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.

1. Concept of discharge as introduced by the Statute of Ann in 1705. Discharge was not automatically granted to a debtor. The administrators of the estate need to agree that the debtor has assisted and adhered to the proceedings. **It would be beneficial to elaborate on how this shaped the way of thinking concerning modern insolvency law, for example by discussing 'fresh start' concepts.**
2. The first English Bankruptcy Act of 1542 provided for mandatory sequestration enforced upon a debtor wilfully in default. This law treats such debtor as quasi-criminals. It formed the basis of modern insolvency regulations where there is joint involvement of creditors and an equal distribution amongst creditors of the pool of funds from realized assets. **How does mandatory sequestration shape joint involvement or equal distribution? You need to clearly describe a development and how it shaped modern insolvency thinking. There is a gap in the logical development of this statement.**
3. The law of 1883 formed the fundamentals of the English insolvency law today. It introduced the concept of the Official Receiver's office and remained the standards throughout the 20th century.

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 Corporate Insolvency and Governance Act 2020 (the "Act") was passed on 26 June 2020, introducing amendments to the insolvency law which includes but is not limited the following:

1. New Moratorium period

   An entity benefits from a payment holiday in a form of a moratorium period which provides the entity protection from creditors action against non-financial debts including actions taken by landlords while it attempts to restructure its debts or seek a rescue plan.

2. New restructuring plan

   The Act introduces a new restructuring plan that allows distressed entities to propose an arrangement or seek a compromise with creditors which features new regulations that are previously only found in the Chapter 11 procedure adopted in the United States.

3. Suspension of winding up petitions and statutory demands

   A short-term suspension on filing winding-up applications and statutory demands forming the basis for a winding up petition was implemented during the period 1 March 2020 to 30 June 2020, where the debtor was negatively affected financially by COVID-19. This short-term suspension was extended until 31 March 2021.

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.

Treaties are an example of public instrument which states become signatories to and are bounded to it and are enforceable in the domestic law each state that are signatories to the treaty. One example is the Nordic Convention (1933) where an insolvency order granted in a member state is largely recognised, effective and enforceable in all other member states without requiring any additional procedures such as registration of such order in the local court.
It would be beneficial to discuss 'hard law' concepts.

"Soft law" on the other hand typically takes the form of a Model Law such as the UNCITRAL Model Law which serves as a guideline that UNCITRAL encouraged members to endorse in their respective statutes, with or without adaptations. It forms a basis of standard law that allows various states to utilize to obtain recognition in cross-border insolvency matters. The Model Law is drafted in such a form where it does not require reciprocity so countries adopting the Model Law can utilize it to recognize foreign winding-up orders and appointment of foreign insolvency estate representatives.
It would be beneficial to elaborate upon the different successes of soft vs hard law.

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.

Domestic laws historically have only been developed to deal with situations where an entity became bankrupt within the same country and did not account for cross-border scenarios. Domestic laws may only briefly mention cross-border insolvency situations such as providing for foreign entities to be registered locally and allowing a winding up process in home state once the entity has been wound up in its place of incorporation (a foreign state). Where domestic laws do not specifically provide for ways to deal with such cross-border insolvency, the State may rely on other sources such as public international law (hard-law) and soft-laws in forms of Model Law.

International laws include public and private international law. Examples of public international instrument are treaties and conventions which states become signatories to and are bounded to it and are enforceable in the domestic law each state that are signatories to the treaty. One example is the Nordic Convention (1933) where an insolvency order granted in a member state is largely recognised, effective and enforceable in all other member states without requiring any additional procedures such as registration of such order in the local court.

Soft-laws are yet another source of insolvency law that a state may adopt. An example is the UNCITRAL Model Law which serves as a guideline that UNCITRAL encouraged members to endorse in their respective statutes, with or without adaptations. It forms a basis of standard law that allows various states to utilize to obtain recognition in cross-border insolvency matters. The Model Law is drafted in such a form where it does not require reciprocity so countries adopting the Model Law can utilize it to recognize foreign winding-up orders and appointment of foreign insolvency estate representatives.

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.

.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.

1. In which jurisdictions may insolvency proceedings be opened?
   Does the court have the power to decide on the dispute? Some instances may involve foreign factors in other jurisdictions out of the court's control and there may be a need for the involvement of another jurisdiction or obtaining recognition in another jurisdiction.
2. What country's law should be applied in respect of different aspects of the case?
   Each country has their own set of laws which governs how to deal with different disputes which may be more favourable to certain parties, depending on the case. A common law system only brings up choice of law upon parties invoking such choice whereas in civil law systems, it is presumed that the foreign law is applied by default.
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?
   Having a foreign judgement recognized in another country can be significant, in particular instances where a winding up order is granted. Similarly, having an order granted that directs a third-party to make payment to the insolvent estate creates enforcement issues where the order may not be granted in the state that the third-party has assets and requires foreign recognition for it to be enforced.

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

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 example is the Maxwell Communications plc cross-border insolvency case in 1991 which surrounded 2 main insolvency actions taken in United states and United Kingdom against the same entity, resulting in there being 2 distinct estate representatives in each

country with comparable authority and duty. The judges in both states proposed the concept of an insolvency arrangement between the 2 estate representatives to administer the bankrupt estate effectively with minimal disputes or disruptions and allow for knowledge sharing.

Under such arrangement the two main objectives were:

1) To maximize returns to creditors; and
2) To minimize costs, duplication of work and jurisdiction conflict by having some form of uniformity in proceedings.

It was agreed as long as the relevant conditions were fulfilled, the United States court would defer to the English proceedings to minimize costs and conflict.

Some key terms includes the retention of the management to keep the entity as a going concern to maximize returns, but the UK insolvency estate representative ("**UK IER**"), with agreement from the US insolvency estate representative ("**US IER**") can appoint new and independent directors to the board; UK IER may only take on additional liabilities or propose a restructuring plan with agreement from US IER or the US court; the UK IER must notify the US IER when proceeding with a large deal on behalf of the entity but may proceed with smaller deals without approval from the US IER. A large number of topics were not included in the arrangement as they were to be addressed as the administration of the bankrupt estate progressed. An addendum to the arrangement was subsequently entered into the address additional topics such as creditors' distributions.

5
Marks awarded 8.5 out of 15

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

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

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

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

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

Question 4.1 [maximum 7 marks]

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

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

1. The first question is whether the European Insolvency Regulation Recast) ("**EIR Recast**") applies?

As the insolvency proceeding against Rydell was commenced on 18 June 2020 in UK (before 11pm on 31 December 2020), EIR Recast still applies to UK as a member state. Accordingly, any order granted pursuant to the EIR Recast will be binding (recognized and enforceable) to all EU member states, including UK.

2. Are there any measures adopted by UK to support distressed businesses through the COVID-19 crisis?

   On 26 June 2020, the UK government passed into law the Corporate Insolvency and Governance Act introduced amendments to the English insolvency law, including a short-term suspension on winding-up petitions from 1 March 2020 to 30 June 2020 where the debtor was negatively affected financially by COVID-19. This short-term suspension was extended until 31 March 2021. The creditors will need to consider if Rydell's business has been negatively impacted by COVID-19.

3. Is Fernz allowed to open proceedings in another country in Europe given the COMI of Rydell is in UK and proceedings have already commenced in the UK?

   As the COMI of Rydell is within the jurisdiction governed by the EIR Recast, the UK courts would have designated jurisdiction competence to deal with the insolvency proceeding of Rydell. Although the UK proceeding would be the main proceeding given COMI is in UK, the EIR Recast allows for secondary proceedings to be commenced in other member States if the entity has an "establishment". An establishment in this instance refers to a location where the entity deals or trades from in a non-transient manner. The secondary proceeding can still be commenced after the insolvency order is granted in the state where COMI is established as long as it can be proven Rydell has an "establishment" in the country that Fernz is trying to commence proceedings in. An "establishment" can be in a form or a branch or an office or a warehouse where goods are stored for example. **It would be beneficial to set out what further information is required to determine if an establishment exists.**

4. Would the EIR Recast still apply post-11pm of 31 December 2020?

   UK and EU entered into an Withdrawal Agreement which was implemented in the UK on 23 January 2020 and allowed for the EIR recast to continue be applied for bankruptcy adjudication where proceedings were initiated before 31 December 2020 as a main proceeding but does not address the instance for which when it is a secondary proceeding. The UK will still grant recognition to insolvency actions initiated in other EU Member States and if main proceedings are initiated before 31 December 2020, the UK will also gain mutual recognition of UK insolvency actions in EU member states.

5. Alternative to relying on EIR Recast?

   The EIR Recast is not the sole source of cross-border insolvency law under UK law. The UNCITRAL Model Law on Cross-Border Insolvency is also adopted which provides, a framework for UK courts to recognize proceedings commenced in other states and providing cooperation to foreign insolvency estate representatives.

   There are often established frameworks that can be adopted to deal with not having mutual recognition under the EIR Recast. The UK Insolvency Service has also provided guidelines on fundamentals adopted in the various EU Member States on recognition and enforcement of foreign bankrupt adjudication.

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.

From 11pm on 31 December 2020, the EIR recast ceased to apply in the UK following its exit from the European Union.

The English law would instead be relevant. It would be relevant to know if UK and EU laws adopted the UNCITRAL Model or provides for recognition of foreign proceedings. If parties do not invoke the choice of law, it may be assumed in English law it will be the choice of law that applies in the proceedings commenced by the minor creditor in UK.

3

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?

Jurisdiction – does UK have jurisdiction over the affairs of Rydell? Given that Rydell's COMI is in a country in Europe that is a member of the European Union (EU), it may not be the appropriate forum to commence insolvency proceedings in the UK unless the creditor is commencing action pursuant to certain contracts that are governed by UK laws.

Section 221(5) Insolvency Act 1986 allows for a court-ordered winding-up of unregistered companies in the following scenarios:

1. If the 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.

Sufficient connection requirements should also be discussed.

Choice of law – foreign law may be more applicable in this case given that the COMI is in Europe. For a liquidation commenced pursuant to the UK Insolvency Act 1986, UK regulations would be applied even for foreign companies. However, reference can be made to a foreign regulation that governs certain issues like in the instance to verify the veracity of claims for contracts that is under the jurisdiction of a foreign regulation when reviewing a proof of debt submitted to the insolvency estate representative.

Recognition and enforcement – if an order is granted in the UK for the winding up of Rydell, how would the minor creditor be able to have this recognize in the EU where Rydell's COMI is? Would there be issues on enforcement as Rydell's assets may not be situated in the UK and there may not be anything that the insolvent estate representative in the UK is able to realize in the UK.

There are often established frameworks that can be adopted to deal with not having mutual recognition under the EIR Recast. The UK Insolvency Service has also provided guidelines on fundamentals adopted in the various EU Member States on recognition and enforcement of foreign bankrupt adjudication.

3.5
Marks awarded 12.5 out of 15
TOTAL MARKS 39.5/50

*** End of Assessment ***