



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1
(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)**

This is the **summative (or formal) assessment** for **Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202122-545.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 November 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1570. Select the **most accurate response** to this statement from (a) – (d) below.

- (a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.
- (b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.
- (c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.**
- (d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.2

English insolvency law was not affected by the Covid-19 pandemic to date. Select the **most accurate response** to this statement from (a) – (d) below.

- (a) This statement is correct since the UK decided to merely provide financial aid to financially troubled entities and individuals.
- (b) This statement is correct since the legislative reform process in the UK is too slow to effect amendments to an elaborate piece of legislation such as its Insolvency Act of 1986.
- (c) This statement is correct since the English insolvency law already provided special rules to deal with extreme socio-economic situations like those brought about by global disasters such as the Covid-19 pandemic.
- (d) The statement is incorrect since the UK did review parts of its insolvency rules and amended some, amongst other things, to deal with the negative economic fall out of the pandemic.**

Question 1.3

Since the Dutch insolvency system is rather outdated when compared with English or American insolvency / bankruptcy laws, it does not provide for a modern scheme of arrangement that could be used to reorganise or rescue a company in distress. Select the **most accurate response** to this statement from (a) – (d) below.

- (a) This statement is correct since the Dutch insolvency system does not provide for a discharge of debt and without such a dispensation in place, a scheme of arrangement will not be functional.
- (b) This statement is correct since the Dutch government has not approved such legislation yet.
- (c) This statement is incorrect since the Dutch in fact introduced new legislation in this regard in 2000 already.
- (d) This statement is incorrect since the Dutch quite recently adopted legislation in this regard and it became operational on 1 January 2021.

Question 1.4

There is no real need for the reform and establishment of a more uniform set of cross-border insolvency rules since the courts of the various States around the globe are well-equipped to deal with such issues by way of judicial discretion and since the broad rules of local insolvency legal systems are largely the same. Select the **most accurate response** to this statement from (a) – (d) below.

- (a) This statement is correct since courts cooperating across jurisdictional borders are familiar with global insolvency principles.
- (b) This statement is correct since courts across the globe are inclined to apply comity as a principle to assist foreign estate representatives to deal with cross-border insolvency matters in a coherent way.
- (c) The statement is not correct since both local insolvency systems as well as cross-border insolvency rules differ quite significantly in many respects.
- (d) This statement is correct since apart from the wide discretion that judges in general have, the UNCITRAL Model Law on Cross-Border Insolvency has been adopted by the majority of UN Member States, hence these rules are well-known to judges across the globe.

Question 1.5

Universalism has become the main approach regarding the application of cross-border insolvency rules around the globe since the majority of States follow a strict adherence to comity. Select the **most accurate response** to this statement from (a) – (d) below.

- (a) The statement is not correct because very few States allow insolvent estate representatives to deal with assets of a foreign debtor situated in their own jurisdiction without some form of a (prior) local procedure to recognise the foreign insolvency proceeding.

- (b) The statement is correct because universality has become the norm in the majority of States in cross-border insolvency matters since the introduction of the UNCITRAL Model Law on Cross-Border Insolvency in 1997.
- (c) The statement is correct because the prevalent approach of modified territoriality amounts to a universal embracement of universalism amongst the majority of States around the globe.
- (d) The statement is not correct because important international policy-making bodies such as the International Monetary Fund (IMF), the World Bank Group and the United Nations still support strong territoriality in cases of cross-border insolvency cases.

Question 1.6

A number of initiatives have been pursued in international insolvency in order to stimulate debate and to develop international best practice standards. Which of the following statements is **most accurate** regarding the World Bank's *Principles for Effective Insolvency and Creditor / Debtor Regimes*?

- (a) They were developed in 2000 and are the international best practice standards for insolvency regimes.
- (b) They were recently revised in 2021 and, together with the UNCITRAL Legislative Guide, form the international best practice standard for insolvency regimes.
- (c) They were recently revised in 2020 and, together with the UNCITRAL Model Law on Cross- border Insolvency, form the international best practice standard for insolvency regimes.
- (d) They were initially released in 2011 and are the international best practice standards for insolvency regimes.

Question 1.7

Which of the following **does not** focus on communication among States in international insolvencies?

- (a) ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases.
- (b) The JIN Guidelines.
- (c) The JIN Modalities.
- (d) The Nordic Convention 1933.

Question 1.8

Which of the following **best describes** the fundamental legal issues that arise in an international legal problem?

- (a) Choice of forum, choice of law, and choice of jurisdiction.

- (b) Choice of forum, recognition and effect accorded foreign proceedings in the same matter, and choice of law.
- (c) Choice of effect, choice of recognition, and choice of law.
- (d) Choice of forum, recognition and effect accorded foreign proceedings in the same matter, and choice of parties.

Question 1.9

Which of the following statements **best describes** the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*?

- (a) It is not intended to be prescriptive and is intended to provide information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases could be facilitated by cross-border co-operation.
- (b) It is prescriptive and provides information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases must be facilitated by cross-border co-operation.
- (c) It is prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.
- (d) It is not prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.

Question 1.10

What **best describes** the overriding objective of the ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases?

- (a) To interfere with the independent exercise of jurisdiction by the relevant States' courts and ensure an effective outcome.
- (b) In urgent situations only, to interfere with the independent exercise of jurisdiction by the relevant States' courts in order to ensure an effective outcome.
- (c) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than one State through communications among the States involved.
- (d) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than three States through communications among the States involved.

Marks Awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate three significant (historical) developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law.

- The English Bankruptcy Act of 1542 as this act allowed creditors to bring claims against the insolvent party and in cases of a fraudulent insolvent party (debtor) the distribution of the assets pari passu among parties that have an interest in the assets.
- The 1570 Act (Act of Elizabeth) allowed creditors to file a petition which could lead to appoint commissioners to examine all transactions and take all property which would be eventually distributed to the creditors with a claim.
- **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

The appointment of Joseph Chamberlain as president of the Board of Trade in 1881, which led to the Act of 1883. This Act noted, among other things, that assets of the insolvent debtor should be controlled by creditors. This has created a new dynamic in Debt Collecting procedures with creditors now having a say in asset realization (an example of this would be Liquidators reporting to a Committee of Inspection on the collection of debt process). **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.

The UK enacted the below changes, among others, to the current insolvency laws (by passing the Corporate Insolvency and Governance Act of 2020):

- Introduced a new restructuring plan
- New moratorium rules
- The 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 documents/agreements where, once a state is a signatory of the agreement, the state is bound by the treaty and this will then affect the domestic law based on the contents of the treaty. This could then be enforced in the related state and (after the signing) can be considered hard law.

Soft Law relates to guides principles or agreements which is not legally binding. These do not need to be signed as they are not binding.

Treaties can be used to establish a formalized set of rules and proceedings between states creating clear protocols for cross-border insolvency (given the treaty is signed and the insolvency relates to the states which have ratified the treaty). An example of a treaty would be the Nordic Convention (1933).

Soft law can be used when models or best practice guides are developed for the information and consideration of multiple states. While not binding, organizations such as UNCITRAL can recommend member states to consider and adopt the model/guide.

An example of this would be UNCITRAL developing a Model Law on Cross-Border Insolvency, which is under consideration from states (some of which have adopted the model).

It would be beneficial to elaborate on the relative success between hard and soft laws.

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.

Possible sources of insolvency laws in any state:

A state will normally have the primary source of law, this is usually documented per the states binding legislation. **It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation depending upon the State**

Another source of insolvency law is the use of common law principles.

Another source of insolvency laws which exist, for some states, would be one Act/Code which addresses all aspects of the States bankruptcy.

Another source of insolvency laws which exist, is when there are several different legislations which need to be read and applied concurrently with each other to apply the entire state insolvency system. **Are you endeavouring to refer to general law? Elaboration and clarification is warranted.**

Other sources of insolvency laws include:

- Soft law
- Any precedent set by the state

How these law sources may interact with each other:

Law sources will interact differently in different states depending on the law sources the state apply.

In common law jurisdictions/states there is the main source of legislation. This is then supplemented with common law principles to address any deficiencies in the legislation.

In other states, which concurrently use several different legislations, these will be enforced together. Hard law will be used more stringently and soft law and or precedent will guide best practice in these states.

There could also be acts which are more applicable to certain aspects of the insolvency (fraud specific legislation, creditor distribution rules) which could take precedent over insolvency legislation or insolvency soft law.

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.

Pertinent question 1 and issues raised:

In which jurisdictions may insolvency proceedings be opened?

The issues in relation to this question relates to the if the court (in that jurisdiction) has the authority to hear and make a judgement on the case. This will be based on whether the parties or the place of dispute relates to the same jurisdiction.

Pertinent question 2 and issues raised:

What country’s law should be applied in respect of different aspects of the case?

The issues in relation to this question comes about where if a court has determined that it will hear the liquidation case, the court may have to deliberate as to which law to apply. Parties to the case could appeal for the courts to consider applying different law systems. If this isn’t the case the local laws will stand.

Pertinent question 3 and issues raised:

What international effects will be accorded to proceedings conducted at a particular forum (including issues of forum)?

The issues in relation to this matter is what happens when there are foreign judgements on the same matter in which the local courts are hearing. This brings up uncertainties as to the court that issued the judgement, as well as the type and effect of the judgement. Will the foreign judgement impact how the local courts can effectively hear the case (what if a winding up order has already been granted in a foreign court on a significant foreign branch of the entity).

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 ?

3.5

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.

This quote relates to the case of Maxwell Communications Corporation plc cross-border insolvency case of 1991.

This case had simultaneous principal insolvency proceedings in the United States (Chapter 11 bankruptcy proceedings) and in the England (administration proceedings).

Both proceedings were initiated by a single debtor. There was an appointment of two separate insolvency representatives in each state (US and England).

Both courts noted that an agreement between the two administrators could resolve conflicts and facilitate better exchange of information.

Under the agreement drafted two goals were set to guide the insolvency representatives, namely:

- To maximize the value of the estate
- Synchronizing the proceedings to minimize expenses, waste and judicial conflict.

Both parties agreed, in essence, that the United States court would defer to the proceedings in England once it was determined that certain criteria was met, these included:

- Retaining existing management to maintain debtors going concern value.
- The English insolvency representatives will be allowed to select new independent directors, with the consent of their United States counterparts.
- English Insolvency representatives should only incur debt or file a restructuring plan with the consent of the United States courts/representatives.
- English Insolvency representatives should give prior notice to the United States representatives before undertaking major transactions on behalf of the debtor.

These two proceedings were co-ordinated through protocols approved by the courts in the respective states.

5

Marks awarded 11 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.

I have noted two instances which the European Insolvency Regulation Recast application needs to be discussed, these are:

- The current proceeding opened on 18 June 2020 and,
- The potential new proceedings to be opened in another European jurisdiction.

Firstly, both scenarios relate to States within the European Union (UK timing discussed below) so the European Insolvency Regulation Recast could apply if the below also criteria are also met.

The main application of the European Insolvency Regulation Recast is to insolvencies where the main proceedings were opened. For the UK this needs to be before 11pm on 31 December 2020).

The European Insolvency Regulation allocates primary jurisdiction on the centre of main interests (COMI).

Given we are told that in, relation to Rydell, its COMI is in the UK. We can conclude that main proceedings were opened in the UK and this was opened before the date expiration noted above (was opened on 18 June 2020).

We can therefore conclude that, for the current proceedings, the European Insolvency Regulation Recast will apply.

With regards to the potential new proceedings:

The further information I will need in this scenario is twofold, namely:

- Can the new proceedings be opened before the expiration date (it is noted that the consideration is taking place mid-July 2020, however in the covid climate many courts are running at limited capacity so this should be considered) and,
- Is the Rydell European office in the European country which Fernz is considering opening proceedings in considered an "establishment". I.e. is this office non-transitional and do they carry out transactions with natural people and assets?

If the office is not considered an establishment or the proceedings can only be opened after the UK expiration, then we can conclude that the European Insolvency Regulation Recast will not apply.

Alternatively, If the office is considered an establishment and the proceedings can be opened before the UK expiration, then we can conclude that the European Insolvency Regulation Recast will apply.

It would be beneficial to elaborate with respect to establishment.

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.

If the proceedings were opened on 18 June 2021, the European Insolvency Regulation Recast will have expired for the UK.

Hence, for the UK opened proceedings, the European Insolvency Regulation Recast will not apply. **What would this mean in terms of automatic recognition?**

In relation to the potential new proceedings in another European country under the European Union, the European Insolvency Regulation Recast could still apply as the expiration only applies to the UK.

Further information that could become relevant would be a detailed breakdown of the creditors, and how much money is owed per region. This will be helpful as proceedings will need to be made in another European country and the next most relevant COMI (after UK) will need to be established.

Would the MLCBI apply? Is further information required in this respect?

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?

The main Act which would be considered is the Insolvency Act of 1986.

Section 221(5) of the Insolvency Act of 1986 has guidance in relation to the winding up of an unregistered company (which Rydell is) and can be done if any of the following criteria are met:

- if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- if the company is unable to pay its debts;
- if the court is of opinion that it is just and equitable that the company should be wound up.

There is no information suggesting that the first or third point would apply, however given that a minor creditor is not able to collect their debts from Rydell and is looking to initiate insolvency proceedings it is reasonable to assume that Rydell is unable to pay its debts.

The courts will also consider if the liquidating entity has a “sufficient connection” with England and Wales. When considering this, the following 3 principles apply:

- Sufficient connection with England and Wales which may (but not necessarily) consist of assets within the jurisdiction
- There must be a reasonable possibility of benefit to those applying for the winding up
- One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.

Given Rydell trades in the UK it's safe to assume there is assets in the UK.

With regards to point 2, this needs more information, but it appears as if the entity is still trading so there could be assets and therefore a benefit to party asking for the winding up.

W.r.t point three the party bringing proceedings is a UK entity so the courts can exercise jurisdiction over them.

Given the above, I would conclude there is a sufficient connection.

5

Marks awarded 12 out of 15

TOTAL MARKS 40/50

*** End of Assessment ***