



**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 9 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.

Debt collection procedures were shaped by the following developments:

1. The English Bankruptcy Act of 1542 was the first development in English law which provided for the appointment of commissioners who could proceed against a fraudulent debtor, upon a creditor's application. This act provided for collective debt participation by creditors and the pari passu distribution of the collected assets.
2. The 1570 Act, known as the Act of Elizabeth, allowed a creditor to petition the Lord Chancellor to convene a meeting, examine the debtor's transactions and property, and summon people for questioning, all of which constituted individual debt-collecting mechanisms. **What was the development and how did it shape the way of thinking concerning modern insolvency law?**
3. The 1883 Act, which remained the foundation of English insolvency law for the most of the next century, was guided by principles set out by Joseph Chamberlain, president of the Board of Trade in 1881, such as the assets of the debtor being deemed as belonging to the creditors who should have full control of the assets subject to little interference. **What was the development and how did it shape the way of thinking concerning modern insolvency law?**

It would be beneficial to consider developments such as the abolishment of imprisonment for debt, or the introduction of a fresh start.

1

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.

Three insolvency measures introduced in the UK following the Covid-19 pandemic include:

1. The temporary suspension of serving statutory demands and the voiding of statutory demands served on a company between 1 March 2020 and 30 September 2021.
2. Temporarily raising the current debt threshold for a winding up petition to £10,000 or more to protect small businesses from creditors with relatively small debts.
3. A permanent measure which included a new restructuring plan to help viable companies with problematic debt obligations which could be sanctioned by the courts if it is fair and equitable and can be imposed on creditors by the courts. This marks a shift towards the "business rescue" culture more in line with US insolvency law.

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

1.5

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 and conventions are instruments to which States bind themselves to and affect their domestic law and can also have an effect on cross-border insolvencies. **It would be beneficial to discuss how this is 'hard law'**. The Istanbul Convention, Council of Europe Treaty Series No 136, whilst signed by 8 member states in Europe, actually failed in getting ratified into effect yet had a large influence on forming the

European Union's solutions to questions posed by international insolvencies among its States. Soft laws are quasi-lega instruments which do not have legally binding force; however, they can be successful such as the Model Law on Cross-border Insolvency (MLCBI) developed by UNCITRAL. The MLCBI as draft legislation has now been adopted by many States as a framework for addressing issues in cross-border insolvencies.

3.5

Marks awarded 6 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Briefly discuss the various possible different sources of insolvency laws in any State and how they may interact with each other.

Roman Law principles largely sourced much of civil law which is practiced in many States around the world, whilst developments in English insolvency law largely were the foundation of insolvency law in common law jurisdictions. Roman law principles such as cession bonorum (assignment of property) and dilation (compositions with creditors) also presumably fed into the principles set out by Joseph Chamberlain, eventually leading to the English 1883 Act which included similar principles (set out in my answer to question 2.1). Also, ancient Roman law allowed creditors to be enslaved as punishment for not paying their debts, whilst early English law allowed for creditors to be imprisoned.

Additionally, US bankruptcy law was built on the founding principle laid out in the US Constitution that insolvency law is a federal matter, rather than law which can vary from US state to state. This principle has also developed in the European Union to rule on cross-border insolvencies among its member States.

This question asks you to consider the different sources of law and how they interact. You need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations), common law where it applies, general non-insolvency laws etc

.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 on the pursuit of harmonisation of insolvency laws posed by Fletcher are as follows:

1. In which jurisdictions may insolvency proceedings be opened?
 - This question addresses the legal issue relating to the choice of forum. This issue directly ties into the concepts of universalism (where a the choice of law insolvency law is based on where the debtor holds its centre of main interests) and territorialism (where multiple insolvency laws of more than one State can be involved). The EIR takes on this question by allocating the jurisdiction of law to where the debtor has its centre of main interests; however, it allows for subsidiary territorial proceedings to progress at the same time.
2. What country's law should be applied in respect of different aspects of the case?

- This question takes into effect the choice of law to apply to the matter. In a common law system, choice of law issues will only arise if provoked, otherwise the law of the jurisdiction will prevail. Naturally, the issue of choice of law will only arise if it is advantageous for the party to apply foreign law, so this matter will depend case by case. Alternatively, in civil law systems which abide most by territoriality, foreign law is presumed to be a question of law whether provoked or not. In English law, where foreign elements are included in a case, English law will apply to matters of procedures or substance; however, reference may be made to a foreign law to establish a particular matter or to provide more clarity to an issue which involves a foreign element.
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?
- This legal issue of the recognition and effect of various judgments in foreign proceedings in the same matter involves questions surrounding the court issuing the judgment, the type of judgment, and the effect of the judgment. In my view, the crux of this issue revolves around co-operation. Many States permit recognition of foreign insolvency proceedings and judgments. One relevant case which resulted in the turnover of assets in a local liquidation to a foreign liquidator for distribution was *McGrath v. Riddell* wherein Lord Hoffman cited the principle of modified universalism to require the courts to co-operate with the foreign proceedings to allow for a fair distribution of the debtor's assets. Additionally, Chapter 15 in US Bankruptcy Law provides for recognition of foreign proceedings in the USA, including the distribution of assets out of the country where applicable.

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.

One case law example which relates to the court approval of co-ordination agreements which pre-date the MLCBI is the Maxwell Communications Corporation plc cross-border insolvency case of 1991. The case involved two primary insolvency proceedings, one in the US and one in the UK, brought by a single debtor, in which the courts independently ruled that an agreement between the two insolvency representatives in each State could ease the burden of the two administrations regarding communication and information conflicts. The agreement specified goals to guide each representative including maximizing the value of the debtor's estate and harmonizing the proceedings to minimize expenses and conflicts. This resolution is an example of how co-operation in cross-border insolvencies, such as the enactment of agreements which are specifically tailored to each case, can alleviate the pressures of the situation and facilitate a more equitable and pragmatic solution.

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

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 (“**EIR (Recast)**”) would apply to these proceedings if Fernz opened the proceedings prior to 31 December 2020, the transitional period granted by the UK in its departure from the European Union to insolvencies. Assuming that Fernz initiated proceedings before 31 December 2020, the EIR (Recast) would dictate that the primary jurisdiction for proceedings would be in the UK, due to the debtor having its centre of main interest (“**COMI**”) in the UK. This would mean that although Fernz is Rydell's main creditor, the UK courts would have primary jurisdictional competence over any cross-border insolvency, rather than Fernz's country of incorporation. However, Fernz would be able to open a secondary proceeding, opened after the adjudication of the bankruptcy in the UK, if Rydell had an establishment (carried out non-transitory business) in the country in which Fernz is incorporated. To fully consider this question, I would need to know approximately when Fernz initiated its proceedings against Rydell to understand if the EIR (Recast) would apply. **Take care to consider the information that has been provided to you.** Additionally, I imagine that Rydell would have an establishment in Fernz's country of incorporation; however, I would appreciate a bit more information as to the nature of the debt between Rydell and Fernz to clarify whether or not this debt would qualify as a non-transitory economic activity which took place in this country (or if it was a one-off agreement) and whether or not Rydell had business operations in Fernz's country.

It would be beneficial to discuss relevant articles of the EIR Recast.

4.5

Question 4.2 [maximum 3 marks]

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

My answer to 4.1 would differ if the proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020 because the UK left the European Union on 31 January 2020 but kept a transitional period whereby the EIR (Recast) applies to insolvencies which are initiated before 31 December 2020. This would mean that the EIR (Recast) would not apply to proceedings initiated on 18 June 2021 and would be subject to new the new Exit Regulations. In 2021, EU-based insolvencies opened after the end of this transitional period no longer benefit from automatic recognition in the UK. Now EU insolvency practitioners are relegated to the same status as non-EU insolvency practitioners meaning that their options are now more limited to the Cross-Border Insolvency Regulations (2006 revision) which enacted the UCITRAL Model Law on Cross-Border Insolvency (“**Model Law**”), section 426 of the IA (1986 revision) and English common law under comity principles. Referencing the third option, English common law is based on the principle of modified universalism so the English courts have the power to assist foreign insolvency proceedings. However, an application by Fernz would now have to be made to the UK court system.

It would be beneficial for you to consider what further information regarding the MLCBI might be relevant.

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?

If Rydell were unregistered with its COMI in a European Union member-state and the formal insolvency proceedings were opened in the UK on 18 June 2021, these proceedings would not fall under the EIR (Recast) as the transitional period would have lapsed on 31 December 2020. Instead of relying on those regulations, the UK domestic laws to consider whether the minor creditor could commence the formal proceedings in the UK would be model law, comity, and the laws of the European member state. If the EU member state was Greece, Poland, Romania or Slovenia, the minor creditor could look to Model Law because those countries have enacted Model law as at 18 June 2021. However, automatic recognition would not be applied (as it would be in the EIR (Recast)) and the minor creditor would have to make an application to the Court. If the EU member state was Cyprus or Ireland, the minor creditor could consider the UK domestic law of comity as those are common law jurisdictions. Lastly, the minor creditor would have to consider the laws of the EU member state as some States have provisions which allow for the recognition of certain foreign insolvency proceedings.

It would be beneficial for you to consider Section 221(5) Insolvency Act 1986 and ‘sufficient connection’ issues.

1

**Marks awarded 7.5 out of 15
TOTAL MARKS 31/50**

*** End of Assessment ***