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).

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.

Significant historical developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law include:

(a) The English Bankruptcy Act of 1542 where a compulsory sequestration is applied to dishonest and absconding debtor who is treated as quasi-criminals / offenders. Under the Act, creditors are able to apply to appoint a body of commissioner who could proceed against trading debtors who fled the country, barricaded himself in his house or who neglected to pay his debts or otherwise defrauded his debtors. The Act imposes a compulsory administration and equal distribution amongst all the creditors i.e. the pari passu distribution principle.

(b) Under the 1570 Act of Elizabeth, the supervision of the estate previously within the jurisdiction of a commissioner is transferred to the Lord Chancellor, whose jurisdiction include amongst others convening bankruptcy meeting, examine debtor's transaction, summon persons for questioning and commit people to prison.

The question asked you to indicate significant developments, rather than legislations per se. You needed to identify the developments that shaped the way of thinking with respect to modern insolvency law.

(c) The Statute of Ann of 1705 introduced the concept of statutory discharge, where the Lord Chancellor could grant discharge once it is confirmed that the debtor had conformed and co-operated during the bankruptcy proceedings. **How has this shaped modern insolvency law thinking? Elaboration is warranted**

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.

Measures introduced in the UK following the Covid-19 pandemic include the passing of the Corporate Insolvency and Governance Act 2020 which entered into force on 26 June 2020. The said Act introduced a new pre-insolvency rescue and restructuring plan, new moratorium rules and a ban on the operation of termination provisions (i.e. *ipso facto clauses*). These changes are permanent changes.

Other temporary measures introduced by the said Act include the relaxation of wrongful trading liability and the suspension of winding-up petitions and statutory demands.

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

2.5

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 classic public international instruments which bind States whom choose to be signatories, thereby influencing / affecting the States domestic law. Such domestic laws being enforceable in the Courts would consequentially result to certain treaty forming part of State's "hard law" on insolvency as the domestic laws.

Soft law which differs from treaty is a mechanism which seeks to influence (rather than bind) the domestic laws of different States with the intention to regulate international insolvency. As an example, the UNCITRAL developed a Model Law on Cross-border Insolvency – a draft legislation recommended to member States to adopt, with or without modification. Therefore, the Model Law assists in developing more consistent cross-border insolvency regime / regulation / law among member states and as more States adopt the Model Law, it is hoped that cross-border insolvency could be dealt with more efficiently.

4

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.

In most states, sources of insolvency laws are in the form of legislations. However, common law states may also rely on common law principles should there be any gaps in the existing legislation. Thereafter, if deem necessary and suitable, these common law principles may be legislated.

In countries such as the USA, the Bankruptcy Code 1978 is a single, unified piece of bankruptcy legislation which covers all aspects of bankruptcy and is applicable if the whole country as it is a federal legislation.

There are also other states where their insolvency laws can be more fragmented where multiple legislations are in play governing the insolvency laws of the country. For example, in Malaysia, individual bankruptcy is governed under the Insolvency Act 1967 while the winding up of companies is governed under the Companies Act 2016 and Companies (Winding-up Rules 1972.

In the UK, the law on insolvency is primarily found in the Insolvency Act of 1986 and Insolvency Rules 2016. The recent introduction of the Corporate Insolvency and Governance Act 2020 also contributes to and widens the sources of insolvency law in the UK.

Apart from insolvency specific legislation, other non-insolvency legislations will also have an impact on the insolvency laws of a State. For example, tax-related legislation will inevitably affect the insolvency laws of a State.

Beyond domestic law, a State could also look to international law for guidance (subject to whether the State has adopted the sources). Example of the same includes, treaties, conventions, UNCITRAL Model Law on Cross-border Insolvency and UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments.

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 questions raised by Fletcher are:
(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 (including issues of enforcement)?

In determining jurisdiction, one has to assess whether the court can and will hear and decide on the matter by looking at the connection between the parties and / or disputes with the jurisdiction in question. For example, when deciding on a winding up petition of a Company A in State X, the Court of State X will assess the connection of Company A with the jurisdiction i.e. is the company a registered company of State X, if it is not a registered company then is there sufficient connection between the company with State X.

In a winding up, the court may need to determine the applicable domestic law in respect of different aspects of the winding up which may arise. For example, after Company A is wound up and winding up order has been issued and a liquidator has been appointed, one of the liquidator's duty is to assess the proof of debts filed by creditors. A foreign creditor may file a proof of debt against Company A and should there be a dispute regarding the claim, the court would need to decide what is the relevant domestic law applicable to decide on the claim which gave rise to the proof of debt and make reference to it where necessary.

Next, there is a need to determine what is the international effect of an insolvency proceeding in other foreign states. For example, Company A which has been wound up, may have foreign assets thereby requiring the liquidator to administer / deal with such foreign assets before the local court of the other States. The liquidator has a duty to manage all tangible and intangible property to which the company is entitled to and of which it remains the legal owner. The ability of the liquidator to do so will be dependent on whether the winding up order and appointment of liquidator is recognised in the foreign court(s) i.e. whether the orders could be enforced.

In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State, each State would apply its own laws? What cooperation difficulties does this raise ?

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 which depicts communication and cooperation in a cross-border insolvency proceeding is the 1991 / 1992 case of *Maxwell Communication Corporation plc.* The case

involved 2 primary insolvency proceedings initiated by a debtor – one in the US and one in the UK and the appointment of 2 separate insolvency representatives / liquidators in each state. The judges in both the US and English Courts independently raised the idea of an insolvency agreement between the two administrations in order to resolve disputes and exchange of information. Thus, an "Order and Protocol" was approved by courts in both US and UK.

The main objectives of the insolvency agreement are to maximise the value of the estate and harmonise the proceedings to minimise expenses, waste and jurisdictional conflict. In essence, parties agreed that the US Court would defer to the English proceedings, once it was determined that certain criteria were present. Some of the specificities included that the English insolvency representatives should only incur debt or file a reorganisation plan with the consent of the US insolvency representative of the US Court, and prior notice is to be given if the English insolvency representatives decide to undertake any major transaction on behalf of the debtor.

Many issues were purposely left out of the agreement to be resolved during the course of the proceedings while some issues such as distribution were later included as an extension to the said agreement.

It is interesting to see that as early as 1991, Courts of different States (in particular courts of first world countries such as the US and UK, which sets precedents especially in the context of common law) have recognised the necessity of communication and cooperation in a case of cross-border insolvency. This goes to show that insolvency cases are multi-dimensional and in order to manage and dispose off a cross-border insolvency efficiently and effectively, there needs to be communication and cooperation between the Courts of different States.

The flexibility afforded in the agreement in the *Maxwell* case is also desirable where parties are allowed to expand on the agreement as the circumstances require. However, in the context of modern times, such flexibility to a cross-border insolvency agreement in such nature may be deemed to be lacking certainties – for example, there may be possibility that one side of the insolvency representatives involved may utilised such flexibility as a tactical manoeuvre to delay the administration of the estate. Therefore, should there be such cross-border insolvency agreement in the present times, I am of the view more precise terms ought to be detailed.

In the upshot, cases such as *Maxwell Communication Corporation plc* has set a very pragmatic precedent which are to form the basis of the development of cross-border insolvency for other countries including but not limited to the commonwealth country. Countries ought to refer to these cases as basis in order to escalate the progress in their insolvency laws to also cater for cross-border insolvencies. This can be achieved by amongst others, referring to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, which sets out practical aspects of communication and cooperation in a cross-border insolvency case.

5

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.

This answer seeks to answer the question by applying Fletcher's 3 pertinent questions.

(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 (including issues of enforcement)?

Jurisdiction where the insolvency proceeding is to be opened

On the facts, Fernz is considering to open insolvency proceedings on or about 18 July 2020 at an EU member state therefore, the EIR Recast will be applicable at the said EU member state.

Since an existing insolvency proceeding against Rydell is before the UK Court (opened on 18 June 2021), the EIR Recast will be applicable in the UK as well. Under the EIR Recast, since UK is the centre of main interest (COMI) of Rydell, the English Court is allocated primary jurisdiction over the insolvency of Rydell.

Under the EIR Recast, it is possible for a subsidiary territorial proceedings to be opened in other EU member states. Accordingly, the insolvency proceeding opened by Fernz against Rydell at an EU member states (if opened) will be regarded as "secondary proceedings". Fernz will have to show / prove before the EU member state court that Rydell has an "establishment" at the said member state whereby it is one of Rydell's "place of operations…where the debtor [Rydell] carries out a non-transitory economic activity with human means and assets". In determining if the EU member state is an "establishment", the Court would assess whether an establishment exited within the period of 3 month preceding the opening of the proceedings.

Domestic law applicable

Once the insolvency proceeding is opened before the Court of the EU member state (EU Foreign Court), the EU Foreign Court hearing the application would need to decide what is the relevant domestic law applicable to the Fernz's proceeding. Under the EIR Recast, the law applicable to the proceeding will be law of the primary proceeding which is opened at the COMI. Therefore, the English insolvency law will be the law applicable at the secondary proceedings (with some exceptions involving rights of secured creditors and employees).

International effect / Coordination and Cooperation

With the EIR Recast being applicable in both the UK and EU member state, both the EU Foreign Court and the English Court would have to cooperate and communicate to ensure that the primary and secondary insolvency proceedings are dealt with efficiently and effectively. The insolvency practitioners involved in the primary and secondary insolvency proceedings are also required to cooperate with each other. The EU Foreign Court will automatically recognise the procedure and the officeholder will be able to exercise all his powers over assets situated in other member states.

Other information

In this regard, other relevant information required includes at what stage is the primary insolvency proceedings at the COMI. For example, if a winding up order has been issued by the English Court, under the EIR Recast, the English winding up order is automatically recognised in other member states. Fernz could consider filing proof of debt before the English insolvency representative as under EIR Recast, the English proceedings and insolvency representative will be afforded automatic recognition before the EU Foreign Court.

Other information includes whether there are any creditors who intends to open / have opened other insolvency proceedings at any other EU member state. This will determine the course of action in which Fernz may opt for. For example, if Rydell has been wound up in another EU member state then the EU Foreign Court is obligated to give recognition to the same.

Is further information also required regarding establishment?

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 ceased to apply in the UK from 11 pm on 31 December 2020 following Brexit. Therefore, since the main insolvency proceedings were opened in the UK on 18 June 2021, the EIR Recast will not be applicable.

In the absence of the EIR Recast, the insolvency proceedings opened at the EU member state will not be regarded as secondary insolvency proceeding and it is possible to open a parallel insolvency proceeding at the EU member state in spite of the existing proceeding opened at the UK and regardless of UK being the COMI of Rydell. It is no longer mandatory for all other member state to apply the English insolvency law when insolvency proceedings are opened against Rydell in an EU member state. The relevant insolvency law will the domestic law where the insolvency proceeding is opened.

In terms of recognition, it is also no longer automatic for the EU member state to recognise and / or enforce any insolvency proceedings opened at the UK and vice versa. When an insolvency order is obtained in a EU member state / when an EU insolvency representative is appointed, if the representative seeks to manage the assets of Rydell in the UK, the representative will need to apply in the UK Court to recognise the foreign insolvency order / appointment. Inevitably, there will be additional delay in time and expenses as compared to when the EIR Recast is still in play.

It would be beneficial to discuss the need for information as to whether the relevant countries in Europe had adopted the MLCBI and if not what laws would need to be considered in those countries.

2

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?

EIR Recast will not be applicable when the minor creditor seeks to open insolvency proceedings against Rydell in the UK Court on 18 June 2021 as EIR Recast ceased to apply in the UK from 11 pm on 31 December 2020 following Brexit. Therefore, preliminary consideration will not be on where the COMI is situated and if there is any existing foreign insolvency proceedings. In theory, in the absence of EIR Recast, it is possible for the minor creditor to open parallel insolvency proceeding in the UK Court (if there is existing foreign insolvency proceeding), and regardless of where the COMI is situated.

Under the Insolvency Act 1986 (section 220 – 221), the English court has jurisdiction to wind up Rydell which is formed in another country and has carried on business in the UK. The English insolvency law will apply in respect of procedure and substance of the insolvency proceedings opened by the minor creditor in the UK Court. Under section 221(5) of the Insolvency Act 1986, a court may order winding up of an unregistered company if (i) the company is dissolved, or has ceased to carry on business only for the purpose of winding up its affairs; (ii) if the company is unable to pay its debts; (iii) if the court is of the opinion that it is just and equitable for the company to be wound up. Based on English precedent, the Court will assess whethere there is sufficient connection between Rydell with the UK – which includes whether there are assets within the UK; one or more person interested in the distribution of assets of Rydell must be person over whom the UK Court can exercise jurisdiction. Therefore, we need to identify if there are other creditors within the UK jurisdiction.

There may also be other relevant foreign law which the UK Court may need to consideration in relation to the administration of the winding up.

It is important to note that the EU member states will not be obliged to recognise the English insolvency proceedings and similarly, the UK will not be obliged to recognise other EU member states insolvency proceedings, contrary to the mandatory automatic recognition across EU afforded under the EIR Recast.

Under the English law, S426 of the Insolvency Act 1986 authorises the English Court to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In other words, the UK court may recognise a foreign insolvency proceeding opened against Rydell in other member states if the situation so requires.

Once an insolvency order is given in the UK Court, the process of assets recoveries (if necessary) will also be less efficient as there is no longer an automatic mandatory obligation to communicate and cooperate. The creditor would have to rely on the domestic law of the individual member states in order to determine if cooperation and communication will be afforded to the English court / insolvency representative.

The English Court may also rely on the assistance of the UNCITRAL Model Law (which has been adopted in a few EU member states namely Greece, Romania, Slovenia and Poland) in respect of seeking recognition and assistance from courts in the said member states.

5
Marks awarded 13 out of 15
TOTAL MARKS 45/50

*** End of Assessment ***