



**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.

The first English Bankruptcy Act of 1542 initially introduced the concepts of collective participation by creditors in a compulsory administration of the debtors assets and *pari passu* distribution of the available assets among the participating creditors. The introduction of these two fundamental principles initiated the thinking concerning modern insolvency law¹. **It would be beneficial to elaborate on how it shaped modern insolvency thinking.**

A further development of the debt collection procedure was the enactment of the 'Act of Elizabeth' in 1570 which provided for additional acts of bankruptcy upon which a creditor could petition for the convening of a bankruptcy meeting and transferred jurisdiction of the supervision of the estate from the commissioners (as was the case under the 1542 Act) to the Lord Chancellor who could then also appoint bankruptcy commissioners to supervise the process by examining the debtors transactions and property. The debtor was obligated to transfer his or her property to the commissioners and could be summoned to appear from questioning and be committed to prison². **How did this shape modern insolvency thinking? Elaboration is warranted.**

A later development which shaped the thinking of modern insolvency law was the introduction of a statutory discharge (enacted by the 'Statute of Ann' in 1705) subject to the debtor establishing it had conformed and cooperated in the proceedings. However, it is the legislative reforms in 1883 upon which many writers consider that the foundation of the present system is based. These reforms included the introduction of the office of the Official Receiver to administer the debtor's estate before the commencement of a bankruptcy procedure or friendly agreement with creditors³. These reforms furthered the overall aim of there being fair procedures in place with adequate supervision and means to discourage dishonesty (examination of debtor's conduct leading to insolvency)⁴. The mechanics for addressing bankruptcy matters created by the 1883 Act formed the foundation of bankruptcy law in force today and remained the basic approach of English insolvency law for most of the 20th century until the comprehensive review led by the Cork Committee in 1977 resulting in the Cork Report which ultimately led to the Insolvency Act 1986⁵.

The question asked you to indicate significant developments rather than describe legislation per se. You needed to clearly setting out the specific developments and how they shaped modern insolvency thinking.

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.

¹ | F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005) Ch 1; L E Levinthal, "The Early History of Bankruptcy Law", (1918) 66 *Uni of Pennsylvania Law Review and American Law Register*.

² *Ibid*

³ *Idem*, p9

⁴ See *Idem*, pp 17-18 which notes these features as three principles set out by Chamberlain which are essential to a good bankruptcy.

⁵ *Idem* pp 15-17.

On 26 June 2020, the Corporate Insolvency and Governance Act 2020 was enacted in the UK to help address the negative economic fall out of the COVID-19 pandemic. This Act introduces a moratorium period which a company (solvent or otherwise) can use for a payment holiday from most of its non-finance pre-moratorium debts and protection from creditor action (including enforcement action) while it seeks a rescue or restructuring (including a CVA, a scheme of arrangement, restructuring plan (discussed further below) or administration). Once this procedure is successfully engaged, during the moratorium period, directors will retain most of their management powers but a licensed insolvency practitioner will represent creditors interests and will monitor / supervise the actions of the directors in order to verify that a rescue of the company as a going concern appears likely, approve sales of assets outside the ordinary course and approve the grant of new security over assets. The appointed insolvency practitioner can also challenge the actions of directors. However, it is noted that financial indebtedness such as that of insurers, banks, investment firms, parties to capital markets arrangements and other financial services related entities, is not capable of being availed by the new moratorium rules⁶.

The Act also introduces a new restructuring plan (in addition to CVAs and schemes of arrangement) that companies encountering financial difficulties can use to manage creditors as long as the purpose of the compromise or arrangement proposed addresses those financial difficulties. Akin to the scheme of arrangement process, creditors are required to vote in classes according to the same test but the plan also includes a "cross-class creditor cram down" (similar to the US Chapter 11 process) meaning that the court can force creditors (secured or unsecured) from any class to agree if satisfied that (i) none of the dissenting class would be any worse off than in the event of the 'relevant alternative'; (ii) the compromise or arrangement has been approved by 75% in value of a class of creditors / members, who would receive payment or have a genuine economic interest, in the event of the 'relevant alternative'; and (iii) it is just and equitable to do so⁷.

A third insolvency related measure introduced by the Act was a temporary ban on filing winding-up petitions and statutory demands forming the basis for a winding up petition from 1 March to 30 June 2020 (later extended to 31 March 2021) where the pandemic has had a "financial effect" on the debtor. However, a creditor can still file a petition or statutory demand if they have reasonable grounds to believe that (i) the pandemic has not had a financial effect on the debtor, or (ii) the debtor would have been unable to pay its debts even without this financial effect⁸.

These measures enable businesses to attempt to reach a fair agreement with creditors in the wake of negative economic impact caused by the pandemic.

3

Question 2.3 [maximum 4 marks]

Briefly explain the concept of treaties and "soft law" and indicate how these may be used to establish cross-border insolvency rules in States.

Treaties are international instruments which are binding on those States that have ratified or become signatories to, such instruments. "Soft laws" are not binding in the traditional sense on States but serve to influence and regulate the approach to cross-border insolvencies by

⁶https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/uk-12-may2021-final.pdf pages 3 to 4

⁷ Ibid at page 4

⁸ Ibid

providing best practice guidance for the cooperation between States and coordination of insolvency proceedings which involve cross-border dimensions⁹.

International treaties also known as public international laws, such as the European Insolvency Regulation Recast (2015) ("**EIR Recast**") are binding on the States that have ratified or acceded to it, by its importation into the signatory Member States' domestic laws. Since 2000, broader multilateral developments in international insolvency law have been influenced by the EIR Recast¹⁰. These instruments regularise the approach of the courts in each State when dealing with a cross-border insolvency. **It would be beneficial to note 'hard law' aspects to treaties.**

An example of a "soft law" which has been used to establish cross-border insolvency rules include the UNCITRAL Model Law on Cross-border Insolvency ("**MLCBI**") initiated by the United Nations Commission on International Trade Law ("**UNCITRAL**") The work of UNICITRAL is said by Mevorach to be the most successful "soft law" approach and the MLCBI together with the UNCITRAL Legislative Guide on Insolvency Law (2004) recommended to be adopted and followed by States with or without modification. This is reflected by the growing number of States which have adopted these soft laws in order to address international insolvency issues, thereby seeing them gather momentum in recent years and greater consistency in approach to cross-border insolvencies¹¹. **It would be beneficial to explain what 'soft law' is rather than just provide an example of it.**

2.5

Marks awarded 8 out of 10

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

Question 3.1 [maximum 5 marks]

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

The number and nature of sources of insolvency laws may differ from State to State. Typically, a State will have domestic legislation which addresses bankruptcy of an individual and insolvency of a corporate entity incorporated in that State. The legislation in relation to the latter may also include provisions for dealing with the insolvency of a foreign company which is incorporated in a different State but that has a connection with that State. An example of this is section 221 of the English Insolvency Act 1986 which deals with foreign unregistered companies.

A State may also have other domestic statutory instruments or specific provisions in its insolvency legislation which govern how that State will recognise and give effect to foreign insolvency proceedings and / or judgments, such as section 426 of the English Insolvency Act 1986. This provision has been held to apply where the MLCBI does not apply, i.e., where recognition and enforcement is sought in relation to a foreign judgment against third parties¹².

In addition to legislation there may be other principles arising from domestic law (i.e. in common law States such as England) which may determine how the courts interpret and adjudicate upon issues which arise in a cross-border insolvency. The law of a different State

⁹ However, note the commentary of I Mevorach in *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018) which (at 150) abandons the "notion that treaties are hard and binding and non-treaty instrument are soft and non-binding".

¹⁰ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings ("EIR Recast")

¹¹ I Mevorach in *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018)

¹² *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant* [2012] UKSC 46 at [143]

(foreign law) may interact with a domestic court's adjudication of issues for example where there are choice or conflict of law (private international law) issues or where reference needs to be made to a foreign law to establish the validity of the actual claim where that claim is for a debt governed by the foreign law¹³.

A State may also be a member of or signatory to a treaty or international agreement with another State or several States. Once ratified, such an instrument is imported into that State's domestic law and its interaction with any original domestic law is such that it is deemed to be consistent with and given deference over any non-binding sources of law. Treaties such as the EIR and EIR Recast are considered public international law and will be binding on the Member States that are signatories to it.

Finally, if a State has chosen to implement or adopt guidance from a multilateral institution or organisation, such as UNICITRAL, sources of "soft law" may also interact with that State's domestic law and any public international laws which have been imported into domestic law by ratification. Soft laws can improve consistency of approach to cross-border insolvencies as between those States who have adopted them and aim to increase the degree of cooperation and coordination with proceedings being conducted by insolvency practitioners and the courts in the various States.

It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.

2

Question 3.2 [maximum 5 marks]

A number of difficulties arise in cross-border insolvencies, including as a result of differences in laws between States. Harmonisation of insolvency laws is pursued. In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions. Discuss these pertinent questions / issues raised by Fletcher.

The three pertinent questions / issues raised by Fletcher are:

- (1) In what jurisdictions may insolvency proceedings be opened;
- (2) What country's law should be applied in respect of different aspects of the case; and
- (3) What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?¹⁴

These questions are posed in an attempt to bring the cross-border aspects and the insolvency aspects in any given corporate insolvency together, but in doing so, highlight the difficulties which can arise, including, as a result of differences in laws between States, which arguably supports the pursuit of harmonisation of insolvency laws¹⁵.

In looking at the first question, the potential for concurrency of proceedings in multiple jurisdictions generates the risk that there will be inconsistency in the approach taken to dealing with the assets of a debtor and treatment of creditors. It also results in the depletion of the debtors assets to meet the costs of the multiple proceedings taking place.

The second question raises conflict of law issues where each State in which a proceeding is

¹³ *Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.

¹⁴ I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005) pp 3 to 5

¹⁵ D McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?", (1997) 26(3), *University of Baltimore Law Review* 15, pp 15 to 29.

commenced will seek to apply its own laws (including choice of law rules). There may be a need for a court to apply the law of a different State. However, the rules governing questions concerning choice of law also vary from State to State and in particular, depending on whether the State is a civil or common law based jurisdiction. This problem can arise when the debtor faces creditors pressing their claims in more than one State. As Omar notes "*The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws*"¹⁶. This can result in stakeholders being treated differently and inconsistently from State to State and could incentivise stakeholders to forum shop for the jurisdiction most likely to adjudicate favourable to their interests.

Thirdly, little or no extraterritorial effects may be granted to foreign proceedings meaning that assets in other jurisdictions may be placed beyond the reach of insolvency practitioners appointed in one jurisdiction which could be the jurisdiction in which most of the debt is situated. States have taken steps to amend domestic laws to address international insolvency issues through provisions for the recognition and enforcement or the effects of a foreign insolvency proceeding. Some States have also provided for cooperation and coordinate where there are concurrent proceedings, such as the through the adoption of soft laws such as MLCBI. These steps are conducive to addressing the difficulties arising from different laws and serve to better harmonise the international approach towards cross-border insolvencies.

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.

Maxwell Communications Corporation plc was a cross-border insolvency case in 1991, involving primary proceedings in the United States and in England, instigated by a single debtor, which were co-ordinated through an "Order and Protocol" approved by the courts in the United States (seized of Chapter 11 proceedings) and England (seized of administration proceedings).

The following key features of the agreement adopted in the *Maxwell* case have been summarised in the UNCITRAL Practice Guide¹⁷ wherein it is noted that there were essentially two goals which were intended to guide the insolvency representatives appointed in each of the *Maxwell* insolvency proceedings. The first goal being to maximise the value of the estate and harmonise the proceedings to minimise expense, waste and jurisdictional conflict. Secondly, there was an agreement that the United States court would defer to the English proceedings once it was determined that certain criteria were present. As the summary goes on to illustrate, in order to facilitate these goals being achieved there was an element of give and take on both sides. For example, while the English insolvency representative was allowed,

¹⁶ P J Omar, "The Landscape of International Insolvency", (2002) 11, *IIR* 173, p 175

¹⁷ UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp 128-129

with consent of its US counterpart to select new and independent directors, the English representative agreed to only incur debt or file a reorganisation plan with the consent of the US representative or the US court. The English representative also agreed to giving prior notice to the US insolvency representatives before undertaking any major transaction on behalf of the debtor, but were able to undertake less significant transactions without giving notice. These points of agreement and cooperation were important in order for the proceedings to be coordinated in an orderly fashion and arguably provided flexibility for the insolvency practitioners in both jurisdictions to effectively manage the debtors assets and liabilities for the benefit of the entire creditor base.

Therefore, as evidenced by the *Maxwell* case, although Articles 25 and 26 of the MLCBI authorises (and where adopted as drafted, mandates) co-operation and co-ordination of concurrent proceedings, and approval of agreements concerning coordination of proceedings by the courts is provided for¹⁸, the existence of agreements and protocols for coordination and cooperation with court approval pre-dates the MLCBI which was completed in 1997¹⁹.

However, since *Maxwell*, there has been a greater shift towards the use of protocols and agreements as a means to coordinate cross-border insolvency proceedings and encourage cooperation, more generally.

Firstly, the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation was adopted by the Commission on 1 July 2009. This Guide provides information for insolvency practitioners and judges on practical aspects of cooperation and communications by its focus on the use of cross-border agreements and negotiations between office holders. Although not intended to be prescriptive, this guide includes a number of sample clauses (not model provisions) to give examples of how issues have or might be addressed and summaries of cases involving cross-border agreements that form the basis of the Practice Guide analysis (e.g. Lehman Brothers case).²⁰ Secondly, further guidance to assist insolvency practitioners has been provided by way of the UNCITRAL Practice Guide on Cross-Border Insolvency Agreements (2009), as a potential framework for co-operation under the MLCBI.

5
Marks awarded 12 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.

¹⁸ Article 27(d) of the Model Law.

¹⁹ <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-borderinsolvency>.

²⁰ UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp 123-124

Question 4.1 [maximum 7 marks]

An insolvency proceeding against Rydell was opened in the UK by a minor creditor on 18 June 2020. A month later, Fernz was considering also opening proceedings in another country in Europe which was a member of the European Union.

Discuss if and how the European Insolvency Regulation Recast would apply. Also note what further information, if any, you might require to fully consider this question.

The European Insolvency Regulation Recast ("**EIR Recast**") will apply to insolvency proceedings commenced against Rydell in the UK prior to the expiry of the transitional period (being 11pm on 31 December 2020)²¹.

As Rydell's COMI is England, under the EIR Recast, the UK court would be allocated jurisdictional competence. Article 3(1) of the EIR Recast provides that proceedings opened in the courts of the member State where the debtor's COMI is would be the "main proceedings". However, the EIR and Recast also permits subsidiary territorial proceedings.

Insolvency proceedings could be commenced by Fernz in another EU member state if that State is one in which Rydell has an "establishment". The definition of "establishment" having been slightly amended by the EIR Recast is deemed to mean "*any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*"²².

It is not clear whether the State in which Fernz is considering commencing proceedings is one in which Rydell has an "establishment", but assuming that it does, any proceedings if commenced by Fernz, would be considered "secondary proceedings"²³, having been opened subsequent to the proceedings already afoot in the England where Rydell has its COMI. Article 3(3) of the EIR Recast restricts the effects of the secondary insolvency proceedings to the assets of the debtor situated in the State which is the forum of the secondary insolvency proceedings. **The existence of an establishment is a topic where further information is required and it would be beneficial to note this.**

The law which would apply to the main insolvency proceedings in England would be English law and the law which apply to the secondary insolvency proceedings would be that of the State in which Fernz has been able to commence those proceedings under Article 3(2)²⁴

6.5

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 EIR Recast would not apply to proceedings commenced in the UK on 18 June 2021 as this is after the expiry of the transitional period which ended 31 December 2021. In these circumstances, the Insolvency Act 1986 would apply. However, where there are international

²¹ <https://www.thegazette.co.uk/insolvency/content/103914>

²² EIR Recast, Article 2 Definitions [10]

²³ EIR Recast, Article 3(2).

²⁴ EIR Recast, Article 7(1)

elements, such as in this case, foreign creditors or assets, the liquidators appointed by the English court may need to seek recognition in States where assets are based.

It must also be noted that the Corporate Insolvency and Governance Act 2020 was also enacted on 26 June 2020 which imposes a suspension on winding up petitions. This may be relevant to the extent that the petitioning creditor is not able establish that Rydell would have been unable to pay its debts in the absence of any COVID-19 pandemic-related economic downturn²⁵.

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.

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?

In this situation, on the basis that Rydell's COMI is in another State and it is unregistered, the matter would fall outside the scope of the EIR Recast notwithstanding the proceedings were commenced before the expiration of the transitional period following the UK's exit from the EU. However, the UK court could still have jurisdiction to wind up Rydell pursuant to section 221 of the Insolvency Act 1986 which provides for a court-ordered winding up of unregistered companies if the company has a principal place of business in England and Wales or Scotland, and for the purposes of the winding up, this place of business is deemed to be the registered office of the company²⁶.

A winding up of an unregistered company is permitted in the following circumstances under section 221(5):

- (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- (b) if the company is unable to pay its debts;
- (c) if the court is of the opinion that it is just and equitable that the company should be wound up.

Rydell is said to owe money to several parties, therefore it may well be deemed unable to pay its debts. Although it is not clear whether the company has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs, section 221 has been applied by the English court in circumstances where the court is satisfied that there is a "sufficient connection" with England and Wales²⁷. Underpinning this approach, three requirements must be met in order for the English court to make a winding-up order against Rydell. Firstly, the minor creditor must show a sufficient connection between Rydell and

²⁵ https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/uk-12-may2021-final.pdf pages 3 to 4

²⁶ Sections 221(2) and (3) of the Insolvency Act 1986

²⁷ Re Latreefers Inc [2001] BCC 174 (CA)

England and Wales, such as a place of business. It does not necessarily have to consist of assets within the jurisdiction. Secondly, the minor creditor must also be able to show that there is a reasonable possibility, if a winding up order is made, of deriving benefit. Thirdly, one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction²⁸.

5
Marks awarded 13 out of 15
TOTAL MARKS 43/50

*** End of Assessment ***

²⁸ I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017) [30-017] referring to *Re Real Estate Development Co* [1991] BCLC 210 (Ch D), per Knox J.