



**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 9 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 Bankruptcy Act 1542 introduced the concepts of multiple creditors' collective participation and equal distribution of assets among them. The latter is now known as the *pari passu* principle and is a fundamental aspect on insolvency proceedings in English law.

The Act of Elizabeth of 1570 allowed creditors to petition the Lord Chancellor, who would then appoint bankruptcy commissioners to deal with the distribution of the bankrupt's assets. These commissioners could investigate previous transactions made by the bankrupt and title to the bankrupt's property passed to them. This is very reminiscent of the current court-appointed administration process, where administrators, as officers of the court, look into possible reviewable transactions and deal with the assets of an insolvent company as needed. **It would be beneficial to elaborate on how this introduced formal regulatory structures.**

Finally, the Bankruptcy Act 1883 created the position of Official Receiver and had as its main objective the fairness of the bankruptcy process, as it became the Official Receiver's responsibility to ensure that the proceedings were carried out properly and honestly. Current day insolvency rules in England still maintain similar key principles.

It would be beneficial to consider developments such as the abolishment of imprisonment for debt, or the introduction of a fresh start.

2

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.

A new restructuring plan, a new moratorium and the temporary suspension of winding-up petitions and statutory demands were all introduced by the Corporate and Insolvency Act 2020.

More detail would have improved the mark awarded for this sub-question.

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 entered into by States and, upon ratification, become binding as they have the effect of changing local legislation. As such, they can be seen as "hard law". One example of a treaty is the 1933 Nordic Convention.

"Soft law", by contrast, is created by multilateral organisations and rather than being binding it allows more flexibility by permitting States to incorporate recommended guidelines into domestic law, either as they appear in the text of the relevant instrument or with such modifications as the State sees fit. An example of "soft law" is the UNCITRAL Model Law on Cross-border Insolvency.

There is scope to elaborate and discuss the success of hard law vs soft law in establishing cross-border insolvency rules.

3

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.

There is rarely a single source of insolvency law and as a result, what ends up constituting a State's insolvency laws will often be a mix of legislation (whether consolidated into one single statute or spread over several pieces of legislation which have to be read together), insolvency-related case law and general legal principles which also have an application in an insolvency scenario. As statutes cannot realistically provide for every single eventuality, it is often the case that case law will supplement statutes **(it would be beneficial to discuss how this can depend upon the jurisdiction and whether, for example it is a common law jurisdiction)** where statutes do not provide a clear answer. General legal principles have an over-arching position and, although they may not be specific enough to answer a complex insolvency query, they will nevertheless affect the application and interpretation of both statutes and case law.

4

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's questions (together with commentary on each of them) are as follows:

- in which jurisdictions may insolvency proceedings be opened?
 - Where several jurisdictions are involved, it will be important to consider which State(s) proceedings should be commenced in. This could be the State where a debtor is located, where a creditor is located, where relevant assets are located or, where corporate entities are concerned, perhaps even where some of its directors are located.
- what country's law should be applied in respect of different aspects of the case?
 - It is not necessarily the law of the State in which proceedings are started which should be used. For example, the relevant agreements from which a debt arises may specify that the law of a specific jurisdiction govern the agreement. **Have you considered choice of law concerns?**
- what international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?
 - If several proceedings have been started in several jurisdictions, the issue of recognition of foreign proceedings will apply (for example if international "soft law" such as the UNCITRAL Model Law on Cross-border Insolvency applies). Equally, once judgment has been made in one jurisdiction, it will be necessary to consider whether enforcement order can be recognised in other states. Finally, it may be that the start of proceedings in one jurisdiction result in a moratorium applying to the debtor – in this case, it will be crucial to determine

whether, through cross-jurisdictional recognition, this will stay proceedings in other states as well.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.2 asks for a brief note, it is for 5 marks.

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 case of Maxwell Communications Corporation plc (*re Maxwell Communication Corporation plc*, 93 F.3d 1036, 29 Bankr.Ct.Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084), and *Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991)*) illustrates the quotation.

In *Maxwell*, one debtor started two insolvency proceedings – one in the United States and one in the United Kingdom. Even though this case took place in 1991/1992, several years before the UNCITRAL Model Law on Cross-border Insolvency came into existence in 1997, both courts agreed to come up with a cross-jurisdictional agreement in order to harmonise the two sets of proceedings, improve communication and deal with any conflicts. Such an agreement was reached, and the parties were able to go forward on the basis that the UK proceedings would take priority, subject to certain conditions. Certain steps (such as the replacement of directors, the filing of reorganisation plans) could only be taken by the English insolvency practitioners with the consent of their US counterparts. A certain amount of flexibility was allowed: whilst prior notice was required to be given if the English insolvency practitioners wished to complete material transactions on behalf of the debtor, such consent was not required below a certain threshold.

Maxwell shows that the UNCITRAL Model Law on Cross-border Insolvency “officialised” a trend which had already been in existence for several years, and that it did not in fact create this trend.

4.5

Marks awarded 12 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.

We would need to know what type of proceeding was started in the UK, and whether this involves the start of a moratorium in relation to Rydell. We would also need to know what proceeding Fernz is intending to start.

Because on 18 June 2020 the UK was still part of the EU, the European Insolvency Regulation Recast would apply if the proceeding was included in Annex A to EIR Recast. **It would be beneficial to set out the date when the EIR Recast ceased to apply.** In this scenario, because the UK proceeding was started before Fernz's and therefore is the "State of the opening of proceedings", under article 7.1 of EIR Recast UK law would apply to Fernz's proceeding even if this was started in a different State.

In addition, articles 19 and 20 of the EIR Recast provide for automatic recognition of proceedings and effects in other EU member states. This means that, depending on the type of proceeding which was stated in the UK, a moratorium period may start on 18 June 2020 which may prevent Fernz from starting its own proceeding.

In terms of jurisdiction, again, as Rydell has its COMI in the UK, this means that the UK courts would have primary jurisdiction. However, if Rydell has an establishment in the State where Fernz wishes to start its own proceeding, and if the start of such proceeding is not precluded by UK insolvency law as set out above, then it may be possible for Fernz to start secondary proceedings as long as these fell within the list set out at Annex A of EIR Recast. This, however, would only be of value to Fernz if Rydell had any assets in that State. **Is any further information required in this respect? It would be beneficial to state it specifically.**

6

Question 4.2 [maximum 3 marks]

How would your answer to 4.1 differ if the proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020? Also note what further information, if any, might become relevant.

In that case, the EIR Recast would no longer apply as this ceased to apply to the UK at 11 pm on 31 December 2020. What the exact implications would be depend on whether the UNCITRAL Model Law on Cross-border Insolvency was adopted in the State where Fernz wishes to start proceedings and, if so, whether or not it was adopted with modifications – which is something we would need to query.

If the Model Law applied to the relevant State, then, as before, that State would have to recognise the UK proceedings (which may involve a moratorium and therefore prevent the commencement of other proceedings).

3

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?

We would need to know which sort of proceedings were being considered: the Corporate Insolvency and Governance Act 2020 came into force in the UK on 26 June 2020 and this means that, as at 18 June 2021, there was a restriction on winding up proceedings in the UK as per Schedule 10 of CIGA.

The Cross-Border Insolvency Regulations 2006 may also apply and this is the case, we would need to know whether foreign main proceedings had been started the State where Rydell has its COMI. If so, then the UK courts would have to recognise such proceedings and the minor creditor may not be able to start proceedings of its own.

In terms of Rydell being an unregistered company, the Insolvency Act 1986 may apply to the extent that Schedule 10 CIGA prohibits winding-up petitions against unregistered companies on the ground specified in s.221(5)(b) of the Insolvency Act 1986 (being "if the company is unable to pay its debts").

It would be beneficial to elaborate upon s221(5) and issues regarding sufficient connection.

2.5

Marks awarded 11.5 out of 15

TOTAL MARKS 39.5 /50

*** End of Assessment ***