



**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 9 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 of 1542 established two principals on which the modern insolvency law is based: collective participation of creditors and pari passu distribution of assets among creditors.

The 1570 Act introduced the system of bankruptcy commissioners to overlook the proceeding, which shaped the now-day insolvency representative system.

The Statue of Ann of 1705 first introduced the notion of statutory discharge. How to give the debtor a fresh start is one of the core issues of modern insolvency law.

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.

The Corporate Insolvency and Governance Act 2020 was passed to:

1. it introduced a new restructuring plan.
2. it has new moratorium rules.
3. it relaxed the wrongful trading liability.
4. It suspended the winding-up petitions and statutory demands.

Further elaboration would have achieved a higher mark for this sub-question. While the question says briefly, it is for 3 marks.

2.5

Question 2.3 [maximum 4 marks]

Briefly explain the concept of treaties and “soft law” and indicate how these may be used to establish cross-border insolvency rules in States.

Treaties are agreements signed between States and have binding powers and affect their domestic laws accordingly. Being part of domestic laws enforceable in the court, treaties are deemed as the “hard law”. For example, States signed treaties on jurisdiction, recognition and enforcement. There are both bilateral and multinational treaties in cross-border insolvency area. After the states sign the treaty, the states are bind by the articles in the treaty with regard to cross-border insolvency. But it is hard for several countries to make a consensus on all articles of a treaty and because the treaties have binding power and the nations are prudent to sign one. In contrast, “Soft law” does no have binding power, it only gives models or suggestions for domestic legislation in cross-border insolvency. The UNITRAL is one of these trials and it developed a Model Law on Cross-border insolvency, which has become quite successful.

4

Marks awarded 9.5 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.

First, public international laws. For some countries both bilateral and multilateral treaties can be directly quoted in court, but some others there need to be a legislation proceeding so a domestic law is passed to enforce the treaties.

Second, private international laws. Private international laws solve conflicts among international public laws and foreign laws and domestic laws. They apply when there is need to decide which law is applicable in an international law issue. In insolvency law area, private international laws play a role in solving conflicts between different laws mentioned above in cross-border issues.

Third, domestic insolvency laws. They are laws main govern domestic insolvency issues, the treaties or model laws will be taken into consideration in the process of legislation with regard to cross-border issues.

The legal systems can differ quite substantially in respect of the applicable law. Some countries have a single unified legislation covering all aspects of bankruptcy. Some countries have a multiplicity of legislation in insolvency area, which shall be studied together to understand the insolvency law properly. Under common law system, the principles of case law system apply to insolvency as well.

Besides above insolvency legislation, some legal principles in the general law(non-insolvency laws), such as property laws, security laws, could influence insolvency proceeding.

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.

First issue: Choice of Forum (Jurisdictions)

When an international company faces the problem of insolvency. The country where it has presents need to decide which court has the jurisdiction over the issues. Concurrent proceeding commenced in different countries is possible. If the insolvency laws of countries where this company has presents lack harmonisation with regard to jurisdiction, there may be conflicts among these countries’ courts. In domestic dimension to solve this problem, each local court need to determine whether it has jurisdiction over an international insolvency issue. In international dimension, treaties could be reached to establish rules to solve the questions of jurisdiction. Other approach is each country accept model laws to make their rules of jurisdiction of insolvency law more harmonised.

Second issue: The choice of law to apply to the matter.

When a local court has decided to take up a cross border insolvency issue, it has to decide which laws should be applied, the laws of the forum, the laws with closest relations, etc. When the court decides to apply a foreign law, proof of foreign laws need rules as well.

Third issue: The recognition of foreign proceedings in the same matter. Where a judgement is already made by a foreign court, it becomes a question for local court to answer what is the effect of such judgement. In insolvency field, these judgements could be a foreign order to commence an insolvency proceeding, a judgement to set aside a deal before the commencement of an insolvency proceeding. In international dimension, UNCITRAL model law and other treaties are made to harmonise to rules.

It would be beneficial to also refer to the specific questions.

4.5

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 cross-border insolvency agreements play an important role when lack of clear rules in domestic or international insolvency laws. It relies mainly on the co-ordination of insolvency professionals from different countries in the same case. A prominent example is Maxwell Communications Corporation plc cross-border insolvency case in 1991. In this case, concurrent proceedings went on smoothly based on orders and protocols approved by court of US (Chapter 11 proceeding) and UK(administration proceedings) under an “Order and Protocol” approved by the courts .

The debtor initiated two insolvency proceedings in US and UK separately, and appointed insolvency representatives from two countries. Each representative has similar responsibilities. They reached deals to resolve conflicts and facilitate exchange of information under goal to maximize the value of the estate and harmonize the proceeding to minimize expense. They reached consensus on issues like choosing new director, DIP finance authorization, transaction in the proceeding, etc.

The parties voluntarily arose a workable structure to co-ordinate a complex international insolvency and obtaining the approval of the courts, received further impetus from the IBA and its Concordat, which makes the case a model of cross-border insolvency agreement before the MLCBI. The principles and practices have been accepted by MLCBI.

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 13 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 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 EIR recast came into force on 20 May 2015 and ceased to apply to UK main proceedings commenced after 31 December 2020. The COMI of Rydell lied in UK, so the proceeding started in July in UK is a main proceeding.

On 18 July of 2020, when the insolvency proceeding against Rydell was opened in the UK by a minor creditor, the EIR recast still applied to both UK and the EU member country where Fernz was considering opening proceeding.

According to EIR, the country where locates COMI has the primary jurisdiction, so UK court has the primary jurisdiction. For Rydell has offices and operations through EU, it can be deemed to have "establishment" in EU countries. **It would be beneficial to elaborate upon what amounts to an establishment.** But, because a proceeding has been launched in UK, only a secondary proceeding can be launched by Fernz.

Based on EIR, the law applicable for the insolvency proceeding should be the UK law, for UK is the State of the Opening of proceedings. Both the primary proceeding and secondary proceedings were automatically recognised in EU countries (including UK).

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.

5

Question 4.2 [maximum 3 marks]

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

If the proceeding was opened in UK in June 2021, EIR had ceased applying to UK. The insolvency representative could seek apply for COMI test so the current proceeding could be recognised by EU member courts, but there will be no automatic recognition mechanism under EIR.

It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCBI 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?

EIR had ceased applying to UK in June 2021. So, its domestic laws govern this issue. Under EIR, primary proceeding could not be opened in non-COMI countries. But according to Exit Regulation, UK court could open proceeding where debtor has an establishment in UK. Insolvency Act 1986, The Insolvency (England and Wales) Rules 2016 and The Cross-Border Insolvency Regulations 2006 will be relevant to consider whether the minor creditor could commence those formal proceedings.

It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

1.5

Marks awarded 8 out of 15

TOTAL MARKS 39.5/50

*** End of Assessment ***