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.

The statute of Ann of 1705 introduced the statutory discharge so long as the debtor had conformed and co-operated with the bankruptcy proceedings **It would be beneficial to elaborate on how this shaped modern insolvency law, for example by discussing modern 'fresh start' thinking.**

The Debtors Act of 1869 abolished the imprisonment for non-payment of debt principle. **It would be beneficial to elaborate on how this shaped modern insolvency law, for example by discussing the non-criminalisation and avoidance of stigma and 'punishment' in modern thinking.**

The 1883 Act introduced the foundations for the modern UK law including:

- the assets of the debtor belong to the creditors who should have authority over them, this continues today with creditors being able to vote for the appointment or replacement of insolvency practitioners and being able to form a creditors committee to oversee the insolvency practitioners conduct.

- The insolvency practitioner is subject to supervision in their conduct of an insolvency including the requirement to deliver an account of their actions as seen today with the requirement for reports to be filed with the court and creditors including a statement receipts and payments for review.

- Finally, the need for an independent review of the debtors actions leading to insolvency, which is where an insolvency practitioner is appointed and provides that break in control with a requirement to report on the debtors conduct.

2.5

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 reformed the following:

- A relaxation on wrongful trading rules for directors who may be trading insolvently due to the pressures placed on their business by COVID-19. This allowed some breathing space as directors may have had the opinion that business would bounce back once the pandemic eased or once other sources of revenue were identified, for example the restaurant market which was severely impacted by the lockdown, however, saw some recovery with take-out services and cook at home meal packs, though there was a lag

between the two which have been considered as trading insolvently (on a cashflow basis).

- The suspension of winding up petitions and statutory demands allowed breathing room for businesses that may be experiencing distressed cashflows that had been expected that would allow them to continue to discharge debts in particular loan interest payments. Putting a stay on these has allowed businesses to recover from the pandemic regularise their cashflows again and then begin to repay the interest outstanding without penalty.

- A new restructuring plan allowing businesses to reorganise in cases where they are struggling with debt but can create a viable plan to continue in the future. This is similar to a chapter 11 process in the US.

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.

Soft laws seek to influence the regulations of jurisdictions, however, treaties are binding agreements between jurisdictions that in turn affect that jurisdictions laws.

Soft law examples would include the Model Laws on Cross Border Insolvency set out by UNCITRAL. This soft law seeks to provide a framework for co-operation and provide for best practice guidance for both the Courts and insolvency practitioners on the management and interpretation of cross border insolvency issues. The introduction of these guidelines has also helped to influence the writing of new laws, such as the incorporation of the model laws into the chapter 15 legislation in the US.

Treaties are binding agreements between jurisdictions such as the Montevideo Treaty of 1940 which has committed three South American jurisdictions to incorporate new laws pertaining to meetings of creditors in an insolvency.
It would be beneficial to elaborate, for example by discussing the difference success of hard vs soft law.

3.5
Marks awarded 9 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.

In England, the insolvency laws are mainly dictated by the Insolvency Act 1986 and the Insolvency Rules 2016. The Act legislates for the different insolvency processes available and the powers available to an insolvency practitioner in conducting the processes, for example setting out the process of a Creditors' Voluntary Liquidation and the powers of investigation available in that process. The Rules then provide the detail to the Insolvency Practitioner on how they need to conduct the processes available to them, such as identifying the regularity with which the insolvency practitioner should report and what should be included within that report.

Additionally, the English insolvency processes are heavily influenced through case law, determined through the courts following previous cases that have determined ho specific issues should be managed that are not otherwise dealt with the in the Act or the Rules, for example how property rentals are paid during an insolvency. An example would be the Game Station ruling which requires that rental is paid as an expense of an Administration process on a pay as you go basis, this overturned the ruling of Goldacre which had previously legislated how rents were dealt with in an Administration.

Other examples would be the management of employment contracts in an insolvency where the business is sold to a purchaser. The Transfer of Undertakings (Protection of Employment) regulations require that the employment contracts survive under their original terms including all accrued benefits of those contracts so that employees are not impacted negatively by the sale whilst also being expected to continue to work for the new purchaser. This has a direct impact on an insolvency England and would intertwine with the Insolvency Act and the Enterprise Act where there has been a sale of the business in a pre-pack Administration.

The Enterprise Act has also had influence on the Insolvency Act and Rules by updating certain provisions in those regulations including the Administration process, the preference of the Crown claims, amongst numerous other updates.

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider England, rather you've been asked to consider the sources of laws in any State. This question requires you to consider different types of sources of law and how they interact. You need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations), common law where it applies, general non-insolvency laws etc. You have touched upon some of this.

1.5

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.

Fletcher's three questions ask which jurisdiction proceedings can be opened; which country's laws should apply; and what international effects will be accorded. **It would be beneficial to set out the questions in full.**

These questions highlight the difficulties that can be encountered when dealing with cross border insolvency issues in particular around co-operation between jurisdictions for example:

The first question raised by fletcher around choice of jurisdiction raises issues which have to some degree been addressed through proceedings being opened under COMI or centre of main interest. If a company has significant dealings in a particular jurisdiction but is registered elsewhere, the Court may be satisfied that they have the ability to make orders over such a Company despite not being registered in that jurisdiction. This obviously requires some level of cross border harmonisation in order for such orders to be recognised in the jurisdiction of registration as otherwise it could cause disputes between the two jurisdictions courts when it comes to dealing with matters such as asset realizations.

The second question, relates to the enforcement of judgements in other jurisdictions. Whilst COMI may deal with satisfying a court that they can make a judgement on an application made, it does not deal with enforcement being recognised in the Company's registered jurisdiction. As noted above, jurisdictions will have to have agreed to some level of harmonisation of their insolvency processes. It will make it far smoother to deal with ifor example a main proceeding in England being started and achieving Chapter 15 recognition of the main proceeding in the USA, allowing the UK insolvency practitioner to have standing and take actions through the USA courts. For example an order in the UK made against a USA based director could be enforced in the USA under chapter 15.

Finally, the choice of law to apply. Using the example of the UK main proceeding and chapter 15 recognition in the USA, choice of law would usually be that of the forum, i.e. the chosen law would be English law and this would govern the management of the case by the insolvency practitioner. However, were a dispute to arise under a contract between the insolvent and a creditor for example, the creditor may enforce that the contract was to be governed under US law, this would require that the insolvency practitioner have his proceedings recognised in the US courts in order to have standing and to deal with the dispute.

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Question 3.3 [maximum 5 marks]

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

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

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

A prominent case that pre-dates the model laws and has shown co-operation and communication between the courts is that of Maxwell Communication Corporation plc. which had court approvals between the USA and the UK for an insolvency agreement that would facilitate communication and co-operation.

As with current harmonisation of cross-border insolvency cases, this agreement provided that the UK insolvency proceeding be the main proceeding in a number of aspects, thus allowing English law to govern the insolvency. However, certain matters were left out of this particular agreement where further review would be required as to how they managed (i.e. English or US law) in particular the managing of creditor debts which may be contractual and governed by US law for example secured lending against assets in the US.

The agreement also provided for a communication process between the UK and US practitioners to ensure that the case would run smoothly without significant interference but to also ensure proper checks and balances were in place so that the US practitioners still had some measure of control of the actions being taken on behalf of the Company to which they were also appointed. This included that significant decisions required by US and UK practitioner sign off before moving forward, but smaller decisions such as de minimis payments could be made without requiring additional approvals.

This agreement pre-dated the various harmonisation soft laws that have since been written in an effort to support cross- border insolvency and showed that harmonisation can be achieved when it is in the best interested of the creditors and where the practitioners are the courts are pragmatic in their approach to a proceeding. The agreement also garnered support from professional bodies further displaying that it was move in the right direction for dealing with such matters.

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Marks awarded 11.5 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 took effect in 2017 and applied to all EU member states. The UK at the time if the insolvency in June 2020 was not part of the European Union, however, it was still in the transition period at this time. The transition period meant that the UK was still subject to the EIR rules.

The EIR rules provide that the insolvency proceedings of Rydell in the UK would be considered the COMI and primary jurisdiction of the insolvency proceedings. Therefore, all other jurisdictions would fall under the UK law for the purpose of the insolvency proceedings, with all EU jurisdictions recognising the UK proceeding and any court rulings made.

The EIR also provides for subsidiary or secondary proceedings in other territories, this is an option that Fernz may believe it has and can therefore take action in its our jurisdiction, however, the case study above does not provide enough information to make this determination as Rydell's business in Fernz's territory must be non-transitory and the study here does not include that information.

If secondary proceedings did open, this could be either independent of the primary proceedings or they could fall under the primary proceedings as secondary proceedings. The

new EIR recast amendments would also allow for hybrid proceedings for example if Franz's debt could be reorganised under a scheme of arrangement rather than requiring a Liquidation or Administration equivalent proceeding, this could be done in hybrid with the UK main proceedings, again there is not enough information here to determine this.

It would be beneficial to discuss the establishment needed with respect to secondary proceedings and what further information is required in that respect.

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Question 4.2 [maximum 3 marks]

How would your answer to 4.1 differ if the proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020? Also note what further information, if any, might become relevant.

If proceedings were opened in the UK in June 2021, the UK would no longer be subject to the EIR having left the transition period on 1 January 2021.

In this scenario, Franz's jurisdiction would recognise the UK as a the COMI as the EIR recast amendments now make provision for recognising insolvency proceedings outside of the EU, as well as inside.

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?

Were the COMI of the business to be in another European territory outside of the UK, but the initial proceedings are opened in the UK, these could be considered independent proceedings under the EIR Recast which as amended would recognise these independent proceedings in the UK despite the UK not being subject to EIR anymore following the end of the transition period from the EU on 1 January 2021.

The domestic laws that the court would need to consider fall under section 221 (5) of the Insolvency Act. The Court would need to be satisfied that either, the Company is dissolved or has ceased operations or is winding down those operations; that it is unable to pay its debts; or, the court believes it is just and equitable.

The Court must also consider whether there is sufficient connection with the UK such as assets or operations; that's there is a reasonable possibility of a benefit to the applicant for the winding up; and one or more of the applicants fall under the courts jurisdiction.

In this case, the threshold would likely be met for there being a reasonable possibility of a benefit to the creditor and that the court can exercise jurisdiction over that creditor as they are

UK based and there appear to be assets in Rydell that could be sold for the benefit of creditors (though more information is needed here to confirm this).

The first test regarding sufficient connection to the UK would need to be reviewed in the scope of Rydell but on the basis of the case study it would seem that this test would also be satisfied as there are offices in the UK, which could be considered assets depending on the basis of which they are held (freehold, long term leasehold etc.).

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Marks awarded 11.5 out of 15
TOTAL MARKS 41/50

*** End of Assessment ***