



**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 first of the developments in English law that shaped modern insolvency law was the practice of imprisonment for debt, which was abolished by the Debtors Act of 1869. The imprisonment for debt was introduced with the Statute of Marlbridge dated 1267. **It would be beneficial to elaborate on how abolishment of imprisonment shaped modern insolvency laws, and the nature of modern insolvency not being a criminal act.**

The second development in this regard was experienced with the English Bankruptcy Act of 1542. Among other things, two elements of this law that shape the modern insolvency law come to the fore. Firstly this Act allows the creditors to participate the proceeding in a collective manner. Secondly it contains a provision for distribution of the debtors available assets at an equal rate. Which is known as *pari passu* principle.

The third and final development is the Statute of Ann of 1705, which allows the debtor to get rid of the remaining debt in certain conditions. Which is known as statutory discharge. **It would be beneficial to elaborate upon the modern thinking of 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.

The Insolvency law changes, which have been discussed for a long time in the United Kingdom, were quickly adopted and entered into force with the effect of the Covid-19 pandemic. The law in question is referred to as the Corporate Insolvency and Governance Act (CIG Act). The changes made with this law are generally evaluated under two parts. The first part of the changes are permanent ones which are considered not related to the pandemic. The second part of the changes are temporary and aimed to reduce negative effects of pandemic. The first of the changes related to the pandemic is softening the terms of liability arising from the wrongful trading of company managers during the pandemic. The second measure introduced in this context concerns when and how the creditors can initiate the winding-up proceeding and make statutory demands on the debtor. The last and third change is the flexibility brought about holding the shareholders' meeting.

**To improve your mark for this sub-question, it would be beneficial to briefly discuss the measures in more detail. While the sub-question says 'briefly' it 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.

Treaties and soft law are both sources of international law. Treaties are written agreements that become binding on the State upon their signing and ratification<sup>1</sup>. **It would be beneficial to talk about treaties being 'hard law' and why.** The controversial nature of "soft law" makes it difficult to define or agree on a definition. Generally "soft law" refers to a non-binding instrument as a source of international law which appears in different forms such as principles, guidelines, recommendations, key attributes, codes of conducts or model laws<sup>2</sup>.

Both sources can be used as tools to solve various problems of international insolvency law. Treaties appear as the most ideal tool/resource with a definitive, binding and uniform arrangement. A Treaty accepted and put into effect by states has the potential to provide great convenience to all participants in practice. However, the adoption of an agreement of this nature with the desired level of participation has not been achieved, especially in the field of insolvency law. It is stated that it is unlikely that such an agreement in the field of insolvency will enter into force with a wide participation in the future<sup>3</sup>.

Contrary to treaties, "Soft Law" does not seek the acceptance of states with a definitive and binding text. Instead, it is in a form that includes general rules and basic principles, allowing States to preserve their local laws to a certain extent. Thus, instead of breaking the resistances related to local law, it serves to establish a common understanding and practice in the field of insolvency law with them.

**It would be beneficial to make reference to the UNCITRAL Model Law on Cross-Border Insolvency which is arguably the most successful example of 'soft law' in the field of cross-border insolvency to date.**

3

Marks awarded 7.5 out of 10

### QUESTION 3 (essay-type questions) [15 marks in total]

#### Question 3.1 [maximum 5 marks]

Briefly discuss the various possible different sources of insolvency laws in any State and how they may interact with each other.

The sources of a State's insolvency law appear in different forms. In connection with the legal system of the State, codes and case law can constitute the two main sources on this subject. In States that have adopted the Common law system, binding case law must be evaluated together as well as the relevant legislation. In States that have adopted the Civil law, the codes related to the law of insolvency are the main sources. In both systems, the regulations related to the law of insolvency may be gathered in a single code, or it is possible to come across different codes on different subjects. Such as insolvency for consumers or individuals in a separate code and insolvency for companies in a different code.

The sources of insolvency law are not limited to the codes pertaining to these procedures. In addition, codes related to substantive law may also contain regulations that affect the law of insolvency. For example, regulations related to company law or securities have a wide application area in the insolvency procedure and have significant effects on the process.

<sup>1</sup> Shaw, Malcolm N, International Law, Cambridge University Press, Cambridge (2003), p 88.

<sup>2</sup> Thirlway, Hugh, The Sources of International Law, Oxford University Press, Oxford (2019), p 188-189; Mevorach, Irit, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps, Oxford University Press, Oxford (2018), p 151.

<sup>3</sup> Mevorach, Irit, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps, Oxford University Press, Oxford (2018), p 134.



**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 first question asked by Fletcher concerns the determination in which State’s court the insolvency proceeding will be initiated in cases where the insolvency crosses a border. The first thing to be determined when a insolvency proceeding is to be initiated, whether initiated by the debtor or the creditor, will be the jurisdiction of the court. The person who will apply for insolvency will want to file for proceeding in the most suitable place for his/her own benefit. On the other hand, other interested parties will object to the jurisdiction of the court where the proceeding was started and claim that it should be started in another State that suits their interests. The problem of jurisdiction is a problem that can affect the progress of the process in cross-border insolvency proceedings.

The second important question is about which country's law will be applied to the different issues of the proceeding. The determination of the law to be applied will vary according to the legal problem that is being tried to be resolved. In this sense, in an insolvency proceeding, the same court applies the laws of different countries to different legal problems.

The last important question Fletcher asks is about what effects the insolvency proceeding seen in one place might have in the international arena. Are the actions and decisions taken by a court of a certain place, which considers itself authorized, are recognisable and enforceable in another country? This problem is tried to be solved through multilateral agreements and other instruments of private international 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 ?**

3.5

**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.**

Cross-border Insolvency Agreements can be used for different purposes in various ways in cross-border insolvency procedures. It serves many purposes including but not limited to the administration and liquidation of the assets, the participation of creditors in different countries, the prevention of increase in expenses in parallel procedures.

In Article 27 of the MLCBI, the forms of cooperation that will take place between the courts and representatives are counted as exemplary. As stated in the quotation, this cooperation was known and practiced before the Model Law. Precedent cases on this issue are summarized in Annex 1 of UNCITRAL's "Practice Guide on Cross-Border Insolvency Cooperation"<sup>4</sup>. Of the 44 cases in that annex, 6 are prior to 1997, when the Model Law was adopted.

Prominent among these is the one dated 1991/1992 case called "Maxwell". Insolvency proceedings have been initiated against the debtor Maxwell in both the United Kingdom and the United States. In these two concurrent procedures, the examiner from the USA and the joint administrators from the UK carried out an unprecedented cooperation in accordance with the signed "protocol". In this context, the assets of the debtor were evaluated jointly in terms of both procedures, the submitting of claims was carried out in connection in both countries, and unity was achieved in the voting of the plan and scheme.

**This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.3 asks for a brief note, it is for 5 marks. It would be beneficial to elaborate upon your case discussion.**

**3**

**Marks awarded 11.5 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.

To determine whether to apply the EIR Recast, it is necessary to evaluate the scope of the Regulation. EIR Recast has four aspects in scope.

1- The first of these issues is related to the scope of the Regulation in terms of subject (Material Scope). For the provisions of the Regulation to apply to a proceeding, that proceeding must be public collective proceeding. In the question, it was stated that the

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<sup>4</sup> UNCITRAL, Practice Guide on Cross- Border Insolvency Cooperation, p 115-140.

proceedings initiated by the minor creditor in the UK were insolvency proceeding. Therefore, the nature of the proceeding initiated is within the scope of the regulation. However, proceedings not listed in Annex A are not covered by the Regulation. The proceedings initiated in the UK against Rydell are not specified in the question. If this proceeding is one that is not counted in Annex A like Scheme of Arrangement, the provisions of the Regulation will not apply.

2- The second issue to be considered in determining whether the regulation will be implemented or not is the temporal scope. EIR Recast has repealed its predecessor, EIR 2000. EIR Recast provisions will be applied to proceedings to be started after 26.06.2017. In the question, the small creditor started the proceeding on 18.6.2020, and Fernz wants to start it one month later, on 18.7.2020. Both dates are in scope in terms of time as they are after the Regulation's entry into force. **It would be beneficial to consider when the EIR Recast ceased to apply to UK proceedings.**

3- The third issue is the personal scope. The Regulation applies to everyone, regardless of whether the debtor is a natural or legal person, merchant or consumer. However, certain entities are excluded from the scope of the second point of Article 1. Regulation shall not be applied to the insolvency proceedings of the organizations listed in this paragraph. As Rydell is not one of the entities listed in this paragraph, the provisions of the Regulation will apply to the proceedings about Rydell.

4- Finally, the territorial scope of the Regulation should be examined. The Regulation shall apply in all EU States except Denmark. For the provisions of the Regulation to be applicable to an insolvency procedure, the debtor's COMI must be within the EU and the COMI must not be Denmark. In the question, there is no information on whether the proceedings to be initiated by Fernz are in Denmark. If these proceedings are initiated in an EU country other than Denmark, they are covered and the provisions of the Regulation will be applied.

**It would be beneficial to discuss how such secondary proceedings are permitted where the debtor has an "establishment". An establishment is defined as meaning "any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets"**

**It would also be beneficial to consider the need for further information as to whether Rydell has an establishment in the other country in Europe where the other proceedings were intended to be commenced by Fernz.**

3.5

#### **Question 4.2 [maximum 3 marks]**

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

Due to Brexit, the EIR Recast provisions will not apply to insolvency proceedings initiated on or after January 1, 2021. The provisions of the EIR Recast do not apply to the insolvency procedure initiated in the UK on 18 June 2021 as stated in the question. However, UNCITRAL Model Law provisions can be applied to this international insolvency procedure. As it is known, the UK is among the countries that accept the Model Law. However, the Model Law lacks the conveniences provided by the Regulation. In this context, there will be differences in terms of recognition of foreign proceeding and foreign representative. In this case, English domestic law provisions will come into play.

**It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCBI and if not what laws would need to be considered in those countries.**

2.5

**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?

In UK law it is possible, under certain conditions, to seek the winding-up of a company that is not registered in the UK. Section 221(5) of the 1986 Insolvency Act is the provision to be applied here. Accordingly, in the following three circumstances, an English court can order the winding-up of an unregistered company:

*“(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”*

If the said minor creditor can convince the court that his/her claim has sufficient connection with England and Wales, he/she can initiate such formal insolvency proceedings in the UK.

**There is scope to elaborate regarding ‘sufficient connection’ and what is required.**

**4**

**Marks awarded 10 out of 15  
TOTAL MARKS 39/50**

**\* End of Assessment \***