



**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. The Debtor's assets should belong to its creditor(s) and such creditors should have absolute control over those assets (i.e. at the least possible interference).
2. The administration of the liquidator (or the equivalence) is subject to official supervision and control. The accounts prepared should be audited.
3. The debtor's conducts and the circumstances that gave rise to the debtor's insolvency should be subject to an independent examination.

**Elaboration is needed regarding the historical developments you intend to identify and how they shaped modern insolvency law thinking.**

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.

1. New restructuring plan (one feature of which is the court has the discretion to impose restructuring plan on the dissenting creditors)
2. New moratorium rules (e.g. entry requirements are relaxed)
3. Temporary removal of personal liability with respect of wrongful trading
4. Suspension of winding-up petitions and statutory demands (if the petitions are presented or the statutory demands are issued during the specific "relevant period")

**Further elaboration would improve the mark for this sub-question. While it does say 'briefly', the sub-question is for 3 marks.**

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.

1. The signatories (i.e. the States) of the cross-border insolvency-related treaties (and conventions) will be bound by such treaties (and conventions) and will therefore adopt the treaties (and conventions) in its domestic insolvency laws (i.e. making them become the "hard law").
2. The members (i.e. the States) of multilateral organisations (e.g. UNCITRAL) will adopt the draft legislation on cross-border insolvency written and recommended by such multilateral organisations (i.e. making them become the "soft law").

**Further elaboration would improve the mark for this sub-question. While it does say 'briefly', the sub-question is for 4 marks. For example to make reference to the UNCITRAL Model Law on Cross-Border Insolvency which is arguably the most successful example of 'soft law' in the field of cross-border insolvency to date and to discuss the success of hard vs soft law.**

3

**Marks awarded 6 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.

1. The Hong Kong insolvency law comprises, among other things, the Companies (Winding Up and Miscellaneous Provisions) Ordinance, the Companies (Winding Up) Rules, the Bankruptcy Ordinance and the Bankruptcy Rules.
2. The Companies (Winding Up and Miscellaneous Provisions) Ordinance and the Companies (Winding Up) Rules are applicable to corporate insolvency; whereas the Bankruptcy Ordinance and Bankruptcy Rules are applicable to personal insolvency.
3. The Companies (Winding Up and Miscellaneous Provisions) Ordinance outlines / defines the broad insolvency-related concepts and winding up-regime; whereas the Companies (Winding Up) Rules outline the procedures involved in the corporate debt recovery process. For instance, the Companies (Winding Up and Miscellaneous Provisions) Ordinance prescribes the circumstances in which a company could be wound up and who has standing to file a winding-up petition; whereas the Companies (Winding Up) Rules prescribe the procedures for filing a winding-up petition.
4. The Companies Ordinance might be applicable if there is evidence to substantiate a breach of certain directors' duties.
5. The Bankruptcy Ordinance outlines / defines the broad bankruptcy-related concepts and bankruptcy legal framework; whereas the Bankruptcy Rules outline the procedures involved in bankruptcy proceedings. For instance, the Bankruptcy Ordinance provides a definition of "inability to pay" and the Bankruptcy Rules cover the procedures for service of a bankruptcy petition.

**Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider HK, rather you've been asked to consider the sources of laws in any State. This question asks you to consider the different sources of law and how they interact. You need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations), common law where it applies, general non-insolvency laws etc. You have discussed legislation in multiplicity.**

1

#### **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.

Fletcher asks the following three very pertinent questions:

1. A question on the forum.
2. A question on the applicable law.
3. A question on the recognition and enforcement of the order made by a competent court with jurisdiction.

The answers to the above three questions will provide clarity as to whether one of more sets of proceedings would run concurrently in more than one states, whether the issue in question



should be adjudicated with one or more sets of rules and the extent of which the order made by a competent court with jurisdiction would have extraterritorial effects.

For the choice of forum, there is a chance that issues with foreign elements are required to be adjudicated in local insolvency proceedings. If such issues exist, other local courts might be better placed to hear and adjudicate them.

For the choice of law, different legal systems might treat this matter differently. In common law system, this is a question of fact to be raised by the parties who favours the application of foreign law. In civil law, this is a question of law and would have to be dealt with irrespective of the parties' preference.

For the recognition and enforcement of foreign judgment, this also ties with the choice of forum. In the event that issues related to the local insolvency proceedings have to be heard by foreign courts, the judgments so handed down would have to be recognized and enforced in the local court, otherwise the foreign judgments would not have an effect. The development of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), being a way to harmonise insolvency laws, would provide certainty on the effect of foreign judgments.

**In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State, each State would apply its own laws? What cooperation difficulties does this raise ?**

3

### **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.**

Before the Model Law was adopted on 30 May 1997, the Maxwell Communication Corporation Plc. case already demonstrated how an agreement (raised and approved by the United States and UK judges) could facilitate coordination of two concurrent principal insolvency proceedings. Through such agreement, the concurrent insolvency proceedings were limited to just one set of proceedings (upon the satisfaction of certain conditions) and it provided guidelines to the UK insolvency representatives on their scope of powers / authorities and how the insolvent debtor should be managed. All of which were to work towards the goals to maximize the value of the estate and minimize unnecessary expenses and conflicts. A key feature of the agreement is that certain actions taken by the UK insolvency representatives should be consented by the US insolvency representatives or the US Court. It was this type of coordination by way of an insolvency agreement that resolved potential conflicts and facilitated the exchange of information thereby achieved harmonisation.

**This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.3 asks for a brief note, it is for 5 marks.**

4

**Marks awarded 8 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.

If Fernz brought the proceedings in another country in Europe (which was a member of the European Union) ("**Country A**") before 11pm on 31 December 2020 (i.e. before UK exited the European Union), the European Insolvency Regulation Recast would still apply. This conclusion was made on the assumption that the EIR Recast was applicable to that specific country.

As regards the choice of forum, the general principal allows UK courts the jurisdiction to hear the insolvency proceedings (the "**Main Proceedings**") because Rydell's COMI is in the UK. However, if Fernz could establish that Rydell has an "establishment" in Country A, secondary proceedings (running alongside the UK insolvency proceedings) could be brought in Country A by Fernz. Further information on the operation and asset location of Rydell are needed to analyse whether the "establishment" limb could be proven. **It would be beneficial to set out what is required for an 'establishment'.**

As regards the choice of law, UK law should be applicable to the Main Proceedings. However, if concurrent proceedings were commenced by Fernz in Country A, the law of Country A may be applicable to the proceedings as the general principal (unless otherwise specified in the regulation) is the applicable law shall be the law of the state of the opening proceedings.

As regards the recognition and enforcement of foreign judgments, the reciprocal and automatic regime will allow automatic recognition of foreign judgments handed down in proceedings if so brought by the other creditors outside of the UK but within the European Union.

**6**

##### **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 ceased to apply in the UK from 11pm on 31 December 2020 after UK's exit from the European Union. Hence, the EIR Recast would no longer be applicable if the proceedings were brought in Country A by Fernz a month after 18 June 2021.

In the event that other creditors commenced proceedings against Rydell in other different countries in Europe (which are all members of the European Union), there might be recognition and enforcement issues. The Cross-Border Insolvency Regulations 2006 will have to be examined. To the extent that the recognition application is not approved by the UK courts, new / fresh proceedings might have to be brought in the UK. Foreign law might be applicable to adjudicate the issue in dispute under such circumstances.

**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?

UK courts have jurisdiction to wind up a company not registered in the UK. Hence, the UK courts can hear the formal insolvency proceedings commenced in the UK on 18 June 2021. Given that the EIR Recast would no longer be applicable in UK from 11pm on 31 December 2020 onwards, the UK Insolvency Act 1986 will be the applicable law. The UK Insolvency Act 1986 requires that the court has to be satisfied that there is a "sufficient connection" with the UK (such as Rydell has assets in the UK), the order so made by the UK courts must have a reasonable possibility to benefit the minor creditor and the UK courts can exercise jurisdictions over the minor creditor who would be interested in the distribution of assets of Rydell (if it is so ordered).

Again, in the event that other creditors commenced proceedings against Rydell in other different countries in Europe (which are all members of the European Union) whilst main proceedings in the UK are on foot, there might still be recognition and enforcement issues. New / fresh proceedings might have to be brought in the UK if recognition application is not approved by the UK courts. Foreign law might be applicable to adjudicate the issue in dispute under such circumstances.

Further, the Corporate Insolvency and Governance Act 2020 will also have to be looked at during the COVID-19 pandemic to determine whether the minor creditor(s) could commence formal insolvency proceedings in the UK. The Corporate Insolvency and Governance Act 2020 does include provisions on the moratorium mechanism.

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

**2.5**

**Marks awarded 10 out of 15  
TOTAL MARKS 34/50**

**\* End of Assessment \***