



**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.

Talking about the three significant (historical) developments regarding debt collection procedures in English law are:

The 1542 Act was the first Bankruptcy Act that provided a compulsory sequestration to be applied to the dishonest and absconding debtors. This act also provided for an appointment of a body of commissioners who on application on creditors could proceed against a trading debtor who fled from the country. The principal of this Act was that there was compulsory administration, and all the creditors would be distributed the estate on equality basis. Thus, if we see, the modern insolvency laws are based on two fundamental principles i.e., collective participation by creditors and a *pari-passu* distribution among them of the available assets. Then, the 1570 Act under the reign of Queen Elizabeth I was one of the first law designed specifically as a true bankruptcy statute as the previous laws focused on fraud prevention laws. However, this act did not contain a discharge provision but provided additional acts of bankruptcy. This act however transferred jurisdiction of the supervision of the estate from commissioners to Lord Chancellor (new introduced term of the Bankruptcy Act of 1542). Following the act of bankruptcy, the creditor could open the bankruptcy proceedings against the debtor and then creditor would put up petition to the Lord Chancellor to convene a bankruptcy meeting.

The Status of Ann of 1705 was then one of the important parts of legislative framework, as it introduced the notion of a statutory discharge. The discharge was not via automatic entitlement, but the commissioners had to confirm that the debtor was conformed and co-operated during the proceedings. Most of the principals introduced in this act still there in the modern bankruptcy law. **It would be beneficial to elaborate on modern concepts of 'fresh start'**

Then, the 1883 Act was also viewed by certain writers as the foundation of the present system of English bankruptcy law wherein a fair procedure for adequate supervision and means on discourage dishonesty appeared.

2.5

### 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.

UK government like other states also have adopted insolvency related reforms following Covid-19 pandemic. On 20<sup>th</sup> March 2020, the UK government published its Corporate Insolvency and Governance Bill. This Bill introduced some permanent reforms like Company moratoriums wherein the company will benefit from payment holiday from majority of its pre-moratorium debts, new restructuring plans to compliment the company moratorium as an option for companies in financial difficulty and the prohibition of insolvency termination clause in supply contracts. While the temporary reforms were specifically introduced to ease the burden on companies and directors caused by the Covid-19 pandemic.

The temporary reforms introduced were a) suspension of the director wrongful trading offence, wherein the potential personal liability for wrongful trading was suspended from 1<sup>st</sup> March 2020, until the later of (a) 30<sup>th</sup> June 2020 and (b) one month after the Corporate

Insolvency and Governance Bill has been enacted (the “relevant period”). Courts had to ignore the actions of a director during the relevant period when assessing the amount of compensation payable by a director who is later found liable for wrongful trading. b) restriction on the service of statutory demands being issued against companies where the debt is unpaid for reasons relating to the COVID-19 pandemic and c) winding up petitions, this is designed to prevent creditors from threatening winding up proceedings as a method of securing payment from companies.

reference: <https://www.mayerbrown.com/en/perspectives-events/publications/2020/06/covid19-updates-to-uk-insolvency-law-and-their-effect-on-insolvency-remoteness-in-securitisation-transactions>  
<https://www.klgates.com/covid-19-new-uk-corporate-insolvency-and-restructuring-tools-and-reforms-03-26-2020>

**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.

The treaties and conventions are public international instruments which States sign and bind themselves and the same affect in their domestic laws. These domestic laws then become enforceable in courts and then may or may not form a Hard law on insolvency. In 19<sup>th</sup> century modern form of bilateral treaties and conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangement and composition appeared. Also, due to increasing interest in international trading and commercial activities, many regions as well as international bodies have drafted treaties, conventions and solutions to address the international insolvency issues.

Soft Law on the other hand are agreements, principles and declarations that are not legally binding. Most of the multilateral organisations are using the soft laws and it is gaining more success than hard laws. One of the most successful “soft law” approach has been undertaken by UNCITRAL i.e., it developed a Model Law on cross-border insolvency (MLCBI) which was not formed as treaty or convention, but it adopted draft legislation that UNCITRAL recommended member states to adopt with or without modification.

Many states are now adopting the MLCBI, and it is gathering momentum as a response to international insolvency law. UNCITRAL is seen promoting soft law responses to the international insolvency issues. European Union have drafted treaties and conventions to address international insolvencies within geographical regions. These treaties, conventions and Model law are used in the cross-border insolvency cases. England and Wales have adopted UNCITRAL Model law on cross-border insolvency in 2006. European Insolvency regulation (EIR) (2000) has also influenced broader multilateral developments in international insolvency law. This was further amended to incorporate current multilateral “instruments” on international insolvencies within European union. One should note that, as there is no global insolvency law system or a global court to address the Cross-border insolvency matters, thus use of these treaties and soft laws could help States solve problems and questions they face in addressing the insolvency issues.

**4**

**Marks awarded 9.5 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.

Though, there are various possible different sources of insolvency laws, it is important to find the main source of the law that apply, when someone is analysing the insolvency laws of a particular State. The rules are usually found in legislation or codes of those States. taking an example of the USA, it has a single Unified Bankruptcy Code of 1978 and it applies throughout the USA as it is federal legislation. This unified piece of bankruptcy legislation covers all aspects of bankruptcy. While, in other State's multiplicity of legislations exists, where the laws for individual bankruptcy is contained in one statute while laws related to winding up of the companies is contained in another statutes. Also, other than the legislation, many legal principals forming part of general law will also have effect in insolvency for example the rules that regulate the vesting of real rights such as ownership or rights of real security. These rules are usually not found in the insolvency legislation, but they do have huge impact on insolvency law. Further, when it comes to US system it is seen as a prime example of a pro-debtor system due to its liberal approach to rehabilitation which is also referred as discharge.

The English insolvency law of 1986 is also an example of the unified insolvency legislation. This code deals with consumer (personal) and corporate bankruptcy in one but the act basically duplicities many provisions as these apply to individuals and companies respectively. Some of the aspects of the 1986 were amended in the Insolvency Act 2000 and the Enterprise Act 2002. The Debt relief Order for individuals was introduced in 2009, further amendments are done in 2016 to reflect online application for bankruptcy relief. England and Wales have adopted the UNCITRAL Model Law on Cross-Border insolvency in 2006. On the other hand, though Australian insolvency law is based on English common law. It does not have single unified Bankruptcy or insolvency Act. Though recently they have introduced reforms to incorporate new restructuring and liquidation process for small business into the corporation act.

Continental European countries follow a civil law system, most of these countries are typical very much pro-creditor i.e., there will be no discharge allowed unless creditors agree. However, Germany is an example of unified insolvency legislation. While the insolvency laws in the Emerging Markets and developing countries are based on existing insolvency law systems such as those found in England or civil law countries as most of these countries were colonies and they inherited their laws from formal colonial masters.

**There is scope to elaborate on common law as a source to fill the gaps in common law countries.**

**4.5**

### **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.

Fletcher states that the "cross border insolvencies should be considered as a situation". To bring the cross-border and insolvency aspects together, Fletcher has asked three pertinent questions

- In which jurisdictions must insolvency proceedings be opened?
- What country's law should be applied in respect of different aspects of the case?
- What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

In answering these questions and issues that one may face would be that, though insolvency proceedings could be opened concurrently in more than one State. The issue would be each State will apply its own laws. One should however note that all States have developed legal

systems and have some form of bankruptcy/ insolvency system, however the approaches and policies as well as substantive and procedural rules differ in every State. Further, most of the domestic legal systems are ill-equipped when it comes to dealing with cross-border insolvencies while some laws are outdated and require review. If the proceedings are opened in more than one State this may result in all proceedings competing with each other or can be incompatible in nature i.e., for example winding up or liquidation in some states verse corporate rescue/ restructuring in another State this may result in capital losses for the creditors. In case of local insolvency proceedings, other disputed issues may arise like if the debtor's assets are in different jurisdiction which are secured by lenders in that jurisdiction, and insolvency proceedings have been initiated in that jurisdiction too. It can also happen that in one court the order is passed to liquidate the company while other court passes the order of re-organisation or compromise. Sometimes it also happens that there is foreign judgement already in place when the matter is listed in the local courts, in these cases issue arises of recognition of the judgment and effect of it. Lastly, in the cross-border insolvency the local court will also have to decide upon the law to apply. Different system of law adopts different approaches. For example, in common law system such as in England, the choice of law issues only arises if parties invoke them otherwise the law of the forum will apply. However, this occurs only where it is to that party's advantage.

Westbrook has also highlighted issues in the cross-border insolvency namely recognition of foreign representative, moratorium on creditors actions, creditor participation, executory contracts, co-ordinated claim procedures, priorities and preferences, avoidance provision powers, discharge and conflict of law issues.

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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.**

The Maxwell Communication Corporation Plc. is the prominent example of the above quote. This case in 1991 is a cross border insolvency case in which concurrent principal insolvency proceedings in the United States i.e., Chapter 11 (reorganisation or rescue) and in England i.e., administration proceedings were co-ordinated through an “Order and Protocol” and were approved by the courts in the respecting States.

The Maxwell Communication Corporation Plc case involved two primary insolvency proceedings initiated by a single debtor, one in United States and the other in the United Kingdom and two different insolvency representatives were appointed in the two States, each charged with a similar responsibility. The Judges of both courts i.e., United States and England 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. In the agreement two goals were set to guide the insolvency representatives namely, maximising the value of the estate and harmonizing the proceedings to minimize the expense, waste and jurisdictional conflict. Both the parties agreed that essentially the United States court would defer to the English proceedings once it was determined that certain criteria were present.

Criteria included that some existing management would be retained in the interest of maintaining the debtors going concern value, but the English insolvency representatives would be allowed with the consent of their United States representatives to select new and independent directors. Further to incur new debt or to file reorganisation plan the English insolvency representatives needed to take consent of the United State representatives or the United States court. It was also decided that the English insolvency representatives had to give prior notice to the United State insolvency representatives before undertaking any major transaction on behalf of the debtor but was pre-authorized to undertake lesser important transactions. Many issues were left out of the agreement to be resolved during course of proceedings while some were later included in the extension of the agreement i.e., distribution matters.

Voluntarily putting the workable structure to co-ordinate, a complex international insolvency and obtaining the approval of the courts received further impetus through the work of professional bodies such as IBA and its concordats. The UNICTRAL Practice Guide on Cross-border Insolvency Corporation was adopted by the commission in July 2009. It provided information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases- focusing on the use and negotiation of cross-border agreements.

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Marks awarded 14.5 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.

Given in this case the insolvency proceeding against Rydell was opened in UK which is its centre of main interest (COMI) and before the transition period of 31<sup>st</sup> December 2020, the European Insolvency Regulation Recast (EIR Recast) would apply. **It would be beneficial to discuss automatic recognition.** Further, though Fernz can also open the secondary proceeding given the operations of the Rydell are in different parts of EU. The EIR Recast would regulate the applicable law in proceedings subject to the regulations. It would also contain provisions on the law to apply in respect of specific matters such as right in rem, set-off, immoveable property, employment and detrimental rights.

EIR allocates jurisdictional competence to the courts of a member State within which the centre of the debtor's main interest (main proceedings) is situated. But it does allow for the possibility of subsidiary territorial proceedings in other member States. However, these are permitted where the debtor has an "establishment" i.e., any place of operations. Such subsidiary proceedings may be either "independent proceedings", opened prior to the main proceedings or secondary proceedings, opened subsequently to the bankruptcy adjudication in the State with the centre of main interests. EIR has also influenced broader multilateral developments in the international insolvency law. EIR was amended so that current multilateral "instruments" on international insolvencies within the European union can become the regulation on insolvency proceedings. The areas of amendment in the EIR recast included the extension of scope to pre-insolvency/ hybrid proceedings, expanding the provisions on the "centre of the debtor's main interest", recognising the existence of insolvency proceedings outside the EU for the purpose of co-ordinating proceedings both inside and outside the EU , extending secondary proceedings to include rescue, providing for an electronic register and standard forms and acknowledging corporate groups through enhanced co-operation and co-ordination provisions. **It would be beneficial to discuss relevant articles.**

In Europe, the European Guidelines on Communication and Cooperation 2007 contains non-binding rules and a Draft Protocol for international insolvencies subject to the EIR. The Joint working group was also incorporated review the guidelines focusing on the duty to co-operate and communicate under the EIR Recast.

**It would be beneficial to discuss what further information would be needed.**

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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.

Following the end of the transitional period, and because the Brexit deal reached between the UK and the EU does not deal with cross-border insolvencies, the European Insolvency Regulation Recast would not apply if the proceedings were opened in the UK on 18 June 2021 instead of 18 June 2020. The UK ceased to be member of the EU at 11:00 pm on 31<sup>st</sup> January 2020. Thus, under UK law, the EIR Recast no longer applies to post 11:00 pm 31<sup>st</sup> December 2020 proceedings in the UK. The Recast insolvency regulation applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period i.e., being 11:00 pm on 31<sup>st</sup> December 2020.

**It would be beneficial to discuss the MLCBI and what further information might be needed to determine if it could be applied. It would be beneficial to discuss what would govern the matter in the absence of the EIR Recast.**

1.5

#### **Question 4.3 [maximum 5 marks]**

Consider an alternative situation now. What if Rydell were unregistered with its COMI in a country in Europe that was a member of the European Union, instead of the UK, and formal insolvency proceedings were opened in the UK on 18 June 2021? What UK domestic laws would be relevant to consider whether the minor creditor could commence those formal insolvency proceedings in the UK?

If Rydell was 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 was opened in the UK on 18 June 2021, then the UK domestic laws would apply.

Following the end of the transitional period, and because the Brexit deal reached between the UK and the EU does not deal with cross-border insolvencies, the benefit of the Recast Insolvency Regulation as between the UK and the EU no longer applies. However, the Recast

Insolvency Regulation will continue to apply to insolvencies where the Main Proceedings were opened prior to the expiry of the transitional period (11pm on 31 December 2020). In this case given the Rydell formal insolvency proceedings were opened in the UK on 18 June 2021 i.e., post the transition period the Recast Insolvency Regulation will not apply instead one can apply:

- The Cross-Border Insolvency Regulations 2006 implemented the UNCITRAL Model Law on Cross-Border Insolvency, provides a framework for recognition by the English courts of proceedings started in another country and assistance to foreign representatives. Other key jurisdictions such as the United States, Singapore, Japan, Dubai, South Korea, Australia, New Zealand and Canada, and some EU Member States Poland, Slovenia, Greece and Romania has enacted in a variety of forms the Model law. In July 2018, UNCITRAL has adopted a Model Law on Recognition and Enforcement of Insolvency-Related Judgments which it recommends complementing the Model Law on Cross-Border Insolvency and it also provides for insolvency-related judgments to be recognised and enforced where enforceable in the originating state.
- Section 426 of the Insolvency Act 1986 allows the courts in any other part of the UK and in "relevant countries or territory" which largely are Commonwealth countries, to request assistance from the UK Courts. However, the requests for assistance must come from foreign courts rather than directly from foreign officeholders, albeit that the latter must first apply to foreign courts to request that a letter of request be sent to the relevant court in the UK.
- Lastly, English common law under comity principles can also be applied - common law principles in cross-border insolvencies that are based on the concept of universalism, which promotes the idea of one set of insolvency proceedings being recognised worldwide and applied to all creditors and assets in the same manner. In the UK, common law is based on the principle of modified universalism which means that the court has power to assist foreign insolvency proceedings so far as it properly can.

Further, UK recently amended its Corporate Insolvency and Governance Bill to introduce some permanent reforms like Company moratoriums wherein the company will benefit from payment holiday from majority of its pre-moratorium debts, new restructuring plans to compliment the company moratorium as an option for companies in financial difficulty and the prohibition of insolvency termination clause in supply contracts.

**It would be beneficial to discuss s221(5) Insolvency Act 1986 and how it pertains to unregistered companies.**

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**Marks awarded 7 out of 15  
TOTAL MARKS 41/50**

**\* End of Assessment \***