



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**.

Commented [DB1]: Please include your full student number so that I know with which year group you are registered! Your student ID is 202122-496!

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 English Bankruptcy Act of 1542 which provided for the compulsory collection of a debtor's assets. The Act also allowed a creditor to appoint a body of commissioners to a fraudulent debtor in order to administer the debtor's estate and distribute the realised assets on a *pari passu* basis to all creditors of the estate. The *pari passu* distribution basis is a fundamental principle of modern insolvency law.
- The 1570 Act provided for the administration of the debtor's estate to be transferred from the body of commissioners (per the above English Bankruptcy Act of 1542) to the Lord Chancellor and allowed for creditors to petition to Lord Chancellor (in relation to an act of bankruptcy) to convene a meeting to appoint a commissioner to administer the estate. The 1570 Act also allowed for a person to be summoned to appear for questioning and sent to prison. The act of petitioning a court in relation to a debt as well as the ability for the administrator to conduct a public examination are key principles of modern insolvency law.
- The Statute of Ann of 1705 which introduced the notion of a statutory discharge once the commissioner had confirmed that the debtor had conformed and cooperated with the administration of the estate. The discharge of a bankrupt person is a key principle of modern personal insolvency law. **There is scope to elaborate regarding 'fresh start'**

3

Question 2.2 [maximum 3 marks]

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

The Corporate Insolvency and Governance Act 2020 ("CIGA 2020"), which received Royal Assent on 25 June 2020, introduced

- The ability for the courts to sanction a restructuring plan voted by creditors, if fair and equitable, noting that this plan is binding on all creditors including dissenting creditors.
- New moratorium rules in which a company is given breathing room to create a restructuring plan, during which time no creditor can commence an action against a company without the court's permission. It is noted that this moratorium is overseen by a monitor e.g. insolvency practitioner, but the directors are still responsible for the company's day-to-day operations.
- A change to wrongful trading rules by removing the possibility that a director is personally liable for such.
- The suspension of statutory demands, which were voided if served on a company during March 2020 to September 2021.

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 instrument that binds States who sign up to such. By signing a public international instrument, a treaty may become part of the State's 'hard law' on insolvency as a treaty impacts domestic laws and the concepts of the instrument will be enforceable by courts. The Nordic Convention (1933) is a rare example of a successful treaty between five Scandinavian countries in relation to comity issues.
- Treaties are not always successful however, and even if a treaty does not achieve a sufficient number of votes, the 1990 Convention on Certain International Aspects of Bankruptcy (known as the Istanbul Convention, Council of Europe Treaty Series No 136), demonstrated that the intention of the treaty can still influence the development of cross-border insolvency rules as in this scenario it led to the development of the European Union's thoughts on cross-border insolvency issues.
- 'Soft laws' can be used as an alternative to hard law / treaties and can complement or even at times conflict with hard law. Soft laws have assisted in international insolvency law issues, the most successful example being its UNCITRAL Model Law on Cross-border Insolvency. This was not a treaty however was Model Law draft legislation which other states were recommended to adopt some similar form of.

4

Marks awarded 10 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.

In English insolvency law the following items are sources of insolvency law and guidance:

- Whilst not law, it should be mentioned that the Cork Report was an investigation and recommendation on the reform of English insolvency laws which led to the Insolvency Act 1986.
- Insolvency Act 1986. This Act deals with both personal and corporate bankruptcy estates however, it is noted that rules for both types follow the same general principals.
- The Insolvency Act 2000. This Act was enacted to amend parts of the Insolvency Act 1986. For example, it amended personal insolvencies by preventing landlords from exercising rights of re-entry. It also introduced a moratorium for company voluntary arrangements.
- Enterprise Act 2002. This Act was in part enacted to amend parts of the Insolvency Act 1986 to create a more rescue friendly administration process. It also reduced the duration of the bankruptcy process such that some bankrupts can now be discharged after a one year period.
- The Debt Relief Order, 2009. This Act interacts with the Insolvency Act 1986 as it provides assistance to asset poor individuals for whom a bankruptcy process would not be appropriate.
- UNCITRAL Model Law on Cross-Border Insolvency was adopted in 2006.
- EU Insolvency Regulation (EIR) (2000) & the EIR Recast (2015) which, prior to 31 December 2020 impacted cross-border insolvency matters between the UK and EU Member States. The EIR Recast still applies to insolvencies where the main proceedings were opened prior to 11pm 31 December 2020.
- The Debt Relief Order was amended in 2016 to allow for an online bankruptcy relief application.
- Corporate Insolvency and Governance Act 2020 (CIGA 2020) which introduced:
 - The ability for the courts to sanction a restructuring plan which may be binding on all creditors.
 - New moratorium rules in which a company is given breathing room to create a restructuring plan, during which time no creditor can take action against a company without the court's permission.
 - Change to wrongful trading rules by removing the possibility that a director is personally liable for such.
 - The suspension of statutory demands.

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 need to discuss legislation (whether as a code of insolvency law or a multiplicity of insolvency legislations), common law where it applies, general non-insolvency laws etc

1

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.

1. *In which jurisdiction may insolvency proceedings be opened?*
2. *What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?*
3. *What country's law should be applied in respect of different aspects of the case?*

It is possible that insolvency proceedings against a debtor may be opened in many different jurisdictions, in which case, each jurisdiction would be entitled to apply their own insolvency laws to the matter. However, each court would need to assess the details of the particular case to determine if that court is the right forum to hear the matter. In a liquidation of a debtor's estate, the initial matter for the court to consider is the commencement order.

The second matter to address is that of recognition. If in the scenario whereby assets of a debtor are located in a jurisdiction which does not follow the concept of Universality, parties may want to open a secondary proceeding in the foreign jurisdiction. For example, a jurisdiction that follows the concept of Territorialism. Depending on each state's rules, if a foreign proceeding has not been recognised in a particular jurisdiction, it is likely that the liquidator will have limited powers. For example, a commencement order may be issued for an English liquidation, however, the English liquidators may identify assets in another country. Whilst the liquidator has a duty to realise the assets, it may be difficult to do such if the foreign state does not recognise the appointment of the liquidator or the power given under such order.

In *McGrath v Riddell*¹ Lord Hoffman allowed for the principle of modified universalism to be applied in which he noted that “*the English court should... co-operate with the courts in the country of the principal, liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution*”. Many countries have statutory provisions that allow for the cooperation between countries. For example, Australia's Corporations Act 2001 allows for a foreign court to issue a letter of request requesting aid in an external administration matter.

A local court may also have to determine what laws should best be applied to a case or a particular issue as different jurisdictions have different approaches and considerations. In a country such as England, this decision only arises if parties request the choice of law.

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.

¹ [2008] UKHL 21

In the case of Maxwell Communications Corporation plc in 1991, there were two primary insolvency proceedings initiated: one in the US and one in England; in which both sets of insolvency practitioners were undertaking similar tasks. Each of the US and English courts raised the possibility that the two estates should enter into an agreement to resolve issues and maximise value to the estate by (i) improving communication and (ii) reducing costs, expenses and conflicts.

As a solution, it was agreed that the US court would defer to the English proceedings if certain criteria was met. For example, this included decisions around the Company's management/board of directors. The English practitioners requested the consent of the US proceedings to incur any debts or file a reorganisation plan or before undertaking a major transaction. However, they were allowed to conduct smaller transactions². The agreement was not all encompassing and certain issues were purposefully left out of the agreement and resolved during the course of the proceedings e.g. Distributions. By entering into the "Order and Protocol", concurrent principal insolvency proceedings were able to be consolidated for the benefit of all stakeholders.

The example of Maxwell Communications Corporation plc in 1991 would likely have been good guidance when drafting 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

- The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation was adopted many years later on 1 July 2009 and illustrates how communication and co-operation can be achieved in competing proceedings. The example of Maxwell Communications Corporation plc in 1991 would likely have been good guidance when drafting the UNICTRAL Practice Guide, noting that it stresses that flexibility is required to resolve the particular issues of each proceeding and simply provides sample clauses to address issues as well as examples of prior cross-border agreements.
- America Law Institute (ALI) / International Insolvency Institute (III): ALI-III's overriding objective was to "*enhance co-ordination and harmonisation of insolvency proceedings that involve more than one state through communications among the states involved*"³. It is clear in the Maxwell case from many years prior that this was achieved via the meaningful resolution of key issues such as company management and small transaction without impacting each courts' right to exercise jurisdiction.
- The Judicial Insolvency Network (JIN) is also a recent project in which the primary objective is to improve efficiency and effectiveness when concurrent proceedings are on foot by enhancing coordination and cooperation amongst supervisory courts⁴. These key principals were already evident in the Maxwell case by both judges separately raising the matter of entering into a cross-boarder agreement.

5

Marks awarded 11 out of 15

² UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp.128-129

³ Boraine, A. & Mason, R. (2021). *Foundation Certificate in International Insolvency Law*. INSOL International. Page 71.

⁴ <http://www.jin-global.org/news-events.html>

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

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

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

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

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

Question 4.1 [maximum 7 marks]

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

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

The European Insolvency Regulation Recast (EIR Recast) applies to insolvency proceedings if the main proceedings are opened prior to 11pm 31 December 2020. Therefore, should the UK proceedings be the main proceeding (see below), the EIR Recast will apply as this proceeding was opened six months prior to this date.

The EIR Recast allocates jurisdictional competence to the courts in the relevant jurisdiction in the "centre of the debtor's main interests" (COMI)⁵. Therefore, the EIR Recast will mean that wherever the debtor's COMI is, this will be the primary jurisdiction for proceedings. As in this scenario, Rydell's COMI is in the UK, this then means that the UK proceedings are the main proceedings, such that the UK courts have the jurisdictional competence to deal with the matter. As mentioned above, the proceedings were commenced prior to 31 December 2020, therefore EIR Recast applies.

It is possible that subsequent proceedings may be commenced by Fernz in another EU member state, under the EIR Recast, should Rydell have an 'establishment' in such state. An establishment may be another place of operations with staff and assets. The question indicates that Rydell has operations which likely require employees as well as vehicle/airplane parts (i.e., assets) throughout Europe, and it is assumed that this requirement for an 'establishment' is satisfied in the other European country and, as such, Fernz is entitled to open proceedings in the other European country. **The question specifically asked what further information is required. It would be beneficial to discuss the need for this information regarding establishment.** These proceedings would be the 'secondary proceedings' as they are subsequent to the UK (location of COMI) proceedings.

As the EIR Recast would apply, the applicable law in these proceedings, would be that of the state of the opening proceedings, i.e. the UK. The UK laws will also govern the conduct of the

⁵ Article 3(1) EIR Recast

proceedings and the closure of the same. I also note that UK proceedings/liquidators are provided with automatic recognition in all member states⁶.

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.

NOTE: Assumption is that Rydell's European proceedings are again 1 month behind the minor creditor's UK proceedings

As mentioned above, the European Insolvency Regulation Recast (EIR Recast) applies to insolvency proceedings in which the main proceedings were opened prior to 11pm 31 December 2020. Therefore, the EIR Recast will not apply (assuming the UK proceedings are the main proceeding/ one current proceeding) as this proceeding was opened after the transition date. However, if the UK proceedings are not the main proceedings, then this may not be the case.

Based on the above, and assuming that the main proceedings were opened in the UK on 18 June 2021 (and therefore EIR Recast does not apply), then Fernz should note that any proceedings commenced in an EU jurisdiction will not be connected to the UK proceedings. As such, that particular EU jurisdiction state law will apply, and the UK proceedings are not automatically recognised in any of the EU member states.

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.

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?

As this matter fall outside of the EIR Recast (as it is post 31 December 2020), the English domestic laws will apply to UK insolvency proceedings, such as the Insolvency Act 1986.

As there are international components to Rydell, the domestic laws on choice of law are also applicable.

The following will need to be considered:

1. **Competent Jurisdiction** – As Rydell is an unregistered company, jurisdiction will need to be established by the court. Section 221(5) Insolvency Act 1986 provides for a court ordered winding up of unregistered companies if:
 - a. The company is dissolved, ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

⁶ Article 19 EIR Recast

- b. If the company is unable to pay its debts;
- c. If the court is of the opinion that it would be just and equitable to wind up the company.

In this scenario, it is not clear from the information provided if any of the above three criteria are satisfied, however:

- a. It does appear that Rydell is still carrying on a business – so (a) is unlikely to apply.
- b. It may be possible that Rydell is unable to pay its debts, however, based on the information it is unknown why the minor creditor has not been paid – possibly the debt is a genuinely disputed debt, rather than Rydell simply not having the cash to pay its creditors. However, it appears from the information that the major creditor, Fernz, is unpaid as Rydell is unable to pay its debts due to a downturn in the economy due to COVID-19. Therefore, it appears that (b) is satisfied, however, the minor creditor would need to evidence such to the court.

I also note that The Corporate Insolvency and Governance Act 2020 (“**CIGA 2020**”) will need to be considered as CIGA 2020 voided statutory demands, if they were served on a company during March 2020 to September 2021. It is likely that any statutory demands issued by the minor creditor to Rydell in this relevant period are therefore voided.

- c. Further information would be required to determine if there were any reasons for Rydell to be wound up on a just and equitable basis, however, given the information provided, there is no basis for this.

2. Sufficient Connection – There are three core requirements that the courts must also consider:

- 1. There must be sufficient connection with England and Wales. This does not mean that the Company needs assets in the UK, but we would need to understand if any of its operations are located there or if any other major creditors are in the UK.
 - I note that, as the creditor is only a minor creditor, it is likely that more significant connections would need to be made. As we have been advised that Rydell's COMI is in the EU, and that Fernz (the major creditor) is also in the EU, it may be unlikely that sufficient connection is made to the UK.
- 2. There must also be a reasonable possibility that, if a winding up order is made, the petitioner will benefit from such.
 - Based on the information, it is not clear what benefits a UK winding up will bring. Based on the question, none of the assets are in the UK, therefore, it needs to be considered how effective a UK liquidator will be. As the EIR Recast no longer applies, the UK liquidator will not have the automatic

benefit of recognition in the EU, such that they may struggle to realise assets and will be required to take additional steps which may be more appropriate to be carried out by an EU liquidator.

3. One or more persons who are interested in the assets of the estate must be persons that the court can exercise jurisdiction.
 - This is satisfied if the minor creditor is a UK entity or subject to the UK courts.

5
Marks awarded 12.5 out of 15
TOTAL MARKS 43.5/50

*** End of Assessment ***