



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**.

Commented [DB1]: As was the case with the formative assessment, you have not read and followed the instructions. Next time I will return your assessment unmarked. Is it really too much to ask that you follow the instructions by completing your student ID in the footer?

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.

1. Imprisonment:
 - a. This was not provided for under English until it was introduced by the Statute of Marlbridge of 1267;
 - b. However, the principle of imprisonment for the non-payment of a debt was abolished by the Debtors Act in 1869 **How does this shape the thinking of modern insolvency law? Elaboration is warranted.**
2. Statutory Discharge – Was introduced by the Statute of Ann of 1705. **How does this shape the thinking of modern insolvency law? Elaboration is warranted, for example regarding 'fresh start'**
3. Act of Elizabeth 1570 – The first true bankruptcy statute (as opposed to a fraud-prevention law). This transferred the jurisdiction of the supervision of the estate from the commissioner (which was a concept introduced under the Bankruptcy Act of 1542) to the Lord Chancellor. **How does this shape the thinking of modern insolvency law? Elaboration is warranted.**

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 inter alia, introduced:

1. a new restructuring plan;
2. new moratorium rules;
3. the relaxation of wrongful trading liability;
4. 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 form of public international law and are agreements between States. When a States signs (or become signatories) to a treaty with another State or group of States they bind themselves and accordingly impact their domestic law. Where the Treaty becomes part of enforceable domestic law they are in effect, "hard law". However, they can be met with various success, as it requires agreement between the member States and, in large multinational treaties, if an insufficient number of States sign up to ratify the treaty it does not enter into force.

Accordingly, soft law options are finding success. Soft Law options not binding, rather multilateral organisations (not States or governments) draft laws which can be used as guidelines by States and Governments for the drafting of their domestic law, enabling all the

States to use the same basis, yet allowing them to customise the law where necessary for their domestic market.

The best example of a successful “soft law” is the UNCITRAL Model Law on Cross-board Insolvency which was first developed in the mid-1990s. However, it did not take the form of a treaty or a convention. Instead the Model Law was effectively draft legislation that member States were recommended to adopt either in full or or to model their law off.

4

Marks awarded 7.5 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.

Sources of insolvency law include, legislation/codes, common law principles (depending on the State), and general law.

Legislation provides the primary source of the insolvency laws in any State. However, some states will have a single unified piece of bankruptcy or insolvency legislation which cover every facet of insolvency. Whereas, some jurisdictions will have multiple pieces of legislation and regulation which must be read together.

Some States which have a common law back ground (Case made law) may still rely on case law to determine certain aspects of that States insolvency laws.

Finally, some States will pull various concepts from pieces of legislation which are not directly insolvency related. This includes, *inter alia*, concepts of vesting of real rights such as ownership or security. While rules such as these may not be found in the relevant insolvency legislation, they are highly relevant to insolvency law.

Accordingly, depending on the jurisdiction there can be various sources of insolvency law, which come together to create the jurisdictions applicable laws.

5

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring the “cross-border” aspects and the “insolvency” aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

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

1. In which jurisdiction 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)?

The potential combination of answers to these questions provide a clear indication of the

difficulties that arise in trying address cross-border insolvency. For instance, insolvency proceedings could be commenced in more than one State. Any one of those States, or all of them, or even States in which proceedings have not commenced by recognition is sought, could apply its own laws. Finally, some States may provide no recognition to foreign proceedings.

It would be beneficial to elaborate upon choice of law matters.

4

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 *Maxwell Communications Corporation plc* case is 1991 cross-border insolvency case. In this case there were concurrent proceedings in the United States and England which were co-ordinated through an “Order and Protocol” approved by the Courts in both States.

In *Maxwell*, a single debtor commenced insolvency proceedings in both the United States and in the United Kingdom. This led to the appointment of two different insolvency representatives (one in each State), each with similar responsibilities. The Judges in both jurisdictions raised the idea of an insolvency agreement between the administrators to resolve potential conflicts and facilitate the exchange of information. Accordingly, an agreement was made, under which the following goals were set:

1. maximizing the value of the estate; and
2. harmonising the proceedings to minimize expenses, was and jurisdictional conflict.

Further, in the agreement one administrator was given the ability to act, but required they seek consent of the other. For instance, they made arrangement with regards to the management (who were to be retained to ensure the debtor's going concern value was maintained. However, the UK administrator, could, with the consent of the US administrator select new independent directors. Further, the UK administrator could incur debt or file a reorganisation plan, provided they had the consent of the US administrator or the US Court. Finally, the UK administrator ought to provide prior notice of any major transactions on behalf of the debtor, however they were pre-authorised to undertake smaller transactions.

5

Marks awarded 14 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Rydell Co Ltd (Rydell) is an incorporated company with offices in the UK and throughout Europe. Its centre of main interest (COMI) is in the UK. Rydell supplies engine parts for large vehicles, including airplanes, and has had a downturn in business due to border closures and travel restrictions throughout the Covid-19 pandemic.

Rydell's main creditor is Fernz Co Ltd (Fernz) which is incorporated in a country in Europe that is a member of the EU. Fernz is considering commencing proceedings or pursuing other options with respect to recovering unpaid debts from Rydell.

There are a number of other creditors owed money by Rydell, who are located throughout different countries in Europe which are all members of the European Union.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 7 marks]

An insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June 2020. A month later, Fernz was considering also opening proceedings in another country in Europe which was a member of the European Union.

Discuss if and how the European Insolvency Regulation Recast would apply. Also note what further information, if any, you might require to fully consider this question.

The European Insolvency Regulation Recast states at Articles 7-19 that the law in the "State of the opening of proceedings" (in this case the UK) that are applicable to insolvency proceedings and their effects is the law which determines the "conditions for the opening of those proceedings, their conduct and their closure". This is subject to other specific provisions with address rights in rem; immoveable property; detrimental acts; employment and set-off.

However, while the UK ceased to be a member of the European Union at 11pm on 31 January 2020 the EIR Recast only ceased to apply to proceedings commenced **after** 11pm 31 December 2020. Accordingly, the Recast Insolvency regulations will apply to the insolvency where the main proceedings opened in advance of the transition period.

In this case, the UK proceeding only for a "minor" creditor, and accordingly it is unlikely to be the main proceeding.

Ideally, we would know:

1. Is Fernz a major creditor;
2. Is Fernz going to open proceedings in advance of the transition period ending.

The EIR allocates the jurisdictional competence to the Court of the country in which the COMI is located. Accordingly, in the circumstances that the COMI is in the UK, the EIR is likely to allocate jurisdiction to the UK courts. However, it does allow for subsidiary territorial proceedings in other member states, which may assist Fernz. However, for this we would need to know:

1. Whether Fernz has an establishment in the other country in which it wants to open proceedings, being "any place of operations...where the debtor carries out a non-transitory economic activity with human means and assets"

These proceedings can either be independent or secondary to the main proceedings.

However, the amendments to the EIR Recast have included expanding the provisions on the COMI and recognising the existence of proceedings which have been commenced outside of the EU for the purpose of co-ordinating both proceedings. This is particularly relevant given the UK is no longer part of the EU.

7

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.

Yes, because by 2021 the transition period will have ended and accordingly the UK will no longer be part of the EU or subject to the EIR Recast.

In the circumstances such as this where you have an English company which is subject to a winding-up order or insolvency proceeding, yet there are assets and creditors in other countries, the liquidators have a duty to take into their custody and control all the assets (tangible and intangible) to which the company is entitled. However, the UK liquidators' ability to do this in practice will be limited by the ability of the liquidator to be recognised in foreign jurisdictions. Finally, the liquidator is authorised to accept and recognise foreign creditors proof of debts (even if governed by foreign laws).

Where there is an international element to an winding up by an English Court the domestic laws on choice of law are applicable. Further, the *Insolvency Act 1986* will apply to an English winding up in matters of both procedure and substance. However, reference may be made to (or English law may require) to a foreign law to establish the validity of a claim of a foreign law governed debt.

However, amendments to the EIR Recast have included expanding the provisions on the COMI and recognising the existence of proceedings which have been commenced outside of the EU for the purpose of co-ordinating both proceedings. This is particularly relevant given the UK is no longer part of the EU.

Therefore, it would be important to know whether the proceedings contemplated by Fernz had been commenced or not. Either way, once there are proceedings in the UK and in a European country subject to the EIR Recast, the EIR will seek to co-ordinate the proceedings.

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

2.5

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?

In the circumstances that the EIR Recast do not apply as this time period is outside of the transitional period, there is a threshold question being whether the UK court has the jurisdiction to hear the matter which has this international element.

An English Court has the jurisdiction to wind up a company registered/incorporated under the law of another country. However, in this case the company is unregistered.

It is possible to, under Section 221(5) of the *Insolvency Act 1986* for the court to order the winding up of an unregistered companies. However, it only in the following circumstances:

- a. if the company is dissolved, or has ceased to case on business, or is carrying on business only for the purpose of winding up its affairs;
- b. if the company is unable to pay its debts;

c. if the court is of the opinion that it is just and equitable that the company should be wound up.

However, the provisions set out in subsection (a) above have only been applied by the Courts of England in the circumstances where it was established that there was a "sufficient connection" with England and Wales. There are three core principles to establish "sufficient connection":

1. there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;
2. there must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for a winding-up order.
3. one or more persons interested in the distribution of assets of the company must be a person over whom the court can exercise jurisdiction.

5
Marks awarded 14.5 out of 15
TOTAL MARKS 46/50

*** End of Assessment ***