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.

In 1267 the Statute of Malbridge introduced imprisonment as a punishment/consequence for a debtor who had absconded, this had the effect of treating debtors as 'quasi-criminals'. Imprisonment as a punishment for non-payment of debts was only abolished in the 1869 Debtors Act. **It would be beneficial to elaborate on abolishment of imprisonment for debt and how that shaped thinking concerning modern insolvency law.**

The English Bankruptcy Act of 1542 introduced two fundamental insolvency law concepts; collective proceedings and pari passu distribution of the debtors assets amongst all creditors.

In 1705 the Statute of Ann introduced the concept of statutory discharge (automatic), prior to this the only way in which a debtor could obtain his/her discharge was for the appointed commissioner to confirm that the debtor had conformed and cooperated throughout the process. **It would be beneficial to elaborate on the concept of 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.

On 26 June 2020, the Corporate Insolvency and Governance Act 2020 (CIGA) came into effect in the UK.

CIGA was part of the UK Government's response to the Covid pandemic and introduced various 'debtor friendly' measures -both permanent and temporary – in an attempt to help UK businesses weather the storm.

Three examples of such measures are:

1. Short term moratorium – which looks to protect a business from creditor enforcement whilst it takes steps to restructure the business to ensure long term viability under the control of the company directors. The initial period of the moratorium is 20 days. This measure involves the appointment of a monitor, an Insolvency Practitioner, who must monitor the position of the business throughout and has a duty to apply for the termination of the moratorium if he/she no longer feels that the restructuring and long term viability is possible.

2. Part 26A CA 2006 (also referred to as the Restructuring Plan ('RP')) – this is a restructuring process under which a plan is proposed by the company directors to compromise the claims of the creditors and potentially shareholders. The RP also introduces the concept of 'cross class cramdown (or up)', meaning that the RP differs from the traditional Scheme of Arrangement which requires approval from all classes. An RP is available to all companies that are currently facing or expect to face financial difficulties; however, the use of the RP to date has been by large multi-national companies and there are questions as to whether the cost of proposing and approving an RP make it prohibitive to smaller mid-size companies.

3. Temporary suspension of Wrongful Trading provisions – the government wanted to show its support for directors to keep business 'alive' during the pandemic by suspending these provisions to ensure the directors weren't worrying about their own personal liability.

3

Question 2.3 [maximum 4 marks]

Briefly explain the concept of treaties and "soft law" and indicate how these may be used to establish cross-border insolvency rules in States.

A treaty is a legally binding agreement that a number of states may sign up to and by doing so the provisions of the treaty become part of the domestic law of that state. A treaty can be described as 'hard law'.

One of the most successful examples of hard law in international insolvency is the European Insolvency Regulation (EIR) Recast, which effectively provides for universalism across EU states (excluding Denmark).

Soft law is not legally binding but can often be described as best practice guidance which a state may undertake to adopt when enacting or amending its own domestic laws.

The most prominent example of soft law in cross border insolvency is the adoption of UNCITRAL's Model Law on Cross Border Insolvency (MLCBI). When dealing with states that have adopted the MLCBI there is a high degree of predictability over how cross border matters will be dealt with.

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.

Dependent on the state there can be multiple sources of insolvency law. In certain states there may be one unified source of insolvency legislation.

In the US there is the Bankruptcy Code 1978 which is part of the federal law and deals with both corporate and personal insolvency.

Likewise, England and Wales has the Insolvency Act 1986 (IA86) which covers both personal and corporate insolvency. However, when dealing with an insolvency process in England and Wales the insolvency practitioner cannot solely rely on the IA86, it may also use the Companies Act 2006 (CA06) especially when considering the duties of the directors an actions that can be brought against them.

In other states the legislation covering personal and corporate insolvency may be contained in separate legislation, an example of such a state is Australia.

In common law jurisdictions, it often seen that common law principles are used to fill any gaps that may be contained within the legislation.

In any state there is also the overarching general (non-insolvency) law which may impact the administration and conduct of the insolvency. An example of general law that has a real impact is the rights of security, especially those that come into force in an insolvency, these rights can differ dramatically from state to state.

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:

1. In which jurisdiction may insolvency proceedings be opened?
2. The law of which state 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?

Taking each of these in turn, firstly, the jurisdiction in which insolvency proceedings may be opened; to determine this the nexus of the debtor to the particular jurisdiction and whether the local court will view this as a sufficient connection to open main proceedings is key. This can often, but not always, be a determination of the COMI of the debtor.

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?

In common law jurisdictions a party to the proceedings can apply for a choice of law contrary to the local law, usually this occurs where the foreign law would provide the party with some form of advantage. It is then for the local court to determine if the local law of foreign law would be most appropriate to determine the matter in question. If no such application is made, the local law will automatically apply in a common law jurisdiction. In civil law jurisdictions no application is required and the local court will itself determine the most appropriate law to apply. The choice of law can allow for cross border matters to the determined in an efficient and cooperative manner.

Finally, considering the international effect of a judgment – we are focussing on recognition and enforcement of foreign judgments in insolvency matters. This was not dealt with sufficiently in MLCBI and in led to the development of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments (2018) which distinguishes between judgments commencing proceedings and judgments during the course of proceedings.

4

Question 3.3 [maximum 5 marks]

It is said that "co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; by UNICTRAL in their *Practice Guide on Cross-border Insolvency Agreements*; and by the Judicial Insolvency Network in their *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters*…"

It is also said that “While court approval of such agreements for the purposes of co-ordinating insolvency proceedings is encouraged by the MLCBI, they in fact pre-date the Model Law.”

Briefly discuss a prominent case law example for this last quotation.

The Maxwell Communication plc (1991) Case
This case involved two concurrent insolvency proceedings, Chapter 11 in the US and an administration in England (& Wales).

Within the two proceedings there existed two separate sets of practitioners administering the proceedings.

It was suggested by the UK and US Courts, independently, that it would be beneficial for there to be an insolvency agreement between the parties.

The insolvency agreement had two main objectives:
1. To maximise the value of the estate assets
2. To do so in the most efficient manner – in a way which would avoid jurisdictional conflict.

The agreement also set out that the US would defer to the UK proceedings. Whilst the agreement allowed the UK practitioners to take various steps to further the objectives, it stipulated that the US practitioners had to be informed and consent to such actions.

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.

4
Marks awarded 13 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.

On 18 June 202, the UK remained part of the European Union and as a result the European Insolvency regulation Recast (EIR Recast) applied to the proceedings opened on 18 June 2020. **It would be beneficial to elaborate upon when the EIR Recast ceased to apply to proceedings opened in the UK.**

The UK proceedings are collective proceedings and Fernz Co Ltd (Fernz) would be able to make a claim in these proceedings. In addition, given that Fernz is the largest ceditor they may be able to 'choose' the officeholder to conduct the proceedings.

As Rydell's COMI is in the UK, the UK insolvency proceedings will be the main proceedings; **why? Elaboration is warranted.** however, EIR Recast does allow for secondary proceedings to be brought in other EU member states.

For Fernz to open secondary proceedings it must be able to demonstrate that Rydell has an establishment in that EU member state. An establishment, as defined in EIR Recast, is 'any place of operations…where the debtor carries out non-transitory economic activity with human means and assets.'

We would need to understand which EU member state Fernz was looking to bring proceedings in and whether or not it could be argued that Rydell had an establishment in that state. **Do you need any further information in this respect?**

In this situation, as the main proceedings are in the UK, under EIR Recast, these proceedings are automatically recognised in all EU member states and a moratorium is also effective in those states. The UK insolvency law will be applicable when dealing with aspect of the estate in EU states.

It would also be beneficial to briefly discuss other articles of the EIR Recast, such as Article 7.

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 at 18 June 2021, the UK had left the European Union and therefore did not benefit from the provisions of EIR Recast. **It would be beneficial to set out when the EIR Recast ceased applying.**

As a result there is no automatic recognition of the UK proceedings in EU member states and the moratorium would not stretch over the EU member states.

The English IP may have made an application for recognition of main proceedings in in the EU member state. We would need to know whether the member state had adopted the MLCBI, which would allow for a relatively efficient recognition process. However, only a limited number of EU member states have signed up.

If no recognition had been sought or granted, Fernz would likely be able to open concurrent proceedings in the EU member state if it was able to demonstrate a reasonable nexus to that state. The local law to that state would then apply to the proceedings and EIR Recast would also apply to these proceedings meaning they would be recognised throughout the EU. **It would be beneficial to clearly state what further information is therefore required.**

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?

For the creditor to bring proceedings in the UK, it must show that the company is insolvent, by way of a statutory demand, it must also satisfy the UK courts that the UK is an appropriate jurisdiction in which to open the proceedings.

Consideration would need to be given to whether or not insolvency proceedings had been opened in the EU member state where Rydell's COMI was situated and whether any application for recognition had been made in the UK.

As the UK has adopted MLCBI, any foreign insolvency representative has access to the UK courts and can seek recognition and if the proceedings are determined as main proceedings an automatic moratorium comes into effect.

The effect of the moratorium would prevent the minor creditor from bringing any enforcement action against Rydell in the UK unless Rydell provided leave for it to do so.

Section 221(5) Insolvency Act 1986 should be considered together with the concept of 'sufficient connection'.

.5
Marks awarded 7 out of 15
TOTAL MARKS 39/50

*** End of Assessment ***