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).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202122-545.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.2

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

(a) This statement is correct since the UK decided to merely provide financial aid to financially troubled entities and individuals.

(b) This statement is correct since the legislative reform process in the UK is too slow to effect amendments to an elaborate piece of legislation such as its Insolvency Act of 1986.

(c) This statement is correct since the English insolvency law already provided special rules to deal with extreme socio-economic situations like those brought about by global disasters such as the Covid-19 pandemic.

(d) The statement is incorrect since the UK did review parts of its insolvency rules and amended some, amongst other things, to deal with the negative economic fall out of the pandemic.

Question 1.3

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

(a) This statement is correct since the Dutch insolvency system does not provide for a discharge of debt and without such a dispensation in place, a scheme of arrangement will not be functional.

(b) This statement is correct since the Dutch government has not approved such legislation yet.

(c) This statement is incorrect since the Dutch in fact introduced new legislation in this regard in 2000 already.

(d) This statement is incorrect since the Dutch quite recently adopted legislation in this regard and it became operational on 1 January 2021.

Question 1.4

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

(a) This statement is correct since courts cooperating across jurisdictional borders are familiar with global insolvency principles.

(b) This statement is correct since courts across the globe are inclined to apply comity as a principle to assist foreign estate representatives to deal with cross-border insolvency matters in a coherent way.

(c) The statement is not correct since both local insolvency systems as well as cross-border insolvency rules differ quite significantly in many respects.

(d) This statement is correct since apart from the wide discretion that judges in general have, the UNCITRAL Model Law on Cross-Border Insolvency has been adopted by the majority of UN Member States, hence these rules are well-known to judges across the globe.

Question 1.5

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

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

(b) The statement is correct because universality has become the norm in the majority of States in cross-border insolvency matters since the introduction of the UNCITRAL Model Law on Cross-Border Insolvency in 1997.

(c) The statement is correct because the prevalent approach of modified territoriality amounts to a universal embracement of universalism amongst the majority of States around the globe.

(d) The statement is not correct because important international policy-making bodies such as the International Monetary Fund (IMF), the World Bank Group and the United Nations still support strong territoriality in cases of cross-border insolvency cases.

Question 1.6

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

(a) They were developed in 2000 and are the international best practice standards for insolvency regimes.

(b) They were recently revised in 2021 and, together with the UNCITRAL Legislative Guide, form the international best practice standard for insolvency regimes.

(c) They were recently revised in 2020 and, together with the UNCITRAL Model Law on Cross- border Insolvency, form the international best practice standard for insolvency regimes.

(d) They were initially released in 2011 and are the international best practice standards for insolvency regimes.

Question 1.7

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

(a) ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases.

(b) The JIN Guidelines.

(c) The JIN Modalities.

(d) The Nordic Convention 1933.

Question 1.8

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

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

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

(c) Choice of effect, choice of recognition, and choice of law.

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

Question 1.9

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

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

(b) It is prescriptive and provides information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases must be facilitated by cross-border co-operation.

(c) It is prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.

(d) It is not prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.

Question 1.10

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

(a) To interfere with the independent exercise of jurisdiction by the relevant States' courts and ensure an effective outcome.

(b) In urgent situations only, to interfere with the independent exercise of jurisdiction by the relevant States' courts in order to ensure an effective outcome.

(c) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than one State through communications among the States involved.

(d) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than three States through communications among the States involved.

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

1. With the 1542 Act, a regime for fraudulent debtors was included in English. This regime provided for the appointment of a body of commissioners who, at the request of a creditor, could proceed against a fraudulent commercial debtor who was in any of the following situations: (i) who fled the country, (ii) who barricaded himself in his house or (iii) who failed to pay his debts. In any case, this request could also be made in any other situation that would lead to defrauding his creditors in any other way.

   Once such a body was appointed, it would be responsible for the administration of the debtor's assets and for achieving an equal distribution among all creditors.

   Two fundamental principles governing modern insolvency law emerge from the 1542 law: (i) the collective participation of creditors and (ii) the equal distribution of available assets among creditors. **It's good that you raise development of a collective debt collecting procedure.**

2. The next point I want to make is the law of the nineteenth century, in which Mr. Chamberlain established three essential principles for bankruptcy law:

   - The assets of the debtor in each insolvency case belonged to the creditors: This principle is still one of the bases of the current insolvency processes. The above, the current liquidation and reorganization processes are based on the fact that the debtor's assets constitute the mass of assets that become the object of the insolvency process. By virtue of the foregoing, it is not permitted, for example, i) for executive proceedings to continue, ii) or for security interests over the debtor's assets to be enforced, outside of the insolvency process.

   - The administrator of "the assets must be subject to official supervision and control with respect to their financial administration... and their accounts must in all cases be audited by the authority": This rule is still used in insolvency proceedings. Thus, the accounts of the administrators are constantly reviewed by the judge of the insolvency proceedings. Likewise, the administrators must render accounts of their management and request authorization from the judge of the proceedings to perform certain acts.

   - An independent review of the debtor's conduct and the circumstances leading to the debtor's insolvency is required: This principle is still used by many jurisdictions to initiate insolvency proceedings. Thus, when debtors apply to initiate reorganization and liquidation proceedings, they must point to the circumstances that led to their insolvency. Likewise, the legal transactions carried out by the debtor prior to the insolvency application (suspicion period) can be studied to determine whether the debtor acted in bad faith.

What was the development and how did it shape the way of thinking concerning modern insolvency law?

3. Finally, the 1570 Act, which allowed a creditor to open bankruptcy proceedings following an "act of bankruptcy" of the debtor, was repealed. This allowance is still in place today, as insolvency proceedings can normally be initiated either by the debtor in insolvency or by his creditors.

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

1.5

Question 2.2 [maximum 3 marks]

Following the Covid-19 pandemic, States across the globe had to introduce measures to deal with the negative economic fall out of this pandemic. Briefly indicate three insolvency and insolvency-related measures so introduced in the UK.

According to the document "INSOL International - World Bank Group Global Guide June 26, 2020", the UK Government enacted the Insolvency and Corporate Governance Act, which provides for insolvency law reforms. Among these reforms are the following:

1. Protection of supply contracts: The Act prohibits suppliers of goods and services to a company from terminating supply contracts merely because the company becomes insolvent. This measure was adopted with the intention that the insolvent company's supply contracts be maintained to aid its survival.

   However, it is possible to terminate the contract for reasons other than the counterparty having entered into insolvency proceedings. Thus, the contract may be terminated if the insolvent debtor fails to perform the contract after the insolvency.

   This measure does not apply to certain companies engaged in financial services and also excludes financial contracts, securities financing transactions and derivatives.

2. A new moratorium period: The Act introduces a moratorium period in which a company (solvent or not) i) can use a grace period for the payment of non-financial debts prior to the moratorium and ii) a protection against creditor action while it seeks a rescue or restructuring of its claims.

   During the moratorium, directors will retain most of their management powers. However, a supervisor is included, who will be in charge of representing the interests of the creditors. Therefore, the supervisor will i) challenge the actions of the directors, and ii) may supervise the directors through different actions, such as a) verifying that the rescue of the company as a going concern appears likely; b) approving sales of assets outside the ordinary course; and c) approving the granting of new guarantees on the assets.

   For this moratorium to operate, it is necessary for the administrators to request it before the court (by means of an extrajudicial filing).

   The company must continue to pay these obligations during the moratorium period as they fall due. Likewise, a financial service provider may accelerate its credit upon default.

3. A new restructuring plan

   The Act establishes a new restructuring plan that companies in financial difficulties (whether solvent or insolvent) may use to manage creditors. The objective of these restructuring plans must be to resolve those financial difficulties.

   To do so, the plan requires creditors to vote in groups according to the same criteria as the plan of arrangement, but also includes a "cram down" of creditors between classes, which means that the court can force creditors (secured or unsecured) of any

class to accept the plan. In order for the court to sanction, certain requirements must be met.

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.

- Soft law refers to rules of conduct that, in principle, have no binding legal force. Thus, "soft law" refers to any written international instrument, other than a treaty, that contains principles, norms, standards or other statements of expected behaviour.

  On the other hand, the "hard law" are treaties created for member countries to adopt them in their legislation. **It would be beneficial to elaborate on treaties.**

- Different instruments have been developed to regulate international cross-border insolvency law. These instruments include, those with a national focus and those with an international focus.

  From the international dimension, attempts have been made to regulate international insolvencies through instruments that can be classified as (i) soft law or (ii) hard law, according to the definitions outlined above.

  In the area of insolvency law, "soft law" instruments have been more successful than "hard law" instruments. For example, the model law created by UNCITRAL has been described as a very successful instrument. This Model Law on Cross-Border Insolvency (MLCBI) did not take the form of a treaty or convention, but of a Model Law that member states were recommended to adopt, with or without modifications.

  This model law has been adopted by many countries and has therefore been considered a very influential instrument for cross-border insolvency issues.

2.5

Marks awarded 7 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.

In order to study the insolvency law of a state, it is very important to establish the sources of law that apply. Among these sources of law are the following, which will be explained below:

- Legislation unified in a single code or law.
- Legislation dispersed in several laws
- Principles of law
- Jurisprudence: judicial decisions

The insolvency legislation of a state can be found in legislation or in codes. In the case of common law countries, it is also possible to find that insolvency rules are based on principles.

Likewise, it will be necessary to establish whether the country to be analysed has a single unified legislation or whether its legislation is dispersed in several legal instruments, all of which must be studied in order to establish the insolvency system as a whole.

An example of the above, given in the reading of this module are the following:

- The United States has a unified insolvency law that applies to all of its states.
- At the same time, there are other legislations in which the insolvency law that applies to companies and the insolvency law that applies to individuals must be studied in different laws.

In the same way, in order to study the insolvency legislation of a state, the general principles of law that apply in that country must be identified. This is because such principles may regulate issues that will have an important effect on the insolvency law. An example of this is the rules on security interests.

Finally, I consider it important to mention that it should also be considered whether the country is a civil law or a common law country. This is because in those countries where the judicial precedent is predominant, it will also be very important to analyse the judicial decisions that have been made in the context of an insolvency process.

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.

The difficulties in dealing with "cross-border insolvency problems" mainly arise from the following three situations: i) there is no global insolvency law system, ii) there is no global court to deal with cross-border insolvency matters, and iii) there is no common insolvency language among the different states.
Take care to address the set task. You’ve been asked to discuss these pertinent questions / issues raised by Fletcher.
Thus, at the national level it is easy to determine the elements of an insolvency process, such as when a company is in insolvency or which insolvency processes exist. However, at the international level these elements may vary and be different in each jurisdiction. Therefore, when there are elements of internationality it may be difficult to define, for example, the term "insolvency" and the procedure to be applied in the event of non-payment of a debt. In this regard, the following aspects, which can be dealt with on a state-by-state basis, take on greater importance: i) creditor participation; ii) coordinated claims procedures; iii) priorities and preferences; avoidance powers; discharges; among others.

The conceptual differences of each state with respect to these aspects generate conflicts of laws in a cross-border insolvency process. These conflicts of laws are precisely the reason for the underlying problem of cross-border insolvencies. Therefore, many have defended the idea of "harmonization", even though in practice it is considered unlikely.

In view of the above and with the intention of bringing together "cross-border" and "insolvency" aspects, Fletcher poses three questions: **It’s good you are addressing the set task here.**

1. In which jurisdictions can insolvency proceedings be opened: To resolve this issue it should be analysed whether a court can hear the insolvency process. For this, it is important to determinate the connection to the jurisdiction of the parties or the jurisdiction of the litigation, the location of the debtor's assets or administrators, among other issues.

2. Which country's law should apply with respect to the different aspects of the case: In relation to this question, when the local court has determined that it will hear the insolvency process, it must decide which law will apply. In this regard, each state may have different rules regarding the law to be applied. Thus some will be determined depending on whether any of the parties claim to use foreign law. On the other hand, other jurisdictions will take this issue into account whether or not it is alleged by either party. **Have you considered choice of law concerns?**

3. What international effects will be given to proceedings conducted in a particular forum (including enforcement issues): In relation to this question, the court that has rendered the judgment, the type of judgment and the effect of the judgment, i.e. its "recognition" and "enforcement" or "effect", must be determined. Thus, for example, it will be important to determine whether it is a judgment initiating insolvency proceedings against a debtor or an order during the course of insolvency proceedings.

3

Question 3.3 [maximum 5 marks]

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

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

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

With respect to the above quotation, the cross-border insolvency case of Maxwell Communications Corporation plc in 1991 stands out.

In this case, two main insolvency proceedings were filed concurrently by the same debtor. One was being conducted in the United States under Chapter 11 proceedings and the other in England. An insolvency representative was appointed in each of these countries.

Taking into account the existence of the two proceedings, the judges in each of these countries (United States and England) proposed the idea of an insolvency agreement between the two insolvency administrators, with the objective of resolving conflicts and facilitating the exchange of information.

This agreement was implemented with two main objectives: (i) to maximize the value of the debtor's assets and (ii) to harmonize procedures to minimize costs, waste and jurisdictional conflicts. Whit the above propose, the parties agreed:

1. That the U.S. court would defer to the English procedure, once it was determined that certain criteria were met.

2. To maintain the management of the company (debtor) in order to maintain the going concern value of the company.

3. That the English directors, with the approval of the American directors, could select new and independent directors, incur debts; and undertake any major transaction on behalf of the debtor company. However, they were previously authorized to undertake "minor" operations.

This agreement was approved by the courts of the respective states.

The issues that were not regulated in this agreement were resolved during the course of the insolvency process, and with a subsequent agreement that expanded the initial agreement.

This case is an example of how the parties voluntarily established a way to coordinate the two existing insolvency processes. It was also cited in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, adopted on July 1, 2009, as a practical case of how cooperation and communication can solve problems in cross-border insolvency cases. The above, without affecting the independence of the courts, but reaffirming the principle of comity.

There is some scope to elaborate.

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, it is worth noting that "European Insolvency Regulation Recast" is the law governing insolvency in the European Union. This law was formally adopted in 2000, however it has been slightly amended in 2015 (applicable since mid-2017).

In relation to the application of this law for the case under study, below presented the points to take into account that I have extracted from the case raised:

1. Rydell has offices in the UK and throughout Europe.
2. The Rydell´s COMI is the UK.

3. Fernz which is incorporated in a country in Europe that is a member of the EU.
4. Fernz has not commenced proceedings to recovering unpaid debts from Rydell.
5. 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.
6. An insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June 2020.
7. A month later, Fernz was considering also opening proceedings in another country in Europe which was a member of the European Union.
8. There are no other insolvency proceedings known to have been initiated against Rydell.

In view of the above, it should be recalled that the UK ceased to be a member of the EU at 23:00 on 31 December 2020. However, the Recast Insolvency Regulation will continue to apply to insolvencies where the main proceedings were opened before the expiry of the transitional period (being 11pm on 31 December 2020). Thus, as the insolvency proceedings against Rydell in the UK commenced on June 18, 2020, the European Insolvency Regulation Recast will continue to govern such insolvency proceedings.

This regulation establishes that the courts of a Member State in which the "center of the debtor's main interests" (COMI) is located will have primary jurisdiction to conduct the insolvency proceedings. Thus, since Rydell's COMI is the UK, the insolvency proceedings will have the UK as the court with primary jurisdiction.

However, the EIR also allows for the possibility of opening subsidiary territorial proceedings in other EU member states. These are allowed when the debtor has an establishment (understood as "any place of operations... where the debtor exercises a non-transitory economic activity with human means and assets). This being the case, since Rydell has offices throughout Europe, it would be possible for other creditors located in another country in Europe and where Rydell has offices to initiate these subsidiary territorial proceedings.

Thus, Fernz will have to determine whether in the country where it wishes to initiate insolvency proceedings against Rydell, Rydell has establishments. If it does have establishments there, it will be able to commence the insolvency proceedings as a subsidiary proceeding to the insolvency proceedings in the UK (as the main court). **It would be beneficial to note specifically that further information is required in this respect.**

In the event that Fernz and other creditors located in another European country initiate these subsidiary territorial proceedings, this proceeding will be called secondary. This is because it is initiated after the adjudication of the bankruptcy in the State with the center of main interests, in this case the UK.

It would be beneficial to discuss specific articles in the EIR Recast which are relevant.
4.5

Question 4.2 [maximum 3 marks]

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

If the insolvency proceedings on Rydell had commenced on June 18, 2021 instead of June 18, 2020, the answer to this case would be different.

This is because under UK law, the EIR Recast does not apply to proceedings commenced after 11:00 p.m. on December 31, 2020 in the UK. The above, as with the UK's exit to the EU, as of 23:00 on December 31, 2020, the EIR Recast ceased to apply in the UK.
Taking into account the above, the law that would apply to such case would be the UK national law, and not the EIR Recast.

UK national law provides that the liquidators of an insolvency proceeding initiated in the UK have the obligation to have custody and control of all tangible and intangible assets to which the company is entitled and of which it remains the legal owner. However, the liquidators' ability to do so, in a practical sense, will depend on the extent to which the liquidation and their appointment as liquidators are recognized in the foreign state in which the assets are located.

The liquidators are also authorized to accept evidence submitted by foreign creditors in relation to the company's obligations incurred abroad or governed by foreign law.

Likewise, national law must also be considered to determine the law applicable to the insolvency proceedings conducted by the English court, taking into account that there are international elements in the case under study. Thus, under the Insolvency Act 1986 English law applies to procedural and substantive issues.

Have you considered whether the MLCBI might be able to assist?

2

Question 4.3 [maximum 5 marks]

Consider an alternative situation now. What if Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, and formal insolvency proceedings were opened in the UK on 18 June 2021? What UK domestic laws would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK?

In the event that Rydell was not registered and had its place of business in a European Union member country, rather than the United Kingdom, and formal insolvency proceedings were opened in the United Kingdom on June 18, 2021, the following would happen:

1. The insolvency proceedings opened in the UK, were not required by the EIR Recast rules because they were opened after December 31, 2020.

2. Therefore, the process initiated in the United Kingdom could not be considered as a subsidiary process to the process initiated in the COMI of Rydell.

3. The process initiated in the United Kingdom shall be governed by the rules of this country.

In this regard, it should be noted that the English court has jurisdiction to wind up a foreign company, i.e. one that was incorporated under the laws of a country other than the United Kingdom (as would be the case of Rydell). This is provided that the foreign company complies with the requirement to register its presence and appoints a resident person or persons to accept service of process and other formal notices on its behalf.

However, it would also be possible for the English court to have such jurisdiction to liquidate a foreign company, even though it is not registered, when certain circumstances are met. These circumstances include a "sufficient connection" with England and Wales.

Thus, if Rydell can be identified as falling within those circumstances, the English court will have jurisdiction to wind it up, despite it being a foreign company not registered in the UK.

Section 221(5) Insolvency Act 1986 requires consideration and discussion.

2

Marks awarded 8.5 out of 15
TOTAL MARKS 38.5/50

*** End of Assessment ***