



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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

Since the Dutch insolvency system is rather outdated when compared with English or American insolvency / bankruptcy laws, it does not provide for a modern scheme of arrangement that could be used to reorganize 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 recognize 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 cooperation 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 cooperation.

(b) It is prescriptive and provides information for insolvency practitioners and judges on practical aspects of cooperation 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 harmonization of insolvency proceedings that involve more than one State through communications among the States involved.

(d) To enhance co-ordination and harmonization 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.

[Type your answer here]

Answer 2.1:

The *English Bankruptcy Act of 1542* was the first bankruptcy Act, and it established a system of forced sequestration for dishonest and absconding debtors. The essential idea of this Act was that in the case of a fraudulent debtor, compulsory administration, and distribution on a basis of equality among all creditors should be required.

The shortcoming of the above Act, resulted in the formation of some of the key legislation in English law governing debt collection techniques that impacted the current insolvency law:

1. The *Act of 1570* also known as the *Act of Elizabeth* authorised a creditor to start a bankruptcy procedure once the debtor committed a "act of bankruptcy." It is said to be the first law with the prime focus on bankruptcy instead of fraud-prevention law as its predecessors. Here the creditors might then ask the Lord Chancellor to call a bankruptcy meeting, and the Lord Chancellor could then appoint bankruptcy commissioners to oversee the proceedings. The Commissioner had the authority to inspect the debtor's property and transactions, and the debtor was required to give his or her property to the commissioners, who may then call the individuals and even imprison them.

It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.

2. The *Statute of Ann of 1705* established the concept of a statutory discharge, which was not an automatic right but required the parties' consent. **It introduced the notion of statutory discharge of debts which has a significant impact on development of insolvency policy. It would be beneficial to elaborate regarding modern principles of 'fresh start' and how it was shaped from this development.**
3. The *Act of 1883* is regarded as the cornerstone of today's English bankruptcy law. It resulted in the establishment of the Official Receiver's Office, which is responsible for overseeing the debtor's estate. In today's insolvency legislation, the Act's mechanism for dealing with bankruptcy problems is still in use. **Further elaboration would be beneficial**

2.5

Question 2.2 [maximum 3 marks]

Following the Covid-19 pandemic, States across the globe had to introduce measures to deal with the negative economic fall out of this pandemic. Briefly indicate three insolvency and insolvency-related measures so introduced in the UK.

[Type your answer here]

Answer 2.2:

The Corporate Insolvency and Governance Act 2020 modifies the UK's corporate restructuring and insolvency regulations significantly. Some of these modifications are temporary in nature and are a reaction to the Covid-19 issue. Other reforms, on the other hand, are intended to be more permanent, bringing UK law closer to Chapter 11 of the US Bankruptcy Code and the modifications envisioned by the European Restructuring Directive, which EU Member States are required to enact by July 2021.

makes major changes to the

Corporate Insolvency and Governance Act 2020 (the "Act") introduces three major permanent changes to companies and insolvency laws.:

1. **"Standalone" Moratorium:**

The 2020 Act establishes a new moratorium process for businesses in financial distress. This is in effect a "debtor-in-possession" procedure aimed at helping businesses survive financially. As a result, the company has breathing space while it investigates its rescue and restructuring options, and creditors cannot pursue payment or enforcement action. As outlined in Section A34 of the Act, a "monitor" oversees the moratorium and shall act with integrity.

2. Flexible **"Restructuring Plan"**:

A new restructuring mechanism has been created by the 2020 Act in order to eliminate, reduce, avoid, or mitigate the consequences of financial issues that have damaged or are likely to damage a company's capacity to continue operating as a going concern. In many ways, the new approach is similar to the old scheme of arrangement procedure found in the corporations statute.

3. Supply Contract **"Termination"**:

The 2020 Act restricts how contract termination clauses may be used by imposing new restrictions. It is not uncommon for contracts to include ipso facto clauses that allow a provider to terminate or alter a long-term supply agreement if the counterparty declares bankruptcy or reorganizes. Providers may require payment of outstanding bills as a condition of providing services. In extreme cases, this could be seen as a "rescue to ransom" situation.

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.

[Type your answer here]

Answer 2.3:

From the 19th century onwards, more modern forms of bilateral treaties or conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions involving there State appear and present a sort of regulation for cross border insolvency. Classic public international law instruments such as treaties and conventions bind themselves and affect their domestic law. As a part of the domestic laws enforceable in the courts, these may form a part of the State's **"hard law"** on insolvencies.

In 1990, the Council of Europe signed the *Istanbul Convention (Convention on Certain International Aspects of Bankruptcy)*. Despite never being implemented, it had a significant impact on insolvency legislation among the member countries. *Scandinavia's Nordic*

Convention (1933), a rare and successful international treaty involving Norway, Denmark, Finland, Iceland, and Sweden. It recognizes that the law of the state of insolvency adjudication determines practically all of the order's consequences in all member states without any additional formalities.

Though not through a convention, the European Union has had more success through the *European Insolvency Regulation, 2000*, which has had a greater impact on international insolvency law. In its entirety, the *European Insolvency Regulation (Recast)* replaced the old multilateral "**instrument**" on foreign insolvencies on 20 May 2015.

There have been varying degrees of success in finding "**hard law**" remedies for international insolvency cases, while "**soft law**" approaches have been more successful. Several international organizations have been working on this method over the last few decades.

The establishment of a *Model Treaty on Bankruptcy at the Hague Convention of 1925* was an attempt to harmonise private international law on bankruptcy. The *UNCITRAL Legislative Guide on Insolvency Law (2004)* was drafted in collaboration with the *Hague Convention* and given to member states in 1997. It has gotten a lot of attention and support, and it's even part of the Model Cross-Borders framework in nations like India.

4

Marks awarded 9.5 out of 10

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

Question 3.1 [maximum 5 marks]

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

[Type your answer here]

Answer 3.1:

A. Sources of Insolvency Law:

It is crucial to understand the main sources of insolvency law that apply when analyzing an insolvency law of a particular state. However, underlying systems still based on the common law may also rely on common law principles to fill any gaps in the existing legislation.

B. English Insolvency Law System:(Common Law System):

The origins of civil law may be traced back to Roman law, which dealt with the execution of judgments in Table 3 of the Twelve Tables. Debt execution arose from the debtor's promise to return the loan with his own body, and he may be imprisoned, put to death, or sold as a slave. Individual debt collection processes gave birth to the development of collective debt collection mechanisms, which in turn gave rise to the development of these methods.

The *English Bankruptcy Act of 1542* was the first bankruptcy Act, and it established a system of forced sequestration for dishonest and absconding debtors. The essential idea of this Act was that in the case of a fraudulent debtor, compulsory administration, and distribution on a basis of equality among all creditors should be required.

The shortcoming of the above Act, resulted in the formation of the *Act of 1570* also known as the *Act of Elizabeth* authorised a creditor to start a bankruptcy procedure once the debtor committed a "act of bankruptcy." It is said to be the first law with the prime focus on bankruptcy

instead of fraud-prevention law as its predecessors. Here the creditors might then ask the Lord Chancellor to call a bankruptcy meeting, and the Lord Chancellor could then appoint bankruptcy commissioners to oversee the proceedings. The Commissioner had the authority to inspect the debtor's property and transactions, and the debtor was required to give his or her property to the commissioners, who may then call the individuals and even imprison them.

The *Statute of Ann of 1705* established the concept of a statutory discharge, which was not an automatic right but required the parties' consent. It introduced the notion of statutory discharge of debts which has a significant impact on development of insolvency policy.

The *Act of 1883* is regarded as the cornerstone of today's English bankruptcy law. It resulted in the establishment of the Official Receiver's Office, which is responsible for overseeing the debtor's estate. In today's insolvency legislation, the Act's mechanism for dealing with bankruptcy problems is still in use.

C. Continental European System (Civil Law System):

Between the 13th and 17th centuries, many European countries enacted bankruptcy legislation. The word "bankruptcy" is said to have originated from the Italian *banca rotta*, which means "to shatter the bench." The *Lex Mercatoria*, or the practises and usages that arose amongst merchants on the continent, gave rise to insolvency law.

The *Ordonnance de Commerce* of 1673 laid the groundwork for subsequent French insolvency legislation, which was codified in the commercial laws of 1807 and 1838. In 1889, a French legislation established the notion of judicial liquidation, and in 1935, the harsh treatment of bankrupts and failing company managers was amended. In 1955, a new dispensation was enacted, followed by a comprehensive revision in 1967, which included a reorganisation procedure including a moratorium and a court-approved plan. As a result of these events, the 1985 Act was enacted, which is still in effect today.

D. Conclusion

It's also worth noting that some jurisdictions have a single, comprehensive bankruptcy law that covers all aspects of bankruptcy. In addition to insolvency laws, it is a reality that many legal concepts found in so-called general law, or non-bankruptcy law, will have an impact on insolvency, such as the rules governing the vesting of real rights such as ownership or real security rights.

Take care to answer the question put to you. You've not been asked to pick a State to consider nor to consider the UK, rather you've been asked to consider the sources of laws in any State. This question requires you to consider different types of sources of law and how they interact. You have touched upon common law and legislation and general law. These were the focus of the question. There was scope to elaborate upon the differences between different States.

4

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonization 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.

[Type your answer here]

Answer 3.2:

In regard to cross-border insolvency, Fletcher asks three pertinent questions:

1. In which jurisdiction must the procedure be opened?

In an insolvency proceeding, it is critical to identify whether a court can hear a case - this necessitates an evaluation of the parties' and dispute's jurisdictions. Contested issues in re the debtor's asset in another estate may appear in a proceeding which results in liquidation rather than reorganisation.

2. Which system must rule elements of diversity?

Foreign law is believed to be a question of law in civil law systems, regardless of whether it is pleaded by the parties. If a local court chooses to consider a case, it must next determine which law will be used. Different legal systems take different approaches to the issue. **There is scope to elaborate upon choice of law concerns.**

3. International effects to proceeding in a particular forum?

A judgement issued by a foreign court in an insolvency proceeding might be significant, since it can direct the beginning of insolvency proceedings against a debtor. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency was developed as a result of the distinction between "recognition" and "enforcement" or "effect" in international law.

In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State, each State would apply its own laws? What cooperation difficulties does this raise ?

3.5

Question 3.3 [maximum 5 marks]

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

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

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

[Type your answer here]

Answer 3.3:

The cross-border insolvency of *Maxwell Communications Corporation plc* in 1991 is a notable example.

Facts of the Case:

Case Title: Maxwell Communication Corporation PLC

Maxwell Communication Corporation plc. had two primary insolvency proceedings filed by a single debtor, one in the United States (“US”) and the other in the United Kingdom. Furthermore, in the two States, two separate insolvency practitioners were appointed, each with the same duties.

Judges Suggestion:

The concept of an insolvency agreement addressing issues between the two administrations was independently discussed by US and English justices with their respective attorneys. A central goal of the agreement was maximizing the estate value and harmonising the process to reduce waste, expenditure, and jurisdictional disputes by the insolvency practitioners.

Specifics of the Agreement includes:

In order to preserve the debtor's going concern value, English management would be retained, but the English representatives would be able to appoint new directors with the permission of their American counterparts.

Many topics were purposefully left out of the agreement so that they may be rectified over the course of the case. Some of these concerns, such as distribution issues, were ultimately addressed under a contract extension.

Through a "Order and Protocol" approved by the courts of the respective states, concurrent principal insolvency proceedings in the United States (Chapter 11 proceedings) and England (administration proceedings) were coordinated.

This answer displays a good understanding. There is some scope to elaborate.

4

Marks awarded 11.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Rydell Co Ltd (Rydell) is an incorporated company with offices in the UK and throughout Europe. Its centre of main interest (COMI) is in the UK. Rydell supplies engine parts for large vehicles, including airplanes, and has had a downturn in business due to border closures and travel restrictions throughout the Covid-19 pandemic.

Rydell's main creditor is Fernz Co Ltd (Fernz) which is incorporated in a country in Europe that is a member of the EU. Fernz is considering commencing proceedings or pursuing other options with respect to recovering unpaid debts from Rydell.

There are a number of other creditors owed money by Rydell, who are located throughout different countries in Europe which are all members of the European Union.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 7 marks]

An insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June 2020. A month later, Fernz was considering also opening proceedings in another country in Europe which was a member of the European Union.

Discuss if and how the European Insolvency Regulation Recast would apply. Also note what further information, if any, you might require to fully consider this question.

[Type your answer here]

Answer 4.1:

The European Insolvency Regulation Recast (the “**Regulation**”) allows for central, territorial, secondary procedures in the other Member States. Article 1(1) of the Regulation applies to all proceedings relating to insolvency laws as listed in Annex A to the Regulation. It includes maybe public collective proceeding or interim proceeding in which assets are totally or partially disposed of by a debtor for the purpose of rescue, adjustment of its debts, reorganization, or liquidation. Thus, this Regulation would be applicable to the instant case, as the minor creditor initiates the insolvency proceeding in the UK, which is covered in *Annexure A of this Regulation*. It is pertinent to note that as per *Article 1(2) of the Regulation* this Regulation would not apply to the instant if Rydell is an insurance company, credit institution, collective investment undertaking, investment firm, and/or other firms/institutions/entities, as defined by Directive 2001/24/EC.

Article 3 of the Regulation grants jurisdiction to the member State courts where the debtor’s centre of main interest is situated to initiate the “**main proceeding**”. Furthermore, to protect the diversity of interests, this Regulation allows for a parallel secondary proceeding concerning the same debtor to commence in the Member States where the debtor has an “**establishment**”. Given the above facts, it can be adequately inferred that Fernz may initiate a parallel secondary proceeding against Rydell. However, it should ensure that there are adequate assets of Rydell to fulfil its debts. Since per Article 3(2) of the Regulation, the proceeding shall be limited to the assets located therein. **There is scope to elaborate regarding establishment and the requirements**

Furthermore, as per *Article 42 of the Regulation* allows for such cooperation to the extent, it is appropriate to facilitate effective administration, with a caveat that the court before which such secondary proceeding is pending should mandatorily ensure collaboration and communication with the court where the main insolvency proceedings are being absorbed by adopting any mechanism as the court consider appropriate. As per the further provision of *Article 42(3) of the Regulation*, the court where Fenz intends to initiate the proceeding should, however, ensure that the following are coordinated to the greatest extent possible:

- a) The appointment of insolvency practitioners must be coordinated;
- b) Communication of information amongst the court;
- c) Debtor’s assets and affairs’ management and supervision;
- d) Hearings;
- e) Approving protocols, if necessary; and
- f) certain other measures as stated in *Article 43 of the Regulation*.

Furthermore, it is also essential to note that as per *Article 8 of the Regulation* the commencement of a insolvency proceeding has no bearing on creditors’ or other parties’ rights in rem in respect of particular assets owned by the debtor. Accordingly, if Fenz is a secured creditor, the main proceeding will in all likelihood have no impact on the right vested in assets in the state in which it intends to initiate the proceeding.

In order to fully address the issues outlined above, the following queries would be helpful:

Q1. Whether the proceeding against Rydell is concerning:

- a) insurance undertaking
- b) credit institutions
- c) investment firms and other firms, institutions and undertakings as defined by Directive 2001/24/EC
- d) collective investment undertakings

Q.2. What type of Assets are involved in this case and their location?

Q3. In which jurisdiction must the procedure be opened?

Q4. Which system must rule elements of diversity?

Q5. International effects to proceeding in a particular forum?

5.5

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.

[Type your answer here]

Answer 4.2:

On 26th June 2020 the UK Legislature brought in place the Corporate Insolvency and Governance Act, 2020 (the "Act") this had initially put in place restriction on winding-up petitions protecting the small suppliers ipso facto to the end of September,2020. However vide an Amendment of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 the period was extend till the end of June, 2021.

The time-limited exception that protect the "small suppliers" ipso facto to enable them minimise the consequences of the COVID-19 issue, according to *Section 15 of the Amedned Act*. As per the same a supplier is considered "small" if it meets at least two of the following criteria:

- a) annual revenue of less than £10.2 million;
- b) balance sheet assets of less than £5.1 million; and
- c) less than 50 workers.

Thus, initiation of proceeding as per European Insolvency Regulation Recast (the "**Regulation**") would go against the very purpose of the Amendment to the Act under the UK legislation. Therefore, we could say that the same would against the lex concursus. Furthermore, the Regulation states that the law of member state of the centre of main proceeding of the debtor i.e. UK's law in the instant case would be applicable as far as possible.

Consequently, it can be concluded that Fenz will be barred from the initiation of the secondary proceeding.

In order to fully address the issues outlined above, the following queries would be helpful:

Q1. Whether Rydell is a supplier and it fulfils the condition of the "small supplier" to safeguard its own interest?

It would be beneficial to discuss the timing of the EIR Recast ceasing to apply to UK Proceedings.

1.5

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?

[Type your answer here]

Answer 4.3:

“**Overseas Companies**” have been defined in the *Section 1044 of the Companies Act, 2006* as a company incorporated outside the UK.

Furthermore, *Sections 220 the Insolvency Act, 1986*, grant to the Court in UK jurisdiction to institute winding up proceeding for an “**unregistered company**”. An unregistered company as per the Act is a company created in another State which has carried on business in UK, but has not met the requirements to be registered therein.

By interpreting the above definitions, it can be inferred that if Rydell were not registered with its COMI in a nation in Europe that was a member of the European Union, instead of the UK. Rydell will then qualify to be an overseas company, and an unregistered company, under the Companies Act, 2006 and the Insolvency Act, 1986, respectively. Against this backdrop, the minor creditors in the UK will need to take into account the **Insolvency Act, 1986** should he wish to initiate a formal insolvency proceeding against Rydell.

In this regard, *Section 221 of the Insolvency Act, 1986* is important as it lays down the following conditions satisfying which an unregistered company shall be wound up in UK:

- a) In the event that the company is dissolved, has ceased to operate, or is conducting operations solely for the purpose of winding things up;
- b) In the event of the company's inability to pay its debts; and
- c) if the court determines that dissolving the corporation is reasonable and equitable.

Since, in the instant case Rydell is unable to pay back it's debt, it can be concluded that the minor creditor is well within their right should they wish to institute an insolvency proceeding against the Rydell.

Additionally, there must be a “**sufficient connection**” as has been held by the Court in the matter of **Stocznia Gdanska SA vs. Latreefers Inc. [2000] CPLR 65**, where the court referred to the following core principle fulfilling which here exists “**sufficient connection**” case of **Real Estate Development Co. [1991] BCLC 210**:

1. *“There must be a sufficient relationship with England and Wales, which may or may not include assets inside the jurisdiction;*
2. *There must be a realistic probability of benefit to those seeking a winding-up order if one is granted.*
3. *One or more persons who are interested in the division of the company's assets must be people over whom the court has jurisdiction.”*

The minor creditor satisfies the above criteria and may very well institute proceedings against Rydell as the business is conducted in the UK, the minor creditor is situated in the UK and falls within the jurisdiction of the UK. Thus, establishing sufficient connection in the instant case.

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Marks awarded 12 out of 15
TOTAL MARKS 43/50

*** End of Assessment ***