



**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.

- 1) The introduction of imprisonment for debt at the end of the thirteenth century by the statute of Malbridge in 1267. **How does this shape the way of thinking of modern insolvency law? Would not the abolishment of imprisonment better reflect a development that shaped modern insolvency law?**
- 2) The introduction of compulsory sequestration of assets against dishonest and absconding debtors by the Bankruptcy Act in 1542. **How does this shape the way of thinking of modern insolvency law?**
- 3) The introduction of the notion of statutory discharge by the Statute of Ann in 1705. **Elaboration is warranted regarding 'fresh start' as a part of modern insolvency law.**

.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 reformed the UK's insolvency law it introduced (among other things);

- 1) A new restructuring plan, allowing the court to sanction a "fair and equitable" restructuring plans to assist viable companies that are struggling with debt obligations;
- 2) A suspension on serving statutory demands, meaning that any statutory demands issued between 1 March 2020 and 30 September 2021 were void; and
- 3) Amendments to wrongful trading rules, including removing the risk of liability for wrongful trading from directors.

**Further elaboration is warranted.**

3

### Question 2.3 [maximum 4 marks]

Briefly explain the concept of treaties and "soft" and indicate how these may be used to establish cross-border insolvency rules in States.

"Soft" law (as opposed to "hard" law) refers to any written instrument that is not legally binding. "Soft" international insolvency laws have historically been more successful than "hard" international insolvency laws. An example of a successful "soft" international law is the UNCITRAL Model Law on Cross-Border Insolvency.

An example of a soft law is the Hague Conference on Private International Law. It is aimed to progress the unification of private international laws, and facilitates coordination between different countries.

Treaties are agreements that states bind themselves to. They typically require the signatory states to change/maintain their domestic law to align with what was agreed in the treaty (these changes being "hard" laws). An example of a successful treaty is the Nordic Convention of 1933, although most attempts at insolvency treaties have been unsuccessful.

Both soft law and treaties can be used to establish cross border insolvency rules by allowing for international cooperation and encouraging (with soft laws), and requiring (if/once entered into, with treaties) states to comply with the relevant cross-border insolvency rules set out in the soft law or treaty.

**4**  
**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.

Different states have different insolvency laws (statute and common laws), procedures and policies in relation to insolvency. There are also different international laws that are applied by some states but not others.

There are three main sources of insolvency laws that may impact on/ interact with each other in an insolvency. These include the relevant country's domestic laws on insolvency, which sometimes, but not always, include laws on cross border insolvency, and reflects the international treaties/ conventions/ soft laws that the country has entered into or follows and the domestic laws. They also include any international treaties, conventions or model laws that another country where debtors, assets or subsidiaries of the relevant companies may be located.

These sources of law will interact in different ways. The primary source of law will be the relevant country's domestic laws (which will reflect the treaties / soft laws it has adopted). This will be what the court most applies to the issue (unless a choice of law issue has arisen and the court has decided to apply another country's laws). The laws of other countries will also be involved where there are assets/ disputes in other jurisdictions. For example, it is common for "chapter 15" recognition to be obtained in the United States of America ("US"), so that the US courts can recognise a foreign liquidation and order that any proceedings against the company in the US are stayed/ any assets in the US are frozen.

**You touch upon domestic law. 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.**

**2**

#### **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 fundamental legal issues raised in a cross-border insolvency (as set out by Fletcher<sup>1</sup>) are the (i) choice of forum to exercise jurisdiction in the proceeding, (ii) the choice of law to apply to the matter and (iii) the recognition and effect that should be accorded to foreign proceedings in the same matter. **It would also be beneficial to discuss the**

---

<sup>1</sup> I F Fletcher, *Insolvency in Private International law – National and International Approach* (Oxford: Oxford University Press, 2<sup>nd</sup> ed, 2005).



### questions asked.

Forum refers to which country's court can and will hear a matter. Under the UNCITRAL Model Law on Cross Border Insolvency, insolvency proceedings should be commenced and continued in the centre of main interests of the debtor company (usually referred to as "COMI"). In some insolvencies, it may be that different elements of the proceeding are heard in different jurisdictions, for example where the company was incorporated and holds most of its assets in one country (so the winding up petition is filed in that jurisdiction) but traded on the stock exchange based in another country (so class action proceedings are brought against the company in that jurisdiction), or where it had subsidiaries that required winding – up in other jurisdictions (so the courts in those countries had jurisdiction to wind up / appoint liquidators to the subsidiaries).

Choice of law refers to which country's law a court should apply when hearing a matter. Sometimes an insolvency or proceeding will introduce different (and conflicting) laws from two or more jurisdictions, or will require a court to consider laws from another jurisdiction (for example, when a contractual document says that it is governed by the laws of another country). Different countries approach this issue differently. In most common law jurisdictions, if the choice of law is raised, the court will consider whether another country's laws are relevant and should be applied. In civil law jurisdictions, relevant foreign laws are presumed to apply.

Recognition refers to the res judicata/ estoppel effect of a judgment and enforcement refers to the ability to compel the judgment debtor to comply with a judgment.

**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.**

A prominent example of this is Maxwell Communications Corporate PLC<sup>2</sup>. The Maxwell proceedings pre date the Model Law and are generally regarded as one of the first examples of successful US-UK cross border co-operation in insolvency proceedings.

---

<sup>2</sup> In re Maxwell Communication Corporation plc, 93 F.3d 1036, 29 Bankr.Ct.Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084), and Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

Maxwell had been incorporated and was headed in the UK, but had its main assets in the US (in the form of operating companies). It collapsed a few weeks after its founder, Mr Maxwell, was found drowned. A debtor issued insolvency proceedings against Maxwell in both the US (a chapter 11 suit) and UK (an administration). Separate insolvency practitioners were appointed in the two jurisdictions, but they had similar responsibilities.

Both courts suggested that a protocol be entered into between the two insolvency practitioners so as to minimise/ resolve any conflicts, allow for information sharing and minimise costs.

The insolvency practitioners worked together. They produced a plan of reorganisation (the US process) and a scheme of arrangement (the UK process) that were consistent with the laws of both countries and mutually dependant. The plan and scheme held Maxwell's assets in a single pot (rather than dividing the assets and creditors up between the two countries) and allowed creditors to submit a claim in either jurisdiction that would allow them to participate in the plan and the scheme.

**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 8.5 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 Insolvency Proceedings (Recast) 2015 ("EIR Recast") is an EU law that governs which EU state insolvency proceedings must be commenced in and which law will govern those proceedings. It also provides for the automatic recognition of proceedings between member states (rather than requiring a recognition application).

On 11:00pm on 31 December 2020 the EIR Recast ceased to apply to the UK (due to Brexit).

Pursuant to the European (Withdrawal Agreement) Act 2020, the EIR Recast will continue to apply to insolvency proceedings where the main proceedings were filed prior to 31 December 2020.

This means that the proceeding filed on 18 June 2020 (and the potential proceeding considered a month later) will be subject to the EIR Recast for the purposes of determining the relevant jurisdiction and laws, and will mean that EU member states will recognise the proceeding without further recognition applications being made pursuant to Article 19 (1) of the EIR Recast. It also means that the UK court will recognise the proceedings that were opened in another EU state.

Assuming no other insolvency proceedings/ preservation measures have been taken in other member states, the insolvency practitioner will be able to exercise the powers they obtained in the UK in other member states.

This also means that, pursuant to Article 45 of the EIR Recast, if the second proceeding is not filed creditors from other EU member states will be able to lodge claims in the UK liquidation. **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"**

Other information that would be relevant is the nature of the insolvency proceedings being filed in each state, if the insolvency practitioner appoint in the UK would support or oppose the secondary proceedings and the other state that the second proceeding is intended to be filed in.

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.

As noted above, pursuant to the European (Withdrawal Agreement) Act 2020, the EIR Recast applies to insolvency proceedings where the main proceedings was filed prior to 31 December 2020.

This means that if the proceeding was filed in the UK on 18 June 2021, it would not be subject to the EIR Recast for the purposes of determining the relevant jurisdiction and laws, meaning the UK's domestic laws would apply instead. Additionally, other EU member states would not recognise the proceeding without further recognition applications being made. Both of these differences would increase time/ costs in the proceedings as they will become more complex.

Other information that would be relevant is whether the client still intends to file a secondary proceeding in another state (and what state that is).

**It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCB also.**

2

#### **Question 4.3 [maximum 5 marks]**

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

The EIR Recast will not apply to the UK proceedings. The Insolvency (Amendment) (EU Exit) Regulations 2020 allow the UK courts jurisdiction where the debtor's COMI is in a member state and there is an establishment in the UK. This aligns with the EIR Recast in terms of determining the proper jurisdiction and applicable law. The Insolvency (Amendment) (EU Exit) Regulations 2020 apply in addition to the UK's domestic laws, meaning the UK courts can liquidate a foreign company regardless of where the COMI is if the court is satisfied that there is a sufficient connection to the UK to justify doing so.

The main domestic law that will continue to apply is the UK's Insolvency Act 1986, which contains most of the UK's insolvency laws. **It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.**

In 2006, the UK implemented the UNCITRAL Model Law on Cross Border Insolvency through the Cross-Border Insolvency Regulations 2006, so this law will still provide for recognition of proceedings.

**2**  
**Marks awarded 9 out of 15**  
**TOTAL MARKS 34/50**

**\* End of Assessment \***