



**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**.

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. The first English Bankruptcy Act of 1542 (**1542 Act**) introduced the principle of collective participation by creditors as well as the principle of *pari passu* distribution among creditors of the assets available. **There is some scope to elaborate regarding how this shaped modern thinking.**
2. The 1570 Act provided additional acts of bankruptcy and was designed as a bankruptcy statute, rather than a fraud-prevention law as with the 1542 Act. That is, the 1570 Act was designed to be used against a debtor following an “act of bankruptcy” whereas the 1542 Act was designed to be used against a dishonest or absconding debtor. The 1570 Act also introduced the principle of regulation of insolvency law where the current role of the Official Receiver was essentially played by the Lord Chancellor.¹ **There is some scope to elaborate regarding how this shaped modern thinking.**
3. The Statute of Ann of 1705 introduced statutory discharge providing that the debtor had “conformed” and had co-operated during the proceedings. **It would be beneficial to elaborate with respect to modern insolvency and the concept of fresh start.**

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 introduced various insolvency and insolvency-related measures in the UK including:²

1. A moratorium as it relates to the enforcement of wrongful trading claims against the director(s) of a company. This provides the protection necessary for the director(s) to continue running the business with the goal of saving it as a going concern. That is, subject to certain exceptions, creditors are not able to pursue payment, for example, while the director(s) formulates a rescue and/or restructuring plan.
2. A new restructuring procedure to support a company’s ability to continue as a going concern that is encountering financial difficulties. While similar to the existing schemes of arrangement, differences include the following:
 - a. The new restructuring procedure is only available to insolvent companies or companies of doubtful solvency.
 - b. The new restructuring procedure only requires a vote in favour of the plan by 75% by value of the relevant creditors whereas schemes of arrangement also require a vote in favour by a majority in number of creditors within each class.

¹ Calitz, Juanitta, “Historical Overview of State Regulation of South African Insolvency Law”, at <https://www.yumpu.com/en/document/read/20046071/historical-overview-of-state-regulation-of-south-african-insolvency-law>, accessed 8 November 2021.

² McCormack, Gerard, “Permanent changes to the UK’s corporate restructuring and insolvency laws in the wake of Covid-19”, at <https://insol.azureedge.net/cmsstorage/insol/media/document-library/special%20reports/permanent-changes-to-the-uk's-corporate-restructuring-and-insolvency-laws-in-the-wake-of-covid-19.pdf>, accessed 8 November 2021.

- c. A restructuring plan cannot be blocked by a class where less than 75% by value of that particular class of creditors voted against the plan. In these situations, the court can approve the restructuring plan if certain conditions are met.
3. The introduction of provisions restricting the ability of suppliers to enforce termination clauses in supply contracts based solely on the fact that a company is experiencing financial difficulties and/or enters formal insolvency or restructuring proceedings (i.e. the statutory moratorium and restructuring plan).

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 international instruments that bind signatory States / governments to the obligations and provisions contained within such instruments. As such, signatory States / governments of treaties are mandated to amend their domestic law as necessary to be in line with the treaties. **It would be beneficial to discuss how this is ‘hard law’.**

“Soft law” on the other hand represents non-binding principles and recommendations that influences a State’s / government’s regulation of its affairs. For example, “soft law” could be draft legislation that is recommended by an organisation to be adopted, with or without modification, by a State / government.

Treaties may be used to facilitate the choice of law as it relates to an insolvency proceeding between two or more States. An example of such a treaty is the Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland, and Sweden which came into force in 1933 (**Nordic Convention**). In cases of insolvency involving more than one of the signatory States of the Nordic Convention, the Nordic Convention determines which State’s law must be followed during the insolvency proceeding to deal with / resolve the various matters encountered.

In respect of solutions to cross-border insolvency law however, “soft law” options have proven to be more successful. A great example of this is that produced by the United Nations Commission on International Trade Law (**UNCITRAL**). UNCITRAL developed a Model Law on Cross-border Insolvency (**MLCBI**) which was simply draft legislation that it recommended be adopted, with or without modification, by a State / government. With the adoption and/or integration of the MLCBI into the existing legislation of the member States, co-operation and co-ordination – two of the primary principles required in successful cross-border insolvencies – became more achievable between and across those member States.

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.

The most common source of insolvency laws in a State is its legislation or codes. However, in situations where the legislation and/or codes in place in a particular common law State has gaps, common law principles are used to fill such gaps.

In respect of legislation or codes, a State may have a single piece of legislation covering all aspects of insolvency. For example, in the USA the Bankruptcy Code 1978 is- used to address insolvency related matters throughout the country.

On the other hand, another State may have multiple pieces of legislation addressing separate aspects of insolvency. For example, Australia has separate pieces of legislation dealing with corporate insolvency and personal insolvency. In such States, all pieces of insolvency related legislation must be read and consulted with jointly to gain a full understanding of the insolvency system.

Finally, it should be noted that there may be instances during an insolvency matter that non-insolvency pieces of legislation must be consulted. For example, the rights of secured creditors may be found in a non-insolvency piece of legislation yet play a vital role in determining the secured creditors' rights to the assets available in a liquidation estate during an insolvency proceeding.

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.

The three pertinent questions asked by Fletcher are as follows:³

1. In which jurisdictions may insolvency proceedings be opened?
2. What country's rules of law should be applied with respect to those aspects of the case in which elements of diversity are present?
3. What international effects will be accorded to proceedings conducted at a particular *forum* (including where necessary the granting of enforcement to any judgment or order affecting persons or property involved in the proceeds)?

In respect of Question 1, the primary issue to be considered is whether a court is able and willing to hear and decide upon a matter. The court must be satisfied that the petitioner has sufficient standing in that particular jurisdiction to commence proceedings against a particular debtor. A simple example is a petitioner applying to a local court for a winding up order of a locally incorporated company; the local court is likely to determine that it is able and willing to hear and decide upon the application. However, if during the course of that insolvency matter foreign assets of the locally incorporated company are identified, the liquidator(s) must determine what foreign jurisdiction(s) / court(s) is able and willing to recognise the local liquidation to facilitate the asset recovery efforts in that foreign jurisdiction. Equally, the opposite holds true in that there may be instances where a local court has to decide whether it is able and willing to hear and decide upon a foreign insolvency proceeding.

In respect of Question 2, once the question of jurisdiction has been answered, the court(s) that has determined it is able and willing to hear and decide upon a matter must now determine what law applies to such hearing. In common law States, common practice is for the court to apply its local law unless otherwise requested by the parties to a matter. For example, where a foreign law may be of benefit to a party to a matter, that party may apply to the court to

³ Fletcher, Ian F, *Insolvency in Private International Law: National and International Approaches*, Oxford University Press (1999), p 5.

enforce that foreign law during the hearing of the matter. **It would be beneficial to discuss choice of law concerns in detail.**

In respect of Question 3, a local court may become aware of foreign judgments made in respect of parallel proceedings being heard and have to decide whether such foreign judgments can be recognised and take effect locally. For example, in the case of Chapter 15 recognition in the US, the US Bankruptcy Court will have to determine, amongst other things, whether the applicant was validly appointed over the entity in question and whether the liquidation order is sufficient to grant the applicant such recognition.

3.5

Question 3.3 [maximum 5 marks]

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

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

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

A prominent case law example in respect of Cross-border Insolvency Agreements that pre-dates the Model Law on Cross-Border Insolvency is the case of *Maxwell Communications Corporation plc* case in 1991. In this case, two primary proceedings were commenced in the US and England with each State appointing separate insolvency representatives.⁴

The presiding judges in the US and England independently considered, in conjunction with legal counsel, the idea of a Cross-border Insolvency Agreement (**Agreement**) between the two insolvency proceedings to “resolve conflicts and facilitate the exchange of information.” The Agreement provided for two main goals: “maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict.”⁵

According to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, the Agreement included the following provisions:⁶

- Some existing management would be retained in the interests of maintaining the debtor’s going concern value;
- The English insolvency representatives should only incur debt or file a reorganization plan with the consent of the US insolvency representative or the US Court; and,
- The English insolvency representatives should give prior notice to the US insolvency representative before undertaking any major transactions on behalf of the debtor.

⁴ United Nations Commission on International Trade Law, “UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation”, at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/practice_guide_ebook_eng.pdf, accessed 11 November 2021.

⁵ *Ibid.*

⁶ *Ibid.*

During the course of the proceedings, addendums were made to the Agreement to address other issues subsequently encountered such as those relating to distributions.⁷ The case of *Maxwell Communications Corporation plc* therefore provided a good example of how such voluntarily agreed upon Cross-border Insolvency Agreements can greatly aid in the co-operation and co-ordination between parallel insolvency proceedings in separate jurisdictions.

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Marks awarded 13.5 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.

The European Insolvency Regulation Recast (**EIR Recast**) applied to the UK up until 11pm on 31 December 2020 following its exit from the European Union (**EU**). As such the EIR Recast would apply to insolvency proceedings commenced in the UK prior to then. In this scenario, the insolvency proceeding against Rydell was opened in the UK on 18 June 2020 which would result in the EIR Recast applying.

The EIR Recast would be referred to if the question of recognition and enforcement of insolvency related matters (such as judgments) between the UK and other member States of the EU arose. In other words, the EIR Recast would assist in the co-ordination and co-operation between member States of the EU as it relates to the insolvency proceedings of Rydell.

Rydell's centre of main interest is in the UK. The EIR Recast would therefore designate the UK as the primary jurisdiction as it relates to the insolvency proceedings. This is also known as the main insolvency proceedings. According to the EIR Recast, "[main insolvency] proceedings have universal scope and are aimed at encompassing all the debtor's assets."

⁷ *Ibid.*

The EIR Recast allows for secondary insolvency proceedings to be opened after the commencement of the main insolvency proceedings in another country in Europe which is a member of the EU. However, the relevant court within that member State would have to determine a number of items in accordance with the EIR Recast including whether Rydell has an establishment located within its jurisdiction. According to Article 2.10 of the EIR Recast, establishment means “any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.” The EIR Recast clarifies that, “[the] effects of secondary insolvency proceedings are limited to the assets located in the State.”

It should be noted that the classification of a creditor as being minor (as the petitioning creditor in the UK) or major (as Fernz) does not impact on their ability to petition for the opening of insolvency proceedings. The classification of main and secondary proceedings revolves around Rydell’s centre of main interest rather than the quantum of a creditor’s claim.

For completeness, Article 45.1 of the EIR Recast says, “Any creditor may lodge its claim in the main insolvency proceedings and in any secondary insolvency proceedings.” Therefore, all creditors of Rydell would be able to lodge claims in the main insolvency proceedings as well as the secondary insolvency proceedings should Fernz successfully open one.

Some further information that I would require to fully consider this question includes the following:

1. Confirmation of whether Rydell has an establishment in the country Fernz is considering opening proceedings. This would determine Fernz’ ability to open proceedings in such country.
2. Confirmation of whether Rydell still has assets in the country Fernz is considering opening proceedings. This would determine whether it is worthwhile for Fernz to open proceedings in such country. If, for example, there were no assets remaining in that jurisdiction, a cost benefit analysis may result in Fernz deciding against opening secondary proceedings in that jurisdiction and simply claiming in the main insolvency proceedings.

It would be beneficial to elaborate regarding other articles of the EIR Recast, for example Article 7.

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.

The European Insolvency Regulation Recast (**EIR Recast**) applied to the UK up until 11pm on 31 December 2020 following its exit from the European Union (**EU**). Therefore, if the proceedings were opened in the UK on 18 June 2021, the EIR Recast would not apply.

The automatic recognition of the UK insolvency proceedings across member States of the EU that was afforded under the EIR Recast would no longer apply. In addition, the UNCITRAL Model Law on Cross-Border Insolvency (**MLCBI**) as adopted by the UK in 2006 would apply as it relates to any proceedings Fernz may bring against the debtor in a member State of the EU.

As it relates to recognition principles between the UK and a member State of the EU, the local laws of the member State of the EU in which Fernz wants to open proceedings, rather than the EIR Recast, would apply. The UK would be guided by the MLCBI as it relates to the co-ordination and co-operation with the insolvency representatives and proceedings in a member State of the EU.

Further information that would be relevant is confirmation of the member State of the EU in which Fernz intends to open proceedings. The specific laws of that member State would assist in identifying any conflicts that may arise in the administration of the parallel proceedings.

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?

The Insolvency Act 1986 (**Act**) is the relevant piece of legislation as it relates to winding up any unregistered company in the UK. Section 220 of the Act specifically excludes any “company registered under the Companies Act 2006 in any part of the United Kingdom” as being included in the definition of “unregistered company.” The English court would also refer to case law in determining whether a winding-up order should be granted.

The minor creditor would have to satisfy the English court that one or more of the following conditions exist as required by Section 221(5) of the Act in order to wind up Rydell:

1. If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
2. If the company is unable to pay its debts;
3. If the court is of opinion that it is just and equitable that the company should be wound up.

According to the ruling in the case of *Latreefers Inc* in 2001, the English court may also consider the following principles in determining whether it has jurisdiction to wind up Rydell:⁸

1. There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction.
2. There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order.
3. One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.

⁸ *Re Latreefers Inc* [2001] BCC 174 (CA), at <https://www.casemine.com/judgement/uk/5a8ff8cd60d03e7f57ecd977>, accessed 12 November 2021.

The European Insolvency Regulation Recast (**EIR Recast**) applied to the UK up until 11pm on 31 December 2020 following its exit from the European Union (**EU**). As such, the ability of the minor creditor to gain recognition of the English proceedings in the country in Europe where Rydell's COMI is located will depend on the laws of that relevant member State.⁹ To clarify this point we would need to know the specific member State to determine the specific legislation and guidelines in place that would impact the recognition and enforcement of the English proceedings. Should that member State also be the one where Rydell's COMI is located, the implications of such a classification would also have to be considered.

5

Marks awarded 14 out of 15
TOTAL MARKS 46/50

*** End of Assessment ***

⁹ Norton Rose Fulbright, "Impact of Brexit on insolvency", at <https://www.nortonrosefulbright.com/en/knowledge/publications/fc0fb698/impact-of-brexit-on-insolvency>, , accessed 12 November 2021.