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.

[Type your answer here]
In 1542 the concept of collective participation and *pari passu* distribution amongst creditors were introduced. This arose from the fist English Bankruptcy Act of 1542, which provided for a form of compulsory sequestration.[1]

In 1570 the Act of Elizabeth introduced during the reign of Queen Elizabeth I was passed, this provided for additional acts of bankruptcy and transferred jurisdiction for the supervision of a bankruptcy to the Lord Chancellor, whose office was petitioned by the debtor's creditors to convene a bankruptcy meeting. The debtor's property was transferred to the control of the Lord Chancellor. People could be summoned for questioning and may be sent to prison.[2]

In 1705, the Statute of Ann of 1705 introduced the concept of a statutory discharge. This statutory discharge was not automatic, their discharge had to be confirmed by the commissioner who had to verify that the debtor had cooperated throughout his/her bankruptcy.[3]

A different way to approach this question would be to set out developments in English history, such as statutory discharge from the Statute of Ann, and to explain how they shaped modern insolvency law thinking, such as modern concepts of 'fresh start'.

2

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.

[Type your answer here]
The United Kingdom passed the Corporate Insolvency and Governance Act 2020 ("**CIGA**"), which introduced new restructuring methods, relaxed wrongful trading liability and suspended winding-up petitions and statutory demands.[4]

CIGA has two measures, permanent to update the UK's insolvency regime and temporary, to assist businesses through the pandemic. With almost all provisions having commenced on 26 June 2020 and some temporary measures having retrospective effect to 1 March 2020.[5]

---

[1] Prof. Andre Boraine & Prof. Rodalind Mason – INSOL Foundation Certificate In International Insolvency Law Module 1 Guidance Text Introduction to International Insolvency Law 2021/2022 ("**Guidance Text**") pages 5;
[2] Guidance Text page 5
[3] Guidance Text page 6
[4] Guidance Text page 7
[5] https://commonslibrary.parliament.uk/research-briefings/cbp-8971/

The CIGA's permanent measures marks a change towards a business rescue culture, similar to that of the US's Chapter 11 insolvency regime. CIGA's temporary measures include a suspension on serving a statutory demand over the "relevant period" (between 1 March 2020 and 30 September 2021), restrictions on winding up petitions due to unpaid debt due to COVID 19 during the relevant period, which expired on 30 September 2021, however a modified version continues to operate until 31 March 2022, suspension of wrongful trading rules which was extended and expired on 30 June 2021. Temporary governance measures allowed by CIGA include temporarily allowing flexibility for companies to hold their AGMs in a safe and practical matter such as virtual meetings, and temporarily extended filing deadlines.[6]

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.

[Type your answer here]
Treaties and conventions are public international instruments to which signatory states bind themselves and affect their domestic laws accordingly forming part of the State's "hard law", which is enforceable in the State's local court.

"Soft law", separate to States or governments working on treaties or conventions, usually takes the form of model law to which states can adopt with or without modification. The most successful "soft law" is the United Nations Commission on International Trade Law (UNCITRAL) and the UNCITRAL Legislative Guide on Insolvency Law (2004)[7]. An example of a state adopting UNCITRAL Model Law on Cross-border Insolvency is Australia through its Cross-border Insolvency Act 2008 (Cth).[8]

"Soft law" is not binding on States but it does work to contribute to international deliberations, an example of such is the Hague Conference on Private International Law established in the 19th century with an aim to achieve progressive unification of private international law.[9]

4

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.

[Type your answer here]
It is important to find the main sources of law that apply to the insolvency laws of a particular state when analysing the laws of such state. The main source of a state's insolvency law is usually found in legislation, however some states have not developed their legislation in insolvency and may still rely on common law to fill in any gaps in their domestic insolvency legislation.

Some states could have a single unified piece of bankruptcy legislation covering all aspects of bankruptcy, such as in the United States through the Bankruptcy Code 1978, whilst other

[6] https://commonslibrary.parliament.uk/research-briefings/cbp-8971/
[7] Guidance Text page 47
[8] Guidance Text page 50
[9] Guidance Text page 47

states may have a multiplicity of legislation that needs to be studies in conjunction with each other, such as separate insolvency legislation for individuals and for corporations.[10]

Further to multiplicity of legislation would be the state's general law that impacts its insolvency legislation (if any), such as legislation regarding securities, rights of ownership, domestic policy such as employee entitlements or tax liability, which may not be found directly in a state's insolvency legislation. Case law of a state would also needs to be considered where there may not be clarity in its legislation.

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.

[Type your answer here]
The Three pertinent questions / issues raised by Fletcher include:

1. The choice of forum to exercise jurisdiction in the matter;
2. The recognition and effect accorded foreign proceedings in the same matter; and
3. The choice of law to apply to the matter.[11]

Choice of forum to exercise jurisdiction is the local court's determination as to whether it can and will hear and determine the matter, this is done by examination of the connection with the jurisdiction of the parties or dispute. Typically a court will consider this in respect of a commencement order, which may result in a company's liquidation as opposed to a restructure or reorganisation.[12]

Recognition refers to whether the local court will recognise a foreign judgment and give effect or enforce the foreign judgment. This may vary according to the contents of the foreign judgment, such as whether it has to do with a recognition of a winding-up order or a claim for enforcement for a foreign creditor.

Choice of law, this is a decision of the local court as to whether it will apply its domestic law to the judgment (if recognised and determined that it will exercise jurisdiction) or the foreign law of the country of the judgment. In common law systems, generally the question of choice of law only arises if the parties invoice them, otherwise the law of the court will apply. In civil systems foreign law is a question of fact to be applied whether pleaded or not.[13]

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

4

Question 3.3 [maximum 5 marks]

It is said that "co-ordination agreements are sometimes known as Protocols or Cross-border

[10] Guidance Text page 19
[11] Guidance Text page 44; I F Fletcher, the Law of Insolvency, London (Sweet and Maxwell, 5th ed, 2017) ("Fletcher") note 56
[12] Guidance Text page 44
[13] Guidance Text page 45

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.

[Type your answer here]
The case of *Maxwell Communications Corporation plc* is the 1991 case in question. This case involved the cross-border insolvency of British media magnet Robert Maxwell whose insolvency concerned concurrent insolvency proceedings both the United States (Chapter 11 proceedings) and the United Kingdom (administration proceedings).

The UNCITRAL Practice Guide provides a summary of the matter which includes the goals to guide the insolvency representatives which were to maximise value of the estate and harmonise the proceedings to minimise expense, waste and jurisdictional conflict.

This case specificities includes aspects such as that some existing management be retained in the interest of maintain the debtor's value as a going concern, with authority for the English insolvency representatives' to appoint new and independent directors with the American insolvency representatives' consent. Allowing the English insolvency practitioners to incur debt or file a reorganisation plan with the consent of the American insolvency practitioners or the American (United States) courts. The English insolvency practitioners had to give prior notice to the American insolvency practitioners before undertaking any major transact n behalf of the debtor, but was authorised to undertake "lesser" transactions. Many issues were purposely left out to be resolved over the course of the proceedings.

This case illustrates how the resolution of issues and conflicts that might arise in cross-border insolvency could be facilitated by cross border cooperation.[14]

5

Marks awarded 14 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.

[14] Guidance Text pages 68-69

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.

[Type your answer here]
On 18 June 2020, the United Kingdom remained a member of the European Insolvency Regulation Recast. Accordingly per the EIR Recast, at Article 7.1, the law of the insolvency proceeding and their effect shall be that of the State of the opening of proceedings. Accordingly, the laws of the UK will apply as the insolvency proceedings were opened in the UK.[15]

EIR allocates jurisdiction to the debtor's Centre of Main Interest (COMI) as the COMI is in the UK, the jurisdictionally competent court will be that of the UK, though there is provision for the subsidiary territorial proceedings in other member states.[16]

It would be beneficial to discuss how such secondary proceedings are permitted where the debtor has an "establishment". An establishment is defined as meaning "any place of operations … where the debtor carries out a non-transitory economic activity with human means and assets"
It would be beneficial to consider the need for further information as to whether Rydell has an establishment in the other country in Europe where the other proceedings were intended to be commenced by Fernz.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 7 marks.
3.5

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.

[Type your answer here]
As from 23:00 on 31 December 2020, the EIR Recast ceased to apply in the UK following Brexit, or the exit of the United Kingdom from the European Union.[17] The cross border insolvency application of the United Kingdom as it would apply to another nation would apply to the European Union creditors. Namely the United Kingdom's approach and application of its cross-border insolvency legislation that may be found in section 426 of the Insolvency Act 1986 (UK) and its favoured approach to universalism as opposed to territorialism.[18]

In the absence of any pleading of the applicability of a law (per the third pertinent question raised by Fletcher, namely choice of law) the UK court will find itself applying its domestic laws to the cross-border insolvency. The three pertinent questions raised by Fletcher, (choice of forum, recognition of and effect accorded to foreign proceedings and choice of law) will also be a factor taken into account by the UK courts.[19]

[15] Guidance Text page 54
[16] Guidance Text page 64
[17] Guidance Text page 46
[18] Guidance Text pages 47 – 50
[19] Guidance Text page 45

It would be beneficial to elaborate further regarding the MLBCI, local laws and other information that 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?

[Type your answer here]

The three pertinent questions to ask and establish in respect of an international insolvency and its domestic applicability, which is the same questions asked by Fletcher in a cross-border insolvency matter are:

1. The choice of forum to exercise jurisdiction in the matter;
2. The recognition and effect accorded foreign proceedings in the same matter; and
3. The choice of law to apply to the matter.[20]

Where a court is satisfied that there is a "sufficient connection" with England and Wales, the relevant principles underpinning the approach of the three core requirements:

1. "There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;
2. There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying or a winding-up order;
3. One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction."[21]

Section 220 of the Insolvency Act 1986 (UK) allows for jurisdiction to be established to wind up an "unregistered company", which includes a company formed under foreign law. Section 221(5) of the Insolvency Act 1986 (UK) provides for a court ordered winding up 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 purposes 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.[22]

One of three core requirements to establish if there is a "sufficient connection" with England and Wales is if "…one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction."[23]

---

[20] Guidance Text page 44; I F Fletcher, the Law of Insolvency, London (Sweet and Maxwell, 5th ed, 2017) ("Fletcher") note 56

[21] Guidance Text page 48; Fletcher note 4

[22] Guidance Text page 48

[23] Guidance Text page 48, Fletcher note 4

Section 426 of the Insolvency Act 1986 (UK) was raised by Lord Scott in the matter of *McGrath v Riddell* [2008] UKHL 21, that co-operation between courts exercising jurisdiction in relation to insolvency on cross border matters is to be interpreted essentially with the universalism in mind, namely that where UK liquidators were requested by foreign liquidators to remit to them assets collected in the UK so that such foreign liquidators can implement a universal *pari passu* distribution, the UK liquidators should "accede" to such request.[24]

In the same matter, Lord Hoffmann referred to the court's "jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of English assets, notwithstanding any difference between English and foreign systems of distribution."[25]

Accordingly, the United Kingdom may be able to consider whether the minor creditor would be able to commence insolvency proceedings in the UK.

5
Marks awarded 10.5 out of 15
TOTAL MARKS 43.5/50

*** End of Assessment ***

[24] Guidance Text page 50
[25] Guidance Text page 49; McGrath v Riddell [2008] UKHL 21, par 30