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.

The fundamental principle of the first English Bankruptcy Act of 1542 introduced compulsory administration and distribution on the basis of equality amongst all creditors of a fraudulent debtor. The concept of collective participation by all creditors of a debtor as well as distribution on an equal basis (known more commonly as *pari passu* these days) are important principles of modern insolvency law and underpin the participation of creditors in any insolvency case. On the other hand, the 1570 Act of Act of Elizabeth allowed creditors to petition to the Lord Chancellor to convene a bankruptcy meeting who would then appoint a commissioner to supervise the process of the debtor's bankruptcy. The commissioner would examine the debtor's transactions and property and the debtor was also obligated to transfer their property to the commissioner. This concept underpins the statutory duty of a liquidator in modern insolvency law to take control of the properties of the debtor as well as investigate into the affairs of the insolvency debtor.

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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.

In response to the Covid-19 pandemic, the UK introduced the Corporate Insolvency and Governance Bill in May 2020 **It would be beneficial to discuss it as an Act.** aimed at helping companies maximise their chances of survival, protecting jobs and supporting the UK's economic recovery. One of the measures introduced include temporarily prohibiting creditors from filing statutory demands and winding-up petitions for coronavirus related debts. Insolvent companies or companies likely to be insolvent can also obtain a 20-business day moratorium supervised by an insolvency practitioner to provide formal breathing space from creditors while they seek a rescue. Besides that, a new restructuring plan was introduced modelled after the existing scheme of arrangement with the ability to cram down across classes of creditors (unsecured and secured). This new restructuring plan enables complex debt arrangements to be restructured and will support the injection of new rescue finance.

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.

When considering cross-border insolvency rules between and within States, there are several ways to approach this. One of such approach is the regulation of rules through binding "hard law" and another which influences regulation through "soft law".

Binding legal instruments on an international platform are those that affect the domestic law of a State once a State becomes a signatory to said instrument thus forming part of the "hard law" of the State. An example of such an instrument are treaties which are formal, legally binding written agreements between sovereign States. With regards to

cross-border insolvency rules, treaties may be used to address insolvency issues through the harmonization of insolvency rules between States. Unfortunately, treaties that manage cross-border insolvency are rare due to the differences in legal systems and laws of States which makes it difficult to present one set of rules that takes into account local political and cultural factors. There are only a few treaties currently in operation that manage cross-border insolvency such as the Nordic Convention of 1933, the Montevideo treaties of 1889 and 1940 and the Havana convention of 1928.

On the other hand, there has been more success in establishing cross-border insolvency rules through the use of "soft law". Soft laws are quasi-legal instruments which do not have any legally binding force and serve more as a guide to States for adoption into their domestic law. One of the most successful soft laws for managing cross-border insolvency is the Model Law on Cross-Border Insolvency ("Model Law") by UNCITRAL. Instead of being a signatory to the instrument, States can choose to adopt Model Law into their domestic law in order to establish cross-border insolvency rules. This allows States to take into local factors that are otherwise not acknowledged in treaties.

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Marks awarded 10 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 practice is generally regulated which is why it is important to be aware of the different sources of insolvency in any State, especially in cases of cross-border insolvency where an insolvency practitioner may find themselves having to perform their statutory duties in a foreign State.

Sources of law in modern times are usually found in legislation or codes. States based on the civil law system have a comprehensive system of rules and principles usually arranged in codes, which serves as the primary source of law. On the other hand, states based on the common law system will also rely on judicial precedents to plug gaps in existing legislation.

Insolvency law started as addressing individual bankruptcy but as the way of doing business has evolved, so has the law in order to address new commercial entities. In some systems, there still remains a single, unified piece of bankruptcy legislation aimed to address all aspects of bankruptcy whether individual or corporate such as the Bankruptcy Code 1978 in the USA and the Insolvency Act 1986 in the UK. It is also common for systems to have separate statutes on individual bankruptcy and corporate bankruptcy. In Malaysia, personal bankruptcy is addressed in the Insolvency Act 1967 while laws on company winding-up are found in the Companies Act 2016.

Equally as important are non-bankruptcy laws that can also have an effect on insolvency practice. An insolvency practitioner in any insolvency case may face a multitude of issues ranging from employees' rights, vesting of real rights, laws relating to land, income tax and real property gains tax. An insolvency practitioner may sometimes find that insolvency law does not adequately address a specific issue so he may need to look beyond insolvency law to understand how to properly handle such issues.

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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.

While it is highly unlikely a global insolvency law system will come into fruition anytime soon, efforts to harmonise insolvency laws such as UNCITRAL's Model Law on Cross-Border Insolvency ("Model Law") has had success in providing uniform approaches to dealing with cross-border insolvency for States that have adopted the Model Law. In this regard, Fletcher raises three pertinent questions to reconcile the "cross-border" and "insolvency" aspects in the harmonisation of insolvency laws.

Firstly, "in which jurisdictions may insolvency proceedings be opened?". As companies grow to become multinational and trade internationally, determining where proceedings should be held is important. In order to answer this, the connection between the jurisdiction and the parties or dispute is to be considered. Furthermore, foreign elements such as assets or officers in another State may also come into play. There is also the issue on whether a local court will hear and determine on a matter if a foreign insolvency proceeding is already in progress. That is why cooperation and communication between courts in different States are very much encouraged to avoid conflict.

Secondly, "what country's law should be applied in respect of different aspects of the case?". If a court has chosen to hear a matter, it may have to decide on the law to apply especially if we consider that insolvency proceedings can be held outside of the State of incorporation of a company. In a common law system, unless a party invokes choice of law, the law of the forum will apply. This may occur when a party stands to gain from applying foreign law instead of law of the forum.

Finally, "what international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?". It is not unheard of for a foreign liquidator requiring a local court order recognising them so that they may dispense of their duties (such as requests for information). Thus, the issue of recognition and enforcement of foreign judgements. Certain states have enacted legislation to address foreign judgements and the UNCITRAL had also developed the Model Law on Recognition and Enforcement of Insolvency-Related Judgements.

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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.

Maxwell Communications Corporation plc ("MCC") was a British media business involved in information services and electronic publishing, school and college publishing, language instruction and reference-book and professional publishing. Although the company was administered in London and nearly all of its financial affairs were managed there, its principal assets were found in the United States in the form of large operating companies. After the company collapsed in 1991, two insolvency proceedings were initiated by a single debtor; an administration in the UK and a Chapter 11 bankruptcy in the US.

As the bankruptcy judge in the US, Judge Brozman, was not inclined to dismiss the Chapter 11 case, she instead appointed an insolvency representative and instructed him to work with his counterparts in the UK. A document called the "Protocol" was drawn up to formally state that the administration of MCC be carried out in cooperation between the insolvency representatives appointed in the US and UK. The goals of the Protocol were to maximize the value of the estate and harmonize proceedings to minimize waste, expenses and jurisdictional conflict.

Although the insolvency representatives filed separately their plan of reorganization and scheme of arrangement consistent with their relevant laws, the plan and scheme were mutually dependent. The plan and scheme did not separate creditors by courts and operated a single distribution mechanism of all of MCC's assets in order to avoid creditors claiming in both jurisdictions.

The case of MCC was the first ever joint arrangement under English and United States insolvency laws for orderly transnational liquidation. The Protocol successfully demonstrated that coordination agreements between courts in different States can be achieved and are indeed an approach to addressing international insolvency issues.

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Marks awarded 15 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.

Under the European Insolvency Regulation Recast ("EIR Recast"), main insolvency proceedings should be opened in the debtor's centre of main interest ("COMI") and that there will be automatic recognition of the main insolvency proceeding in other member States. As insolvency proceedings have already been opened by a creditor in Rydell's COMI, Fernz may request for the opening of secondary insolvency proceedings as provided by the EIR Recast. The effects of such secondary insolvency proceedings are restricted to the assets of the debtor in the State where the proceedings are opened. **It would be beneficial to discuss 'establishment' in detail.**

If Fernz decides to open secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceeding will be notified. If the insolvency practitioner would like to avoid any secondary insolvency proceedings, he has the right to give an undertaking in respect of the assets located in other Member States that he will comply with distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State.

The EIR Recast provides measures for coordination and cooperation between the courts of member States as well as between insolvency practitioners in main and secondary insolvency proceedings. The aim of such measures to increase the efficiency and effectiveness of the administration of the debtor's insolvency estate. These measures imply the insolvency practitioners and the courts are to cooperate closely, in particular by exchanging a sufficient amount of information. The EIR Recast also allows for the insolvency practitioner and courts to enter into agreements and protocols in order to facilitate such cooperation.

It would be beneficial to discuss specific relevant articles of the EIR Recast.

Besides that, Fernz will still retain their rights as a creditor of Rydell should they decide not to open insolvency proceedings in their country. Under the EIR Recast, it is the duty of the court having jurisdiction or the appointed insolvency practitioner to inform creditors all known foreign creditors and to accept lodgement of claims by these creditors.

The EIR Recast provides a clear structure with regards to cross-border insolvency between member States of the European Union. As a foreign creditor, Fernz will find that the EIR Recast allows for them to exercise their right as a creditor in the manner they see fit.

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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.

Following the UK's exit from the European Union, the EIR Recast ceased to apply in the UK from 31 December 2020. If the proceedings were opened in the UK on 18 June 2021, member States of the European Union will not be obligated to recognize the UK proceedings. Fernz may be able to open insolvency proceedings against Rydell in their country but will have their rely on their own State's domestic law on winding-up a foreign company.

Should Fernz decide to proceed with the insolvency proceeding and the courts in the country have allowed it, the issue of recognition and enforcement of judgments will come into play as the non-application of the EIR Recast in the UK would mean the courts in the UK are not obligated to recognize the insolvency proceedings opened by Frenz in their

country. Without the EIR Recast, Fernz will have to rely on other international instruments such as UNCITRAL's Model Law on Cross-Border Insolvency for the recognition of the insolvency proceeding.

Have many counties adopted the MLCBI in Europe? What further information would be required regarding the MLCBI?

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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 Rydell were unregistered with its COMI in Europe instead of the UK and the minor creditor would like to commence formal insolvency proceedings in the UK, they will have to rely on the provisions under Part V of the Insolvency Act 1986 which deals with the winding-up of unregistered companies. Section 221 states that an unregistered company may be wound up "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; if the company is unable to pay its debts; or if the court is of opinion that it is just and equitable that the company should be wound up."

While the courts in the UK do not claim to have jurisdiction over foreign companies, it was held in the case of Re Real Estate Development Co (1991), that three requirements had to be satisfied for the courts to consider the winding-up of foreign unregistered company. These three requirements were "there must be sufficient connection with the jurisdiction; there must be a reasonable possibility that a winding-up order would benefit those applying for it; and the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets."

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Marks awarded 12 out of 15
TOTAL MARKS 47/50

*** End of Assessment ***