



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**.

Commented [DB1]: Please READ and FOLLOW the instructions!
If you don't, I have to do it for you!

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 Statute of Marlbridge of 1267 was introduced which provided for imprisonment for debt.
- Imprisonment for the non-payment of debt was then abolished in 1869 by the Debtors Act.
- The English Bankruptcy Act of 1542 provided for the appointment of a body of commissioners who could, *inter alia*, proceed against a trading debtor who fled from the country or neglected to pay his debts.
- **It would be beneficial to elaborate and clearly state how this 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.

- New moratorium rules were introduced
- There was a suspension of winding-up petitions and statutory demands
- There was relaxation of wrongful trading liability
- **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 instruments that provide for agreements between different States in relation to the treatment of cross-border insolvency matters where there may otherwise be conflicting legislation between the differing jurisdictions. Treaties may be a useful instrument in determining procedures for dealing with specific aspects of cross-border insolvency cases, such as the treatment of certain assets. **It would be beneficial to discuss why this is called 'hard law'**
- A "soft law" is a form of quasi-legal instrument or policy which is not legally binding which could be referred to as 'guidelines'. An example of such would be the Model Law on Cross-Border Insolvency (MLCBI) developed by UNCITRAL in the mid-1990s, which UNCITRAL recommended to member States to adopt; so, although member States were governed by their own legislation, they could follow similar guidelines, the MLCBI provides guidelines to allow a synergistic approach to cross-border insolvency matters between member States.

3.5

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.

A State may have multiple sources from which to draw its insolvency laws, such as in UK insolvency law, there is both the Insolvency Act 1986 (the “Act”) and the Insolvency Rules 2016 (the “Rules”).

In this instance, both the Act and the Rules are examples of unified insolvency legislation as they each combine the necessary laws and rules for corporate and personal insolvency and they detail the legislation to follow for the treatment of both insolvent individuals and insolvent entities. Both of these sources of legislation should be reviewed simultaneously and should be implemented together in order to achieve the desired and effective outcome in UK-based insolvency proceedings.

In more recent times, the UK also passed the Corporate Insolvency and Governance Act 2020 (“CIGA”) which has brought about reforms to the UK’s insolvency law. Whilst there would be conflicts between CIGA and certain sections of the Act and the Rules, CIGA would be expected to supersede in this instance as it was introduced in order to address and help UK-based individuals and entities overcome the modern day effects which have stemmed from the COVID-19 pandemic.

Your answer could have instead been structured to discuss the sources of law across all States and to recognise how and why there may be differences between certain States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation depending upon the different States, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

1.5

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 three pertinent questions asked by Fletcher are as follows:

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 proceeding conducted at a particular forum (including issues of enforcement)?*

These questions asked by Fletcher give rise to issues in relation to harmonisation between different countries or states as, although this would likely be the desirable outcome, it is not easily achievable. With so many countries having such different legal systems, the differing laws of each country provide the root problem in trying to achieve harmony when approaching a cross-border insolvency matter. These issues are addressed in the three questions above as, when a cross-border insolvency case arises, Fletcher acknowledges the difficulty in determining which country should be the primary jurisdiction for the insolvency proceedings and whose laws should be applied. It could be argued that the determination of such would be dependent upon specific factors, such as the debtor’s centre of main interest or country of residence; however, dependent on the countries involved, conflicts may arise in establishing and affirming the outcome of these matters.

There is also the concern that insolvency proceedings could be opened concurrently in multiple countries, with each country applying its own laws. If this situation were to arise, this could result in conflicting laws and regulations, and so would require cooperation between the multiple countries involved in order to achieve a seamless process, but this would be dependent on each country's recognition and treatment of proceedings in foreign jurisdictions. Concurrent proceedings in different jurisdictions would likely result in increased costs being borne by the insolvent estate.

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.

Case: Re Maxwell Communications Corporation Plc

The Model Law on Cross-Border Insolvency ("MLCBI") was introduced in 1997.

The example case above preceded the introduction of the MLCBI. This matter involved two primary insolvency proceedings, which were initiated by a single debtor. One set of proceedings took place in the USA and the other proceedings took place in the UK. The separate proceedings resulted in the appointment of two different and independent insolvency representatives in the two States with each bearing similar responsibilities.

In the case of Re Maxwell Communications Corporation Plc, the courts in the USA and the UK cooperated with each other and ruled that an insolvency agreement, or protocol, between the two separate insolvency proceedings could be reached to resolve potential conflicts, as well as to facilitate the sharing of information and achieve a working arrangement.

Pursuant to the protocol put in place in this case, the insolvency representatives were set the following goals:

- Maximizing the estate's value; and
- Harmonization of proceedings to minimize the costs borne by the estate.

The relevant parties cooperated and applied to their respective courts. It was then agreed that the UK proceedings would take precedent and the USA court would defer to the UK proceedings; however, this was subject to certain criteria being put in place so that the proceedings could be undertaken in a just manner and each insolvency representative could fulfil their duties and obligations as required. Some of the criteria in question included, *inter alia*, that the UK representatives could only file a reorganization plan with the consent of the USA representatives or the USA court, and that the USA representatives should be given prior notice before authorizing transactions of a particular size.

The insolvency representatives essentially cooperated with each other and, through the courts, structured an effective working plan to carry out and coordinate a complex, cross-border insolvency matter.

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**") relates to a multilateral arrangement in the European Union involving Council Regulation on insolvency proceedings. The EIR Recast was passed by the European Union in 2000, and was then modified and adopted in 2015.

The EIR Recast allocates jurisdictional competence to the courts of a member state within which a debtor's centre of main interest ("**COMI**") is situated.

Rydell's COMI is confirmed to be in the UK and the insolvency proceedings were commenced against Rydell on 18 June 2020. As at this date, the UK was still a member state under the EIR Recast. The EIR Recast would, therefore, be expected to allocate primary jurisdictional competence to the UK courts for overseeing the insolvency proceedings of Rydell.

It is noted that Fernz, a firm based in a different European country, may seek to open separate insolvency proceedings against Rydell in another country in the European Union. If Fernz follows through with this, Fernz could be granted secondary proceedings pursuant to the terms of the EIR Recast. **Matters pertaining to 'establishment' requirements should be elaborated upon**

If Fernz were to obtain secondary proceedings, it should be considered by the duly appointed UK-based insolvency representative, as well as the UK courts, in which jurisdiction the secondary proceedings are to be granted. This would assist in understanding which insolvency legislation the secondary proceedings would be governed by and in determining the likelihood of any cooperation between the courts in that country and the UK courts. Should secondary proceedings be obtained in another country, an arrangement or protocol should be established between the respective insolvency representatives of Rydell and, similarly in the

case of *Re Maxwell Communications Corporation Plc*, they should seek for this to be ratified by the courts in both countries.

The appointed insolvency representative should also investigate the affairs of Rydell to consider in which other countries or jurisdictions Rydell has establishments and in which European countries Rydell's other creditors are based. This is to determine the potential or likelihood of further subsidiary proceedings being granted in other member states pursuant to the EIR Recast. If further subsidiary proceedings were to be granted, this would require further arrangements to be established and ratified by the necessary courts to ensure an efficient coordination of Rydell's insolvency process. The involvement of other insolvency representatives from different countries or jurisdictions would likely result in increased costs to Rydell's estate, which the appointed insolvency representative should be mindful of and should seek to minimise.

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.

The UK ceased to be a member of the EU at 11:00pm on 31 January 2020 and the EIR Recast no longer applies to proceedings in the UK following 11:00pm on 31 December 2020.

If the insolvency proceedings were opened in the UK on 18 June 2021, the EIR Recast would no longer apply. The proceedings would be governed by the laws of the UK jurisdiction; however, it should be considered in which other countries Rydell has an establishment to consider if there would be competing interests from foreign jurisdictions. The appointed UK insolvency representative of Rydell would need to consider the ability for cooperation between the courts of the UK and the other European jurisdictions in which Rydell has an establishment. **There is scope to elaborate regarding MLCBI and further information that would be beneficial.**

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?

Pursuant to Section 221 of the UK Insolvency Act 1986 (the "Act"), an unregistered company may be wound up by the UK Courts, but only if that company is deemed to be registered in England and Wales, if its principal place of business is situated in England and Wales, and the principal place of business is deemed to be the registered office of the company.

An unregistered company may only be wound up in the UK if certain criteria is met, pursuant to Section 221(5) of the Act. **It would be beneficial to elaborate and explain the criteria.**

If the insolvency proceedings of Rydell were opened in the UK on 18 June 2021, the UK would not be subject to the EIR Recast. The UK Courts would have their own governance on the matter and could make any ruling as the Court sees fit. The UK Courts could do so without consideration of the Courts in other jurisdictions in which Rydell's establishment(s) or creditors are based.

If a minor creditor is commencing insolvency proceedings against Rydell in the UK, that creditor should refer to Sections 222 to 224 of the Act, which sets out the grounds on which Rydell would be deemed unable to pay its debts. For instance, the debt owed to the minor creditor must be a sum exceeding at least £750 and the minor creditor must have served a statutory demand at Rydell's principal place of business or on a relevant representative of Rydell, as listed under Section 222(1)(a).

When administering the insolvency proceedings, the appointed UK insolvency representative of Rydell should take into consideration the application of some foreign laws. For example, in the instance of Rydell, we are aware that there are some creditors based in other European jurisdictions. When the Rydell insolvency representative requests proofs of debt to be lodged by each creditor, they are authorised to accept such proofs, even if the related liabilities are governed by foreign law. If Rydell's insolvency representative is in doubt of administering aspects of the insolvency proceedings, they should apply to the UK Court for directions.

Matters pertaining to 'sufficient connection' requirements should be considered as well

3.5

Marks awarded 11.5 out of 15
TOTAL MARKS 40/50

*** End of Assessment ***