



**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.

- As the case in continental Europe, the English bankruptcy and insolvency laws started off with individual debt collection mechanism, that was pro-creditor in nature, and viewed delinquent debtors as quasi-criminals. The Statute of Malbridge (1267) introduced the imprisonment for debt, and the first English Bankruptcy Act (1542) provided a form of compulsory sequestration for delinquent debtors. **It would be beneficial to address the development regarding abolishment of imprisonment for debt.**
- The Act of Elizabeth (1570), which was considered as the first law designed as a true bankruptcy statute rather than fraud-prevention legislation, further developed the collective debt-collection measures by vesting the authority to supervise the bankruptcy estate to a single executive body, the Lord Chancellor.
- The Statute of Ann (1705) introduced the notion of statutory discharge, marking the shift in the stance of the English insolvency legislation towards a less pro-creditor posture. Statutory discharge allows a debtor to have a clean-slate fresh-start following insolvency.

2

It's good that you have

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 ("Act") was passed into law on 26 June 2020, which introduces certain measures to counter the financial distresses triggered or worsened by the Covid-19 pandemic. The measures introduced by the Act, include;
 - Prohibiting the termination of the supply of goods and services to companies that are becoming insolvent, to improve the chances of such companies to survive the financial distress;
 - Certain moratorium period during which companies are protected from legal and enforcement actions from their non-finance pre-moratorium creditors;
 - Temporary ban on winding-up petitions in cases where Covid-19 has had financial effect on the debtors.
- The Coronavirus Act 2020 also introduced a certain moratorium period during which landlord in England and Wales could not terminate leases and take possession of the properties because of rent arrears.
- Measures were also introduced to provide Insolvency Practitioners with more flexibility in performing their duties and meeting deadlines, which takes into account the Covid-19 practical consequences on the duty of these practitioners.

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.

Treaties are agreements, covenants, conventions, or pacts, that states entered or acceded into, and as such are binding to those states that are signatories, and become part of the prevailing “hard law” applicable in those states. Treaties are considered public international law instruments given that they govern the states that are parties to them. There are treaties setting forth how cross-border insolvency matters should be resolved in the respective jurisdictions of the signatories or parties, and these treaties become part of the applicable insolvency laws in the respective jurisdictions of the signatories.

On the other hand, a “soft law” is not a binding law of the land. Soft laws are guidelines promoted by multilateral organizations which may influence the legislation of a state, and which when adopted by a state and passed as a legislation, would then become a prevailing “hard law” in the respective state. As guidelines, there could be varying modifications applied by different states adopting it. UNCITRAL Model Law on Cross-border Insolvency is considered the most successful soft law in cross-border insolvency, given its wide-spread influence and adoption.

4

Marks awarded 9 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 possible sources of insolvency laws to any state comprise of:

- Domestic insolvency laws are laws that are passed or enacted by a state’s legislative body to deal with insolvency matters in the state’s jurisdiction; **It would be beneficial to elaborate upon legislation beign either in a code or in a multiplicity of legislations**
- Treaties or conventions to which a state becomes a signatory, will become hard-laws once these treaties are ratified, and are therefore enforceable domestically;
- The state’s own private international law principles which are principles that are applicable for matters involving interaction with another state or jurisdiction;
- Soft laws which are guidelines promoted by multilateral organizations, which may influence the legislation and regulation developed by the state.

A presiding forum will defer to the domestic insolvency laws and the ratified treaties or conventions in its jurisdiction, in deciding an insolvency matter, and where there is any issue not covered by these laws, the jurisdiction’s private international law principles may fill in. The soft-laws promoted by the multilateral organizations may serve as guidelines or model for the respective state in developing its domestic insolvency laws.

Have you considered common law as it relates to common law countries or general law and its impacts on insolvency law?

1.5

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring the “cross-border” aspects and the “insolvency” aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

The three pertinent issues in any cross-border insolvency case, according to Fletcher, comprise of:

- Which court or forum (or which state) has jurisdiction over the case, and as such which court can preside over insolvency proceeding to adjudicate and hear the matter. Insolvency proceeding may be commenced concurrently in more than one court, forum, or state, and the jurisdictional competence of the court in which the petition has been brought to hear and adjudicate the case, would be the first and foremost pertinent issue to be analysed and addressed. The establish the suitability or competence of the court or forum, usually there need to be a connection between the forum or state, with the parties concerned, or with the disputed assets or objects.
- Which law should be applied over different aspects of the case concerned. Once a forum or court has determined that it has the jurisdictional competence to hear the case, it must decide which set of laws it need to apply for the case. In common law system, normally the default would be to apply the laws of the forum, unless a choice of laws issue has been brought up by parties concerned. On the other hand, in civil law system, the issue concerning the applicable law is a question of law, which is an issue that the court would usually address even if it has not been pleaded or brought up by the parties. **It would be beneficial to elaborate upon choice of law issues.**
- What international or cross-border reach and enforcement, should be allowed and afforded to the proceedings in a particular forum, or to its rulings, judgements, or decisions. The issue is on whether a state would provide recognition, allow enforcement, give effect to, the ruling, judgement, or decision made by a foreign court. On this pertinent issue, absent any specific principle set forth in its domestic laws, or in any treaty or convention adopted by it, a state would usually resort to its own private international laws principles to address the issue.

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.

The prominent case law example is the Maxwell Communications Corporation plc cross-border insolvency case in 1991 which took place before UNCITRAL’s MLCBI was introduced. Maxwell group had a UK-based holding company, with hundreds of subsidiaries outside the UK, and the group has its significant assets located in the US¹. Facing imminent default on its debt, the group filed a pre-emptive Chapter 11 petition in the US, and subsequently filed an insolvency petition in the UK.

Given that there are two concurrent proceedings over Maxwell, with two different court-appointed insolvency representatives with similar and overlapping roles (the US court appointed an examiner, and the UK court appointed a joint administrators), the courts and the insolvency representatives faced the challenge of meeting the main objective of the

¹ Paul H Zumbro, “Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool” (2010), 11 *Business Law International*, p 163.

proceedings (which is to preserve the value of the estate) without undermining the respective sovereign authority of the two jurisdictions.

The judges in these two courts independently raised and proposed the idea of an agreement or protocol to be negotiated and agreed, to coordinate and harmonize the two separate proceedings, facilitate exchange of information, with the objective of maximizing the estate value and minimizing expenses and conflicts between the two proceedings. Pursuant to the protocol, the US examiner and the UK joint-administrators had similar authority and each was made subject to the jurisdiction of the other court. Specificities were set forth in the protocol to stipulate certain actions by one insolvency representative that requires the consent of the other.

The case culminated with the approval of a reorganisation plan in the US and a scheme of arrangement in the UK, which were separate documents filed in different forum, but were mutually dependent, reflecting a collaborative arrangement as a result of the protocol agreed, and yet both documents were made consistent with the insolvency regimes of both countries².

4.5

Marks awarded 9.5 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.

The European Insolvency Regulation Recast of 2015 (EIR Recast) that became applicable for the EU member states starting from mid-2017 would be applicable for insolvency proceedings brought up against Rydell in the UK given that the UK was a member state of the EU. **It would be beneficial to address legislation dealing with application of the EIR Recast to proceedings opened in the UK prior to 31 December 2020.** As Rydell has its centre of main interest (COMI) in the UK, the rules of the EIR Recast would allocate to the UK forum, the primary jurisdictional competence over insolvency proceedings against Rydell, and this

² *Ibid*, at p 164.

proceeding in the UK will be governed by the UK insolvency laws in all respects (save for some exceptions).

However, the EIR Recast allows concurrent proceedings as secondary or subsidiary territorial proceedings in other forums in which the debtor has had an “establishment”. The establishment is defined as the debtor having a non-transitory operation within the jurisdiction. Therefore, Fernz will be able to launch a secondary proceeding in another EU member state outside the UK, if Rydell has had an establishment in that state. The secondary proceeding to be pursued by Fernz would then become a subsidiary or secondary territorial proceeding against Rydell, to be governed by insolvency laws of the respective state, and the jurisdictional reach and effect of this subsidiary proceeding would be restricted to Rydell’s assets that are situated in that state. Further information required for this question is whether Rydell has had a non-transitory establishment in the jurisdiction within which Fernz is considering an insolvency proceeding.

It would also be beneficial to consider other articles of the EIR Recast briefly, such as Article 7.

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.

Given the UK’s exit from the EU in 2020, the EIR Recast would no longer be applicable for the proceeding against Rydell that was opened in the UK on 18 June 2021 (given that the proceeding was opened post the deadline of the transitional period, being 31 December 2020). Therefore, notwithstanding Rydell has had its COMI in the UK, the UK proceeding against Rydell (and any Insolvency Representative appointed by the UK forum) would no longer enjoy the automatic recognition across the EU member states, which recognition was previously automatically accorded by the rules of the EIR Recast. Conversely, other proceedings opened in other EU member states outside the UK by Fernz, would not benefit from the automatic recognition in the UK as secondary (subsidiary) territorial proceedings under the rules of the EIR Recast. Following ‘Brexit’, the UK forum’s appointed Insolvency Representative intending to carry out the UK judgement to any EU member state, will have to follow the local procedures for enforcement of foreign judgement that are prevailing in the respective EU member state, and conversely any Insolvency Representative appointed by an EU forum outside the UK, intending to enforce the judgement in the UK, will have to follow the prevailing local UK procedures for enforcement of foreign judgment.

Have you considered the relevance of the MLCBI?

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?

Despite Rydell being unregistered in the UK, and have had its COMI outside the UK, a formal insolvency proceeding can still be opened against Rydell in the UK. The Insolvency Act 1986 (the “Act”) and its related Insolvency Rules 2016 SI 2016/1024 are the relevant domestic laws

in the UK. The EIR Recast would no longer be applicable given that it was opened past the deadline of the transitional period following 'Brexit'. The Act provides **(in what section?)** the possibility of a winding-up order against foreign unregistered companies in the following situations;

- (a) where the company has been dissolved or has ceased its business or is carrying on business only to wind up its affairs;
- (b) where the company is unable to repay its debt;
- (c) where it is in the court's opinion the wind-up judgement would be just and equitable.

Furthermore, the courts would require to satisfy 'sufficient connection' with England and Wales test in hearing or approving the insolvency proceeding against foreign companies. This 'sufficient connection' test consists of satisfying three core requirements;

- (i) having a connection with England and Wales, which may, but does not have to, entail having an asset located in England and Wales;
- (ii) having a reasonable possibility that the winding-up order would benefit the petitioner or applicant of the winding-up order;
- (iii) having one or more person interested in the distribution of debtor's assets to be person(s) over whom the court has jurisdiction.

4
Marks awarded 11 out of 15
TOTAL MARKS 39.5/50

*** End of Assessment ***