



**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.

[the English Bankruptcy Act of 1542 provided a compulsory administration and distribution mechanism for dishonest and absconding debtors. It first introduced the principles of collective participation by creditors and pari passu distribution.

The Statute of Ann of 1705 first introduced the notion of a statutory discharge, which had a significant impact on the development of insolvency policy. **How so? It would be beneficial to elaborate and discuss the concept of fresh start.**

The law of 1883 established the office of the Official Receiver, which was given the responsibility of administering the debtor's estate before the commencement of the bankruptcy procedure. Many viewed the 1883 law as the foundation of the present system of English bankruptcy law.] **Further elaboration would be beneficial.**

**It would be beneficial to consider developments such as the abolishment of imprisonment for debt, and the introduction of a fresh start.**

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.

[Corporate Insolvency and Governance Act 2020 was passed which provided:

1. a new restructuring plan. The new plan is similar to a scheme of arrangement, but introduces a cross-class cramdown, which is a feature of the US Chapter 11 restructuring. The cross-class cramdown allows a sanctioned plan to bind dissenting classes of creditors.
2. a suspension of wrongful trading liability. The Act provides that in assessing whether a director should make a contribution to the company's assets under the wrongful trading provisions, it is assumed that the director is not responsible for any worsening of the financial position of the company or its creditors between certain periods.
3. the suspension of winding up petitions and statutory demands. The Act provides that statutory demand issued against a company during certain period is void. If a winding up petition is presented during certain period on the basis that a company is unable to pay its debts, the court will assess the cause of non-payment. If the cause is covid-19, no winding-up order will be made.]

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.

[Treaty is a legally binding agreement between States. Once entered into, it imposes legal obligations on the contracting States and affects the contracting States' domestic law. **It would be beneficial to discuss the concept of 'hard law'.** Soft law is not strictly

binding on States. But it is not without legal significance. It is usually in the form of guidelines, policies, and codes of conducts, and sets out standards of conducts.

Treaties can be useful to facilitate cross-border insolvency procedures between contracting States. As it creates binding obligations, it promotes certainty and can be used to create a simplified cross-border insolvency procedure amongst contracting States. For example, Nordic Convention (1933) was made between Norway, Denmark, Finland, Iceland and Sweden, which provides that the law of the place of insolvency adjudication as determining almost all the effects of the order in all member States without the need for further formalities.

It can be difficult to have a large number of States with diverged domestic law and socio-economic situation to agree on a uniform set of cross-border insolvency rules. As a result, it may not be possible to use treaties to harmonise insolvency rules. Soft law has the flexibility where a participating State may adopt with or without modification to make it suit its domestic legal and socio-economic framework. So soft law is a very useful tool to harmonise the cross-border insolvency rules. For example, UNCITRAL Model Law on Cross-border Insolvency is a soft law. Given its wide adoption, it has shaped the international insolvency law.]

**3.5**

**Marks awarded 8.5 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.

[Sources of insolvency laws include domestic insolvency legislation (for example Insolvency Act 1986 (UK)), domestic international insolvency provisions (for example, the Cross-Border Insolvency Regulations 2006 (UK)), common law (case law, precedents), **It would be beneficial to note this is in relation to common law countries where common precedents can 'fill the gaps' in the law** private international law, treaties, protocols and soft law (for example, UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation). **It would be beneficial to discuss how general law or non-bankruptcy / non-insolvency law and its effect on bankruptcy/insolvency laws.**

The domestic insolvency legislation usually sets out in which circumstances a company may be wind up by the domestic court. However, if there is a concurrent foreign proceeding, domestic international insolvency provision or private international law may impose restrictions on commencing domestic insolvency proceedings. If there are concurrent domestic and foreign insolvency proceedings, domestic international insolvency provisions and/or private international law may deal with the relationship between the domestic proceedings and foreign proceedings, for example, which proceedings have supremacy, and what effect the foreign proceedings should have and what assistance the domestic court could give to the representatives appointed in the foreign proceedings. If a treaty relating to insolvency has been entered into between the state and the foreign state in which the foreign proceedings are opened, the treaty provisions should be followed. Note that treaty is often implemented by domestic laws. So, the treaty obligations may have already been reflected in domestic legislation.

Though protocols and soft law are not legally binding and do not need to be followed, it sets out standard practice, and are often followed, in particular in the areas where is no domestic provisions.]



**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.

[In which jurisdictions may insolvency proceedings be opened?

It is possible that concurrent insolvency proceedings may be opened in different jurisdictions under different laws. Some jurisdictions may limit its insolvency proceedings to the assets within the jurisdiction, whereas under laws of other jurisdictions, insolvency proceedings may have extraterritorial effect. This may pose the problem that the same asset may be subject to different orders from courts of different jurisdictions. Without harmonisation, there may be conflict regarding how this asset should be dealt with. There are also questions about what limitations should be imposed on proceedings opened outside of the jurisdiction of incorporation or outside of the debtors' COMI.

What country's law should be applied in respect of different aspects of the case?

After a court accepts jurisdiction, it has to decide which law it should apply. This is a private international law question, and different jurisdiction have different approaches. This may create a problem, where if the same issue is decided by a Chinese court applying Chinese private international law rule, the court may conclude that Chinese law applies and the result may be more favourable to the debtor, and if the same issue is decided by a Singapore court applying Singapore private international law rule, the court may conclude that English law applies and the result may be more favourable to the creditors. This would create opportunities for forum shopping.

What international effects will be accorded to proceedings conducted at a particular forum (including enforcement)

Different jurisdictions adopted different approaches in relation to the recognition and effects given to foreign insolvency proceedings. This may create a problem that a foreign proceeding may be recognised in certain countries but not others. If creditors want to enforcement the judgment against assets in those countries which do not recognise that foreign insolvency proceeding, they may have to issue fresh proceedings, which will incur further costs and may take a considerable amount of time, and may result in inconsistent judgment. Another problem is that if a foreign insolvency proceeding is not recognised and the creditors are free to commence proceedings against the debtor in the non-recognition jurisdiction. This may result in some creditors getting better recovery than others in the same class.]

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.**

[Maxwell Communications Corporation Plc (“MCC”) cross border insolvency case in 1992. It is significant in international insolvency. It introduced protocols as important tools in cross-border cases.

MCC is a conglomerate with its holding company incorporated in the UK, substantial assets in the US and substantial debt in the UK. MCC filed chapter 11 petition in the US and applied for administration in the UK. US Court appointed a chapter 11 examiner in the US proceeding, and the UK Court appointed joint administrators in the English proceeding.

A protocol was negotiated and agreed to harmonise the two proceedings with the aim of minimising the costs and conflicts between the concurrent US and English proceedings, and preserving the value of the estate (the “Protocol”).

Under the Protocol, the English joint administrators and the US examiner had similar authority and each was made subject to the jurisdiction of the other Court. The Protocol installed the English joint administrators as monitors of the ‘corporate governance’ of MCC with certain important actions, such as the disposal of assets and the incurrence of further debt, subject to the prior consent of the US examiner.

As a result of the effective coordination of the concurrent proceedings, a plan of reorganisation in the US and the scheme of arrangement in the UK, which constituted a single collaborative arrangement consistent with the insolvency regime of both countries, have been successfully approved and implemented.]

**This answer displays a good understanding. There is some scope to elaborate.**

**4.5**

**Marks awarded 12 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 European Insolvency Regulation Recast (“EIR Recast”) applies to the specified insolvency proceedings as set out in Annex B to the regulation, and it applies to all EU member states except Denmark.

The English insolvency proceedings were opened on 18 June 2020, and at the time, UK was an EU member state. The English insolvency proceedings are one of the proceedings set out in Annex B to the EIR Recast. Therefore, EIR Recast applies unless the contemplated proceedings are to be opened in Denmark.

Assuming, EIR Recast applies, since the English proceedings have been opened in the court where the debtor’s COMI is located, the English proceedings are main insolvency proceedings under the EIR Recast (Article 3.1). The significance of characterise the English proceedings as main proceedings include:

(1) the courts of another member state may only open a secondary proceeding if the debtor has an establishment in that state. The secondary proceeding is generally limited to dealing with assets within that member state. (Article 3.2)

(2) the English proceedings are automatically recognised in all other member state and shall have the effect in each member state as they would have in the UK (Article 20.1). This means the English law moratorium preventing the commencement of new proceedings against the debtor will be given automatic effect in another EU member state.

This means that Fernz can only open insolvency proceedings in another EU member state (other than Denmark) if Fernz can establish that Rydell possesses an establishment in that state. In order to establish this, it must be proved that Rydell carries out or has carried out in the 3 month period prior to the request to open the English proceedings a non-transitory economic activity with human means and assets. In order to assess whether Rydell has an establishment in that country, further information about Rydell’s activities in that country (whether it is carrying on business, or has carried on business, whether it has any employees and assets there, etc) is required.

If the contemplated proceedings are not insolvency proceedings (i.e. not one of the proceedings listed in Annex B to the EIR Recast), the English law moratorium may prevent commencing such proceedings in another EU member state because of the automatic effect under the EIR Recast.]

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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.

[From 11 pm on 31 December 2020, the EIR Recast ceased to apply in the UK following its exit from the EU. If the English proceedings were opened on 18 June 2021, the EIR Recast will not apply. This means that the English proceedings will no longer to be given automatic effect under the EIR Recast, and the creditors in the UK may be able to commence proceedings against the debtor, enforce against the debtor’s assets in the US.

What it means to Fernz is that it is no longer be prevented by English law moratorium to commence proceedings in an EU member state against Rydell. If Fernz intends to open an insolvency proceeding, it no longer needs to establish that Rydell has an establishment in the member state.

It is also open to Fernz to open main insolvency proceedings in an EU member state, if it can persuade the court that Rydell's COMI is in that state. There is a presumption that the place of the registered office of the debtor is its COMI. If Rydell has a registered office in that member state, unless it is proved to the contrary, Rydell's COMI is presumed to be in that member state, and Fernz can open main proceedings in that state. If Rydell's COMI is not in that member state, the conditions set out in Article 3.4 of the EIR Recast must be satisfied in order for Fernz to open secondary insolvency proceedings prior to the opening of the main insolvency proceedings.]

**Have you considered the MLCBI and whether it might be able to assist?**

**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?

[Insolvency Act 1986 ("IA") is relevant. English Court has jurisdiction to wind up unregistered companies under Part V of the IA, regardless of whether or not the debtor's COMI is in the UK. It is well established by a well-accepted line of case law that the court will only exercise such jurisdiction if the followings are met:

- (1) there must be a sufficient connection with England and Wales which may, but not necessarily have to, consist of assets within the jurisdiction. **Elaboration is warranted.**
- (2) there must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the 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 a jurisdiction.

(Re Real Estate Development Co [1991] BCLC 210, and Stocznia Gdanska SA v Latreefers Inc [2000] EWCA Civ 36)

The minor creditor must also establish one of the grounds for winding up unregistered companies in section 220(5) of the IA.

Cross-Border Insolvency Regulations 2006 may also be relevant or become relevant if a concurrent foreign insolvency proceeding has been or will be commenced. If a foreign insolvency proceeding has been opened in the court of the debtor's COMI, and that foreign representative has sought recognition in the English Court, the English proceedings may only be opened if Rydell has assets in the UK.]

**Section 221(5) Insolvency Act 1986 should be considered in detail.**

**2**

**Marks awarded 11 out of 15  
TOTAL MARKS 41.5/50**

**\* End of Assessment \***