



**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 of 1542 provided for a form of compulsory sequestration for a dishonest and absconding debtor, as well as providing for a body of commissioners who could proceed against a delinquent debtor on the petition of his creditors. Distribution of the debtor's assets was to be equal among creditors. It therefore contained collective participation by creditors and a *pari passu* distribution among them. **It would be beneficial to elaborate on how this shaped modern insolvency law.**

The 1570 Act of Elizabeth was the first statute designed as a bankruptcy law, rather than for the effective purpose of fraud prevention. This act allowed creditors to petition the Lord Chancellor to convene a bankruptcy meeting, which could appoint commissioners. The commissioners could examine the debtor's transactions and property, and the debtor was obligated to transfer his or her property to the commissioners. **It would be beneficial to elaborate on how this shaped modern insolvency law.**

The Statute of Ann of 1705 introduced the notion of a statutory discharge. Although it was not an automatic entitlement and required the approval of the commissioners, it was an important development. **Why was it an important development? It would be beneficial to elaborate upon modern thinking of 'fresh start'.**

The question asked you to indicate significant developments, rather than legislations per se. You needed to identify the developments that shaped the way of thinking with respect to modern insolvency law and explain how they did so.

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 UK Government passed the Corporate Insolvency and Governance Act 2020. This contained new, permanent changes to corporate insolvency, as well as temporary measures explicitly introduced as a direct response to the pandemic (and intended to lapse upon cessation of the pandemic). These included a measure preventing creditors from presenting a winding-up petition unless they have reasonable grounds for believing that either coronavirus has not had a financial effect on the debtor company, or that the company was unable to pay its debts regardless of the financial effect of coronavirus.

The Act also included a temporary suspension of wrongful trading rules, directing courts to presume that the director is not responsible for any worsening of the financial position of a company or its creditors during the period 1 March 2020 to 30 September 2020, and during the period from 26 November 2020 to 30 June 2021.

As a permanent measure, the Act also introduced a free-standing moratorium to help rescue distressed but viable companies. This is aimed at allowing companies some breathing space from creditor action to pursue a turnaround plan without adding significant costs, and is focused on the recovery of the company rather than realisation of assets. The moratorium

lasts 20 business days, with a further extension of 20 business days available without consent. The directors of the company remain in control, albeit under the supervision of an insolvency practitioner. Certain debts, largely those incurred during the course of the moratorium, are given priority status if an insolvency process which follows within 12 weeks of the end of the moratorium.

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.

Treaties are international agreements and conventions to which States become signatories, thereby binding themselves and potentially affecting their domestic law accordingly. In Europe, these conventions began appearing from the 13th and 14th centuries but did not historically achieve much success. The European Union has achieved more success through the European Insolvency Regulation 2000, which (in its amended and recast form) continues to bind EU member states. In theory, treaties would take the form of an international agreement on the aspects of insolvency law with which they are concerned; signatories would then be obligated to make the necessary changes to their domestic law.

“Soft law” refers to the work of multilateral organisations which attempt to influence the approach of states, rather than explicitly binding them like treaties. The most successful example is the UNCITRAL Model Law on Cross-Border Insolvency. This model law (never presented as a binding requirement, rather as a recommendation) has been adopted by a wide variety of states, with a broad spread of economic sizes and geographical locations. This model works through persuasion, convincing states to adopt the new law, rather than obligation. States are not bound to implement it.

4

Marks awarded 9 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 main source of insolvency law in any given state is likely to be legislation or a civil code. In common law systems, this will often be supported by common law principles which work to plug any gaps.

Some states will codify all their insolvency provisions within a single, unified piece of legislation – such as the Bankruptcy Code 1978 in the USA. In other states, there a number of different statutes which must be considered. For example, in the UK personal bankruptcy and corporate insolvency are handled by separate statutes. This is compounded, in the UK, by the involvement of multiple jurisdictions – for example, personal bankruptcy in Scotland is governed by specific Scottish legislation, while corporate insolvency is governed by Scottish-specific sections of broader UK legislation. As a common law state, in the UK court decisions are used to guide interpretation of the legislation.

Separately to these specific sources of insolvency law, general legal principles will also apply. For example, law relating to the vesting of real rights such as ownership, or rights in security. These can affect how aspects of insolvency law are implemented. For example, a trustee in a bankruptcy may require to comply with laws relating to ownership of property in order to establish title to an asset so that it may be sold to benefit creditors.

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 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)?

These questions represent an attempt to bring together the “cross-border” and “insolvency” elements when considering cross-border insolvencies. These questions identify the problems which can exist in cross-border insolvencies, by drawing attention to the fact that:

- (1) Insolvency proceedings may be opened concurrently in more than one state;
- (2) Each state would apply its own laws; and
- (3) Little or no extraterritorial effect would be afforded to any foreign proceedings.

In short, by examining the possible answers to these pertinent questions, we alight upon the reasons why harmonisation is important. It is clear that, in the circumstances above, cross-border insolvency proceedings would be difficult to manage. Increased harmonisation would ensure that cross-border insolvency proceedings do not result in multiple states pursuing wildly different approaches to insolvency.

There is scope to elaborate, for example in discussing choice of law issues.

4.5

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 celebrated case of Maxwell Communication Corporation which involved two primary insolvency proceedings, both initiated by a single debtor – one in the USA and one in the UK – each with its own insolvency practitioner. This case involved two concurrent principal insolvency proceedings, one in the USA (a chapter 11 bankruptcy) and one in England (administration). These proceedings were coordinated through a protocol which was approved by the respective courts. Generally, it was agreed that the aims were to maximise the value of the estate and to harmonise proceedings so as to minimise expense, waste and jurisdictional conflict. It was agreed that, generally, the US court would defer to the English proceedings,

subject to certain specific criteria (such as the fact the English insolvency practitioners could only incur further debt with the consent of their US counterparts or the US court).

The case is significant because the parties voluntarily, with the encouragement of their courts, created a workable structure to coordinate a complex international insolvency. This approach has been influential and is approved in the UNCITRAL Model Law on Cross-Border Insolvency. **It would be beneficial to elaborate further on the outcome of the case.**

4

Marks awarded 13.5 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.

At the time the insolvency proceedings were raised in the UK, the UK was subject to the EIR (Recast) as the transitional period following its departure from the EU had not expired. As such, the EIR (recast) would apply.

Article 3.2 of the EIR (Recast) states that, where the debtor's COMI is located in a Member State (which, for the purposes of this question, it is), "the courts of another member state shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State." "Establishment" is defined, broadly, as a place of operations for non-transitory economic activity. We would therefore need to know whether Rydell had an establishment in the Member State in which Fernz wished to raise proceedings.

On the assumption that Fernz could raise proceedings in its chosen jurisdiction, these would be secondary insolvency proceedings (Article 3.3, EIR (Recast)). The effects of those proceedings would be restricted to any assets of Rydell's which are located within that jurisdiction (Art. 34, EIR (Recast)). The Insolvency Practitioner appointed in relation to the main proceedings in the UK would have the right to be heard on the question of whether to open the secondary proceedings (Art. 38.1 EIR (Recast)).

7

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.

If the UK proceedings were opened in 2021, the transitional period following the UK's departure from the EU would have expired. As such, the EIR (Recast) would no longer apply to the proceedings raised in the UK. The ability of a UK liquidator to ingather the company's assets would depend on whether the UK insolvency proceedings are recognised in other states.

The EIR (Recast) would, however, apply to Fernz's proposed action, as this continues to be raised within the EU. However, as the COMI is not located within a Member State, there is no requirement that Rydell have an establishment in the Member State in which Fernz seeks to open secondary proceedings.

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.

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?

Section 221 of the Insolvency Act 1986 allows for "unregistered companies" to be wound up under the jurisdiction of the courts of the various parts of the United Kingdom; this includes companies created under foreign law and not registered within the UK (s220, Insolvency Act 1986).

Elaboration regarding s221(5) is warranted.

It would be important to consider whether there was a "sufficient connection" with the relevant part of the UK (such as Scotland, Northern Ireland or England and Wales). This might involve, for example, identifying assets within the relevant part. There must also be a reasonable possibility of the creditor benefitting from the winding-up order, and at least one of the persons interested in the distribution of the company's assets must be a person over whom the court can exercise jurisdiction.

Finally, choice of law provisions would need to be considered. The applicable law for most of the procedure would be that of the relevant part of the UK, but it may be that foreign law requires to be taken into consideration – for example, when determining whether a debt is valid.

2.5

**Marks awarded 11 out of 15
TOTAL MARKS 43.5/50**

*** End of Assessment ***