



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**.

Commented [DB1]: Please read and follow the instructions! I had to do this for you.

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 8 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.

In early English bankruptcy law, namely the English Bankruptcy Act of 1542, a creditor could make an application to the Commissioner against a debtor who failed to pay his debts or otherwise defrauded the creditor. Upon a successful application, the Commissioner would administer the estate and distribute amongst creditors.

The first modern insolvency law principle stemming from and based on this early English Bankruptcy Act of 1542 is the *pari passu* distribution principle. Still being applied today, the *pari passu* principle means 'equal right of payment' and basically means all unsecured creditors in insolvency processes are entitled to an equal distribution share of any realised assets of the estate. This fundamental principle stems from the Commissioner distribution of assets noted above.

Another modern insolvency law principle shaped from the English Bankruptcy Act of 1542 is the collective participation by creditors. This principle is considered an essential part of any well developed insolvency administration system and includes the *pari passu* principle noted above. It also features prominently in modern insolvency law through things such as creditor meetings, creditor committees and opportunities for the creditor to contribute to decisions of importance in insolvency proceedings.

One of the most significant, in my opinion, developments regarding debt collection procedures in English Law is the notion of debt discharge, which wasn't introduced until the Early 18th Century having previously not formed part of the Act of Elizabeth. Statutory discharge was introduced in the Statute of Ann and has remained part of modern bankruptcy. **It would be beneficial to elaborate on the modern thinking of fresh start.**

Finally, Fletcher explored the roots of bankruptcy law and principles which developed individual debt collection procedures, with one of those principles being *cessio bonorum*, i.e. the voluntary surrender of goods from a debtor to his creditor in Roman Law. The creditor would sell the goods as restoration of their debt and whilst discharge from said debt would not occur unless the value was sufficient to cover the debt, it did protect the debtor from arrest. The features of *cessio bonorum* appear in many modern insolvency systems.

2.5

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.

Insolvency Practitioners in the UK are guided by the UK Insolvency Act, 1986, which includes provisions for both corporate and personal insolvency within the same piece of legislation, therefore applicable to both individuals and companies. Over the years, various updates and modifications have been made such as the Insolvency Act, 2000 and Enterprise Act 2002.

In more specific terms, as a result of the unprecedented COVID-19 pandemic, the Corporate Insolvency and Governance Act 2020 was brought into place. This marked significant changes in UK Insolvency Law and was rapidly passed through Parliament for approval, due to the significant impact and distress brought about by the pandemic.

The most significant impacting, albeit only temporary, measure introduced under this legislation, in my opinion, was the suspension of winding up petitions and statutory demands. This was a measure to protect UK businesses and individuals against aggressive debt recovery actions and no doubt proved to be a welcome relief following the challenges faced in regards to the impact of COVID-19. Under this measure, a creditor could not present a winding-up petition without sufficient reasonable grounds to demonstrate that COVID-19 has not had a financial effect on the company/individual in question.

Also included in this legislation was new moratorium rules. A moratorium is effectively a suspension of law and this free standing moratorium is for distressed but viable companies, and was introduced as a permanent measure under the Corporate Insolvency and Governance Act, 2020. It allows a company protection from creditor action whilst a turnaround plan is pursued, effectively giving the company 'breathing space'. During the moratorium period, which is initially 20 business days (but can be subject to extension), the running of the business continues under supervision and provides a 'payment holiday' in respect of most pre-moratorium debt. It should however be noted that there are certain debts that must continue to be serviced by the company under the rules and at the end of the moratorium period and certain debts that will be given priority status in terms of any creditor distribution (in the event of insolvency).

The third new measure I will discuss is the new restructuring plan; again, another permanent measure introduced under the Corporate Insolvency and Governance Act. This is a Court supervised restructuring process, similar to Schemes of Arrangement, which gives a company the opportunity to propose a compromise with its creditors and/or members. The restructuring plan may or may not include the moratorium detailed above. An application can be made for a restructuring plan in respect of a company that may already be facing financial difficulties or are likely to face that position. The key element is the valuation of the process in respect of both the creditors position and the voting process. The proposals may be sanctioned by the Court notwithstanding that certain classes may have voted against it, subject to safeguards for minority creditors.

The moratorium and restructuring plan together give further flexibility to UK restructuring.

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.

The concept of treaties form part of a State's "hard law" on insolvency and are applied to domestic laws and principles to resolve insolvency issues that are connected with another State. Under the treaties, States become signatories and are bound to the effect this has on their domestic law, hence the concept being "hard law". Whilst these treaties haven't always been enforced or applied successfully, in fact there has been varying levels of success generally, they have certainly had an effect on the development of States' response to international insolvency issues over the years.

The use of "soft law" options have certainly proved more successful in application to cross border insolvency matters.

The Model Treaty, which was adopted at the Hague Conference on Private International Law in 1925 was never actually ratified (i.e. had sufficient signatories to pass), but it contributed to decisions in regulating international insolvency and creating cross border insolvency rules.

Both 'hard law' and 'soft law' treaties and measures have been attempted over many years to try and develop cross border cooperation in insolvency matters and establish cross border insolvency rules across States. However, the first significant development that was widely adopted (and is considered a success) is the UNCITRAL Model Law on Cross Border Insolvency, which came from the United Nations Commission of International Trade Law and presented a Model Law that could be worked into the domestic legislation of States. A key feature of this Model Law is that it assists with the establishment of the 'main proceedings', namely where the debtor usually has its Centre of Main Interest (COMI) and allows for secondary/concurrent proceedings.

4

Marks awarded 9.5 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.

The first source of insolvency law I would seek to find when considering the insolvency laws in any State would be its insolvency Act or Code, which most States would have their own version of. This would provide the relevant legislation for insolvency procedures in that State. Some States have a single piece of legislation, covering all aspects of insolvency law for that State (such as the Bankruptcy Code, 1978, which applies throughout USA), where as in other places, a number of separate pieces of legislation may be in place.

It is important to note that when separate pieces of legislation exist for a State, or even modifications to the existing main piece of legislation (such as modifications that have been made to the UK Insolvency Act, 1986), then these separate pieces of legislation must be read and considered in conjunction with one another in order to determine the most accurate course of action or consideration. This principle also applies when, for example, individual insolvency law is contained in one Statute and corporate insolvency law is contained in a separate Statute.

In addition, depending on the situation in hand, General Law principles may also need to be considered and applied over and above the considerations of the insolvency legislation being used. This may include matters relating to ownership and security, for example and this can vary significantly from State to State in terms of the application of General Law.

It would be beneficial to discuss common law in common law countries as filling any gaps in law.

4

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring

the “cross-border” aspects and the “insolvency” aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

Harmonisation of insolvency laws has been an ongoing problem as regards to bringing cross border insolvency issues to a conclusion. Many initiatives have been put in place in efforts to promote harmonisation of insolvency Laws, such as the UNCITRAL Legislative Guide on Insolvency Law, which seeks to inform and assist on insolvency law around the world and serve as a reference tool for regulatory bodies. The main objective of this guidance is the evaluation the different approaches and solutions to matters arising in insolvency proceedings, so that the most appropriate solution can be sought in the context of that particular matter. It notes key objectives and principles that should be reflected in a State’s insolvency laws which, if applied by most, would ultimately promote the harmony and consistency of State to State insolvency laws and reduce the cross border difficulties faced.

As referenced in the INSOL International Foundation Certificate: Module 1 guide notes, “in an attempt to bring the ‘cross border’ aspects and the ‘insolvency aspects’ together, Fletcher asks three very pertinent questions:

1. In which jurisdictions may insolvency proceedings be opened?
2. What country’s law should be applied in respect of different aspects of the case?
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?”

As regards to where insolvency proceedings may be opened, it raises the question of whether each State in question can enter into insolvency proceedings in their own State, to run concurrently with those in another state. However, which legislation ultimately prevails is where the difficulty lies and it requires State to State communication and cooperation, which doesn’t always occur.

In instances where the insolvency proceedings are occurring in one State but may have matters to be dealt with in another State, often the local Court (in the State where the matter is to be dealt with) will insist that formal recognition of the insolvency proceedings is sought in the local Court before any case specific dealings are entered into. Often, this hoop jumping cannot be avoided if there are assets to be traced and realised in another State, assets connected with ongoing litigation in another State, or Officers of the company to be examined in another State (amongst many other things), for example. Of course then, even once recognition is obtained, questions are raised as to which State’s law to actually apply, however, ordinarily this would only really become an issue if challenged.

Similarly, if another country’s law is applied in respect of a certain aspect of a case and this is pursued with success and a foreign judgment is obtained, you then have to consider your ability to enforce this in your home State (or elsewhere) and the additional recognition that may be required to do so. When considering foreign judgments in answer to question two above, consideration of the Court that made the judgment, the type of judgment and the effect of the judgment are all important questions, in particular whether it’s an order to commence insolvency proceedings or whether its an order concerning ongoing insolvency proceedings.

It is these questions and considerations that factored into the development of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments, which was developed in 2018 and seeks to resolve many of these issues. It is designed to assist and equip States with a framework of provisions for recognition and enforcement of these judgments alongside their own laws and it facilitates the overall conduct of cross border insolvency proceedings.

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.

Where a debtor is connected to multiple concurrent proceedings across two or more States, be it initiated or threatened, cooperation and coordination is encouraged to promote recognition and enforcement. One of the key principles of the MLCBI is cooperation and coordination. This is with a view of ensuring a debtors' estate is administered efficiently and fairly, with a view to maximising the outcome for creditors. The Model Law mandates an insolvency representative to cooperate with a foreign court or foreign representative.

One well known case law example is the case of Maxwell. This case demonstrated how the UK and USA were able to cooperate by way of Court Orders and had agreed division of duties and protocol in place between the UK and USA (both of which were COMI's for the debtor), which was agreed by representatives of both States and allowed the insolvency proceedings in both States to run concurrently. As noted above and as applied in this case, the proceedings were run with a view ensuring the debtor's estate was administered efficiently and fairly to maximise the outcome for creditors. This case demonstrated a credible and successful structure to properly administer international cross border insolvency proceedings.

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.3 asks for a brief note, it is for 5 marks.

2.5

Marks awarded 11.5 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.

The European Insolvency Regulation (EIR) was originally developed in 2000. It was then reviewed and became the EIR (Recast) in 2015 and has been applied to matters since 2017.

Whilst the UK ceased to be a member of the European Union on 31 January 2020, the EIR Recast legislation still applies to UK insolvencies where the main proceedings were opened prior to the completion of the UK's transitional exit period, being 31 December 2020. Therefore, in this case, EIR Recast regulations would still be applicable and the UK would be treated in this circumstance as though it was still a member of the European Union.

If Fernz were to open proceedings in another country in Europe which was an EU Member State, the EIR would still allocate the primary jurisdiction based on the debtor's Centre of Main Interest (COMI). Therefore, the primary jurisdiction would be the UK, where the initial proceedings commenced and under the EIR, within the EU, only the Courts of the member state where the debtor has COMI have the jurisdiction to open main proceedings.

However, the EIR still allows for subsidiary territorial proceedings in Member states, therefore, action by Fernz is still a possibility and may still be allowable.

In order to do so, the debtor must have an 'establishment' in the State where Fernz wishes to commence proceedings and Fernz would be required to adequately demonstrate this as part of the application. An 'establishment' is a place of operations where economic activity is carried out by human means and assets. Since Fernz would be making this application prior to the commencement of the UK proceedings, they would be opened as secondary proceedings to the ones in the COMI, being the UK. However, it should be noted that the proceedings are generally limited so that they only deal with assets within that State. The Courts in each member State apply their own laws to insolvency proceedings opened in that State, under the EIR and it is also important to note that insolvency proceedings in one member state are automatically recognised in all other member States and shall have the same effect as if the proceedings had been opened in that State.

Therefore, in this example, the UK would still have been an EU member state and the UK Courts were Courts of a member state in which case automatic recognition would have applied in the country where Fernz was considering opening proceedings.

There is scope to elaborate regarding provisions of the EIR Recast.

6.5

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.

Yes, the circumstances would change if the proceedings were opened a year later, due to the completion of the UK's transitional exit period from the European Union. Because of this significant date change, the EIR Recast legislation would no longer apply, under UK law.

As a result of the UK leaving the EU, it lost all access to mutual recognition of proceedings in the EU and in order to fully answer this question, we would need to know whether the

proceedings being commenced in the EU were happening in an EU Member State that has adopted the UNCITRAL Model Law that permits cross border recognition, upon application to the member State's court (recognition is not automatic).

However, something else needed in order to fully answer this question, would be the need to consider whether Fernz still intended to commence proceedings on 18 July 2020 as in the question above, or whether this action would also be a year later.

If Fernz was still intending to take action in 2020 as in question 4.2, then EIR Recast would still be applicable and Fernz would be required to demonstrate that the debtor had an 'establishment' in the EU Member State in which they would be commencing proceedings. As a reminder, an 'establishment' is defined as a place of operations where economic activity is carried out by human means and assets. In this case, because the UK proceedings would not have commenced or been initiated at this point, the action being taken by Fernz would, under the EIR Recast be considered 'independent proceedings' as subsidiary proceedings, as they are opened prior to the main proceedings in the COMI.

However, another clarification that would have to be sought is the significance of Fernz taking action within the UK transitional exit period from the EU where the EIR Recast would still be applicable and the minor UK creditor initiating proceedings after the exit period has ended, therefore rendering the COMI principle not applicable. You would think though that the commencement of proceedings by Fernz would prompt action from the UK creditor earlier or, in fact, negate the need completely.

3

Question 4.3 [maximum 5 marks]

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

Difficulties would certainly be faced as, due to the departure of the UK from the EU on 31 January 2020 (with the transitional exit period completing on 31 December 2020, the UK lost access to all mutual recognition proceedings in the EU and therefore proceedings being opened in the UK on 18 June 2021 would be problematic.

Accordingly, recognition of UK insolvency proceedings in the EU will now depend on the local law of the applicable member state and in fact, only four EU Member States have adopted the UNCITRAL Model Law, permitting cross border insolvency recognition. An application would need to be made for this recognition, as it is not automatic. If recognition is not sought, or cannot be sought, simultaneous local insolvency proceedings in the EU State may need to be opened.

The UK Insolvency Service does provide guidance on how UK proceedings may be recognised under the local laws of each State.

Significantly, the English law moratorium preventing the commencement of new civil proceedings against a debtor will no longer be given automatic recognition in the EU and creditors in the EU can enforce against assets in the EU and commence proceedings in the

EU, if they can demonstrate the debtor's COMI is in that State, as has what is happening here in this scenario.

If UK proceedings were opened, the UK insolvency practitioner would need to seek assistance or recognition to deal with assets or any other business of the debtor from the Courts in the EU Member State under that States national law, which will certainly incur additional costs to the estate. It would therefore not necessarily be credible for a 'minor' creditor to commence these proceedings, particularly as a UK insolvency practitioner's ability to deal with the assets of the estate is effectively diminished so together with the additional incurred costs, is likely to lead to a less beneficial outcome for creditors. It would therefore be encouraged for creditors to seek commencement of proceedings in the EU as a much more efficient way of conducting the process.

Take care to answer the question put to you. It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

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Marks awarded 10 out of 15
TOTAL MARKS 39/50

*** End of Assessment ***