



**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.

- a. Introduction of the notion of statutory discharge by the Statute of Ann, 1705.
- b. Introduction of the office of the Official Receiver in 1883.
- c. Further to the law of 1883, the aim of the Act, which remains premise of most insolvency practices and principles to – date was the introduction of a fair procedure with adequate supervision and means to discourage dishonesty.

How did these developments shape 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.

- a. Extension of prohibition of termination of contracts on account of insolvency. **Further elaboration would be beneficial**
- b. Implementation of a new standalone moratorium that allows directors to remain in control of the insolvent company, unlike the previous position where the directors' powers ceased (save for a CVA proceeding) and for the appointed insolvency practitioner to play the role of monitor.
- c. Temporary suspension of the wrongful trading provisions under Section 214 of the Insolvency Act, 1986 to allow directors of companies to continue carrying on trade without the fear of being caught by the provisions on wrongful trading.

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:

These are public international law instruments that, upon ratification by individual sovereign States, form part of the domestic law of the States that have ratified them and therefore, have legally binding force in these States. One of the most successful multilateral treaties is the Nordic Convention of 1933 that governs the cross-border insolvency relations and proceedings of the Scandinavian countries.

Soft law:

These are instruments that do not have any binding legal effect but are a composition of the best industry practices. The UNICTRAL Model Law on Cross – Border Insolvency is one, if not the most, successful piece of soft law which, although not legally binding on States, has been adopted into law by a number of States in dictating the conduct of cross – border insolvency proceedings.

There is scope to elaborate and discuss the success of hard law vs soft law in establishing cross-border insolvency rules.

3.5

Marks awarded 7 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.

Some sources of law are part of the hard law. These include Conventions and Treaties such as the Nordic Convention on Bankruptcy, 1933 which dictates the law of the place of insolvency adjudication as determining the effects of the orders related to insolvency given in these States without the need for further formalities.

This implies that in as far as cross – border insolvency is concerned, the local laws of Norway, Denmark, Finland, Iceland and Sweden are interpreted and implemented subject to the Convention.

In most States, UNCITRAL Model Laws on Cross – Border insolvency forms the soft – law offering the international best practices to be implemented by the States in dealing with cross – border insolvency. These include the determination of the COMI, the commencement of main proceedings, the cooperation between courts in the different jurisdictions in which the debtor may have assets and cooperation amongst the insolvency representatives, among others. These are all interpreted subject to the local law.

Your answer could have instead been structured to discuss the sources of law across all States and to recognise how and why there may be differences between certain States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

.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?

This looks at the choice of forum with the key problem being that insolvency proceedings could be opened concurrently in more than one State, each State applying its own laws. In an attempt to harmonise the laws on commencement, proposals have been put forth in looking at the subject of the insolvency proceeding and determining whether it is the place at which the insolvency company ordinarily carries on its day – to – day operations and is ascertainable by creditors (foreign main proceedings under UNCITRAL Model Law on Cross – Border Insolvency). All other places other than such a place would then qualify as establishments (branches of the insolvent).

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

The local law of the State in which the relevant aspect of insolvency is the subject of a proceeding, such as questions pertaining to the assets of an insolvent foreign company, will apply unless one of the parties to the proceeding invokes it, in which case its application and the scope thereof will still be dealt with in the context of the local law.

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

This is particularly important where there are questions of the enforcement of foreign judgments on the same matter before a local court. Private international law raises the question of recognition and enforcement of such judgments. The type of judgment is significant in such instances given the different tests of insolvency applicable in different states. Before enforcement, the court would be keen to confirm whether the character of the judgment is the kind that would also classify the debtor as insolvent for purposes of commencing insolvency proceedings in the local jurisdiction.

There is scope to elaborate upon choice of law matters.

4.5

Question 3.3 [maximum 5 marks]

It is said that “co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; by UNICTRAL in their *Practice Guide on Cross-border Insolvency Agreements*; and by the Judicial Insolvency Network in their *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters...*”

It is also said that “While court approval of such agreements for the purposes of co-ordinating insolvency proceedings is encouraged by the MLCBI, they in fact pre-date the Model Law.”

Briefly discuss a prominent case law example for this last quotation.

The Maxwell Communications Corp. cross border case represents cooperation between two sovereign States with a view to resolving complex issues arising in the cross-border context. This case involved two primary insolvency proceedings initiated by Maxwell Communication Corporation plc. One was commenced in the United States and the other in the United Kingdom. Two different insolvency representatives were appointed in both States and each was charged with a similar responsibility.

The idea was raised by the respective judges in United States and English that an insolvency agreement between the two administrations could resolve the conflicts and facilitate the exchange of information. Under the agreement, two goals were set to guide the insolvency proceedings namely maximising the value of the estate and harmonising the proceedings to minimize expense, waste and jurisdictional conflict.

The parties also agree essentially that the United States court would defer to the English proceedings once it was determined that certain criteria were present.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.3 asks for a brief note, it is for 5 marks.

3.5

Marks awarded 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.

The European Insolvency Regulation Recast would apply because it only ceased to apply in the UK on 31 December 2020. One of the key principles of the Recast is that the jurisdiction to open insolvency proceedings is governed by the debtor's centre of main interest and as such, only the courts in the UK would have the jurisdiction over the main proceedings open against Rydell. As such, the courts in the other member States would only have the jurisdiction to open secondary proceedings and these would be the States in which Rydell has its establishments.

Secondly, the States in which secondary proceedings are commenced would have the jurisdiction to determine particular aspects of the insolvency proceeding subject to the law of the UK.

With regards to the additional information, I would seek to establish the character of the UK COMI in order to confirm whether it is merely the place of registration of Rydell or whether it is the place that is ascertainable by third parties.

It would be beneficial to consider the need for further information as to whether Rydell has an establishment in the other country in Europe where the other proceedings were intended to be commenced by Fernz.

It would also be beneficial to consider specific provisions of the EIR Recast and their application.

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.

Yes. My answer would defer because with effect from 31 December 2020, the EU Insolvency Regulation Recast ceased to apply to the UK. This implied that the automatic recognition of insolvency proceedings, the status of the insolvency officeholder status in the Recast and the applicable law in as far as cross-border insolvency would cease to apply.

I would therefore need to confirm whether there subsists any agreement for cooperation between the UK and the State in question and how this agreement would impact on the commencement and management of insolvency proceedings commenced in the UK.

I would also need to confirm if, in the absence of the agreement, the State ratified the UNICTRAL Model Law on Cross-Border Insolvency Law in which case I would need to the extent to which provisions of the Model Law were incorporated into the local law.

Finally, I would also need to confirm which State Fernz is incorporated in such that I can confirm what requirements must be met for an application for recognition of foreign proceedings. If the State applies the UNCITRAL Model Law, then the decision to recognise the foreign representative appointed in the proceeding in the UK will depend on the requirements of the local law.

3

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?

1. Insolvency Act, 1986.
2. Companies Act, 2006 (UK).
3. UK Insolvency (Amendment) (EU Exit) Regulations, 2019 ("The Retained EIR").
4. The Insolvency Rules (England and Wales) 2016.
5. Company Directors Disqualification Act, 1986.
6. Employment Rights Act, 1996 Part XII.

To improve your responses, ensure they are commensurate with the mark allocation – the question is for 5 marks.

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

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**Marks awarded 8.5 out of 15
TOTAL MARKS 34/50**

*** End of Assessment ***