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.

It´s important to say that the notion of bankruptcy and it´s legislation started in Europe from the 13th to 17th century when the business worked as rustic markets and the creditors used to break the debtor´s counter when the debtors could not pay. And after that, going through debtor´s execution and dispension of execution and incarcerating. After that, more human treatments were being considered and the concept of discharge of debts was taking place. **It would be beneficial to directly answer the specific question from the outset.**

At the beginning, English law doesn´t have the incarcerating procedures, but this option took place on the 13th century and has it´s abolition only with the Debtors Act in 1869.
Meanwhile that, English law has a bad debtor vision, whit the first Bankruptcy Act of 1542, that used to view debtor as quasi criminals, providing compulsory sequestration, administration, and distribution of the debtor´s assets to creditors, in equal basis. This act brings what nowadays are one of the most important insolvency principles, which are collective participation by creditors and a pari passu distribution among the debtor´s assets.

The second important Act was the Statute of Ann of 1705, because it introduced the very relevant discharge notion. The discharge procedure is so important that remain until the present days in bankruptcy laws. **It would be beneficial to elaborate upon the modern concept of fresh start which was shaped by this development.**

The law of 1883 is the third significant historic mark to the English Insolvency Law, providing a fair procedure that intends to discourage dishonesty and adequate supervision. **What development are you referring to specifically and how did it shape modern insolvency law? Elaboration and direct language is required.**

These historical developments remain alive until nowadays because brought not only a more human treatment to the debtor and its financial condition, but also predict procedures to help both the creditor and the debtor in the best possible way.

Further elaboration would improve your mark for this sub-question.

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.

Several States promoted amendments to their insolvency law regarding Covid-19 pandemic. Covid-19 brought several social and economic impacts to all places in the world. UK introduced the “Corporate Insolvency and Governance Act 2020” bringing the possibilities of other restructuring plans, moratorium rules, the relaxation of wrongful trading liability and others.

Further elaboration would improve your mark for this sub-question.

2.5

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 public international instruments and conventions than States can be signatories and from that the State will have to obey to some rules in its domestic law regarding the treaty topic, showing some kind of obligation to all the others signatories States. These public instruments are known as hard law, because if a State become signatory, it has a huge government obligation to provide what does the treaty imposes.
In the other hand, what it´s considered as “soft law” is the union of the States in conventions and commissions in other to cooperate to each other. In this kind of structure, all States can put their difficulties and facilities on a negotiation discussion, and all States are involved to make the best efforts for all.

Both, public treaties, and soft law can be used and can be effective depending on what is the subject in discussion regarding to cross border insolvency. Although soft law has shown itself the very best option to deal with this theme. Some aspects from Treaties, like The Nordic Convention on Bankruptcy and The European Insolvency Regulation (EIR) influenced multilateral developments in international insolvency law.

Concerning to soft law, there are a lot of multilateral organisations focusing their efforts within cooperation and coordination on best practices and solutions on cross border insolvency, such as UNCITRAL Model Law on Cross-border Insolvency **It would be beneficial to note this is arguably the most successful** and ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases

3.5
Marks awarded 7.5 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.

There are different possibilities and sources regarding to insolvency law, such as harmonisation of domestic insolvency laws, uniform choice of law principles, uniform recognition laws, co-operation, and co-ordination to promote recognition and enforcement.

Also in 2000, the World´s Bank produced some guidelines on the regulation of insolvency, named as “Principles for Effective Insolvency and Creditor / Debtor Regimes”. These principles were reviewed many times, with it´s further revision in the beginning of April 2021 and recommend countries to convergence on insolvency law.

These sources and principles are effective options to countries to deal with cross border insolvency situations. Together with The UNCITRAL Legislative Guide they are considered as the international best practice standard for insolvency regimes.

Your answer could have instead been structured to discuss the sources of law across all States and to recognise how and why there may be differences between certain States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

.5

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

The questions asked by Fletcher were (i) In which jurisdictions may insolvency proceedings be opened? (ii) What country's law should be applied in respect of different aspects of the case? And (iii) What international effects will be accorded to proceedings conducted at a particular forum?

Despite the brilliant answers to these questions given by Fletcher, it´s important to note, as part of this discussion, that because of the particularity of each Country, each culture and each law, the extraterritorial limits and boundaries always will be a challenge to be faced, because there are no single insolvency rules that can apply globally without making changes to each States and it´s characteristics.

Fletcher also pointed the fundamental international legal issues, which are (i) the choice of forum to exercise jurisdiction in the matter; (ii) the recognition and effect accorded foreign proceedings in the same matter; and (iii) the choice of law to apply to the matter.

These issues are the very beginning to start an insolvency proceeding in all the places in the world, and judges and lawyers may have a lot of difficulties to deal with these issues, if they don´t have the necessary knowledge about these questions and about the complexity that it requires.
That´s why it´s important to respect the differences and to know how to apply the insolvency sources and guidelines in cooperation and facing the reality of each State.

In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State, each State would apply its own laws? What cooperation difficulties does this raise ?

3

Question 3.3 [maximum 5 marks]

It is said that "co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; by UNICTRAL in their *Practice Guide on Cross-border Insolvency Agreements*; and by the Judicial Insolvency Network in their *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters*…"

It is also said that "While court approval of such agreements for the purposes of co-ordinating insolvency proceedings is encouraged by the MLCBI, they in fact pre-date the Model Law."

Briefly discuss a prominent case law example for this last quotation.

The important example is the Maxwell Communications Corporation plc cross-border insolvency case in 1991.

This case involves insolvency proceedings in United States and United Kingdom, both initiated by the same debtor.ç

The two courts stated that an insolvency agreement between the two States could solve conflicts by facilitating the communication and information. The agreement was accepted by the countries and courts and two goals were setted up: maximizing the value of the estate and harmonizing the proceedings to minimize expense and jurisdictional conflict.

As the procedures began, other issues were being included to solve other issues, and this case is considered as a successful case of cooperation and use of the co-ordination agreements.

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.

3.5
Marks awarded 7 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, consider the first jurisdiction option based on the centre of the debtor's main interests (COMI), but it does allow commencing na insolvency procedure on a subsidiary territory, allowed where the debtor has an "establishment" (a place of operation). These subsidiary proceedings may be either "independent", or "secondary proceeding". **Elaboration regarding establishment is warranted. Also, do you require further information to determine whether there is an establishment?**

In this case, as the UK is the Rydell COMI was opened on 18 June 2020, the European Insolvency Regulation Recast still applies, since the proceeding was opened prior to the expiry of the transitional period of the UK exit from European Union in December 2020.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 7 marks.

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 the UK on 18 June 2021, it won´t be regulated by the European Insolvency Regulation Recast, because the Recast Insolvency Regulation applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (31 December 2020).

Instead of that, UK courts can choose it´s domestic law and some other insolvency sources such as the JIN Guidelines and UNCITRAL Model Law on Cross-border Insolvency.
It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCB and if not what laws would need to be considered in those countries.

2.5

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?

If Rydell had it´s COMI in another country that was not a member of European Union and was not the UK, and a formal proceedings were opened int the UK on 18 June 2021, the UK is already considered as a non-member country of the European Union, which means that the proceeding won´t be able to follow the Recast Insolvency Regulation.

The proceeding will have to observe the culture and country legislation on this matter and also the domestic UK laws to co-ordinate the rules.

Both countries will also have the opportunity to use the JIN Guidelines and UNCITRAL Model Law on Cross-border Insolvency to understand what are the best sources to apply.

Take care to answer the question put to you in full. It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

1

Marks awarded 8.5 out of 15
TOTAL MARKS 33/50

*** End of Assessment ***