INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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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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.

An important step in the development of insolvency and bankruptcy law in English law was the adoption of the Bankruptcy Act of 1542. This Act already introduced two principles which remain valid as fundamental today: (1) the collective character of creditor participation in insolvency proceedings; and (2) the principle that the debtor's assets are to be distributed *pari passu* between the creditors, meaning that they must share any available assets of the debtor (or any proceeds of the sale thereof) in proportion to the debts due to each creditor.

Another major reform came with the Statute of Ann of 1705 because it was a step towards a more humane treatment and protection of people in poor financial situation. Until then, debtors were mainly seen as criminals. This piece of legislation made it possible, amongst other things, for the competent authorities to discharge debts when the envisaged procedures had been followed. Although the law at that time still largely favoured the creditors, many of the principles introduced remain valid in modern insolvency law.

Finally, the Act of 1883 was also a significant development and important piece of legislation since it brought a return to "officialism", thereby again replacing a largely creditor-run system with a governmental official who would be the principal supervisor and conduct most of the administrative functions of the bankruptcy procedure. This Act established what are still the basic parameters of the modern English insolvency law.

3

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.

In an effort to prevent businesses in the UK to fail as a consequence of the disruption caused by the Covid-19 pandemic, the UK government introduced permanent measures to reform the UK insolvency regime as well as temporary measures to support businesses through the pandemic, as part of the Corporate Insolvency and Governance Act 2020. One of the permanent measures is a new free-standing moratorium during which no creditor action can be taken against the company without the court's permission. The objective of this measure is to provide businesses in financial distress with 'breathing space' to allow them to pursue a rescue or restructuring plan. Furthermore, the Act also in principle prevents suppliers from ceasing their supply while a company is going through a rescue process (note *inter alia* that a distinction is made between small and large(r) suppliers). Finally, the Act temporarily suspended the provisions relating to wrongful trading director's liability. The aim of this temporary measure was to prevent directors worrying about their potential personal liability for any worsening of the companies' financial position during the indicated period. However, it should be noted that in the meantime a large number of the temporary measures came to an end, and were not / no longer extended.

3

Question 2.3 [maximum 4 marks]

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

A 'treaty' can be defined as "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*" (see Article 2(1)(a) of the Vienna Convention on the Law of Treaties of 1969).

Treaties are international legal agreements which are usually concluded in writing between States or other subjects of international law with a view to regulating their mutual relationships, irrespective of how they are called ('treaties', 'agreements', 'conventions', 'protocols', 'covenants'), and which are intended to be binding at the international law. They are the principal regulatory instrument of Public International Law.

If a State ratifies or accedes to 'treaties' (irrespective of the name given to it, see above) containing principles to resolve cross-border insolvency issues, these are imported into domestic laws enforceable in the courts. As such these principles can become part of a State's "hard law".

Whereas "hard law" refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court, "soft law" is the term applied to something which is a document that is being developed which is merely persuasive and trying to influence the development of local laws or (quasi-legal / policy) instruments which are not binding on those to whom they are addressed.

However, despite its lack of legally binding effect, "soft law" may to a great extent affect policy development and practice and can still produce legal effects, precisely because of its informal influence: in situations where States would be reluctant to become signatories to 'treaties' due to them being legally binding, the use of soft law instruments could still encourage those States to consider and eventually adopt policies and strategies in order to achieve solutions to cross-border insolvency issues (e.g. the UNCITRAL Model Law on Cross-border Insolvency as one of the most successful initiatives in this regard within the field of international insolvency law).

4

Marks awarded 10 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.

First of all, it is important to pinpoint the law system of the particular State within the context of a civil law or an English common law system (or even a mix of both legal systems, e.g. South African insolvency law). Whereas the civil law systems are steeped in the Roman Law tradition, the roots of the English common law systems are of course to be found in English Law. In both these systems there was a historical development until they finally reached the stage where both systems acknowledged insolvency law.

Although legislation is generally considered the primary source of law today and will override the common law, 'common law' (i.e. a body of additional legal rules of practice that have been made by judges as they issue rulings on cases) is of primary importance and used in various common law based systems to fill in gaps in existing legislation.

Leaving aside supra-national legislation and/or international instruments (both "hard law" as well as "soft law", see above), if we look at modern day systems across the globe we will find many pieces of insolvency legislation, either in civil law systems or in English common law systems. It is thereby also important to ask the question if a particular system provides for a

single insolvency act or bankruptcy act, or a (bankruptcy) code, or if it takes a more fragmented approach where we find a multiplicity of legislation dealing with various aspects of insolvency. This is also very prevalent in the various systems across the world (e.g. in Australian insolvency law, the rules will be found in separate legislation dealing with various aspects of insolvency; it does not have a single unified Bankruptcy or Insolvency Code or Act, as opposed to the Bankruptcy Code of 1978 that applies throughout the USA or the Insolvency Act of 1986 that applies to England and Wales).

In addition to insolvency legislation, another important source of insolvency laws is to be found in the notion of the 'general law'. We usually refer to the general law as the law outside insolvency law but that may have an impact on insolvency law aspects as well, e.g. the law of securities. However, it goes without saying that the general law will apply substantively different depending on the specific legal system. in the English common law systems we find a floating charge; we do not necessarily find the same kind of security in other systems. So the rules on how to establish rights of security may differ, and the general law will prescribe how these rights are established in a particular system and it is very important in any insolvency case to take note of this.

5

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.

Prof. FLETCHER poses three pertinent questions regarding a cross-border insolvency matter: (1) In which jurisdiction(s) must the insolvency proceeding(s) be opened; (2) The law of which State should be applied in respect of different aspects of the matter / which system must rule elements of diversity; and (3) What are the international effects to proceedings in a particular forum? (see I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005, pp 3 to 5).

Most legal systems when they have developed laws in relation to insolvency law, have omitted to consider international insolvency. They have typically developed the statutes or codes to deal with an insolvency that is solely operating within the one (nation) state / country. However, business crosses borders. And if that business becomes insolvent than an issue arises with how to resolve that foreign connection, that connection with a foreign state.

If there is a foreign connection than this is where private international law comes into play. And as Prof. FLETCHER describes it: 'where there is an international legal problem coming before a local court, essentially that will raise three key legal questions: (1) can the local court exercise jurisdiction in the matter that has come before it; is it an appropriate forum in which that matter should be heard; (2) if there are in fact at the same time foreign proceedings dealing with the same matter and this is brought to the attention of the local court, will the local court recognise what is happening in another jurisdiction (will it for example recognise a foreign winding up order), and if it does, what impact does that have locally; will the local court enforce that foreign order, will it in some way give it an effect such as placing a stay upon any proceedings in the local jurisdiction because of those foreign proceedings; and finally **it would be beneficial to elaborate and discuss in detail difficulties that can result from concurrent proceedings** (3) if the local court decides that it does have jurisdiction to hear a matter, it may be that the question of the choice of law arises; that is when determining the matter should it apply the local law / the law of the forum, or does the matter before the court raise an issue that in fact raises the possibility that a foreign law will apply, for example the law of the place where the debtor's assets are situated'.

So those are three key issues that can still apply, and looking at it from a domestic dimension, that a local court may have to answer those questions when dealing with an insolvency that has a foreign connection.

Some practical determinants in this regard are: the court first issuing the order and the jurisdiction of that particular court (think in terms of the COMI), whether that particular state or jurisdiction does adhere to universalism or territorialism, what types of assets are involved in the estate and the location of the assets, etc.

It is also very important in a cross-border insolvency matter to understand the differences between approaches and laws.

4.5

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.

In those situations where there are multiple insolvency proceedings (proceedings happening in more than one jurisdiction concerning the same individual debtor or individual company and also potentially a whole business enterprise) than it may be that the insolvency representatives appointed in those proceedings may seek to come to some agreement about how to manage some of the cross-border insolvency issues that they are facing and to try and see to what extent agreement can be reached on some key issues in the interests of saving time and money.

Already in the 1990's there was, as an example, the Maxwell case, which was a situation where there were two plenary insolvency proceedings, one happening in the UK and one in the USA. While Maxwell had its seat in London, its principal assets (various operating companies) were in the USA. Due to this ambiguous structure, Maxwell filed for a Chapter 11 bankruptcy in the USA and – the next day – also petitioned for an administrator order in the UK. The UK judges appointed administrators whereas the USA judges appointed an examiner. In order to minimize the potential inconsistencies and conflicts that might arise in simultaneous proceedings in different countries, the judges in both countries authorised their respectively appointed insolvency representatives to coordinate their efforts pursuant to an agreement between these insolvency representatives (a so-called Protocol) in order to produce a common system for reorganising Maxwell. **There is scope to elaborate regarding this case, which is the focus of question 3.3**

After that occurred, the United Nations Commission on International Trade Law (UNCITRAL) developed in 1997 the Model Law on Cross-Border Insolvency which also has provisions within it which encourages the arrival at some protocols or some agreements by the parties with or without some recognition of those agreements by the courts themselves. In 2009 UNCITRAL also developed a Practice Guide on Cross-Border Insolvency Agreements which contains information about examples of cross-border insolvency agreements or protocols (see

also the summary of the *Maxwell Communications Corporation plc* case of 1991 in *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, pp. 128-129).

3.5
Marks awarded 13 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.

First of all, the question arises whether this matter falls within the (material, territorial, temporal and personal) scope of the European Insolvency Regulation Recast (hereafter "**EIR**").

The EIR applies to "*insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. […]. National insolvency procedures not listed in Annex A should not be covered by this Regulation*." (see recital 9 of the EIR). It is for the sake of completeness that we thus must require further information on what kind of insolvency proceeding was opened in the UK.

Given the activity of Rydell, it seems that Rydell is not to be considered as one of the entities described in Article 1.2 of the EIR in which case the regulation would not apply.

With regard to the temporal scope of the EIR, the EIR applies to insolvency proceedings commenced after 26 June 2017. **What about when it ceased to apply to UK proceedings?**

Assuming that the EIR applies in this case, Article 3.1 of the EIR states that the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. Given the COMI of Rydell being in the UK, the UK courts thus have jurisdiction to open a (main) insolvency proceeding in the UK.

Article 7 contains provisions on the applicable law in proceedings subject to the EIR, and Articles 7 to 18 contain provisions on the applicable in respect of specific matters.

Article 19 of the EIR states that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings. It thus provides in an automatic recognition of the aforementioned proceeding in all the other countries in Europe which are a member of the European Union (it should however be noted that Denmark is not bound by the EIR or subject to its application; see recital 88 of the EIR).

Following the above, Fernz can only request the courts in another country of Europe which is a member of the European Union to open insolvency proceedings against Rydell if the latter has an establishment in the jurisdiction of that particular country. The effects of those secondary insolvency proceedings shall be restricted to the assets of Rydell situated in the territory of that country (see Article 3.2 of the EIR). An establishment is defined as "*any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*" (see Article 2(10) of the EIR). We thus must require further information on the countries of Europe which are a member of the European Union in which Rydell at least still carried out such activity in the period between 18 March and 18 June 2020. If Rydell did not, the courts in those countries cannot commence secondary insolvency proceedings against Rydell. Furthermore, the opening of such proceedings seems only appropriate if Rydell has in fact assets in that particular country.

5.5

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.

Because of Brexit and due to the lack of regulations between the UK and the EU on cross-border insolvencies as part of the Brexit deal, the European Insolvency Regulation Recast ceased to apply to insolvencies where the proceedings are opened after the transitional period (11pm on 31 December 2020). However, the European Insolvency Regulation Recast (and thus also the rules regarding the applicable law, jurisdiction and automatic recognition) continues to apply to insolvencies where the main proceedings are opened before this transitional period.

If the proceedings were opened in the UK on 18 June 2021, the EIR would thus not apply.

Nonetheless, the UK courts would in principle still have jurisdiction to open proceedings where Rydell's COMI is in the UK or Rydell has an establishment in the UK, but these proceedings (or any other proceedings for UK companies) will no longer benefit from automatic recognition in the countries in Europe which are a member of the European Union.

The would be beneficial to consider the MLCBI and other information required.

1.5

Question 4.3 [maximum 5 marks]

Consider an alternative situation now. What if Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, and formal insolvency proceedings were opened in the UK on 18 June 2021? What UK domestic laws

would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK?

As mentioned above, the EIR would not apply.

It seems that UK courts also have jurisdiction to wind up a “overseas company”, that is one which was incorporated outside the United Kingdom (see Section 1044 of the Companies Act 2006).

Furthermore, according to Section 221(5) of the Insolvency Act 1986 an unregistered company may also be wound up in the following circumstances: (a) 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; (b) if the company is unable to pay its debts; (c) if the court is of opinion that it is just and equitable that the company should be wound up. Article 220 of the Insolvency Act 1986 defines an “unregistered company” as any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom.

However, it seems that English case law requires some kind of (sufficient) connection with England and Wales (either directly or indirectly). **There is scope to elaborate further.**

It should also be noted that domestic laws of choice of laws might apply in an English winding up under the Insolvency Act of 1986 of a company where there is an international dimension.

4

Marks awarded 11 out of 15

TOTAL MARKS 44 /50

*** End of Assessment ***