



**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.

Initially, the English Bankruptcy Act of 1542 that introduced the principles of collective participation by creditors and equal distribution among them of the available assets. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

The 1570 Act was the first law designed as a true bankruptcy statute, as it not focused on prevent frauds, with the possibility of opening the case by an act of bankruptcy, bankruptcy meetings and the possibility of being appointed a commissioner to supervise the process. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

The notion of a statutory discharge marks the Statute of Ann of 1705. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law, eg 'fresh start' principles.**

1.5

### 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 of 2020 introduced a new restructuring plan, new moratorium rules and the relaxation of wrongful trading liability, due do Covid-19 effects.

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

1.5

### 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.

Soft law can be described as a convenient description for a variety of non-binding normatively worded instruments used in contemporary international relations by states and international organizations<sup>1</sup>. The concept of treaties was defining by the 1969 Vienna Convention as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its designation. Both treaties and soft law can cover some aspects of cross-border insolvency rules in States, essentially to harmonise multiples domestics insolvency rules and to regulate the co-operation and co-ordination to promote recognition and enforcement.

**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**

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<sup>1</sup> BOYLE, Alan. The choice of a treaty: Interaction between hard law and soft law in United Nations law-making. In: **The Oxford Handbook of United Nations Treaties**. Oxford University Press, 2019. p. 100-118.

**Insolvency which is arguably the most successful example of 'soft law' in the field of cross-border insolvency to date.**

**2.5**

**Marks awarded 5.5 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 sources of insolvency law interact with each other in any State, such as code law, principles, customs, jurisprudence, and soft law. Depending on the State, it can exist a federal and unified law (such as Bankruptcy Code in US or Law 11.101 2005 in Brazil) or multiples laws or statutes. Insolvency law is affected by other non-bankruptcy law and principles, and its application is guided by the jurisprudence, essentially in countries that adopt the common law system. **It would be beneficial to discuss common law in common law countries as filling any gaps in law** In cross-border insolvency cases, code law of a specific State essentially interacts with soft law and international treaties in many aspects, such as creditors' payment and liquidation of the assets. The challenge is to harmonise different sources of insolvency both within a country and when dealing with cross-border insolvency proceedings. **It would be beneficial to discuss general law and its relevance and impact upon insolvency law.**

**3**

**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 raised by Fletcher are: (i) in which jurisdiction may insolvency processes be opened, (ii) what country's law should be applied in respect of different aspects of the case, and (iii) what international effects will be accorded to proceedings conducted at a particular forum?

First, choice of forum requires the analysis of the jurisdiction of the parties or the dispute. In many cases exists a conflict of jurisdiction, because each State can appoint the forum based in different aspects, such as the existence of assets in the country, the center of administration of the company etc.. In that case, some treaties tried to harmonise different insolvency laws by adopting the concept of Center of Main Interests (European Insolvency Regulation, for example). **It would be beneficial to elaborate re the possibility of concurrent proceedings and what that means.**

Secondly, and related to the first question above, the decision of which law to apply is related to the different approaches that each State and system of law has to this question. In common law, this problem arises only if the parties invoke them, otherwise the law of the forum applies. In civil law, this problem arises even if any of the parties invoke them.

Lastly, the international effects are related to the recognition and the enforcement of a specific decision provided by a foreign forum. Some decisions provided by a foreign forum can violate other countries' principles or domestic legislation, for example. The type of judgement is also



an issue, that motivated UNCITRAL to develop the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements.

**It would be beneficial to elaborate on choice of law issues.**

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.**

The cross-border insolvency case of *Maxwell Communications Corporation plc* in 1991 were co-ordinated by an “Order and Protocol” accepted by both United States and England, following the idea that an insolvency agreement between the administrations of U.S. and England could resolve conflicts and facilitate communication. In that case, the center of gravity of the company was in England, the location of its principal executive offices, but most of the debtor’s assets were in the United States. The two goals pursued by the agreement were to maximize the value of the assets and harmonise the proceedings to minimize expenses and conflicts of the different jurisdictions.

The United States’ court had ceded primary authority for corporate governance to the British administrators, while protecting against potential injury to U.S. interests through maintenance of the Chapter 11 case and appointment of the examiner<sup>2</sup>.

**It would be beneficial to discuss the harmonisation and cooperation provisions put in place.**

Voting on MCC’s plan was completed on July 1, 1993, with holders of 99.3% in number and 99.98% in amount of class 3A (general unsecured) claims voting to accept the plan. Judge Brozman confirmed MCC’s plan on July 14, 1993. The U.K. court sanctioned MCC’s scheme pursuant to section 425 of the Companies Act 1985 the following week, with holders of 99.3% in number and 99.7% in amount of scheme claims voting to accept the scheme.

This case, that arises before almost all the soft law that exists for cross-border insolvency cases, was crucial to develop the study of cross-border insolvency and to stimulate treaties and soft law in cross-border cases, showing that cooperation between courts of different countries could result in a better approach to the matter.

3

**Marks awarded 9 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

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<sup>2</sup> WESTBROOK, Jay Lawrence. The Lessons of Maxwell Communication. **Fordham L. Rev.**, v. 64, p. 2531, 1995.

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.

Consider that the proceedings were opened before January 1, 2021, which marked the departure of the UK from the EU and the end of UK's recognition under European Insolvency Regulation, the European Insolvency Regulation Recast would apply to this case. Considering the UK as the Center of Main Interests (COMI) of Rydell and considering that the main proceeding is allocated by the European Insolvency Regulation on the COMI (UK, in this case), Fernz could open subsidiary proceedings in other member States of the EU, if the country has an establishment of the debtor. Considering that Fernz would open proceedings after an insolvency proceeding against Rydell was opened in the UK, the COMI in this case, the proceedings opened by Fernz would be classified as secondary proceedings.

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

4

#### **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.

After December 31, 2020, due to the Brexit, automatic recognition under the European Regulation on Insolvency proceedings has fallen away. The Trade and Cooperation Agreement between the EU and UK, which marked the departure of the UK from EU, made no reference to coordination and cooperation of cross-border insolvency proceedings<sup>3</sup>. That said, if the proceedings were opened in the UK on 18 June 2021, the European Insolvency Regulation Recast would not apply.

**This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 3 marks.**

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<sup>3</sup> Recognising UK insolvency proceedings in the EU - where does the UK stand post-Brexit? London, January 1, 2021. <https://www.ashurst.com/en/news-and-insights/insights/recognising-uk-insolvency-proceedings-in-the-eu>

**It would be beneficial to consider whether the MLCBI would apply for example and what further information might be relevant.**

**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?

An unregistered company in a UK is a business that is not covered under the provisions of the Companies Act 2006, including companies formed under foreign law. The English court has jurisdiction to wind up unregistered companies, in accord of Section 221(5) Insolvency Act 1986, which list three 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, or (c) if the court is of opinion that is just and equitable that the company should be wound up.

**This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 5 marks, eg. Matters pertaining to ‘sufficient connection’ should be discussed.**

**2.5**

**Marks awarded 8 out of 15  
TOTAL MARKS 32.5/50**

**\* End of Assessment \***