



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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

- (a) This statement is correct since the Dutch insolvency system does not provide for a discharge of debt and without such a dispensation in place, a scheme of arrangement will not be functional.
- (b) This statement is correct since the Dutch government has not approved such legislation yet.
- (c) This statement is incorrect since the Dutch in fact introduced new legislation in this regard in 2000 already.
- (d) This statement is incorrect since the Dutch quite recently adopted legislation in this regard and it became operational on 1 January 2021.

Question 1.4

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

- (a) This statement is correct since courts cooperating across jurisdictional borders are familiar with global insolvency principles.
- (b) This statement is correct since courts across the globe are inclined to apply comity as a principle to assist foreign estate representatives to deal with cross-border insolvency matters in a coherent way.
- (c) The statement is not correct since both local insolvency systems as well as cross-border insolvency rules differ quite significantly in many respects.
- (d) This statement is correct since apart from the wide discretion that judges in general have, the UNCITRAL Model Law on Cross-Border Insolvency has been adopted by the majority of UN Member States, hence these rules are well-known to judges across the globe.

Question 1.5

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

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

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

Question 1.6

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

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

Question 1.7

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

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

Question 1.8

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

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

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

Question 1.9

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

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

Question 1.10

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

The significant historical developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law are –

- (a) the English Bankruptcy Act of 1542 intended to deal with fraudulent debtors. The Bankruptcy Act of 1542 introduced the principles of collective participation by creditors and *pari passu* distribution of the debtor's assets amongst its creditors;¹
- (b) the Act of Elizabeth introduced in 1570 which is considered as the first true bankruptcy statute.² The Act of Elizabeth provided for additional acts of bankruptcy, transferred the jurisdiction for supervision of the debtor's estate from the commissioners (under the Bankruptcy Act of 1542) to the Lord Chancellor. The Act of Elizabeth also provided that following an act of bankruptcy, a creditor could initiate bankruptcy proceedings and petition the Lord Chancellor to convene a bankruptcy meeting for the examination of the debtor's transactions and assets and the debtor was then required to transfer its assets to the bankruptcy commissioners appointed by the Lord Chancellor;

Rather than describing legislation, it would be beneficial to explain the developments that occurred and how they shaped modern insolvency law.

- (c) the Statute of Ann of 1705 which introduced the notion of a statutory discharge.³ The discharge was not automatic and was subject to the bankruptcy commissioners confirming that the debtor had conformed to and co-operated in the bankruptcy proceedings;
- (d) the Bankruptcy Act of 1883 which introduced the office of the Official Receiver. The Official Receiver was responsible for administering the debtor's assets before commencement of the bankruptcy procedure.⁴

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 United Kingdom ("UK") was already in the process of reforming its insolvency framework when the Covid-19 pandemic hit. Following the hit of the pandemic, the reforms were hurried along and brought about by the Corporate Insolvency and Governance Act 2020 ("CIGA 2020"). Apart from permanent measures to update the UK's insolvency regime, the CIGA 2020

¹ JC Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) *Fundamina* 1, p 13.

² JC Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) *Fundamina* 1, p 13.

³ JC Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) *Fundamina* 1, p 9.

⁴ JC Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) *Fundamina* 1, p 12.

also introduced the following temporary insolvency and insolvency-related measures in the UK to deal with the negative economic fall-out of the pandemic –

- (a) voiding of statutory demands. The CIGA 2020 provided that any statutory demand for a payment of debt issued during the relevant period that the measure was in place was void and no petition for the winding-up of a company could be presented in respect of such a statutory demand;⁵
- (b) restrictions on winding-up petitions. The CIGA 2020 placed a restriction on the circumstances in which a winding-up petition can be presented by creditors during the relevant period that the measure was in place. Creditors could not present winding-up petitions in respect of any unpaid statutory demand or unsatisfied judgment debt unless the creditor has reasonable grounds for believing that Covid-19 has not had a financial effect on the company or the grounds for presenting the winding-up petition would have arisen even if Covid-19 had not had a financial effect on the company;⁶ and
- (c) suspension of the wrongful trading rules. The CIGA 2020 temporarily amended the wrongful trading rules to the effect that when assessing if a director should be liable to make a contribution to the assets of the company under the wrongful trading provisions, the court is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors during the relevant period that the measure was in place.⁷

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 an example of an instrument under public international law. States which become signatories of a treaty bind themselves to the treaty. The treaty would then become a part of the State’s domestic laws that are enforceable by its courts and these domestic laws would form part of the State’s “hard law” or binding law. Hence, where States are signatories to treaties on cross-border insolvency covering areas such as jurisdiction, choice of law and recognition and enforcement of foreign proceedings, the signatory States would have a uniform set of cross-border insolvency rules in respect of the areas covered by the treaty. From the 19th century, one could see bilateral and multilateral treaties related to insolvency in Europe covering areas such as jurisdiction, recognition and enforcement related to bankruptcy, winding-up, arrangements and compositions. One such treaty is the Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden (1933).

In contrast to treaties that are more binding in nature, “soft law” options attempt to influence a State to change its domestic laws to be in line with these “soft law”. In this regard, multilateral organisations have come up with initiatives providing “soft law” instruments such as standards, principles and model laws that States may consider adopting into their domestic insolvency laws. Some examples of these “soft laws” are the United Nations Commission on International Trade Law (“UNCITRAL”) Legislative Guide on Insolvency Law (2004) and the UNCITRAL

⁵ Ali Shalchi, “Corporate Insolvency and Governance Act 2020”, 5 October 2021, House of Commons Library, page 34.

⁶ Ali Shalchi, “Corporate Insolvency and Governance Act 2020”, 5 October 2021, House of Commons Library, page 34.

⁷ Ali Shalchi, “Corporate Insolvency and Governance Act 2020”, 5 October 2021, House of Commons Library, page 32.

Model Law on Cross-border Insolvency (1997). The aim is that as more and more States adopt these “soft laws” into their domestic insolvency laws, this would lead to harmonisation of the cross-border insolvency rules amongst such States.

Notwithstanding the general categorisation of the binding and non-binding nature of treaties and soft law, I Mevorach⁸ draws upon behavioural and economic analyses to examine the merits or otherwise of hard or soft instruments, of treaties and model laws and abandons “*the notion that treaties are hard and binding and non-treaty instrument are soft and non-binding.*” The number, economic size and geographical spread of States that are adopting the UNCITRAL Model Law on Cross-border Insolvency,⁹ a soft law, lends credence to this argument of I Mevorach. **This last paragraph would benefit from rephrasing. It would be beneficial to explain the success of ‘soft laws’ in more detail.**

3.5

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 insolvency laws of a State in modern times are usually contained in its statutes or codes.

The domestic insolvency laws of a State may be set out in legislation specifically enacted to address insolvency matters such as the Insolvency Act 1986 of the United Kingdom (“UK”). On the other hand, there are States where laws relating to insolvency are not set out in a separate piece of legislation but are instead contained in the legislation that governs the respective types of entity. For example, in Australia, provisions governing the insolvency of corporations are not contained in a separate insolvency legislation but are instead set out in the Corporations Act 2001, the legislation which regulates business entities.

Some States may have a unified insolvency legislation that governs the insolvency of both individuals and corporations such as the UK’s Insolvency Act 1986. On the other hand, some States may have separate legislation each to deal with the insolvency of individuals and the insolvency of corporations respectively. An example is Australia whereby the Corporations Act 2001 governs the insolvency of corporations and the Bankruptcy Act 1966 governs the insolvency of individuals.

States may also have special rules to govern certain types of insolvency proceedings, for example, insolvency proceedings involving financial institutions such as banks and insurance companies. The financial distress of institutions such as banks and insurance companies could pose a danger of systemic risk to the financial system of a State or globally depending on the presence of the financial institution around the world. In order to mitigate the danger of this systemic risk, States usually have strictly regulated special rules governing the insolvency of financial institutions.

⁸ I Mevorach, *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), page 150

⁹ I Mevorach, *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018)

Where there are a multiplicity of legislation regulating the insolvency regime of a State, these legislation must be studied holistically to understand the insolvency system of the state in full.¹⁰ Further, though insolvency laws of a State are usually comprehensively set out in its statutes and codes, there may be certain gaps in the statutes and codes. Hence, States whose laws are based on the common law may rely on common law to close the gaps.

One must also take note of the fact that apart from insolvency laws, a State's general laws and legal principles may also have an impact on insolvency proceedings. An example of a general law that may have an impact on insolvency proceedings is land law or the laws of real property. A person may have to refer to these laws to determine the rights over immovable assets. Where there are conflicting provisions between the insolvency laws and general laws, one may also have to determine, based on specific conflict provisions in the relevant legislation or general legal principles, whether the insolvency laws or general laws prevail.

In respect of cross-border insolvency matters, a State may also have private international law principles that apply when the State is dealing with a matter of cross-border insolvency. These private international law principles will determine the choice of forum, choice of law and recognition and enforcement of foreign legal proceedings in such a cross-border insolvency matter.

If a State is a signatory to a treaty governing matters of cross-border insolvency, the State will be bound by the treaty and the treaty would be a part of the State's domestic laws.

States may have also adopted international insolvency law instruments into its domestic insolvency laws, in particular, to address cross-border insolvency law matters. An example is the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (1997) into a State's domestic insolvency laws as was done by the UK vide the Cross-Border Insolvency Regulations 2006.

This is answered well.
5

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

The following are the three (3) pertinent questions that Fletcher¹¹ asks in an attempt to bring the "cross-border" aspects and the "insolvency" aspects of cross-border insolvencies together –

- (a) in which jurisdictions may insolvency proceedings be opened?
This is also known as the choice of forum question. This question pertains to whether the local court in which the proceedings are filed can and will hear and determine the matter. In order to answer this question, the court will examine the connection of the parties or the dispute to the jurisdiction in question. Consideration must also be given to any relevant foreign elements such as assets or officers of the corporation in another

¹⁰ Professor Andre Boraine, Professor Rosalind Mason and Dr Elizabeth Stretten, *Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law, 2021/2022* (INSOL International 2021), page 19

¹¹ F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd Ed 2005), pages 3 to 5

State and the effect of any foreign insolvency proceeding in proceedings before the local court.¹²

- (b) what country's law should be applied in respect of different aspects of the case?
This is also known as the choice of law question. If it has been determined that the local court in which the insolvency proceedings are filed can and will hear and determine the matter, the next question is the law that the local court should apply to the proceedings. In general, there is a difference in how common law systems and civil law systems approach this question. Common law systems such as the English legal system will only address the choice of law question if it is raised by the parties. Otherwise, the law of the forum would apply. Further, proof of the foreign law is a question of fact. On the other hand, in civil law systems, choice of law is a question of law to be applied whether or not it is raised by the parties.¹³
- (c) what international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?
Where there is a foreign judgment on the same matter, this question pertains to whether the local court will give recognition to, and enforce the foreign judgment. The foreign judgment may be a judgment commencing insolvency proceedings against a debtor such as a liquidation order or may be an order given in the course of ongoing insolvency proceedings such as an order for payment of monies into the estate of the company arising from an action for voidable disposition.¹⁴ A State would apply its cross-border insolvency rules in determining whether recognition and effect should be given to foreign insolvency proceedings. For example, the UK would look to section 426 of the Insolvency Act 1986 and the Cross-Border Insolvency Regulations 2006 which enacts the UNCITRAL Model Law on Cross-Border Insolvency in the UK, in determining this issue.

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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.

¹² Professor Andre Boraine, Professor Rosalind Mason and Dr Elizabeth Stretten, *Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law, 2021/2022* (INSOL International 2021), page 44

¹³ Professor Andre Boraine, Professor Rosalind Mason and Dr Elizabeth Stretten, *Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law, 2021/2022* (INSOL International 2021), page 45

¹⁴ Professor Andre Boraine, Professor Rosalind Mason and Dr Elizabeth Stretten, *Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law, 2021/2022* (INSOL International 2021), page 45.

A prominent case law example for the above quotation is the cross-border insolvency case of *Maxwell Communications Corporation plc* (“MCC”) in 1991.¹⁵ MCC was a United Kingdom (“UK”) holding company with substantial assets in the United States (“US”). Although most of MCC’s assets were located in the US, substantially all of MCC’s debt had been incurred in the UK.

MCC initiated two (2) primary insolvency proceedings, a Chapter 11 bankruptcy proceeding in the US and an administration in the UK. There were also different insolvency representatives appointed in each State and each was charged with a similar responsibility.

The judges in the UK and the US independently raised with their respective counsel the idea that an insolvency agreement between the two (2) administrations could resolve conflicts and facilitate the exchange of information. The courts in the US and the UK co-operated with each other by way of court orders recognising an agreement called the “Protocol” between the insolvency representatives of the two (2) States.

The Protocol set two (2) goals to guide the insolvency representatives. Firstly, to maximise the value of the debtor’s estate and secondly to harmonise the two (2) insolvency proceedings to minimise expense, waste and jurisdictional conflict. In essence, the parties agreed that the US court would defer to the UK proceedings once it was determined that certain criteria were present. The order of the US court approving the Protocol recognised the UK insolvency representatives as the corporate governance of MCC while the order of the UK court approving the Protocol granted standing to the US insolvency representative to be heard in the UK court.

Subsequently, the UK insolvency representatives simultaneously filed a plan of reorganisation in the US court and a scheme of arrangement in the UK court. Although filed as separate documents, the plan of reorganisation and scheme of arrangement were mutually dependent and in effect constituted a single mechanism that was consistent with the laws of both the US and the UK for reorganising MCC through the sale of assets as going concerns and for distributing assets to creditors in both jurisdictions.¹⁶

The Protocol allowed for a successful reorganisation of MCC. While the Protocol did not explicitly contemplate court-to-court communication, practitioners recall that the Judges of both the US and UK courts were often in communication directly and sometimes with the parties involved. Hence, it could be said that the Protocol provided for truly integrated reorganisation proceedings which maximised efficiency and minimised disputes amongst the debtor, creditors and the courts in both jurisdictions.¹⁷

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Marks awarded 15 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

¹⁵ The discussion below is based on summaries of the case in (i) the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pages 128 to 129*; and (ii) Stacy A. Lutkus, “Court-to-Court Communication in Cross-Border Insolvency Cases”, the International Insolvency Institute, Eighteenth Annual International Insolvency Conference New York, NY, III NextGen Leadership Program and Class VII Induction, pages 1 to 2.

¹⁶ *In Re Maxwell Communication Corp.*, 170 B.R. 800, 801-02 (Bankr. S.D.N.Y. 1994), *aff’d*, 186 B.R. 807 (S.D.N.Y. 1995)

¹⁷ Stacy A. Lutkus, “Court-to-Court Communication in Cross-Border Insolvency Cases”, the International Insolvency Institute, Eighteenth Annual International Insolvency Conference New York, NY, III NextGen Leadership Program and Class VII Induction, pages 1 to 2

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.

For purposes of the discussion in respect of the entire question 4, it is assumed that the insolvency proceeding opened in the UK by a minor creditor is not barred by any of the temporary measures introduced by the Corporate Insolvency and Governance Act 2020 for relief during the Covid-19 pandemic.

The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) ("EIR Recast") applies to all member states of the European Union ("EU"), except for Denmark which exercised its right to opt-out of the Regulation.

[Additional information required to answer the question: Whether the other EU member state in which Fernz is considering opening insolvency proceedings is Denmark. This is because if the other EU member state is Denmark, the EIR Recast would not apply and one has to look at Denmark's private international law rules for the recognition of the UK insolvency proceedings. For purposes of this discussion, it is assumed that the other EU member state in which Fernz is considering opening insolvency proceedings is an EU member state other than Denmark.]

The United Kingdom ("UK") insolvency proceeding was opened on 18 June 2020. This is before the expiry of the transitional period in respect of the UK's departure from the European Union ("EU"). Hence, the EIR Recast would apply to the insolvency proceedings in the scenario above.

Good.

Main Insolvency Proceeding

Where a debtor's centre of main interest ("COMI") is in a member state of the EU, the EIR Recast stipulates that such member state shall have jurisdiction to open main insolvency proceedings concerning the debtor.¹⁸ The facts of the case state that Rydell's COMI is in the UK (since the facts of the case already state that the COMI is in UK, the discussion will not delve into whether UK is the actual COMI under the EIR Recast). Hence, in this scenario, the

¹⁸ Article 3(1) EIR Recast.

UK court will have jurisdiction to open insolvency proceedings against Rydell and the UK insolvency proceedings will be recognised as the main insolvency proceeding in respect of Rydell.

Subject to specific provisions dealing with rights in *rem*, set-off, immovable property, employment contracts and detrimental acts, English law will be applicable to the UK insolvency proceedings.¹⁹ The judgment of the UK court for the opening of the UK insolvency proceeding will be automatically recognised in all other EU member states (except for Denmark).²⁰ However, this automatic recognition of the UK insolvency proceedings will not affect the rights in *rem* of creditors or third parties which will be determined according to the *lex situs*.

The judgment opening the UK insolvency proceeding will have the same effect in any other EU member state (save for the EU member state in which secondary insolvency proceedings are opened) as it has under the law of the UK.²¹ The UK insolvency practitioner may exercise all powers conferred on it by English law, in another EU member state, provided there are no other insolvency proceedings in that EU member state and no preservation measure to the contrary has been taken there pursuant to a request to open insolvency proceedings in that EU member state.²²

Secondary Insolvency Proceeding

Under the EIR Recast, Fernz will have jurisdiction to open a secondary insolvency proceeding against Rydell in another EU member state, only if Rydell has an establishment in that EU member state.²³ Rydell would be deemed to have an establishment in the EU member state if Rydell carries out or has carried out in the 3-month period prior to the request to open the UK insolvency proceeding, a non-transitory economic activity with human means and assets in that EU member state.²⁴ This requirement of an “establishment” would highly likely be satisfied since Rydell has offices throughout Europe. **Would further information assist in this respect?**

The EU member state court seised with jurisdiction for the request to open the secondary insolvency proceedings must immediately give notice to the UK insolvency practitioner and give it an opportunity to be heard.

The EIR Recast also provides for two (2) specific situations in which the court seised with jurisdiction for the request to open the secondary insolvency proceedings may, at the request of the insolvency practitioner in the UK insolvency proceedings, postpone or refuse the opening of the secondary insolvency proceedings. The first is when the UK insolvency representative gives an undertaking to local creditors in that other EU member state that they will be treated as if secondary insolvency proceedings have been opened and such undertaking is approved by a qualified majority of local creditors.²⁵ The second is that the court of the secondary insolvency proceeding may temporarily stay the opening of the secondary insolvency proceeding when a temporary stay of individual enforcement proceedings has been granted in the UK insolvency proceeding, in order to preserve the efficiency of the stay granted in the UK insolvency proceedings.²⁶

¹⁹ Articles 7 to 18 EIR Recast.

²⁰ Article 19(1) EIR Recast.

²¹ Article 20(1) EIR Recast.

²² Article 21(1) EIR Recast.

²³ Article 3(2) EIR Recast.

²⁴ Article 2(10) EIR Recast.

²⁵ Article 36 EIR Recast.

²⁶ Article 38(3) EIR Recast.

It must be noted that the effects of these secondary insolvency proceedings commenced by Fernz will be restricted to the assets of Rydell that are situated in the EU member state in which the secondary insolvency proceedings are opened.²⁷ Subject to specific provisions dealing with rights in *rem*, set-off, immovable property, employment contracts and detrimental acts, the law of the EU member state in which the secondary insolvency proceedings are commenced will be applicable to the secondary insolvency proceedings.²⁸ The judgment of the EU member state court for the opening of the secondary insolvency proceeding will be automatically recognised in all other EU member states (except for Denmark).²⁹ However, this automatic recognition of the secondary insolvency proceedings will not affect the rights in *rem* of creditors or third parties which will be determined according to the *lex situs*.

The insolvency practitioner in the secondary insolvency proceeding must immediately transfer to the UK insolvency practitioner, any assets remaining after meeting the claims of all creditors allowed under the secondary insolvency proceedings.³⁰

The EIR Recast also requires the insolvency practitioners and courts of the main insolvency proceedings and the secondary insolvency proceedings to cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings.³¹

An alternative to opening secondary insolvency proceedings is for Fernz to lodge a claim in the UK insolvency proceedings for the debts owing from Rydell to Fernz.³²

6.5

Question 4.2 [maximum 3 marks]

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

If the UK insolvency proceeding was opened on 18 June 2021, that is, after the expiry of the transitional period in respect of the UK's departure from the EU, the EIR Recast would not apply to the insolvency proceedings in such scenario.

Since Rydell has its COMI in the UK, the minor creditor will be able to open insolvency proceedings in the UK. However, since the EIR Recast no longer applies, the UK insolvency proceedings will not be automatically recognised in the EU member states and the UK insolvency practitioner will need to obtain a recognition of the UK insolvency proceeding in the EU member states. The following options may be available to the UK insolvency practitioner in obtaining such a recognition³³ –

- (a) where an EU member state has adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997), the UK insolvency practitioner may apply to the court of the EU member state for a recognition of the UK insolvency proceeding. In this regard, the EU member states that have adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997) are Greece, Poland, Romania and Slovenia;

²⁷ Articles 3(2) and 34 EIR Recast.

²⁸ Articles 7 to 18 and Article 35 EIR Recast.

²⁹ Article 19(1) EIR Recast.

³⁰ Article 49 EIR Recast.

³¹ Articles 41 and 42 EIR Recast.

³² Article 45(1) EIR Recast.

³³ Alan Bennett and Karolina Lewandowska, "What is the impact of Brexit on cross-border insolvency?" at <https://www.thegazette.co.uk/insolvency/content/103914> accessed 10 November 2021.

- (b) for EU member states whose legal systems are based on English common law, the UK insolvency practitioner may be able to rely on the common law principle of comity to gain recognition for the UK insolvency proceeding; and
- (c) the UK insolvency practitioner would also have to look at the private international law principles of each EU member state in respect of the recognition of foreign proceedings. These principles may differ from State to State.

Similarly, the insolvency proceeding commenced by Fernz in the EU member state will not be automatically recognised in the UK. Hence, in respect of any insolvency proceedings opened by Fernz in an EU member state, the insolvency practitioner of such insolvency proceedings will need to obtain a recognition of the insolvency proceedings in the UK. The following options may be available to the insolvency practitioner in obtaining such recognition³⁴ –

- (a) the insolvency practitioner may apply to the UK court, under the Cross-Border Insolvency Regulations 2006 which enacts the UNCITRAL Model Law on Cross-Border Insolvency in the UK, for a recognition of the EU member state insolvency proceeding. Since the UNCITRAL Model Law on Cross-Border Insolvency is not a reciprocal provision, the Model Law need not be enacted in the State requesting recognition;
- (b) if the EU member state is a “relevant country” under section 426 of the Insolvency Act 1986 (“IA 1986”), the insolvency practitioner may also apply to the UK court for assistance under section 426 IA 1986. In this regard, Ireland is the only EU member state which is listed as a “relevant country”; and
- (c) the insolvency practitioner may also be able to rely on the English common law principle of comity to seek assistance of the UK court for the insolvency proceeding by the EU member state.

It would be beneficial to directly state what further information would be beneficial.

2

Question 4.3 [maximum 5 marks]

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

When dealing with a cross-border insolvency matter, the UK court must address the three (3) pertinent questions as raised by Fletcher,³⁵ that is –

- (a) the choice of forum to exercise jurisdiction in the matter;
- (b) the choice of law to apply to the matter; and
- (c) the recognition and effect accorded foreign proceedings in the same matter.

Since the EIR Recast would not be applicable to the insolvency proceeding opened in the UK on 18 June 2021, one would have to look at the domestic laws and private international laws

³⁴ Alan Bennett and Karolina Lewandowska, “What is the impact of Brexit on cross-border insolvency?” at <https://www.thegazette.co.uk/insolvency/content/103914> accessed 10 November 2021.

³⁵ F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd Ed 2005), pages 3 to 5

of the UK to answer the above three (3) question and determine if the minor creditor could commence the UK insolvency proceedings.

The choice of forum to exercise jurisdiction in the matter

The relevant UK domestic law to determine jurisdiction for the Rydell insolvency proceeding by the minor creditor is the Insolvency Act 1986 (“IA 1986”). Section 221(1) IA 1986 provides that an unregistered company may be wound-up in the UK under the IA 1986. An “unregistered company” includes any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the UK.³⁶ Hence, Rydell, a foreign company that has an office in the UK could fall within the meaning of an “unregistered company” under IA 1986.

The circumstances in which an unregistered company may be wound up under the IA 1986 are as follows³⁷ –

- (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding up its affairs;
- (b) if the company is unable to pay its debts;
- (c) if the court is of the opinion that it is just and equitable that the company should be wound-up.

Though the circumstances in section 221(5) IA 1986 are very widely drafted, English courts generally do not exercise jurisdiction to wind-up a foreign company unless there is a sufficient connection with the UK.³⁸ The relevant principles that English courts have considered in the exercise of this jurisdiction have been summarised by Knox J in *Real Estate Development Co*³⁹ as follows –

- “(1) *There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction.*
- (2) *There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order.*
- (3) *One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.*”

Based on the facts of the case, it is highly likely that Rydell would satisfy the requirement of being unable to pay its debts.⁴⁰ However, it must be noted that Rydell’s COMI is not in the UK, the creditor intending to file the UK insolvency proceedings is only a minor creditor and Frenz, the main creditor of Rydell intends to file insolvency proceedings outside the UK. Taking into consideration these factors and applying the principles stated by Knox J above, it is highly likely that the UK courts will come to the conclusion that there isn’t a sufficient connection with the UK for the minor creditor to initiate insolvency proceedings against Rydell in the UK and hence, the UK court does not have jurisdiction in the matter.

The choice of law to apply to the matter

If the UK court decides that it does not have jurisdiction over insolvency proceedings in respect of Rydell, the choice of law question would no longer be relevant.

³⁶ Section 220 IA 1986.

³⁷ Section 221(5) IA 1986.

³⁸ *Re Latreefers Inc* [2001] BCC 174 (CA)

³⁹ [1991] BCLC 210

⁴⁰ Sections 222, 223 and 224 IA 1986 provide scenarios under which a company is deemed unable to pay its debts.

However, for the sake of completeness, in respect of applicable law, the domestic choice of law principles of the UK would be applicable to the winding-up of a company by an English court where international elements are involved. English law will apply to matters of procedure and substance in the winding-up of Rydell under the IA 1986.⁴¹ However, it is possible for reference to be made to foreign law to establish certain aspects of administration of the winding-up, for example, if the claim for a debt is governed by foreign law, reference may be made to the foreign law to establish the validity of the claim.⁴²

The recognition and effect accorded foreign proceedings in the same matter

In the event insolvency proceedings are opened in the EU member state where Rydell has its COMI after the expiry of the transition period in respect of the UK's exit from the EU, such insolvency proceedings will not be automatically recognised in the UK. However, the insolvency practitioner of the EU member state may apply to the UK court under the UK's Cross-Border Insolvency Regulations 2006 ("CBIR 2006") which enacts the UNCITRAL Model Law on Cross-Border Insolvency in the UK, for the recognition of such insolvency proceedings in the UK. Since the insolvency proceeding is taking place in the State where Rydell has its COMI, the insolvency proceeding in the EU member state will be recognised as a foreign main proceeding under the CBIR 2006⁴³ and will be given the necessary effect in the UK as provided for under the CBIR 2006.

5
Marks awarded 13.5 out of 15
TOTAL MARKS 47 /50

*** End of Assessment ***

⁴¹ I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd Ed 2005), [30-017], referring to *Re Real Estate Development Co* [1991 BCLC 210 (Ch D)], per Knox J.

⁴² *Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.

⁴³ Article 2(g), Schedule 2 CBIR 2006