



**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 Romans formulated insolvency concepts that are familiar today, from assignment of the debtor's property to his creditors (cessio bonorum) to liquidation of the debtor's assets (distratio bonorum) and compositions with creditors (dilation). Later, the bankruptcy of merchants came to be regulated by medieval European law merchant (lex mercatoria), a substantial part of which was absorbed into English common law. (Law in transition, Catherine Bridge, 2013)

1. Cessio bonorum (assignment of property)  
is a voluntary surrender of goods by a debtor to his creditors. It did not amount to a discharge unless the property ceded was sufficient for the purpose, but it secured the debtor from personal arrest. The creditors sold the goods as partial restoration of their claims. The procedure of cessio bonorum avoided infamy, and the debtor, though his after-acquired property might be proceeded against, could not be deprived of the bare necessities of life.
2. Distratio bonorum (forced liquidation of assets)  
Is the liquidation of the debtor's assets
3. Remission and dilation (compositions with creditor)

**Take care to read the sub-question and answer what is put to you. Here you need to discuss English law not Roman law or the influences of Roman law.**

0

### 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.

Passage of the Corporate Insolvency and Governance Act 2020, which sets out certain reforms to insolvency law that among others introduced:

1. A new restructuring plan  
This new reorganisation measure will be similar to a scheme of arrangement, which many companies already use to successfully restructure their debts. As with a scheme, creditors will be divided into classes based on the similarity of their rights prior to and as a result of the plan.
2. New moratorium rules  
The provisions will provide businesses with a statutory breathing space from creditors within which to formulate a rescue plan. With certain key exceptions, the company will not have to pay debts falling due prior to the moratorium but will have to pay debts falling due during the moratorium. The moratorium will be similar to that which is available in an administration. For as long as the moratorium applies, it will prevent the enforcement of security, the commencement of insolvency proceedings or other legal proceedings against the company and forfeiture of a lease. The moratorium will last for an initial period of 20 business days with an ability to extend for a further period of 20 business days without consent and with the possibility of further extensions of up to one year or more.
3. The relaxation of wrongful trading liability and also the suspension of winding  
The Act temporarily amends the wrongful trading regime such that the court, in assessing whether a director should make a contribution to the assets of the company

under the wrongful trading provisions, is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors between 1 March 2020 and 30 September 2020, and between 26 November 2020 and 30 June 2021.

4. The relaxation of wrongful trading liability and also the suspension of winding-up petitions and statutory demands: The legislation plans to temporarily remove the threat of statutory demands and winding-up proceedings where unpaid debt is due to Covid-19. Statutory demands will be void if issued against a company between 1 March 2020 and 30 September 2021. Winding-up petitions presented during the relevant period that claim that a company is unable to pay its debts will be reviewed by the court to determine the cause of non-payment. If the company cannot pay its debts because of Covid-19, no winding-up order will be made.  
(Ref. Allen & Overy, Corporate Insolvency and Governance Act 2020)

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.

A treaty is a formally concluded legally binding written agreement between states.

Soft laws denotes agreement that are of persuasive nature and not legally binding.

In cross border insolvency, states are legally bound by treaties which they have imported into their domestic laws to resolve insolvency issues that have a connection with another state. States may also be influenced or persuaded by international conventions to resolve insolvencies that have a connection with another state as a matter of soft law.

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

2

**Marks awarded 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 main sources of insolvency laws are found in legislation or codes and most case common law principles for systems still based on common law to augment gaps in their existing legislation.

Some states have a single unified document of insolvency legislation like the United States of America, where a piece of bankruptcy legislation covers all aspects of bankruptcy. Many other states have a multiplicity of legislation that exists and all the legislation will have to be studied in conjunction with each other in order to understand the system in full. An example is the case where the laws for individual bankruptcy is contained in one statute while the laws relating to the winding up of companies is contained in another different statute.

Other non-bankruptcy laws may also have an effect in insolvency may not be found in insolvency legislation but may impact insolvency cases. These rules are usually not found in



insolvency legislation, but they have a huge impact on insolvency law generally. What is however important to note is the fact that legal systems can differ substantially in the matter of the generally applicable statute.

**It would also be beneficial to discuss common law in common law countries as filling any gaps in law**

4

**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.

1. In which jurisdictions may insolvency proceedings be opened? Commonly in cross-border insolvencies questions of international jurisdiction always arises in relation to the opening of the insolvency proceeding. In answering this question by Fletcher, insolvency proceedings could possibly be opened concurrently in more than one state. **What are difficulties that arise as a result of this?**
2. What country’s law should be applied in respect of different aspects of the case? Many substantive issues must be resolved in every insolvency proceeding since insolvency laws are highly procedural in nature. The answer to this question is that each state would apply its own laws including choice-of-law rules.
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)? An answer to this question is that no or very limited extraterritorial effects would be granted to foreign proceedings.

**To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.2 asks for a brief note, it is for 5 marks.**

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.**

In Re Maxwell Communication Corp. Plc, 186 B.R. 807 (S.D.N.Y. 1995)

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

Under the agreement, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present.

Specificities included that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the English insolvency representatives should only incur debt or file a reorganisation plan with the consent of the United States insolvency representatives or the United States court; and the English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the agreement to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the agreement."

(UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp.128-129)

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.

On the issue of whether or not the recast will apply? The recast will apply because the EIR Recast ceased to apply in the UK from 11pm on 31 December 2020 due to Brexit. 18 June 2020 is therefore within legal time of the Recast.

On the issue of the proceeding opened in the UK by the minor creditor, the case opened against Rydell in the UK by the minor creditor on 18 June 2020 would be regarded as the main proceedings since the UK is the centre of the debtor's main interest. This is so because according to the EIR Recast, the courts of the Member State within the territory of which the

debtor's center of main interest is situated shall have jurisdiction of open insolvency proceedings. The proceedings would have universal scope with regard to both (i) the insolvency estate and (ii) the body of creditors. All assets of the debtor, regardless of the Member State where they are situated, are subject to these proceedings; and all creditors are entitled to (and obliged to) participate in them.

if the debtor has an establishment in another Member State, the courts of this State will have jurisdiction to open territorial insolvency proceedings. The effects of those proceedings are restricted to the assets of the debtor situated in the territory of the latter State. In effect Fernz, can open a proceeding in another country in Europe against Rydell since Rydell has establishment throughout Europe however the proceeding will be subsidiary. The effect of the proceeding is that it will only be restricted to the asset of Rydell in the country.

**It would be beneficial to elaborate on how 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 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.**

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.

The EIR Recast will not apply because from 11pm on 31 December 2020, the EIR Recast ceased to apply in the UK following its exit from the European Union. The effect is that an insolvency proceeding will have to be opened in every state against Rydell.

**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.**

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?

[On the issue of formal insolvency proceedings opened in the UK on 18 June 2021, the EIR Recast will not apply because the EIR Recast ceased to exist in the UK on 31 December 2020 at 11pm. The proceeding opened in the UK will not be regarded as the main proceeding.

On the issue of what relevant domestic law be relevant whether the minor creditor could commence those formal insolvency proceedings in the UK, it would be the The Corporate Insolvency and Governance Act 2020.

The Corporate Insolvency and Governance Act (CIG Act) came into force on 26 June 2020]

It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

.5  
Marks awarded 7 out of 15  
TOTAL MARKS 34 /50

**\* End of Assessment \***