



**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 English Bankruptcy Act 1542 introduced the concept of a body of commissioners who could take action against a debtor. It introduced the principles of collective participation by creditors and *pari passu* distribution of available assets which are in modern insolvency law.

The 1570 Act allowed for creditors to petition to the Lord Chancellor to convene a bankruptcy meeting and the introduction of bankruptcy commissioners to supervise the process. **How has this shaped modern insolvency law thinking?**

The Statute of Ann 1705 introduced the notion of statutory discharge, which is has remained in modern bankruptcy and insolvency law. **It would be beneficial to elaborate regarding modern 'fresh start' concepts**

The 1883 Act introduced to deal with bankruptcy matters required adequate supervision through the appointment of an Official Receiver, including the independent examination of debtor's conduct and circumstances leading to the insolvency.

The above 3 significant developments then applied to debt collection produces in English shaped the modern insolvency law. **Further elaboration is warranted**

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 as a measure to deal with the negative economic fall-out from the pandemic. Insolvency and insolvency-related measures introduced were as follows:

1. The suspensions of wrongful trading provisions of the Insolvency Act meaning that Directors' personal liability attached to insolvent companies that continues to trade may be relaxed
2. Temporary prohibition of the winding-up petitions **Elaboration is warranted.**
3. The introduction of the UK Restructuring Plan modelled on the UK Scheme of Arrangement but with certain changes to make it more efficient. For example, it introduced the notion of a cross-class cram down that will bind all creditors

3

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.

States may become signatories to certain public international treaties and conventions and thereby bind themselves to such laws which will then affect their domestic laws accordingly. For example, Malaysia is a signatory to the Cape Town Convention and therefore insolvency proceedings initiated in Malaysia or in other signatory countries would consider and adopt the bindings terms which are enforceable in court. **It would be beneficial to raise this as 'hard law'**

On the other hand "soft law" means multilateral organisations such as the United Nations or the World Bank work to establish and promote non-prescription practice guides, model law or draft legislations for members States to adopt. This may be taken with or without modifications. An example of a "soft law" is the UNICTRAL's Model Law on Cross-Border Insolvency (MLCBI). **It would be beneficial to discuss the success of the MLCBI and the success of soft vs hard law**

A key principle of soft law such as MLCBI is co-operation and co-ordination. This enables courts and practitioners in various States to communicate, co-operate and co-ordinate as much as possible with the intention of ensuring an insolvent debtor's estate is administered fairly and creditor's rights are protected.

3

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.

There is no unified or unified piece of bankruptcy or insolvency legislation covering all aspects in Malaysia. This contrasts with the US Bankruptcy Code of 1978. In Malaysia, corporate insolvencies are governed under Companies Act 2016 whilst individual insolvencies or bankruptcies are governed under Insolvency Act 1967.

Malaysia follows English common law. General laws governing the rules that property ownership rights, security law etc are dealt outside of the insolvency legislations but are important to be considered during insolvency proceedings.

Malaysia has not adopted UNICTRAL's Model Law on Cross-Border Insolvency.

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider Malaysia, 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. You have discussed legislation, common law and general law but there is scope to elaborate further on these sources and how they interact across different states.

3.5

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 3 questions posed by Fletcher are:

1. In which jurisdictions may insolvency proceedings be opened?
2. What country's law should be applied in respect of different aspect of the case?
3. What international effects will be accorded to proceedings conducted at a particular forum, including the issues of enforcement?

The jurisdiction that would apply would require an examination of the connection with the jurisdiction of the parties or the dispute. Today, companies have strong international presence and operations in many States. As such during the case of a local insolvency proceedings, foreign elements may be required to be examined such as assets in another State. The key consideration is whether the local court can and be willing to hear and determine the matter for the benefits of all parties.

Where the local court has decided to hear the matter related to foreign elements, the choice of law to be applied will then have to be considered. Typically, in common law systems, the law of the forum will apply unless there is an objection. However, this is not necessarily the case in civil law systems where choice of law is presumed to be questioned regardless of whether it is pleaded by the parties or not.

The question of recognition and enforcement is important, in particular how foreign judgements would be considered and applied by the local courts.

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.

A prominent case law example is the Maxwell Communications Corporations Plc cross-border insolvency case in 1991. In this case, concurrent insolvency proceedings were initiated in the United States (under Chapter 11) and in the United Kingdom (under administration).

Each jurisdiction had its own insolvency representative, and each charged with the same responsibility. The judges in both the United States and the United Kingdom proposed that an insolvency agreement i.e., an "Order and Protocol" in order to resolve conflicts and facilitate the exchange of information. The purpose was to maximise value of the estate and harmonising the proceedings to minimise expense, waste and jurisdictional conflict.

The parties agreed that United States courts would defer to the English proceedings, following certain criteria. English insolvency representatives would be allowed to do the following but requiring the consent of their United States counterpart for the following:

1. To select new and independent directors
2. File debt or reorganisations plans
3. Undertake major transactions on behalf of their debtor

The above case law example illustrates the co-ordination between jurisdictions on insolvency proceedings that pre-dates the Model Law.

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.

4

Marks awarded 11 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) assists to coordinate proceedings inside of the European Union. Yes, EIR Recast would apply. UK was part of the European Union when the proceedings were opened. Here, it would allocate UK to be the primary jurisdiction based on UK being the centre of main interest ("COMI").

Rydell has operations in other members states of the European Union and therefore, the EIR Recast may allow for the possibility of Fernz to initiate insolvency proceedings as a secondary proceeding.

It is important to note that article 7.1 of the EIR Recast states that the applicable law for insolvency proceedings shall be that of the "State of the opening of the proceedings". As such, UK law will apply to the insolvency proceeding in the UK and the law of the European Union state will apply to the secondary proceeding.

EIR Recast may assist to provide for an electronic register and standard forms for proof of debt, if relevant and other co-ordination and co-operations, as required.

However, to fully consider this question, it is important to know the following information:

1. The list of all countries for which Rydell has operations in for purposes of determining “establishment” as defined by EIR Recast
2. Whether the minor creditor also has operations in the European Union
3. When Fernz would likely initiate proceedings

Elaboration is warranted regarding ‘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.

EIR Recast would not apply to the UK from 11pm on 31 December 2020 following Brexit.

The timing as to when the Fernz initiative proceedings may be relevant, particularly if this was before 31 December 2020 and had brought Rydell’s operations in UK into play as part of its insolvency proceeding.

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.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 3 marks.

1.5

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?

Since insolvency proceedings were opened in the UK on 18 June 2021, EIR Recast would not apply however the Insolvency Act 1986 would allow for court-ordered insolvency proceedings on unregistered companies to proceed in the UK based on the following circumstances:

1. Debtor company is dissolved or has ceased to carry on business
2. Debtor company is unable to pay debts
3. Just and equitable grounds for insolvency proceedings to commence **What section is relevant? Matters of ‘sufficient connection’ should also be considered.**

Since Rydell is unable to pay debt, the Insolvency Act 1986 would be relevant here.

Furthermore, the following questions are relevant to be considered by the UK Courts:

1. In which jurisdictions may insolvency proceedings be opened?
2. What country’s law should be applied in respect of different aspect of the case?
3. What international effects will be accorded to proceedings conducted at a particular forum, including the issues of enforcement?

The Insolvency Act 1986 allows for a UK court to have jurisdiction to wind-up Rydell, even though it is formed in another State and has not complied with the requirements to register in the UK since it has carried out business in the UK.

The Insolvency Act 1986 allows for a UK court to recognise winding-up proceedings for Rydell. It may also refuse to grant a local winding-up order and instead give effect to the foreign proceedings by recognising the authority of the foreign liquidator. This may apply if Fernz or any other creditor outside the UK have commenced proceedings.

English law would typically apply however foreign law may be relevant to aspects of the administration of the winding-up or where required as reference. Where the UK court is acting under the aid and assistance statutory provisions in the Insolvency Act 1986 to recognise and cooperate with a foreign insolvency proceeding, then it may apply either the English law or the foreign law.

2.5

Marks awarded 10 out of 15

TOTAL MARKS 39/50

*** End of Assessment ***