



**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.

The three significant historical developments are;

- a. Collective participation by creditors
- b. Equal distribution of the debtors assets among creditors
- c. Notion of statutory discharge

Further elaboration would improve the mark for this sub-question. While it does say 'briefly', the sub-question is for 3 marks. It would be beneficial to explain the developments and how they shaped 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.

Three insolvency related measures introduced in the UK:

- a. The passing of the Corporate Insolvency and Governance Act, 2020 (CIGA 2020) to update the Insolvency laws and to put permanent and temporary measures in place to help manage the negative economic fall out of the pandemic.
- b. The introduction of a new restructuring plan by the passing of CIGA 2020 to give relief to viable businesses struggling with debt commitments.
- c. Restrictions on winding-up petitions where unpaid debts were due to the effects of the pandemic. **Elaboration is warranted**

2.5

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 are binding and affect domestic/local law once a State accedes to same. "Soft law" on the other hand serve as a guide in formulating particular laws and not binding.

Various States and international bodies have used treaties and or "soft laws" to establish and or fine tune local insolvency rules across the world.

For example, the Nordic Convention on Bankruptcy, (a treaty between Denmark, Finland, Iceland, Norway and Sweden) has been used by the contracting States to deal with provisions on recognition and enforcement among member states. By signing on to the treaty, each State adopted the terms of the treaty into their respective local laws. Since coming into force, there has been one minor and one major review to the Convention of 1933. The binding effect of these reviews to the treaty is applied when signed. So for instance, Iceland is yet to sign on to the revisions (hence is not bound by the text to the revisions) made to the Convention of 1933, however, the original text of 1933 is still binding on the contracting States.

A persuasive “soft law” instrument in operation is one developed by UNCITRAL. The UNCITRAL Model Law on Cross Border Insolvency, unlike the Nordic Convention, is a legislative guide for member States to adopt with or without amendment. The Model Law is not binding but only serves as a guide. As soon as it is adopted by a State however, it becomes binding on the State.

The World Bank has also formed some guidelines to strengthen the insolvency regimes across the world. In view of that the World Bank has developed Principles for Effective Insolvency and Creditor/Debtor Regimes (Principles). The Principles have been revised over the years and as early as in 2021.

The World Bank by its global reach, is able to compel States to reform their insolvency laws by requiring States to develop/improve their insolvency laws as a precondition for loan support. This has enabled the reformation of insolvency laws in many States especially, States in the developing world.

Currently, the Principles and UNCITRAL guide serve as the best practice standard for insolvency across the world. In sum, treaties and “soft law” have been used and is being used to harmonise insolvency rules both within individual states and across borders.

4

Marks awarded 8 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 State under consideration is Australia. Australia does not have a single Insolvency law. There is a distinction between the insolvency laws regulating companies and individuals. . For companies and any related insolvency issues, the applicable insolvency law is the Corporations Act, 2001. Alternatively, the Bankruptcy Act 1966 relates to individual insolvency.

Take care to answer the question put to you. You’ve not been asked to pick a State to consider nor to consider Australia, rather you’ve been asked to consider the sources of laws in any State. This question requires you to consider different types of sources of law and how they interact. 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. You have touched upon legislation.

1

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 are:

- a. In which jurisdiction can an insolvency proceeding be opened?

- b. Which country's law will apply in the matter?
- c. What international effect will be accorded foreign proceedings in the matter?

As it relates jurisdiction, the jurisdiction of a court in an insolvency matter is of outmost importance. In cross-border insolvency where different jurisdictions come to play, a determination of this question, will in itself determine how an insolvency proceeding may be opened. An answer to this question warrants a consideration of the link between the parties to the forum and or the link between the assets to the forum. For instance in the Maxwell case, where the debtor initiated insolvency proceedings in separate jurisdictions, the Courts in the UK and USA were able to make their respective orders by the connection the debtor had in both States. In the referenced case, the Company was incorporated in the UK whilst it had assets in the USA.

Applicable Law-Which law is applicable in an insolvency matter?

Cross-border insolvencies raises questions on applicable law.

Ordinarily, once a court is seized with jurisdiction in a matter, the Court will apply the local/domestic laws to the matter. This is not so simple in cross-border related matters. By the very nature of cross-border cases, there are competing laws at work. A determination of this will determine the procedure for commencing/opening an insolvency proceeding. In any case, whether a court is seized to deal with a cross-border matter is dependent on the applicable law.

Recognition and Effect – Will the local court recognise and give effect to foreign judgements? The fact that a foreign judgement will be recognised in another state is of outmost importance. Issues relating to enforcement of foreign judgement is also of importance. In insolvency matters, the type of judgement for which recognition and or enforcement is sought

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 ?

4

Question 3.3 [maximum 5 marks]

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

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

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

The Maxwell Communications PLC case exemplifies the point that co-ordination agreements existed before the adoption of the MLCBI.

Maxwell Corporation PLC, filed a petition under chapter 11 of the US Bankruptcy Code. The Corporation also petitioned the UK courts for an administration order. The courts in the two States made orders pursuant to the petitions filed. With the involvement of the two States and

the pending orders in place, it was clear that issues regarding recognition and effect of foreign judgement, forum and applicable law will be in issue.

The administrator in the UK and the Examiner in the US through coordination, agreed and filed a plan of reorganisation and scheme of arrangement in line with the laws of the UK and USA. The reorganisation plan and scheme of arrangement were subsequently approved by the courts which is now known as the Maxwell Protocol.

It is evident from the steps taken by the parties and the Courts that as far back as in 1993, court approval of agreements (protocols) for the purposes of co-ordinating insolvency proceedings was accepted and sanctioned by the Courts. It was on the basis of this acceptance of agreements in such cases that the Maxwell Protocol was approved by the Court.

Since the Maxwell protocol in 1993, other agreements (protocols) have been approved by various courts in different states. This has over the years formed the basis for many successful protocols which has also led to considerable development in cross-border insolvency agreement. Over the years, there has been a gradual there is a growing acceptance of these cross-border agreements or protocols and this is evident with the UNCITRAL Practice Guide on Cross-Border Insolvency Agreements, adopted in 2009, ALI-III in their Guidelines Applicable to Court to Court Communication in Cross-Border Cases, published in 2012 and JIN Guidelines for Communication and Cooperation between courts in Cross-Border Matters, promulgated in 2016.

There is scope to elaborate in your discussion of the case.

4

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.

First, "the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings')." Article 3 paragraph 1 of the EIR Recast.

From the facts, Rydell is a company incorporated with offices in the UK and with its centre of main interest (COMI) in the UK. On 18 June 2020, whilst the UK was still part of the EU, a creditor of Rydell opened an insolvency proceeding against Rydell. The main proceeding was thus commenced in the UK.

A month thereafter (July 2020 thereabouts), Fernz is considering opening an insolvency proceedings in another EU country. For the possible secondary insolvency proceedings to be probable, it must be determined whether the debtor (Rydell) has an “establishment” within the other EU country. An ‘establishment’ is defined in the Recast 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.”

Again from the facts there has been a downturn in the business of Rydell due to the covid restrictions imposed. From this very fact it can be inferred that Rydell has not been carrying out its usual brisk business outside the borders of UK. The case may therefore be made that Rydell does not have an “establishment” in the other EU country as prior to the commencement of the main action in the UK, the business of Rydell had been affected by the restrictions arising from the pandemic.

Assuming Rydell was carrying out business in the other EU before the insolvency proceedings in the UK, then it must also be determined whether Fernz’s claim “arises from or is in connection with the operation of an establishment within the territory” (EIR Recast) of the other EU country.

It would be beneficial to clearly set out what further information is required.

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.

As at 18 June 2021, the UK had severed its ties with the EU thus was not bound by the terms of the EIR Recast. Were an insolvency proceeding be opened on 18 June 2021, the issues relating to the matter will be determined by the domestic insolvency laws of UK; Insolvency Act 1986 and the Corporate Insolvency and Governance Act 2020.

Considering the time for the possible commencement of the proceeding, there was a restriction on winding up petitions on companies where the debt arose out of the pandemic (CIGA 2020). On a petition for winding up during this period, the Court will determine whether the debt arose from the effects of the pandemic or not. From the facts, the position that Rydell finds itself is significantly due to the effects of the pandemic. Should the Court come to the same conclusion then the insolvency proceedings may not be opened in the UK.

Alternatively, Fernz, may commence the insolvency proceeding in the court of another country. Should that happen, the court in the other country (if the country falls within the relevant countries) can request the courts in the UK under section 426 of the Insolvency Act 1986 for assistance. On receipt of such a request, the UK court has the discretion to grant the request for assistance or not. This discretion is dictated by the domestic laws of the UK.

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 domestic laws applicable are the Insolvency Act 1986 and the Corporate Insolvency and Governance Act, 2020 (CIGA 2020).

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

.5

Marks awarded 8.5 out of 15
TOTAL MARKS 34.5/50

*** End of Assessment ***