



**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 FOLLOW the instructions. If you ignore the instructions, who do you think ends up having to do this?

## **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 9 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.

The introduction of new legislation and various reforms in English Law have significantly impacted modern insolvency law and practices. The Statute of Ann 1705 was the first law to introduce statutory discharge.

This is significant since this essentially allows the debtor after surrendering assets and making distributions to its creditors to be completely absolved on any liability. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law, eg by discussing 'fresh start' principles.**

**The question asks for 3 separate developments.**

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.

Due to the Covid-19 pandemic and its resulting negative effects of the economy because of mandatory lockdowns which disrupted commercial activities, new measures to address insolvency matters were included in the United Kingdom. The legislature passed the Corporate Insolvency and Governance Act 2020. This act outlines new guidelines for addressing issues such as business restructuring, moratoriums, the suspension of winding up petitions and demand notices from statutory bodies and relief from wrongful trading liability.

**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.

A treaty is a formal agreement, contract, or instrument executed among related parties. Treaties are legally binding when ratified, and usually influence legal proceedings among the parties. In relation to cross-border insolvency, a treaty would be very effective in establishing cross-border insolvency rules since the executed agreement generally becomes part of the laws of local jurisdictions. One such example is the Nordic Bankruptcy Convention (1933) established among Norway, Denmark, Finland, Iceland and Sweden. It is based on the principle of universalism, as such a bankruptcy proceeding occurring in one state, considered be the centre of main interest, influences all other member states, regardless of the differences in domestic legislation. Contrastingly, "Soft law" is not legally binding. These are usually recommendations, guidelines or best practices established by multilateral organizations that states or governments may use choose to adopt as part of the legal framework on cross-border insolvency in their respective countries or states.

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

**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.

Sources of insolvency law of a particular state may vary in relation to the presentation of the legislation, that is, whether it is contained in one specific act or various acts. In Australia, the Corporations Act 2001 is the legislative authority on corporate insolvency, while the Bankruptcy Act 1966 provides the regulations for individual or natural persons. The Personal Properties Act 2009 outlines the process for the registration of a security interest in personal property. In the case of personal bankruptcy of an Australian citizen it may be necessary for the administrator or trustee to consult both the Bankruptcy Act 1996 and the Personal Properties Act in case where the financial institution is a creditor and has a secured interest in the property of the debtor.

**Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider Australia, rather you've been asked to consider the sources of laws in any State. This question requires you to consider different types of sources of law and how they interact.**

**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 and how this changes depending upon the State, common law in common law countries could be discussed as filling any gaps in law, and general law and its relevance and impact upon insolvency law could also be considered.**

2.5

**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.

Fletcher opined that the three pertinent issues in cross-border insolvency involved the choice forum or which court will have the legal authority or jurisdiction in the matter; choice of law - that is, which country or state's law is applicable to the insolvency proceeding; and whether any judicial pronouncements in one state would be enforceable in any state without any agreement such as treaty or adopted regulations in place among the parties.

In addressing issues surrounding the choice of jurisdiction, countries which have adopted the European Insolvency Regulation or allocate jurisdiction on the basis of the existence of a "centre of the debtor's main interest" (COMI) in the determination of where the main proceeding will be held. There must be an established operations location used for economic activity and some agreed upon criteria must be met. However, it must be noted that this does not preclude other member states from opening insolvency proceedings domestically. Proceedings occurring outside of the main proceeding are subsidiary, regardless of whether they pre-date the main proceeding. Opponents of this practice, highlight issues such as the vulnerability of the main proceeding to manipulation and issues of trust with the legal systems



in a particular country. **It would be beneficial to elaborate upon the possibility of concurrent proceedings and difficulties that may arise, such as with cooperation.**

As it relates to the choice of law, the Nordic Bankruptcy Convention adopted by Norway, Denmark, Finland, Iceland and Sweden outlines how countries can work together on international insolvency matters. This convention is based on principle of universalism, such as, a bankruptcy proceeding opened in one Nordic state is recognized in all member states, in effect, the law of the country in which the bankruptcy proceeding is opened, is applicable in all other states, unless an exemption is stated in the convention. In practice, court ordered stays of proceedings on legal actions opened by creditors are upheld and the administrator or trustee has the legal authority to request the surrender of the debtor's assets and to carry out other administrative functions related to the bankruptcy such as requesting documents from statutory bodies of other member states.

The ability to enforce the laws in international insolvency proceeding is of critical importance particularly with globalization and international trade. In resolving issues surrounding international insolvency, countries are encouraged through various regulatory bodies such as the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) to promote recognition and enforcement of insolvency laws across borders. Co-operation and co-ordination among countries is one a guiding principle of the UNCITRAL Model Law on Cross-border Insolvency. (MLCBI). It outlines the basic principles and procedures for the recognition of foreign insolvency proceedings and the provisions of relief and assistance among courts and administrators. It is believed that abiding these guidelines lead to the most far and effective administration of a debtor's affairs and helps to mitigate the cost of administration since resources and information is shared amongst courts especially where more than one proceeding is occurring concurrently.

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.**

Maxwell Communication Corporation plc. Insolvency case of 19991 is an example of an insolvency proceeding in which "hard law" or common law, that is, case made law encouraged co-ordination agreements between states prior to the development of modern insolvency regulations or such as UNICTRAL Model Law. At issue, in the case of Maxwell was whether Maxwell Communication, a limited liability company incorporated in England, and having filed chapter 11 bankruptcy, could recover under the Laws of the United States, millions of dollars that was transferred to foreign bank accounts prior to the bankruptcy declaration. The Bankruptcy proceedings were initiated in both the United States and England by the affected creditor. The courts in both countries ultimately agreed that it was in the best interest of the affected creditor to promote the co-operation and co-ordination, despite the differences in the existing bankruptcy laws in each country. The parties agreed to a distribution mechanism that would allow for the pooling together of the debtor's assets, that ultimately led to the maximum of creditors' return, regardless of whether the creditor had filed a claim in both countries. This was significant since it reduced the processing time and eliminating inefficiencies and cost.

**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**

**Marks awarded 9.5 out of 15**

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

Rydell Co Ltd (Rydell) is an incorporated company with offices in the UK and throughout Europe. Its centre of main interest (COMI) is in the UK. Rydell supplies engine parts for large vehicles, including airplanes, and has had a downturn in business due to border closures and travel restrictions throughout the Covid-19 pandemic.

Rydell's main creditor is Fernz Co Ltd (Fernz) which is incorporated in a country in Europe that is a member of the EU. Fernz is considering commencing proceedings or pursuing other options with respect to recovering unpaid debts from Rydell.

There are a number of other creditors owed money by Rydell, who are located throughout different countries in Europe which are all members of the European Union.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

**Question 4.1 [maximum 7 marks]**

An insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June 2020. A month later, Fernz was considering also opening proceedings in another country in Europe which was a member of the European Union.

Discuss if and how the European Insolvency Regulation Recast would apply. Also note what further information, if any, you might require to fully consider this question.

The European Insolvency Recast 2015 allows for countries within the European Union to comply the principle of "the centre of debtor's main interests" (COMI) when deciding jurisdiction between members. On 18 June 2020, the United Kingdom was still a member of the European Union and as such, it would be subjected to the rules of the EIR Recast. EIR Recast allows for more than one insolvency proceeding to be initiated where it is determined that, "the debtor conducts the administration of its interest on a regular basis, and which is ascertainable by third parties" according to Section 3 of the EIR Recast. Since the COMI was established to be in the United Kingdom, and the minor creditor's proceeding was initiated in the UK, this proceeding would be the main proceeding if the minor creditor was also a member of the European Union. Nevertheless, Fernz would not be prevented from opening a subsidiary proceeding in its own country, if it could be determined that Rydell has a place of operations located in the country of the minor creditor where economic activity is carried out solely for that domestic market. However, before this determination may be made, it is necessary to ascertain whether the minor creditor is also a member of the European Union ("EU") and would therefore be bound by the regulations of EIR Recast. If the minor creditor is not an EU member, the administrator of the insolvency proceedings such as a liquidation would still be guided by the UNICITRAL Model law to co-operate and co-operate with the local insolvency proceedings to ensure the maximum return for the creditors. Additionally, the contractual agreements between the parties should be reviewed to see if there existed any special agreements for insolvency or bankruptcy proceedings.

**This displays a good understanding. There is scope to elaborate, for example with respect to '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.

The choice of law applicable to Rydell's case would differ if the proceeding were opened on 18 June 2021 instead of 18 June 2020. The United Kingdom was no longer a member of the European Union in 2021, therefore the EIR Recast would not be applicable to this scenario. The domestic laws of the UK, such as the Insolvency Act 1986 would have precedence in addressing this scenario, except where multilateral treaties or conventions were ratified by the British legislature.

**What further information might be relevant?**

2

**Question 4.3 [maximum 5 marks]**

Consider an alternative situation now. What if Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, and formal insolvency proceedings were opened in the UK on 18 June 2021? What UK domestic laws would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK?

The EIR Recast 2015 regulations became inapplicable to the United Kingdom on 31 December 2020 when the UK left the European Union. However, domestic English laws such as the Insolvency Act 1986 outlined special circumstances in which UK domestic law could influence the winding-up of an unregistered company. These conditions or requirements include situations where the company is unable to pay its debts; and it is possible to establish substantive connectivity with the UK, (for example having the debtor's centre of main interest (COMI) in the UK as it's the case in this scenario for Rydell) and the existence of one or more interest parties in the distribution of the assets over whom there is judicial authority.

**It would be beneficial to discuss s221(5) Insolvency Act 1986 in further detail**

2.5

**Marks awarded 10.5 out of 15  
TOTAL MARKS 35/50**

**\* End of Assessment \***