INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the**summative (or formal) assessment**for**Module 1**of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determineyour 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 **9pages**.

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/ bankruptcylaws, 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 ofmodified 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 Nationsstill 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 three main developments include:

Imprisonment for debt (debtor's prison) was introduced by the Statute of Marlbridge in 1267. This was then abolished in 1869 by the Debtors Act and generally provides the backdrop of the initial attitudes towards debtors; however, some jurisdictions still have something similar to a debtor's prison[1]

- In the 1542 Bankruptcy Act sequestration was used in cases of dishonesty debtors or those leaving to try to avoid paying their debts. Commissioners were also appointed and creditors could apply to them and proceed against the Debtor and administration could be compulsory and distributions would be made. In this context a few main principles developed which can still be found in modern insolvency laws, including, collective participation by creditors a pari passu approach to distribution of assets.
- The 1570 Act of Elizabeth was said to be the first English law that was viewed as an insolvency Statute as opposed to just a preventative fraud measure[2]. Further, the Act fell under the remit of the Lord Chancellor.
- Another key change was made under the 1705 Act of Ann. This Statute first introduced the concept of discharge of a debtor, subject to the debtor conforming. **It would be beneficial to elaborate on how this shaped concepts of 'fresh start' in modern insolvency.**

2.5

Question 2.2 [maximum 3marks]

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 measures introduced by the UK as a result of the COVID-19 pandemic was in the main, detailed in the Corporate Insolvency and Governance Act 2020[3]. Some of the measures included:

- There was a moratorium for a period halting winding-up petitions where COVID-19 was the main reason for the financial difficulties[4]
- A moratorium on the use of statutory demands and non-payment of the amount demanded as the main reason for the a winding up petition[5]

[1] Cayman Islands still commit judgment debtors to prison is certain circumstances (GCR O.52, Part I, Imprisonment for non-payment of Judgment Debts)
[2] J C Calitz – "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) Fundamina 1, p 13
[3]Corporate Insolvency and Governance Act 2020 (came into force on 26 June 2020) https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted
[4] Ibid, Section 10 and Schedule 10, Part 2
[5] Ibid, Section 10 and Schedule 10, Part 1

- Suspension of wrongful trading and liability relating to the same[6]
- Increasing restructuring options[7] which has been based on UK schemes of arrangement under the Companies Act 2006.

The Act's temporary measures detailing some automatic extensions have now come to an end while some measures have been extended, for example in relation to winding up petitions[8] and others are permanent, like the restructuring plan.[9]

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Question 2.3 [maximum 4marks]

Briefly explain the concept of treaties and "soft law" and indicate how these may be used to establish cross-border insolvency rules in States.

The Vienna Convention on the Law of Treaties in 1969 played a significant role in addressing the framework of a treaty and defined treaties as "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*"[10].

A treaty itself is a mechanism of public international law by which States, once they become signatories, can proceed to ratify and the treaty may then become adopted into domestic law, becoming what been termed as 'hard law'. Terminology can differ across States as to what constitutes a treaty and depending on whether a State has a civil law or common law foundation will determine how, once ratified, it becomes hard law having a binding effect.

The concept of soft law stems from a perspective of on a non-binding nature, to influence rather than categorically bind and is accomplished by non-State associations, bodies and collectives. UNDROIT and UNICTRAL are examples of bodies that seek to influence insolvency laws around the globe. For example, UNCITRAL's Model Law on Cross Border Insolvency is a good example of a successful international 'soft law' approach, providing a model law which can be used by a State and adapted to suit, so trying to harmonise international insolvency law from a different perspective.

Specifically in the insolvency context, Europe, as an example has previously had little success in achieving a treaty or convention across the European Union but more recently via another mechanism, introduced in the European Insolvency Regulation (EIR) (2000)[11] which itself has had an impact on international insolvency law.

Treaties have traditionally been seen more as 'hard law' and Model Laws more as 'soft law'. The former often having a more binding effect and the latter designed to be used more as guidance or to influence, for example, by a State wishing to incorporate new laws or regulations to enhance or harmonise its international insolvency laws. However, Mervorach moves away from the traditional "...*notion that treaties are hard law and binding and non-*

[6] Ibid, Section 12
[7] https://www.legislation.gov.uk/ukpga/2006/46/part/26A (New Part 26A in the Companies Act 2006)
[8] Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No 2) Regulations 2021. In force from 1 October 2021
[9] https://www.thegazette.co.uk/insolvency/content/103601 Article: "*What you need to know about Corporate Insolvency and Governance Act 2020*" by Cathryn Butler (Solicitor) and Katie Farmer (Legal Director) from Ashfords LLP.
[10] Vienna Convention on the Law of Treaties in 1969, Article 2(1)(a). Found on Page 3. (Entered into force on 27 January 1980)
[11] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF

treaty instruments are soft and non-binding"[12]. This view of Mervorach's is understandable given the success seen with soft law approaches in many cases leading ultimately to adoption by a State of the Model Law itself, without or with very little modification, therefore, achieving what has traditional been the treaty realm leading to 'hard law'.

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Marks awarded 9.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1[maximum 5 marks]

Briefly discuss the various possible different sources of insolvency laws in any State and how they may interact with each other.

There can be numerous sources of insolvency law in any State and it will vary depending upon whether they are civil or common law in their approach and whether they have adopted any international related model law or treaties or whether they are part of a regional or supra-national area. Depending on the type of State the following may be in play:

- Domestic Civil Codes
- Domestic Statutes (specific to insolvency and those more general laws that overlap insolvency in some areas - such as how ownership is determined and laws relating to securities and so on)
- Regional (USA codes having federal application), Supra-National (EU)
- Treaties and Conventions (which ones apply)
- Model Laws (if adopted)
- Judicial, co-operation/co-ordination, interpretation of laws and prevailing case law
- Administrative rules - substantive and procedural aspects

In order to consider the interaction of the various sources of insolvency laws one needs to look first at the main source of insolvency law in a particular State such as its legislation or code as a starting point.

A number of States like the USA and England have a unified or single Code[13] or Statute[14] which deals with insolvency law. In the USA the Code is Federal and therefore has effect across all the US States of the USA, as opposed to just being enacted and effective in one. It would therefore be the Code or Statute governing this area that would be the main source examined before looking at other sources.

There would therefore be less need to look to other sources in these situations because the main sources are so comprehensive and mostly all in one place. However, in England there are still other statutes that play a role and require consideration, depending on the context, such as the Companies Act 2006[15], which deals with restructuring of a company as opposed to it being incorporated in the Insolvency Act 1986. Further the Corporate Insolvency and Governance Act 2020[16], where measures were introduced in light of COVID-19 and need to be considered regarding insolvency proceedings and restructuring. In a wider context, other statutes and case law may need to be considered such as the Trusts of Land and

[12] I Mervorach in *The Future of Cross=Border Insolvency: Overcoming Biases and Closing Gaps* (OUP, 2018)
[13] Bankruptcy Code 1978
[14] Insolvency Act 1986
[15] https://www.legislation.gov.uk/ukpga/2006/46/contents
[16] https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted

Appointment of Trustees Act 1996[17] where there are questions in relation to trusts and principles of equity which may also come into play.

In addition Model Laws, if adopted modified or not, will need to be considered and how they interact with any other domestic and regional laws in place. For example, the Model Law on Cross-Border Insolvency[18] may in certain aspects be overridden by a regional law or domestic law where there is any conflict between the them – it depends upon whether a State has adopted the Model Law modified or not.

Other States such as Australia do not have a unified piece of legislation and have more than one statute each dealing with different aspects of insolvency. Therefore, the starting point would likely be those pieces of legislation most relevant to the context. Some States are more common law based without any unified insolvency law and therefore the main sources would more likely be found in case law primarily, although perhaps some limited legislation. Then other domestic, regional and international Model Laws or Treaties would also need to be considered as and when applicable.

No matter what the sources of domestic law(s) there will always be, in the international insolvency context, to a greater or lesser extent – depending upon how comprehensive and/or fragmented a State's insolvency law is, a necessary interplay with international law aspects (public and private) and the likely involvement and interpretation by Courts in different States where cross-border insolvency is in play.

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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.

Fletcher[19] outlined three main important questions[20] in relation to situations where different State laws are vying and there is conflict of laws given the interplay between the domestic insolvency aspects and the cross border element.

Firstly, in relation to choice of forum the key element is which jurisdiction will be seized of the matter. The order commencing proceedings together with other issues that may arise, such as establishing a connection with a specific jurisdiction and the parties or the dispute itself. During an insolvency process which has international aspects to it, there will inevitably be questions which require determination by the local Court, for example, regarding assets and liabilities which are in another State – which may also have concurrent proceedings. The forum if unclear, even if contractual or non-contractual aspects are apparent[21], will often be an area of great contention given the ramifications of which forum and laws will govern future actions of a global enterprise in an insolvency context. If no Treaty or other mechanism has been adopted by the State then one would need to refer to the State's own private international law principles in order to determine the issue.

[17] https://www.legislation.gov.uk/ukpga/1996/47/contents

[18] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf

[19] I F Fletcher in *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd Edition, 2005)

[20] Ibid, pp 3 to 5.

[21] Rome I, (Regulation 593/2008/EC) and Rome II (Regulation 864/2007/EC)

Secondly, recognition and effect regarding foreign proceedings in the same matter will often come into play where there has been a judgment in another State, the judgment itself is relevant as well as the effects running from that judgment. The judgment awarded in the other jurisdiction can have a significant impact on insolvency proceedings because the order may impact regarding insolvency or aspects of disclosure which can have a significant impact both in terms of substantive action but also implications in the jurisdiction where the effect of such a decision will require judicial action. The importance of the type of judgment led to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments 2018 which allows for a State to follow a clear procedure in relation to recognition and enforcement[22]- this model law further harmonises this aspect of insolvency.

Thirdly, in relation to the choice of law to apply once a jurisdiction is seized of a matter will usually be determined by the laws of a particular State, which may or may not give more weight to any contractual terms expressing agreement in this regard. This is often where the civil and the common law States significantly vary in their approach. There have been attempts to harmonise domestic choice of law principles[23] and Fletcher and Wessels made recommendations in this area within the ALI – III Report[24] in which they commented that the "*ultimate purpose of the proposed uniform rules of choice of law is to bring consistency and predictability into and area that has hitherto been notable – indeed notorious-for the variability of the possible outcomes to the resolution of a given matter"*[25]*.*

Disharmony can be seen where, a Civil law State deeming the choice of law aspect to be a question of law, and common law States as one of fact. Depending on the State and the domestic laws in place will determine what rules apply. For example, England will start from the position that the law of the forum will apply unless a party to the proceedings seeks to invoke perhaps a contractual clause citing that some other law should be applied in the matter instead. However, there can be an application of both in specific contexts, for example where English law applies to submitting a proof of debt but a foreign law may need to be referred to should the validity of a foreign debt be in question[26]. An example of choice of law in a unified inter-State context would be the Nordic Convention[27] where it was agreed that the state deemed to be the 'home State' would be the law that generally would become applicable in those proceedings.

It would be beneficial to also set out the relevant questions asked.

4

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*…"

[22] https://uncitral.un.org/en/texts/insolvency/modellaw/mlij

[23] UNCITRAL Legislative Guide on Insolvency Law (2004), Pt 2 at 68

[24] ALI – III Report on Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases (2012). Feltcher and Wessel contribution to the

[25] Ibid, at *Global Rules on Conflict-of-laws matters in International Insolvency Cases:* General Provisions, Rule 1: https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf

[26] Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux (1890) 25 QBD 399

[27] The Nordic Convention on Bankruptcy 1933

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 most prominent case reflecting the pre-existing or pre-Model Law co-ordinating efforts in insolvency proceedings between Courts is the case of Maxwell Communications Corporation Plc[28] in 1991/92.

In this case primary insolvency proceedings were issued in the USA by the Maxwell Communications Corporation ("MCC") and concurrent proceedings in the United Kingdom. In those jurisdictions insolvency representatives were appointed in each State to essentially perform the same functions. The Judges presiding instigated the idea of a cross-border agreement between the Courts, a protocol to allow for cross-border co-ordination of the matter. It was the first of its kind. The idea being that a more unified approach would have the effect of ensuring that the value of the estate could be managed more effectively and it would reduce the expenses involved as well as conflicts arising from differing judicial decisions[29].

MCC was a UK registered company with its executives also in the UK but around 80 percent of its revenue was via US based holding companies[30]. The Chapter 11 proceedings in the USA and the UK insolvency proceedings, administrators were appointed, who took differing approaches to insolvency procedures and how the matter was to be managed. In the UK the insolvency practitioners traditional enjoyed more freedoms to manage the matter where as in the USA the Courts were much more involved and stricter in the management of the matter. An Examiner was appointed by the Court in the US to negotiate the joint approach with the UK administrators. Essentially the UK Courts had the main tasks and decision making powers but the "*...U.S. Examiner with a right to consult and object*"[31]. Some of the detail agreed between the US and UK Courts included jointly: choosing new directors to manage ongoing concerns; agreeing any further debts or reorganising; prior notice should be given to the US if a major transaction was required. There were also other major aspects left out of the initial protocol to be dealt with as matters progressed[32] which led to an extension of the agreement.

During the process when the US and the UK agreed to pursue an action in relation to alleged preference payments paid by MCC to Banks. One of the Banks to be affected, Barclays Bank Plc, tried to file an injunction in the UK Courts, however, Justice Hoffman

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[28] Maxwell Communication Corporation plc, 93 F.3d 1036, 29 Bankr.Ct.Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084), and Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

[29] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp 128-129 - https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/practice_guide_ebook_eng.pdf

[30] J L Westbrook in *"Comment: A More Optimistic View of Cross-Border Insolvency"*, Washington University Law Review, Volume 72, Issue 3 (January 1994): https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1735&context=law_lawreview

[31] In re Brierley, 145 B.R. 151, 164 (Bankr. S.D.N.Y. 1992).

[32] Ibid, at Note 29, p 129

dismissed the UK application noting it was for the US Court to decide- when challenged, the reasoning was upheld by the Court of Appeals[33].

The result was a protocol and a more harmonised approach to distribution of assets and other procedures. As Westbrook describes it was "*...administered in a cooperative spirit-distilled comity*."[34] While the aforementioned was pre-Model Law there was a clear desire and recognition of the need for a more harmonised approach from the judiciary, especially given the cross-border nature of the Maxwell global empire.

5

Marks awarded 14 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 Union Regulation (EU) 2015/848[35] of the European Parliament and European Council 20 May 2015 on Insolvency Proceedings (Recast) ("EIR Recast") would have been applicable to the UK, when the UK was still a part of the EU, pre-Brexit. The EIR Recast set out the conflict of laws rules regarding debtors in an insolvency context where more than one EU State was involved. It generally applies to the State in which the debtor has its centre of main interest or COMI.

Rydell is a UK incorporated company with offices in the UK and Europe, with its centre of main interest ("COMI")[36] is in the UK. The COMI is presumed so long as the company has

[33] Barclays Bank PLC v. Homan, [1993] BCLC 680, [1992] BCC 757

[34] Ibid, at Note 30, p 949

[35] European Union Regulation (EU) 2015/848, applicable after 26 June 2017 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R0848

[36] Ibid, Article 3

not moved in the previous 3 month period prior to the commencement date[37]. A minor EU based creditor has commenced (opened) insolvency proceedings in the UK, against Rydell, on 18 June 2020, the commencement date. It is presumed that the company did not move within the last 3 months for the purpose of this scenario.

There is no harmony as such of inter-EU State law, in the same sense as a treaty is formed, because an EU regulation is directly applicable in each Member State – so the rules are imposed on all Member States within the EU. This means in an EU context that it is directly applicable and supersedes any domestic law of any Member State[38]. If the EU State of the minor creditor(s) or Fernz (main creditor) is in Denmark, which we do not know at this point, other rules would possibly apply.

The EIR Recast generally applies to EU States from 26 June 2017 onwards and provides for determination of the jurisdiction, the applicable law and provides for mandatory recognition of those proceedings. However, from 11pm on 31 December 2020 the EIR Recast no longer unilaterally applies to the UK, following Brexit[39]. In this scenario the minor creditor commenced insolvency proceedings in the UK before the EIR Recast ceased to apply. The UK catered for the transition in The Insolvency (Amendment) (EU Exit) Regulations 2019[40]. There were however saving and transitional provisions in regulation 4 which continued to apply the EIR Recast and the relevant UK domestic law where the main proceedings have been opened before 31 December 2020[41]. This transitional regulation has since been revoked[42] and the UK Withdrawal Agreement, Article 67(3)(c)[43] replaced it but it still provides for the application of the EIR Recast to continue to apply regarding main proceedings commenced before 31 December 2020.

In July 2020 Fernz was considering commencing proceedings against Rydell in a different EU State. Secondary proceedings may be commenced in a State where the debtor has an establishment[44]. We know that Rydell has a presence in other EU States in addition to the UK and therefore secondary proceedings could be commenced but would be restricted to the assets of the debtor situated in that secondary State. Dates become relevant at this point and we do not know if Fernz in July 2020 actually commenced any proceedings. If Fernz did then it would be pre-December 2020 and the EIR Recast would likely still apply. This could lead to possible conflict but without further information this cannot be explored more.

It would be beneficial to consider the need for further information as to whether Rydell has an establishment in the other country in Europe where the other proceedings were intended to be commenced by Fernz.

Another consideration is whether either creditor is deemed to be a 'local creditor'[45] or not. Instead of commencing any secondary proceedings the Insolvency Practitioner in the main

[37] Ibid, Article 3(1)
[38] Excluding Denmark
[39] The Insolvency (Amendment) (EU Exit) Regulations 2019, No 146: https://www.legislation.gov.uk/uksi/2019/146/contents
[40] Insolvency (Amendment) (EU Exit) Regulations 2019, No 146: Regulations 4 and 5
[41] The Insolvency (Amendment) (EU Exit) Regulations 2020, No. 647, Explanatory Note, paragraph 2.1 https://www.legislation.gov.uk/uksi/2020/647/pdfs/uksiem_20200647_en.pdf [this instrument revokes the 2019 Regulations No 146 and replaces it with Article 67(3)(c) of the Withdrawal Agreement]
[42] Ibid
[43] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN
[44] European Union Regulation (EU) 2015/848, Regulation Preamble paragraph (23) & Article 2(10), definition of establishment.
[45] European Union Regulation (EU) 2015/848, Article 2 (11)

proceedings can give an undertaking[46] to local creditors akin to what they would enjoy if secondary proceedings were commenced, with the approval of a qualified majority of local creditors. This undertaking can be enforced in the main proceedings or in the State in which secondary proceedings could have been commenced[47].

Restructuring could potentially be an option as well, if appropriate and the laws of a State provide for the possibility. Again further information is required to explore this aspect further.

The EIR Recast, provides that main proceedings may only be opened in the Member State where the Debtor has its centre of main interest (COMI). However, this can be a rebuttable presumption[48]. Just because Rydell is incorporated in the UK is not conclusive evidence that their COMI is there and potentially this could be argued by Fernz, as the main creditor they would likely want to be in control of the main proceedings. Fernz could try to rebut that presumption. However, an EU State Court of its own motion should consider this question of COMI from the outset of any main proceedings[49]. More information would be required in order to potentially challenge on this front and whilst they were considering commencing in July 2020 it is not known what they in fact did at that point. If nothing was done and no proceedings were commenced then as the 31 December 2020 date has now passed, the EIR Recast may not now apply at all.

Finally, Covid-19 being the main reason for the downturn felt by Rydell must be a consideration. However, the implications of this will likely be determined on any temporary measures introduced in the relevant State to protect companies finding themselves in distress as a direct result of Covid-19, as many States within the EU did. Further information is required in order to explore this area further.

6

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.

Any proceedings commenced in the UK post-31 December 2020 would be not fall under the EIR Recast but the UK's own insolvency laws. The UK enacted the European Union (Withdrawal Agreement) Act 2020[50], once agreement had been reached with the EU and this does provide for some transitional measures but only where proceedings were commenced in the UK before 31 December 2020. In this case proceedings were commenced on 18 June 2021 therefore the UK's domestic laws would apply[51].

The UK has already adopted the Model Law on Cross-Border Insolvency in 2006[52]. Recognition of any proceedings or judgments will need to be sanctioned by the domestic laws of an existing EU State and EU Laws where required. However, in untangling itself from the EU various UK regulations have remained consistent with the approach of the EIR Recast. For example, COMI as well as establishment, remain central to determining the

[46] Ibid, Article 36, Right to give an undertaking in order to avoid secondary insolvency proceeding
[47] Ibid, Article 36 (8)and (9)
[48]European Union Regulation (EU) 2015/848, Regulation Preamble paragraph (30) & Article
[49] Ibid, Article 4, Examination of jurisdiction
[50] https://www.legislation.gov.uk/ukpga/2020/1/introduction, came into force on 23 January 2020
[51] Insolvency Act 1986, as amended https://www.legislation.gov.uk/ukpga/1986/45/contents
[52] Cross-Border Insolvency Regulations 2006 (SI 2006/1030), https://www.legislation.gov.uk/uksi/2006/1030/contents

jurisdiction. Given that the registered office of Rydell was in the UK in this instance, the UK Courts would likely allow commencement.

It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCBI and if not what laws would need to be considered in those countries.

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?

Post December 2020 the UK domestic laws would apply, including but not limited to the following:

- Insolvency Act 1986
- Cross-Border Insolvency Regulations 2006 (SI 2006/1030) – which enacted the Model Law on Cross-Border Insolvency
- Insolvency (Amendment) (EU Exit) Regulations 2019, No. 146; now mostly superseded by The Insolvency (Amendment) (EU Exit) Regulations 2020, No. 64
- Corporate Insolvency and Governance Act 2020
- The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No 2) Regulations 2021
- Companies Act 2006

Any creditor can present a winding-up petition[53]. Therefore the minor creditor has the ability to commence proceedings against Rydell under UK law. In the UK, COMI as well as establishment, remain central to determining the jurisdiction as seen in the EIR Recast. However, UK laws have a broader ability. In this scenario Rydell is unregistered with its COMI in an EU State – therefore a foreign company. However, the UK Courts could possibly allow a creditor to make a winding up petition in the UK despite the lack of COMI or establishment, even where a foreign company[54] is not registered in the UK[55].

It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.

The UK adopted the Model Law on Cross-Border Insolvency in 2006[56]. Whilst recognition of any proceedings or judgments will now need to be sanctioned by the domestic laws of an existing EU State and EU Laws where required, this may not be fatal. The various UK regulations have remained consistent with the approach of the EIR Recast. As mentioned, in addition, the UK has also extended its reach reigniting sufficient connection[57] as a threshold

[53] Insolvency Act 1986, s.124(1)
[54] Companies Act 2006, s.1044
[55] Insolvency Act, s.220
[56] Cross-Border Insolvency Regulations 2006 (SI 2006/1030), https://www.legislation.gov.uk/uksi/2006/1030/contents
[57] Re Latreefers Inc [2001] BCC,(CA)

for determining whether the English Court will allow the matter to open. The contract for the supply of goods[58] in this case would also be relevant depending on what procedures were being considered.

Recognition of a UK appointed liquidator in another State will depend the other State's own laws. Further, choice of law in the UK is usually English law in relation to procedure and substance[59]. It is likely therefore, depending on additional information being provided, that proceedings post-Brexit could still be commenced in the UK.

A further important aspect are the measures in the Corporate Insolvency and Governance Act 2020[60] which will likely also affect any proceedings, even if it is an unregistered company as in this scenario. The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No 2) Regulations 2021[61] which substitutes Schedule 10 of the Corporate Insolvency and Governance Act 2020, extending protection brought in, due to Covid-19's impact on the economy. Specifically, this new Schedule affects the Insolvency Act 1986 and the ability for even an unregistered company to be wound up in the UK for being unable to pay its debts as a direct result of Covid-19[62].

2
Marks awarded 10.5 out of 15
TOTAL MARKS 44/50

End of Assessment

[58] Insolvency Act 1986, s.223B
[59] I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017) [30-052-053]
[60] Corporate Insolvency and Governance Act 2020 (came into force on 26 June 2020) https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted
[61] https://www.legislation.gov.uk/uksi/2021/1091/contents/made - In force from 1 October 2021
[62] Insolvency Act 1986, s.221(5)(b)