



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**.

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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. English Bankruptcy Act of 1542 – contained two fundamental principles on which modern insolvency laws are based i) collective participation by creditors and ii) *pari passu* distribution to creditors.
2. The Statute of Ann of 1705 – this Act introduced the notion of a statutory discharge. **It would be beneficial to elaborate on how fresh start is part of modern insolvency law thinking as a result.**
3. The Act of 1883 – the aim of the Act was fair procedure with adequate supervision and means to discourage dishonesty, the machinery for dealing with bankruptcy matters created by the Act remain in force in present-day insolvency law. **What was the development and how did it shape the thinking of modern insolvency law? Elaboration is needed.**

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 in the UK. The act included insolvency related reform measures such as:

1. New moratorium rules
2. Relaxation of wrongful trading liability
3. 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 binding 'hard law' international instruments whereby States are the signatories for these instruments. Ratification of the same can affect the States domestic laws. An example of treaties includes the Montevideo Treaties (1889) and (1940) which have a clear set rules to establish jurisdiction and provides for concurrent insolvency proceedings in more than State among the countries who have ratified the treaties.

The concept of 'soft law' refers to non-binding instruments and initiatives such as development of principles and guides that when adopted form best practices for international insolvency proceedings i.e. UNCITRAL Model Law which can be adopted by countries with or without

modification. **It would be beneficial to discuss the success of this 'soft law'**. Such initiatives aid with co-operation and communication and establish clear guidance in cross-border insolvency cases.

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.

The possible sources of insolvency laws in any State include:

- i) Insolvency legislation – this can be either:
 - A single Act, Code, piece of bankruptcy legislation covering all aspects of bankruptcy i.e. the USA has the Bankruptcy Code 1978 which is federal legislation and the UK has the Insolvency Act 1986; or
 - Multiple pieces of legislation, for example a piece of legislation relating to individuals and another relating to companies.
- ii) General or common law – meaning non-bankruptcy legislation. **Common law is not non-bankruptcy legislation. Rather it is precedent from case law which fills the gaps in common law jurisdictions.**

Insolvency legislation and general laws of a State may interact with each as there may be some instances where the rules included in general laws can impact insolvency proceedings.

In the Cayman Islands Part V of the Companies Act includes the rules with respect to the Winding up of Companies and Associations, there is also a separate piece of legislation, the Companies Winding Up Rules which details the procedures for insolvency proceedings. Both need to be considered when bringing insolvency proceedings.

3

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 pertinent questions asked by Fletcher¹ were:

1. In which jurisdiction may insolvency proceedings be opened?

¹ See Fletcher, *supra* note 56, pp 3 to 5

Here it must be considered if a court has jurisdiction to open insolvency proceedings with respect to the debtor's estate, for example does the debtor have a link to the jurisdiction in which insolvency proceedings are being brought.

2. What country's law should be applied in respect of different aspects of the case?

The laws in the jurisdiction in which the insolvency proceedings have been opened will be the governing law over the case however during the course of the proceedings consideration may also need to be given to foreign law, for example if there was a contract in place with a foreign creditor, the foreign governing law of the contract may need to be considered when determining what law should be applied this aspect of the case.

3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

The issue here is whether a State will recognise or cooperate with foreign insolvency proceedings in the local court and grant access to the foreign insolvency representative to the assets held in that State.

In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State, each State would apply its own laws? What cooperation difficulties does this raise ?

3

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 UNCITRAL 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.

A prominent case law example with respect to the last quotation is the 1991 Maxwell Communications Corporation plc cross-border case. In this case there were concurrent primary insolvency proceedings in the United States and United Kingdom, Chapter 11 proceedings and administration proceedings, respectively, with separate insolvency representatives in each jurisdiction. These concurrent proceedings were coordinated through an insolvency agreement approved by the courts in the US and UK, with the UK court/English law governing the proceedings and the US court deferring to the UK proceedings.

"Under the agreement, two goals were set to guide the insolvency representatives: maximising the value of the stated and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict."²

The initial agreement addressed a number of issues and determined how each court should act with respect to the same. This ensured cooperation between the courts and the insolvency

² UNCITRAL *Practice Guide on Cross-Border Insolvency Cooperation*, 2009, pp 128-129.

representatives. This also allowed the insolvency representatives to take action without delay as the issues had been resolved through the agreement in place.

In addition, other issues that arose during the course of the proceedings were addressed in extensions to the agreement.

Reference to the proceedings in this case is made throughout the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

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

Marks awarded 9 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.

Despite the UK leaving the European Union on 31 January 2020 at 11pm, there was a transitional period where, when main proceedings were opened prior to expiration of this period, the European Insolvency Regulation Recast ("EIR Recast") would apply to such proceedings. As the proceedings against Rydell were open on 18 June 2020, i.e. within the transitional period, EIR Recast would apply to these proceedings.

The EIR Recast considers a company's COMI, when determining the jurisdiction where primary proceedings are allocated. In this case, under the EIR Recast, the jurisdiction of the primary proceedings would be the UK. The EIR Recast does also allow for secondary proceedings to be opened in other member States where the debtor has an establishment.

To fully consider if the EIR Recast would apply to these secondary proceedings further information would need to be provided in relation to the country where Fernz is considering opening the secondary proceedings and whether Rydell has an 'establishment' in this country – under the EIR Recast 'establishment' is defined as "*any place of operations where a debtor*

carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets”.

Good. There is some scope to elaborate.
6.5

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 proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020, the European Insolvency Regulation Recast (“EIR Recast”) would not apply. Following the UK leaving the European Union on 31 January 2020 (11pm), the EIR Recast ceased to apply from 11 pm on 31 December 2020, i.e., expiry of the transitional period. Where main proceedings were opened prior to expiration of the transitional period, the EIR Recast applied.

Given the EIR Recast would not apply as at this date, we would require further information on the country where Fernz is located to determine if secondary procedures may be opened.

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.

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?

The UK domestic laws that would be relevant when considering the winding up of an unregistered company in the UK would be the Insolvency Act 1986 and the Corporate Insolvency and Governance Act 2020 (“CIGA 2020”).

Pursuant to Section 221(5) of the Insolvency Act 1986 it is possible to wind up an unregistered company in the UK under the following circumstances:

- a) if the company is dissolved, or has ceased to carry 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 opinion that it is just and equitable that the company should be wound up.³

It would also be beneficial to discuss the need for ‘sufficient connection’

In addition, with respect to bringing the insolvency proceedings against Rydell in the UK, we would also need to consider the CIGA 2020. Under the CIGA 2020, a creditor cannot present a winding up petition, unless it has reasonable grounds for believing that a) coronavirus has

³ Section 221(5) of the Insolvency Act 1986

not had a financial effect on the company, or b) the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company.⁴ This was in effect from 27 April 2020 until 30 September 2021 therefore a conclusion would need to be made with respect to points a) and b) before a winding up petition could be presented. From the information provided it seems that Rydell had suffered financial effect from coronavirus but we would need further information to determine if coronavirus was the only factor.

4
Marks awarded 12.5 out of 15
TOTAL MARKS 38/50

*** End of Assessment ***

⁴ Schedule 10, Part 2(2) of the Corporate Insolvency and Governance Act 2020