



**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.

(1) Bankruptcy acts: England began to pass laws that specifically targeted bankruptcy in 1542, with the first English Bankruptcy Act of 1542. England went on to pass other acts, e.g. the 1570 Act, that moved closer towards bankruptcy statutes as we know them today.

(2) Discharge: The concept of a discharge was first introduced by the Statute of Ann in 1705. Commissioners confirmed that a debtor had cooperated during the bankruptcy proceedings, which is similar to our systems today (particularly the American system—where the discharge is the main goal of most consumer and business bankruptcies). **It would be beneficial to elaborate with respect to the concept of fresh start.**

(3) Receiver: The office of the “Official Receiver” was founded in 1883, whereby the receiver administered the debtor’s estate before commencement of a bankruptcy. This has clearly impacted the American system, particularly with regards to the bankruptcy trustees that are tasked with administering a debtor’s estate, although this takes place in, not prior to, bankruptcy. Of course, this also closely resembles the receivership system.

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

1.5

### Question 2.2 [maximum 3 marks]

Following the Covid-19 pandemic, States across the globe had to introduce measures to deal with the negative economic fall out of this pandemic. Briefly indicate three insolvency and insolvency-related measures so introduced in the UK.

(1) Corporate Insolvency and Governance Act 2020: This was passed following the first part of the pandemic, and it set out reforms to insolvency law, e.g. new moratorium rules, a new restructuring plan, relaxation of wrongful trading liability.

I really do not see any others in the text. The footnote regarding this (footnote 20) has a link that does not work, so I cannot see more. **The footnote links to an Insol international document successful.**

**More detail would have improved the mark awarded for this sub-question.**

2

### 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.

While some scholars disagree, the difference between treaties and soft law is meant to be that treaties are binding and soft law is non-binding, but influential. It is difficult to successfully advocate for treaties as States are slow to ratify treaties and there are issues with the multiculturalism of the different member States. With differing domestic laws, it is difficult for member States to imagine treaties that work for each State.

Soft law, on the other hand, can provide a good framework for domestic implementation within a State. With soft law, a State is free to adapt the framework to its liking and needs. For

example, the Model Treaty on Bankruptcy adopted by the Hague Conference on Private International Law in 1925 was a helpful tool in regulating international insolvency. In addition, the Model Law on Cross-border Insolvency can be adopted with or without modifications, making it more attractive the diverse member States.

**4**  
**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.

Typically, a State will have legislation, statutes and laws, or codes. America has its own bankruptcy code, which is applicable throughout the states despite their differing laws. The bankruptcy code in America interacts with the state laws of whichever state the bankruptcy proceeding has been initiated in, and the bankruptcy code is subject to special rules in the face of conflicting state laws: depending on the circumstance, the bankruptcy code may supersede a state law, or it may be superseded by another non-bankruptcy law. Much depends on whether the bankruptcy law conflicts with the non-bankruptcy law, or whether it merely answers a question unanswered by the non-bankruptcy law. The bankruptcy code in America also refers to three different types of bankruptcy, which can be split up into two categories: consumer and corporate bankruptcies.

In other places, different types of legislation may exist in the same State, and some States may not distinguish between the bankrupt individual and bankrupt company. It's also possible that the bankruptcy laws in a State are found all across its laws, rather than in one unified place, thereby making it simpler to apply the bankruptcy law in conjunction with non-bankruptcy law. Within the context of a proceeding, other types of laws will inevitably become relevant when it comes to injunctions (i.e. the automatic stay) and executory contracts (which will be governed by relevant contract law).

Moreover, bankruptcy laws are bound to interact with domestic non-bankruptcy laws in any insolvency proceeding. The differences among States will depend on how they treat the bankruptcy laws, and which supersedes which.

**It would be beneficial to also discuss common law precedents in common law countries.**

**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? There are two basic theories answering this concern: universalism and territorialism. Universalism allows for more than one proceeding to be opened in different states, whereby the law of the 'main proceeding' (where the debtor has its center of main interests) has the most effect. This approach calls for unity and uniformity. Territorialism, on the other hand, states that different proceedings in different states have the stated effect domestically, but not outside the borders of that State. Under this approach, the insolvency laws of many States could be involved, and each



proceeding takes a more exclusive approach and does not apply to other proceedings. While there are other approaches that tweak these ideas, these two are the main approaches regarding when and where insolvency proceedings should be opened, and how.

Whether or not could or should determine a matter depends on that State's jurisdictional rules and the consequential standing of the parties in dispute. This is typically determined at the beginning of an insolvency proceeding.

(2) What country's laws should be applied in respect of different aspects of the case?

Choice of which law to apply depends on the 'choice of law' rules of that particular State. Typically, the law of the chosen State (where the proceeding is taking place) will apply, unless a party challenges application of that State's laws. In a place like America, the bankruptcy-specific legislation will apply to all matters related to the insolvency itself, and its procedure, but foreign or state law may be introduced for particular matters within the bankruptcy: for example, if a contract at issue is subject to international law.

(3) What international effects will be accorded to proceedings conducted at a particular forum?

The recognition of foreign proceedings is a fairly big issue in this context. Each State has its own rules for recognizing foreign judgments, and a procedure for determining whether the judgment is truly for the same matter being adjudicated in that State. Whether a foreign judgment has a preclusive effect can make a huge difference in insolvency proceedings, where large judgments can make or break a case. If a judgment calls for liquidation or large payment, it is likely its recognition will be challenged by the party affected by it. The costs associated with recognizing a foreign judgment can be extensive, as some jurisdictions may call for a re-litigation of the underlying matters, or extensive briefing and argument on the issues.

While domestic consistency is important, it's also clear that a lack of comprehensive law regarding this issue (and the other two above) has resulted in costly and lengthy litigation as parties attempt to determine choice of law, forum, and recognition of foreign judgments. Some clarity regarding these issues, or some uniformity, would likely result in a decrease in cross-border insolvency costs. Some attempts have been made, as in the UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments, but more uniformity in this respect would increase the predictability of outcomes and consequently engage in more international/cross-border credit activity as more creditors become more comfortable knowing the likely outcomes of a cross-border insolvency proceeding, were one to be initiated. Predictability in this regard would only increase cross-border lending and perhaps increase trust in global insolvency systems.

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 example is *Maxwell Communications Corporation plc*, a cross-border insolvency case from 1991. There, concurrent insolvency proceedings in America and England were coordinated by an “Order and Protocol” approved by both courts in each State. The two cases were initiated by a single debtor, which a representative of the company in each proceeding. The judges actually suggested the idea of coordination to counsel, which culminated in the agreement. The agreement set out to maximize the value of the estate and harmonize the proceedings to minimize expenses and waste. Importantly, the agreement stated that the American court would defer to the English court. Other details were included, and then some left out and later included in an extension of the agreement.

This case is a good example of one of the underlying principles of insolvency—working together in unfavorable circumstances. The parties’ agreement likely saved an immense amount of time and money on both sides of the pond, and likely serves as a good model for others seeking to do the same. It also indicates that this type of good-faith negotiation is embedded in the system, whether in England or America.

**This answer displays a good 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.**

**4**

**Marks awarded 13 out of 10**

**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) allocates jurisdictional competence to the courts of a State that contains the center of a debtor’s main interests (COMI). Since Rydell’s COMI is in the UK, much depends on whether the EIR Recast applies retroactively, as the UK left the European Union on December 31, 2020. While the EIR Recast does not apply after this date, since the proceeding in the UK was initiated on June 18, it is possible

that the EIR Recast still applies as the proceeding was initiated pre-Brexit. I would need more information regarding EIR Recast's retroactive application, or continued application after Brexit. **The problem sets the dates of the various events occurring. It is not retrospective. Rather you need to note the date when the EIR Recast ceased to apply, and apply the law to the date set out in the problem.** Per the text, the Recast Insolvency Regulation applies to cases where the main proceedings were initiated prior to December 31, 2020, so it looks like the EIR Recast does apply as this is the main, in fact only, proceeding as of yet.

Assuming the EIR Recast does apply, the UK proceedings will have primary jurisdiction over any proceedings in Europe. Since the EIR Recast allows for subsidiary territorial proceedings, Fernz could open another proceeding in an EU member state as a 'secondary proceeding' wherever Rydell has an 'establishment.' An establishment here is any place of operations where the debtor carries out non-transitory economic activity with human means and assets. **Is any further information required regarding establishment?**

Domestic UK law would also work in tandem with the EIR Recast, including as it relates to forum, choice of law, and recognition of any judgments in the secondary proceeding. The EIR Recast also provides that the law of the UK country in which the proceeding is opened will be the applicable law per Article 7.1. **It would be beneficial to also briefly discuss the other relevant articles of the EIR Recast.**

4.5

#### **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.

As hinted in the prior answer, the EIR Recast would definitively not apply if this proceeding were opened in 2021, as the UK left the European Union on December 31, 2020. If another proceeding has been opened previously, the opening date of the 'main' proceeding would be relevant in determining whether the EIR Recast applies. In addition, if any other disgruntled creditors had opened proceedings in other States, those may become the 'main' proceeding as opening a 'main' proceeding at the site of Rydell's COMI will become impossible after the UK has left the European Union. It's unclear whether the EIR Recast would allow a 'secondary' proceeding in a member State if a 'main' proceeding cannot be opened pursuant to EIR Recast as the COMI is outside of the European Union. As Rydell does business in Europe, this complicates things.

**It would be beneficial to consider whether the MLBCI might be able to assist. In this regard, further information might be necessary.**

1

#### **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?

This depends somewhat on which UK country is at issue. Assuming it is England or Wales, per the Insolvency Act of 1986, an English court has jurisdiction to wind up a company formed in another State, as long as it has carried on business in England, even if it is unregistered.

Thus, an English court could arguably oversee an insolvency proceeding with Rydell as long as Rydell maintained business in England if the company has dissolved, if the company is unable to pay its debts, or if the court is of the opinion that it is just and equitable for the company to be wound up. **It would be beneficial to set out the relevant legislation.**

This law can only be applied if there is sufficient connection with England or Wales, which determination requires three things: a sufficient connection which may consist of assets within the jurisdiction, a reasonable possibility of benefit to those applying for a winding-up order, and one or more persons interested in asset distribution must be persons over whom the court can exercise jurisdiction. This last requirement is particularly important here, as I do not know whether the minor creditor is a resident of the UK, or whether a UK court would have jurisdiction over it. Depending on the minor creditor's status, the court may or may not have jurisdiction, which could end the creditor's attempts at opening a case.

Finally, the case may be influenced by the new Corporate Insolvency and Governance Act of 2020 in England because Rydell's business has been affected by COVID-19. The suspension of winding up petitions may save Rydell's business from liquidation.

**4**  
**Marks awarded 9.5 out of 15**  
**TOTAL MARKS 40/50**

**\* End of Assessment \***