



**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.

Collective debt collection developed from individual debt collection procedures which emanated from Roman law and included procedures created in respect of the assignment of property, forced liquidation of assets and composition of creditors. Three significant (historical) developments that occurred regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency are as follows:

As distinct from previous legislation which was primarily aimed at preventing fraud, the 1570 Act (or the Act of Elizabeth) was the first law specifically designed to deal with bankruptcy. Under the 1570 Act, a body of commissioners (which introduced and appointed under the provisions of the first English Bankruptcy Act of 1542) was given jurisdiction and supervision over the estate of a debtor. To fulfil its mandate, the body of commissioners was given wide examination powers to investigate the debtor's estate (including past transactions) and the debtors themselves. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

The Statute of Ann of 1705 (which was further developed in 1883) first introduced the concept of statutory discharge and to which creditors would become entitled only after having demonstrated that they had cooperated with the insolvency proceedings. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law, for example by discussing modern 'fresh start' principles**

The 1883 Act formed the basis on which the current English bankruptcy law was established. Up until the enactment of the Insolvency Act of 1986, the approach set out in the 1883 Act was that which was followed in English insolvency Law. **It would be beneficial to elaborate and clearly state a development and how it shaped the way of thinking concerning modern insolvency law. The question did not ask for a description of legislation per se.**

1

### 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.

Three insolvency and insolvency-related measures introduced in the UK in response to the pandemic are as follows:

1. Legislative reform by way of enactment of the Corporate Insolvency and Governance Act 2020 addresses the issue of stakeholders dealing with companies in financial distress. The Act,
  - a. protects supply contracts by prohibiting their termination by suppliers on the basis of a company's insolvency,
  - b. introduced a moratorium in which companies can restructure and during which they are protected from certain legal action,

- c. introduced a restructuring plan in which the court can intervene and influence, and
  - d. temporarily banned winding up petitions and statutory demands.
2. The Coronavirus Act 2020 prohibited business and residential landlords from ending a lease and taking possession due to rent arrears. The Act also made provision for the use of remote hearings in anticipation of the backlog in cases because of social distancing measures implemented during the pandemic.
3. Common Law – Recent UK court decisions made in respect of contracts of employment for individuals who have been furloughed prior to the administration of a company established that, in certain circumstances, payments to employees are given priority over other debts See *Re Carluccio's Ltd* [2020] EWHC 886 (Ch) and *Re Debenhams Retail Ltd* [2020] EWCA Civ 600

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.

Both treaties and soft law are categorised as multilateral approaches which seek to regulate international insolvencies.

Treaties are public international instruments to which states can become signatories. Accession to a treaty has the effect of importing the rules set out in that treaty into a State's domestic law. In an insolvency context, treaties governing international insolvency serve to assist States determine the three key questions which often arise i.e. how any judgment given in the liquidation will be recognized and enforced, which jurisdiction's rules will apply to that liquidation, and questions related to creditors or other parties.

Whilst treaties can be domesticated and therefore converted into hard law, soft law is not legally binding. An example of soft law is the Model Law on Cross Border Insolvency established by UNCITRAL and put forward as a recommendation for States to adopt can adopt and modified, as necessary.

**Further elaboration would improve the mark for this sub-question. While it does say 'briefly', the sub-question is for 4 marks.**

3

**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.

Unlike some other states which have a single statute which deals with the conduct of insolvency, Australia has multiple Acts addressing the issues which arise in an insolvency context, each dealing with a particular aspect.

Australia's Corporations Act 2001 is the statute which regulates the conduct of insolvency proceedings as in relates to corporate entities and contains provisions which are akin to section 426 of the Insolvency Act 1986. The Bankruptcy Act 1966 is the legislation which is relevant to proceedings concerning of individual persons.



Australia's common law is based on English common law. Therefore, the concepts as it relates to the application of the various acts will be primarily based on the principles and guidelines set by the UK courts.

As a state which has adopted the UNCITRAL Model Law on Cross-Border Insolvency, Australia is also guided by its principles as regards the recognition of foreign proceedings.

**Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider Australia, rather you've been asked to consider the sources of laws in any State. This question asks you to consider the different sources of law and how they interact. You need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations and how this changes from State to State), common law as applying in only common law States to fill the gaps in law, and general non-insolvency laws etc. You have touched upon some aspects of legislation and common law.**

2.5

### **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 that Fletcher asks as it relates to cross-border and insolvency reflects the three main problems that international insolvency present, each of which are discussed below.

The first question relates to the jurisdiction in which the insolvency proceedings will be conducted i.e. is the court able and willing to hear the matter. In order to make that determination, the court must consider factual matters which can show a sufficient connection with the jurisdiction in which the proceedings are being brought. That determination can be further complicated where the insolvency proceedings relate to the debtor's estate as opposed to a restructuring etc. The estate, as well as key individuals (such as managers, directors and creditors) can be spread across multiple jurisdictions. The local court may also be involved in determining the effect of the decisions made in a foreign jurisdiction.

The second question relates to the extent to which the local court will recognise and enforce a decisions made by a foreign court in insolvency proceedings. In an insolvency context, a significant consideration for a local court in determining the question of recognition and enforcement is the type of judgment awarded by the foreign court. For example, is the foreign court's order one which is against a debtor or a third party.

The third question which Fletcher asks relates to the law which will be applied, a question which can arise after the local court has determined that it can and will hear the matter. There are differences between how courts deal with the question of applicable law depending on whether that court is located in a common law or civil law jurisdiction. In a common law jurisdiction such as the UK, the applicable law of the proceedings is that in which the proceedings have commenced, unless the parties raise the question of foreign law. The question of whether foreign law applies is determined upon fact when it comes to common law jurisdictions. In a civil law jurisdiction however, the issue of foreign law is one which arises automatically (regardless of whether it has been raised by the parties) and is determined based on law.

**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 ?**

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 decision in Maxwell Communications Corporation plc is a prominent case law example which demonstrates how the courts successfully and independently implemented a structure to harmonise two separate sets of proceedings. The Maxwell decision dates back to 1991 and therefore prior to the Model Law’s adoption in 1996. The case concerned the commencement of proceedings brought in respect of a single debtor in two separate jurisdictions (the UK and the U.S.) in respect of which, two separate insolvency representatives were appointed. Without any prompting from Articles 25 and 26 of the Model Law which deals with the approval/implementation of agreements concerning the coordination of proceedings or any guidance from the court in the other jurisdiction, each court raised the issue of the need to reach an agreement which would provide for coordination between the two separate sets of the liquidation proceedings.

The agreement ultimately reached between the courts in the U.S. and the UK included provisions for deferral to the English proceedings (in certain specific circumstances), covered issues such as minimizing expense through harmonisation efforts as well as the ongoing management of the debtor’s operations. Other matters which were not initially provided for in the terms of the agreement were worked out during the course of the insolvency proceedings.

**There is scope to elaborate on the goals and outcome of the judgment.**

**4.5**

**Marks awarded 11 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 determining whether the EIR (Recast) would apply, consideration must be given to the time at which the minor creditor commenced insolvency proceedings and the State that such commencement took place. In this case, proceedings were brought against Rydell Co Ltd., (a UK incorporated entity) in the UK and in the period prior to the UK's departure from the EU on 31 December 2020. Therefore, both the commencement and conduct of the insolvency proceedings would be regulated under the Recast Insolvency Regulations (which applies to main proceedings commenced prior to the 31 December 2020 expiration date).

Under Article 3 of the RIR, jurisdiction is given to the courts located in the jurisdiction representing the debtor's COMI. Similar to Article 7.1 of the EIR (Recast), Article 19 of the RIR has the effect of automatic recognition in all other member states. Notwithstanding its effect, the EIR Recast still allows for secondary proceedings to be commenced but only if certain criteria are met i.e. if the debtor has an establishment in the member state. Fernz will only be permitted commence proceeding in another EU Member State where Rydell is established. **It would be beneficial to elaborate upon the requirements for establishment in detail.**

The information that we have about Rydell and its operation is limited to the location of incorporation, the location of its offices and the location of its main creditor and other creditors. To fully answer the question of whether the secondary proceedings would be permitted under the RIR, we would need to be provided with additional information such as where Rydell conducts its business (which is not necessarily synonymous with its place of incorporation or the location of its offices) and secondly, evidence as to the location from which other parties perceived Rydell to be operating.

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**Question 4.2 [maximum 3 marks]**

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

Given that the date of commencement in this scenario post-dates the UK's departure as a member state of the EU (i.e. 31 December 2020), the conduct of the insolvency proceedings would therefore fall outside the scope of the EIR Recast. The proceedings would be conducted in accordance with the provisions of the UK's domestic insolvency statutory provisions i.e. the Insolvency Act 1986 in relation to both procedure and substance.

**It would also be beneficial to consider the MLCBI.**

1.5

**Question 4.3 [maximum 5 marks]**

Consider an alternative situation now. What if Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, and formal

insolvency proceedings were opened in the UK on 18 June 2021? What UK domestic laws would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK?

As set out above, any insolvency proceedings brought in the UK at a time which post-dates the UK's departure as a member state of the EU falls outside of the EIR Recast. The UK courts will therefore rely upon domestic laws to guide the conduct of such proceedings.

The relevant domestic statutory law relevant to the court's consideration of whether the minor creditor could commence formal insolvency proceedings is the Insolvency Act 1986, in particular, section 221(5) as it relates to the question of the UK court's jurisdiction to bring winding up proceedings in relation to unregistered companies.

According to the provisions in section 221(5), the minor creditor would have to demonstrate a sufficient connection between Rydell and the UK. That consideration would necessarily involve factors such as whether Rydell has assets in the UK, that there is some benefit for the minor creditor for a winding up order to be granted by the UK court and that the court can exercise jurisdiction over persons interested in any potential distribution made in the liquidation.

**There is some scope to elaborate further**

**4.5**

**Marks awarded 12 out of 15**

**TOTAL MARKS 40/50**

**\* End of Assessment \***