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 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.

1 Although the early English law does not provide for imprisonment for debt, the imprisonment option was introduced by Statute of Marlbridge of 1267 (13th century). The imprisonment for non-payment of debt was only abolished by the Debtors Act 1869 (19th century).

2 English law viewed unpaid debts seriously. When Bankruptcy Act 1542 (16th century) was introduced, it viewed debtors with unpaid debts as "offenders" or "quasi-criminals". In the case of a fraudulent debtor, his assets will be sequestrated (taken into custody by officials). The proceeds of sale of the debtor's assets will be used to repay creditors (collective participations) on pari passu principle.

3 The Act of Elizabeth (1570) is said to be the first law designed to address bankruptcy, as opposed to the earlier fraud-prevention law. However, this Act does not provide for discharge of debt – all debts must be paid in full.

4 The concept of discharge of debt was introduced by the Statute of Ann of 1705 (18th century), although the discharge was not automatic. In order to be discharged, the administrator (commissioner) must be satisfied with the co-operation and conduct o the debtor.

5 Further legislative reform took place in 1883, with the appointment of Joseph Chamberlain as president of the Bord of Trade in 1881. Mr Chamberlain set out three key principles for bankruptcy –

a) the assets of the debtor belong to the creditors – creditors therefore should have control over the administration of the debtor's assets.
b) the trustee of the bankrupt's asset should be subject to official supervision. His remuneration must be supervised, and his conduct must be audited.
c) an independent examination of the debtor's conduct and circumstance leading to the insolvency must be examined.

6 The law of 1883 is seen as the foundation of present English bankruptcy law. The approach to bankruptcy remains largely the same until the promulgation of the Insolvency Act 1986.

7 Insolvency Act 1986 provides for restructuring (compromise) of the debtor's debts via (a) Corporate Voluntary Arrangement regime and (b) Administration regime – an insolvency practitioner will be appointed to take control of the assets of the debtor, while he (the insolvency practitioner) considers developing a restructuring scheme. This often involves a partial discharge of debt.

Take care to focus on explaining the developments directly and clearly.
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.

In the light of Covid-19 pandemic, UK has introduced a number of insolvency related measures under the Corporate Insolvency and Governance Act 2020. The measures include the following:

1) New restructuring plan

- The new restructuring plan is somewhat similar to the Scheme of Arrangement under the Companies.
- It allows a debtor who is facing financial difficulties to apply for the use of restructuring process.
- The debtor company has to demonstrate that it is in financial difficulties, and it will or may affect its ability to carry on the business as a going concern. It also has to demonstrate that there is some form of compromise or arrangements with the creditors with the view of resolving the debtor's financial difficulties.
- If 75% of the creditors vote in favour of the restructuring (there is no requirement for majority in number of creditors), it binds the creditors (assuming that there is no dissenting class of creditors).
- It also provides for the court to effect a cross-class cramdown if one class of creditor (Class A – dissenting class) does not vote in favour, but other classes vote in favour of the scheme (Class B, C, etc).
- When effecting the cram-down, the court has to be satisfied that the dissenting will not be worst off compared to if the scheme is rejected.
- When making the application for the restructuring process, the debtor may also apply for a moratorium providing the debtor company with "breathing space" to work out a restructuring plan.

2) Moratorium

- A viable (but distressed) company may apply for a moratorium. The aim is to provide the company space to work out a restructuring (turnaround plan).
- The initial period of moratorium is for a period of 20-business days, which can be extended for another 20-business day. Any extension beyond that would require the approval of the creditors or the court.
- Management of the company – during the moratorium, the day-to-day management of the company is in the hands of its directors. However, the management is under the supervision (oversight) by an insolvency practitioner (monitor). Certain transactions would require the consent of the insolvency practitioner (monitor).
- Debts incurred during the moratorium period – Supplies (debts) incurred during the moratorium period must be paid in full. This includes wages and salaries and amount due under the loan agreements. As the amount due under the loan agreements are typically a large (larger) amount, the extension of moratorium is largely in the hands of the lenders.

3) Wrongful trading

- The Insolvency Act 1986 makes the directors personally liable for wrongful (insolvent) trading.

- This rule on wrongful (insolvent) trading is relaxed during the "pandemic period" – it expires on 30 June 2021. The 'relaxation" provides that the court is to assume that the director is not responsible for worsening financial position of the debtor (creditors) company.
- While there is relaxation on wrongful (insolvent) trading rule, the provision relating to fraudulent trading continues to apply.

4) Statutory demand and winding-up petition

- There was a ban on statutory demands served between 1 March 2020 to 30 Sept 2021 (a period of 19 months) from being used, for presenting a winding up petition.

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.

1 Treaties are bilateral and multilateral agreements among States which bind themselves and are coded in their domestic laws. They are enforceable is their courts "hard law".

2 An example of treaty (hard law) is the Nordic Convention on Bankruptcy (1933). This is a successful multilateral treaty involving 5 Nordic countries - Norway, Sweden, Finland, Denmark and Iceland. When a bankruptcy order is issued in any of the member State, it is recognised by other States without the need for further formalities. An insolvency administrator is recognised in every member States and may directly request the assistance of other States' courts and public authorities. There is an immediate stay of creditor actions in all States when an insolvency administrator is appointed, which has the effect on almost all the assets of the bankrupt's debtor (except for real property).

3 On the other hand, soft law is a form of "model law" that is not legally binding. However, it provides a model or template to States that is motivated or inclined to update its domestic law to be in harmony with other States.

4 The most successful soft law is the UNCITRAL Model Law on Cross-Border Insolvency (1997) (UNCITRAL MLCBI). It provides a model (template) and recommend member States to adopt it with or without modifications. To date, over 40 members have adopted this model law. Most recently, Singapore has adopted this model law in 2017.

5 The key principles of UNCITRAL MLCBI relates to co-operation and co-ordination. It places obligations on courts and insolvency representatives to communicate, co-operation and co-ordinate with each other with the view of administering the insolvent estate in an efficient manner, such that the returns to the creditors may be optimised.

6 Another example of soft law is the World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes (2021) (World Bank Principles).

7 IMF and World Bank sometimes require developing countries who want loans from them to update their domestic bankruptcy law. UNCITRAL MLCBI and World Bank Principles are models (templates) that could be used for their domestic insolvency laws.

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.

1 Most countries have some form of domestic insolvency regime. Some countries have it in one legislation, while other have it in more than one legislation. The following are some examples –

- In USA, there is a Bankruptcy Code 1978, a single federal legislation that covers all aspects of bankruptcy and it applies through the country.
- In the UK, there is single legislation, Insolvency Act 1986, covering all aspects of individual and corporate bankruptcy. However, corporations sometimes carried out restructuring under Scheme of Arrangement via UK Companies Act 2006, rather than Insolvency Act 1986.
- In Australia, its Corporation Act 2001 deals with corporates insolvency, while the insolvency involving individuals is in a separate legislation.
- In Singapore, there is a recent law reform. Its Insolvency, Restructuring and Dissolution Act 2018 (IRDA 2018) is a single piece of legislation covering both corporate and individual insolvency.

2 In addition, some countries have embedded cross-border insolvency law (or co-operations) in their domestic legislation. The following are some examples –

- Section 426 of UK Insolvency Act 1986 allows English court to recognise winding-up proceedings of a foreign country.
- UK has also adopted UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL MLCBI) (1997), and provisions of UNICTRAL MLCBI will apply.
- In Singapore, IRDA 2018 has also adopted UNCITRAL MLCBI. It however has carved out provisions. For example, it will be me applied to some sectors (banking and insurance companies, for example).

3 In addition to domestic insolvency laws and adoption of model laws, there are also treaties that have been signed and are legally binding in their respective States. The following are some examples –

- Nordic Convention (1933) – It is a unified legislation applicable to five countries: Norway, Sweden, Finland, Denmark, and Iceland.
- Cape Town Convention – it is a treaty that has been ratified by over 50 countries. It is a source of law in each domestic State.

4 Besides the laws coded in legislation, common law in Commonwealth countries continues to apply, where the domestic legislation has a gap (lacuna).

It would also be beneficial to consider general law (or non-insolvency / non-bankruptcy law) and its impacts on insolvency law.

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. 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 Fletcher spoke about three fundamental difficulties – (a) which jurisdiction should insolvency proceedings be opened? (b) what country's law is to be applied and (c) what effect will it have on enforcement.

2 As an illustration, the Airline of State A flies to and has businesses in many countries. There will be creditors (debts not paid) in these countries. When the Airline is insolvent, which jurisdiction should the insolvency proceedings be opened? Should it be in State A? If it does, what about contracts where both parties had agreed to be subject to laws in State B? If the contract has an underlying asset, say, an aircraft, could the creditor in State B enforce the contract by taking possession of the aircraft?

3 Examples of other difficulties include the following –

a) Recognition – Would the office-bearer of one State (State A) be recognised by the other State (State B)? If not, the officer-bearer (example, liquidator) of State A will have no standing in the State B, and his requests for information or claims against the debtor will be ignored.

b) Moratorium – When an insolvency proceeding is opened in State A, would the creditors be prevented (moratorium) from taking a recovery action against the debtor or assets of the debtor in State B?

c) Creditors' participation – When an insolvency proceeding is opened in State A and an office-bearer is appointed, will the creditors of State B be allowed to participate? If they do, would they be treated equally (pari passu)?

d) Executory contracts – There will be executory contracts (contracts that are existing and have not been completed yet – there are remaining rights and obligations to be performed). Would the law of State A allow for disclaiming such a contract on the basis that it is onerous (the burden of continuing such a contract exceeds the benefits)?

e) Claims procedures – Are there clarity on claims procedures? For example, what are the documents to be provided to the office-bearers for the claim? If the claims are provided, how long does the office-bearer has in deciding whether to accept or reject the claim. If the claim by a creditor is rejected, what is the appeal procedure?

f) Priorities and preferences – Are there priorities or preferences provided by the local legislation. For example, claims by employees. Will they be accorded priorities?

g) Avoidable transaction – What are the laws relating voidable or void transaction. For example, when a debtor knows that an insolvency proceeding will be initiated by a creditor, the debtor chooses to pay a creditor(s) [undue preference transaction] knowing that other creditors will be put in a less advantageous position.

It would be beneficial to elaborate on choice of law and recognition concerns.

3

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 A prominent cross-border insolvency case can be found in Maxwell Communication Plc (Maxwell Case) bankruptcy in 1991.

2 This is before (pre-date) UNICITRAL Model Law on Cross-Border Insolvency (1997) and World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes in 2005 (revised in 2021) and various others cross-border communication, co-operation, and co-ordination protocols among countries.

3 In Maxwell case, legal proceedings involved two States - USA and UK. There were appointments of two separate insolvency representatives, one in the UK and the other in USA.

4 Communication, co-ordination, and co-operation "protocols" in the Maxwell Case include the following:

a) There was an insolvency agreement entered into between the two insolvency representatives. The goals were (a) optimise the value of the estate and (b) harmonise the proceedings to minimise waste (additional expense) and avoid jurisdictional conflicts.

b) Parties broadly agree that English proceedings will take the lead, but with some conditions. For example, (i) English insolvency representatives should give prior notice to USA insolvency representative before undertaking a major transaction, and (ii) English insolvency representative should only file a reorganization plan with the consent of the US insolvency representative or court.

There is scope to elaborate further. This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.3 asks for a brief note, it is for 5 marks.

4
Marks awarded 11 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.

Issues

1 The issues that arise are (a) whether COMI is in the UK, (b) which law of the state govern the contract(s) between Rydell and Fernz, and (c) where the assets of Rydell are.

The Law

2 Article 2(10) of Recast provides that 'establishment' means 'any place of operations where a debtor carries out or has carried out in the three-months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.'

3 Article 3 of the Recast provides that 'the centre of main interests shall be the place where the debtor conducts the administration of its interest on a regular basis, and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the country. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.'

4 Recital 28 of the Recast provides some further explanation – 'When determining whether the centre of the debtor's main interests is ascertainable by the parties, special consideration should be given to the creditors and their perception as to whether a debtor conducts the administration of its interest. This may require, in the

event of a shift of centre of main interest, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example, by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.'

5 Case law have suggested factors to look into when considering the debtors COMI – (a) the location of the debtor's headquarters, (b) where the management staff are located, (c) the location of the debtor's primary assets, (d) the location of majority of their creditors, and (e) if there is a dispute, which member law of the country should apply, (f) where the debtor's books and records are kept, (g) the debtor's principal lender(s), (g) the debtor's administration, payroll activities, (h) where is the main tax authority, and (i) which law governs the preparation of audited accounts.

6 Determining where COMI is ultimately a question of fact. Fernz would need more information and satisfy itself on where COMI is situated.

Advice

7 Option A – If it is not satisfied that COMI is in the UK (a minor creditor has opened an insolvency proceeding there), Fernz can consider filing an application to intervene in the application and ask for the proceedings to be struck off, on the basis that COMI is not UK, and proceedings cannot be filed in the UK.

Take care to read all of the facts provided.

8 Option B – If it is satisfied that COMI is in the UK, Fernz may consider opening another proceeding (subsidiary proceeding) in the place where the contracts between Rydell and Fernz took place.

Take care to read all of the facts provided.

9 Option C – Ferns may want to sue Rydell for breach of contract and seek other forms of legal remedies, as opposed to opening a subsidiary insolvency proceeding, in the state where the contract(s) governs.

10 In considering the options, Rydell should investigate where the assets of Rydell are located and whether they are recoverable. There are limitations to the Recast relating to rights in rem, set-off, immovable property, and employment matters. Commercial aspects of recoverability of assets should be considered before suing in contract or opening a subsidiary proceeding in another state within EU.

It is important that you read all of the facts provided. This question required greater consider of the timing of the proceedings and when the EIR Recast ceased to apply to proceedings opened in the UK. It also required consideration of 'establishment' for secondary proceedings and consideration of further articles in the EIR Recast.

3

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.

1 UK ceased to be a member of EU with effect from 31 Dec 2020. Recast will no longer apply in the UK from 1 Jan 2021. There is no need to be concerned about where COMI is situated.

2 What Fernz need to find out is where Fernz has a valid contractual claim, whether the contract provides for which state law should apply in the event of dispute.

3 Assuming that the Rydell has a contractual claim in (say) France, Fernz will be able open an insolvency proceeding against (sue) Rydell in France, if Rydell has non-transitory business operations in France.

4 As the UK has adopted the UNCITRAL Model Law and Recast no longer applies in the UK from 1 Jan 2021, Rydell can consider the possibility of suing Fernz in the UK or be a supporting creditor (relating to insolvency proceeding) to the petition by the minor creditor.

It would be beneficial to consider any further information required regarding the MLCBI.

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?

1 On 18 June 2021, UK is no longer a member of EU. EIR does not apply.
2 The issue that arises is whether the Fernz may proceed to commence an insolvency proceeding against Rydell in the UK, when Rydell is not registered in the UK (and COMI is not in the UK).

3 Section 220 – 221 of UK Insolvency Act 1986 provides that an English court has jurisdiction to wind-up a company formed in another State if the foreign company (not registered in the UK) carried on business in the UK.

4 If Fernz has a contractual claim in the UK against Rydell, Fernz can either (a) sue Rydell in the UK, or (b) commence an insolvency proceeding against Rydell in the UK, if Rydell can meet the procedural requirements to winding-up under UK Insolvency Act 1986.

This sub-question required detailed consideration of s221(5) of the IA and issues regarding 'sufficient connection'.

1.5

Marks awarded out 6 of 15

TOTAL MARKS 37/50

*** End of Assessment ***