hear a matter, the court will then have to decide upon the law to apply. (i.e. including their choice of law.)

Thirdly, what international effects will be accorded to proceedings conducted at a particular forum (Including issues of enforcement)? Notably, no or very limited extraterritorial effects would be granted to foreign proceedings.

Due to unambiguity of the scope of cross-border and insolvency law, persons may find it difficult in trying to bring about co-operation and most importantly co-ordination between states. There is no main enforcement body, so this makes the practice of insolvency law complex.

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

3.5

Question 3.3 [maximum 5 marks] (Pg. 68)

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 that is a prime example of this quote is the case of Maxwell Communications Corporation plc.

The case involved proceedings in two jurisdictions, one in the United States and the other in the United Kingdom. The proceedings were initiated by a single debtor. Two different and separate insolvency representatives were appointed in each jurisdiction. Each were charged with similar responsibilities.
The United States and the United Kingdom judges separately raised respectively the idea that an insolvency agreement between the two administrations could resolve conflicts and enable the exchange of information. Due to the agreement, two main goals were set to guide the insolvency representatives; the value of the estate and harmonizing the proceedings to minimize the expense as well as minimize jurisdictional conflict.

There, the parties agreed that the United States court would concede to the United Kingdom proceedings, once it was determined that certain criteria were present.

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.

2.5

Marks awarded 11 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.

> *In this case, the European Insolvency Regulation (EIR) (Recast) will apply. The EIR has influenced broader multilateral developments in international insolvency law.* ***Why? It would be beneficial to elaborate and explain your reasoning***
>
> *EIR (Recast) states, the law in the "state of the opening of proceedings", that are applicable to insolvency proceedings and their effects is the law which determines "the conditions for the openings of those proceeds, their conduct and their closure."* **It would be beneficial to refer to specific provisions**
>
> *In this case, although only a minor creditor, the insolvency proceedings against Rydell were opened in the minor creditor's jurisdiction, so the law of this jurisdiction will determine the details of the proceedings, as mentioned above.*
>
> *This differs from the idea of Universalism which states, that one insolvency proceeding originating in different states will be dealt with under the provision of one insolvency law, for example the law of the state where the debtor has its centre of main interest (COMI. Therefore, if they were applying the principle of Universalism, and applying the law of the state of COMI, this would have been the law of the United Kingdom although the creditor which brought the first action is based in a city in Europe.*
>
> *The European Union has been moving towards creating uniformity in the domestic insolvency laws of the member states. Over a decade ago in 2010, the European Parliament published a report on the Harmonisation of Insolvency Law at EU Level. The report focused on the difference between domestic insolvency laws within the EU and identified a number of areas of insolvency law where harmonisation at the EU level would be necessary and achievable.*

If harmonisation of insolvency law at an EU Level has already accomplished on a wide scale this would have been considered in this case since both Fernz and the minor creditor are in EU states. The harmonisation of domestic law can reduce the significance of an insolvency crossing a state boundary and the need for regulators or courts to resolve any insolvency issues.

Elaboration is warranted, including with respect to 'establishment' and secondary proceedings.

3.5

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 in the UK on 18 June 2021, instead of 18 June 2020, the EIR Recast would have ceased to apply in the UK. The UK ceased to be member of the EU at 11pm on 31 January 2020. Under UK law the EIR Recast no longer applies to any proceedings opened after the transitional date, 11pm 31st December 2020. Any proceedings where the main proceedings were opened prior to the transitional period, EIR will apply.

Therefore, in this instance, it would no apply if the proceedings were opened in 2021.

The MLCBI and relevant local laws should be discussed together with a deliberation upon further information that is relevant

1.5

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?

If the formal insolvency proceedings were opened in the United Kingdom on 18th June 2021, EIR Recast will not be applied. Instead, the UK domestic law can be used as the presiding law. English court has the jurisdiction to wind up a foreign company. The company will be considered a foreign company since the UK at this time has exited the EU and the COMI is in another country in Europe.

The English court may also have jurisdiction to wind up an "unregistered company which includes a company formed under foreign law. According to Section 221 (5) Insolvency Act 1986 provides for a court ordered wind up of unregistered companies by the following circumstances: 1) if a company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs 2) if the company is unable to pay its debts; 3) if the court is of opinion that it is just and equitable that the company should be wound up.

Elaboration is warranted, including with respect to the requirement of 'sufficient connection'

2.5

Marks awarded 7.5 out of 15

TOTAL MARKS 36/50

*** End of Assessment ***