



**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.

First, is the English Bankruptcy Act of 1542's introduction of a system where creditors could apply for the appointment of a body of commissioners who could proceed against a trading debtor who was seeking to avoid paying his debts (e.g. by fleeing the country, barricading himself in his house, or simply neglecting to pay his debts) or by fraud. This contained 2 fundamental principles of modern insolvency law – collective participation by creditors and *pari passu* distribution.

Second, is the Act of Elizabeth in 1570 which was the first law designed specifically as a true bankruptcy statute, rather than as a fraud-prevention law, by providing for additional acts of bankruptcy. A creditor could open a bankruptcy proceeding following an act of bankruptcy by the debtor. **How did this shape the way of thinking concerning modern insolvency law? Elaboration is warranted**

Third, is the Statute of Ann of 1705, which introduced the notion of a statutory discharge if the debtor had conformed and cooperated during the pendency of bankruptcy proceedings. These principles have remained part of modern bankruptcy. **It would be beneficial to elaborate and discuss how they underpinned the modern concept of 'fresh start'**

2

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. This introduced a new restructuring plan and new moratorium rules.

In addition, the Corporate Insolvency and Governance Act 2020 also relaxed wrongful trading liability and suspended winding-up petitions and statutory demands.

The UK also introduced special financial aid schemes.

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 public international instruments which States may sign and bind themselves to. The States would then affect their domestic law according to the treaties as part of the State's hard law. An example of such a treaty in establishing cross-border insolvency rules is the European Convention on Human Rights which concluded a Convention on Certain International Aspects of Bankruptcy in 1990, known as the Istanbul Convention, Council of

Europe Treaty Series No 136. This convention had an important influence on the development of a European Union response to the problems of international insolvencies among its member states, even though it was not ratified by a sufficient number of states. **It would be beneficial to note concepts of 'hard law' and the success of soft vs hard law**

Soft law can take the form of legislative guidelines or a draft legislation for states to adopt. The UNCITRAL Model Law of Cross-border Insolvency is the most successful soft law approach to date. It is a form of a draft legislation that UNCITRAL recommended member states to adopt, with or without modification. Given that many States across the world have adopted it, it is a highly influential way to develop international insolvency laws.

3.5
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.

Generally, modern day insolvency rules are found in legislation or codes. Some states may have a single unified code, such as the USA's Bankruptcy Code of 1978 and the English Insolvency Act of 1986. In other states, their legislation dealing with companies include corporate insolvency and there may be a separate legislation dealing with personal insolvency, such as Australia. These legislations may also refer to one another and therefore need to be studied in conjunction with each other.

For common law states, common law principles also plug possible gaps in the existing legislation. These states would therefore also turn to case law as a possible source of insolvency law.

Beyond these sources, the general law or non-bankruptcy law would also have an effect in insolvency and act as an additional source of insolvency laws. In particular, rules in relation to real rights such as ownership, or rights of real security. These sources may inform insolvency laws of what property may constitute part of the bankruptcy estate. They may also determine whether a creditor is in fact owed money by the bankrupt.

Well answered.
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.

Fletcher's three pertinent questions are:

- (1) in which jurisdictions 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 first question relates to the choice of forum (i.e. whether a court can and will hear and determine the matter) and involves an examination of the connection with the jurisdiction of the parties or the dispute. For example, where are the debtor's assets located and where is the debtor domiciled.

The second question relates to the question of which law is to be applied, and usually only arises if parties invoke them. Foreign law must then be proven as a question of fact (in common law systems) and as a question of law (in civil law systems). **There is scope to elaborate upon choice of law.**

The third question relates to recognition and enforcement. Recognition depends on the conclusive or res judicata effect of a judgment – i.e. whether the dispute has been ventilated and determined fairly and conclusively as between the parties on the same issues. Enforcement relates to the execution of the judgment or the defendant's compliance with its terms. Whether a foreign judgment should be enforced and/or recognised also depends on the type of the judgment given – i.e. whether it is a judgment on the commencement of insolvency proceedings or is an order as between parties in the course of the insolvency proceedings. Whether and how international insolvency rules apply would depend on the type of the judgment.

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 ?

3.5

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 Corporation plc cross-border insolvency case in 1991 is a case initiated by a single debtor which involved two concurrent principal insolvency proceedings in the United States (Chapter 11 proceedings) and England (administration proceedings) and the appointment of two different and separate insolvency representatives in the two states.

The US and English judges raised the possibility of an insolvency agreement between the two administrations to resolve conflicts and facilitate information sharing with their respective counsel. In other words, the two principal proceedings were co-ordinate through an “Order and Protocol” approved by courts in the US and England. The agreement provided for two goals – maximising the value of the estate and harmonising the proceedings to minimise expense, waste and jurisdictional conflict. Certain other mechanisms and provisions were also agreed and set out in the agreement, such as that the English insolvency representatives should only incur debt or file a reorganisation plan with the consent of the US insolvency representative or court. Issues which were left out from the initial agreement were later included in an extension of the agreement, presumably because it is difficult to anticipate and provide for all the possibilities in an insolvency.

This answer displays a good understanding. There is some scope to elaborate.

4

Marks awarded 12.5 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 ("**EIR (Recast)**") allocates jurisdiction competence to the courts of a member State within which is situated the "centre of the debtor's main interests" ("**COMI**"). Article 3(1) of the EIR (Recast) provides that "*the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*".

Since Rydell's COMI is in the UK, the main proceedings is in the UK pursuant to Article 3(1) of the EIR (Recast). For completeness, it is to be noted that the insolvency proceedings were opened on 18 June 2020. This means the main proceedings were opened during the transitional period (i.e. after UK's exit from the EU at 11pm on 31 January 2020 but before 11pm on 31 December 2020). As such, the EIR (Recast) would apply.

The proceedings opened by Fernz in another EU country may be opened as subsidiary territorial proceedings if Rydell has an "establishment" in that EU country (Article 3(2) of the EIR (Recast)). Whether Rydell has an "establishment" depends on whether Rydell has any place of operations where Rydell carries 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 (Article 2(10) of the EIR (Recast)). Assuming that Rydell has an establishment in the EU country, the subsidiary proceedings, would be considered "secondary proceedings", since it was opened a month after the main proceedings were opened.

It would be beneficial to consider the need for further information as to whether Rydell has an establishment.

6

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.

In view of the UK's departure from the EU, under which it ceased to be a member of the EU at 11pm on 31 January 2020, if the proceedings were opened in the UK on 18 June 2021, the EIR (Recast) would not apply, as the EIR (Recast) does not apply to any insolvency proceedings in the UK opened after 11pm 31 December 2020, which is after the transitional period. This means there will not be any automatic recognition in EU Member States of UK insolvencies, including in Fernz's EU country.

If Fernz's EU country is a country which adopts the UNCITRAL Model Law on Cross Border Insolvency ("MLCBI"), then the foreign representative can apply to recognise the main proceedings in that EU country and prevent Fernz from commencing parallel insolvency proceedings.

Otherwise, recognition may depend on the principles of comity or the law of the specific EU member state itself.

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.

2.5

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?

The EIR (Recast) would not apply as it is after 11pm 31 December 2020. Instead, English domestic laws would apply. The main insolvency legislation would be the Insolvency Act 1986. If Rydell is unregistered in the UK, then the English Court will only have jurisdiction under Section 221(5) Insolvency Act 1986 to wind up an "unregistered company" by way of a court-ordered winding up if: (a) 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; or (c) if the court is of the opinion that it is just and equitable that the company should be wound up.

In addition, the common law may also shed light and plug gaps in the legislation. For example, the cases of *Re Latreefers Inc* [2001] BCC 174 (CA) and *Re Real Estate Development Co* [1991] BCLC 210 (Ch D), per Knox J establish that some other relevant factors on whether there is a sufficient connection with England and Wales and whether the English courts will assume jurisdiction are:

- (i) if there is a sufficient connection with English and Wales, which may, but does not necessarily have to, consist of assets within the jurisdiction,

(ii) there must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for a winding-up order; and

(iii) if it considers that one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.

Thus, if the minor creditor is domiciled in the UK, if there are assets in the UK, and if there is a reasonable possibility that there would be benefit to the applicant of the bankruptcy order, then the English court may assume jurisdiction and the minor creditor may be able to commence formal proceedings in the UK.

If the English court's jurisdiction is seised, then English law would apply to matters of procedure and substance (e.g. what are the liquidator's obligations, what are procedural requirements for advertisements), although it is possible that foreign law may be referred to to establish certain matters – e.g. in determining whether the creditor has a valid claim against the debtor. English general law may also apply when determining the validity of the creditor's claim against the debtor's estate.

5

Marks awarded 13.5 out of 15

TOTAL MARKS 43.5 /50

*** End of Assessment ***