



**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.

[The 1570 Act, introduced during the reign of Queen Elizabeth I transferred the jurisdiction of the supervision of the estate from the commissioners, as previously was foreseen, to the lord chancellor. Also, the bankruptcy procedure could be opened by any creditor, following an “act of bankruptcy” by the debtor (the creditors gained the right to petition to the Lord Chancellor convene a bankruptcy meeting. **It would be beneficial to directly set out what development occurred and how it has shaped the way of thinking concerning modern insolvency law**

The Statute of Ann of 1705 introduced the notion of a statutory discharge, that was not an automatic entitlement of the debtor, since de commissioners had to confirm that the debtor had cooperated during the bankruptcy proceeding. Also, many of the principles introduced by The Statute of Ann of 1705 have remained part of modern bankruptcy. **It would be beneficial to elaborate upon the modern concept of ‘fresh start’ which derived from this development**

The Law of 1883, viewed by certain writers as the foundation of the present system of English bankruptcy law established three principles essential for a functional bankruptcy procedure: (i) the assets of the debtor in an insolvency case belonged to the creditors and they, the creditors, should have full control over them; (ii) the trustee should be subject to official supervision regarding his pecuniary administration; and (iii) the need of an independent examination of the circumstances that lead the debtor into an insolvency estate.] **It would be beneficial to directly set out what development occurred and how it has shaped the way of thinking concerning modern insolvency law**

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.

[Amongst some measures introduced by the UK, taking into account the Covid-19 pandemic we can highlight the Corporate Insolvency and Governance Act 2020, that introduced the possibility of a new restructuring plan, new moratorium rules and the suspension of winding-up petitions and statutory demands.

It is also important to highlight that many other States have amended/modified their insolvency rules to accommodate some measures, aiming to help debtors and creditors during the pandemic.]

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, that only became binding to the State if they decide to become signatories of the specific Treaty. After signing, the Treaty becomes part of the law system of the signatory State. **It would be beneficial to discuss how these are 'hard law'**

As for the soft-law, they are non-binding instruments, that act as suggestion, as a set of rules that could be followed by the State – but are not mandatory (differently than the Treaty that, once signed by State must be followed.

They might be used to establish cross-border insolvency rules in States in a way that, considering that these are amongst the few instruments that can be created by an International Entity, or a Convention (formed by representatives from different countries), the Treaties and the Soft Laws could set a guide of principles for the insolvency law system for many different countries, helping in the biggest obstacle in the insolvency system, that is the lack of uniformity between the set of rules that each and every State applies in their own country.]

More detail would have improved the mark awarded for this sub-question. It would be beneficial for example to make reference to the UNCITRAL Model Law on Cross-Border Insolvency which is arguably the most successful example of 'soft law' in the field of cross-border insolvency to date.

3

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.

This question requires you to consider different types of sources of law and how they interact within any State.

[Amongst the various tools that a State can apply to regulate its insolvency system, it is worth highlighting its own set of laws (known as "hard law"), which are generally formulated following the system of the country regarding new legislations (such as, for example, in Brazil, for a law to be sanctioned, it goes through several stages, until it reaches the presidential sanction).

It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation

This is often one of the most common methods for regulating insolvency.

A second source are the International Treaties and Conventions, created by international entities and ratified by the countries, at their discretion and which, as indicated in question 2.3, when ratified, become mandatory in the country.

A third source are the principles and model laws, such as the World Bank Principles and the Uncitral Model Law, which serve as a guideline for countries and can be incorporated into the State legislation, acting as a form of unifier for insolvency systems across the Globe (such as the UNCITRAL Model Law, for example.)

It would be beneficial to discuss common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

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 issues raised by Fletcher are: (i) Choice of forum to exercise jurisdiction in the matter; (ii) the recognition and effect accorded foreign proceedings in the same matter; and (iii) the choice of law to apply to the matter. **It would be beneficial to set out the questions.**

Regarding point number (i), I believe that it has the potential to be the most sensitive point among those raised by Fletcher and, if well regulated, it can lead to the solution of the other issues raised by Fletcher.

I believe in that since, regarding jurisdiction, States tend to be less flexible with regards to that, and the discussions that could arise have the potential to escalate to large international incidents, as countries tend to defend their jurisdiction to judge insolvency cases concerning companies which operate in the State (regardless of the level of activity of such company).

In addition to that, it is difficult to establish a criteria that would be applied worldwide as to the requirements that need to be followed to determine the jurisdiction of an insolvency proceeding (country of debtor's assets, country where the company has its board members located, country where the creditors are located, among others).

Regarding the second point, the recognition of the insolvency procedure by other countries, we face the problem of lack of uniformity in the insolvency legislation, which leads to difficulty in accessing other jurisdictions, and the uncertainty that the procedure will be recognized by other jurisdictions, since each country follows its own legislation.

This can also end up generating large costs and delays in the procedure for the debtor, since it is not clear where the procedure needs to be recognized, and what recognition procedure must be followed in each country.

Finally, regarding the choice of law to apply to the matter, I understand that in the situation is very similar to the same issue pointed out in question number (i), the choice of jurisdiction. Once the jurisdiction has been chosen, the law to be followed must be that of the country of the procedure, however, when the procedure needs to be recognized in other jurisdictions, the law that must be followed is the one of that jurisdiction (for opening an auxiliary insolvency procedure, for example).]

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.

[One of the most recent cases in which the principles of harmonization of international insolvency and recognition of procedures was the case concerning the Chapter 11 filed by LATAM. **The question relates to the last quotation regarding 'pre-dating' the MLCB. This requires consideration of a prominent case that pre-dates the MLCB.**

The procedure was initially filed in New York, United States, and has already been recognized in Chile and Colombia - countries in which the airline company has operation and, consequently, has creditors and assets.

Important to highlight that, at the time of the filing, Brazil had not yet incorporated the UNCITRAL Model Law into its bankruptcy legislation (that were incorporated in the end of 2020, when the new legislation regarding insolvency proceeding was sanctioned) and, most likely for this reason, LATam chose to include the Brazilian branch as plaintiff in the procedure filled in the United States.

They have not tried to seek recognition of the procedure in Brazil yet, and probably won't, trying to reduce costs and the risk of delaying the chapter 11 filed in the USA.

The Chapter 11 filled by LATAM is still ongoing, and the company remains seeking a way to recover itself, and renegotiate its debts.

.5
Marks awarded 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.

[Considering the date in which the proceeding was opened, June 18, 2020, the European Insolvency Regulation Recast would apply to the case. **Why?**

Thus, it is important to highlight that the EIR establishes the insolvency procedure primary jurisdiction where the debtor has its COMI (centre of the debtor's main interests). Furthermore, the EIR foresees the possibility of allowing the opening of an auxiliary procedure in another State.

Therefore, considering that Rydell's COMI is in the UK, the procedure that was initiated by a creditor in the UK should be maintained, and be judged as the primary insolvency procedure of Rydell.

However, considering that Rydell has operations in other EU territories, it would be interesting for Rydell to initiate an auxiliary procedure in other countries where the company has operations, and have creditors, with the assistance of the European Insolvency Regulation Recast, seeking to either reorganise the company and its debts, or liquidate the company and all of its branches.]

More detail would have improved the mark awarded for this sub-question. A discussion regarding secondary proceedings, establishment and further information in that regard is warranted.

3

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.

[Considering that the UK has left the European Union, the European Insolvency Regulation Recast ceased to apply in the UK since December 31, 2020.

Thus, if the procedure had been opened on June 18, 2021, instead of June 18, 2020, the European Insolvency Regulation Recast could not be applied in the case, and the insolvency procedure opened would be regulated, would follow the laws established in the legal insolvency system from the United Kingdom.

Furthermore, if it were necessary to recognize the insolvency procedure in another country, the ideal would be to apply the principles that govern jurisdictional communication between Estate, such as, for example, the UNCITRAL Model Law or the Principles for Effective Insolvency and Creditor/Debtors Regimes, produced by the World Bank.]

What further information might be required in this regard?

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?

[Firstly, it is important to highlight that the UK is a signatory/has adopted the UNCITRAL Model Law, which means that the UK adopts the criteria suggested by UNCITRAL for the regulation of cross-border insolvency, and follows the procedure established in the document to recognize international insolvency procedures.

Therefore, in some cases of international insolvency proceedings, the UK can apply the UNCITRAL Model Law to solve any issues that may arise concerning jurisdiction, law applied and collecting assets of the debtors, for example.

That being said, in case 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, the domestic insolvency law of the UK foresees that the English court has jurisdiction to wind up a foreign company – a company that was incorporated under the law of a foreign country – according to the Section 221 (5) Insolvency Act 1986.

For this to happen Rydell would have to be in one of these circumstances: (i) the company being unable to pay its debts; (ii) the company is dissolved or has ceased to carry on business or is only carrying its business for the purpose of winding up its affairs; or (iii) if the court is of opinion that it is just and equitable that the company should be wound up.

Furthermore, the relevant principles that are followed in this case/approaching a scenario like this, it is necessary that three core requirements to be fulfilled, them being: (i) sufficient connection with England and Wales; (ii) reasonable possibility, if a winding-up order is made, of benefit to those applying for a winding up order; and (iii) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.]

5

**Marks awarded 10.5 out of 15
TOTAL MARKS 32.5/50**

*** End of Assessment ***