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 Bankruptcy Act of 1542 introduced the principles of collective participation by creditors and a pari passu distribution among them of any available assets and the sequestration of a fraudulent or absconding debtor.
The 1570 Act permitted a bankruptcy proceeding to be commenced against a debtor following an 'act of bankruptcy' meaning that a creditor could petition The Lord Chancellor to have a debtor adjudged bankrupt.
The Statute of Ann of 1705 provided for the first time that a debtor could be discharged from bankruptcy. Taken together, these 3 pieces of English legislation, while historical and of a different era, laid the foundation for modern insolvency procedures: a collective process; equality amongst a class of creditors and the concept of discharge and 'a fresh start'.

3

Question 2.2 [maximum 3 marks]

Following the Covid-19 pandemic, States across the globe had to introduce measures to deal with the negative economic fall out of this pandemic. Briefly indicate three insolvency and insolvency-related measures so introduced in the UK.

Th UK introduced the Corporate Insolvency and Governance Act 2020 in June 2020. This Act contains the UK's response to the pandemic from an insolvency related perspective. The Act contains a number of provisions; taking 3 insolvency related measures: prevention of statutory demands served between 1 March and 30 September 2020 being used as a basis for issuing a winding up petition against a company. A new moratorium of 20 business days was introduced which prevents creditors taking action against a company within this period which the company is to use to restructure/seek fresh investment. The Act contains a provision to the effect that suppliers of goods and services cannot rely on contract terms varying or terminating contracts because the company enters an insolvency process.

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 and conventions to which States become signatories become part of domestic law, enforceable in the courts and as such a part of that States 'hard law'. An example is the European Insolvency Regulation which applies between EU member states. By contrast, 'soft law' seeks to influence the direction of cross-border insolvency rules and provides guidance and suggests best practices. A range of multilateral organisations rather than governments/States are involved in the creation of 'soft law'. An example of soft law (and how it may influence the direction of cross border insolvency as opposed to treaties and conventions) is the UNCITRAL Model Law on Cross-border Insolvency. Another example is the development of the Asian Principles of Business Restructuring through the collaboration of the Asian Business Law Institute and the International Insolvency Institute. Soft law assists in establishing cross border rules as

it can be difficult for States to agree such rules in the form of international treaties and conventions.

It would be beneficial to elaborate on the different success of soft vs hard law.

3.5

Marks awarded 9.5 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.

A State's insolvency law may arise from its own (historical and modern) statues (for example, the Insolvency Act in the UK); under common law (if the State is governed by a common law legal system); by becoming a party to international treaties and conventions such as the European Insolvency Regulation (if an EU member state) whereby these laws are written into domestic law; by adopting so called 'soft law' such as the UNCITRAL Model law on cross border insolvency. Hard and soft law combine to enable the courts of a State deal effectively with cross border issues.

It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, it would also be beneficial to elaborate on how common law in common law countries fills any gaps in law, and it would be beneficial to discuss general law and its relevance and impact upon insolvency law.

2.5

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 3 questions raised by Fletcher are (a) choice of forum, (b) recognition and effect given to foreign proceedings in the same matter and (c) choice of law. All 3 together must be considered when pursuing harmonisation of insolvency laws. **It would be beneficial to list out the questions themselves.**

Forum choice concerns which court can and will hear and determine the matter and involves an examination of the connection with the jurisdiction of the parties to the dispute. The court will be assisted in granting or refusing jurisdiction by certain international treaties and (where applicable) common law and soft law.

Recognition and effect given to foreign proceedings in the same matter raises questions on the court that gave the judgment, the type of judgment and its effect, for example an order commencing insolvency proceedings. Standards can vary across jurisdictions and States leading to complications with cross border recognition. Furthermore, the laws of the State in which recognition is sought may not recognise the foreign order or indeed provide a mechanism for which recognition may be sought. Where a State is not a signatory to treaties, soft law such as the JIN Guidelines and JIN Modalities in the field of judicial co-operation may assist. For EU member states, the EIR Recast provides for recognition of insolvency proceedings.

The question of the choice of law for a proceeding can depend on the type of legal system. In common law systems choice of law issues only arise if parties invoke them otherwise the law of the forum applies. In civil law systems, foreign law is presumed to be a question of law to be applied regardless of whether or not it is pleaded. Harmonisation can be seen to work in the EIR (recast) where, subject to certain provisions, the law of the member State that opened the proceedings applies.

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]

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 Corp plc is a leading case from 1991 in which the courts in the US and the courts in England co-ordinated proceedings in both jurisdictions in relation to concurrent insolvency proceedings through an 'Order and Protocol'. A debtor initiated proceedings in both jurisdictions appointing two different insolvency practitioners. The judges on both sides of the Atlantic suggested that both practitioners agree an administrative procedure between them in order to minimise conflict and maximise return to creditors. The parties agreed that the US courts would essentially defer to the English court. A specific example is where the English insolvency practitioner agreed not to incur debt without US approval. The parties agreed the mechanisms of co-operation between themselves and obtained court approval.

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.

3

Marks awarded 9 out of 15

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

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

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

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

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

Question 4.1 [maximum 7 marks]

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

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

The EIR Recast applies. The proceedings by the minor creditor were opened during the BREXIT transition period wherein the EIR Recast continued to apply (period ceased 31 December 2020). Rydell's COMI is in the UK hence UK law applies with the UK insolvency proceeding being the 'main proceeding'. The UK insolvency proceeding will be recognised under the EIR Recast by the courts of the other EU member states which contain creditors of Rydell. The insolvency of Rydell will not be re-examined by the courts of the other member states. Fernz is bound by the main proceedings and it will not be possible to take action against Rydell in its home country.
The further information I require is whether Rydell has an 'establishment' within another member state sufficient to consider launching secondary proceedings (Art. 34). An establishment is defined in the EIR Recast as a non-transitory economic activity with human means and assets. Secondary proceedings are only possible if Rydell has an establishment in the other member state. The effect of secondary proceedings is limited to those assets in the member state.
There is scope to elaborate.

6.5

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.

Yes my answer would be different. As noted above in 4.1 the BREXIT transition period ceased 31 December 2020 meaning that if the proceedings were commenced 1 year later, the EIR Recast would not be applicable. Fernz could consider issuing its own proceedings pursuant to the EIR Recast which may run concurrently to the UK proceedings.

It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCBI and if not what laws would need to be considered in those countries.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 3 marks.

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?

The minor creditor should investigate whether a court ordered winding up is possible pursuant to section 221(5) of the Insolvency Act 1986. The relevant circumstances which appear applicable in the current case are whether Rydell is unable to pay its debts and/or if the court is of the opinion that it would be just and equitable that the company should be wound up. There must be a sufficient connection with England and Wales – proof of assets within the jurisdiction will be helpful; there must be a reasonable possibility if the order is made of benefit to those applying for the winding up order – the court will not make an order in vain; and one or more of the persons interested in the distribution of assets must come within the jurisdiction of the English court. In the event the minor creditor can meet these requirements then it may be possible to launch formal insolvency proceedings in the UK.

5

Marks awarded 13 out of 15

TOTAL MARKS 41.5 /50

*** End of Assessment ***