



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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

(b) The JIN Guidelines.

(c) The JIN Modalities.

(d) The Nordic Convention 1933.

Question 1.8

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

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

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

Question 1.9

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

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

Question 1.10

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

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

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.

The first *English Bankruptcy Act of 1552* signalled a decisive break from the past, where previously debtors were treated like criminals, by providing for collective participation of creditors and a *pari passu* method of distribution.

This was followed by the *Statute of Ann* in 1705 which introduced the notion of statutory discharge provided certain requirements were met. **It would be beneficial to elaborate regarding modern thinking of 'fresh start'.**

The *1883 Act* which paved the way for the foundation of good bankruptcy law by laying down fundamental principles relating to examination of a debtor's affairs, the office of the trustee and the distribution of assets. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

2

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 *Corporate Insolvency and Governance Act* became operational on 26th June 2020 in response to the effect of the Covid-19 pandemic on debtors by introducing amongst other things, revised rules on moratoriums, winding-ups and other insolvency regulated matters connected therewith.

In addition, section 214 of the *Insolvency Act, 1986* which concerns the UK's wrongful trading provisions, has been temporarily suspended. Previously, and in terms of this section, directors faced liability for trading at a time when the company was financially distressed without the option of rescue.

Lastly, a moratorium has been placed on all "creditor-lead" insolvency proceedings subject to the filing of a special "COVID-19 Declaration" which must indicate that the company is in financial distress.

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 are the positive result of the outcome of deliberations between States with a view to establishing common grounds and reciprocal enforcement. Treaties are therefore binding public international instruments.

Treaties carry a signal that the signatory States agree to reciprocally abide and enforce its conditions, which for the purposes of this question, mean they share common

denominators of Access, Recognition and Enforcement thus establishing cross-border insolvency rules. Thus, because of its binding effect, treaties are seen as “hard law” enforceable in a domestic court.¹

Soft law, in contrast to a treaty, has an influence on the concretization of domestic insolvency laws passed by any State, but unlike treaties, is of no binding effect unless acknowledged by States in their own insolvency deliberations.

The *UNCITRAL Model Law* is a foundational model of soft law, because it is not binding but may be equated to a “vehicle for the harmonization of laws”² as between States.

The Model Law guideline offers a template for member States to work from and mould their domestic legislation within its dimensions. In turn, a measure of consistency in regulating insolvency matters is established, similar to the reciprocity of treaty agreements.

Domestic legislation based on the Model Law provides clarity on issues of comity and the duplication of proceedings which in turn promotes value for the creditor of an insolvent estate as well as reducing unnecessary costs associated therewith.

As transnational commercial activity increases, and with it, the rise of Enterprise organizations, so too are soft law approaches to insolvency increasing. The *Model Law* is the clearest example of soft law that is fast being adopted by States³ (see for example the *UAE Bankruptcy Law* 9 of 2016, and the Abu Dhabi Global Markets “ADGC” which explicitly endorses the application of the *Model Law*) as a solution to cross-border insolvencies.

In conclusion, treaties and soft law share common characteristics such as, if soft law is practiced by the relevant States to the insolvency matter at hand, reciprocal enforcement. Both are therefore used in international disputes as a springboard from which deliberating States can further regulate the process of insolvency and solve it. Treaties and soft law therefore maintain a “fair and efficient international insolvency regime, [thereby] enhancing certainty and predictability and preventing forum shopping.”⁴

4

Marks awarded 9 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.

¹ Boyle, A “Some Reflections on the Relationship of Treaties and Soft Law” *The International and Comparative Law Quarterly* Vol. 48, No. 4 (Oct., 1999) pp. 901-913.

² *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (“Model Law”).

³ See Asian Principles for Business Restructuring, a joint project between the International Insolvency Institute and the Asian Business Law Institute.

⁴ I Mevorach, “The ‘Home Country’ of a Multinational Enterprise Group Facing Insolvency” in *The International and Comparative Law Quarterly* Apr. 2008, Vol. 57, No. 2 pp. 427-448 available online at <https://www.jstor.org/stable/2048821>. Accessed 14th October 2021.

Introduction

Bankruptcy laws are present in every legal system, albeit, that rules and procedures governing such are applied differently from one State to the next.

Bankruptcy laws have their roots in the Roman Law Tablets. As States attained sovereign status, Roman laws influenced and shaped two distinct outgrowths of legal systems: The English Law of Bankruptcy, and civil law systems influenced by the *Lex Mercatoria*. The sovereignty of States lead to the individualization of domestic laws which differed from State to State. Today, the USA and the UK have a single unified piece of legislation – the *Bankruptcy Code of 1978* and the *Insolvency Act of 1986*. Other States have different pieces of legislation which deal with corporate and personal insolvency separately, or read together in certain defined instances.

Multinational treaties and the rise of legislative guidelines

Despite the steady rise of global commerce and multinational enterprises, transnational insolvencies were in a far from settled state. Multinational treaties like the *Nordic Convention of 1933*, the *Havana Convention of 1928*, and the *Montevideo Treaties of 1889 and 1940* made work of resolving cross-border insolvencies although on a regional level. These treaties have survived because the States involved “are not only geographical neighbors, but also have close affinities in their legal traditions, and in cultural, linguistic, and political matters...indicating that treaties work satisfactorily in their regional settings but supplied only a partial solution to the problems of any insolvency in which the spread of contacts extends beyond the regional setting.”⁵

In instances, albeit rare but nonetheless existing, such as the province of Quebec in Canada and the State of Louisiana in the US which practice laws (of French origin) which differ to their neighbouring States, the scope for common ground and shared principles was therefore well recognized. Efforts were undertaken in different parts of the globe to integrate legal approaches to transnational insolvencies. Examples include the Istanbul Convention in Europe as well as the Model International Insolvency Cooperation Act (“MIICA”) by the International Bar Association which greatly contributed to the eventual UNCITRAL Model Law discussed below.⁶

Some States, such as the UK have long seen the advantage of recognition; thus, the *English Insolvency Act 1986*, had already grafted an automatic recognition clause into its proceedings which eased the burden of administering the estate.

Maxwell: Whose rights are more important?

Where no public international instrument existed amongst States whose domestic operational laws differed from each other, local creditors were prejudiced by the administration of assets under a foreign system of insolvency law.

The only practical solution was to commence with a secondary insolvency proceeding so that assets located in a jurisdiction “where such creditors’ expectations are established”⁷ can be administered according to the provisions of the local laws.

⁵ Fletcher, I “International Insolvency: A Case for Study and Treatment” *The International Lawyer*, Summer 1993, Vol. 27, No. 2 pp. 429- 443.

⁶ Fletcher, I “Challenge and opportunity: The AI/III global principles project” *Potchefstroom Electronic Law Journal* (2008) 11(1), 1-29.

⁷ Fletcher note 5 above at 438.

In the *Maxwell case*, now firmly regarded as the *locus classicus* of cross-border cooperation, both the USA and UK were enjoined to collaborate under the direction of a concordant between the Courts in both countries in which insolvency proceedings were opened - despite their different sources of law and in the absence of a treaty between them.

UNCITRAL: The Model Law

Following from the work undertaken in previous conventions, the development of the UNCITRAL *Model Law* followed by the *Legislative Practice Guide*, created standardized norms and minimum standards concerning co-operation, access and recognition, achieving equitable distribution among creditors on a basis of non-discrimination, and the free flow of communication between the courts of different states to be used as a template for the solving of cross-border insolvencies.

UNCITRAL entrenches the principle of COMI or the Centre of Main Interests of a Company to determine jurisdiction and by implication, the applicable laws tied to the jurisdiction of the court. In this way, the domestic laws of each State interact to create a platform from which to work from.

Conclusion

From the above it can be seen that insolvency regimes, although different from one State to the next, can be stitched together in patchwork fashion to harmonize the administration of the insolvent estate of a multinational enterprise.

The harmony may be synthesized with reference to local laws, combined with multiparty treaties, such as laws which grant recognition, as well as soft law guidelines which instruct methods of communication and cooperation.

This question asks you to consider the different sources of law and how they interact. You need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations), common law where it applies, general non-insolvency laws etc You touch upon legislation but elaboration was needed.

1.5

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.

International insolvency matters cause several issues which come under consideration by Fletcher in the treatment and administration of an insolvent estate:

First, “In which jurisdictions may insolvency proceedings be opened?”

Secondly, “What country’s law should be applied in respect of different aspects of the case?”
Lastly, “What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?”

These questions arise out of the “diversity that exists between the sovereign legal systems of the world, both in their domestic laws of credit, security, and insolvency, and in their rules of private international law applicable to these same matters.”⁸ To this may be added, the effects of an insolvency judgment granted in a sovereign State but which undoubtedly impacts upon

⁸ Fletcher, I “International Insolvency: A Case for Study and Treatment” *The International Lawyer*, Summer 1993, Vol. 27, No. 2 pp. 429- 443.

the creditors of another sovereign State having different laws of territorial application and in which the insolvent conducts business. The principle of equal treatment for all creditors in the event of the debtor's insolvency therefore breaks down in cases of international insolvency, because of the historic inability of private international law, as traditionally practiced, to provide a consistent and standardized set of rules to which all sovereign states subscribe in common

The impact upon creditors is defined by any number of factors affecting the extent of a creditor's preferential status, the extent of a secured creditor's rights, and the extent of assets available for distribution, all of which can work independently to reduce the maximization of value of the estate for the creditor. In transnational insolvencies, "the principle of equal treatment for all creditors because of the inability of private international law to provide a consistent and standardized set of rules to which all sovereign states subscribe in common."⁹

Determining where international insolvency proceedings are to be opened, *viz.* jurisdiction is in itself no mean a task.¹⁰ Mevorach¹¹ considers jurisdiction should be found based on a framework in which economic efficiency in the handling of an international insolvency is enhanced, by allowing for a unified process of Enterprise groups to the maximum extent.

The position has to a large extent, now become well settled by the application of the COMI principle, described by Merovach as a single geographical *locus* in which the "Centre of Main Interests" of an insolvent is the directional factor in deciding jurisdiction. COMI has been grafted into most domestic Insolvency laws of States meant as a solution to the issue of jurisdiction of the main proceedings.

However the issue of jurisdiction is not always solved with reference to the application of COMI. Founding jurisdiction leads to Fletcher's second question, and the relevance of the territorial application of laws to an insolvent estate with international aspects. Naturally, the domestic laws of the sovereign State in which the proceedings are opened are limited to the operation of laws within its territorial jurisdiction.

There can be no argument with the second issue that different legal systems in (concurrent) international proceedings presents a puzzle with no straight answer, but for which the insolvency practitioner is left to clear his own path.

Fletcher opines that the effects of foreign elements on a domestic proceeding depends upon the "willingness of a foreign legal system which is vested with jurisdiction to recognize the validity of insolvency proceedings."¹²

Not all States may be willing to grant recognition to a foreign office-holder and the administration of the estate can still be compromised by a State's refusal to acknowledge the laws of another State. Consider the *Singularis*¹³ matter, in which the enforcement of an applicable section of the Bermudian Act sought by the Cayman liquidators in a Bermudian Court was refused on appeal, the Court holding that a similar order would not be able to be granted by the Cayman Court if requested by a foreign liquidator. The Court in *Singularis* did not apply foreign insolvency provisions holding that it did not form part of its local law. Thus,

⁹ *Ibid* at 433.

¹⁰ Fletcher, I. (2008). Challenge and opportunity: The ali/iii global principles project. *Potchefstroom Electronic Law Journal*, 11(1), 1-29 at 15/29.

¹¹ Mevorach note 3 above at 433.

¹² Fletcher note 5 above at 431.

¹³ *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 (10 November 2014), [2015] 2 WLR 971; See also: A. Smith "Assisting Foreign Insolvency Practitioners in Cross-Border Insolvency: Some foreign insights into South African Law" *Obiter* (2016) 167 – 186.

applying the *ratio* as also found in *African Farms*,¹⁴ the Courts in both matters lacked jurisdiction.

Insofar as Fletcher's third question is concerned, and the international effects accorded at a particular forum, recognising the foreign liquidator "carries with it the active assistance of the Court."¹⁵ In the *Lehane*¹⁶ matter the insolvency official was granted recognition and authority to deal with assets of the debtor under the South African *Insolvency Act*, 1936, albeit that a local sequestration order was not issued. Applying the principle of modified universalism, which assist in founding jurisdiction and the *lex concursus*, one solution adopted by Courts has been to apply their common-law power (if any) to recognize and help foreign insolvency officials so as to solve insolvency matters subject to the limitations of its own domestic laws.

There can be no argument with the second issue that different legal systems in concurrent proceedings presents a puzzle with no straight answer, but for which the insolvency practitioner is left to clear his own path. have, is a question which has no clear answer raises regarding applicable laws in concurrent proceedings is materially connected to the principles of access and recognition. Access and recognition are factors influenced by the dynamics and inter-play of different legal systems in which a debtor's assets are situated.

In the *Lehane*¹⁷ matter the insolvency official was granted recognition and authority to deal with assets of the debtor under the South African *Insolvency Act*, 1936, albeit that a local sequestration order was not issued. Applying the principle of modified universalism, Courts apply their common-law power (if any) to recognize and help foreign insolvency officials so as to solve insolvency matters subject to the limitations of its own domestic laws.

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.

The Maxwell Case: An introduction¹⁸

The case of *Maxwell Communication Corp, Societe Generale (In re Maxwell Communication Corp)* 93 F.3d 1036 (2d Cir. 1996) ("Maxwell"). Is the *locus classicus* of applied Universalism and international co-operation pre-dating the Model Law.

¹⁴ *Re African Farms Ltd* 1906 TS 373 at 377.

¹⁵ *Ibid African Farms*.

¹⁶ *Lehane v Lagoon Beach Hotel (Pty) Ltd* 2015 4 SA 72 (WCC); see also: A. Smith "Some Aspects of South African Cross-Border Insolvency Relief: The Lehane Matter" *PER / PELJ* 2016(19) – DOI.

<http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1221>

¹⁷ *Ibid*. 1

¹⁸ Westbrook JL "The Lessons of Maxwell Communication" *Fordham Law Review* (1995) Vol 64(6) available online at <https://www.researchgate.net/publication/254595908>.

The facts in brief may be summarized as follows: Shortly after the mysterious death of its founder, Robert Maxwell, the Maxwell media house collapsed, and the company's management commenced bankruptcy proceedings in both the USA and the UK simultaneously.

Maxwell had its "headquarters" in England and as the "parent company" England was the financial and governance centre of the enterprise.

However, Maxwell's major assets were in the form of stock of subsidiaries in the United States. Based on this setup, the company's management commenced Chapter 11 Bankruptcy proceedings in the United States.

But, also fearing personal liability of the directors under UK law, the company launched simultaneous proceedings in the UK.

Issue:

The challenge brought about by the commencement of two separate proceedings in two different jurisdictions and which applied their own national laws meant that different insolvency regimes applied to certain international aspects of the case.

Shifting knowledge to insight, "At the beginning of its decision-making process, the court faced the question, whether it has to apply its own substantive law or any other of the involved laws of other states."¹⁹ Clearly this was the issue faced by the Bankruptcy Judge in New York.

It would be beneficial to discuss the goals sought and the outcome of the case.

Discussion

As proceedings were opened in two separate jurisdictions, both of which had a material connection to handling the administration of *Maxwell*, the *nexus* in each jurisdiction was equal. The approach to solving the question then involved the application of the principle of territorialism, or universalism.

Such a situation where the multinational enterprise adopts an approach like the eight tentacles of an octopus, by liberally spreading its head office, creditors, assets and operations across foreign countries can create confusion in which forum to commence proceedings and, by implication the *lex concursus* which follows therefrom.

Described as the "balance of connections"²⁰ there was in the *Maxwell* case a case for why each separate jurisdiction had an interest in *Maxwell's* insolvency, which gave it the right to choose the forum and applicable law.

The path to solving the insolvency, gave rise to the need for inter-court coordination across two continents in the absence of any formal regulated between the foreign courts involved.

The *Maxwell* case highlights the principle of Recognition which, as the name suggests, is the ability by one sovereign State to recognize the foreign judgments of another sovereign state. Since Sovereign States place more weight in their domestic law on the rights of secured creditors than on foreign creditors, *Maxwell* raised the issue of whose rights were more important.

¹⁹ Martinek, M "The principle of reciprocity in the recognition and enforcement of foreign judgments – history, presence and ... no future" *TSAR* (2017) 1 36 at 38 ("Martinek").

²⁰ Merovich note 4 above.

This case is important for it created foundational directives which were a model instruction for the founding of the UNCITRAL Model Law and other cooperation agreements.

The Maxwell case is a model of good co-operation between foreign States and it brought to the forefront, the urgency with which “formal regulation”²¹ of multinational insolvencies was needed.

3.5

Marks awarded 10 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 Recast (“EIR Recast”) Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 became operational on the 26th June 2017 and is applicable to all Member States of the EU (excluding Denmark).

The UK was until 11pm on the 31st December 2020, a member of the EU.

Regulation 2015/848 continues to apply for insolvencies opened upto 31 Dec 2020. This has implications for inbound and outbound requests for recognition by the UK and Member States of the EIR Recast. **Take care to apply this to the problem at hand.**

The EIR Recast solidifies the appropriate jurisdiction for the commencement of proceedings and the applicable law, as well as compulsory recognition and enforcement in the European Union (“EU”).

²¹ Oliver M and Boraine A “Some Aspects of international law in South African cross-border insolvency law” *The Comparative and International Law Journal of Southern Africa* (2005) Vol 38. No 3 pp 373 – 395.

It further promotes the concept of pre-insolvency restructuring proceedings like business rescue or rehabilitation for companies in financial distress which, at the outset, may be of some assistance to Fernz as an alternative option.

The applicability of the provisions of the EIR to the situation herein involve Group Proceedings and Synthetic Proceedings. In Group Proceedings the insolvency practitioner appointed to a member of a group of companies can request the appointment of an insolvency court as coordination court and an insolvency practitioner as group coordinator. A group coordination plan will be recommended by the group coordinator which will then be considered by the insolvency practitioners of all the legal entities involved.²²

Insofar as Synthetic Proceedings are concerned, the EIR Recast provides that the insolvency practitioner can give an undertaking that local creditors will be treated 'as if' insolvency proceedings had been opened in their jurisdiction thereby avoid the necessity for multiple insolvency proceedings. This may prove useful to Fernz who can adopt this provision if it decides to open proceedings in another Member State.

Regulation 23 of the EIR Recast

enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union.

Therefore, COMI is now defined as the place where the debtor conducts the administration of its/his or her interests on a regular basis and which is ascertainable by third parties.

This statement must be qualified: A debtor company's COMI is only presumed to be the place of its registered office unless it has moved States for a period not exceeding three months.²³ Fernz will need further information to confirm whether Rydell has been registered in the UK for a period exceeding three months.

The COMI presumption is under Regulation 30, a rebuttable one and expressly aims to curb forum shopping under Regulation 29. When companies indulge in forum shopping, they shift their registered office from one member state to another in order to restructure in the jurisdiction that provides them with the most favourable outcome.²⁴ As soon as it can be established that the principal reason for filing insolvency proceedings in the new jurisdiction is to 'materially impair the interest of creditors'

Rydell's COMI is in the UK as is the minor creditor so both parties would remain under the jurisdiction of the UK courts subject to the laws of the EIR Recast.

This is because the date of commencement of proceedings by the minor creditor (18th June 2020) precedes the UK's exit from the EU, so the proceedings would be dealt with under the EIR.

²² B Cahir, "A new dawn for restructuring and insolvency throughout the EU" available online at <https://www.beauchamps.ie/publications/469>. Accessed 26th October 2021.

²³ Regulation 31 of the EIR Recast.

²⁴ <https://www.mondaq.com/insolvencybankruptcy/561472/european-insolvency-regulation-recast-and-pre-packed-asset-sale-arriving-in-the-netherlands>.

As proceedings against Rydell have already commenced by the minor creditor and Fernz is considering opening proceedings in another Member State of the Union, Regulation 24 provides:

Where main insolvency proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office, it should be possible to open secondary insolvency proceedings in the Member State of the registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State, in accordance with the case-law of the Court of Justice of the European Union.

This now creates a problem because although Fernz is a major creditor of Rydell, the main proceedings have already commenced in the UK because of Rydell's COMI.

To challenge Rydell's COMI in the UK by bringing proceedings in a Member State will mean that Fernz must prove that Rydell firstly has a registered office in that State. Regulation 28 may be relied upon by Fernz. In terms of Regulation 28:

[In] determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

Fernz can do one of two things: Where main insolvency proceedings have commenced, a court in another member state may refuse or postpone (for up to 3 months) a request to open secondary proceedings at the request of the officeholder in the main proceedings.

In the alternative, Fernz can make use of the Synthetic Procedure grafted into the EIR Recast wherein the main officeholder can offer to give a unilateral undertaking that he will distribute assets in accordance with the distribution and priority rules local to the jurisdiction in which the application for secondary proceedings could have been issued.

By opening synthetic proceedings, the opening of potentially disruptive secondary proceedings altogether in another member state is avoided, whilst still providing protection for local creditors."²⁵

Elaboration is needed regarding secondary proceedings and matters of 'establishment' **4**

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.

As at 11pm on 31st December 2020, the UK exited the EU and is no longer bound by the EIR (Recast). Consequently, insolvency proceedings in Member states will no longer be automatically recognized in the UK and vice versa.

English officeholders can no longer rely on Recast Insolvency Regulation (Regulation EU 2015/848) for automatic Recognition Orders.

²⁵ Carter T and Trot L, "Recast European Insolvency Regulation (2015) comes into effect – 26 June 2017" available online at <https://www.stevens-bolton.com/site/insights/articles/recast-european-insolvency-regulation>. Accessed 26th October 2021.

Whilst foreign IPs will be able to apply for recognition under UNCITRAL Model Law in the UK, and thus obtain many of the benefits of the EIR, the reverse does not apply. Carter noted: “Only 4 EU member states (aside from the UK) have implemented UNCITRAL Model Law, which means IPs from the UK could face significant obstacles in obtaining recognition in EU countries after our exit from the EU.”²⁶

Recognition will therefore depend on the private law of the country where recognition is sought and it will be necessary to seek advice from local lawyers. **It would be beneficial to directly set out what further information is relevant**

Fernz, if considering opening proceedings in the EU, would have to prove why the EU Court has jurisdiction pursuant to the UK’s exit, as well as the fact that Rydell’s COMI is to be found in that European State in which proceedings are opened and not in the UK.

2.5

Question 4.3 [maximum 5 marks]

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

As indicated above, the UK left the EU at the end of 2020. However, adopting the UNCITRAL Model Law would allow Rydell to seek recognition and enforcement in the UK under the *Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (CBIR)*.

As Rydell is an unregistered company situated in a Member State of the EU, once recognition is granted, the winding up of a foreign company is governed by section 221 of the *Insolvency Act 1986* upon the fulfilment of certain conditions *inter alia* that a sufficient connection exists between the foreign company and the UK, that there is a reasonable possibility of a benefit to creditors, and that the Court can exercise jurisdiction over one of more persons interested in distribution of assets of the Company.²⁷

In addition, section 426(4) of the Act states, “The Courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the Courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.”

Section 426(5) of the Act permits the English Court to apply the insolvency law of England or the law of the requesting Court.

Equally useful may be the Foreign Judgments (Reciprocal Enforcement) Act 1993 which makes provision for the enforcement of foreign judgments in the UK.

²⁶ Carter and Trot note 12 above.

²⁷ <https://www.5sblaw.com/hidden-out-app/app-uploads/2021/03/2021-03-18-Cross-border-insolvency-webinar-slides-18-March-2021-002.pdf#:~:text=S426%285%29%20Insolvency%20Act%201986%20permits%20the%20English%20Court,assista nce%20applying%20substantive%20Irish%20law%20or%20English%20law.>

Lastly, the English courts have accepted jurisdiction in approving schemes of arrangement under *Part 26 of the Companies Act 2006* in relation to overseas debtors so long as a sufficient connection with English law exists including in circumstances where a scheme would be recognised by an EU Member State in which the debtor has its centre of main interests.²⁸

There is scope to elaborate regarding 'sufficient connection'

4

Marks awarded 10.5 out of 15

TOTAL MARKS 37.5/50

*** End of Assessment ***

²⁸ <https://www.nortonrosefulbright.com/en/knowledge/publications/fc0fb698/impact-of-brexit-on-insolvency>.