



**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**.

**Commented [DB1]:** Please read and comply with the instructions! If you don't, I have to do this for you.

## **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 8 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.

Three significant historical developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law are:

- (a) First, **the Roman Law and Table 3 of the Twelve Tables introduced execution of judgements**. Debt execution was developed from the acts of debtors in this era who pledged their bodies as collaterals for the repayment of loans. These debtors could be imprisoned, sold into slavery, or even sentenced to death to ensure the repayment of the debts owed. **You have been asked to address [English law](#).**
- (b) Second, the word bankruptcy evolved from the **Italian *Banca rotta***, which means “to break the bench” This introduced debt collection and liquidating of assets of the debtor. This depicts a situation where a debtor or merchant who ran a business could not pay his debt and his creditors closed his business by breaking his bench or counter. There was a shift from execution against a person to execution against the assets of the debtor. **You have been asked to address [English law](#).**
- (c) Third, **the statute of Ann of 1705** introduced the statutory discharge. This discharge is also referred to as a fresh start and it is not automatically bestowed on the debtor. The commissioners must confirm that the debtor had conformed and had co-operated during the proceedings.

1

### 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.

Three insolvency related measures introduced in the UK after the passing of the Corporate Insolvency and Governance Act 2020 are:

1. **Restructuring Plan:** A new restructuring plan was introduced. This measure enables a company which has encountered or is likely to encounter financial difficulties that are affecting its ability to carry on business as a going concern, the company may make an application to use the restructuring process.
2. **Moratorium:** This is also referred to as stay of proceedings. There is now a free-standing moratorium for distressed but viable companies which can be used to support a rescue of a company as a going concern. The major aim of this is to afford insolvent companies the breathing space from creditor action to pursue a turnaround plan.
3. **Wrongful trading:** wrongful trading liability has been relaxed. There is a temporary suspension of wrongful trading rules. **Further elaboration is needed.**

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

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.

Soft law are legal norms which are created by treaties which various states import into their domestic laws principles to resolve insolvency concerns they have in connection with another state. **You have confused treaties (hard law) with soft law.**

1. The adoption of the Model treaty on Bankruptcy at the 1925 conference was an early initiative. This model treaty has contributed to the international deliberations on regulating international insolvency. Even though this treaty was never ratified, it has contributed to the international regulations on regulating international insolvency. For e.g., it bestowed jurisdiction in respect of a corporation to the court where the statutory registered seat was located “provided that it be neither fraudulent nor fictitious”
2. In the Mid 1990s the most successful soft law approach has been undertaken by UNCITRAL. It developed a model law on Cross border insolvency (MLBCI) This initiative took the form of a model law, draft legislation that UNCITRAL recommended member states to adopt, with or without modification. As a result of the number, economic size and geographical spread of states that are now adopting the MLBCI, it is gathering momentum as an influential response to international insolvency law and cross border issues affecting states.

1.5

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 sources of insolvency laws are usually gotten from legislations or codes in that state. In circumstances where there is a lacuna and the legislations or the codes have failed to provide for a particular insolvency law concern, common law steps in to fill in the gap.

Some states have a unified law regulating bankruptcy and when insolvency concerns arise, everyone resorts to that law for guidance. In the USA for example, the Bankruptcy Code of 1978 is a Federal Legislation, and it applies throughout the USA. In many other systems or states a multiplicity of legislation exists and these laws must be studied in conjunction with each other to understand the system in Full. For example, in Canada, there are two major insolvency laws which are the Bankruptcy and Insolvency Act and the Companies Creditors Arrangement Act. Insolvent companies have the discretion to choose any of these two regimes.

There are also some other laws which are not found in the insolvency legislations that regulate a huge part of the insolvency proceedings for e.g. the rules regulating the vesting of real rights such as ownership or rights of real security. And often times before the insolvency laws might take effect these laws have to come in first to lay down some ground rules.

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 questions raised by Fletcher are:

- (a) In which jurisdictions may insolvency proceedings be opened?

According to universalism theory, if there are more than one insolvency proceedings originating in different states, their concerns and issues should be dealt with under one insolvency law. For eg, in the state where the debtor has its center of main interests (COMI). This rule implied that the law of the main proceedings will have worldwide effect, even under the territorial jurisdiction of the state where the so-called main proceeding has been opened.

However, according to Fletcher, insolvency proceedings can be commenced concurrently in more than one state

- (b) What country's law should be applied in respect of different aspects of the case

The territorialism theory answers this question perfectly by stating that the consequences of an insolvency proceeding will only have effect on the state where the insolvency proceedings have been opened and may lead to multiple insolvency proceedings.

However, in Territorialism it is difficult to know when the debtor is insolvent as the debtor might be declared insolvent in the jurisdiction where his debts are but solvent in the jurisdiction where his assets are located, it therefore becomes difficult to ascertain the status of the debtor. **Have you considered choice of law concerns?**

- (c) What international effects should be accorded to proceedings conducted at a particular forum (including issues of enforcement).

The enforcement issues that arise during insolvency proceedings should be regulated and none or very limited extra territorial effects will be granted to foreign proceedings. However, in situations where a treaty has a solution to the insolvency concern in that jurisdiction, the treaty will need to be ratified before it can apply. In my opinion, the situations that arise from the courts in one jurisdiction requesting that the courts in a different jurisdiction grant enforcement power can be prevented by establishing what the home state of the debtor will be, where the debtor can commence all insolvency proceedings.

4

### 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 **Maxwell communication Corporation Plc**, two primary insolvency proceedings were commenced by a debtor, one in the United States and the other in the United Kingdom and also the appointment of two separate insolvency proceedings in two states and each had similar responsibility. The judges in the US and the UK alongside their counsels raised the idea that an insolvency agreement between the two administrations could resolve conflicts and facilitate the exchange of information.

Two goals were then established to guide the insolvency representatives. The first goal is the maximization of the value of the estate and harmonizing the proceedings to minimize expense, waste, and jurisdictional conflict. The US court agreed to defer to the English court once certain criteria were determined to be present.

The plan was that the existing management in the insolvent corporation would be retained to preserve the debtors going concern value and continue the business as a going concern, but the English representatives would have the right to select new and independent directors. The English representatives should seek the consent of the US insolvency representative or the insolvency court before incurring a debt or filing for a reorganization and the English representative should also give prior notice to the United States Insolvency representative before undertaking any major transaction on behalf of the debtor when they were pre-authorized to undertake lesser transactions.

There were also other issues which were left out of the agreement to be discussed in the course of the proceedings. These issues such as distribution matters were included in a subsequent agreement called the extension agreement.

**5**  
**Marks awarded 14 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.

**Issue**

Whether Fernz can also open proceedings in another country in Europe which was a member of the European union

**Rule**

The UK ceased to be a member of the EU on 31<sup>st</sup> January 2020. The recast insolvency regulation applies to insolvencies which were commenced before the expiration of the transitional period of December 31, 2020.

The European Insolvency Regulation (Recast) Articles 7-18: The Law in the “state of the opening of proceedings” that are applicable to insolvency proceedings and their effects is the law which determines “the conditions for the opening of those proceedings, their conduct and their closure.” However, this is subject to provisions dealing with rights in rem, et off, immovable property, employment, and detrimental acts.

**Application**

From the scenario, the proceedings were to be commenced on 19<sup>th</sup> July 2020, in other words the European Insolvency Regulation Recast would apply as it was commenced before the expiration of the transitional period of December 31, 2020

Generally, the EIR allocates jurisdictional competence to courts of a member state within which is situated the “Centre of the debtors’ main interests”. While the EIR allocates jurisdiction based on the COMI, it makes provisions for subsidiary territorial proceedings in other member states. These are permitted where the debtor has an “establishment” An establishment has been defined as “any place of operations where the debtor carries out a non-transitional economic activity with human means and assets”

These subsidiary proceedings can either be independent proceedings or opened subsequently.

The additional information which will be required to answer this question is whether Rydell has an establishment in that country in Europe and what country is that.

**Conclusion**

If this is answered in the affirmative then the subsequent proceedings can be commenced but if this is answered in the negative then it cannot be commenced as the debtor is required to have an establishment located at that country where subsequent proceedings are about to be commenced.

7

**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.

If the proceedings were opened on 18<sup>th</sup> June 2021, it will be commenced after the expiration of the transitional period of December 31, 2020 as such the European Insolvency Regulation recast would not apply. Because it does not apply no other information is relevant or required.

**It would be beneficial to elaborate and consider what method of recognition could be pursued in this different scenario.**

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?

The UK domestic laws that would be relevant to consider whether the minor can commence those proceedings are:

1. UNCITRAL Model law on cross border insolvency.
2. UNCITRAL Legislative Guide on Insolvency Law
3. Insolvency Act of 1986

**To improve your responses, ensure they are commensurate with the mark allocation –Q 4.3 is for 5 marks. S221(5) of the IA should be considered in detail.**

.5

**Marks awarded 8.5 out of 15  
TOTAL MARKS 35.5/50**

**\* End of Assessment \***