



**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.

In 1267 the Statute of Malbridge introduced the first instance of imprisonment for the non-payment of debt under English law and was only abolished by Debtors Act of 1869 (section 5).¹ **It would be beneficial to elaborate upon how this shaped modern insolvency law, for example by discussing principles of non-criminalisation of insolvents.**

In 1542 the first English law bankruptcy statute was passed, namely the Bankruptcy Act of 1542. This Act appeared to introduce a mechanism akin to compulsory sequestration where the debtor absconded or was dishonest and, paved the way for the principles on which modern insolvency law was developed, namely collective participation by creditors and *pari passu* ranking of creditors at the point of distributions.² The Act also made provision for a body of commissioners who were empowered to take action against an absconding or dishonest debtor at the request of a creditor, and more importantly provided for equal distribution of a debtors assets where that debtor had acted fraudulently.

In 1705 the Statute of Ann was passed which was the first piece of legislation under English law to introduce the concept of a statutory discharge and described the the specific instances and/or conditions applicable.³ **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law, eg principles of 'fresh start'**

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.

In June 2020, the Corporate Insolvency and Governance Act 2020 was passed. This Act introduced both permanent measures to develop the UK insolvency regime, and temporary measures to help businesses in financial distress. These temporary measures included:⁴

- The suspension of statutory demands and there service, such that any served during the period 1 March 2020 and 30 September 2021 were void (the "relevant period");

¹ A Borraine, R Mason and E Streten "Module 1 Guidance text: Introduction to international insolvency law 2021/2022" Foundation Certificate in International Insolvency Law course notes, p 5 (hereinafter the "**Module 1 Guidance Text**").

² Ibid.

³ Idem p 6.

⁴New business support measures: Corporate Insolvency and Governance Act 2020

<https://commonslibrary.parliament.uk/research-briefings/cbp-8971/> published 5 October 2021, accessed on 6 November 2021.

- winding-up petitions could not be made where the underlying unpaid debt was a direct result of the Covid-19 pandemic. The consequence of this, however was that the courts were required to review each winding-up petition presented where a company was unable to pay its debts in order to determine whether or not the reason for this inability was a direct result of the Covid-19 pandemic (i.e., they had to establish the cause of non-payment). If the unpaid debt was due to the Covid-19 pandemic, no winding up order could be made.
- Although the aforementioned restrictions expired on 30 September 2021, further measures (rules) were put in place and applied from 1 October until 31 March 2022, namely that winding-up petitions could only be presented: (a) in respect of debts of over £10,000; (b) if the debtor has been given 21 days to respond with a proposal for repayment of the debt; and (iii) in respect of commercial rents only - if the debt isn't related to the Covid-19 pandemic.
- the wrongful trading rules being suspended. The Act temporarily removes the threat of personal liability for wrongful trading from directors.

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 public international law instruments which regulate certain matters between States. Treaties are an example of "hard law" as they are drafted, passed and intended to be used as law once promulgated into the local laws of State. Once a State becomes a signatory to a specific treaty (and therefore adopts the treaties provisions into their domestic laws), the treaty is considered a "hard law" instrument. Treaties are useful for purposes of international insolvency law as they allow certain laws, provisions and concepts to become applicable across multiple States thus allowing for a more uniform approach to insolvency procedures (with a international element) and encourages a harmonious the application of common insolvency concepts/principles across States. This would mean that where two States are signatories to a treaty and have adopted the relevant provisions a treaty on insolvency law into their domestic law, that law can be applied uniformly in both of those States. Treaties on insolvency law also facilitate cross border insolvency proceedings and allow for a more streamlined process of distribution of assets and fairness between creditors.

"Soft law" instruments are intended to assist with the regulation of "Hard Law" (i.e. they are not in and of itself law, but are rather instruments which can be (i) used to inform the law (ii) persuasive in understanding and interpreting a specific provision of a law; (iii) provide insight into how the law should be applied in different circumstances. An example of "Soft law" is the UNCITRAL Model Law on Cross-border insolvency. Soft law is not intended to be made into law and does not require States to accept it as part of their domestic laws before it will be applicable. "Soft law" instruments in an international insolvency context can be used to interpret and inform the applicable cross-border insolvency provisions contained within the "hard law", and more importantly where a State does not provide for any cross-border insolvency or international insolvency measures, or where these measures are minimal or unclear, guidance can be obtained from "soft law" instruments. Referring to "soft law" to assist with cross border insolvency is important as it assists practitioners across different States to work together to find a way of unifying what may be nearly incompatible "hard

laws" (which allows practitioners to find commonalities across two differing insolvency regimes and to use them to effectively liquidate entities in a fair manner).

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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.

In any State the main source of insolvency law usually takes the form of insolvency legislation. For example, in England the main source of insolvency law is the Insolvency Act of 1986. It is a unified piece of insolvency legislation. States may also have insolvency provisions contained in consolidated legislation which regulates a variety concepts, structures, process in relation to insolvency, but that also regulates a variety concepts, structures, process in relation to company structures, incorporation and formation (for example in Australia, the Australian companies laws sets out the insolvency provisions in relation to corporate entities). There will also be instances where States will have certain laws which have not formally been enacted to regulate insolvency, but will nonetheless contain provisions which may have an influence on or affect the application of the States insolvency laws (for example, certain provisions of a States security or companies laws may influence how the insolvency laws are interpreted under certain circumstances.)

In States that have a common law based legal system, their source of insolvency law will be the common law legal concepts, processes and remedies which have developed over time (for example, as a result of judicial decisions). This is an important source of law in instances where the main source of legislation needs further interpretation in certain respects – the common law may be used to clear up any questions on which the legislation itself is silent or provide the generally accepted practice in a jurisdiction.

As mentioned above, case law is also an important source of law in that the court will consider a piece of legislation in a practical sense and create ways of interpreting same. Decisions of a court under English law create precedents which create a legal rule in itself which is to be followed when applying the law. Referring to case law and/ or common law principles may also be necessary to clear up any *lacunae* in the existing legislation.⁵

Further, in some States, the insolvency laws will need to be consistent with the overarching Constitution of the State, if applicable. For example, in South Africa, although the Constitution⁶ does not specifically deal with the insolvency (in a domestic or an international sense), any laws need to be consistent with it and the Bill of Rights contained therein. In other words, insolvency proceedings in South Africa, whether they are purely domestic in nature or taking place on a cross border basis, and the legislation applicable to these proceedings will need to be interpreted in light of the applicable constitutional provisions, and the proceeding must be a construction that promotes, the spirit, purport and objects of the Bill of Rights.⁷

It would also be beneficial to discuss general 'non-insolvency' law and how it may be relevant to insolvency law.

4

⁵ Module 1 Guidance Text supra note 1 at p19.

⁶ The Constitution of the Republic of South Africa, 1996 (hereinafter the "Constitution").

⁷ Section 39(2) of the Constitution.

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 raises three questions in an attempt to bring the "cross-border" aspects and the "insolvency" aspects together and in doing so rightly identifies the main issues or difficulties faced with the harmonisation or unification of insolvency law across various States. The three questions posed by Fletcher are:⁸

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

In trying to answer the questions posed, Boraine *et al*⁹ expressed the view that a good arguable case could be made that concurrent proceedings should be opened in each State where the insolvency of the entity is applicable. This allows each State to apply its own insolvency laws and *lex fori* rules. This would in turn have the effect that no or very limited extraterritorial effects would be granted to foreign proceedings. **What cooperation issues might arise regarding concurrent proceedings?**

It would seem to be that the questions raised by Fletcher, whilst attempting to create a unified system of insolvency law across various States, also raises certain issues which need to be considered, which include deciding which State comes out on top when deciding where to issue proceedings, especially where each State has its own laws and each state allows for proceedings to be issued. Notwithstanding this, even it was decided on where the insolvency proceedings should take place and what law would be applicable, nothing stops proceedings from also taking place in another State where the insolvency proceedings may be relevant (i.e. further creditors bring claims for assets situated in that State). In this case, how would one determine the effect that such foreign proceedings concluded in one State (which have full force and effect) would have on separate proceedings instituted in another State.

Dealing with the specific questions pose, I note that the first question deals with a situation where insolvency proceedings may take place in two different jurisdictions and the question is then in which State will the best results be achieved. The first question also gives rise to an ancillary question, namely whether proceedings may be opened in multiple States. Often proceedings may be brought in multiple jurisdictions and this brings to the fore a further issue to be considered as part of question one being how does one resolve concurrent proceedings taking place in two different jurisdictions to ensure that creditors are treated equally or *pari passu*. A creditor in one jurisdiction where the majority of the debtor's assets are may succeed in claiming more than a creditor in whose jurisdiction the debtor has no assets, thus making it harder for the second creditor to attach the assets in a foreign country. In trying to answer these questions, the second question raised by Fletcher becomes relevant as well. Deciding on what laws are applicable where multiple jurisdictions may be involved poses issues to how creditors are treated. For example, a States domestic laws may not effectively provide for regulation of insolvency where there are cross border aspects. Domestic laws also have an influence on creditor position and preferences affecting how various creditors would be treated based on where the insolvency proceedings are taking place.¹⁰

⁸ Module 1 Guidance Text *supra* note 1 at p42.

⁹ *Ibid.*

¹⁰ Module 1 Guidance Text *supra* note 1 at p41.

Where insolvency proceedings are commenced in various jurisdictions and where a unified or cooperative approach isn't followed, it becomes an issue as to which jurisdictions law should be applied leading to the most common issue of conflict of laws. The applicable law then becomes front and centre in the proceedings, rather than the actual insolvency issues facing the creditors and debtor.

Other questions which follow on from the above are:

- Would a foreign judgment have effect in another country – can it be enforced?
- If the assets are in different countries how do you attach them for distribution to creditors

Different jurisdictions have different structures for how proceedings are held and how enforcement takes place will also affect insolvency proceedings in particular with regards to enforcement and distribution.

4

Question 3.3 [maximum 5 marks]

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

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

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

An important case in cross-border insolvency law in relation to Cross-border Insolvency Agreements is the case of *Maxwell Communications Corporation plc*¹¹ which took place before the UNCITRAL Model Law on Cross-border Insolvency (“MLCBI”) was published.

Most insolvency regimes across the world set out anti-avoidance provisions in the insolvency law structures dealing with circumstances where before insolvency has become an issue, contracting parties do not unfairly or fraudulently contract to avoid all creditors being treated fairly if insolvency should develop at a later stage.¹² The *Maxwell* case is a good example of how cross-border insolvency proceedings between two States can be completed effectively despite differing legal systems and fora being applicable, and how cooperation between different courts and insolvency representatives can assist in ensuring a fair conclusion to a matter where there are multiple insolvency laws at play. The case involved a single debtor opening insolvency proceedings in both the United States and the UK. The debtor's assets were largely in the form of large companies in the US, whereas it was administered and had a majority of its financial affairs in the UK. The Courts in both jurisdictions proposed that the parties enter into an agreement regulating the exchange of information and resolution of conflicts were they arose. In the agreement reached, the parties set out the parameters as to how the proceedings would be run on a cross border basis and agreeing the terms between the US and UK insolvency practitioners. This ensured that the equality between creditors in

¹¹ As summarised in the UNCITRAL Practice Guide on Cross-border Insolvency Cooperation pp 128-129.

¹² Westbrook JL “The Lessons of Maxwell Communications” (1996) *Fordham Law Review* 64 2531.

both the US and the UK was upheld and that the debtor's interest were dissolved fairly across two jurisdictions. This case shows how effective Cross-border Insolvency Agreements can be in solving two of the fundamental difficulties in cross-border insolvency proceedings, namely the choice of law and choice of form.¹³ **There is scope to elaborate upon the goals and outcome of these actions**

Although both a plan of reorganization and scheme of arrangement were filed separately, they were mutually dependent and accordingly the courts treated them as single mechanism, consistent with the laws of both countries, for the reorganisation of the debtor. The Agreement instead of separating the assets for distribution by the two courts to different groups of creditors, pooled the assets together for distribution to all creditors. In accordance with the single distribution mechanism, creditors were then allowed to submit a claim in either jurisdiction.

The Maxwell case importantly required the court to raise the question of where is the home of the matter (the insolvency) in order to determine which law or forum should be applicable to the insolvency proceedings. Instead of attempting to answer this question as one or the other – the courts decided it was best to cooperate and this took the form of an agreement or "protocol" whereby it was agreed that the matter be deferred to English administration, however the US examiner, who was appointed by the US courts under US bankruptcy law, retained the power to consult and object to decisions made by the English administrator.

According to Westbrook, the cooperation displayed and agreed in the insolvency proceedings was fundamental to preserving the assets underlying the proceedings and which needed to be sold by ensuring that “potentially ruinous cost, and even more ruinous delay, through transnational litigation” was avoided.¹⁴

This answer displays a good understanding. There is some scope to elaborate.

4

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.

Question 4.1 [maximum 7 marks]

¹³ *Idem* at 2532.

¹⁴ *Ibid.*

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 first question relevant to this situation is whether the European Insolvency Regulation Recast (the "**Recast Regulation**") applies. On 31 December 2020, the UK ceased to be a Member State of the European Union and the Recast Regulation ceased to apply in the UK. In the abovementioned case, the main proceedings were begun in June 2020 which was during the transition period for Brexit and during which time the UK was treated for most purposes as if it were still an EU member state, and most EU law continued to apply to the UK (the "**Transition Period**"). Accordingly, the Recast Regulation was still applicable to insolvency proceedings opened in the UK at the time that the minor creditor opened insolvency proceedings in the UK against Rydell. The Recast Regulation was imported into English law by the European Union Withdrawal Act 2018 at the end of the transition period.¹⁵

Now that it has been ascertained the Recast Regulation applies, the second question is how it applies and it is relevant to look at the company's centre of main interests is ("**COMI**"). The Recast Regulation defines COMI as the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties. The Recast Regulation contains a presumption that the jurisdiction of a company's registered office is the jurisdiction of its COMI and that in order to rely on this presumption, the registered office must have been located in the same Member State for at least three months before the opening of proceedings, which should be ascertainable by a third party.¹⁶ In this case Rydell's COMI is said to be in the UK, presumably because it's incorporated in the UK and has its main seat of administration at its offices in the UK.

If a debtor's COMI is located in one EU Member State, insolvency proceedings can be opened in another EU Member State, if the debtor has an "*establishment*" there.¹⁷ Establishment is defined as a place of operations where the debtor carries out, or has carried out in the three months before the main insolvency proceedings, "a non-transitory economic activity with human means and assets".¹⁸ Following this definition under the Recast Regulation, practically, this means that secondary proceedings may be opened in a Member State either where a company has an establishment in that jurisdiction or where a company no longer has an establishment provided that the company had an establishment in that jurisdiction at the time the main proceedings were opened and establishment cannot be created after main proceedings have been opened.¹⁹ With this in mind, Fernz will be able to open secondary proceedings against Rydell in another EU Member State so long as it can prove that Rydell has an establishment in that State. To assess whether this is the case, Fernz would have to act quickly as this can only be assessed within 3 months following the institution of the main proceedings in the UK. Further information in respect of Rydell's business dealings, the debts owed to the various creditors, and the various factors to determine whether Rydell carried out

¹⁵ [Practical Law Restructuring and Insolvency](https://uk.practicallaw.thomsonreuters.com/w-007-7841) "The Recast Insolvency Regulation" accessed on 15 November 2021 at <https://uk.practicallaw.thomsonreuters.com/w-007-7841>.

¹⁶ Kar P and Crawford H, Kirkland & Ellis International LLP "Recast Insolvency Regulation: key changes for corporate restructurings" 4 May 2017, accessed on 15 November 2021 at <https://uk.practicallaw.thomsonreuters.com/2-641-0330>.

¹⁷ Paganuzzi D and Smith L, Kennedys LLP "Brexit and EU cross-border insolvency – what comes next?" 16 December 2020, accessed on 15 November 2021 at <https://kennedyslaw.com/thought-leadership/article/brexit-and-eu-cross-border-insolvency-what-comes-next/>.

¹⁸ Kar, *supra* note 15.

¹⁹ Kar, *supra* note 15.

a non-transitory economic activity with human means and assets in that Member State. Case law would need to be looked at in this regard (e.g. cases such as *Interedil Srl (in liquidation) v Fallimento Interedil Srl* and *Trillium (Nelson) Properties Limited v Office Metro Limited* may be referred to where this concept was fleshed out).

From the above it is clear that the Recast Regulation would apply to Rydell, as Rydell's COMI is in the UK which means the main proceedings will be those begun in the UK by the minor creditor on 18 June 2020. Practically this means:

- these proceedings will be recognised as the main proceedings in all other member states and will produce the same effects in all other member states as in the UK where the main proceedings are opened in Rydell's case;²⁰
- that the UK's insolvency laws will apply generally to the conduct of the insolvency in the absence of local proceedings in any particular Member State, where allowed;²¹
- that the secondary proceedings opened later by Fernz in another Member State will be restricted to the assets of Rydell located in that other Member State.²²

7

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.

Pursuant to the European Union (Withdrawal Agreement) Act 2020, at the end of the Transition Period (as defined in Question 4.1 above), the Recast Regulation will continue to apply to insolvency proceedings in the UK so long as main proceedings were opened before the end of the Transition Period. In this set of facts however, the main proceedings are opened after the Transition Period (on 18 June 2021 instead of 18 June 2020). This means that the Recast Regulation will not apply directly as per the answer in question 4.2. The effect of this is that there will be no EU instrument whereby Member States of the EU will be able or even obliged to apply the Recast Regulation's terms to UK insolvency proceedings. The automatic recognition which the Recast Regulation provides for in relation to insolvency proceedings, applicable law and insolvency officeholder status will no longer apply as between the UK and the EU.²³

Due to this lack of mutual recognition between UK and the EU in respect of cross-border insolvencies, the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) (implemented under the Cross-Border Insolvency Regulations 2006 (CBIR) in the UK) appears to be the only solution to facilitate cooperation.²⁴

What further information might be beneficial in this respect?

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?

²⁰ Article 19 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (hereinafter referred to as the Recast Regulation).

²¹ *Idem* at Article 20.

²² *Idem* at Article 3(2).

²³ Paganuzzi, *supra* note 16.

²⁴ Paganuzzi, *supra* note 16.

The European Union (Withdrawal Agreement) Act 2020 (the "**Withdrawal Agreement**"), provides that the Recast Regulation continued to apply to the UK as if the UK were still a Member State until the end of the Transition period (31 December 2020).

As the date of the proceedings are in any event after the end of the Transition Period (defined above), the Recast Regulation will not apply to coordinate the proceedings where proceedings have been brought against an EU entity in the UK. Automatic recognition in EU Member States under the Recast Regulation will generally only apply where UK insolvency proceedings are based on an entity's COMI being in the UK and such proceedings were opened before the end of the Transition Period. For any new insolvency proceedings opened from 1 January 2021, the benefits of automatic recognition contained in the Recast Regulation will no longer be applicable. Should UK insolvency officeholders require assistance in EU Member States, they will have to rely upon the domestic laws of those Member States. Where recognition is sought in Romania, Slovenia, Greece or Poland, the UK insolvency officeholder will be assisted by the adoption of the UNCITRAL Model Law on Cross-Border Insolvency ("**MLCBI**") in those countries. If the insolvency proceedings originate in the Member State, the EU insolvency office holder may apply for recognition in England under the MLCBI. The MLCBI as drafted does not require reciprocity so it does not matter whether the Member State in question has adopted the MLCBI or not, the MLCBI principles may still be used.

From 31 December 2020, some extent of the Recast Regulation was retained under English law in the form of the UK Insolvency (Amendment) (EU Exit) Regulations 2019 (the "**UK Insolvency Regulations**"). The UK Insolvency Regulations preserves certain aspects of the Recast Regulation such as the jurisdiction of the English courts to open insolvency proceedings in relation to debtors who have their COMI in England. This means that insolvency proceedings may still be opened in England where the debtor has its COMI in England, although those proceedings will not benefit from any automatic recognition in the EU as the UK Insolvency Regulations has no effect in the EU. As a consequence of this, the English law moratorium preventing the commencement of new civil proceedings against a debtor, for example, will no longer be given automatic effect in the EU and creditors in the EU may rush to enforce against any assets situated in the EU or even open main proceedings in the EU if they can persuade the court of an EU state that the debtor's COMI is in that state.²⁵

Features of the UK Insolvency Regulations which originate from EU law, such as COMI, will not necessarily be interpreted in the same way as those same aspects are in future interpreted by EU courts. In relation Rydell's COMI not being within the UK, this technically isn't an issue as the Recast Regulation is what sets out and requires a COMI for the opening of main proceedings and as already mentioned these proceedings are brought after the Transition Period, and accordingly the Recast Regulation does not apply. It may for English law purposes be appropriate to establish a centre of main interests as the concept stands in accordance with the local laws of the UK and the MLCBI and in doing so will be able to institute proceedings in the UK. However the issues, such as automatic recognition, set out above which become

²⁵ Whiteoak J, Pullen K, Chetwood J and Cooke A, Herbert Smith Freehills, "Cross-Border Insolvencies in the UK and EU – A Post-Brexit Guide" 4 February 2021, accessed on 15 November 2021 at <https://www.herbertsmithfreehills.com/insight/cross-border-insolvencies-in-the-uk-and-eu-%E2%80%93-a-post-brexit-guide>.

prevalent as a result of the disapplication of the Recast Regulation will still remain an obstacle for minor creditor commencing those formal insolvency proceedings in the UK.

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

1
Marks awarded 10 out of 15
TOTAL MARKS 41.5/50

*** End of Assessment ***