



**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.

Three significant developments regarding debt collection procedures in the English law that assisted in shaping modern insolvency law are as follows:

Bankruptcy Act of 1542 – This Act allowed for a debtors creditor(s) to apply to the High Court to request a form of compulsory sequestration to be applied to a dishonest and/or fleeing debtor. Debtors under this act were viewed as quasi-criminals. Additionally, provided under this Act was the ability to appoint a body of commissioners who were given the permission to proceed against a dishonest debtor who may have fled from his country and/or refused to pay his debts. In summary, this Act was established so that there could be a compulsory administration and equality distribution amongst all creditors in the event that they are faced with a fraudulent debtor.

Bankruptcy Act 1570 (also known as “The Act of Elizabeth”) – According to Ibid, this is the first Act designed as a true bankruptcy statute, rather than a fraud-prevention law. The Act of Elizabeth provided for additional acts of bankruptcy, however, it still lacked a provision to discharge debts. This Act also transferred the jurisdiction of the supervision of the estate to Lord Chancellor from the previously mentioned commissioners that was outlined in the Bankruptcy Act of 1542. This transfer of jurisdiction meant that creditors could now petition Lord Chancellor to convene a bankruptcy meeting and in turn Lord Chancellor could then appoint bankruptcy commissioners to supervise the process.

Statute of Ann of 1705 – This Statute proved to be a significant change in the insolvency law as it introduced the notion of statutory discharge. It is important to note that automatic entitlement was not given under this Statute as the commissioners still had to confirm that the debtor had “conformed” and had co-operated during the proceedings.

The question asked you to indicate significant developments, rather than legislations per se. You needed to identify the developments that shaped the way of thinking with respect to modern insolvency law. You have referred to collective participation by creditors. You have also made reference to “statutory discharge”. It would be beneficial to elaborate with respect to modern insolvency and the concept of fresh start. Other things to consider are the abolishment of imprisonment for debt or the introduction of formal regulatory structures. Further elaboration was 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.

Corporate Insolvency and Governance Act of 2020 incorporated three permanent changes in the UK to insolvency laws due to COVID-19. The three major changes are outlined below:

1. Standalone Company Moratorium – This change focuses on providing assistance in salvaging a company that is deemed a going concern. The moratorium provides

protection to a company's remaining directors and allows them to continue running the business all while being covered under the moratorium protective umbrella. Further, in most cases the moratorium can prevent the company's creditors from putting pressure of payment on the company and prohibits the creditors from taking any further enforcement action while the company investigates the restructuring options available to it. The moratorium is initially available to a company for 20 days, however, it can be extended for up to 12 months from the date of filing with the consent of the pre-moratorium creditors.

2. Flexible Restructuring Plan Procedure – As stated in the Special Report on Permanent UK Reforms article, the new restructuring plan was essentially put into place to “eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties” that have affected or have the potential to affect the Company to carry on its business as a going concern. This new procedure is included in Part 26A of the Companies Act of 2006.
3. Termination of contracts – A entirely new set of provisions relating to termination clauses of supply contracts. These provisions prevent suppliers from automatically terminating their contract with the Company if it enters into insolvency or restructuring procedures. The contract may only be terminated if the liquidator, company or court provides their consent.

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.

Soft law utilises a more flexible approach as opposed to hard law or treaties that are viewed as compulsory. Soft law is understood to be influential when it comes to insolvency rules across the states while hard law/treaties is understood to be binding.

Governments have seen a minimal amount of success when implementing hard law/treaties to various international insolvency law issues – however, a higher level of success has been achieved through implementing a soft law approach.

To this day, the most successful implementation of soft law was implemented by UNCITRAL. UNCITRAL formed the Model Law on Cross Border Insolvency (MLCBI) in the mid-1990s. The MLCBI was a recommendation made by the UNCITRAL to member states that encouraged the states to adopt the legislation. UNCITRAL provided the states the freedom to determine on their own accord if they wanted to adopt the legislation how it was or if they would like to implement their own adjustments prior to adopting.

Soft Law gives the member states a sense of freedom to choose and therefore will likely encourage them to adopt the proposed legislation.

You were also required to explain the concept of treaties. Elaboration is warranted in this respect.

3

Marks awarded 8 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Briefly discuss the various possible different sources of insolvency laws in any State and how they may interact with each other.

There are several possible sources of insolvency law and it is very important to understand how they all interact together. The varying sources include the following:

Legislation or Codes
Common Law Principles
Unified Bankruptcy Legislation
Varying Legislation
General Law (i.e. Non-bankruptcy law)

General Law is often used in conjunction with the other varying insolvency laws listed above as it tends to cover rules that would not typically be included in the legislation. Overall, legal systems can differ quite significantly and it is extremely important to take this into account when working on insolvency matters.

Further, when considering the legislation of specific legal system it is very important to first determine if you are working on an individual or corporate insolvency matter. Individual and corporate insolvency principles can differ widely in some areas and therefore makes it key to make this determination on the onset of the case.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

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.

The three pertinent questions asked by Fletcher in the attempt to bring the “cross-border” aspects and the “insolvency” aspects together are as follows:

- 1) In which jurisdiction may insolvency proceedings be opened?
 - a. Fletcher outlines that insolvency proceedings may be opened simultaneously in more than one State. He further states that each of the States may apply their own laws and laws outside of the state territory would be granted. This concept can definitely lead to issues arising in cross-bored insolvency proceedings.
- 2) What country’s law should be applied in respect of different aspects of the case?
 - a. Under common law, the law of the jurisdiction will apply unless the parties make the decision to change the law.
- 3) What international effects will be accorded to proceedings conducted in particular forum (including issues of enforcement)?
 - a. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgements will need to be considered.

In answering the above three questions that Fletcher has raised, it could be possible to open multiple proceedings concurrently in more than one State. This would in turn allow each State

to apply its own Laws and allow for very limited extraterritorial effects (or in some cases none at all) to be granted to foreign proceedings.

There is scope to elaborate with respect to choice of law issues.

3.5

Question 3.3 [maximum 5 marks]

It is said that “co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; by UNICTRAL in their *Practice Guide on Cross-border Insolvency Agreements*; and by the Judicial Insolvency Network in their *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters...*”

It is also said that “While court approval of such agreements for the purposes of co-ordinating insolvency proceedings is encouraged by the MLCBI, they in fact pre-date the Model Law.”

Briefly discuss a prominent case law example for this last quotation.

The prominent case law example relating to the above quotation is the Maxwell Communications Corporation plc cross-border insolvency case of 1991. Within this case, there were concurrent principle insolvency proceedings both within the United States (Chapter 11) and England (administrative proceedings) that were co-coordinated through an “Order and Protocol” that had been approved by the Court in the respective States.

According to the UNCITRAL Practice Guide, this specific case involved two primary insolvency proceedings that were initiated by a single debtor. One proceeding was located with the United States and the other within the United Kingdom. Additionally, an insolvency representative was appointed within each of the respective States and each were charged with similar responsibilities. Both judges independently with their counsel discussed the possibility of forming an agreement between the two administrations to resolve the underlying conflict and assist in exchanging the required information.

The two goals that were outlined from of the above mentioned agreement were to 1) maximize the value of the estate and 2) harmonize the proceedings to minimize expense, waste and conflict between the jurisdictions. It was agreed that once certain criteria was present that the United States court would then defer to the English proceedings.

To summarise, the specifics of the agreement included retaining existing management in the debtor’s interest to maintain his going concern value. However, with the permission of the United States counterpart, the English insolvency representative would be permitted to select new and independent directors. Additionally, the English insolvency representative may only incur debt and/or file a reorganization plan if he has previously received the consent from the United States representative or United States Court. Lastly, prior proper notice is to be given to the United States representative by the English representative before undertaking any significant transactions on behalf of the debtor.

5

Marks awarded 11 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 Regulations Recast became void to the United Kingdom ("UK") on 31 December, 2020 at 11PM due to the UK's departure from the European Union ("EU") on 31 January 2021. The UK law states that the EIR Recast only applies to insolvencies in the UK where the proceedings began prior to 31 December, 2020 at 11 PM. With that being said, I believe since the creditor in the UK opened a proceedings against Rydell on 18 June, 2020 that the European Insolvency Regulation Recast does in fact apply to this specific insolvency proceeding.

It would be beneficial to elaborate upon automatic recognition of such proceedings and judgments across the EU.

Further, the European Insolvency Regulation Recast notes that "the law applicable to insolvency proceedings and their effects shall be of the State of the opening of proceedings", therefore, Fernz would not be permitted to open proceedings in another European Union member country.

It would be beneficial to discuss how such secondary proceedings are permitted where the debtor has an "establishment". An establishment is defined as meaning "any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets"

Lastly, the minor creditor's proceedings will be recognized as the main proceeding and any subsequent proceedings will be recognized as the secondary proceedings.

It would be beneficial to consider the need for further information as to whether Rydell has an establishment in the other country in Europe where the other proceedings were intended to be commenced by Fernz.

It would also be beneficial to consider specific provisions of the EIR Recast and their application.

3.5

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.

There is no EU mechanism that will be compelled to apply as the cut off had passed after 31 January 2020. **It would be beneficial to discuss what this means, in that there would not be automatic recognition across to the EU and the reciprocity provided by the Recast no longer would apply.**

Therefore, if the proceedings began on 18 June 2021, the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) would therefore be relied up. Further, the insolvency officeholders of the EU Member State can apply for recognition of appointment in the UK.

It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCB and if not what laws would need to be considered in those countries.

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?

I believe that this matter relates to the English domestic laws on the insolvency of companies where there is an international dimension, but the matter lies outside of the scope of the EIR Recast.

It is permitted for jurisdictions to be established in order to windup an unregistered company which also includes a company formed under a foreign law. Section 221(5) of the Insolvency Act allows for a court ordered winding-up of unregistered companies in the following three circumstances:

- A dissolution of a company; or a company that has ceased to carry on business or a company that is carrying on business for the sole purpose of winding up its affairs.
- If the Company is unable to pay its debts
- If the court holds the opinion that it is just and equitable that the company should be wound up.

As noted above in the case details, Rydell is unable to pay its debt. Further Rydell would be required to satisfy the 3 core requirements before being permitted:

- Sufficient connection with England and Wales (may or may not consist of assets within the jurisdiction)
- There must be benefit in a winding up order to those that made it As such, as Rydell is unable to pay debts.
- One or more parties interested in the distribution of assets of the Company must be an individual over whom the court can exercise jurisdiction.

In my opinion, Rydell will satisfy all three of the above principles and therefore is in line with the UK insolvency laws.

5

Marks awarded 10 out of 15
TOTAL MARKS 39/50

*** End of Assessment ***