



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1
(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)**

This is the **summative (or formal) assessment** for **Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202122-545.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 November 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

- (a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.
- (b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.
- (c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.**
- (d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.2

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

- (a) This statement is correct since the UK decided to merely provide financial aid to financially troubled entities and individuals.
- (b) This statement is correct since the legislative reform process in the UK is too slow to effect amendments to an elaborate piece of legislation such as its Insolvency Act of 1986.
- (c) This statement is correct since the English insolvency law already provided special rules to deal with extreme socio-economic situations like those brought about by global disasters such as the Covid-19 pandemic.
- (d) The statement is incorrect since the UK did review parts of its insolvency rules and amended some, amongst other things, to deal with the negative economic fall out of the pandemic.**

Question 1.3

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

- (a) This statement is correct since the Dutch insolvency system does not provide for a discharge of debt and without such a dispensation in place, a scheme of arrangement will not be functional.
- (b) This statement is correct since the Dutch government has not approved such legislation yet.
- (c) This statement is incorrect since the Dutch in fact introduced new legislation in this regard in 2000 already.

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

Question 1.4

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

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

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

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

Question 1.5

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

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

- (b) The statement is correct because universality has become the norm in the majority of States in cross-border insolvency matters since the introduction of the UNCITRAL Model Law on Cross-Border Insolvency in 1997.
- (c) The statement is correct because the prevalent approach of modified territoriality amounts to a universal embracement of universalism amongst the majority of States around the globe.
- (d) The statement is not correct because important international policy-making bodies such as the International Monetary Fund (IMF), the World Bank Group and the United Nations still support strong territoriality in cases of cross-border insolvency cases.

Question 1.6

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

- (a) They were developed in 2000 and are the international best practice standards for insolvency regimes.
- (b) They were recently revised in 2021 and, together with the UNCITRAL Legislative Guide, form the international best practice standard for insolvency regimes.
- (c) They were recently revised in 2020 and, together with the UNCITRAL Model Law on Cross- border Insolvency, form the international best practice standard for insolvency regimes.
- (d) They were initially released in 2011 and are the international best practice standards for insolvency regimes.

Question 1.7

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

- (a) ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases.
- (b) The JIN Guidelines.
- (c) The JIN Modalities.
- (d) The Nordic Convention 1933.

Question 1.8

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

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

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

Question 1.9

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

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

Question 1.10

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

- (a) To interfere with the independent exercise of jurisdiction by the relevant States' courts and ensure an effective outcome.
- (b) In urgent situations only, to interfere with the independent exercise of jurisdiction by the relevant States' courts in order to ensure an effective outcome.
- (c) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than one State through communications among the States involved.
- (d) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than three States through communications among the States involved.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

[The three significant (historical) developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law are as follows;

The root of civil law has been said to be traced to Roman law. Fletcher identified this and argued that the roots of Bankruptcy law (as a collective debt collecting procedure) are found in the procedures of the Roman law namely; *cessio bonorum* (assignment of property); *distractio bonorum* (forced liquidation of assets); *remission and dilatio* (composition with creditors). This significant (historical) development evolved from individual debt collecting procedures to collective debt collecting mechanisms (Insolvency Law) when the debtor was found to be insolvent. **You have been asked to consider English law.**

There is also a significant (historical) development of the procedure of the *lex mercatoria* which is the customs and usages that developed between merchants on the continents which later influenced the laws of the countries that had a more Roman or Germanic law character (loosely termed “civil law”). The effect that between the 13th and 17th century some forms of Bankruptcy legislation has been developed among European countries. For instance, the word *bankruptcy* came from the Italian *banca rotta* procedure which means to “break the bench”, and which referred to circumstance where a merchant who operated his business in the medieval market place could not pay his debt and his creditors closed his business by breaking his bench or counter. This heralded the gradual movement of debt collection and insolvency law from execution against the person towards the dispensation of execution against the assets of the debtor.

There is also the development of the concept of a discharge of debts (sometimes referred to as *fresh start* or *rehabilitation*) and the abolishment of imprisonment for debt, which development brought about providing insolvency law with a far more humane face **These are relevant. It would be beneficial to restructure your answer to explain them more directly and clearly with respect to English laws.**

The following English laws were applicable under the above historical periods.

The Statute of Marlbridge of 1267 which introduced imprisonment for debt in the 13th Century but abolished in 1869 by the Debtors’ Act. The English Bankruptcy Act of 1542, which provided for a form of compulsory sequestration applicable to dishonest and absconding debtor viewed as quasi-criminals. The law also provided for a compulsory administration and distribution of the dishonest debtors’ estate on the basis of equality amongst all the creditors resulting to the modern insolvency law principle of collective participation by creditors and a parri passu distribution among them on the available assets. There is also the Statute of Ann of 1705 which introduced the notion of a statutory discharge during the period. This statute stayed up to the passage of the 1883 Act now viewed as the foundation of present system of English bankruptcy law aimed at fair procedure with adequate supervision and means to discourage dishonesty, the basis of present-day insolvency law.]

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.

[The three insolvency and insolvency-related measures introduced in the UK to deal with the negative economic fallout of the Covid-19 pandemic as provided for in the new Corporate Insolvency and Governance Act, passed into law upon the receipt of the Royal Assent on 25th June, 2020 include the following;

1. Introduction of a new restructuring plan to help viable companies struggling with debt obligations. Under the plan, the UK Courts is given power to sanction a restructuring plan that will bind Creditors, if it is “fair and equitable”. By the plan, Creditors are given power to vote on the plan, however, the court can also impose the plan on dissenting Creditors. The details of this plan are contained in Schedule 9 of the UK Corporate Insolvency and Governance Act, 2020.
2. Introduction of a free-standing moratorium to give UK Companies a “breathing Space” to enable UK companies pursue a rescue or restructuring plan. According to the measure, during this moratorium, no creditor action can be taken against the Company without the Court’s permission. Further, the moratorium will be overseen by a Monitor who is an Insolvency Practitioner. Meanwhile, the responsibility of the day-to-day running of the company shall remain with the directors which can be regarded as (a “debtor-in-possession” procedure). The period of the moratorium shall be in multiple of 20 days with a maximum period of 12 months. This can be found in Schedule 4 of the UK Corporate Insolvency and Governance Act, 2020 containing new rules and creating by inserting PART 1A.
3. Introduction of prohibition on termination (or “ipso facto”) Clauses that are entered when a company enters an insolvency procedure, a moratorium or begins a restructuring plan. By the Act, suppliers are prevented from stopping their supply while a Company is going through a rescue process and safeguards to ensure that continued supplies are paid for. Suppliers can also be relieved of the requirement to supply if it causes hardship to their business. However, small suppliers were exempted from the obligation to supply until 30th June, 2021 to protect their business where necessary. This can be found under IA 1986, section 233B of the UK Corporate Insolvency and Governance Act, 2020.]

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.

[Treaties can be said to be adjudged highest quality form of public international instruments to which States become signatories or ratify or accede to and as such bind themselves and affect their domestic law accordingly. They form part of the “hard law” of domestic laws enforceable in the Courts of such States which had become signatories to them or ratify them or accede to them. For instance, from the 13th and 14th Centuries, in order to address absconding debtors’ issues and issues of gathering assets, bilateral International Insolvency Conventions began to appear in Europe. These existed until the 19th Century when more modern forms of bilateral treaties or conventions on issues of jurisdiction, recognition and enforcements related to Bankruptcy, winding up, arrangements and compositions involving their State began to also appear. One of such successful multilateral treaty is the Nordic Convention of 1933 from the Scandinavian States which include Denmark, Finland, Iceland, Norway and Sweden.

Other treaties that have also been developed include the Montevideo Treaties on International Commercial Law 1889 and 1940 respectively ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. Argentina, Paraguay and Uruguay ratified the 1940 Montevideo Treaty. There is also the Havana Convention on Private International Law concluded in 1928 between some Latin and Middle American States¹. Also, the European Union Insolvency Regulation (EIR) (2000)².

Soft law on the other hand is a general term that may refer to a variety of quasi-legal, non-binding rules, instruments, and processes used in international relations by countries and international organizations³. Conventionally, soft law is considered a weakened version of hard law, with diminished levels of bindingness, obligation, and precision⁴. Soft law may be said to include instruments like guides, recommendations and model law. They are usually operational guides that provide details for implementation of provision in treaties. They also enables the development of international norms through more relaxed processes, although assumed to be non-binding, such laws can be concluded with high degree of precision and can generate a strong compliance pull where they are negotiated by representatives of many countries and where various economic forces, including concerns about reputation, induce participants to comply⁵. One major example of soft law development concept is the Hague Conference on Private International Law referred to as (the Hague Conference) which was established in the 19th Century to work towards the progressive unification of private international law. The adoption of a Model Treaty on Bankruptcy at the 1925 conference was regarded an early initiative. Though never ratified, this Model Treaty likewise has contributed to the international deliberations on regulating international insolvency. For example, it allocated jurisdiction in respect of a corporation to the court where the statutory registered seat was located “provided that it be neither fraudulent nor fictitious”. The Hague Conference now describe itself as “The World Organization for Cross-Border Co-operation in Civil and Commercial Matters”⁶. Other examples of soft law in Cross-Border Insolvency include, the UNCITRAL Legislative Guide on Insolvency Law (2004) the Model Law on Cross-Border Insolvency (MLCBI) etc.

It has however been argued that treaties can at best supply only a partial solution to the problems of any insolvency in which the spread of contacts extends beyond their regional frontier⁷. Hence “soft laws” when properly coordinated and adopted by Insolvency professionals and stakeholders in different jurisdiction or States with existing treaties, may assist in achieving better insolvency practice and procedure in cross border insolvencies.

Treaties and “soft laws” therefore, may be used to establish cross-border insolvency rules in States as they can help to provide guidelines and details about applicable rules in various insolvency situations that States can adopt in cross-border insolvency proceedings. For Instance, the Legislative Guide on Insolvency Law (2004) is a soft law which is intended to be used as a reference by national authorities and legislative

¹ These States include Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.

² The European Insolvency Regulation (EIR) (2000) has been currently reviewed and amended as the European Union Regulation (EU) 2015/848 by the European Parliament and of the Council on 20th May, 2015.

³ Irit Mevorach, *A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups*, Michigan Journal of International Law, Vol 40 (2) 2019 p 508.

⁴ *Ibid.*

⁵ *Idem* p 509.

⁶ INSOL INTERNATIONAL, *Foundation Certificate in International Insolvency Law: Module 1 Guidance Text* 20212022, p 47.

⁷ Ian F. Fletcher, *International Insolvency: A case for Study and Treatment, Perspective*, The International Lawyer, (1993) 27 (2) p 437.

bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations⁸.

Similarly, treaties and “soft laws” may be used to foster cooperation among States in cross-border insolvency proceedings. For instance, the Guidelines Applicable to Court-to-Court communication in Cross-Border Cases (2001) is intended to enhance coordination and harmonization of insolvency proceedings that involve more than one Country through communication among the jurisdictions involved⁹.

Treaties and “soft laws” may also be used to establish best practices in cross-border insolvency rules in States. For example, INSOL Lenders Group Statement of Principles for a Global approach to multi-Creditor workouts is aimed at achieving best practice in States for all multi-creditor workouts¹⁰.]

4

Marks awarded 8.5 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 various possible different sources of insolvency laws in the United Kingdom are as follows;

1. The Insolvency Act of 1986 “the Act”.
2. The Insolvency Rules 2016 SI 2016/1024 “the Rules”.
3. Corporate Insolvency and Governance Act, 2020
4. The UNCITRAL Model Law on Cross-Border Insolvency
5. Common Law Principles
6. Decided Cases.

The Insolvency laws in United Kingdom has its major deep root linked to the Insolvency Act of 1986 (UK) and the Insolvency Rules 2016. Suffice to say that, the Act has undergone several amendments since its enactment. The Act which contains additional parts and schedules sometimes, is said to be a statute with difficulty in sailing through. The UK Insolvency Act, 1986 has also been said to be an example of a unified Insolvency legislation in that it deals with consumer (personal) and corporate bankruptcy in one and the same Act¹¹. Recent amendment to the Act has brought about an Insolvency Act 2000 and the Enterprise Act, 2002. Also introduced in 2009 was the Debt Relief Order for individuals. There is also a further amendment now allowing online application for bankruptcy relief introduced in 2016.

The Insolvency Rules 2016 which revoked and replaced the 1986 Insolvency Rules was the original rules enacted with the Act. The Rules made provisions for the practice and procedure on the application and functionality of the Act. For instance, the Rules contains details of what should constitute a proper notice to creditors, how decision by companies and creditors are to be made and how the proceeds of insolvent debtor’s assets are to be distributed to creditors¹².

⁸ UNCIRAL legislative Guide on Insolvency law, P 1.

⁹ Bruce Leonard, *Co-ordinating Cross-border Insolvency Cases*, *International Insolvency Institute*, Appendix 5, p 52.

¹⁰Idem, p 50.

¹¹ INSOL *supra* Module 3B, Guidance Text, p 3.

¹² UK Insolvency Rules 2016, R 15.3.

Procedure to obtain deemed consent of creditors under the Act and other decisions procedures are also provided in the Rules¹³.

Another source of Insolvency Law in the United Kingdom is the recently introduced Corporate Insolvency and Governance Act, 2020 to mitigate the effect of the COVID 19 pandemic on businesses in the UK. The new Act assented to on 25 June 2020 introduced a number of permanent and temporary measures as reforms which include a new restructuring plan, new moratorium rules, the relaxation of wrongful trading liability and the suspension of winding up petitions and statutory demands, etc.

The United Kingdom has also adopted as part of its Cross-Border Insolvency Rules, the UNCITRAL Model Law on Cross-Border Insolvency in 2006. Section 426 of the Insolvency Act is still applicable to “relevant” listed Countries.

Prior to Brexit, the European Union Insolvency Regulation 2016 was also a relevant source of Insolvency law in the United Kingdom. The EU Insolvency Regulation was applicable to European Union member states which the United Kingdom was a member. But as at 11 pm on 31 January 2020, the UK ceased to be a member of the European Union¹⁴.

The United Kingdom also have the common law principles as a relevant source of insolvency law where there are no specific legislations. For instance, under the common law system, such as England, choice of law issues can arise where parties decide to invoke them.

Finally, decided cases can also be said to be relevant source of insolvency law in the United Kingdom applicable where the laws are vague and do not make adequate provisions for the particular circumstance. This can be found in the effect of the decision of the Supreme Court in 2012 in the case of *Rubin v. Eurofinance SA; New Cap Reinsurance Corp. (in liq) v Grant*¹⁵ where the Court considered the question of recognition and enforcement of judgments concerning avoidance provisions and declined to accept that there was a *sui generis* (unique) category of insolvency orders and judgments subject to special rules¹⁶.]

Take care to answer the question put to you. You’ve not been asked to pick a State to consider nor to consider the UK, rather you’ve been asked to consider the sources of laws in any State. This question requires you to consider different types of sources of law and how they interact.

2.5

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.

[In an attempt to bring the “cross-Border” aspect and the “insolvency” aspects together in the difficulties that arises in a cross-border insolvency, Fletcher asked three very pertinent questions. These questions are;

1. In which jurisdiction may insolvency proceedings be opened;
2. What country’s law should be applied in respect of different aspects of the case;

¹³ INSOL Module 1 Guidance Text *supra*, p 7.

¹⁴ *Idem*, p 63.

¹⁵ [2012] UKSC 46.

¹⁶ INSOL Module 1 Guidance Text *supra* p 50.

3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

The first question Fletcher asked, is the question seeking to determine the choice of forum in insolvency proceedings that involves more than one State. The issue here is which State's Court has jurisdiction to determine a cross-border insolvency case; which court can exercise jurisdiction over the parties or the dispute relating to the debtor's estate? In which State's Court will the commencement Order be determined in the case of corporate liquidation. Which State's Court will determine the issues of foreign elements- assets or examinable corporate officers in another state when they arise?

Bilateral and multilateral agreements aimed at governing cross-border insolvencies between countries have been developed to answer this question though, limited in application. Under the Model Law, which is said to be a subscription of the Universalist approach to cross-border insolvencies, cooperation and coordination between States' Court and Insolvency Representatives is advocated, recommended and made mandatory to reduce the conflict and uncertainty associated with the difficulties involved in agreeing on the question of jurisdiction. Hence the opening of concurrent proceedings in more than one State, and each State applying its own laws with no or very limited extra territorial effects granted to foreign proceedings is recommended. Also, under the European Insolvency Regulation (EIR), location of the debtor's Centre of Main Interest is provided as the determining factor for both the competent insolvency court as well as the applicable insolvency laws¹⁷. According to Article 3 of the European Regulation (EIR), the debtor's Centre of Main Interest (COMI) is the place where the debtor conducts the administration of his interest on a regular basis which is ascertainable by third parties. With respect to companies, the place of the registered office of the company is presumed to be the COMI of the company. For countries who are yet to adopt either the Model law or nay protocol agreements, or are not members of the European Union, the question or issue is left to be determined by the debtor's and creditor's in their agreements as such matters have been said to be in the rem of Private International Law.

The second question Fletcher asked seek to determine the issue of which law will be applicable in the forum of the proceedings. Here, different systems of law adopt different approaches to this question. Under common law jurisdiction, like England, the question of which law to apply only arise where the parties invoke the question. In the absent of the parties invoking the question, the law of the forum applies. This will however, only occur where it is to that party's advantage to apply the foreign law. Similarly, proof of foreign law in common law states is a question of fact whereas in civil law systems, foreign law is presumed to be a question of law to be applied regardless of whether it is pleaded by the parties or not¹⁸. Under the Insolvency Act, 1986, in an English Winding up, including winding up of a foreign company, the Insolvency Act, will be applicable in relation to matters of procedure and substance. For instance, English Court may deal with the issue of the procedure of lodging a proof of debt while, it may also require reference to a foreign law to establish the validity of the actual claim where that claim is for a debt governed by foreign law¹⁹. **Have you considered choice of law concerns?**

The third question Fletcher asked seek to determine the issue which may arise in International Insolvency where there is a "foreign judgment" issued on the same matter by a court of another State or jurisdiction. Foreign Judgments raises questions concerning the Court that issued the judgment, the type of Judgment and the effect of the Judgment. In insolvency, the type of judgment can be significant- in particular, whether it is a judgment commencing insolvency proceedings against a debtor (such as an Order to liquidate a company) or an Order of Court

¹⁷ Wolf-Georg Ring, *Insolvency Forum Shopping, Revisited*, Hamburg Laws Review (2017) 38.

¹⁸ INSOL, Module 1 Guidance Text *supra*, p 45.

¹⁹See, *Gibbs & Sons v. La Societe' Industrielle et Commerciale des Me'taux* (1890) 25 QBD 399.

made during the Course of an insolvency proceedings (such as an Order that a third party pay monies to the estate following a successful action setting aside a voidable depositions)²⁰. In an attempt to resolve this issue, the Model Law developed the Model Law on Insolvency Related Judgments 2008 after the United Kingdom's Supreme Court decisions in the case of Rubin v. Eurofinance SA; New Cap Reinsurance Corp (in liq) v. Grant [2013] 1 AC 236²¹. Insolvency Related Judgment however does not include a judgment commencing an insolvency proceeding nor does it include any interim measure of protection. To be covered, a foreign Judgment (i) must arise as a consequence of or be materially associated with an insolvency proceeding and (ii) must be issued on or after the commencement of that insolvency proceedings²².

However, some States have laws for recognition and enforcement or the effects of a foreign insolvency proceeding. Other States provided for the cooperation and coordination where there are concurrent proceedings. In the case of MC Grath v. Riddel (2008) UKHL 21, the House of Lord turned over the assets in a local ancillary liquidation to a foreign principal liquidator for distribution under foreign laws²³. Under Australian law, Sections 580-581 of the Corporations Act, 2001 (Ctn), a similar legislation to Section 426 of the UK Insolvency Act, 1986, provided for cooperation between Australian and foreign Courts in relation to "external administration" matters, such as liquidations. In Re Chow Cho Poon (pte) Ltd [2011] NSWSC 300, an Australian Court granted assistance to a foreign liquidation upon a request under Section 581, thus enabling control of assets in a bank account. In this case, the Court specifically discussed the Cross-Border Insolvency Act, 2008 (ctn) and Section 22 on the relationship between the Model Law on Cross-Border Insolvency with the Corporation Act 2001 (ctn) Section 581 invoked in the case. Similarly, in the New Zealand Insolvency (Cross-Border) Act 2006, (NZ), Section 8 provide that, if a foreign Court requests the aid of the New Zealand High Court in relation to an Insolvency proceeding, the High Court can act in aid of and be auxiliary to that Court. This provision has become useful in circumstance where the Model Law on Cross-Border Insolvency does not apply²⁴.
Type your answer here]

3.5

Question 3.3 [maximum 5 marks]

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

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

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

²⁰ INSOL, Module 1 Guidance Text *supra*, p 44-45.

²¹ *Ibid*, note 81.

²² INSOL *supra* Module 2A Guidance Text, p 56.

²³ INSOL Module 1 Guidance Text *supra* p 49.

²⁴ See, *Williams v. Simpson* [2010] NZHC 1786 (12 Oct, 2010); *Batty v. Reeves* [2015] NZHC 908 (4 May, 2015). The UK provision in Section 426 (5) of the Insolvency Act 1986 where it authorised the local court to apply the Insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction, is a step further when compared to the Australian and New Zealand laws.

[A prominent case law example for the last quotation can be found in the case of Maxwell Communications Corporation Plc cross-border insolvency case of 1991. The case involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom. There was appointment of two different and separate insolvency representatives in the two States, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that an insolvency agreement between the two administrations could resolve conflict and facilitate the exchange of information. Under the agreement, two goals were set to guide the insolvency representatives; maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present. Specificities included that some existing management would be retained in the interest of maintaining the debtor's going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the English insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States Court; and the English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake lesser transactions. Many issues were however purposely left out of the agreement to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the agreement²⁵.

The parties' approach in this case brought about a new approach in complex international insolvency proceeding and process where the parties can by consent agree to reduce or minimize conflict by putting in place a workable structure to coordinate such complex proceedings with approval of the courts²⁶. IBA and its Concordat as a professional body has encouraged the outcome of the above case. Also, the cooperation and communication achieved in the case may have also contributed to the development of the UNCITRAL Practical Guide on Cross-Border Insolvency Cooperation which has provided information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases through the use and negotiation of cross-border agreements, even though it is however not prescriptive, it has helped to foster cooperation through parties agreements based on the parties specific needs.

In Nortel Networks case²⁷, subsequent co-ordination and co-operation shown in the conduct of the concurrent insolvency proceedings in North America extended to a joint electronic trial, using video link, in the Ontario Court of Justice (Commercial List) and the US Bankruptcy Court for the District of Delaware on an allocation dispute. What was in issue was the distribution of some USD 7.3billion in funds from the sale of Nortel business lines and intellectual property. The joint trial arose out of arrangements by the parties as part of the process of selling the assets as well as from the Protocol that had been approved by the relevant US and Canadian courts.

Some significant global developments adopting the approach of the use of Protocols or Cross-Border Insolvency Agreements include:

1. The ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published by the American Law Institute (III) in 2000;
2. The ALI-III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border cases published in 2012; and

²⁵See, INSOL Module 1 Guidance Text *supra* p 69.

²⁶ Lehman Brothers case also followed the example of Maxwell Communication Corporation's case. See, *Idem*, p 70.

²⁷ *Ibid*.

3. The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Matters in 2016.^{28]}

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Marks awarded 11 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, further information is required on the country of the minor creditor to determine the insolvency law of the country that will be applicable and the extent of the procedure to apply under the laws for the court's jurisdiction in the proceeding. Where the minor creditor is a UK company, the UK Insolvency Act of 1986 will apply and the proceedings under the UK insolvency system will be adopted. However, where the minor creditor is a foreign creditor, it may be required to be recognised by the act which has adopted the model law on cross-border insolvency. The liquidator will be required to accept proofs lodged by the minor creditor where the minor creditor is a foreign creditor with respect to Rydell's liabilities incurred overseas or governed by the foreign law of the minor creditor. **Take care to address the set task. Does the EIR Recast apply? Why or why not?**

The further information will also determine the domestic law on choice of law to be applied in the insolvency proceeding opened in the UK where the minor creditor is a foreign creditor. Under the UK Insolvency Act 1986, where international element is involved, English law applies to matters of procedure and substance, like the procedure of lodging the proof of debt by the minor creditor while to establish the validity of the actual claim of the minor creditor which is governed by the foreign law of the minor creditor's country, the UK insolvency law may require reference to the minor creditor's country's law to establish the claim against Rydell²⁹. However, the minor creditor's proceeding against Rydell in the UK has been affected by the Corporate Insolvency and Governance Act, 2020 which has restricted winding-up petitions against UK companies affected by the Covid 19 pandemic and has made provision

²⁸ Ibid.

²⁹ See, *Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.

for a company in UK to enter free-standing moratorium even where the company has been subject to an insolvency proceeding procedure in the previous 12 months. By the Act, Rydell can now enjoy breathing space within the relevant period provided under the Act from the insolvency proceeding opened against it in the UK by the minor creditor.

On Fernz consideration to opening proceedings a month later in another country in Europe, a member of the European Union, such consideration is possible under the European Insolvency Regulation recast only to the extent that the proceeding will be a subsidiary territorial proceeding in the country where Rydell establishment or asset can be found among the member states of the European Union since Rydell's center of main interest is located in UK now outside of the European Union due to the effect of Brexit. **Take care to note the dates in the problem and when the EIR Recast ceased to apply to proceedings opened in the UK. You need to clearly advise whether the EIR Recast applies to the problem dates.** By the EIR (Recast), such subsidiary territorial proceedings may be independent of the main proceeding in the UK and with the effect of Brexit, Fernz will now need to seek recognition in the UK to initiate or commence or open insolvency proceeding in the UK with respect to Rydell's asset in the UK.

However, with the effect of the UK Corporate Insolvency and Governance Act (CIGA) 2020 which was passed into law on 25th June, 2020 and became effective on 26th June, 2020, Fernz by the 18th of July, 2020 can no longer open proceedings against Rydell's assets in the UK within the relevant period provided by CIGA 2020 to protect UK companies who are unable to pay their debts due to the effect of the Covid 19 pandemic. The CIGA (2020) which became effective on 26th June, 2020 had made provision for a new restructuring plan to help viable companies struggling with debt obligations. By the Act, the UK Courts can sanction a restructuring plan (that binds creditors) where it is fair and equitable to do so. Creditors' may also be allowed to vote on the plan which the court can also impose on dissenting creditors. The Act also provided a free-standing moratorium that Rydell now enjoys to give Rydell a breathing space in which it can pursue a rescue or restructuring up to 30th September, 2021, the effect of which Fernz cannot take action against Rydell's assets in the UK. Also, by the Act, a company could enter a moratorium even where it has been subject to an insolvency procedure in the previous 12 months like Rydell was subject to the proceeding initiated by a minor creditor on 18th of June, 2020. Further, as a temporary measure to mitigate the Covid 19 pandemic, which was the reason for Rydell's downturn in business, CIGA, 2020 also made restriction on winding-up petitions where the unpaid debt is due to Covid 19 pandemic.
Type your answer here]

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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.

[My answer to 4.1 would have differed if the proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020 because the provisions of the Corporate Insolvency and Governance Act, 2020 enacted to intervene by setting up permanent and temporary measures to mitigate the effect of the Covid 19 pandemic on companies in the UK and to pursue a rescue or enter a restructuring plan, would then regulate the proceedings. And under the Act, such proceedings can no longer be opened without the sanction of the UK courts. Furthermore, there is a free-standing moratorium which has suspended opening of proceedings against UK companies who are unable to pay their debts due to the effect of Covid 19 pandemic such that affected Rydell, to give it a breathing space. There is also a restriction on filing a winding-up petition against companies such as Rydell under the Act within the relevant period. These restrictions by the new Act are expected to expire on 30th September, 2021. However, modified

rules would apply from 1st October until 31st March, 2022. The proposed 18 June 2021 to open proceeding in the UK falls within the relevant period of the operations and applications of the permanent and temporary measures set up by the CIGA, 2020.

Type your answer here]

It would be beneficial to consider the EIR Recast application with respect to the different dates provided.

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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?

[The UK domestic laws that would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK upon the above facts that Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, are the UK Insolvency Act of 1986 and the UK Insolvency Rules of 2016. Under Section 221(5) of the UK Insolvency Act 1986, a court ordered winding-up of unregistered companies is possible on the following conditions:

- (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.

There is also the jurisdiction under the Act, section 220 to wind-up a company formed under foreign law which in the present circumstance Rydell may be said to be. It does not make any difference that the proceedings were opened in the UK on 18 June 2021.]

Issues regarding 'sufficient connection' should also be considered.

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**Marks awarded 3.5 out of 15
TOTAL MARKS 32/50**

*** End of Assessment ***