



**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**.

## 2 **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.

The English Bankruptcy Act 1542 introduced two key concepts which have shaped modern insolvency law, being the compulsory realisation of assets which were to be administered and distributed *pari passu* amongst creditors.

The Statute of Ann of 1705 was the first piece of legislation to provide for a statutory discharge from bankruptcy for those that conformed with the law and were co-operative during the bankruptcy process. **It would be beneficial to elaborate upon how this has shaped modern thinking regarding 'fresh start'**

The Bankruptcy Act 1883 sets out many of the principles that form the basis of the modern day English bankruptcy system, including the creation of the office of the Official Receiver which continues to exist today. **Further elaboration is warranted.**

2

### 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 introduced the following measures:

1. A prohibition on the use of "ipso facto" clauses when a company enters certain insolvency procedures. This measure prevents suppliers from terminating a supply contract as a result of the insolvency procedure;
2. For a defined period, there was a suspension on the service of statutory demands; and
3. A suspension of wrongful trading laws to remove the threat of personal liability for directors. This was initially only a temporary measure but was also reinstated again during 2021.

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

3

### 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 agreements that a state enters with another state or multiple states and have a binding effect internationally. These instruments will often impact domestic law as well. In New Zealand for instance, treaties only becoming binding into domestic law when parliament passes legislation to this effect.

Certain treaties may provide for how personal and corporate bankruptcy is to be dealt with when there is an international element to the insolvency. For instance, the Montevideo Treaty of 1889 (ratified by a number of Latin American countries) provides for rules around jurisdiction for the bankruptcy proceeding.

Soft law is traditionally considered to be non-binding rules that assist with the development of law and create expectations of certain conduct. In the context of insolvency, the UNCITRAL Model Law on Cross-border Insolvency is an important piece of soft law. The model law has been adopted by 49 states in 53 different jurisdictions (“United Nations Commission on International Trade Law”, at <<[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)>>, accessed 14 November 2021). The model law is draft legislation that reflects best practice principles for insolvency legislation that states can adopt in part or in full.

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Marks awarded 9 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 key sources of insolvency law are typically insolvency specific legislation or codes. In some countries, insolvency legislation is found in a single overarching piece of legislation (for instance the Bankruptcy Code of 1978 in the United States, or the Insolvency Act 1986 in the UK) or in multiple pieces of legislation. Common law or common law principles represent the court’s interpretation of legislation or codes as well as principles developed over time. Common law principles include relevant court decisions from international jurisdictions, particularly where the other jurisdiction has a similar legal system and applicable legislation. Insolvency law is also impacted by general non-bankruptcy law, for instance laws relating to secured transactions or employee rights.

International treaties and other soft law sources will also impact insolvency laws in states.

Within this framework, there will be differences in how individual bankruptcy is addressed compared with a corporate bankruptcy. A large part of this is driven by the fact that an insolvency will often lead to the ‘termination’ of a corporate entity, whereas this is not a realistic outcome in a personal insolvency.

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#### **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.

In an insolvency context, an entity may have assets, interests, creditors, and/or obligations in more than one state, such that there is the potential that proceedings against the debtor may be commenced in more than one state and insolvency law from one state may have application to an entity in another state. Fletcher’s three pertinent questions to address a cross border insolvency are (I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2005) pp 3 to 5):

1. In which jurisdictions may insolvency proceedings be opened?



2. What country's laws should be applied in respect of different aspects of the case?
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

With regards to jurisdiction, insolvency proceedings may potentially be opened in multiple jurisdictions, leading to concurrent proceedings. Legislation and common law will define what jurisdiction proceedings may be opened. In the UK, unregistered overseas companies may be subject to UK insolvency proceedings, while there may also be secondary proceedings in other jurisdictions. If there are concurrent proceedings, there is the possibility of each jurisdiction applying its own laws to the matter, with no recognition or ability to enforce the overseas proceedings. This would be consistent with a "territorial" approach. A territorial approach allows local creditors to participate in the proceedings subject to local laws, without the challenges and costs posed from engaging with a foreign jurisdiction proceeding. However, a purely territorial approach could be both costly and highly detrimental to creditors.

A number of initiatives are aimed at reforming and harmonising insolvency laws, including how to deal with cross border insolvencies, in order to create more consistent and predictable outcomes. These initiatives include the UNCITRAL Model Law on Cross-Border Insolvency and the UNCITRAL Legislative Guide on Insolvency Law.

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### **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 prominent case which supports this quote is *Maxwell Communications Corporation plc*. In *Maxwell*, the debtor company was incorporated and administered in the UK but had significant assets and subsidiary entities incorporated in the United States. The debtor company presented a Chapter 11 bankruptcy petition in the United States and a petition to appoint administrators in the UK. The United States Bankruptcy Court appointed an examiner as an insolvency representative, who was mandated to try and harmonise the proceedings for the benefit of creditors.

The insolvency representatives (the examiner and the administrators) agreed to coordinate their activities subject to an agreed protocol, which was authorised and approved by the respective courts. The representatives were also given standing in each jurisdiction.

The key goals of the protocol were to maximise the value of the assets and harmonise the proceedings. Under the protocol, the English insolvency practitioner was given power to "administer all assets and operations of the debtor group's business, incur expenses and so forth, subject to agreement by its United States counterpart as to specific questions and to approval by the United State court.", (UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, p 52). The protocol required communication and consultation between the respective insolvency practitioners, but effectively left the English administrators in charge.

The case of *Maxwell*, heard in 1992, predates the Model Law which was developed by UNCITRAL in 1997. **There is some scope to elaborate.**

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**Marks awarded 14 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.

There are two key questions that need to be answered to determine whether the European Insolvency Regulation Recast ("EIR Recast") applies:

1. What are the nature of the UK insolvency proceedings? The EIR Recast only applies to certain defined collective insolvency proceedings. Accordingly, some of the UK procedures fall outside the scope of the EIR Recast. Most notably, Schemes of Arrangements and Receiverships are not included as an insolvency proceeding under the EIR Recast; and
2. Where Fernz was located? If Fernz was located in Denmark, the EIR Recast would not apply, as Denmark opted out of the regulation.

If the UK insolvency proceedings were collective proceedings that met the qualification criteria in the EIR Recast and Fernz was located in a country other than Denmark, then the EIR Recast would apply.

As Rydell's COMI was in the UK and the insolvency proceedings were opened up there, this would be defined as the primary jurisdiction and proceeding. The UK insolvency proceedings would have automatic recognition in European Union member states.

The EIR Recast does allow for secondary proceedings to be opened, where the debtor has an "establishment". An "establishment" is defined as "*any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets*". Provided Rydell's operations in the European country where Fernz was located met the definition of an

“establishment”, then Fernz may be able to open a secondary proceeding. **What further information would be beneficial in this regard?**

The EIR Recast recognises that secondary proceedings may “*hamper the efficient administration of the insolvency estate*” and, accordingly, the insolvency practitioner in the primary proceeding can seek to refuse or postpone secondary proceedings when:

1. The insolvency practitioner in the primary proceedings provides an undertaking to local creditors to treat them “*as if secondary insolvency proceedings had been opened*”, provided a majority of local creditors agree; or
2. The local Court can grant a temporary stay from opening secondary proceedings, in situations where a stay has been granted in the UK from individual creditors enforcing against Rydell.

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#### **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 UK exited the European Union on 31 December 2020, following which the EU rules, including the EIR Recast ceased to apply. In an insolvency context, the EIR Recast ceases to apply to any insolvencies where the primary proceedings were opened after this date.

While the EIR Recast is no longer applicable, a number of countries have adopted the UNICTRAL Model Law on Cross-border Insolvency (Greece, Poland, Romania and Solvenia) (“The Insolvency Service”, at <<<https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states#fn:1>>>, accessed 14 November 2021), with a number of other member countries providing for some form of recognition or relief through Court application (Ashurt, “Recognising UK Insolvency Proceedings un the EU – where does the UK stand post-Brexit?” ,<https://www.ashurst.com/en/news-and-insights/insights/recognising-uk-insolvency-proceedings-in-the-eu>>>, accessed 14 November 2021). Accordingly, while secondary proceedings are likely possible, the insolvency practitioner in the primary proceedings in the UK would likely be able to seek recognition in the other jurisdictions.

**What further information would be beneficial in this regard?**

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#### **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?

Under the Insolvency Act 1986, unregistered companies, including foreign registered companies may be wound up in the following circumstances:

- (a) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- (b) If the company is unable to pay its debts;

(c) If the court is of opinion that it is just and equitable that the company should be wound up.

In order for the UK courts to assume jurisdiction, there must be a sufficient connection to the UK. In the case of *Re Real Estate Development Co* [1991] BCLC 210 at 217, Knox J set out the key requirements that apply when determining whether the UK courts had jurisdiction to hear the matter:

*“(1) There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;*

*(2) There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order;*

*(3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.”*

Given the requirements set out in *Re Real Estate Development Co*, the Court would need to consider whether Rydell had assets within the UK, the minor creditor would need to be able to benefit from the winding-up order and be a UK domiciled entity.

As part of the UK’s exit from the EU, the UK also introduced the Insolvency (Amendment) (EU Exit) Regulations 2019 (S1 2019/46), under which UK Courts were granted jurisdiction to open proceedings if the debtor’s COMI was in the UK, or if the COMI was in the EU but it had an establishment in the UK. In accordance with this regulation, provided Rydell had an establishment in the UK, proceedings could be opened within the UK (The Gazette, <<https://www.thegazette.co.uk/all-notices/content/103914>>, accessed 15 November 2021).

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**Marks awarded 13 out of 15  
TOTAL MARKS 46/50**

**\* End of Assessment \***