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 1570 Act which was also known as Act of Elizabeth, which was introduced during the reign of Queen Elizabeth I is said to be the first designed law to be considered as a true bankruptcy statute rather than fraud prevention law. This laws allows creditors to open bankruptcy proceedings against debtor and petition a Lord Chancellor to convene bankruptcy meetings and appoint commissioners to supervise the bankruptcy process and having the powers to prosecute. The Act however lacks discharge provisions.

What was the development and how did it shape the way of thinking concerning modern insolvency law?

The Statute of Ann of 1705 introduced the notion of statutory discharge in the proceedings whereby the bankrupted debtors was discharged from their bankruptcy upon confirmation by the commissioners that the debtors have "confirmed" and co-operated during the bankruptcy proceedings. **It would be beneficial to elaborate on the thinking regarding fresh start.**

The law of 1883 which is viewed as the foundation of the present system of English Bankruptcy Law introduces the three essential principles of a good bankruptcy law which namely the assets of an insolvent debtor belongs to the creditors and therefore creditors should have full control over the assets with the least possible interference; the trustee of the assets should be subject to official supervision; and independent examination of the debtors' conduct and circumstances leading to his insolvency. This act aims to provide fair procedure with adequate supervision and means to discourage dishonesty.

Take care to address the question posed. It would be beneficial to consider developments such as the abolishment of imprisonment for debt, or the introduction of a fresh start.

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.

With the passing of the Corporate Insolvency and Governance Act 2020, a new moratorium rules were introduced whereby a company will be able to apply for moratorium for a period of 20 business days (with a possibility to extend for a further 20 business days) to provide the company breathing space within which they can explore to options to restructure.

The Act also introduced the relaxation of wrongful trading liability whereby the Court when assessing the directors under the provisions of Wrongful Trading Act is to assume the

directors are not responsible for the worsening financial position of the company for the period from 1 March 2020 to 30 September 2020 and between 26 November 2020 and 30 June 2021.

The Act also includes suspension of winding-up petitions and statutory demands whereby threat of statutory demands and winding-up petition over unpaid debts due to Covid 19 are temporarily removed.

Further elaboration is warranted.
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 instruments to which States become signatories and as such bind themselves and affect their domestic law accordingly. **Further elaboration is needed. It would also be beneficial to discuss 'hard law'.** Meanwhile, "Soft Law" are model laws developed by multilateral organisations for member States for their adoption with or without modifications. **It would be beneficial to elaborate on how these are examples or templates that may be adopted.**

As such, for member States who are signatories to a particular convention, the cross-border insolvency rules established under the convention shall be binding on the member States in dealing with cross-border insolvency issues amongst its member States. Meanwhile, under the "Soft Law" approach, member states can opt to adopt the cross-border insolvency law as recommended under the model law developed by multilateral organisation such as UNCITRAL into their jurisdictions with or without modifications. As such, member states would have a guidance in establishing their own cross-border insolvency rules for dealing with cross border insolvency issues.
There is scope to discuss the success of 'hard' vs 'soft' law.

2.5
Marks awarded 7 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.

Various States have various possible sources of insolvency law. In Malaysia, the insolvency laws are primarily derived from its written law being the Companies Act 2016 (for insolvency involving companies), Bankruptcy Act 2020 (for insolvencies involving individuals) and Winding-Up Rules 1972 (being the secondary legislature to the Cessation of Companies Section in the Companies Act 2016). Besides written law, Malaysian insolvency law is also derived from unwritten law such as the English common law and common law judicial decisions. Often when they are gaps in the existing legislation, Courts are guided by the precedent set by the common law principles or judicial decisions set by other jurisdictions following the common law principles in coming up with their decisions.

It would be beneficial to elaborate further, for example by discussing, among other things, unified legislation vs multiplicity of legislation, and the relevance of 'general law' or 'non-bankruptcy law'.

3.5

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 first issue raised is the choice of forum, whether a court can and will hear and determine the matter. Where a foreign insolvency proceeding is in progress, local court may have to determine the effect of its decision on the foreign proceeding or whether the local court can and will hear the matter.

The second issue raised is on recognition of foreign judgment on the same matter. Questions may be raised concerning the Court which issued the foreign judgment, the type of judgment and the effect of the judgment. In insolvency proceedings, judgment may involve winding-up order against a company or order for a third party to pay monies to the foreign liquidator which may pose significant impact.

Thirdly the laws to be applied. Where the local court has determined that it will hear a matter, it may have to decide upon the law to apply. For example, England which applies a common law system dictates that a choice of law issues only arise if the parties invoke them. Otherwise, the law of the forum shall apply. Whereas in a civil law systems, foreign law is presumed to be a question of law to be applied regardless of whether it is pleaded by the parties or not.

It would be beneficial to list out Fletcher's questions. It would also be beneficial to elaborate on choice of law and extraterritorial effects to be granted to foreign proceedings

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.

The case of Maxwell Communication Corporation plc. involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two States, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that an insolvency agreement

between the two administrations could resolve conflicts and facilitate the exchange of information.

Under the agreement, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present.

Specificities included that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the English insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; and the English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the agreement to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the agreement

There is some scope to elaborate further.

4.5
Marks awarded 11 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 circumstances where the insolvency proceedings were opened on 18 June 2020, the provisions under the European Insolvency Regulation Recast ("EIR") would apply as the transition period for Brexit would still apply to Rydell. Although the EIR allocates primary jurisdiction based on the centre of the debtor's main interest ("COMI") (main proceedings), it also allows for the possibility of subsidiary territorial proceedings in other member States. The

subsidiary proceedings are permitted where the debtor has an "establishment" in the other member States. Establishment in this context is defined as meaning "any place of operations……where debtor carries out a non-transitory economic activity with human means and assets". In this case, Rydell has offices throughout Europe. Subsidiary proceedings which may be opened can be either "independent proceedings" opened prior to the main proceedings, or "secondary proceedings" opened subsequent to the bankruptcy adjudication in the State with the centre of main interest.

It would be beneficial to address what further information is required and to discuss relevant articles of the EIR Recast.

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.

Under the circumstances where the insolvency proceedings were opened on 18 June 2021, the EIR would not apply as the transition period for Brexit ended on 31st December 2020. As such, the UNCITRAL Model Law on Cross Border Insolvency would apply for UK and the respective member States on concurrent proceedings.

It would be beneficial to consider what further information might be relevant.

2

Question 4.3 [maximum 5 marks]

Consider an alternative situation now. What if Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, and formal insolvency proceedings were opened in the UK on 18 June 2021? What UK domestic laws would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK?

The relevant UK domestic law which would apply would be under Section 221(5) of Insolvency Act 1986, which provides for a Court ordered winding-up of unregistered companies in the following circumstances:

a) 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;
b) If the company is unable to pay its debts;
c) If the court is of the opinion that it is just and equitable that the company should be wound up.

This jurisdiction may also be established to wind up an "unregistered company" which includes a company formed under foreign law.

Sufficient connection and non-application of the EIR recast should also be addressed.

2.5

Marks awarded 9 out of 15

TOTAL MARKS 37 /50

*** End of Assessment ***