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.

[
1. The English Bankruptcy Act 1542 provided for compulsory sequestration in the case of dishonest and absconding debtors. The Act provided for compulsory administration and distribution on the basis of equality among creditors.
2. The English Bankruptcy Act 1570 introduced for the first time collective bankruptcy procedures.
3. The Statute of Ann of 1705 introduced statutory discharge to debtors where they had cooperated during the proceedings.

]
There is scope to elaborate.

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 Corporate Insolvency and Governance Act 2020 set out reforms as follows:
1. Protection of supply contracts – prohibiting the company's suppliers from terminating contracts purely on grounds of company insolvency. Exceptions for events apart from insolvency or if it causes hardship to the supplier's business.
2. New Restructuring Plan – Companies facing financial difficulties, whether solvent or insolvent, can use the new plan to manage creditors. The creditors have to vote for the plan by majority, however, the court can force creditors to agree to the plan it it satisfied with certain conditions.
3. Moratorium – payment holiday period for all companies (solvent or otherwise) from repaying their non-finance pre-moratorium debt and protection from creditor action. Directors to retain most of the management powers.

]

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.

[
International insolvencies may be regulated by way of establishing "hard law" in domestic jurisdictions or to bring change to the domestic law regulations by way of "soft law". These changes can be imported into the domestic law through ratification of treaties and conventions.

Treaties are public international instruments where State become signatories. The State brings a change to their domestic law thus making it a "hard law". A successful treaty is the Nordic Convention of 1933 or the European Union's European Insolvency Regulation.

Soft Law are quasi-legal instruments that may not have legal binding but works towards unification of private international law. This approach has been more successful in

solving international insolvency issues. The use of Soft law through multilateral organisations providing draft legislations those may be adopted by States with or without modifications.

]

More detail would have improved the mark awarded for this sub-question. It would be beneficial for example to make reference to the UNCITRAL Model Law on Cross-Border Insolvency which is arguably the most successful example of 'soft law' in the field of cross-border insolvency to date.

2.5

Marks awarded 8 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Briefly discuss the various possible different sources of insolvency laws in any State and how they may interact with each other.

[

The legal systems across the globe are generally based on the principles of English Law (Common Law) or Civil Law. The insolvency laws are directly affected by these principles that are established as a result of local culture, basic rights and ways to deal with related matters. Civil Law systems will apply rules through legislations or codes. However, Common Law systems may not always rely upon codified laws but also applies common principles to plug gaps in the legislations. This is so since general law principles also have an effect in insolvency proceedings and may differ substantially in applicability and terminology across States.

Under Common Law system the judicial decisions are binding and can be overturned through legislation. Civil Law only allows for legislative enactments although in practice judges follow judicial precedence.

Some legal systems have unified piece of bankruptcy legislations covering all aspects. In other systems there are a multiplicity of legislation and these separate legislations need to be understood in conjunction for better application. **There is scope to discuss examples.**

Under Common Law system it is important to set out all terms governing relationship between contracting parties as very few provisions are implied. However under the Civil Law system several provisions are implied into a contract by law. **Clarification and elaboration is warranted regarding the relevance of non-bankruptcy or general law.**

As both systems differ in their approach, multilateral organisation like UNCITRAL Legislative Guide has designed to set uniform standards and approaches to insolvency law reforms on a global basis. The Guide has been developed to be used by member Sates of the United Nations when reforming their existing insolvency laws.

]

4

Question 3.2 [maximum 5 marks]

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

[

The three pertinent questions posed by Prof. Ian F. Fletcher are:

"

1. In which jurisdictions may insolvency proceedings be opended?
2. What country's law should be applied in respect of different aspects of the case?

3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

"

The determination of jurisdiction is important as it has bearing on the commencement of proceedings, settlement of dispute between parties those involving foreign dealing, control and realisation of assets of the debtor in foreign State or examining officers of the debtor in another State among other matters.
Where insolvency proceedings would be opened against the debtor in multiple States, critical requirement shall be for recognition of judgements from Courts of those States under the principle of adjudication by a competent court that shall not be pursued further by the same parties. The enforcement and giving effect to judgements have a direct bearing to the achieving the main objectives of insolvency of maximisation of value, minimisation of expenses and doing away with unnecessary litigation. The critical points in foreign judgements would be the type of Court and the type of judgement. The type of judgement can have material bearing on the proceedings and may give rise to judicial conflict. UNCITRAL have drafted Model Law on Recognition and Enforcement of Insolvency Related Judgements that assist insolvency Courts in matters of co-operation.
The application of law in deciding insolvency matters differs in legal systems. Common Law system is a question of fact and therefore allows the parties their choice of law else the law of the forum shall apply. In Civil Law system it is a question of law and is applied regardless of what the parties may plead for.
]

There is scope to elaborate upon choice of law issues.

4

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 relates to Maxwell Communications Corporation plc cross-border insolvency in 1991.
There were concurrent proceedings in United States of America and England. The proceedings in USA were under Chapter 11 whereas there were administration proceedings in England and both these were co-ordinated through an "Order and Protocol" approved by courts of respective States.
It was voluntary putting in place a workable structure to co-ordinate a complex international insolvency.
Two insolvency representatives were appointed in separate States with similar responsibilities.
The Courts after confirming with counsels advised for an agreement between the two administrations to resolve the conflict and facilitate exchange of information. The goal of the agreement was maximise the value of assets of the debtor, and to harmonise the proceedings to effectively minimise expenses, waste and jurisdictional conflict. The United States court would defer to the English proceedings.
Some of the working points included were:

1. Retention of existing management in USA to keep the debtor a going concern whereas the insolvency representative in England would appoint new and independent directors after confirming with the USA insolvency representative.
2. The insolvency representative was to give prior notice to undertake any major transactions, however was pre-authorised for "lesser" transactions.
3. The English insolvency representative was allowed to incur debt or file a reorganisation plan with consent of insolvency representative or court of USA.
4. Some matters were left of the first agreement that were later addressed in the extension agreement.

]

5
Marks awarded 13 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.

[

1. As the UK has ceased to be a member of the EU, the EIR (Recast) is not applicable to insolvency proceedings post 11pm 31 December 2020. Since the insolvency proceeding was opened on 18 June 2020, the EIR (Recast) are to be applied to the matter on hand. **What is the consequence of this? Elaboration is warranted regarding automatic recognition.**
2. COMI has to be determined by the court in UK and to ensure that the Rydell's centre of management and supervision and of the management of interest is in its jurisdiction.
3. The relocation of COMI should not have happened within the 3-month period prior to the request for opening insolvency proceedings. Any challenge to opening the proceedings in UK would be a matter of law of UK.
4. The proceedings in UK will termed as main proceedings whereas all other proceedings will be secondary proceedings and would be limited to assets located in that State. Therefore, it would be important to know the debtor assets located in the State. This determination would need to be done to decide which assets belong to main or secondary proceedings or involves third part rights.

5. Fernz shall open another proceeding in an EU Member State only if Rydell has an establishment in that State. Establishment would only be considered if there is non-transitory economic activity with human means and assets. **What further information might assist in this respect? It is not limited to matters of assets.**
6. The courts may postpone or refuse the opening of secondary insolvency proceedings where qualified majority of local creditors have accepted the undertaking of the insolvency representative of the main proceedings to meet a number of conditions or where the court of main proceedings has granted temporary stay on individual enforcement proceedings. This information would be required to decide on the matter of request for opening of secondary proceedings.
7. It would be appropriate to know if the court of Member State has agreement or protocol with court in UK for co-operation and co-ordination of the insolvency proceedings.

]

It would also be beneficial to discuss specific provisions 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.

[

1. Yes, the answer would differ as UK has ceased to be a member of the EU and the EIR (Recast) is not applicable to insolvency proceedings post 11pm 31 December 2020. **Elaboration is warranted as to what this means for automatic recognition and reciprocity.**
2. UK has adopted the UNCITRAL Model Law on Cross-Border Insolvency vide Cross-Border Insolvency Regulations 2006.
3. It would be appropriate to know if the EU Member State where Fernz intends to open insolvency proceedings has also adopted the Model Law. The Model Law allows for recognition, co-operation and co-ordination.
4. The Insolvency (Amendment) (EU Exit) Regulations 2019 give jurisdiction to UK courts to open insolvency proceedings.

]

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?

[

1. The Insolvency Act of 1986 is applicable in UK.
2. The UK court may wind up an “unregistered company” formed under foreign law under section 221(5) of the Insolvency Act 1986 where the following circumstances exist:
    a. 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. Company is unable to pay its debts;

c. Court is of opinion that it is just and equitable that the Company should be wound up.

3. Minor creditor may commence formal insolvency proceedings in UK if the Court was to establish that there is sufficient connection to England and Wales, there shall be benefit from such winding up and the person interested in distribution of assets of the debtor is under the court jurisdiction.

]

There is scope to elaborate.

4.5
Marks awarded 11.5 out of 15
TOTAL MARKS AWARDED 42.5/50

*** End of Assessment ***