



**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 8 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.

Answer:

The 1542 Act provided for an appointment of a commissioner who could proceed against a trading debtor who fled from the country; barricaded himself in his house; neglected to pay his debts; or defrauded his creditors. The fundamental principle of this Act was a compulsory administration and distribution on the basis of equality amongst all creditors. And these developed the concept of collective participation by creditors and a *pari passu* distribution among creditors under the modern insolvency law.

The Statute of Ann of 1705 introduced the notion of a statutory discharge. The principles of which have remained part of the modern bankruptcy law. **How so? It would be beneficial to discuss fresh start concepts of modern insolvency.**

The law of 1833 is said to be the foundation of the present English bankruptcy law system. It set three principles essential to a good bankruptcy law and remains in force in the modern bankruptcy law, namely a fair procedure with adequate supervision and means to discourage dishonesty. **Further elaboration is warranted.**

2.5

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.

Answer:

Following Covid-19 pandemic, Corporate Insolvency and Governance Act 2020 was introduced in the UK. The proposed changes included:-

1. a temporary suspension of the wrongful trading provisions to allow directors to continue trading through financial difficulties without the threat of this type of personal liability and other measures to protect companies from aggressive creditor action;
2. a free-standing moratorium for companies in financial distress to give such companies time to explore options for a rescue or restructure; and
3. a new restructuring plan to bind all creditors to that plan even if they vote against it (a "cross-class cram-down"), including safeguards for creditors and suppliers to ensure they are paid while a solution is sought.

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.

Answer:

Treaties are international instrument to which statutes become signatories and as such bind themselves and affect their domestic law, making such become enforceable in the courts. Ultimately, such cross-border insolvency content may form part of the State's "hard law" on insolvency.

"Soft law" is a quasi-legal obligation that is not legally binding to the domestic law. It just likes a reference to the states who choose to follow. For example, the Model Law on Cross-border Insolvency provided a draft legislation to the member states to adopt. By more and more states to adopt, it becomes a well known and influential rules on cross-border insolvency that a state may refer to.

There is scope to elaborate and discuss the success of hard law vs soft law in establishing cross-border insolvency rules.

3.5

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.

Answer:

Regardless of a common law system or civil law system, some States have a single, unified piece of bankruptcy legislation. In some States like the USA, a federal legislation and multiple legislation may co-exist and co-related. We have to study in conjunction so as to understand the system in full. While some common law principles may still be relied on to fill any possible gaps in that legislation.

Although some States do not have a single legislation but their general law regulating ownership, rights or real security may cover a content on insolvency.

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.

Answer:

Fletcher asked three very pertinent questions which are:

1. in which jurisdictions 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 at a particular forum (including issues of enforcement)?

In the choice of forum to exercise jurisdiction, it requires an examination of the connection with the jurisdiction of the parties or the dispute. The local court may inevitably to determine and affect the treatment of a foreign proceedings or foreign assets.

In the choice of law, different law systems will have different treatments or approaches towards the choice of law. Under a common law system will, it is usually the law of the forum to be applied unless the parties invoke them. Under the civil law system, foreign law is presumed to be a question of law to be applied.

In what international effects will be accorded, recognition, enforcement and execution become a question. Foreign judgments raise questions concerning the court that issued judgment, the type of judgment and the effect of the judgment. For examples, one may allow restructuring but one may not; the effect of voidable disposition may also vary.

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 ?

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.

Answer:

A prominent example is the Maxwell Communications Corporation plc cross border insolvency case in 1991. In that case, concurrent principal insolvency proceedings in the United States and English were co-ordinated through an “Order and Protocol” approved by the courts in the respective States. The insolvency representatives in the two States, each charged with a similar responsibility.

Under the agreement, two goals were set to guide the insolvency representatives, which were to maximising the value of the estate and to harmonise the proceedings to minimise expense, waste and jurisdictional conflict.

All major actions such as incurrence of debts, transactions on behalf of the debtor, appointment of directors, distribution matters were mutually agreed by one another by obtaining consent of the respective courts.

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.

3.5

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.

Answer:

Upon the UK's departure from the EU, EIR Recast no longer applies to post-11pm 31 December 2020 proceedings in the UK. That says, the EIR Recast remains to be applied in this case since it was opened on 18 June 2020. **It would be beneficial to elaborate upon automatic recognition of such proceedings and judgments across the EU.**

The EIR allocates jurisdictional competence to the courts of the UK which is the COMI of Rydell, but it also allows subsidiary territorial proceedings to be opened in the other EU member States given that there is an "establishment" of debtor.

Fernz may open a secondary proceedings in another EU member State where Rydell has an operation in that State, carrying out a non-transitory economic activity with human means and assets.

It would be beneficial to elaborate upon what 'establishment' requires and what further information might be needed in that respect.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 7 marks.

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.

Answer:

Since the UK's departure from the EU, EIR Recast no longer applies to post-11pm 31 December 2020 proceedings in the UK. The EIR Recast does not apply in this case since it was opened on 18 June 2021, after the UK's departure from the EU. **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.**

However, Fernz may apply for a recognition of the UK's insolvency proceedings in the EU member State where Rydell has an operation in that State, for the purpose of co-ordinating the UK's insolvency proceedings.

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?

Answer:

To the UK domestic laws, Rydell is an unregistered company formed under foreign law. To consider whether UK is a relevant jurisdiction to wind up Rydell, there should be a sufficient connection between Rydell and the UK. To hold a sufficient connection, Rydell must consist of assets within UK, or there is a reasonable possibility that the petitioner (i.e. the minor creditor) will be benefited from obtaining a winding-up order, or that the UK court can exercise jurisdiction against one or more persons (i.e. the minor creditor) interested in the distribution of assets of Rydell.

Under section 221(5) of Insolvency Act 1986, it also needs to consider that 1. if Rydell is carrying on business only for the purpose of winding up its affairs, 2. if Rydell is unable to pay its debts; and 3. if the UK court is of opinion that it is just and equitable that Rydell should be wound up.

If the UK court satisfies the above, they would make a winding up order against Rydell. Its liquidator has a duty to take into custody and control of all tangible and intangible assets of Rydell. A recognition of UK's winding-up order may be required when the liquidator handles assets in foreign States.

5

**Marks awarded 10 out of 15
TOTAL MARKS 39 /50**

*** End of Assessment ***