



**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. 1542 English Bankruptcy Act – early bankruptcy legislation which had a focus more on fraudulence and dishonesty of debtors, and wherein debtors (“offenders”) were akin to criminals. There was no statutory discharge as we are used to in today, although it did include the fundamental principle of *pari-passu* ranking of creditors who would participate collectively in the debtors’ bankruptcy.
2. 1570 act of Elizabeth – introduced two important notions which remain in place today – fraudulent conveyance and the ability of creditors, via an appointed commissioner, to recover fraudulently transferred property; and the commencement of bankruptcy when a debtor commits an “act of bankruptcy”.
3. Statute of Ann 1705 – introduce the notion of statutory discharge – i.e. that a debtor can be ‘released’ from bankruptcy and be free from their creditors afterwards – which was not present in earlier English Law and which remains fundamental to personal insolvency (in jurisdictions based on English Law) today

3

### 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. Limits on enforcement, i.e. increase in threshold debt to wind up a company, increase in stat demand time
2. Suspension of provision relating to wrongful trading, which was intended to prevent a mass influx of insolvency appointments by directors seeking to avoid wrongful trading liability.
3. Prohibition (except small companies) on enforcement of termination clause (e.g. *ipso-facto clauses*), such that suppliers could not suddenly terminate contracts to avoid credit risk (i.e. with the overarching intention that the credit risk would be shared through the economy)

**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, generally, domestically legally binding agreements between nations which are intended to bring some form of uniformity between the agreeing nations in respect of the particular legal matter. IN the case of insolvency law, treaties are used to ensure that the different domestic laws of the interacting nations will be congruent with each other (or not partially not apply to the particular matter, as the case may be) in an insolvency matter involving those particular countries. Treaties can be difficult to agree, given they’re legally binding and inevitably states will need to make significant concessions about particular matters in their respective interests. A (relatively early)

successful European treaty was the Nordic Convention in 1933, between a number of Scandinavian nations, in which the insolvency law of an insolvent entities “home country” would apply in the insolvent estate’s dealings in any of the participating countries.

Soft-law (e.g. codes of conduct, model laws) are often formed by inter-governmental bodies (e.g. the UN, through UNCITRAL), but can also be formed directly between nations, and can take the form of either non-binding agreements between nations as part (or in support) of broader diplomatic relations between the agreeing nations (e.g. a code of conduct), or a model law which nation states are encouraged to adopt. UNCITRAL has formed a number of model laws which continue to be incorporated into domestic legislation freely by various countries at their discretion. Recently (in 2021), Brazil adopted the UNCITRAL Model Law on Cross-Border Insolvency which was originally drafted in 1997. **It would be beneficial to elaborate upon the success of the MLCBI.**

3.5

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.

The sources of insolvency law in a state depend significantly (but not entirely) on that state’s legal system. For example, ‘common law’ jurisdictions, most of which are based on English law, including Australia, New Zealand, BVI, UK etc. draw their law from both the legislation enacted by parliament as well as historical common law principles from both that jurisdiction and from English common law. Many relevant principles date to historical judgments handed down in England hundreds of years ago. Additionally, common law principles are generally adopted into and form an integral part of the relevant legislation enacted by parliament, with common law principles being used where the Court in a matter feels the legislation does not entirely or sufficiently apply to the matter at hand.

In ‘civil law’ jurisdictions (for example most European and African nations), the law is contained only in the relevant legislation.

The source of law also depends on the nature of the insolvency, and its varying aspects. For example, personal bankruptcy and corporate insolvency may be contained either in a single piece of legislation (e.g. BVI Insolvency Act 2003) or in different pieces of legislation (e.g. in Australia *the Corporations Act 2001* and *the Bankruptcy Act 1997*). Insolvency law may not necessarily be in a stand-alone piece of legislation, e.g. the Australian Corporations Act covers almost all other aspects of corporations law, not just the insolvency and winding up of companies.

Further, the insolvency law in a matter may come from multiple different pieces of legislation, even for related issues in a single jurisdiction. For example, the Australian *Personal Property Securities Act 2009*, which relates generally to the granting of security interests in personal property, contains provisions specifically related to the vesting of security interests in the liquidator upon a company’s winding up in certain situations, notwithstanding that the Corporations Act is the main piece of legislation for corporate insolvency law in Australia and itself contains provisions relating to the vesting of security interests.

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.

1. Jurisdiction in which to be opened – the main issue is whether the a Court actually has jurisdiction, and will act on that jurisdiction, to hear the matter. The preferred jurisdiction (for creditors in involuntary insolvency or the debtor in voluntary insolvency) may not have sufficient connection to the entity in question for the Court to hear the matter. In addition, even if the Court does have jurisdiction, other factors (including in certain countries, political factors) may be at play which may affect the Court’s desire to hear the matter.. Further, and separately, there are practical (i.e. non-legal) issues to opening an insolvency in one jurisdiction vs another – e.g. if it is opened in the jurisdiction where the company is registered but undertakes little operations, the effected creditors/stakeholders, other than those seeking to enforce against the debtor (if an involuntary proceeding) are less likely to quickly be notified of the insolvency than if the insolvency were opened in the jurisdiction of principal operation.

2. What country’s law should apply for respect of different aspects – Assuming the Court will hear the matter, the issue is then to what extent it adopts foreign law into its process (e.g. with experts from that foreign jurisdiction, the Court could not actually ‘adopt’ the foreign law in the true sense). The way this is deal with also differs between common and civil law jurisdictions – in common law jurisdictions, questions of foreign law are considered as a matter of fact, whilst in civil law it is considered, irrespective of the parties’ pleadings, as a matter of law.

3. What international effects accorded – the main considerations relate to recognition of the proceeding generally by the foreign court, the ability of the estate and of creditors to pursue enforcement action, and the effect of the judgments. The type of judgment/order will likely determine the approach of the foreign court significantly. For example, orders commencing an insolvency proceeding (such as an order appointing a receiver or liquidator) may have greater effect or be more readily recognised than an order obtained by the liquidator/receiver against a third party for the payment of monies (i.e. practically this may mean that a liquidator/receiver may have to obtain a separate enforcement judgment in the foreign jurisdiction, after having their appointment recognised, rather than being able to give effect to a judgment obtained in the local jurisdiction automatically following recognition of the appointment).

**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 ?**

**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 Communications Corporation plc* was a 1991 United States case which dealt with two insolvency proceedings – one in the USA and one in England – of the same debtor. The United States and England courts both brought to the attention of Counsel the cross-border issues and the possibility of a coordination agreement between the US and England proceedings, to facilitate the exchange of information and improve the efficiency of the administration of the debtor. The agreement, which was successful between the Courts, pre-dates the UNCITRAL Model Law on Cross-Border Insolvency and the Practice Guide on Cross-Border Insolvency Agreements.

The effect of the agreement, in essence, was that the US Courts (upon certain conditions) would defer to English proceedings to the maximum extent possible. Other matters agreed were in relation to the management of the insolvency generally, including who would be allowed to appoint directors etc.

**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 12 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.

On the face of it, given that the proceeding was opened prior to the UK's exit from the European Union (more precisely, prior to 11pm on 31 December 2020), the debtor's COMI is in the UK and the creditor's place of registration is in Europe, the EIRR would appear likely to apply.

Important assumptions necessary for this, however, including that the first proceedings commenced by the minor creditor were in fact commenced within the EU. The question is not clear on this – it is possible that Ryder’s operations extend to non-EU European countries and that the minor creditor also has business (or possibly its COMI, it is not clear what “located” means in the facts) in that same jurisdiction such that those first proceedings might have been commenced in a non-EU country.

In addition, there is various other information not available in the facts which is required to say for certain whether the EIRR will apply, in particular:

- When will Fernz’ proceeding be opened, i.e. before 11pm on 31 December 2020?
- What is meant by “located” in the facts – i.e. whilst all creditors may be registered in European Union member states, their COMI’s may be in different countries outside of the EU
- Importantly, the extent of Rydell’s has economic activity outside of the UK is not entirely clear, and it is also unclear whether Rydell has any economic activity in the whichever jurisdiction Fernz intends to commence insolvency proceedings. If Rydell does have sufficient economic activity (i.e. an “establishment” under the EIRR) in that jurisdiction, then Fernz will be able to commence secondary proceedings (assuming the first proceeding is an “EIRR” proceeding – if not then Fernz’ proceeding will be the main proceeding in this case), given they would be commenced after the proceedings already commenced by the minor creditor.

**It would be beneficial to elaborate further regarding establishment.**

**5.5**

**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.

The EIRR would not apply.

The “sunset date” for the EIRR’s applicability in the UK, given the UK’s exit from the EU, was 11pm on 31 December 2020. Accordingly, Rydell’s centre of economic interest, after that date, will no longer be within the jurisdiction of the EIRR and it cannot apply.

**It would be beneficial to discuss the need for information regarding the MLCBI and any other local laws**

**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?

If Rydell were unregistered with its COMI outside of Europe and formal proceedings were opened in the UK in June ’21, after the UK’s exit from the EU, then EIRR would still not apply to those proceedings although it would apply to Rydell generally if proceedings were opened within the EU (and that proceeding would be the main proceeding).

The UK domestic laws allow for the winding up of unregistered companies, including companies registered overseas but not in the UK. The laws applicable in this case, i.e. to

whether a minor creditor could commence proceedings in the UK against Rydell, which is unregistered and does not have its centre of economic interest in the UK, include:

- S221(5) of the Insolvency Act 1986, which is broad in providing three circumstances in which unregistered companies can be wound up in the UK (being the usual 1- if it is dissolved/not carrying on business/only carrying on business for purpose of winding up; 2- unable to pay its debts; 3- on just and equitable grounds)
- Common law principles applied by the Courts such that the company must have:
  - “sufficient connection” to the UK, including for example (but without exclusion) having assets within the jurisdiction;
  - A reasonable possibility of providing benefit, through the winding up process, to those applying for the winding up order, if a winding up order is made
  - At least one person within the jurisdiction of the Court who’s interested in the distribution of the assets of the company.

**5**  
**Marks awarded 12 out of 15**  
**TOTAL MARKS 42.5/50**

**\* End of Assessment \***