



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!

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 third steps in the development of the debt collection procedures is the Insolvent Debtors Act 1813 which permitted to create more structure in the debt collection procedure by introducing the office of the Official Receiver. This represents a big step since the procedure was supervised and the debtor was more protected. **It would be beneficial to elaborate upon how this shaped modern insolvency law thinking. The question required discussion of 3 separate developments.**

1

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.

Following the Covid-19 Pandemic, several countries have taken measures to support companies in financial difficulties and prevent by the same the insolvency thereof. The Corporate Insolvency and Governance Act 2020 passed in the UK contains legal measures such as: (i) the introduction of a new restructuring procedure, (ii) moratorium to permit companies to restructure or improve their financial situation, (iii) the restriction of statutory demands and winding up petitions and suspension 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.

Contrary to treaties such as the European Insolvency Regulation (EU) 2015/848 and the Nordic Convention (1993), soft law instruments such as the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL Legislative Guide on Insolvency Law, the World Bank's Principles for Effective Insolvency and Creditor / Debtor Regimes, the UNCITRAL Legislative Guide on Insolvency and the American Law (ALI) Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2001), are not binding.

Notwithstanding, these non-binding legal instruments are of particular importance in cross-border insolvency proceedings due to the fact that courts, insolvency representatives and other parties involved in cross-border insolvency proceedings may use these non-binding instruments to fill the gaps to be found in local insolvency regulations. The JIN Guidelines which main objective is to set rules for the communication and co-operation between all parties of the insolvency proceedings, are of importance, since they complement the applicable insolvency law which lacks any disposition on this matter.

Further, it shall be noted that the constant use of non-binding instruments may influence future changes of the local regulations. It may also normalize their use in cross-border insolvency proceedings and in fine eventually lead to their transposition into the local insolvency law.

It would be beneficial to elaborate upon the nature of treaties and the nature of 'soft law'

2

Marks awarded 5 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.

In the 17th century, the French bankruptcy law was based on the Ordonnance of 1673, supplemented by several royal declarations. The 1807 Code de Commerce amended this legal source and tried to reflect the economic changes within the French society at that time.

In 1839, further changes have been made in the French bankruptcy law. These changes foresee among others that (i) non-compulsory imprisonment if the debtor has among others filed his balance sheets with the court; (ii) the insolvency receiver is no longer appointed by the creditors, but by the court.

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

Fletcher asks questions related to the followings aspects:

- (i) choice of jurisdiction;
- (ii) choice of the applicable law; and
- (iii) the effect of the decision rendered by a national court.

The questions raised by Fletcher are relevant in cases whether (i) the debtor has assets are located in more than one State; (ii) foreign creditors are involved in the proceedings.

In such situation, it essential in the first step to determine which State is competent for the opening of the insolvency proceedings over the assets of the debtor. The doctrine makes the difference between the concept of universalism and territorialism. The universalism principle provides that only one court shall be competent for the opening of the insolvency proceedings and the laws of this State shall be applied during the proceeding. The principle of territorialism foresees that insolvency proceedings could be opened in each State where the assets of the debtor are located. Even though most of the practitioners prefer the universalism approach, most countries apply the modified universalism approach which is a mixed between the two principles. As an example, the EU Insolvency Regulation is the result of a modified universalism, since it is possible to file for the opening of a main proceedings in the Member State where the debtor has its centre of main interest and a secondary proceeding in another

Member State, where the debtor has an establishment.

Once it is determined which jurisdiction is competent for the insolvency proceedings, the question related to the applicable law still need to be answered. In the practice, the court opening the insolvency proceedings applies its local laws. No court would apply the laws of another jurisdiction. The idea of applying the laws of another jurisdiction is for instance excluded in the EU Insolvency Regulation.

The effects of the decisions of the insolvency court also need to be regulated in order to satisfy the creditors and to fulfil the purpose of the insolvency proceeding. Such dispositions have also been included in the EU Insolvency Regulation.

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.

The Maxwell case:

The case is about the debtor Maxwell Communication Corporation plc. (“Maxwell”). Insolvency proceedings were opened in England and in the United States over the assets of Maxwell. Each jurisdiction considered itself as competent for conducting insolvency proceedings against Maxwell. However, in order to ensure the coordination of the proceedings, the insolvency court of the United States appointed an examiner whose main task was to cooperate with the appointed British administrator. Both, the examiner and the administrator, have commonly released protocols. Those protocols concerned key aspects of the insolvency proceedings, such as a common plan for the restructuring which provides detailed information related to the single steps and mechanism. Due to their effective communication and cooperation, they could provide creditors with tailor-made solutions.

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.

Based on the information provided above, Rydell Co Ltd ("Rydell") conducts the administration of its business in the UK, which means that its centre of main interest is located in the UK.

The European Insolvency Regulation Recast foresees that the insolvency proceedings against a debtor can be opened before the courts of the Member State within the territory of which the COMI is situated. Such proceedings could be could successfully opened in the UK within the transitional period ending on 31 December 2020 following a petition of a minor creditor. As a consequence, the courts of the other Member States will recognize and enforce the decision of the UK insolvency court.

The insolvency proceedings opened in accordance with the European Insolvency Regulation Recast are based on the universalism principle. This means that the insolvency court, which is competent for the conduct of the main proceedings, is also in charge of the assets located in other Member States. Such assets fall in the scope of the regulation if they are qualified as "establishment". **Elaboration is warranted**

Under the assumption that Rydell also has assets in the form of establishments in other Member States, secondary insolvency proceedings could be opened in the concerned countries.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – the question is for 7 marks.

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.

The European Insolvency Regulation Recast does not longer apply to the UK since 31 December 2020. Thus, insolvency proceedings could now be opened in the UK and in the any other Member State where Rydell does have assets.

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

MLCBI and other local laws should be considered together with what further information might be relevant

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?

In case Rydell's COMI is not situated in the UK, but in another Member State where the European insolvency Regulation is applicable, this country would be competent for the opening of the insolvency proceedings over the assets of Rydell.

If at the same time insolvency proceedings were opened in the UK on 18 June 2021, the courts of both countries will need to co-operate and communicate in order to find an effective solution with regard to the administration of assets. The courts would need to consider the international best practice standards such as the UNCITRAL Legislative Guide on Insolvency. Prior to opening the insolvency proceedings before the UK courts, the court will first examine whether it is competent to do so based on the UK private international law.

It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

.5

Marks awarded 6 out of 15
TOTAL MARKS 29/50

*** End of Assessment ***