



**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 9 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.

Medieval England already recognised a collective procedure for the *pari passu* distribution of a debtor's assets among his creditors (Fletcher, *The Law of Insolvency*, 5<sup>th</sup> ed. 2017, at 1-018), but the reign of Elizabeth I saw two significant statutes which would shape the future of English insolvency law: the Fraudulent Conveyances Act (13 Eliz. 1, c.5) and the Bankrupts Act (13 Eliz. 1, c.7), each of 1571. The former addresses a mischief that persists today – transactions to defraud creditors or impede collection efforts. The latter introduced a range of procedures relating to bankruptcy, some of which have been retained today, e.g. the commencement of a bankruptcy process by petition (save for some areas of company law, most civil actions in England today are commenced by a claim form or application notice).

In 1705 the Statute of Ann introduced the concept of the statutory discharge of a debtor, thereby providing a route out of insolvency for a bankrupt (and an incentive to co-operate with creditors, since bankrupts still went to prison at that time). **It would be beneficial to elaborate on modern concepts of fresh start which were shaped by this discharge.**

Corresponding with enormous economic growth in Britain and the rapid expansion of trade (especially with Raj India, which was under British rule), the Bankruptcy Act 1883 introduced the office of the Official Receiver, which took over responsibility for administering the debtor's estate prior to the commencement of bankruptcy proceedings or a CVA. This arrangement has largely been retained in subsequent insolvency statutes, including the present day Insolvency Act 1986.

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.

The Corporate Insolvency and Governance Act 2020 entered into force on 26 June 2020, although some of its measures have retrospective effect from 1 March 2020. The 2020 Act implemented a mix of permanent and temporary measures to assist businesses during the Covid-19 pandemic. The permanent measures include (1) a fair and equitable restructuring plan to help viable companies struggling with debt obligations, and (2A) a free-standing moratorium which aims to give companies time to pursue a rescue or restructuring plan (this is separate from the moratorium in respect of issuing claims against a company in insolvency proceedings). The moratorium is overseen by an insolvency practitioner but day-to-day management of the company remains with the directors. The temporary measures include (2B) a temporary relaxation for the eligibility requirements for the aforementioned moratorium, and (3) a suspension of statutory demands between 1 March 2020 and 30 September 2021. Any statutory demand issued during this period will be invalid.

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.

A treaty is essentially a contract made between states. Treaties can contain binding obligations or mere expressions of support for a proposition; the negotiating states are the masters of its content. But most treaties will not be binding immediately upon agreement between the negotiators. This is for two reasons. Firstly, almost all treaties contain provisions about the steps which acceding states must take in order to bind themselves on the international plane. This is usually a combination of depositing a signed copy of the treaty at a specified location, and a minimum number of acceding states before the treaty will come into action. Secondly, the domestic law of most states provides that a treaty (even if signed and deposited, and effective on the international plane) will not be binding in domestic law unless and until the treaty is ratified by the national parliament (a constitutional doctrine known as “dualism”). The UK and Germany are two examples of dualist states.

“Soft law” refers to law which is not binding. This is usually because it is in the form of a code or guidance, and is contrasted with “hard law” which is binding. For example, the UNCITRAL Model Law on Cross-Border Insolvency is not binding unless and until the national legislator transposes the international provisions into national law and those provisions enter into force at a national level. That is an example of soft law being made into hard law by a national legislator. Guidance issued by international bodies, such as the World Bank, is another example of soft law.

There are some rare examples of treaties which impose binding obligations in respect of insolvency, e.g. the Nordic Convention 1933. The European Insolvency Regulation Recast (EIR Recast) is also a good example of hard insolvency law – although the EIR Recast is a somewhat idiosyncratic example as it is agreed by the organs of the EU itself (not by individual Member States) and derives its binding, “hard” effect from the underlying EU Treaties.

By contrast, there are a large number of examples of “soft” international insolvency law. A growing area recently has been the subject of co-operation and communication between different jurisdictions, e.g. JIN Guidelines and Modalities, the work of the ALI, the IBA Concordat, and so on.

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.

The sources of insolvency law will depend on the type of legal system which exist within a jurisdiction. In common law jurisdictions, the common law (whether through fundamental principles and conventions, or long-established case law) may provide a source of insolvency law – especially to fill lacunae left by statute. In civil law jurisdictions, by contrast, the domestic insolvency law will be set out in statute. Given the complexity of the subject matter, the specific procedures required and the relative modernity of many aspects of this area of law, most aspects of insolvency law are likely to be dealt with by statute in a common law jurisdiction, too.

When it comes to statute, some legislators have settled upon a single, unified statute covering all aspects of insolvency, e.g. the USA Bankruptcy Code 1978 and the UK Insolvency Act 1986, whereas others have created a patchwork of specific statutes dealing with distinct aspects of insolvency, e.g. Australia.



International law is an important source outside the domestic realm. I will not repeat the matters set out in question 2.3, but there are a number of international treaties and authoritative but non-binding documents (like those published by UNCITRAL) which may provide a source of law where a state has ratified or transposed those provisions, or provide guidance which judges may wish to take into account when adjudicating upon international insolvency proceedings. For Member States of the European Union, there is the Recast European Insolvency Regulation, which is directly effective in the domestic law of every Member State (and this Regulation has been largely retained by the UK following Brexit, with some modifications).

Beyond insolvency law, some areas of general domestic law (e.g. conflicts) are likely to have a significant impact in any international insolvency scenario, as well as case-specific areas of law (e.g. employment rights).

**You have answered this question very well.**  
**5**

### **Question 3.2 [maximum 5 marks]**

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

The three questions posed by Professor Fletcher are:

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

Fletcher, *Insolvency in Private International Law – National and International Approaches* (OUP, 2<sup>nd</sup> ed. 2005) pp 3-5

There is nothing unique to insolvency law here; questions of jurisdiction, applicable law and recognition and enforcement will arise in any situation where there is a conflict of laws, that is, where the domestic laws of more than one state are in play. The questions underscore the importance of co-operation and communication between jurisdictions where insolvency proceedings are in progress or where a creditor seeks to commence proceedings, because it is easy to see that individual courts might well choose their own national law in answer to question (2). **It would be beneficial to elaborate on the possibility of concurrent proceedings and how this can raise difficulties** That could duplicate expense in different jurisdictions and lead to a risk of inconsistent decisions and a “race to court”. The most successful harmonisation attempt to date has been the Recast European Insolvency Regulation, but the single market created a strong impetus to harmonise. It is unrealistic to imagine that there could be similar harmonisation outside the European context in the short to medium term future; states have repeatedly shown that they are happy to adopt a modified territorialism, but true universalism is not on the cards. Indeed, even the EIR Recast permits subsidiary proceedings in other jurisdictions.

**There is scope to elaborate, for example with respect to choice of law issues.**

**3.5**

### **Question 3.3 [maximum 5 marks]**

It is said that “co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*;

by UNICTRAL in their *Practice Guide on Cross-border Insolvency Agreements*; and by the Judicial Insolvency Network in their *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters...*”

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

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

England and Wales: *In re Maxwell Communication Corporation plc (No. 1)* [1992] B.C.C. 372.  
USA: *In re Maxwell Communication Corporation plc*, 93 F.3d 1036, 29 Bankr.Ct.Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084), and *Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992)*.

In 1999, Maxwell Communication Corporation plc (the transatlantic media empire founded by vanished fraudster, Robert Maxwell) became insolvent. Concurrent proceedings were opened in the USA (Chapter 11) and England (administration proceedings). While the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) had been agreed in 1997, the USA did not implement it domestically until 2005 and the UK until 2006, so at that time the MLCBI did not apply in either jurisdiction. The proceedings were co-ordinated under two *ad hoc* agreements which were approved by the courts in each jurisdiction.

Under those agreements, essentially, the US court deferred to the English court as the jurisdiction having the greatest interest in the outcome of the insolvency. The first agreement, concluded at the outset of the case, dealt with stabilisation and asset preservation, as well as allocating functions between the courts and deciding on a co-operative approach to administration, including expenses (see UNCITRAL, *Practical Guide on Cross-Border Insolvency Co-operation 2009*, p.52). The second agreement, concluded at the end of the proceedings, dealt with distribution to creditors and the close of proceedings (see UNCITRAL, *Practical Guide on Cross-Border Insolvency Co-operation 2009*, p.36).

A similar *ad hoc* approach has subsequently received support from the International Bar Association in its Concordat, although in the Maxwell case, the idea of a protocol originated with the judges, not counsel (see UNCITRAL, *Practical Guide on Cross-Border Insolvency Co-operation 2009*, p.128).

An *ad hoc* agreement will not be appropriate in every case. It takes time to negotiate an agreement and adds legal costs upfront, although the hope is that expense will be saved later in the process by reducing duplication between jurisdictions. There may also be a rule of national law which prevents the national court deferring to a foreign court on a particular matter.

**5**  
**Marks awarded 13.5 out of 15**

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

Rydell Co Ltd (Rydell) is an incorporated company with offices in the UK and throughout Europe. Its centre of main interest (COMI) is in the UK. Rydell supplies engine parts for large vehicles, including airplanes, and has had a downturn in business due to border closures and travel restrictions throughout the Covid-19 pandemic.

Rydell's main creditor is Fernz Co Ltd (Fernz) which is incorporated in a country in Europe that is a member of the EU. Fernz is considering commencing proceedings or pursuing other options with respect to recovering unpaid debts from Rydell.

There are a number of other creditors owed money by Rydell, who are located throughout different countries in Europe which are all members of the European Union.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

**Question 4.1 [maximum 7 marks]**

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

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

This answer and those which follow each assume that Rydell is incorporated in England and Wales.

The Recast European Insolvency Regulation (the "EIR Recast") applies to insolvency proceedings commenced in England and Wales on or before 11pm on 31 December 2020 (the impact of Brexit is discussed in response to the next question). The EIR Recast therefore governs this scenario.

Under Article 3(1) of the EIR Recast, the courts of the state where the debtor's "centre of main interests" (COMI) is located, have primary jurisdiction (the main proceedings). Secondary proceedings may be commenced in another state where the debtor has an "establishment", however. Establishment is defined Article 2(10) as "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".

The question states that Rydell has offices throughout Europe. The critical questions are geographic and temporal: (1) whether Rydell has an office (a place of operations which has supported non-transitory economic activity with human means and assets) in the jurisdiction in which Fernz wishes to commence insolvency proceedings; and (2) whether Rydell has been active at that office within the 3 months prior to commencing the secondary proceedings. This further information is required to fully consider the question.

If the answer to either of the above questions is no, the EIR Recast prevents Fernz from issuing proceedings there (Article 3(2): "only if").

If the answer to each of the above questions is yes, Fernz may commence secondary proceedings under the EIR Recast. Secondary proceedings are dealt with in Chapter III of the Regulation. Secondary proceedings are restricted to assets of the debtor which are located within the territory of the Member State in which the secondary proceedings are commenced (Article 34), so whether this is a suitable recovery mechanism for Fernz, will depend on the size of the pool of assets in that jurisdiction. Again, this is information which the question does not provide. The applicable law of the secondary proceedings is the law of the secondary jurisdiction (Article 35) and there is no automatic right to bring secondary proceedings (Article 38).

#### 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 UK ceased to be a Member State of the European Union at 11pm GMT on 31 January 2020. Under section 1 of the *European Union (Withdrawal) Act 2018*, European Union law ceased to apply in the UK from 11pm on 31 December 2020 (the end of the “transition period”) unless specifically retained under sections 2-4 of the 2018 Act. The EIR Recast has been largely retained, subject to amendments, by regulation 4 of the *Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/46)* as amended by the *Insolvency (Amendment) (EU Exit) Regulations 2020 (SI 2020/647)*. A UK court therefore has jurisdiction to open proceedings where (i) the debtor’s COMI is in the UK or (ii) the debtor has an establishment in the UK.

On that basis, the English court is able to proceed as before and open the proceedings. Any reciprocity between the UK and the EU has fallen away, however. As a result, there would be no bar under Article 3(2) of the EIR Recast to Fernz opening proceedings in its own jurisdiction. Any other potential bar (e.g. arising on the basis of comity or transposition of the UNICTRAL Model Law on Cross-Border Insolvency) would be a question of the domestic law of the state where Fernz intends to issue proceedings. That further information is required to fully consider the question.

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

2

#### Question 4.3 [maximum 5 marks]

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

As noted above, the *Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/46)* as amended by the *Insolvency (Amendment) (EU Exit) Regulations 2020 (SI 2020/647)*, now govern the opening of insolvency proceedings with an EU dimension in the UK.

The UK courts retain jurisdiction where the COMI is in the UK (as discussed in response to the previous question) or where the COMI is an EU Member State and there is an establishment in the UK. In addition (and extending the jurisdiction which the UK courts previously had under EIR Recast), the UK courts will also exercise jurisdiction where it would otherwise have grounds to open insolvency proceedings. This effectively extends the English court’s jurisdiction to wind up unregistered companies under Part V of the Insolvency Act 1986 and to place a company incorporated in an EEA state (or with its COMI there) into administration in the UK.

**It would be beneficial to discuss s221(5) Insolvency Act 1986 in detail and how it pertains to unregistered companies. It would also be beneficial to discuss ‘sufficient connection’ requirements.**

Further information is required to fully consider this question, e.g. does Rydell have an establishment in the UK? Does it have assets in the UK? On the face of it, it appears that in this variation of the question, Rydell has no connection at all with England. If that were the

case, it seems most unlikely that the English court would accept jurisdiction over a winding up petition or administration proceedings.

1

**Marks awarded 10 out of 15**

**TOTAL MARKS 42 /50**

**\* End of Assessment \***