



**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 1570 Act of Elizabeth permitted a bankruptcy proceeding to be opened by a creditor following an act of bankruptcy by the debtor and petition the Lord Chancellor to convene a bankruptcy meeting and appoint bankruptcy commissioners to supervise the proceeding. The commissioners had broad powers to examine the debtor's transactions and property, require the debtor to transfer his property to the commissioners, summon people for questioning and even commit people to prison.

**It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

2. The Statute of Ann in 1705 introduced the notion of statutory discharge provided the commissioners confirmed that the debtor had cooperated with the proceeding.

**It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

3. The 1883 Act created the office of the Official Receiver, who had responsibility of administering the debtor's estate prior to commencement of the bankruptcy procedure.

**It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

1.5

### Question 2.2 [maximum 3 marks]

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

1. The Corporate Insolvency and Governance Act 2020
2. Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus)(England) Regulations 2021
3. Taking Control of Goods (Amendment)(Coronavirus) Regulations 2021.

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

1.5

### 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.

Treaties are bilateral or multilateral agreements signed by more than one State or territory (collectively referred to as a "State") to promote cross-border cooperation in areas of mutual benefit including recognition and enforcement of foreign insolvency practitioners, foreign insolvency proceedings where assets are located in another member State. They enter into

force in each State once they have been signed and ratified by that member State. Member States are required to adopt the agreed principles and measures into their domestic laws, thereby becoming “hard law”, to deal with insolvency issues that are connected with other member States.

“Soft law” is non-binding in nature and acts as a legislative guide or draft legislation comprising a “shopping list” of international best practices that States can adopt into their domestic law, such as the UNCITRAL Legislative Guide on Insolvency Law (2004) and the UNCITRAL Model Law on Cross-Border Insolvency (1997) (“Model Law”). States are at liberty to adopt the Model Law wholesale or adapt it to suit local or cultural preferences.

**It would be beneficial to elaborate and discuss the relative 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.

The possible sources of insolvency laws in any State are:

1. Domestic insolvency legislation, such as:
  - English Insolvency Act 1986 (as amended by the Insolvency Act 2000 and the Enterprise Act 2002, the Corporate Insolvency and Governance Act 2020;
  - US Bankruptcy Code 1978 which is a federal code and applies to all states in the USA; or
  - French Ordonnance no. 2021-1193 of 15 September 2021, which incorporates the 2019 European Restructuring Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (“European Restructuring Directive”) into national law.

**It would be beneficial to elaborate upon differences between certain States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation.**
2. Common law principles and case law (for common law countries), which are used to fill the gaps or lacunas in national legislation in common law countries.
3. For members of the European Union (“EU”):
  - European Directives, which must be implemented into member States’ national laws, such as the above-mentioned European Restructuring Directive; and the European Insolvency Directive (“EIR”) 2000 and its amended version created by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (“EIR Recast”), which is directly applicable in all member States except Denmark since it came into effect on 20 June 2017. As of 31 December 2020, the EIR Recast ceased to have effect in the UK following its exit from the EU.
4. Conventions entered into between regional groups of countries such as the 1933 Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden, which create a uniform approach towards determining the choice of law. Under the Nordic Convention, Scandinavian countries recognise bankruptcy orders issued by the courts of the place of the insolvency adjudication as applicable in other member States without further formalities. There is an immediate stay of creditor



action. An insolvency practitioner (“IP”) recognised in the other member States may request judicial assistance and assistance from public authorities to enforce the order.

**It would be beneficial to also discuss general law and its relevance and impact upon insolvency law.**

**3.5**

**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:

1. In which jurisdiction 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 proceedings conducted in a particular forum?

If a debtor conducts business out of multiple locations in multiple jurisdictions and has assets in multiple jurisdictions, it is possible that insolvency proceedings are commenced in more than one jurisdiction. In this situation, each State will apply its own laws and little or no recognition may be given to foreign insolvency proceedings, giving rise to uncertainty as to **(1)** which forum can exercise jurisdiction, **(2)** how to obtain recognition and enforcement of foreign insolvency proceedings and orders in relation to the same matter and **(3)** the choice of law to apply to the matter.

As regards **(1)** above, the commencement order is of paramount importance where the liquidation of the debtor’s estate is sought, and results in the liquidation of the debtor company. If assets are located in overseas jurisdictions or evidence is required from officers of the company located overseas, the local court(s) where the assets or officers are located will have to determine what impact the foreign insolvency proceedings may have on the local proceedings and whether the local court(s) will hear the matter.

As regards **(2)**, where a foreign judgment is sought to be enforced in a local court, private international law raises question of recognition of that judgment and its enforcement in the local jurisdiction. The effect of the judgment may be to commence liquidation proceedings against the debtor (e.g. an order to liquidate a company), or it may take place during the course of an insolvency proceeding (e.g. an order against a third party to pay monies owed to the insolvent estate following an action settling aside a voidable disposition). The 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments seeks to address such issues.

As regards **(3)**, if a local court has determined that it has jurisdiction to hear a matter, it may need to determine what law to apply to the dispute. In common law jurisdictions, the question of choice of law only arises if raised by a party, otherwise the law of the forum applies. In civil law jurisdictions, the choice of law is a legal question to be determined regardless of whether a party raises it or not.

**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.**

Prior to the Model Law, the *Re Maxwell Communication Corp. Plc* case involved Maxwell Communications Corp. (“MCC”) filing two parallel insolvency petitions in December 1991 in the USA (Chapter 11 petition in the Southern District of New York) and the UK (petition for an administration order under the 1986 Insolvency Act in the High Court). MCC was a holding company for various publishing and information service businesses located around the world, and approximately 80% of its assets were held in two US companies. However, most of its debts were incurred in the UK.

As the two filings commenced insolvency proceedings in both jurisdictions, the US bankruptcy court appointed an Examiner to harmonise the two proceedings so as permit a reorganisation under US law in order to maximise returns to creditors. The English High Court appointed four joint Administrators in the English proceeding to carry out MCC’s corporate governance and administer its affairs.

This case was remarkable in that the joint Administrators and the Examiner cooperated and entered into a procedural Protocol to coordinate their efforts, setting out their respective powers and duties and providing the basis for a Plan of Reorganisation under US law filed in the US bankruptcy court and a Scheme of Arrangement under English law filed in the English High Court. These two documents were mutually interdependent and constituted a single mechanism for reorganising MCC. They created a single pool of assets and permitted creditors to file their claims in either jurisdiction to participate in the Plan of Reorganisation and the Scheme of Arrangement.

**5**  
**Marks awarded 13.5 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 English insolvency proceeding commenced before the UK left the EU on 31 December 2020, so the European Insolvency Regulation (“EIR”) Recast would continue to apply to this proceeding. The English proceeding will be automatically recognised in the EU member States without further formalities, and the law applicable to that proceeding will be English law, being the law where the proceeding was opened.

The reason why Fernz wishes to open proceedings in a particular EU member State is not known. Presumably there is some benefit to doing so, e.g. if Rydell has an office in that State and owns valuable assets such as aircraft engine parts or other valuable vehicle engine parts that are located in that State. Fernz could commence a secondary insolvency proceeding in that State so that the IPs in both jurisdictions may coordinate their efforts in order to maximise the returns to the minor creditor, Fernz and the other creditors. **It would be beneficial to discuss the requirement for establishment in detail**

EIR Recast introduced provisions aimed at encouraging cooperation and communication between courts and IPs where there are separate proceedings in relation to the same debtor. If Fernz does open a secondary proceeding in an EU State, the IP in that State and the UK IP would be obliged to cooperate with each other to facilitate the coordination of the two proceedings to the extent this would not be incompatible with local laws and regulations.

5

#### **Question 4.2 [maximum 3 marks]**

How would your answer to 4.1 differ if the proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020? Also note what further information, if any, might become relevant.

If the proceedings were opened in the UK in 2021 after the UK left the European Union, EIR Recast would not apply to the UK proceeding. Nonetheless, given that the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in the UK and depending on whether the Model Law was adopted with any amendments, the English court and IPs could be mandated to cooperate and coordinate with their European counterparts via, for example, an agreement.

**It would be beneficial to discuss what further information would be required regarding the MLCBI or other local laws.**

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?

Section 221(5) of the English Insolvency Act 1986 would permit an English court to order a winding-up of Rydell as an unregistered company if (1) Rydell has ceased to carry on business; (2) Rydell is unable to pay its debts; and (3) the court is satisfied that it is just and

equitable that Rydell should be wound up, as long as there is a sufficient connection with England and Wales, for example if there are assets located in the jurisdiction.

In an English proceeding under the Insolvency Act 1986, English law would apply to the procedure and substance of the proceeding. However, in applying English law to the procedure of lodging proof of debt, the court may require reference to the law of the EU State where the debt is alleged to be owed to establish the validity of the claim where the debt is governed by the law of that State and potentially, any EU regulations that are directly applicable in that State.

**5**  
**Marks awarded 12 out of 15**  
**TOTAL MARKS 41.5/50**

**\* End of Assessment \***