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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate three significant (historical) developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law.

According to Fletcher – he states that the roots of bankruptcy law can be found in three procedure of the Roman Law:

- Cessio Bonorum (assignment of property)
- Distractio Bonorum (forced liquidation of assets
- Remission and Dilatio (compositions with creditors)

These procedures were developed from debt collecting procedures in relation to individuals, and later developed into debt collection where multiple creditors were involved.

Notable developments:

Statute of Marlbridge – 1267, provided for the imprisonment for the non-payment of debts.

Imprisonment for non-payment of debt was later abolished in 1869 by the Debtors Act in England.
It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.

First English Bankruptcy Act came into force in 1542. The act provided for the ceasing of assets for the none payment of debts or dishonest debtors. This act also provided for the appointment of a commissioning body who could investigate and take action against the debtor on the behalf of creditors. The act also provided for an application to be made by a creditor, against a debtor, for the recover of debts/funds. The act introduced that in the case of a fraudulent debtor, there should be an independent administration and distribution between the debtors of a 'pari passu' nature, and that thi procedure should be compulsory and initiation through the courts. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

1.5

Question 2.2 [maximum 3 marks]

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

The UK passed the Corporate Insolvency and Governance Act 2020, which although some matters were already in development prior to COVID-19, the difficulties arising from the pandemic were covered in this legislation:

- **New restructuring plan** – enabled the 'cramming down' of creditor classes, altering the provisions needed to pass voluntary arrangements.

- **Moratorium** – enables companies (not currently in insolvency proceedings) to obtain a moratorium (independent from any other insolvency proceedings, ie moratorium as a standalone process outside of an administration for example) for a period of 20

business days (unless extended). Moratorium gives protection from enforcement from creditors, amongst other obligations the office holder must confirm the business has a viable future of trade on exit from the procedure.

- **Relaxation of wrongful trading liability**
  Governed by s.124 of the Insolvency act 1986, this liability was lifted for a designated period in order to protect Directors, owing to the fact that COVID-19 was not something that could have been predicted or planned for and some transactions may have been challenged under s.124 but would not have been a true reflection.

- **Suspension of winding up petitions and statutory demands**
  No wining up petitions or statutory demands were able to be filed for the period from 27 April 2020 – 30 September 2020. This was further extended several times. The UK Government had advised there will be a gradual staging of this returning to normal over the period 1 October 2021 – 31 March 2022

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: An agreement between states which establishes obligations in relation to international law and how certain aspects of such are agreed to be dealt with between the agreeing states. An example of this would be the Montevideo Treaties (1889) and (1940).

Treaties can be used to agree on pertinent issues between states, saving time and costs when insolvencies are based across these jurisdictions as procedure has already been established. They are limited in that they only cover the jurisdictions which agree, but in places where Companies or individuals often operate across these states it can be beneficial. A good example of this is the treaties which cover Latin America mainly the Montevideo Treaties (1889) and (1940). For the agreeing states, this clearly defines, amongst other things, a provision for one set of proceedings, concurrent proceedings.

Soft-law: Although not legally binding, soft law relates to agreements and/or principles which can give guidance in certain issues. An example of this is UNCITRAL Model Law on Cross-boarded Insolvency **It would be beneficial to elaborate upon its success.**

Soft-law can be used as a way to model approaches to cross-border insolvencies once in occurrence but can also be used when writing new legislation to provide a reference point for considerations. This can also be used when writing legislation that may not necessarily be insolvency related but will be in conjunction with – for example employment and property law.

3.5
Marks awarded 8 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.

Some states may have a single piece of specific insolvency legislation – for example in the UK this would be the Insolvency Act of 1986.

Some states which are based on common law, may rely on common law principles which would provide for gaps in existing legislation. It is also to be considered that some states do not have one single piece of insolvency legislation, so the sources of insolvency law are to be found in several different acts/articles – an example of this may be a state which has one statue what may deal with the insolvency of corporate entities, and a separate statute to deal with personal insolvencies.

It is important to consider, with insolvency, there are also other aspects of the legal system/statue in the state that will need to be considered that will effect certain aspects of the insolvency, an example of which is dealing with the estate and realisations of he assets. This would lead to consideration of ownership of assets, rights of charge holders over certain assets and the recovery options of same. Therefore the various statutes will also be a source of insolvency law here – an example of this would be employment 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.

The three questions raised by Fletcher are:

(1) In which jurisdictions may insolvency proceedings be opened
(2) What country's law 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 (including issues of enforcement)

In terms of which jurisdiction, this will determine which court will or can hear any matters in relation to the case. This may be difficult to establish as differing systems/states will have different determining factors of how this may be established. For example, some systems such as the UK will take the COMI approach, which is not supported by all states/jurisdictions.

The determination of the jurisdiction where proceedings are opened will then impact the second questions of which law(s) should be applied. This will impact all matters pertaining to the insolvency as differing systems will have different approaches and laws in relation to the qualifications needed to hold office, management of the proceedings, creditors rights and recoverable assets to name a few.

In cases where there may be a judgment on the same matter in more than one state, this will give rise to considerations in terms of the recognition and effects. It is to be considered if one jurisdiction will recognise the matter/judgment from another and how each would handle such issues. For example, where assets are located in a differing jurisdiction than the one where proceedings are opened, the local law may not allow for the recognition of same and therefore asset realisation may be restricted.

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.

Case law example: Maxwell Communications Corporation plc cross-boarder insolvency case in 1991.

In the above case law example, there were proceedings in both the US and the UK, being chapter 11 proceedings in the US and administration in the UK. Both proceedings were carried out by separate insolvency representatives.

In this example the judges from both US and UK, agreed that it would be beneficial for the administration of proceedings to come to agreements on pertinent issues including the sharing of information and that this would be best achieved by an insolvency agreement between the two.

The main objective agreed by both representatives was to establish a way in which the value of the estate would be maximised by prioritising keeping the expenses as low as possible. It was seen from the offset that having two legal proceedings in separate jurisdictions could be costly to the estate, especially if matters were seeking agreement in front of both courts each time issues would arise. In order to mitigate this, amongst other things it was agreed that the US court would defer to English proceedings in the majority of matters set out by criteria agreed in the insolvency agreement.

A few examples of things specifically covered by the agreement were:

- Retention of staff and procedure/responsibility in relation to hiring Directors
- Any reorganisation plan be agreed by both
- Guidelines were set on what value of transaction could be made without consent of both, and which values the English representative would need to seek consent from the US
- The agreement was later extended to cover distribution matters

5

Marks awarded 13.5 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.

The EIR Recast only applies if the debtor has COMI in a member state, as the COMI is in the UK this will apply for the current proceedings. EIR Recast ceased to apply in the UK 11pm 31 December 2020, therefore as the proceedings opened 18 June 2020 in the UK this will apply.

Also to consider EIR Recast only applies to (in England) administrations, liquidation, and voluntary arrangements, therefore dependant on the insolvency proceeding which has been opened will determine if this would apply – for example a receivership would not apply.

As Rydell is not one of the following industries, the recast can be applied, would Ryell have fallen within these classifications of business it would not apply:

- Insurance
- Credit institutions
- Investment firms

Should the proceedings be covered by the Recast this will governs the following aspects of the insolvency proceedings:

- **COMI – Centre of main interest including establishments**

The recast states that proceedings can only be opened in a state which is the debtors COMI or where the debtor has an establishment. Therefore, this will dictate for the above example if Fernz is able to open proceedings within a member state. It would have to be determined if Rydell can be classified as being established in the member state for which Fernz would like to bring proceedings, as the COMI is the UK.

- **Which law to be used**

Typically this will be the law under which the proceedings are opened – there may be exemptions to this in some cases. In this example the laws would be UK.

- **Automatic recognition of these proceedings in member states**

  This EIR Recast would dictate that the proceedings be recognised in member states, in this case it would benefit Fernz in pursuit of their claim in the member state having this recognition as standard and not having to incur costs in gaining recognition, but also there will be no issues as such which could have interfered with potential actions/returns.

- **Methods of coordinating and cooperation between member states**

  By the case falling under the EIR Recast, it would mean that clear lines of communication and coordination are set between the member states, for Fernz in particular this will ensure as a creditor they are able to access information in regards to the proceedings in the UK.

It would be beneficial to discuss secondary proceedings and matters pertaining to 'establishment'.

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.

If the proceedings were opened in 18 June 2021 in the UK, the transitionary period (for UK leaving the EU) would have ceased, and therefore the proceedings in the UK would no longer fall under EIP Recast as default owing to the UK no longer being part of the European union.

Following the 31 December 2020 when the UK left the EU, the courts of the remaining member states (EU) are no longer prevented from opening proceedings where the debtor as its COMI in the UK. Meaning Fernz would likely be more successful in brining proceedings against Rydell within the member state.

The remaining states within the EU are no longer obligated to recognise the insolvency proceedings within the UK, so therefore Fernz again has scope to open proceedings in their member state (which is within the EU).

The obligations in relation to the coordination and cooperation will no longer apply, this could mean that if proceedings are just run in the UK, Fernz may find it difficult to keep updated of the proceedings and maintain their rights as creditors as this may differ between the jurisdictions.

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.

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?

For a minor creditor to commence proceedings in the UK, against a Company where the COMI is outside of the UK, the UK domestic laws to be considered would be:

- s426 of the Insolvency Act 1986;
- The Cross-Border Insolvency Regulation 2006;
- English Common law; and
- The Insolvency (Amendment) (EU Exit) Regulations 2019.

As these proceedings are opened after 31 December 2020 – the EIP Recast is not applicable within the UK.

The Insolvency (Amendment) (EU Exit) Regulations 2019, amongst other things grants jurisdiction to the UK courts to open proceedings where the debtor has an establishment in the UK, that may not necessarily mean the COMI is located within the UK.

However it is to note that the proceedings opened within the UK are not guaranteed to gain recognition in the member states and could leave to several proceedings being opened at the same time – a more territorial approach. This may have implication on realisation of assets an it should be considered beforehand if this will present challenges which would lead to the lack of asset recovery, or control of such, within the UK proceeding(s).

Under the Cross-Border Insolvency Regulation 2006, any proceedings brought in the UK (being it not the COMI) would be considered foreign non-main proceedings.

It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

1
Marks awarded 7 out of 15
TOTAL 37.5/50

*** End of Assessment ***