



**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.

Imprisonment for the non-payment of debt was as a principle only abolished in 1869 by the Debtors Act. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

The first English Bankruptcy Act of 1542 contained the two principles of collective participation by creditors and equal-footing distribution of the assets among them.

The 1570 Act of Elizabeth was the first law intended specifically in relation to bankruptcy, rather than a fraud-prevention law. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

1.5

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.

The Corporate Insolvency and Governance Act 2020 was passed which offered a new restructuring plan, new moratorium rules, the relaxation of wrongful trading liability and the suspension of winding-up petitions and statutory demands.

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

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 a binding legal agreement to which States themselves to, which then affects domestic law.

"Soft law" refers to agreements where there is no binding to domestic law, but usually guidance and/or draft legislation.

The Soft law approach has been taken with UNCITRAL and the Model Law on Cross Border Insolvency, whereby draft legislation was recommended for member States to adopt. This creates a wider pool of States which are following the same legislative principles.

The European Insolvency Regulation (2000) was introduced as a convention and influenced developments in international insolvency law.

Further elaboration would improve the mark for this sub-question. While it does say 'briefly', the sub-question is for 4 marks.

3

Marks awarded 6.5 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.

Insolvency laws will usually be found in legislation, however States that are still based on the common law may rely on common law principles to cover for any gaps in the existing legislation. Many principles of the law that do not directly relate to insolvency will also impact insolvency. Examples of this include rights of ownership and rights of security.

Different States may have multiple sources of legislation or laws, for example the laws for insolvency is contained within one statute, whilst the laws in relation to the winding up of companies is contained in another, different statute or Act. This can be seen in the Cayman Island for example where you have both the Companies Act (2021 revision) and The Companies Winding Up Rules (as amended). They interact in conjunction with each other and must both be applied in order to be effective.

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.

1. In which jurisdictions may insolvency proceedings be opened?
 - a. An additional insolvency proceeding may be opened in the State where the Debtor’s assets are located in an instance if the State does not follow an approach of universality, even though a proceeding has been opened in the Debtor’s centre of main interest. **What difficulties may arise as a result of concurrent proceedings?**
2. What country’s law should be applied in respect of different aspects of the case?
 - a. The Debtor’s centre of main interest should govern the overarching insolvency proceedings, with other State’s laws governing recovery of assets if the asset is located in a jurisdiction that follows a more territorialist approach to insolvency. **There is scope to elaborate upon choice of law issues**
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?
 - a. Where there is a foreign judgement on a same matter, the enforcement of the judgement has to be assessed, particularly in relation to the type of judgement and effect of the judgement as these can differ tremendously across international insolvencies.

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 case of Maxwell Communications Corporation plc in 1991 is a case in which both Chapter 11 proceedings in the United States and Administration proceedings in the UK were

coordinated through an “Order and “Protocol” approved by both of the Courts. The US court appointed an examiner with expanded powers and directed it to work to facilitate coordination of the different proceedings.

The insolvency agreement in Maxwell resulted in the UK and US insolvency representatives performing in a manner such that no conflict requiring Court resolution arose.

An agreement was made at the start of the case to address issues of stabilization and asset preservation, with a second agreement at the end to address creditors and closing of proceedings.

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.

2.5

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.

Article 3 of the European Insolvency Regulation Recast (**EIR**) sets the jurisdiction to open main insolvency proceedings State where the debtor has a centre of main interest. Article 19 sets out the automatic recognition of these proceedings in all Member States. As such, another EU State may only commence secondary insolvency proceedings against that debtor if it has a presence in the jurisdiction of that Member State.

The proceedings subject to the EIR are largely governed, by the law of the State which opened the initial insolvency proceedings.

I would seek to understand under which entities are the assets and liabilities of Rydell contained with specific reference to the country of incorporation of the entities.

From 11pm on 31 December 2020, the EIR no longer applies to the UK.

To improve your responses, ensure they are commensurate with the mark allocation – the question is for 7 marks. This question requires you to consider whether the UK

proceedings would fall within the timeframe that the EIR Recast applied to the UK and to consider matters of main and secondary proceedings, including the requirements of establishment.

2.5

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.

From 11pm on 31 December 2020, the EIR Recast no longer apply to the UK. Exit Regulations in relation to the EIR came into force on 31 December 2020 with the premise to:

- Reinforce the position that the UK courts will largely continue to apply the EIR to insolvencies opened prior to end of the transition period without any changes.
- Give the UK courts power to open proceedings where the debtor's centre of main interest is in the UK, or the debtor has a presence in the UK. In practice this opens the possibility of English insolvency proceedings in respect of EU companies without the need for a centre of main interest shift.

The remainder of the Recast Insolvency Regulation has been rescinded. As such, insolvencies opened in the EU after the end of the transition period will not benefit from automatic recognition from the UK Courts.

Separate recognition applications will be needed by UK Insolvency Practitioners across each Member State where the debtors' assets are situated within EU Member States, whereas Insolvency Practitioners in EU Member States will have the advantage of a single application in the UK. **How might this be pursued? What information would be beneficial? Could the MLCBI assist, how so, what further information is required?**

2

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?

Recognition would be required to be granted to UK insolvency practitioners across each member state in which the debtor's assets are situated.

Section 426 of the Insolvency Act 1986 would need to be considered and two court applications required.

Section 221 of Insolvency Act 1986 accommodates the winding up of unregistered companies in the case the company cannot pay it's debts, the Court decides it is just and equitable or the company is dissolved. There are 3 principles behind the above which are:

- There must be sufficient connection to England and Wales;
- Reasonable benefit of those applying for the winding up order;
- One or more persons interested in the distribution of assets of the company must be persons over whom the Court can apply jurisdiction.

Common law principles still apply as well.

Further elaboration would be beneficial, such as with respect to s221(5).

3

Marks awarded 7.5 out of 15
TOTAL MARKS AWARDED 35/50

*** End of Assessment ***