



**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.

The first significant development was the establishment of the Act of Elizabeth which provided individual debt-collecting procedure. It is the first law deal with bankruptcy. Secondly, the establishment of commissioner who has various powers to administrate the bankruptcy process. Finally, it is the concept of statutory discharge which offer a fresh start to the bankrupt.

More detail would have improved the mark awarded for this sub-question.

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.

Firstly, specific financial aids were given to the affected entities. **Insufficient detail is provided.**

Secondly, a new act namely, the Corporate Insolvency and Government Act 2020, was introduced by the UK after the Covid19 pandemic which launched new restructuring plan and moratorium rules. **What were these? Elaboration is warranted.**

Thirdly, UK relaxed the wrongful trading rules to reduce the risk for directors being personally liable for continuing to run the company.

Finally, UK also suspended winding-up petitions and statutory demand.

More detail would have improved the mark awarded for this sub-question.

2

Question 2.3 [maximum 4 marks]

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

Treaties are binding agreements signed and followed by treaty states. Terms of treaties will import to their domestic law and principles for solving cross-border issues. **It would be beneficial to note it is ‘hard law’.**

Soft law is non-binding instruments that were created by multilateral and non-government organisations intending to influence formation of domestic law/treaties for different countries. In establishing their own counties cross-border insolvency rules, they may make reference to soft law i.e. Model Law on Cross-border Insolvency.

You have provided a satisfactory response. To achieve a higher mark for this sub-question you needed to provide further details.

2

Marks awarded 6 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.

Being a colonial city of England, Hong Kong adopted English Common Law systems and adopted a collective debt-collecting mechanism. Insolvency law are divided into corporate insolvency and individual bankruptcy. Corporate insolvency is governed by (Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) and the Companies (Winding Up) Rules (Cap 32H). While individual bankruptcy is governed by Bankruptcy Ordinance (Cap. 6). Unlike individual bankruptcy, there is no separate chapter for corporate insolvency but was included in the Company Ordinance. The statutory ordinances are often interacted the case law principles when dealing with legal issues in the bankruptcy proceedings.

The Bankruptcy Ordinance (Cap. 6) was originated from, in particular, the Bankruptcy Act of 1914 in England and Wales and subsequent replacement of Insolvency Act 1986. It undergone a major overhaul in 1998 in order to modernise the insolvency law. One of the changes is to view bankruptcy as a chance for rehabilitation rather than punishment which is a global trend on insolvency law at that time. Unlike its UK and US counterparts, Hong Kong did not make provision for corporate rescue bills. It appeared that the sources of law not only followed international trend, but also taken into account of local factors.

The source on handling cross-border insolvency proceedings seems to be unclear as Hong Kong has not introduced UNCITRAL Model Law on Cross-Border Insolvency to local insolvency systems. However, the court in Hong Kong is flexible in adopted case law principles in granting recognition and providing assistance to overseas administrators. It appeared a modified universalism approach for cross-border insolvency.

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider Hong Kong, rather you've been asked to consider the sources of laws in any State. This question requires you to consider different types of sources of law and how they interact.

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 first question is the choice of forum to exercise jurisdiction in the matter. It became an issue when the parties and disputed event are of different locations. The Courts have to determine whether the hearing is under their jurisdiction. Meanwhile, it is common for multinational corporations have assets located in foreign jurisdictions which the local court may not have the authority to hear.

The second question is the recognition and effect accorded foreign proceedings in the same matter. In case a foreign court has made an order to appoint an administrator to handle the asset in local jurisdiction. There will be a problem on recognition and enforcement issues regarding the order made by foreign jurisdiction.

The third question is the choice of law to apply to the matter. It becomes an issue when there is competing law for resolving the same issues. Unless there is provision in the contract underpinned the applicable law in case of disputed, different countries may have different approach on handling this issue.

It would be beneficial to set out Fletcher’s questions themselves. It would also be beneficial to elaborate on choice of law and recognition concerns.

To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.2 asks for a brief note, it is for 5 marks.

2.5

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.

Before the establishment of the Model Law, the bankruptcy proceedings of Maxwell Communications Corporation plc. Two similar proceedings were initiated, namely an administration in UK and a Chapter 11 bankruptcy in United States, by a single debtor at the same time.

Both courts agreed that the administrator in UK and US should cooperate with each other in accordance to a protocol approved.

Although some problems are left opened in the protocol, it harmonised the conflict between two jurisdictions, exchanged information and smoothed the process of bankruptcy proceedings which, in turn, maximised efficiency and minimized disputed of cross-border insolvency case.

This case set a prominent example for subsequent multinational corporation insolvencies as well as the development of principles/guidelines on court-to-court communications. This, in turn, facilitates more consistent decisions in global insolvency cases.

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 8.5 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.

EIR will allocate primary jurisdictional competence to UK courts as COMI was situated in UK. **It would be beneficial to explain the relevance of the date proceedings were opened in this respect.** According to Article 7.1 of EIR Recast, the applicable law in proceedings shall be the state where the proceedings open. In this case, the applicable law is UK insolvency law for the minor creditor. It also determines the conditions for the opening, their conduct and closure of those proceedings.

Fernz may still consider to open subsidiary territorial proceedings in another country in Europe as long as Rydell has establishment in that country. The proceedings should be regarded as secondary proceedings as it was opened after the bankruptcy adjudication in the UK with COMI. According to Article 8-18, it set out the applicable law for dealing with right in rem, set-off, immovable property, employment and detrimental acts. **Is any further information required regarding establishment?**

Fernz may also consider to a corporate rescue according to EIR Recast as the primary insolvency proceedings was only waged by a minor creditor. More information is needed regarding,

- 1) the financial status of Rydell,
- 2) whether the Corporate Insolvency and Governance Act 2020 applied in Rydell proceedings,
- 3) indebtedness of Rydell against the minor creditors,
- 4) costs for opening insolvency / rescue proceedings, and
- 5) likelihood of debt repayment from primary proceedings.

4.5

Question 4.2 [maximum 3 marks]

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

The European Insolvency Regulation Recast will cease to apply as UK is no longer a member of EU on 18 June 2021 and the expiration of transitional period. **What is the consequence of this?** UK adopted the UNCITRAL Model Law in dealing with cross border insolvency.

Is further information required regarding the MLCBI and its possible application?

1

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?

Although the Company is an unregistered company with foreign status, the minor creditor can still wind up Rydell if the conditions in Section 221(5) Insolvency Act 1986 were satisfied

- 1) Rydell is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs,
- 2) Rydell is unable to repay its debt,
- 3) The Court believed that it is just and equitable to wind up Rydell.

Rydell have to register its presence and nominate a resident person for accepting service of process and formal notices.

The English may consider whether there is 'sufficient connection' between Rydell and the UK. Given that Rydell has offices in UK and the court and exercise its jurisdiction over the minor creditor who has interested in the distribution of assets, it is very likely that Rydell has sufficient connection with the UK. Liquidator maybe appointed to realize such assets.

5
Marks awarded 10.5 out of 15
TOTAL MARKS 35/50

*** End of Assessment ***