



**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. In 1542, the first English Bankruptcy Act was introduced. The fundamental principle of this Act was that in the case of a fraudulent debtor, there should be a compulsory administration and distribution on the basis of equality amongst all the creditors. **It would be beneficial to elaborate upon what you say shaped thinking concerning modern insolvency law in greater detail.**
2. The Statute of Ann of 1705 introduced the notion of a statutory discharge. A discharge of the debts of the debtor was granted under the condition that the debtor had “conformed” and had co-operated during the proceedings. **It would be beneficial to elaborate of the modern thinking of fresh start.**
3. In 1883, the office of the Official Receiver was introduced. The office of the Official Receiver had the responsibility of administering the debtor’s estate before the commencement of bankruptcy procedure or of the friendly agreement with creditors. **It would be beneficial to elaborate upon what you say shaped thinking concerning modern insolvency law in greater detail.**

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.

The UK passed the Corporate Insolvency and Governance Act 2020 following the Covid-19 pandemic. The reforms introduced with this act include:

1. a new restructuring plan,
2. new moratorium rules,
3. the relaxation of wrongful trading liability, and
4. the suspension of winding-up petitions and statutory demands.

**Further elaboration would improve the mark for this sub-question. While it does say ‘briefly’, the sub-question is for 3 marks.**

2.5

### Question 2.3 [maximum 4 marks]

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

A treaty is convention to which States can become signatories. If a State becomes a signatory of a treaty that State has to bind itself to the rules stipulated in the treaty and affect its domestic law accordingly. By doing so, the treaty becomes part of domestic law of the signatory State and is enforceable in its courts. Therefore, the rules in a treaty may be labelled as part of the “hard law” of the signatory State (I Mevorach in *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018) did, however, abandon the notion that treaties are hard and binding and non-treaty instruments are soft and non-binding.). Hence, if a State signs a treaty about cross-border insolvency rules these insolvency rules become enforceable in the

signatory State either directly, if the treaty is self-executing, or by passing new legislation, if the treaty is not self-executing.

Soft law refers to quasi-legal instruments which do not have any legally binding force. An example of soft law is a Model Law which contains rules which are recommended to be enacted. **It would be beneficial to discuss the success of this soft law.** There is, however, no obligation to do so. Hence, soft law may be used to establish cross-border insolvency rules in States by suggesting the enactment of certain rules in order to solve the issues of cross-border insolvencies.

2.5

Marks awarded 7 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 main source of insolvency laws is usually legislation or codes. In common law systems, an additional source may also be common law principles to plug any possible gaps in the legislation.

Some States have a single, unified piece of bankruptcy legislation covering all aspects of bankruptcy while other States have a multiplicity of legislations covering different aspects of bankruptcy. The bankruptcy laws for individuals can, for example, be in one piece of legislation and the bankruptcy laws for companies in another.

Additionally, legal principles of the general law of a State have an effect in insolvency as well. These legal principles, like ownership and rights of real security, are usually not part of the bankruptcy laws but have an important impact on insolvency law. For example, rights of real security on a specific asset may give the creditor of such a right the priority right on the sales proceed this specific asset.

5

#### Question 3.2 [maximum 5 marks]

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

The three questions asked by Fletcher are the following:

- 1) In which jurisdiction may insolvency proceedings be opened?
- 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)?

Discussion of these three questions:

- 1) Each State may decide on its own under what circumstances insolvency proceedings may be opened in its jurisdiction. In general, there needs to be an interest to open an insolvency proceeding in a specific jurisdiction. An interest to open an insolvency proceeding usually exists at the centre of main interest of a company, the seat of a company or the domicile of a natural person. Additionally, an interest to open an insolvency proceeding could also exist in the jurisdictions where assets of the debtor in insolvency are located. Therefore, it is possible that several jurisdictions open separate insolvency proceedings regarding the same debtor. The separate insolvency



proceedings could, however, get in conflict with each other. In order to resolve such conflicts, coordination and cooperation is necessary.

- 2) Again, each State may decide on its own which law it applies in respect of different aspects of an insolvency case. Regarding the procedural laws which govern the insolvency proceedings, States, usually, decide to apply their own law. It would be too difficult for the judge to apply foreign procedural law of which they do not have in-depth knowledge. However, foreign law may apply to claims of the creditors against the debtor in insolvency. Therefore, when deciding if a claim is to be admitted and to what extent, foreign law may need to be applied. The opening of insolvency proceedings can be a condition for responsibility claims against the directors of the bankrupt company or claims against persons and companies which benefited of a preferential disposition of the debtor. Responsibility claims should be decided based on the company laws of the State in which the company was incorporated. Only then the directors can know which laws they have to observe in their function as directors. Claims against individuals and companies which benefited of a preferential disposition of the debtor should be decided based on the laws of the jurisdiction where the insolvency proceeding was opened in order to guarantee equality. The problem there is, however, that court decisions regarding such claims are not recognised in all States and can, therefore, not always be enforced against individuals domiciled in foreign jurisdictions.
- 3) States may decide to automatically recognise all or certain effects of (certain) foreign insolvency proceedings without the need for any recognition proceedings. Or they may decide all or certain effects of (certain) foreign insolvency proceedings may only be recognised based on a decision of a local court or other authority (recognition proceeding). Finally, States may decide to not recognise any effects at all of foreign insolvency proceedings. If all effects of foreign insolvency proceedings are recognised there is, usually, no need to open separate (local) insolvency proceedings. If no or only certain effects of foreign insolvency proceedings are recognised it may be necessary to open separate (ancillary) insolvency proceedings in order to deal with assets of the debtor in insolvency located in the local jurisdiction.

5

### **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 law example for this quotation is the case of Maxwell Communication Corporation plc. In the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) this case is summarised as follows:

*“The case of Maxwell Communication Corporation plc. involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two States, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that an insolvency agreement between the two administrations could resolve conflicts and facilitate the exchange of*

*information. Under the agreement, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present. Specificities included that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the English insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; and the English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the agreement to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the agreement."*

This case a good example that conflicts between separate insolvency proceedings can only be solved with cooperation and coordination.

**This answer displays a satisfactory understanding. To improve your responses, it would be beneficial to also use your own words to describe the case.**

**3.5**  
**Marks awarded 13.5 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.

In June and July 2020, the UK was still a member of the EU. On 31<sup>st</sup> December 2020, the UK left the EU. Hence, the European Insolvency Regulation Recast still applied to the UK at the relevant time.

Given, that this case concerns the international jurisdiction between different members of the EU, the European Insolvency Regulation Recast is applicable here.

According to art. 3(1) of the European Insolvency Regulation Recast, the courts of the Member State within the territory of which the centre of the debtor's main interest is situated shall have jurisdiction to open main insolvency proceedings. In this case, Rydell's centre of main interest is situated in the UK which is why main insolvency proceedings may only be opened in the UK.

Pursuant to art. 3(2) of the European Insolvency Regulation Recast, where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

According to art. 2(10) of the European Insolvency Regulation Recast, "establishment" means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

Hence, secondary insolvency proceedings may be only opened in other countries of the EU based on art. 3(2) of the European Insolvency Regulation Recast by Fernz where Rydell possessed an establishment. To advice Fernz in this regard, I would need to know where Rydell possessed establishments in the meaning of art. 2(10) of the European Insolvency Regulation Recast.

7

#### **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.

In June 2021, the UK was not a member of the EU anymore and the European Insolvency Regulation Recast was not applicable in the UK anymore.

Therefore, the question if insolvency proceedings may be opened in another EU Member-State is governed by the international insolvency laws of each individual EU Member-State. A decisive question in this context would be if the proceedings in the UK can be recognised in the individual EU Member-States.

**It would be beneficial to also raise the MLCBI and the need for information as to whether it might apply.**

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 winding-up of unregistered companies in the UK is governed by section 221 Insolvency Act 1986. According to section 221(5) of the Insolvency Act 1986, an unregistered company may be wound in the UK under the following circumstances:

- (a) if the 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) if the company is unable to pay its debts;
- (c) if the court is of opinion that it is just and equitable that the company should be wound up.

Additionally, the English courts consider the following three core requirements for the winding-up of an unregistered company:

- (1) There must be as 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 for 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.

**5**  
**Marks awarded 14 out of 15**  
**TOTAL MARKS 44.5 /50**

**\* End of Assessment \***