



**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.

The English Bankruptcy Act 1542 applied to dishonest and absconding trading debtors. It provided that a body of commissioners, upon application of creditors, could sequester or take legal possession of such debtors' property, including personal and real property, and sell the same to distribute the proceeds to the creditors in proportion to their respective claims. This would be the basis for collective participation by creditors and distribution of assets on *pari passu* basis in modern insolvency law.<sup>1</sup>

The Act of Elizabeth in 1570 provided for additional acts of bankruptcy and that bankruptcy proceedings could be opened by creditors upon such an 'act of bankruptcy' by the debtor. This has effect on modern insolvency law in terms of the doctrine of relation back of the bankruptcy of the debtor to the act of bankruptcy, and the validity of dealings by the debtor after the act of bankruptcy has occurred.

The Act of Elizabeth also provided for the Lord Chancellor, upon petition by creditors, to appoint bankruptcy commissioners to manage the debtor's property and affairs. The bankruptcy commissioners were empowered to receive the debtor's property and to deal with the same to settle creditors' claims. Towards this end, the commissioners could examine the debtor's property and affairs and summon people for questioning. The Lord Chancellor had jurisdiction for supervision over the debtor's estate. **How did this shape modern insolvency law thinking?**

Finally, the Statute of Ann of 1705 introduced the notion of a statutory discharge, which remains an important part of modern insolvency law. This releases the debtor from its bankruptcy debts, usually upon fulfilling certain conditions, and allowed the debtor "a fresh start".

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### 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") came into force on 26 June 2020, and provided for temporary and permanent changes to insolvency law aimed at helping companies in financial distress due to the economic implications of COVID-19 pandemic in the UK. Three of the measures provided for in CIGA are as follows:<sup>2</sup>

- (a) CIGA introduced a new moratorium period where a company can have a "payment holiday" for most of its pre-moratorium debts (there are some exceptions e.g. debts involving financial services, wages/salary under contract of employment, goods or services supplied during the moratorium etc.) and be protected from creditor action, while the company seeks to implement a rescue or restructuring. This new moratorium

<sup>1</sup> Module 1, Guidance Text on Introduction to International Insolvency Law, page 5

<sup>2</sup> See the updated INSOL International – World Bank Group Global Guide at:

[https://insol.azureedge.net/cmsstorage/insol/media/documents\\_files/covidguide/30%20april%20updates/uk-12-may2021-final.pdf](https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/uk-12-may2021-final.pdf).

applies for rescue or restructuring including under scheme of arrangement, corporate voluntary arrangement (CVA), administration or the new restructuring plan introduced also by CIGA. During the moratorium period, the directors remain in charge but a licensed insolvency practitioner is appointed as a monitor to, among others, review whether the rescue of the company as a going concern appears likely.

- (b) In addition to the existing CVA or scheme of arrangement, CIGA introduced a new restructuring plan which enables companies in financial difficulties to propose a compromise or arrangement with its creditors and/or members for the purpose of addressing the company's financial difficulties. This new restructuring plan will be Part 26A of the Companies Act 2006.

A key element of the restructuring plan is that the Court can sanction the restructuring plan and bound dissenting classes of creditors or members to the plan ("cross-class cram down"), provided:

- they are no worse off than in the "relevant alternative", which is defined as what the court considers will be most likely to occur if the plan is not sanctioned;
- the plan has been approved by 75% in value of at least one class of creditors or members, who would receive a payment or have a genuine economic interest in the company in the event of the "relevant alternative"
- it is just and equitable to do so.

- (c) CIGA also provides for temporary measures such as the restriction on the presentation of winding-up petitions and statutory demands forming the basis for a winding-up petition from 1 March 2020 until 30 June 2020. The temporary restriction was thereafter extended from time to time to 30 September 2021. Creditors may still present a winding-up petition where they have reasonable grounds for believing that COVID-19 has not had a financial effect on the company or that the company would not have been able to pay its debts even if COVID-19 had not had a financial effect on the company. The restrictions expired on 30 September 2021 and have been replaced with modified rules between 1 October 2021 until 31 March 2022 to promote a gradual return to the normal regime.<sup>3</sup>

**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 formal agreements between States which are binding, and may be imported by the States to form part of their domestic law enforceable in court. International insolvency treaties will accordingly form part of the cross-border insolvency rules of States which have ratified such treaties. Treaties can therefore be used to provide a universal approach for the signatories to deal with a cross-border issue (e.g. choice of forum, choice of law etc.), which otherwise would have to be addressed using national laws and likely lead to multiple proceedings in different States and differing laws applied to different aspects of the insolvency.

An example of a treaty on international insolvency is the Nordic Bankruptcy Convention (1933) between Denmark, Finland, Iceland, Norway and Sweden. The Nordic Convention provides that a bankruptcy opened in one member State will encompass all assets and liabilities of the debtor in all other member States, and that the law of the country in which the insolvency

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<sup>3</sup> Research briefing on New business support measures: Corporate Insolvency and Governance Act 2020 at <https://commonslibrary.parliament.uk/research-briefings/cbp-8971/>



proceedings are opened (“Home State”) is applicable (save for specific exceptions stated in the Convention) to determine the effects of the order in all the member States without further formalities. The principles of the Nordic Convention are thus part of the insolvency rules of these Nordic countries and are applicable to insolvency proceedings involving two or more member States. Otherwise, for the proceedings which the Nordic Convention does not apply, the national laws of the States will apply to determine any international aspects of the insolvency.

On the other hand, soft law generally refer to non-binding instruments, meant to be persuasive. One way in which soft law can be used to establish cross-border insolvency rules in States is to influence and provide reference for the development of domestic insolvency laws.

One significant example is the United Nations Committee on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (1997) (“UNCITRAL Model Law”). The UNCITRAL Model Law is a non-binding draft legislation intended to assist States to equip national insolvency laws with a harmonised and fair framework to deal with cross-border insolvency cases.<sup>4</sup> Countries are not bound or compelled to adopt the UNCITRAL Model Law but may do so with or without modifications. Once adopted, the parts of the UNCITRAL Model Law so adopted would form part of the insolvency rules of that State. For example, the United Kingdom enacted the UNCITRAL Model Law to the extent possible through the Cross-Border Insolvency Regulations 2006 (“CBIR”), and thus is now part of the UK insolvency rules.

Besides assisting States to develop national insolvency laws, soft law can also supplement insolvency legislation of the States. One such way is soft law that provide guidance to the Courts and insolvency practitioners to cooperate and communicate in cross-border insolvency cases. Initiatives in this regard include the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), the ALI-III Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2012), and the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016). Courts and insolvency practitioners can use these guidance to agree to cross-border agreements or protocols that will govern the cross-border insolvency proceedings on a case-by-case basis. Nevertheless, such soft law instruments are not binding and their use will depend on the discretion and willingness of the courts and insolvency practitioners.

Soft law can also extend the established insolvency rules of the State (i.e. the ‘hard law’).<sup>5</sup> The European Insolvency Regulation (Recast) 2015 (“EIR”) provides that *“When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral).”*<sup>6</sup> This essentially compels the courts and insolvency practitioners to consider certain soft law instruments when dealing with cross-border insolvency cases.

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Marks awarded 10 out of 10

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

#### Question 3.1 [maximum 5 marks]

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<sup>4</sup> Soft law instruments in restructuring and insolvency law: exploring its rise and impact, 2019, Bob Wessels & Gert-Jan Boon at <https://ssrn.com/abstract=3397874>

<sup>5</sup> Ibid, page 17.

<sup>6</sup> Recital 48 of the European Insolvency Regulations (2015) at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=ES>

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

The main source of insolvency laws in any State is legislation. In some countries, insolvency legislation for individuals and corporate insolvency may be in a single statute such as the Insolvency Act 1986 for the United Kingdom or the unified Bankruptcy Code of 1978 for the United States of America (US). For other countries, the insolvency legislation may be fragmented such as in Australia where the legislation for bankruptcy of individuals is in one statute while the legislation for winding-up of companies is in another statute.

Another source of insolvency law would be international public law instruments like treaties or conventions which the State are members of or has ratified or acceded. Once ratified, the treaties or conventions will be binding and becomes part of the law of the State, although some States require the treaties or conventions to also be incorporated with national law to be binding.

For common law systems, where there is a lacunae in the legislation, the law can be supplemented by common law principles. An example of an English common law insolvency rule is the *Gibbs*<sup>7</sup> rule that debt obligations governed by English law cannot be discharged or compromised by a foreign insolvency proceeding.<sup>8</sup> Common law principles will be superseded if legislation is made to address that lacunae.

Aside from insolvency legislation, legal principles in general law (i.e. non-insolvency law) will also impact insolvency including laws on real security rights, netting and set-off rights and voidable transactions. For example, real security rights may impact the validity or priority of a creditor claim and the enforceability of security over the debtor's property. These laws will generally be contained in other non-insolvency statutes (as supplemented by common law in common law systems), and not the insolvency legislation.

Further, soft law instruments may also be a source of insolvency laws of a State. Soft law instruments may be applied by the courts and insolvency practitioners where agreed upon on case-by-case basis, or even incorporated by binding legislation. For example, the European Insolvency Regulation (Recast) 2015 provides that "*When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral).*"<sup>9</sup> This could indirectly incorporate UNCITRAL guidelines such as the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) into the considerations of the EU member States when dealing with cross-border insolvency cases. However, generally soft law is merely persuasive and provides guidance to supplement the insolvency laws of a State if there is leeway to do so, but will not override such laws.

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### 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

<sup>7</sup> Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux [1890] 25 QBD 399

<sup>8</sup> Stephan Madaus, The Rule in Gibbs, or how to protect local debt from a foreign discharge, 19 December 2018, Oxford Business Law Blog at <https://www.law.ox.ac.uk/business-law-blog/blog/2018/12/rule-gibbs-or-how-protect-local-debt-foreign-discharge>

<sup>9</sup> Recital 48 of the European Insolvency Regulations (2015) at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=ES>

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 raised by Fletcher are:<sup>10</sup>

- (a) In which jurisdiction may insolvency proceedings be opened?
- (b) What country’s law should be applied in respect of different aspects of the case?
- (c) What international effects will be accorded to proceedings conducted at a particular forum?

In respect of the first question on jurisdiction, this relates to the choice of forum in which insolvency proceedings can or should be heard when the debtor has operations, creditors and assets in multiple jurisdictions. In such a case, insolvency proceedings may be opened concurrently in various jurisdictions.

Generally, a State will have jurisdiction over insolvency proceedings of a debtor which is incorporated in that State. A State may also have jurisdiction to open insolvency proceedings of a foreign debtor incorporated in another State but having business or interests in the first State. For example, s.221 of the Insolvency Act 1986 empowers the English courts to wind-up a foreign company unregistered in England but having a principal place of business in England. The issue of choice of forum therefore arises as multiple States have jurisdiction over insolvency proceedings of the same debtor and how to coordinate these concurrent proceedings.

The second question relates to the choice of law to be applied by the Court to the various aspects of insolvency proceedings. The law applicable is important as it will affect the treatment of creditors and their claims as well as transactions and assets of the debtor, including determination on security interests, set-off and avoidance provisions. The regimes in some jurisdictions may be more debtor-friendly or creditor-friendly than others, and parties to a transaction would want certainty as to which law would apply in insolvency.

For example, the European Insolvency Regulation (Recast) 2015 provides that the law applicable to an insolvency proceeding in an EU member State is the national law of that State and determines the conditions for the opening, conduct and closure of the proceedings.<sup>11</sup> However, beneficiaries of an act or transaction can argue that the particular act or transaction is subject instead to the law of another EU member State which does not allow the transaction to be challenged.<sup>12</sup> The law applicable can impact the validity and enforceability of a particular act or transaction.

The third question relates to the recognition and enforceability of foreign insolvency proceedings or foreign judgments. This will impact how insolvency proceedings over a debtor can be conducted and coordinated when there are creditors and assets in various jurisdictions, including issues such as whether foreign creditors can participate and the priority of their claims or whether the officeholder appointed may be able to holistically deal with the debtor’s assets in another jurisdiction. The challenge for a State and the courts is that there are competing interests between territoriality in protecting national interests and universality in assisting the foreign insolvency proceedings or insolvency practitioner.

For example, the English courts can give recognition and provide assistance to foreign insolvency proceedings and foreign insolvency practitioners to deal with assets in England

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<sup>10</sup> See I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2<sup>nd</sup> Ed, 2005), pp 3-5

<sup>11</sup> Article 7 of EIR (Recast) 2015

<sup>12</sup> Article 16 of EIR (Recast) 2015

(section 426 of the Insolvency Act 1986 as well as the CBIR 2006). However, the assistance and reliefs provided will depend on whether the foreign insolvency proceedings are main or non-main proceedings, and also whether the insolvency proceedings have commenced in England prior to recognition of the foreign insolvency proceedings.

Certainty and predictability on all three fundamental issues raised by Fletcher is important for countries' economic growth when it comes to encouraging cross-border trading and foreign investments.

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**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.**

An example of a prominent case law in this respect is the case of *Re Maxwell Communications Corporation plc* as early as in 1991. In *Maxwell*, there were two primary insolvency proceedings involving the same debtor opened in two different jurisdictions i.e. administration in England and Chapter 11 bankruptcy in the United States of America (US), with insolvency representatives appointed under the two separate proceedings respectively. The key points of the case are summarised in the UNICTRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) and are reproduced below for ease of reference:

*“The case of Maxwell Communication Corporation plc. Involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two States, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that an insolvency agreement between the two administrations could resolve conflicts and facilitate the exchange of information.*

*Under the agreement, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present. Specificities included that some existing management would be retained in the interests of maintaining the debtor’s going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the English insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; and the English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake “lesser” transactions. Many issues were purposely left out of the agreement to be resolved during the course of*

*proceedings. Some of those issues, such as distribution matters, were later included in an extension of the agreement.”*

The case of Maxwell shows how a cross-border agreement or protocol can be used to coordinate concurrent insolvency proceedings in two different jurisdictions. The cross-border agreement was approved by both the English and the US courts and allocated functions between the courts and provided for cooperative administration of the company.<sup>13</sup> The agreement/protocol was used to assist in preventing jurisdictional conflict as the agreement enabled the insolvency representatives to carry out their functions in a way that no conflict requiring judicial resolution arose.<sup>14</sup>

This is evident from the agreement determining upfront that the English insolvency representative would administer the company including appointing new directors, incurring debt and undertaking transactions, but requiring the consent of the US insolvency representative to do so. Such coordination also allowed the insolvency representatives in both jurisdictions to file separate reorganisation plans respectively to reorganise the company through sale of assets as going concern, and which are mutually dependent and effectively constituted a single mechanism consistent with the laws of both countries. Creditors' participation in either jurisdiction amounted to participation in both plans and the assets were distributed from a single “pot” to all creditors.<sup>15</sup>

It is also important to note that most of the agreements in *Maxwell* were negotiated upfront prior to the commencement of proceedings.<sup>16</sup> This is important to avoid disputes arising mid-way which may derail the coordination and implementation of the plans between the insolvency representatives.

Nevertheless, it must be noted that coordination and communication was successful in the case of *Maxwell* as both the US and English courts had raised the idea of the cross-border agreement and were amenable to compromise in order to resolve any conflict. In the absence of any binding provisions, the use of cross-border agreements would therefore depend on the buy-in of the jurisdiction or the discretion of the specific court/judge, which may be influenced by national interests. Further, there may be inconsistent application of these instruments in different jurisdictions and it may be difficult to interpret their provisions, as precedents are difficult to access and keep track.<sup>17</sup> This may discourage the use of such instruments.

With the inclusion of cross-border agreements in the UNCITRAL Model Law, and upon adoption of the same by States, the use of cross-border agreements to coordinate cross-border insolvency proceedings would strengthen.

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**Marks awarded 15 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.

<sup>13</sup> UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), page 52

<sup>14</sup> Ibid, page 29.

<sup>15</sup> Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 Fordham L. Rev. 2531 (1996) at <https://ir.lawnet.fordham.edu/flr/vol64/iss6/3>, at page 2535.

<sup>16</sup> Supra note 12, page 36.

<sup>17</sup> See also <https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/soft-law-instruments-restructuring-and-insolvency-law-why-they-matter>

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.

At the outset, pursuant to the Corporate Insolvency and Governance Act 2020 ("CIGA"), it is noted that the insolvency proceeding against Rydell was opened in the UK on 18 June 2020 despite the temporary restrictions on winding-up petitions from 1 March 2020 to 30 September 2021 unless creditors have reasonable grounds to believe Covid-19 has not had a financial effect on the company or the company would still be insolvent notwithstanding the financial impact of Covid-19 ("Conditions"). Winding-up orders made on or before 27 April 2020 but before commencement of CIGA on 26 June 2020 are regarded as void if the aforesaid Conditions are not met.<sup>18</sup> In this case, further information will be required to see if the Conditions are met for the insolvency proceedings to be opened against Rydell during this period. Nevertheless, the following discussion is premised on the assumption that the insolvency proceeding opened against Rydell in the UK is valid and proper.

Pursuant to the European Union (Withdrawal Agreement) Act 2020, the European Insolvency Regulation Recast 2015 ("EIR") will continue to apply to main insolvency proceedings opened in the UK before 31 December 2020.<sup>19</sup> As such, the EIR will apply to the insolvency proceedings opened against Rydell on 18 June 2020, given that Rydell's centre of main interests ("COMI") is in UK and its creditors are all located in countries which are members of the European Union (EU).

Under the EIR, the appropriate forum for main insolvency proceedings of a debtor is the EU member State where the debtor's COMI is situated (Article 3(1) of EIR). Under the EIR, COMI is presumed to be the place of the registered office of a company unless there is proof to the contrary. In this matter, the COMI of Rydell is stated to be the UK and there is no proof to the contrary. As such, the EIR applies and the UK is the appropriate forum to open the main insolvency proceedings against Rydell. The applicable law will accordingly be English law, as the applicable law to insolvency proceedings opened in UK (Article 7 of EIR).

Once the insolvency proceedings are opened against Rydell in the UK, the EIR provides for automatic recognition and effect of the proceedings by other EU member States (Articles 19 and 20 of EIR). This legitimises the status of the UK main insolvency proceedings against

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<sup>18</sup> Schedule 10 Corporate Insolvency and Governance Act 2020.

<sup>19</sup> The Insolvency Service, *Guidance on Cross-border Insolvencies: Recognition and Enforcement in EU Member States*, 24 March 2021 at <https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states>

Rydell in each of the EU member States, and allows the insolvency practitioner appointed in the UK to deal with Rydell's assets and affairs throughout the other EU member States, although it must still comply with the relevant EU member State's laws in taking action such as undertaking realisation of assets (Article 21 of EIR).

Any creditor may submit its claim in the main insolvency proceedings (Article 45 of EIR). Fernz (as well as the other creditors of Rydell in various EU member States) thus do not have to open fresh insolvency proceedings and can submit their claims in the main insolvency proceedings opened against Rydell in the UK.

Nevertheless, the EIR allows secondary insolvency proceedings to be opened in another EU member State where the debtor has an establishment in the other State and such proceedings can only relate to the assets in that secondary member State (Article 3(2) of EIR). In this regard, establishment means any place of operations where the debtor carries out or has carried out non-transitory economic activity. In considering whether to open proceedings in another EU member State, Fernz has to consider whether Rydell has an establishment in that other State and whether the proceedings intended to be taken relate only to the assets there. Further information would be required to make this assessment.

If Fernz meets the conditions and decides to open secondary insolvency proceedings against Rydell in another EU member State, then the effect of the UK main insolvency proceedings against Rydell and actions taken by the UK insolvency practitioner will have to take into account the secondary proceedings. For example, Rydell's assets in the jurisdiction of the secondary proceedings are generally subject to the jurisdiction and national law of that other EU member State in which the secondary proceedings are opened. The courts in the main insolvency proceeding in UK and in any other secondary proceedings in other EU member States will have to cooperate to the extent that such cooperation is not incompatible with the rules of each proceedings respectively (Article 42 of EIR). These include coordination on approval of protocols where necessary, administration of Rydell's assets and affair, exchange of information etc.

Secondary proceedings may cause disputes and hinder the administration of the debtor's assets and affairs. To avoid such secondary proceedings, the EIR allows the insolvency practitioner in the main insolvency proceeding to instead give a unilateral undertaking to distribute assets located in the EU member State in which secondary proceedings could be opened, in according to the distribution and priority rights under the national law of the that State (Article 36 of EIR). This is another option that Fernz and the UK liquidator may consider, instead of commencing secondary insolvency proceedings.

As for the potential issue as to the insolvency proceedings opened against Rydell in UK due to the temporary prohibitions under CIGA, where the main proceedings cannot be opened due to the law of UK, territorial insolvency proceedings can be opened first in another EU member State where Rydell has an establishment (Article 3(4) of EIR). When main insolvency proceedings are opened thereafter, the territorial insolvency proceedings will then become secondary proceedings.

**It would be beneficial to specifically state what further information is required, rather than imply it.**

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#### **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.

If the insolvency proceedings were opened in the UK against Rydell on 18 June 2021, the EIR will no longer be applicable to the UK.<sup>20</sup> After 31 December 2020, the law of the UK and the relevant domestic laws of each individual EU member States will apply instead. This means that the recognition and enforceability of the UK insolvency proceedings against Rydell and the UK insolvency practitioner is not automatic and would depend on the domestic laws of the relevant EU member States.

For EU member States that have adopted the UNCITRAL Model Law (i.e. Greece, Poland, Romania and Slovenia), there will at least be a uniform set of rules for the recognition and enforcement of foreign insolvency proceedings (the UK insolvency proceedings against Rydell in this case) which the UK insolvency practitioner can rely upon to seek assistance from the courts of the other countries that have adopted the Model Law. An application must be made to the court in the relevant jurisdiction and the reliefs and assistance that can be provided will depend on whether the proceeding is a main proceeding or non-main proceeding.

In this regard, further information would be needed as to what EU countries are the creditors and assets of Rydell located in, and the relevant laws on recognition and enforcement of foreign insolvency proceedings in such countries.

As such, there may be difficulties for the UK insolvency practitioner to deal with the assets and affairs of Rydell located in the EU member states (or any other countries outside UK).

As for Fernz considering to open insolvency proceedings against Rydell in another EU member State, the EIR only applies to proceedings in respect of a debtor whose COMI is located in the EU.<sup>21</sup> Based on the given facts that the COMI of Rydell is situated in the UK and subject to any further information to the contrary, the EIR will not apply to insolvency proceedings opened in respect of Rydell in a EU member State. As such, any insolvency proceedings opened by Fernz in a EU member State will be addressed by the national laws of that country.

If there are concurrent insolvency proceedings opened against Rydell in other countries, it is noted that the UK has enacted the UNCITRAL Model Law through the Cross-Border Insolvency Regulations 2006 ("CBIR"). Therefore, insolvency representatives of foreign proceedings have access to the English courts to apply for recognition and relief, and the CBIR also sets out provisions of coordination between courts and insolvency representatives in concurrent proceedings.

Nevertheless, whether or not there are foreign insolvency proceedings, the creditors of Rydell in the EU countries (including Fernz) can participate in the Rydell insolvency proceedings in the UK as foreign creditors have the same rights to participate in the English insolvency proceedings as local creditors (see Schedule 1, Article 13(1) of the CBIR). The English insolvency representative can accept proofs lodged by foreign creditors for debts incurred outside the UK or under foreign law.<sup>22</sup>

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#### **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?

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<sup>20</sup> European Union (Withdrawal Agreement) Act 2020

<sup>21</sup> Preamble 25 of EIR

<sup>22</sup> I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5<sup>th</sup> ed, 2017), [30-041]



Under section 221 of the Insolvency Act 1986 (“IA”), the English courts have jurisdiction to wind-up a company incorporated in another country that is carrying on business in the UK but which has not been registered in the UK. Therefore, the English court can open insolvency proceedings against Rydell in the UK by virtue of section 221 IA. The circumstances in which Rydell can be wound up in this case is if Rydell has ceased carrying on business, it is unable to pay its debts or if the court is of the opinion that it is just and equitable for Rydell to be wound up.

Since Rydell has its COMI in a member State of the EU, it would be advisable for Rydell’s creditors situated throughout other EU member States (including Fernz) to commence insolvency proceedings against Rydell in the EU country in which Rydell’s COMI is situated (“Rydell main insolvency proceedings”). The EIR will apply so that the Rydell main insolvency proceedings will have recognition throughout the other EU member States.

UK has enacted the UNCITRAL Model Law through the Cross-Border Insolvency Regulations 2006 (“CBIR”). The EU insolvency representative in the Rydell main insolvency proceedings therefore may apply to the English courts for recognition of the Rydell main insolvency proceedings. It does not matter whether the country in which the Rydell main insolvency proceedings are opened have reciprocal laws on recognition of foreign proceedings.

The reliefs that can be sought by the EU insolvency representative in the Rydell main insolvency proceedings would depend on whether the English court grants recognition of the proceedings as a foreign main proceeding or a foreign non-main proceeding. On the given facts, the Rydell main insolvency proceedings will likely be recognised as foreign main proceeding as Rydell’s COMI is in the country where the proceedings commenced. If it is a foreign main proceeding, the recognition by the English court will trigger an automatic stay of creditor actions and an automatic freeze of Rydell’s assets in the UK (Article 20 of Schedule 1, CBIR).

However, on the assumption that the UK insolvency proceedings against Rydell have already been opened on 18 June 2021 prior to the commencement of the Rydell main insolvency proceedings in the EU, any relief (including various stays, entrusting Rydell’s assets in UK to the EU insolvency representative etc. under Article 19 and 21 of Schedule 1, CBIR) that may be granted by the English court must be consistent with the UK insolvency proceedings. This is so even if the Rydell main insolvency proceedings are recognised as foreign main proceedings by the English court. In this case, the automatic reliefs (including automatic stay) afforded under Article 20 of Schedule 1, CBIR upon recognition of foreign main proceedings, will not apply.

The CBIR also sets out provisions of coordination between courts and insolvency representatives in concurrent proceedings (set out in Articles 25, 26 and 27 of Schedule 1, CBIR). Under the CBIR, the English insolvency representative has a duty to cooperate with foreign courts and representatives in the Rydell main insolvency proceedings and is entitled to communicate directly with them.

Section 426 of the IA is another avenue for the English Courts to assist foreign insolvency proceedings. If a request under section 426 IA is approved by the English court, section 426 will provide flexibility to choose whether English insolvency law or the insolvency law of the requesting state will apply. This means a foreign insolvency representative may access powers which are available under English law that they do not have in their home State or to exercise powers they have in their home State in the UK. However, section 426 IA only applies to limited number of countries, of which Republic of Ireland is the only EU member State.<sup>23</sup>

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<sup>23</sup> The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 lists Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St. Helena, Turks & Caicos Islands, Tuvalu and the British

It would be beneficial to discuss the requirements for 'sufficient connection' in relation to s221(5) Insolvency Act 1986

3.5

Marks awarded 13.5 out of 15  
TOTAL MARKS 48.5/50

**\* End of Assessment \***

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Virgin Islands. The Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996 designates Malaysia and South Africa with effect on 1 March 1996. A similarly titled order added Brunei to the list effective 11 December 1998. Subsection 426(11) of the IA includes Channel Islands or the Isle of Man.