



**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).
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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.

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 roots of English insolvency law can be traced back to Roman law. However, despite its origins as a system for personal debt collecting, since the 16th century, the law of insolvency in England has undergone significant developments to a 'collective debt collection' approach which has shaped the way of thinking concerning modern insolvency law.

In 1542 England passed its first insolvency law, the Bankruptcy Act 1542 (the **1542 Act**). While the 1542 Act treated debtors as criminals and deprived them of property without a discharge, it also introduced well-established principles that underpin modern insolvency law. First, the 1542 Act provided for the appointment of an insolvency representative who is charged with the administration of the debtor's affairs. The 1542 Act also allowed creditors to participate in a collective process through which the creditors would share equally on the distribution of the debtor's assets¹.

The next major development occurred in 1705 when the Statute of Ann 1705 (the **1705 Act**) was passed. The 1705 Act continued to build upon the foundation of its predecessor, and its notable developments included, *inter alia*, that:

- Debt was no longer treated as a crime;
- Introduced the concept of a statutory discharge, which allowed the debtor to obtain what is known today as a "fresh start"; and
- Regulated the amount of debt that entitled a creditor to petition against a debtor².

Before the introduction of the modern approach in England's Insolvency law (i.e. the Insolvency Act 1986), the last piece of legislation was the Bankruptcy Act 1883 (the **1883 Act**). The 1883 Act introduced the office of the Official Receiver. The Official Receiver's office was responsible for taking control of the debtor's assets and administering the debtor's insolvency estate³. Another notable development under the 1883 Act was distinguishing between fraudulent insolvency and one attributable to financial misfortune⁴.

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.

On 25 June 2020, the Corporate Insolvency and Governance Act 2020 (the **Act**) received Royal assent and introduced significant changes to the domestic laws of the UK. The Act introduced temporary measures to respond to the financial difficulties caused by the Covid-19 global pandemic. Specifically, (i) restrictions on the presentation of winding up petitions⁵; (ii)

¹ See Module 1 at §4.1.1, pg. 4

² See <http://classic.austlii.edu.au/au/journals/AUCollLawMon/1899/3.pdf>

³ See https://www.jstor.org/stable/25119096?seq=3#metadata_info_tab_contents

⁴ See https://www.jstor.org/stable/25119096?seq=3#metadata_info_tab_contents

⁵ Section 10 [Corporate Insolvency and Governance Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

temporary suspension for wrongful trading⁶; (iii) extensions of time for filing accounts⁷; and (iv) relations of the meeting requirements⁸.

Section 12 of the Act introduced a moratorium preventing the presentation of winding up petition in circumstances where the cause of the unpaid debt was attributable to Covid-19. The Act provides that for the period of 27 April 2020 to 30 September 2021⁹, a creditor may not present a petition to wind-up a company unless the creditor has reasonable grounds to believe that Covid-19 has not had a financial effect on the company or that the company would have been unable to meet its financial obligations regardless of the economic impact that Covid-19 had on the company¹⁰. While the moratorium has now come to an end, The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No 2) Regulations 2021 introduced a new Schedule 10, which came into effect on 1 October 2021 introduced further changes to the presentation of winding-up petitions. To present a petition, the following requirements must be satisfied (i) the debt must be liquidated and not be an excluded debt; (ii) the creditor must have delivered notice to a company which contains a statement that if no proposal is made within 21 days, the creditor intends to present a petition; (iii) no proposal is received within the 21-day deadline; and (iv) the debtor is greater than £10,000¹¹.

As indicated above, the Act suspended the wrongful trading rules, i.e., personal liability for directors who continue to trade when they know the company is insolvency or in the zone of insolvency. The suspension was in force from 1 March 2020 to 30 September 2020 but was extended to 30 June 2021¹². The policy underlying the relaxation of the wrongful trading provisions was to support directors to continue trade during the pandemic's initial stages. This is because it was considered to be in the best interest of a companies' general body of creditors for a company to continue as a going concern¹³. Notwithstanding the relaxation of the wrongful trading rules, directors must still exercise best commercial practice and good corporate governance as they remain liable under common law principles and other domestic legislation¹⁴.

The Act also granted an automatic extension for companies filing yearly accounts and filings in Companies House. The extensions have ceased to have effect on 5 April 2021, and the deadlines prior to the enactment of the Act have come back into force¹⁵.

As to the meetings, the Act provides that AGM's and other general meetings may be held by electronic means without a quorum being physically present in one location. Similar to the above, the relaxation of these restrictions was enacted to ensure that companies continued to hold annual meetings and practice good corporate governance¹⁶.

⁶ Section 12 of the Act [Corporate Insolvency and Governance Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

⁷ Section 38 [Corporate Insolvency and Governance Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

⁸ Section 37 [Corporate Insolvency and Governance Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

⁹ The initial period restricting the presentation of petitions was put in place until September 2020 but has been extended to 30 September 2021.

¹⁰ Schedule 10, Part 10, section 2(2)

¹¹ See <https://www.thegazette.co.uk/insolvency/content/103601>

¹² <https://www.nortonrosefulbright.com/en/knowledge/publications/5ac21a15/the-uk-corporate-insolvency-and-governance-act-2020>

¹³ Ibid.

¹⁴ Ibid

¹⁵ <https://www.dlapiper.com/en/uk/insights/publications/2020/09/uk-corporate-insolvency-governance-bill/>

¹⁶ <https://www.nortonrosefulbright.com/en/knowledge/publications/5ac21a15/the-uk-corporate-insolvency-and-governance-act-2020>

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.

As a preliminary point, cross-border insolvency gives rise to complex issues independently addressed by courts and legislation in each jurisdiction. Since cross-border matters have not been adequately addressed at the state level in general terms, treaties and ‘soft law’ have been developed to efficiently deal with cross-border insolvency.

The Vienna Convention on the Law of Treaties defines a treaty as “*an international agreement concluded between states in written form governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*”¹⁷. Therefore, treaties establish procedures and laws of member states and are automatically incorporated into the domestic laws of the member state without the need for enabling legislation. Treaties aim to provide some certainty to the application of domestic laws, which tends to give rise to jurisdictions applying different insolvency rules¹⁸. Given the divergence of application of the ‘universal’ or ‘territorial’ approach to insolvency, the effect of treaties is that parties to the treaty agree to ‘harmonize’ their insolvency laws to efficiently manage cross-border insolvency between states¹⁹ and ensure the fair treatment of debtors. In general terms – treaties will typically deal with issues of choice of laws, judicial cooperation and recognition. An example of a multinational treaty concerning insolvency is the Nordic Convention (1993). Under the Nordic Convention, insolvency in one-member state is recognized in other member states and the law of the member state where the proceedings have been commenced determines all matters which arise under the proceedings²⁰.

By contrast, ‘soft laws’ are model laws or suggested best practices put forward by organizations to influence domestic laws related to cross-border insolvency. Unlike conventions limited applicability (i.e. between parties to the treaties) – the aim of ‘soft law’ is to promote a uniform reform to insolvency law globally. The goal is two-fold (i) to harmonize and (ii) modernize the legal framework to efficiently deal with cross-border insolvency. To date, out of the 60 UNCITRAL Member States, only 19 have adopted the Model Law.

A fundamental difference between a multilateral treaty and ‘soft law’ is that ‘soft laws’ are not binding unless a state’s legislature has adopted them. Similar to treaties, the effect of soft laws is to ‘harmonize’ insolvency laws to facilitate a fair, orderly, and cost-efficient framework for the orderly administration and distribution of a debtor’s insolvency estate²¹. The Model Laws have developed model laws to address international aspects concerning choice of law, recognition and judicial co-operation among courts in different jurisdictions.

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.

¹⁷ See https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

¹⁸ <https://www.iiiglobal.org/sites/default/files/landscapeofinternationalinsolvencylaw.pdf>

¹⁹ Ibid

²⁰ [https://uk.practicallaw.thomsonreuters.com/5-504-9659?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-504-9659?transitionType=Default&contextData=(sc.Default)&firstPage=true)

²¹ Module 1, pg. 37.

There are four sources of insolvency laws in a state for the purposes of this question, namely (1) domestic law; (2) multilateral treaties or conventions; (3) Model Law and/or 'soft law'; and (4) where there is a lacuna in domestic law courts in common law jurisdictions will develop the law on cross-border matters engaging common law principles.

As to domestic laws, these are laws enacted by a state's legislature. These laws are binding on the parties and may be enforced by the state's courts. While some state's domestic laws deal with issues concerning cross-border insolvency (i.e. recognition and enforcement) generally they are focused on domestic issues within the state. In these circumstances, one must look to the interplay between treaties and/or conventions, Model Law and/or courts in the exercise of their inherent jurisdiction to address cross-border insolvency elements to fill in the gaps.

As to multilateral treaties and conventions, once ratified, these provide rules and procedure which are automatically imported into a state's domestic law (without the need for enabling legislation). Similar to domestic law, multilateral treaties and conventions are binding on the parties and may be enforced by the state's court. A fundamental difference between domestic laws and treaties/conventions is that treaties bind the state's which are parties to them and will address issues concerning cross-border insolvency, whereas a state's domestic insolvency law is not binding outside of the jurisdiction. Typically, treaties will address areas where there is an inherent conflict between the domestic laws concerning elements of insolvency²². These areas, by example, include *inter alia*, avoidance of preference, avoidance of transactions, and equality between creditors²³. Treaties/conventions will provide an overarching framework dealing rules/laws concerning choice of law and recognition and enforcement. By way of example, the Nordic Convention 1993, provides a uniform approach and provides that the law of the member state where proceedings are commenced will determine all matters arising out of the insolvency proceedings.

As to Model Laws or soft laws, these set out principles, declarations and/or recommendations on the law and are not legally binding. Model Laws will only become binding in a state when they are adopted by a state's legislature and become part of a state's domestic insolvency law. Model Laws may be adopted in full or in part and may be modified to address substantive issues that are important to that particular state. While the Model Law may not have direct application to issues arising in domestic insolvencies, its purpose is to harmonize the laws to ensure cross-border insolvencies are dealt with effectively, cost efficiently, predictably and fairly for the creditors. This is done by seeking to achieve uniform rules related to recognition, choice of laws and judicial co-operation. As to judicial co-operation the Model Laws encourage and require courts in both jurisdictions to co-operate in the insolvency proceedings. The way that domestic law interacts with the Model laws is that the law of the forum will govern matters related to procedure and if assets are within the jurisdiction.

Finally, where there are gaps in the domestic law of a state, in common law jurisdictions the judiciary have helped to develop insolvency laws to adapt to globalization of business and/or individuals. These judicial decisions become binding on the courts within that state until such time that the legislature amends the domestic laws. An area where courts have developed the law in cross-border cooperation between states in order to facilitate an orderly distribution of a debtor's assets provided this is not contrary to the laws of the forum and/or against public policy. Under the common law the courts have adopted a 'universalism' or 'modified universalism' approach to cross border insolvency. By way example, (as described here and expanded more fully below) the courts of England have found that the court has a common law power to assist foreign winding up proceedings provided, whatever the court is doing could properly be done under England's domestic insolvency laws.

²² <https://www.iiiglobal.org/sites/default/files/landscapeofinternationalinsolvencylaw.pdf>

²³ *Ibid*

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 fundamental issues as expressed by Fletcher that arise in a cross-border insolvency are as follows:

1. The choice of forum
2. The recognition and effect of foreign proceedings in the same matter; and
3. The choice of law to apply to a matter.

Although these are distinct issues (and for convenience) discussed separately below, they are interrelated to each other. As a preliminary point, it is important to note that there are no internationally recognized rules or procedures governing private international law²⁴.

As to the choice of forum, this is generally the first port of call for a court to determine whether it has jurisdiction to hear a matter. A court will only hear a winding up petition if it is satisfied that there is a sufficient connection to the forum. This generally can be established by demonstrating that an individual or company is ‘resident’ within the jurisdiction or has assets located within the jurisdiction. It is open to the court to decline jurisdiction to hear a winding-up petition where there are proceedings afoot in another jurisdiction or if it determines there is a more suitable jurisdiction with a more substantial connection between the parties and the forum. In some instances, a state’s domestic laws will confer jurisdiction on the Court to wind-up foreign companies which have been incorporated outside of the state provided certain statutory requirements are satisfied. An example of this can be found in s 220 and 221 of the Insolvency Act in England and Wales. Under these sections, the English court may wind up a company if it is (i) dissolved or ceased to carry on business or is carrying on business in order to wind up its affairs; (ii) the company is unable to pay its debts; (iii) or the court thinks it is just and equitable to wind up the company. This is of course subject to the foreign company having a sufficient connection with the jurisdiction. It should also be borne in mind that ‘private international conflict of law’ issues will not arise in states where there are treaties and/or have adopted the Model Law as these instruments expressly set out the conflict of law rules for insolvency.

As to recognition and effect of foreign proceedings the legal framework is contained in a state’s private international laws and/or treaties.

Lord Hoffman in *Cambridge Gas* explained the significance of recognition in the insolvency context (at para 22):

“The purpose of recognition is to enable a foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.”

In the absence of any international conventions foreign proceedings do not receive automatic

²⁴ McPherson Law of Insolvency 3rd Edition - §30-036

recognition. In a cross-border context it may be necessary for the insolvency practitioner to seek recognition in a foreign court to be able to take control of assets situated in that jurisdiction or to investigate the affairs of a company. Moreover, following the recognition of an insolvency order, certain principles of insolvency will apply within the jurisdiction such as an automatic stay of proceedings against the debtor and execution against a debtor's assets²⁵.

In England, Section 426 confers a power on the courts of England to assist courts with a corresponding jurisdiction in 'relevant countries' (as defined in the Act). This will involve an insolvency representative in the jurisdiction where main proceedings were commenced to make an application to that court for a letter of request for assistance from the English courts. Then a further application is made to England's court for an order giving effect to the letter of request. If the UK Court accedes to the request then the insolvency practitioner permits the choice of whether to apply the insolvency law of the state where proceedings were commenced or English insolvency laws. By way of example, in *McGrath v Riddell* [2008] UKHL 21 the UK Court granted a request for assistance to assist an Australian practitioner to have assets located within the UK remitted to them for distribution in the Australian insolvency proceedings²⁶.

Third, and relatedly, if a court determines that it has jurisdiction to hear a matter the next question concerns the law that shall apply. In common law jurisdiction, the insolvency law of the state where the proceedings have commenced shall govern the procedural matters and administration of the insolvency proceedings (i.e. *Lex Fori*). Additionally, the doctrine of *Lex situs* generally provides that the law of the jurisdiction where the assets or property is situated shall govern issues/disputes concerning those assets/property. There is a divergence in approach for how choice of law issues arises. In common law jurisdiction the default position (unless there is a contractual choice of law provision) is that choice of law issues only arise if a party invokes them, otherwise the law of the forum will apply to procedural matters. In common law jurisdictions, questions of foreign law are treated as questions of fact. By contrast, in civil law jurisdictions questions of foreign law are treated as questions of laws which are applied regardless of whether the issue is raised by the parties²⁷.

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.

McGrath v Riddell [2008] UKHL 21 involved a case where Australian companies presented a winding-up petition to the Australian Court. The Court in Australia sent a letter of request to the High Court in England to direct the assets of Riddell to be remitted to the Australian Court. There was disagreement between the Lord Justices as to whether the Court's power was by previous judicial decisions or by the statutory scheme of the Insolvency Act 1986.

²⁵ Module 1, pg. 44

²⁶ See §6.2.3 Module 1

²⁷ Module 1, pg. 45

Lord Hoffman observed that the under the principle of modified universalism the English Courts should co-operate with the courts where the main proceedings are opened to ensure the assets of a company are distributed under a unified system of distribution²⁸. By contrast, Lord Phillips was of the view that s 426 of the Insolvency Act gave the court the power to cooperate and accede to the request of the Australian Court. Lord Scott (agreeing with Lord Phillips) view was founded on the basis that s 426 expressly provided for the co-operation between courts exercising jurisdiction in insolvency matters provided the jurisdiction was a 'relevant country or territory'. Lord Scott stated (at para 61):

“The proposition that the assistance and directions sought by the Australian court and Australian liquidators in the present case could be given under an inherent power of the court without reliance on section 426(4) and (5) is, in my respectful opinion, unacceptable. It would mean that the assistance and directions could be given in relation to a winding up being conducted in a foreign country that had not been designated a ‘relevant country’

The principle endorsed by Lord Hoffman concerning the court's power to assist officers of a foreign court was echoed in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36. This case involved requests by the liquidators to obtain information from the company's former auditors PWC relating to the company's affairs. Lord Sumpton observed (at para 10) that:

“The English courts have for at least a century and a half exercised a power to assist a foreign liquidator by taking control of the English assets of the insolvent company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of the power generated a body of practice concerning what came to be known as ancillary liquidations. The English court would order the winding up in England of a company already in liquidation or likely to go into liquidation under the law of its incorporation, provided that there was a sufficient connection with England and a reasonable possibility of benefit to the petitioners. In theory, the effect of the winding up order was to create a statutory trust of the world-wide assets of the company to be dealt with in accordance with English rules of statutory distribution.”

15. The flexibility and breadth of the English court's powers in an ancillary liquidation, together in more recent times with the incorporation into English law of a number of international schemes of judicial co-operation, have had the effect of arresting the development of the common law in England in this area...

Cambridge Gas is authority, if it is correct, for three propositions. The first is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it could properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam according to ordinary common law principles is irrelevant.”

While it is clear from the authorities that there is judicial debate as to the source of the Court's power to assist officers of a foreign court, it is evident that the court's in England have been exercising the principle of 'modified universalism' either under the inherent jurisdiction of the court or pursuant to a statutory scheme. Regardless of the proper approach whether by statutory scheme or pursuant to the common law, it is clear that the English Courts have been willing to assist foreign officers in insolvency matters long before the Model Law.

²⁸ See para 30 <https://www.casemine.com/judgement/uk/5a8ff70260d03e7f57ea5985>

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 United Kingdom ceased to be a member of the European Union (**EU**) on 31 January 2020. In leaving the EU, the United Kingdom entered into the EU-UK Withdrawal Agreement (the **Agreement**). Pursuant to the Agreement, the provisions of the Regulation (EU) 2015/840 (**EIR Recast**) continued to apply between the UK and EU member states so long as the main proceedings were commenced prior to 31 December 2020²⁹.

As the insolvency proceedings were opened on 18 June 2020, the EIR Recast applies. This is because the provisions of the EIR Recast were automatically adopted into the domestic laws of each member state. Since another creditor opened insolvency proceedings in the UK, the centre of main interests (**COMI**) of Rydell, the proceedings are recognised as 'main proceedings'³⁰. The judgment opening the 'main proceedings' are automatically recognised by the courts of each member state³¹. If the proceedings are recognised as 'main proceedings', the automatic stay will not prevent the commencement of parallel proceedings outside of the UK.

It is open to Fernz to commence proceedings in another country in Europe provided that Rydell has an 'establishment' within that country³². These proceedings are 'secondary proceedings'

²⁹ <https://kennedyslaw.com/thought-leadership/article/brexit-and-eu-cross-border-insolvency-what-comes-next/>

³⁰ See Article 3(1) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

³¹ See Article 20 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

³² See Article 3(2) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

and are restricted to the assets of the debtor within that member state. The initial question for Fernz will be to determine to what extent that Rydell has assets located within the jurisdiction.

Four questions arise, which require further information to fully consider this question: (1) Did the insolvency practitioner in the UK provide an undertaking; (2) is Fernz incorporated in Denmark; (3) Does Rydell have an 'establishment' in the jurisdiction where Fernz is domiciled; and (iv) Should Fernz open secondary proceedings. These questions will be discussed in turn below.

As to whether the insolvency practitioner provided an undertaking, Article 36 of the EIR Recast provides that if the insolvency practitioner provides an undertaking in the main insolvency proceedings this will avoid the opening of secondary insolvency proceedings³³. The undertaking will provide that when the assets in the member state have been realised the insolvency practitioner will comply with the distribution and priority rights under the national law where the secondary proceedings would have been opened. If Fernz is a known local creditor to the practitioner, Fernz, together with any other known creditor within the jurisdiction will have to approve the undertaking³⁴. The local creditors upon receiving notice of the undertaking may apply to their local court to request that the court take protective measures to ensure the compliance of the insolvency practitioner³⁵.

As to Fernz domicile, the short answer is that the EIR Recast does not apply to Denmark³⁶. The effect of this is that the domestic laws of Denmark will apply to determine whether the Court of Denmark will recognise the foreign order and assist the foreign insolvency practitioner.

Although Rydell operates throughout Europe it is not clear from the facts whether Rydell operates within Fernz's jurisdiction. If Rydell does not have an 'establishment' then secondary proceedings cannot be opened in Fernz's country pursuant to Article 3(2) of the EIR Recast.

If Fernz wishes to open secondary proceedings upon its application to the Court, the Court must immediately give notice to the debtor in possession or insolvency practitioner³⁷. Where an insolvency practitioner has provided an undertaking at the request of the insolvency practitioner the court may decline to open proceedings if it is satisfied that the undertaking adequately protects the interests of the creditors³⁸. In the absence of an undertaking, an insolvency practitioner and/or debtor in possession may request the court where secondary proceedings are to be opened to stay the proceedings for 3 months. Courts will typically grant a stay to allow debtors/creditors a period of time for negotiations and if measures are put in place with the view to protect the interests of local creditors.

Alternatively, if Fernz has security over assets of Rydell, it should be noted that the opening of main proceedings does not prevent Fernz from enforcing its security in jurisdictions outside of the UK.

³³ Article 36(1) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

³⁴ Article 36(5) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

³⁵ Article 36(9) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

³⁶ Recital (88) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

³⁷ Article 38 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

³⁸ Article 38(3) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

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.

Yes, the answer to 4.1 will differ slightly. Although the EIR Recast ceased to apply to the UK as of 31 December 2020, the Insolvency (Amendment) (EU Exit) Regulations 2019 which has retained limited aspects of the EIR Recast. The UK Courts still have jurisdiction to open proceedings in the UK where the company's COMI is in England. However, the key question will be whether the Courts of England will recognize non-main proceedings following England leaving the EU. The short answer is yes, but there will be an increase of time and cost of insolvency proceedings for the Courts of England to recognise secondary insolvency proceedings. The fundamental difference post Brexit is that (i) proceedings opened outside England will not have automatic recognition in the UK; and (ii) the automatic stay of claims would not apply³⁹. Consideration will have to be given as to whether it is necessary to seek recognition from the UK Court. There are two routes for the UK Court to recognise the insolvency proceedings, first under the Cross-Border Insolvency Regulations (which implement the Model Law⁴⁰); and/or under common law principles.

In short – there will not be any substantial change for EU Member states. Although the EU Regulations no longer have general application in England, England has implemented the Model Law under the CBIR. It follows that recognition applications from the EU to England will continue to enjoy certainty and relief under the Model Law (i.e. the CBIR).

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?

Following the UK leaving the EU there are three sources of domestic law concerning insolvency:

- The Insolvency Act 1986 (the **Insolvency Act**);
- The Cross-Border Insolvency Regulations (2006) (**CBIR**) which implement the UNCITRAL Model Law; and
- The Insolvency (Amendment) (EU Exit) Regulations 2019 (**Amendment Regulations**).

Pursuant to s 221(5)⁴¹ of the Insolvency Act, the Courts of England and Wales have the statutory power to wind-up unregistered foreign companies:

- (1) The company is dissolved, or ceased to carry on business or is carrying on business in order to wind up its affairs
- (2) The company is unable to pay its debts
- (3) If the court thinks it is just and equitable that the company should be wound up.

³⁹ <https://www.herbertsmithfreehills.com/insight/cross-border-insolvencies-in-the-uk-and-eu-%E2%80%93-a-post-brex-it-guide>

⁴⁰ Only 4-member states of the EU have enacted the Model Law

⁴¹ <https://www.legislation.gov.uk/ukpga/1986/45/section/221>

The UK Courts will exercise these statutory powers to wind-up a company if it is satisfied that the 'foreign company' has a 'sufficient connection' to the UK⁴². The relevant authorities⁴³ make clear that a company will have a 'sufficient connection' if:

- (1) The company has assets within the jurisdiction. However, this factor is not determinative should the company have no assets located within the UK.
- (2) There must be a reasonable possibility if a winding up order is made it will benefit those applying for a winding-up order
- (3) One or more of the persons interested in the distribution of the assets must be a person whom the court has jurisdiction over.

As indicated above, the CBIR implements the Model Law into the domestic laws of the UK. Under the CBIR, insolvency proceedings must first be recognised by the English Courts for the CBIR to apply. By contrast, under the EIR Recast there was automatic recognition of foreign proceedings.

In addition to UK's domestic laws, the Amendment Regulations also apply to the UK following 31 December 2020. These regulations extend the jurisdiction already provided under its domestic law to the UK Courts to open proceedings for the purposes of, *inter alia*, liquidation (as is the case here), provided that Rydell's COMI is located in another EU Member State and it maintains an 'establishment' within the UK. Based on the information available it is not clear as to whether Rydell maintains an 'establishment' within the UK⁴⁴. Accordingly, Rydell may be wound up if (i) Rydell's COMI is located in the United Kingdom or under domestic legislation provided that there is a sufficient connection with England. In the circumstances, it would be sensible for Fernz to seek recognition through the CBIR.

Although the UK's domestic laws would permit Fernz to open proceedings in England against Rydell, it must be borne in mind that Rydell has suffered financial difficulties due to a decrease in business caused by the Covid-19 pandemic. As a consequence, consideration will have to be given to the *Corporate Insolvency and Governance Act 2020*. Specifically, whether Fernz may formally commence winding up proceedings against Rydell on 18 June 2021. In order for Fernz to present a petition to wind-up Rydell, the Court must be satisfied that:

- There are reasonable grounds to believe that Covid-19 has not had a financial effect on the company. Based on these facts it is likely that Fernz will be able to do so; or
- In the alternative that Rydell would have been unable to meet its financial obligations regardless of Covid-19. In the present case, more information will be required to determine whether it is viable for Fernz to open winding-up proceedings. If the answer to the foregoing question is no – then Fernz only be able to present a winding-up petition following the restrictions being lifted on 30 September 2021.

⁴² Module 1, pg. 49

⁴³ *Re Real Estate Development Co* [1991] BCLC 210 (Ch), per Knox J

⁴⁴ <https://www.nortonrosefulbright.com/en/knowledge/publications/fc0fb698/impact-of-brexit-on-insolvency>

*** End of Assessment ***