



**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).
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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 Bankruptcy Act of 1542 codified the fundamental principles of the collective participation by creditors in insolvency proceedings and *pari passu* distribution amongst them. The concept of an insolvency process being a collective remedy, for the benefit of all creditors, continues to be a dominant influence in modern insolvency law today.

The Statute of Ann 1705 was the foundation of the notion of a statutory discharge (i.e. a mechanism whereby a debtor can be released from his obligations and have a 'fresh start'). While the discharge was not automatic under the Statute of Ann, as it is under English insolvency now (unless the discharge is delayed), the ability to be released from one's debts (with appropriate conditions) is now taken as a fundamental cornerstone of any modern insolvency system.

The Introduction of Chamberlain's three principles of good bankruptcy law, in the 19th century, which were (i) that the assets in an insolvency estate belong to the creditors, (ii) that the trustee appointed over the estate should be subject to official supervision and (iii) that there should be an independent examination of the debtor's conduct. While certain of the principles had previously been applied in English insolvency law, this condensing into clear principles formed the basis of how insolvency law developed in the UK through to the end of the 20th century. These are still core principles that guide the thinking as to how modern insolvency law operates today.

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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 UK introduced insolvency-related measures under the Corporate Governance and Insolvency Act 2020. These included:

1. Suspending the use of winding up petitions and statutory demands. This prevented creditors from issuing a winding up petition on the basis of an unpaid statutory demand during the 'relevant period', thereby effectively rendering demands issued during that period invalid. There was also a more broad-ranging restriction which prevented winding up petition being issued during the 'relevant period' unless the creditor had reasonable grounds for believing (i) coronavirus had not had an effect on the debtor company or (ii) the debtor company would have been in the same situation even if coronavirus had not had an effect on it. The relevant period commenced on 30 March 2020 and was brought to an end on 30 September 2021 (but separate restrictions on the presentation of statutory demands and winding up petitions were then put in place).
2. Suspending wrongful trading liability under Sections 214 and 246ZB of the Insolvency Act 1986, thereby giving directors some comfort that they would not face personal liability for trading insolvent companies throughout the pandemic (albeit there was no equivalent suspension of wider directors' duties liabilities).

3. Implementation of the new Schedule A1 moratorium rules, which allows companies that meet the relevant criteria to obtain the benefit of an initial 20-day moratorium (which can be extended). During the moratorium creditors are prevented from taking any action against the company to afford it breathing space to assess its options. Plans for the moratorium were in place before the pandemic. However, because of the pandemic the UK temporarily relaxed the eligibility criteria by allowing companies that had been in an insolvency process within the preceding 12 months to obtain the moratorium without a court application.

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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 instruments. They are often put in place by multi-lateral organisations and operate by states becoming signatories and thereby agreeing to bind themselves to affect the treaty policies and provisions into their domestic law.

Treaties are a form of soft law. **No treaties are ‘hard law’** Soft law is legislation which seeks to influence regulation but is not automatically binding. **Soft law is not ‘legislation’**. This contrasts hard law which is binding and is generally the status ascribed to the domestic law which implements international treaties.

In the context of insolvency rules, treaties and soft law can be used by multilateral organisations with specialist insolvency knowledge developing model laws which states can then adopt in their domestic legislation, with associated guidance. This can also include developing protocols which span jurisdictions to provide a framework for cooperation and communication across borders. Generally, this soft law focuses on unification of private international law.

The most successful and prevalent use of soft-law in cross border insolvency today has been the creation and widespread adoption of the United Nations Commission on International Trade Law’s (UNCITRAL’s) Model Law on Cross-Border Insolvency. The Model Law provided a framework which states could then implement into their domestic law (with or without modification). 85 States and a total of 118 jurisdictions have now implemented legislation based on the Model Law and these states therefore have, to a degree, a level of consistency in their cross-border insolvency rules. This allows insolvencies which span these jurisdictions to be dealt with in a more certain and uniform manner.

You appear to have conflated hard and soft law.

1.5

Marks awarded 7.5 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.

Insolvency law is mainly found in legislation or code. This can be by way of single, unified piece of insolvency legislation (such as the USA Bankruptcy Code, which applies at a federal level) or in multiple different pieces of statute which need to be read together to ascertain the

full picture of insolvency law within that state (for example, Australia, which has different legislation for personal and corporate insolvencies).

Such legislation or code will generally be put in place by a state's legislature, unless the state has acceded to automatically recognise some supra-national law. It can either be developed internally by a state (as will be the case for legislation designed to deal with domestic insolvencies) or it can adopt international soft law (such as the Cross-Border Insolvency Regulations 2006 whereby the UK enacted the UNCITRAL Model Law into its domestic legislation).

In many common law countries, case law is also a significant source of insolvency law. This law (developed by senior courts within a state) interacts with legislation and codes to fill any gaps that the legislature has not dealt with, or to establish the proper interpretation of those codified rules.

In addition to legislation and case law which is specifically developed to address insolvency issues, a state's wider legal regime is a significant and important source when addressing insolvency issues. For example, the law on ownership of property and trusts is very significant when considering the vesting of property in a bankruptcy context and the laws on lending and taking of security are often very significant in a corporate insolvency context.

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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 raised by Fletcher are:

1. In which jurisdictions may insolvency proceedings be opened?
2. What 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)?

These questions could lead to insolvency proceedings being opened concurrently in more than one state, with each state applying its own laws and with no or very limited extraterritorial considerations being taken into account. This is not a harmonious approach. However, they also form the basis of much of the analysis that is carried out when seeking to consider cross-border insolvency matters and how jurisdictions can operate harmoniously.

For example, question 1 relates to the choice of forum in which proceedings should be opened. This involves consideration of whether the court can, should and will deal with the matter. It requires an analysis of the nexus between the debtor's estate and the jurisdiction concerned to determine what is the most appropriate forum in all the circumstances.

Question 2 concerns what law the courts should apply (assuming they do adopt jurisdiction). Different countries take differing approaches to this question. In some states, their law will automatically apply but in common law countries that may be open to question. There may also be different laws applicable for different elements of the insolvency proceedings. For example, in England and Wales, if insolvency proceedings are ongoing the procedure will be governed by that state's domestic legislation (the Insolvency Act 1986) but certain discrete

points, such as the admittance of a creditors' proof of debt, may require the application of a foreign law. By appreciating that courts can apply the laws of a different jurisdiction, multiple insolvency proceedings in different proceedings can be avoided thereby reducing associated costs (to the benefit of creditors).

Question 3 is essentially a question of recognition and enforcement. If insolvency proceedings are opened in one state, or if a determination is made in insolvency proceedings in one state, what impact does that have on other states? This is fundamental to having a harmonious insolvency system as it is vital that the judgments of one court can be upheld and enforced where the relevant assets are located elsewhere.

If states have adopted cross-border insolvency legislation, based on multi-lateral instruments which seek to harmonise the position between states, the consideration of the three questions above should lead to an analysis of the debtor's position as a whole. It is therefore likely to lead to a more aligned universal approach. Conversely, states that adopt a more territorial approach have an ideology which will lead to answers that lead to matters being dealt with on a state-by-state basis with limit overlap across borders.

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Question 3.3 [maximum 5 marks]

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

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

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

The case of *Maxwell Communications Corporation Plc* is from 1991 and therefore pre-dates the Model Law.

The case concerned concurrent insolvency proceedings ongoing in two separate states in respect of a single debtor. Those states were the United States (where Chapter 11 bankruptcy proceedings had been commenced) and England (where administration proceedings had been commenced). Separate office holders had been appointed in each state. While their duties were broadly similar, they were clearly governed by different regimes.

At the suggestion of judges in each of the respective jurisdictions, the office holders entered into an insolvency agreement (known as an "Order and Protocol") which was designed to facilitate the transfer of information between the two processes and to resolve any conflicts.

There were two overarching goals within the agreement. The first was to maximise the value of the estate and the second was to harmonize proceedings to minimise expense, waste and jurisdictional conflict.

In relation to the court's role in each jurisdiction, the agreement provided for the United States courts to defer to decisions taken in the English proceedings.

The agreement also addressed how certain specific matters would be dealt with, such as retaining the debtor's management to allow it to continue to trade. It also governed how decisions going forward would be taken. The English office holder had to give prior notice to

the United States representative before taking any 'major decisions' (but were pre-authorised to take more 'day-to-day' decisions). The English office holders also were prohibited from taking certain actions unless they obtained the consent of the United States representatives. This included (i) appointing new directors or (ii) incurring a debt or a restructuring plan (in the case of (ii) with the US court also being able to provide such consent).

When the agreement was first put in place, certain issues were deliberately avoided to be resolved throughout the course of the insolvency. This included dealing with a process for agreeing distribution, which was later provided for in an extension to the agreement.

The Maxwell case was cited in the UNCITRAL Practice Guide as an example of a cross-border agreement and protocol. It is a clear example of how cooperation and coordination between states, their courts and their office holders can save costs and expense in the long run, which is in the best interests of creditors as a whole.

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Marks awarded 15 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.

The EIR Recast would apply to insolvency proceedings opened in the UK on 18 June 2020.

For the purposes of this answer, it is assumed that the insolvency proceedings were opened properly and in accordance with the temporary measures introduced in response to the Covid-19 pandemic under the Corporate Insolvency and Governance Act 2020. It is, however, noted that the usual insolvency relief of presenting a winding up petition on the basis a creditor was unable to pay its debts was heavily restricted during this time. It is further assumed that the mechanism used by Fernz to seek to open proceedings in another EU country is in accordance with any temporary restrictions put in place in that state.

As Rydell's COMI was in the UK, the insolvency proceedings opened in the UK would have been 'main proceedings' (Article 3(2), EIR Recast). This means that the UK would be the primary jurisdiction for the proceedings and primary jurisdiction is allocated to the UK courts.

However, this does not prevent Fernz from opening subsidiary territorial proceedings in other member states within the EU (as provided for under the EIR Recast) provided Rydell was operating an 'establishment' within that state. An establishment is defined in the EIR to mean "*any place of operations... where the debtor carries out a non-transitory economic activity with human means and assets*". Whether separate proceedings could therefore be opened in the other EU state would depend on factors such as whether Rydell has operated any premises from, or have any employees within, that state. We would therefore need this information. Such proximity is required to demonstrate that Rydell has a sufficient connection to the state within which Fernz wishes to commence insolvency proceedings for it to be appropriate for the courts in that state to assert jurisdiction.

As Fernz would be looking to open proceedings in a separate EU state after the main proceedings had been opened in the UK, any new proceedings would be known as 'secondary proceedings'. These secondary insolvency proceedings can expand beyond winding up proceedings and can include certain rescue proceedings. However, secondary proceedings will only govern the debtor's assets within the EU state in which they are opened (Article 3(2)). The assets within that state would therefore be dealt with on a territorial basis.

If secondary proceedings are opened, the EIR Recast contains a general obligation on different insolvency practitioners appointed in respect of main and secondary proceedings to coordinate and cooperate with each other. The respective office holders in each state would therefore need to act accordingly (e.g. by sharing information). Likewise, the courts in the state of the main and secondary proceedings are obliged to cooperate with each other (to the extent not incompatible with local rules).

As an alternative to seeking to open secondary proceedings, Fernz could request that the UK office holder agrees to give an undertaking to their court (being the UK court) to treat it (and potentially other foreign creditors) under the same laws they would be treated in their state (Article 36). This departs from the standard position whereby the law applicable to insolvency proceedings is the law of the state in which they are opened (Article 7). Such an undertaking can open 'synthetic' secondary proceedings, which would result in Fernz being treated the same as it would have been had the secondary proceedings been opened, but without incurring the associated cost of putting in place a different liquidator.

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.

Yes. The EIR Recast applied to insolvency proceedings commenced in the UK before 11pm on 31 December 2020. Insolvency proceedings opened on 18 June 2021 would therefore not fall within its scope (the Recast Insolvency Regulation would apply instead).

The key differences in Fernz seeking to open proceedings in separate state on 18 June 2020 would be:

1. The UK proceedings would not be designated 'main proceedings' and the relevant EU member state's proceedings may not be classed as 'secondary proceedings'; and

2. Cooperation between the UK courts and the relevant EU members state would be governed by each respective state's domestic legislation. In the UK, that would include (i) the Cross-Border Insolvency Regulations 2006 (whereby the UK enacted the UNCITRAL Model Law) and (ii) section 426 of the Insolvency Act 1986.

It would be beneficial to discuss the MLCBI in some further detail and what further information might be relevant.

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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?

Insolvency proceedings within the EU would still be governed by the EIR Recast. Main proceedings could therefore be opened in the state of Rydell's COMI and secondary proceedings in countries within which it has an establishment.

The relevant legislation to determine whether a minor creditor could bring insolvency proceedings against a company in the UK would be section 220 of the Insolvency Act 1986, which provides the court with jurisdiction to wind up a company that is not registered in the United Kingdom.

Pursuant to section 221(5), unregistered companies can be wound up by the court if (a) the company is dissolved, has ceased to carry on business, or is carrying on business for the purpose of winding up its affairs; (b) the company is unable to pay its debts or (c) the court is of the opinion it is just and equitable to wind the company up.

The scope of section 221 has been narrowed by English case law (including the *Re Latreefers Inc* [2001] BCC 174 (CA)), such that the jurisdiction to wind up unregistered companies will only be exercised if there is a 'sufficient connection' between the debtor company and England and Wales. The principles in underpinning whether there is such a nexus are that:

- there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of the company having assets within the jurisdiction;
- there must be a real possibility, if a winding-up order is made, of benefit to those applying for a winding up order; and
- one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.

For proceedings to be opened in the UK, the minor creditor would therefore need to demonstrate the above principles are met – for example, by showing that it is located within the UK and that it would benefit from having a new liquidator in the UK, as opposed to simply seeking to deal with the liquidator already appointed in the EU member state. This may be the case if there are assets within the jurisdiction which a foreign liquidator cannot readily realise.

If proceedings insolvency proceedings are also ongoing in another jurisdiction, section 426 of the Insolvency Act 1986 may also be relevant by allowing the foreign liquidators' appointment to be recognised (instead of appointing domestic liquidators in the UK).

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Marks awarded 14 out of 15

TOTAL MARKS 46.5/50

*** End of Assessment ***