



**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 developments in English law in relation to debt collection procedures are significant as a number of common law States have followed these developments. These developments include:

- Under the Statute of Marlbridge of 1267, debtors who did not pay their debts could be imprisoned. This was only abolished in 1869 by the Debtors Act.
- **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**
- The Bankruptcy Act of 1542 introduced the principles of pari passu and the collective participation by creditors. If the debtor was deemed to be fraudulent, this would result in a compulsory administration and distribution of debtor assets to creditors on an equal basis.
- **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**
- The Statute of Ann of 1705 introduced the idea of a statutory discharge if the debtor met certain conditions. This principle is still seen today with the insolvency objective for individuals being to discharge their debts and many jurisdictions following a pro-debtor system. **It would be beneficial to elaborate regarding modern 'fresh start' thinkings.**

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.

Following the Covid-19 pandemic, the UK published the Corporate Insolvency and Governance Act 2020. This act includes permanent and temporary measures which have been introduced to ease the burden on companies and individuals during this pandemic. Some of the measures include:

- New moratorium rules: This will allow companies to delay payments of debts to creditors while they seek a rescue plan. No legal action can be taken against the company without court approval during this period.
- New restructuring plan: This will allow companies to propose a restructuring plan to creditors. The court must approve that the plan is fair & equitable and that the creditors involved would be no worse off than if the company entered an alternative insolvency procedure.
- Relaxation of wrongful trading liability: If the court deems that a director failed in their duty to minimize potential loss to creditors, the court can order the director to make such personal contribution to the company's assets as it thinks proper. This potential

personal liability has been suspended from 1 March 2020, until the later of (i) 30 June 2020 and (ii) one month after the CIGB has been enacted

3

Question 2.3 [maximum 4 marks]

Briefly explain the concept of treaties and “soft law” and indicate how these may be used to establish cross-border insolvency rules in States.

States have looked at ‘hard law’ and ‘soft law’ solutions to harmonize cross-border insolvency issues.

“Hard law’ solutions involve treaties which bind the signatories (States) and affects their domestic law. The European Union has passed a number of treaties addressing insolvency issues over the years. The Nordic Convention was established in 1933 between Norway, Denmark, Finland, Iceland, and Sweden. Under this treaty, a bankruptcy declared in one Nordic country is recognized in the other Nordic countries as automatically applying to the bankrupt’s property in those countries.

‘Soft law’ relates to multilateral organizations working on international insolvency law issues as opposed to States and governments. The United Nations Commission on International Trade Law (UNCITRAL) is an example of one of these organizations. Their 2004 Legislative Guide should be considered when countries are revising their own insolvency legislations.

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 8 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Briefly discuss the various possible different sources of insolvency laws in any State and how they may interact with each other.

The main sources of insolvency law are found in either legislation or common law. Multiple legislations can apply, for example the laws in relation to an insolvent individual versus those laws for an insolvent company.

Chosen state: USA

As the US is a federation, a single unified Bankruptcy Code of 1978 applies to all US States. This code includes important insolvency provisions such as chapter 7 (liquidation), chapter 11 (reorganization) and chapter 13 (rescheduling of debt). This code follows a pro-debtor system with regards to insolvency in which they seek a discharge for debtors. As the US is a pro-debtor system, the court and insolvency representatives will follow a liberal approach towards a discharge of the debtor’s debt. The insolvency representatives will have to perform a means test to determine whether the debtor may file for liquidation or a repayment plan.

Unlike other States which have general courts that deal with insolvency matters, the US has a specialized bankruptcy court to decide insolvency proceedings.

Dependent on which US State a debtor holds assets in, different rules and State jurisdictions apply. For example, the number of days to advertise the insolvent debtor may differ depending on which jurisdiction applies.

Treaties and multilateral organizations should also be considered when looking at sources of insolvency law. The US have adopted the UNCITRAL Model Law on Cross Border Insolvency which mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states.

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. It also requires recognition that they interact differently among different states. You need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations), common law where it applies, general non-insolvency laws etc

2

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 harmonization of domestic insolvency law has been a top priority in recent decades. Political pressure, foreign investor pressure and the multiple insolvency bodies have pushed towards increased harmonization of insolvency law. Fletcher raises the following issues when looking at cross-border insolvency:

- Choice of forum to exercise jurisdiction: If a debtor has multiple assets in different States, the practitioner will have to research to confirm which jurisdiction the asset falls under. Depending on the jurisdiction, the system could be pro-debtor or pro-creditor which may lead to contrasting Court rulings.
- Recognition and effect accorded foreign proceedings in the same matter: Foreign judgement on the same matter can lead to increase complications for all parties involved in the liquidation.
- Choice of law to apply: When the local court initially hears the insolvency matter, it must decide on which law to apply. Party's may wish to have a foreign law applied over the law of forum if it suits them.
- **In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State, each State would apply its own laws? What cooperation difficulties does this raise**

?

3

Question 3.3 [maximum 5 marks]

It is said that “co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; by UNICTRAL in their *Practice Guide on Cross-border Insolvency Agreements*; and by the Judicial Insolvency Network in their *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters...*”

It is also said that “While court approval of such agreements for the purposes of co-ordinating insolvency proceedings is encouraged by the MLCBI, they in fact pre-date the Model Law.”

Briefly discuss a prominent case law example for this last quotation.

A prominent case law example here is the Maxwell Communications Corporation Plc case. Insolvency matters here were approved by the courts directly. The judges of two different states, (United States & England), agreed that an insolvency agreement between their two administrations “could resolve conflicts and facilitate the exchange of information.” Under this agreement, both parties will be able to bring proceedings in an efficient manner, as the proceedings were harmonized.

This case is important as cross-border insolvency issues have increased rapidly in recent years. It is not uncommon to have an insolvent debtor holding assets in different countries and jurisdictions. Therefore, the ruling of the Maxwell case will benefit the debtor, as the value of their estate will be maximized, and the insolvent practitioners, as the exchange of information between administrations will be shared.

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.

2.5

Marks awarded 7.5 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.

The European Insolvency Regulation (EIR) Recast is used to determine in which member states insolvency proceedings may be opened and the law which governs those proceedings. As Fernz is considering an insolvency proceeding against Rydell while a minor creditor has currently opened a proceeding, the EIR Recast is relevant to this case.

The EIR allocates jurisdiction of insolvency proceedings based on the debtor's centre of main interest. Rydell's centre of main interest is the UK, therefore UK jurisdiction applies. However, the EIR also allows for insolvency proceedings to be opened in another member State if the debtor has an establishment there. If Rydell has an establishment in the country that Fernz operates, the EIR recast would apply here and Fernz could open insolvency proceedings against Rydell.

If Fernz is to open a proceeding, Fernz should consider doing this before end of 31 December 2020. The EIR Recast will no longer apply in the UK post this date, due to the UK leaving the EU.

Further information required:

- Where country does the minor creditor who opened the insolvency proceeding operate in, member state or not?
- Does Rydell have an establishment in the country where Fernz operates?

Further elaboration regarding 'establishment' is warranted.

5

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.

As the UK exited the EU on 31 January 2020, the EIR Recast does not apply to post 31 December 2020 proceedings in the UK. Therefore, if the proceedings were opened in the UK on 18 June 2021 the EIR recast would not apply. With the absence of the EIR recast, other regimes will need to be considered such as English common law the Insolvency Act 1986 and UNICTRAL's Model Law.

What further information would be useful?

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?

If insolvency proceedings were opened in the UK on 18 June 2021, the EIR Recast would not apply. In the absence of the EIR Recast, the EU member states will not be obliged to recognize

English insolvency proceedings and the UK will not be obliged to recognize proceedings in the remaining member states pursuant to the Recast Regulation.

UK domestic laws that are relevant here are the UK Insolvency Act 1986 and English common law. As Rydell holds its COMI outside the UK, the UNCITRAL Model Law on Cross-Border Insolvency will be relevant and will improve co-operation and communication between the countries involved in this insolvency proceeding.

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

0.5

Marks awarded 7.5 out of 15

TOTAL MARKS 33/50

*** End of Assessment ***