



**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.

Significant historical developments that led to the three Acts:

- The 1570 Act was the first bankruptcy statute introduced in the United Kingdom. This was significant for English law and the development of debt collection procedures as it was the first statute of its kind that dealt specifically with bankruptcy and not solely on fraud. Prior to this Act, there were no formal insolvency laws in place in England. This was a development that helped form the basis of modern insolvency law in England. This Act also shaped the law insolvency proceedings were carried out in that upon a creditor petitioning for an entity to be wound up, the case was brought before the Lord Chancellor who was an officer of the Courts. Previously it was the creditors who established a bankruptcy commissioner who oversaw the process
- A significant development in England that affected debt collection procedures was The Statute of Ann of 1705. This was the first Act that made reference to the idea of statutory discharge. A creditor could no longer pursue an entity if formal insolvency proceedings took place that established there was no instance of fraud and the entity/individual had co-operated fully during the proceedings. Once a commission adjudicated that a debtor had “conformed” a creditor had no legal basis to continue to pursue a claim once complete which is now a concept that forms part of modern insolvency law in the country
- A significant historical development that took place is Joseph Chamberlain's introduction of The 1883 Act. With specific reference to debt collection procedures, Chamberlain's first principle as part of the Act stated that the assets of an estate or individual entered into insolvency proceedings were owned by the creditor. They should have full control with the smallest amount of interference as possible. This gave the creditors the right to pursue any assets owned by a debtor which was backed by law. This principle formed the basis of modern insolvency law which is practiced today **There is scope for further elaboration.**
- The 1869 Debtors Act was abolished which meant that imprisonment was no longer a prerequisite for the non-payment of debt **It would be beneficial to elaborate upon how this shaped modern insolvency thinking regarding non-criminalisation of insolvents**

2.5

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 fallout of this pandemic. Briefly indicate three insolvency and insolvency-related measures so introduced in the UK.

The British government, as a result of the spread of the Covid-19 pandemic, and the subsequent the strain it placed on the profitability of local business, passed the Corporate Insolvency and Governance Act 2020. The provisions contained therein included:

- a new restructuring plan: The U.K. introduced temporary measures that helped small business with financial aid provided retrospectively from March 2020 going forward in an effect to curb the spread of corporate insolvency as a direct result of the pandemic
- new moratorium rules – the length of an entity placed under a moratorium was increased indefinitely who were affected as a direct result of the pandemic
- The U.K. government passed regulations to temporarily suspended wrongful trading liability to assist in helping businesses trade out of the difficulties caused by the pandemic
- The U.K. government placed a temporary suspension of winding-up petitions until such time as a business reason can be established as to the reason for entities no longer being able to continue to trade that was not as a direct result of the pandemic
- Billions of pounds have also been spent in cash injections to prop businesses up, particularly in industries directly affected as a result of the pandemic such as the hospitality industry
- The UK government also introduced furlough payments to employees who lost their jobs as a result of the pandemic

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.

The Concept of treaty is a binding agreement between a number of states in order to uniform law which will enables jurisdictions to co-operate in a more efficient manner when faced with a multijurisdictional issue. They also have a knock on effect with respect to a state’s domestic law, if binding, to adopt the laws of a treaty within their own jurisdiction.

The concept of soft law refers to law, not necessarily legally binding, but often forms the basis to a school of thought that may assist in ratifying hard law in the future. It provides a best practice form of law, often drafted by multinational organisations with input from a number of points of view. This is particularly evident when analysing the work of UNCITRAL and their 2004 published legislative guide on Insolvency Law.

Soft law may be used to establish cross-border insolvency rules in a number of ways such as:

- Providing a best-practice mechanism for implementing cross-border insolvency law, particularly in developing countries where updates to modern insolvency law have been lacking. By making reference to soft law drafted by organisations such as UNCITRAL, countries are adopting more common approach to cross-border insolvency law, as seen in a number of regions like the EU (European Insolvency Regulation 2000).

- Treaties have been used to establish cross-border insolvency laws by ratifying domestic law in a number of regions to ensure the co-operation of states in multijurisdictional issues as seen in the ratified Nordic Convention 1933.
- **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.**

3.5

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 sources of formal insolvency law in America begin with the review commission of 1973. In this particular jurisdiction there are state and federal laws. This was the first attempt to constitute insolvency legislation on a federal basis whereas previously laws in relation to same would have differed state by state by state. The Commission formed the source of the Bankruptcy code which was introduced in 1978.

The sources of information used relating to insolvency in America would have been derived from England being a formal colony of the state. English civil law formed the basis of bankruptcy law in America which can be seen in many other countries around the world like India, Australia and a number of former colonies in Africa. The basic principles of insolvency are not dissimilar in most former colonies of England it was this civil law that formed the basis of law-making in each of the states.

From a multijurisdictional point of view, it is easier to deal with a case that has proceedings involved in states that are former colonies of England. There is a smaller bridge to gap when attempting to understand insolvency that has been based on the principles as your own jurisdiction.

A number of states, when formulating their own insolvency laws are often directed from citing UNCITRAL doctrine. Particularly in developing nations where there hasn't been much legislation in the past, citing model law from UNCITRAL often forms the basis for much of what is put in place. Again, with reference to developing nation states, it is easier for liquidators that have a case with proceedings in jurisdictions that have adopted laws from the same source being the UNCITRAL Model Law on Secured transactions.

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider the US, 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.

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, 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 first question Fletcher raises relating to the jurisdiction that proceedings may be opened can be answered by looking at two possible options i) the territorial method of thought whereby multiple proceedings are taken out in separate jurisdictions and run concurrently based on each of the states insolvency laws and practices ii) the universalism method of thought whereby the laws and practices of one state are used for one proceeding for cases taken out in multiple jurisdictions. Both methods have their own detractors and it is popular opinion amongst professionals that a hybrid of the two ways of thinking should be adopted to form the best possible way of carrying out a multi-jurisdictional liquidation.

The second question raised by Fletcher relates to what country’s law should be applied with respect to different aspects of a case.

Where the majority of the debtors trade was carried out should govern the law that’s applied to the insolvency proceedings. When attempting to retrieve assets into back to the estate for the benefit of the creditors, the law that needs to be applied for these proceedings in asset retrieval is the law of where the assets are located.

The third question raised by Fletcher relates to the international effects accorded to proceedings conducted at a particular forum.

International effects resulting from a case being conducted in multiple jurisdictions is that there are insolvency laws that can’t be translated easily when comparing to different states. For example, in the U.S. when looking at Chapter 11 of the bankruptcy code, there is no law in the U.K. that deals with the same provisions therein.

In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State? 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 perfect example of this is the Maxwell Communications Corporations case in 1991. Insolvency proceedings were brought by a single debtor both in the U.K. and United Kingdom. An agreement was made between the Courts in both jurisdictions so that during concurrent proceedings they would work together to resolve matters and exchange information relating to the case for both their benefit.

This was evident in looking at the U.K. being permitted to appoint new directors in order to keep the entity trading but only with the permission of the U.S. administrators. It illustrated that agreements were beneficial when dealing with complex cross border cases.

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.

3.5

Marks awarded 8 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.

Generally the EIR Guidelines state that a creditor, if in the E.U. should commence insolvency proceedings in the centre of the debtors main interest. Fernz should commence proceedings in the U.K. as that is where Rydell is based.

There are a couple other points to consider though which is not referenced above. The EIR Guidelines do allow for secondary proceedings to be taken out against a company in a different jurisdiction if they have a subsidiary and can demonstrate they carry out non transitory economic activity using human means and assets. Fernz should consider. If Rydell has a subsidiary in another country or they carry out work on regular basis in a different jurisdiction Fernz can commence proceedings in that jurisdiction. If not, they must commence proceedings in the U.K.

To improve your responses, ensure they are commensurate with the mark allocation – the question is for 7 marks. Matters pertaining to the applicability of the EIR Recast should be discussed and elaboration is warranted, for example with respect to establishment.

4

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.

From 31 December 2020, the EIR guidelines no longer applied to the U.K. as they left the EU. On 18 June 2020 these guidelines would have been used as a reference for determining where to commence insolvency proceedings against Rydell. They are no longer relevant to Rydell from 2021 with national laws in the U.K. forming the basis for how Fernz needs to commence proceedings.

It would be beneficial to elaborate upon further information that might be useful and relevant, perhaps the MLCBI and other local laws.

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?

Determining what jurisdiction should be selected for commencing proceedings for unregistered Companies in the U.K. are dictated by Section 221 Insolvency Act 1986. Fernz would have the power to wind up Rydell in the U.K. under three circumstances i) if the company is dissolved and only carrying out business to wind up its affairs, ii) if they are unable to pay their debts or iii) the courts decide that it is just and equitable that the company should be wound up

Elaboration is warranted, for example with respect to ‘sufficient connection’ requirements.

3.5

**Marks awarded 9 out of 15
TOTAL MARKS 36/50**

*** End of Assessment ***