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 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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6. The final submission date for this assessment is **15 November 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.2

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

(a) This statement is correct since the UK decided to merely provide financial aid to financially troubled entities and individuals.

(b) This statement is correct since the legislative reform process in the UK is too slow to effect amendments to an elaborate piece of legislation such as its Insolvency Act of 1986.

(c) This statement is correct since the English insolvency law already provided special rules to deal with extreme socio-economic situations like those brought about by global disasters such as the Covid-19 pandemic.

(d) The statement is incorrect since the UK did review parts of its insolvency rules and amended some, amongst other things, to deal with the negative economic fall out of the pandemic.

Question 1.3

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

(a) This statement is correct since the Dutch insolvency system does not provide for a discharge of debt and without such a dispensation in place, a scheme of arrangement will not be functional.

(b) This statement is correct since the Dutch government has not approved such legislation yet.

(c) This statement is incorrect since the Dutch in fact introduced new legislation in this regard in 2000 already.

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

Question 1.4

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

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

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

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

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

Question 1.5

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

(a) The statement is not correct because very few States allow insolvent estate representatives to deal with assets of a foreign debtor situated in their own jurisdiction without some form 4of 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.

Initially bankruptcy was a pro-creditor concept, with harsh consequences for the debtor. Until 1570 debtors were essentially considered as quasi criminals, however the Act of Elizabeth in 1570 (considered the first true bankruptcy statute) provided for the bankruptcy to be overseen by bankruptcy commissioners (appointed by the Lord Chancellor) giving the insolvency some form of oversight and process. **How did this shape modern insolvency thinking? Elaboration is warranted.**

The Statute of Ann in 1705 provided for the first time the notion of a discharge (or rehabilitation). Whilst not guaranteed, it provided a "fresh start" for those whom the commissioners agreed had cooperated and "conformed".

A third historical development was the Law of 1883; aiming to provide a fair procedure, with adequate supervision and to discourage dishonesty. Thus, it encompassed the previous historical developments and it remains the foundation of English insolvency law.

Further elaboration would improve the mark for this sub-question. While it does say 'briefly', the sub-question is for 3 marks.

2

Question 2.2 [maximum 3 marks]

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

The Corporate insolvency and Governance Act 2020 (CIGA 2020) provided permanent measures and temporary measures to assist businesses during the pandemic, which could be considered more pro-debtor.

This included:

- A new restructuring plan to help companies struggling with debt: The Court can bind even dissenting creditors to a restructuring plan if it considers it to be fair and equitable.
- A moratorium to give UK companies "breathing space" in which to pursue a rescue or restructuring plan. During this moratorium no creditor action can be taken against the company without the court's permission. Whilst the moratorium is overseen by an insolvency practitioner, responsibility for the day-to-day running of the company remains with the directors.
- The suspension of serving statutory demands. Statutory demands were voided if served on a company during the "relevant period" (between 1 March 2020 and 30 September 2021), giving companies longer to respond to financial liabilities.

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.

International treaties and conventions to which States have explicitly signed and ratified, become part of that country's domestic law. Those laws then become enforceable in domestic courts and form part of the States "hard" law on insolvency and should be strictly adhered to.

"Soft" laws on the other hand derive from multi-lateral organisations, e.g. the United Nations Commission on International Trade Law (UNCITRAL) Working Group V (Insolvency) and the World Bank, as well as insolvency practitioners' organisations (e.g INSOL), who develop model laws, recommendations, principles, or guidelines which can assist legislators, practitioners, judges and national policy-makers in their approach or decision making, but which nevertheless, are not legally binding.

When it comes to cross border insolvencies and procedural matters, treaties between States should be a logical solution to cross border insolvencies, providing clear protocols and mechanisms for international cooperation. However in practice, agreeing a set of rules between multiple jurisdictions with varying cultures, policies, and concerns of sovereignty, which are then imported into domestic law makes such universal approaches difficult, and very slow to achieve. Indeed few of these exist, most notably, the European Insolvency Regulation (EIR). As such, an abundance of soft laws that have been developed over time have allowed, in the absence of an applicable treaty to guide practitioners, and Courts, to harmonise cross border insolvencies where there are insufficient common guidelines or principles to refer.

Soft law protocols have been referred to in cross border matters where insolvencies have touched on multiple jurisdictions; indeed Courts have sought to clarify cross border cooperation and communication between different insolvency practitioners and foreign courts such that it is becoming increasingly common. As Justice Kawaley in the Grand Court of the Cayman Islands referred in the matter of LATAM Finance Ltd (August 2020) which involved four different jurisdictions and sets of liquidators, his ability to rely on a soft law instrument provided him with a jurisdictional basis for approving a protocol between the Courts in the Cayman Islands and Chile, thus assisting the foreign insolvency court as far as possible, whilst providing for the Grand Court to manage its own processes domestically.

It would be beneficial to make reference to the UNCITRAL Model Law on Cross-Border Insolvency which is arguably the most successful example of 'soft law' in the field of cross-border insolvency to date.

3.5
Marks awarded 8.5 out of 10

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

Question 3.1 [maximum 5 marks]

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

There are distinguishable sources of law which provide both strict and flexible approaches in insolvency matters being;

(i) international treaties and conventions;
(ii) other international rules;
(iii) private international law;

(iv) soft laws, being recognised principles of law in cross-border insolvencies; and
(v) comity of law.

The Nordic Bankruptcy Convention (1933) is an example of an international convention, and is referred by Wood as an example of a treaty which developed from similar attitudes to insolvency policies and because there was confidence in the suitability of each other's legal systems.

The European Insolvency Regulation (EIR) (2000) agreed across the European Union in order to facilitate the issue of cross border insolvency matters, provides for another set of international rules which can be followed and can take primary position over national laws where they have been ratified by States. These allow for an agreed position on cross border matters with regards to jurisdiction, law to be applied and cooperation/communication.

Nevertheless, international treaties, conventions and rules which are agreed upon between multiple States are a rare occurrence. They can take years to agree upon and even in such cases may still not be ratified by many States. As such, most insolvency laws are derived from private international law developed from common or civil law since colonial times.

In modern times the primary source of law will normally be found in legislation or codes. These may be via a single unified piece of legislation (eg the US Bankruptcy Code) or via a fragmented set of legislation which requires them to be read in conjunction with each other, for example where insolvency law is based in one piece of legislation but the winding up rules for companies are found in another.

These bodies of rules referred to as "private international law" forms part of the legal regime of each country and differs from country to country. Fundamentally in cross border matters, private international law will address whether the country has jurisdiction to deal with a matter, and which country's laws should apply to it.

However, issues may arise in cross border issues where differing insolvency laws may not be comparable, i.e. where there are parallel or concurrent proceedings. Moreover, where a country's law claims to have extraterritorial effect, that effect may not be recognised quite as simply in another jurisdiction.

Thus, Courts and Insolvency Practitioners may rely upon what are known as soft laws; guiding principles such as those within the UNCITRAL Model Law which provides mechanisms for dealing with cross border cooperation and communication. Soft laws arguably have become relied upon increasingly as it provides a flexible approach to a cross border matter without impinging on sovereignty or domestic matters and can be used to plug gaps in all of the above referred to sources of law, i.e. hard laws, private international (or general laws) to expedite and facilitate the insolvency process for the optimal benefit of creditors and stakeholders wherever they may be, and in a transparent way.

Finally, where there is an absence of laws, treaties, and a failure to recognise extra-territorial effects, courts have generally sought to rely on "comity" of law. In essence, and without formal procedure, this relies upon a mutual respect for the territorial integrity of each other's jurisdiction, and where jurisdictional nexus can be identified, courts will seek to assist another court wherever possible.

Your answer could have instead been structured to discuss the sources of law across all States and to recognise how and why there may be differences between certain

States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

2.5

Question 3.2 [maximum 5 marks]

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

With regards to "cross border" aspects and the "insolvency" aspects together, Fletcher asks the following three questions:

1. In which jurisdictions may insolvency proceedings be opened?

   Initially this will refer to whether a Court will even hear the matter. Whilst generally the place of winding up should be where the company is incorporated, where its assets exist or where the company's COMI exists, it is possible that concurrent proceedings can be brought in different jurisdictions. **What difficulties may arise as a result of this?**

2. Which country's law should be applied in respect of different aspects of the case?

   Ultimately this would depend on whether there is a single set or multiple proceedings taking place. In the case of the latter, ideally there would be recognition of a main proceeding such as that within the EU member states, or a process for domestic recognition of an international / cross border matter, and questions of law may be invoked or applied depending on which type of legal system exists (common or civil law). **There is scope to elaborate upon choice of law issues.**

3. What international affects will be accorded to the proceedings conducted at a particular forum (including issues of enforcement)?

   With regards to enforcement, the recognition of that judgement may encounter impediments and may need to be recognised in other States for them to take effect. This may result in questions being raised by the recognising Court as to the basis of the judgment in particular around voidable transactions. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgements seeks to harmonise this process but again depends on the ratification of the same by those States.

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…"

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

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

The Maxwell Communications Corporations plc (Maxwell) is an example of an insolvency matter, which, in 1991 was placed into insolvency in two States, the UK and the US, resulting in two insolvency practitioners being appointed. The MCLBI was drafted in 1997 and as such was not available to inform the Maxwell case with regards to communication and cooperation. Indeed it was the Maxwell case that informed the MCLBI and is referred to within its text as an example of successful cooperation and communication between two States.

In the case of Maxwell, although it was incorporated in the UK, with headquarters also in the UK, circa. 80% of its revenues were derived from the US, giving rise to arguments as to COMI. A Chapter 11 insolvency proceeding was filed in the US, and very shortly after, administrators were also appointed in the UK.

Both the US and UK Judge, posited the creation of a formal agreement between the two sets of Insolvency Practitioners (IP's) in order to facilitate information sharing and for the resolution of conflicts. In particular, two objectives were agreed, to maximise the value of the estate and to harmonise proceedings to minimise cost and conflict. As the case was involved extensive fraudulent acts, including the theft of pension funds in the UK, the issues of asset value and costs became primary and publicly sensitive concerns.

Under the agreement, power was granted to the English IP to administer all assets and operations of the debtor group's business, subject to agreement by its US counterpart and approval. For example, the English IP's could only incur debt or file a reorganization plan with the consent of the US IP's or the United States court; and the English IP's would give prior notice to the United States IP's before undertaking any major transaction on behalf of the debtor.

Essentially the US deferred to English proceedings, however the agreement provided the US IP with the right to be consulted and to object to any acts proposed. Thus the bankruptcy was considered a successful example of cross border cooperation, which informed the MCLBI in its drafting.

5
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.

In the first instance, further information would be needed as regards to the basis of the insolvency; taking into account Rydells situation, which are noted above as being due to the restrictions in place on trave due to the pandemic, and its effect on the business, it is likely that that UK's Corporate insolvency and Governance Act 2020 (CIGA 2020) which provided temporary measures to assist businesses during the pandemic, is likely to apply.

As such, Rydell would be given a moratorium in which to pursue a rescue or restructuring plan, and in any event, statutory demands are considered void if served during the relevant period (between 1 March 2020 and 30 September 2021). Therefore, it is likely that the Court may consider a light touch restructuring plan, where a moratorium is in place to prevent the full winding up of the Company whilst it pursues recovery.

However, more generally, the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (Recast Regulation) would apply. The Recast Regulation sets out the rules on jurisdiction to commence insolvency proceedings after 26 June 2017 and the law governing such proceedings.

The Recast Regulation in the case of Rydell is directly applicable as the date of the proceeding being instigated (being 18 June 2020), means that the proceedings took place prior to the expiry of the Recast Regulation being in force as a result of Brexit and the UK's withdrawal from the EU. Indeed, the Recast Regulation will continue to apply to insolvencies, where the Main Proceedings were opened prior to the expiry of the transitional period (11PM on 31 December 2020).

This means that pursuant to Article 3 of the Recast Regulation where insolvency proceedings are dealt with by the Courts in which the debtor has a centre of main interest (COMI), Rydell will be governed under the Insolvency Act 1986 (IA86). These proceedings are termed the Main Proceedings.

Article 19 of the Regulation provides for the automatic recognition of the insolvency proceedings throughout EU member States, It should be noted that even if the proceedings continue past the expiry date above, ensuring that there will not be any changes to the proceedings, or the laws and rules governing the proceedings until its conclusion.

With regards to the creditor seeking to open proceedings in another State, these are known as either "Secondary Proceedings" if they are initiated after Main Proceedings have been opened, or, are known as "Territorial Proceedings" if they are opened before Main Proceedings are initiated. On the assumption that Fernz had sought to file elsewhere after the UK filing, this would be considered a Secondary Proceeding.

It would be beneficial to discuss how such secondary proceedings are permitted where the debtor has an "establishment". An establishment is defined as meaning "any place of operations … where the debtor carries out a non-transitory economic activity with human means and assets"
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.

4.5

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.

The insolvency proceedings would have been instigated after the expiry of the transitional period and as such the Recast Regulation will no longer apply. Thus the benefits of automatic recognition, agreement on applicable law, and cross border cooperation will not apply.

As a result, the Courts may seek to fall back on the soft laws available to resolve issues of recognition and cooperation, for example the UNCITRAL Model Law on Cross-Border Insolvency (Model Law).

However, not all EU member States have adopted the Model Law, and in the matter of Rydell, the insolvency practitioner would need to confirm which State Fernz (the creditor) was seeking to bring secondary proceedings and whether she would need to have herself recognised in that jurisdiction.

In reality this will depend on the primary source of law in insolvency within those jurisdictions, as only a few EU member states have enacted the Model Law. As such, jurisdictions based on English common law will tend to favour the law of comity, but others may require more complex applications to domestic courts and the laws of those countries would apply as regards to recognition and cooperation.

3

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?

If Rydell were unregistered with its COMI within that of a EU Member State, the UK Court would rely upon Section 221(5) of the Insolvency Act 1986 (IA86) to determine whether a court appointed winding up could take place.

The premise for allowing the same would rely upon:

- If the debtor is unable to pay its debts;
- If the company is dissolved or has ceased to carry on business or is carrying on business for the purpose of winding up its affairs; or
- If it is just and equitable to wind up the company.

Even so, the Court will still need to consider if there is sufficient nexus to the UK for it to make such a winding up order, for example if assets exist in the UK, and if one or more persons with an interest in the distribution of assets of the Company would fall under the Courts jurisdiction.

Nevertheless, taking into account Rydell's situation, and the basis for its winding up, and as noted above, CIGA 2020 is likely to apply. Thus the Court may decide that either proceedings cannot be brought, or a restructuring plan where the directors continue to run the business (i.e. a light touch restructuring programme) would suffice.

5
Marks awarded 12.5 out of 15
TOTAL MARKS 42.5 /50

*** End of Assessment ***