



**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.

- (a) The 1570 Act (Act of Elizabeth) – this Act provided additional acts of bankruptcy and a bankruptcy proceeding could be initiated by a creditor by way of petition to the Lord Chancellor following an act of bankruptcy. The Lord Chancellor could then appoint bankruptcy commissioners to supervise the process and they had the power to examine the debtor's transactions and property, summon persons to appear for questioning and commit people to prison. **How was this a development that shaped modern insolvency law thinking? Explanation and elaboration is warranted.**
- (b) The Statute of Ann of 1705 – this Act introduced the notion of a statutory discharge. **How was this a development that shaped modern insolvency law thinking? Explanation and elaboration is warranted.**
- (c) The Bankruptcy Act of 1883 – most of the principles introduced by this Act currently play a major role in present day insolvency law. **What principles? How was this a development that shaped modern insolvency law thinking? Explanation and elaboration is warranted.**

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.

The UK passed the Corporate Insolvency and Governance Act 2020 to deal with the negative economic fall out due to Covid-19. The Act introduced insolvency related measures such as:

- a) the relaxation of liability for wrongful trading;
- b) the introduction of new moratorium rules; and
- c) the suspension of a creditor's right to initiate insolvency proceedings.

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.

Treaties are public international instruments to which states become signatories and bind themselves and thereby affect their domestic laws. Treaties may be used to establish cross-border insolvency rules in States because once the provisions of a treaty are enacted into domestic law, these laws are enforceable in the courts of that State. Therefore, where various States agree to be bound by the provisions of a treaty which deals with insolvency, the insolvency rules in the different States who are signatories to the treaty are likely to be similar. Even if the insolvency rules in the different States are not similar, the treaty is likely to stipulate how cross-border insolvencies are to be dealt with in the different States. Treaties can therefore be used to establish and facilitate cross-border insolvency.

“Soft law” is used to influence the regulation of the law through private international law which governs the relations between parties. This is largely done through the efforts of multilateral organisations and has been widely successful due to the influence of these organisations. One such example of soft law affecting cross-border insolvency rules is through UNCITRAL’s Model Law on Cross-Border Insolvency which has been widely adopted by a number of states thereby synergizing the law across numerous states. Whereas soft law is not binding, it is persuasive and has been widely influential in shaping cross-border insolvency rules.

4

Marks awarded 8.5 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.

There are various possible different sources of insolvency laws in any State and these include (a) international law and (b) domestic laws.

- a) International law includes treaties, conventions and soft law which all in turn seek to regulate international insolvencies by way of binding “hard law” or to influence its regulation by way of “soft law”. States ratify or accede to treaties or conventions thereby importing the provisions of the treaties and conventions into their domestic law principles to resolve cross-border insolvency issues. International law thus becomes a part of a State’s domestic laws.
- b) Domestic laws for the most part address domestic insolvency issues, however, they have evolved over time to address international insolvency issues. Due to the increasing nature of international insolvency matters courts have had to deal with these issues more frequently and have added to the development of the law by finding creative ways of resolving these issues by applying a mixture of domestic and international law.

Your answer could have instead been structured to discuss the sources of law across all States and to recognise how and why there may be differences between certain States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

.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 questions/issues raised by Fletcher are:

- 1) In which jurisdictions may insolvency proceedings be opened?
- 2) What country’s law should be applied in respect of different aspects of the case?
- 3) What international effects will be accorded to the proceedings conducted at a particular forum (including issues of enforcement)?

The first question is otherwise referred to as the choice of forum issue which raises questions of whether a court can and will hear and determine a matter. Generally, in deciding whether it has jurisdiction, a court will consider the connection that the matter has with the jurisdiction and will often decide that the matter should be determined by a court in the jurisdiction to which it is most closely connected.

The second question is otherwise referred to as the choice of law issue which raises questions as to which law the court determining the matter should apply. This is an issue which often arises as the law of the forum may not be the law that the local court applies when determining the matter. In instances where the law of the forum is not the law which the local court will apply, the local court will often require expert evidence on the foreign law which it is required to apply when determining the matter.

The third question is otherwise referred to as the recognition and effect accorded to foreign proceedings in the same matter. In simple terms, this refers to whether a judgment given by a local court of the forum determining the matter will be recognised and enforced by the courts of the other jurisdiction involved in the cross-border insolvency matter. Different States have different procedures and/or methods of recognising and enforcing judgments obtained in other jurisdictions. The recognition and enforceability of a judgment obtained in one jurisdiction is therefore a pertinent question which must be considered in cross-border insolvencies.

These pertinent questions raised by Fletcher are at the forefront of one's mind when considering cross-border insolvency matters.

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 ?

3.5

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.

A case on point which pre-dates the MLCBI is the *Maxwell Communication Corporation plc* case. This case involved parallel insolvency proceedings initiated by a single debtor in the USA and UK which ultimately led to the appointment of two different and separate insolvency representatives in the USA and the UK. The judges in the USA and UK raised with the attorneys the idea that an insolvency agreement between the two parallel proceedings could resolve conflicts and facilitate the exchange of information. The parties entered into an agreement and by the agreement they sought to maximize the value of the estate and harmonize the proceedings to minimize expense, waste and jurisdictional conflict. The agreement essentially provided that the USA court would defer to the UK court once certain criteria were present and made provision for other factors which furthered the ultimate goal of maximizing the value of the estate and minimizing expense. This case aptly shows that co-

ordination agreements in insolvency proceedings long pre-dated the MLCBI as the MLCBI was subsequently introduced.

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.

3.5

Marks awarded 7.5 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.

In order to fully consider this question, information would be required as to (i) whether the UK proceedings by the minor creditor was properly commenced and (ii) whether Rydell has an establishment in the EU country in which Fernz would commence proceedings.

The below answer is based on the following assumptions:

- the minor UK creditor would be allowed to properly commence proceedings in the UK notwithstanding the suspension of the commencement of insolvency proceedings as a response to Covid-19; and
- Rydell has an establishment as defined in the EIR in the EU country in which Fernz would commence proceedings.

Under the European Insolvency Regulation Recast (EIR Recast), Fernz would be able to commence proceedings against Rydell in another European Union (EU) country if the proceedings would be commenced prior to 11pm on 31 December 2020 notwithstanding that proceedings had already been commenced by a minor creditor in the UK. Although the UK has left the EU the EIR Recast applies to proceedings where the main proceedings were opened prior to 11pm on 31 December 2020. As the allocation of main proceedings is based on the centre of the debtor's main interest, the proceedings commenced in the UK by the UK minor creditor would be considered as the main proceedings since Rydell's centre of main

interests is the UK. If Fernz commenced proceedings prior to 11pm on 31 December 2020, these proceedings would be seen as subsidiary proceedings to the main proceedings by the UK minor creditor.

There is scope to elaborate regarding 'establishment'

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.

If the proceedings in the UK were commenced on 18 June 2021, the EIR Recast would not apply as it no longer applies to proceedings commenced after 11pm on 31 December 2020. In such an instance, Fernz would need to consider the private international law issues which would arise to see whether the UK where Rydell is based or the EU country in which Fernz is based is the appropriate forum to commence proceedings. The three questions posed by Fletcher would need to be considered as a determination would need to be made as to the choice of forum, choice of law and the effect and recognition of any judgment which may flow from such proceedings. Having considered these issues then Fernz would be able to make a better determination to decide whether it ought to commence proceedings in the UK or in its EU home country.

Additional information required to answer this question would include:

- Whether Rydell has an establishment in the EU country in which Fernz proposes to commence the insolvency proceedings; and
- The connecting factors that Rydell would have to the UK and the EU country in which Fernz proposes to commence proceedings. **It would be beneficial to elaborate on the importance of this with respect to determining if the MLBCI applied or what other laws would apply**

2.5

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?

The minor creditor would need to consider the provisions of (i) The Insolvency Act 1986 (as amended), (ii) The Insolvency (Amendment) (EU Exit) Regulations 2019, (iii) The Insolvency (England and Wales) Rules 2016 and (iv) The Cross-Border Insolvency Regulations 2016 to assess whether it could commence insolvency proceedings in the UK. The minor creditor would also need to satisfy the UK jurisdictional tests in order for the UK courts to assume jurisdiction, otherwise, the proceedings commenced by the minor creditor may be subject to a *forum non conveniens* challenge by Rydell.

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

2

**Marks awarded 10.5 out of 15
TOTAL MARKS 36.5/50**

*** End of Assessment ***