SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment** for **Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202122-545.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1570. Select the **most accurate response** to this statement from (a) – (d) below.

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.2

English insolvency law was not affected by the Covid-19 pandemic to date. Select the **most accurate response** to this statement from (a) – (d) below.

(a) This statement is correct since the UK decided to merely provide financial aid to financially troubled entities and individuals.

(b) This statement is correct since the legislative reform process in the UK is too slow to effect amendments to an elaborate piece of legislation such as its Insolvency Act of 1986.

(c) This statement is correct since the English insolvency law already provided special rules to deal with extreme socio-economic situations like those brought about by global disasters such as the Covid-19 pandemic.

(d) The statement is incorrect since the UK did review parts of its insolvency rules and amended some, amongst other things, to deal with the negative economic fall out of the pandemic.

Question 1.3

Since the Dutch insolvency system is rather outdated when compared with English or American insolvency / bankruptcy laws, it does not provide for a modern scheme of arrangement that could be used to reorganise or rescue a company in distress. Select the **most accurate response** to this statement from (a) – (d) below.

(a) This statement is correct since the Dutch insolvency system does not provide for a discharge of debt and without such a dispensation in place, a scheme of arrangement will not be functional.

(b) This statement is correct since the Dutch government has not approved such legislation yet.

(c) This statement is incorrect since the Dutch in fact introduced new legislation in this regard in 2000 already.

(d) This statement is incorrect since the Dutch quite recently adopted legislation in this regard and it became operational on 1 January 2021.

Question 1.4

There is no real need for the reform and establishment of a more uniform set of cross-border insolvency rules since the courts of the various States around the globe are well-equipped to deal with such issues by way of judicial discretion and since the broad rules of local insolvency legal systems are largely the same. Select the **most accurate response** to this statement from (a) – (d) below.

(a) This statement is correct since courts cooperating across jurisdictional borders are familiar with global insolvency principles.

(b) This statement is correct since courts across the globe are inclined to apply comity as a principle to assist foreign estate representatives to deal with cross-border insolvency matters in a coherent way.

(c) The statement is not correct since both local insolvency systems as well as cross-border insolvency rules differ quite significantly in many respects.

(d) This statement is correct since apart from the wide discretion that judges in general have, the UNCITRAL Model Law on Cross-Border Insolvency has been adopted by the majority of UN Member States, hence these rules are well-known to judges across the globe.

Question 1.5

Universalism has become the main approach regarding the application of cross-border insolvency rules around the globe since the majority of States follow a strict adherence to comity. Select the **most accurate response** to this statement from (a) – (d) below.

(a) The statement is not correct because very few States allow insolvent estate representatives to deal with assets of a foreign debtor situated in their own jurisdiction without some form of a (prior) local procedure to recognise the foreign insolvency proceeding.

(b) The statement is correct because universality has become the norm in the majority of States in cross-border insolvency matters since the introduction of the UNCITRAL Model Law on Cross-Border Insolvency in 1997.

(c) The statement is correct because the prevalent approach of modified territoriality amounts to a universal embracement of universalism amongst the majority of States around the globe.

(d) The statement is not correct because important international policy-making bodies such as the International Monetary Fund (IMF), the World Bank Group and the United Nations still support strong territoriality in cases of cross-border insolvency cases.

Question 1.6

A number of initiatives have been pursued in international insolvency in order to stimulate debate and to develop international best practice standards. Which of the following statements is **most accurate** regarding the World Bank's *Principles for Effective Insolvency and Creditor / Debtor Regimes*?

(a) They were developed in 2000 and are the international best practice standards for insolvency regimes.

(b) They were recently revised in 2021 and, together with the UNCITRAL Legislative Guide, form the international best practice standard for insolvency regimes.

(c) They were recently revised in 2020 and, together with the UNCITRAL Model Law on Cross- border Insolvency, form the international best practice standard for insolvency regimes.

(d) They were initially released in 2011 and are the international best practice standards for insolvency regimes.

Question 1.7

Which of the following **does not** focus on communication among States in international insolvencies?

(a) ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases.

(b) The JIN Guidelines.

(c) The JIN Modalities.

(d) The Nordic Convention 1933.

Question 1.8

Which of the following **best describes** the fundamental legal issues that arise in an international legal problem?

(a) Choice of forum, choice of law, and choice of jurisdiction.

(b) Choice of forum, recognition and effect accorded foreign proceedings in the same matter, and choice of law.

(c) Choice of effect, choice of recognition, and choice of law.

(d) Choice of forum, recognition and effect accorded foreign proceedings in the same matter, and choice of parties.

Question 1.9

Which of the following statements **best describes** the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*?

(a) It is not intended to be prescriptive and is intended to provide information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases could be facilitated by cross-border co-operation.

(b) It is prescriptive and provides information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases must be facilitated by cross-border co-operation.

(c) It is prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.

(d) It is not prescriptive and provides information for judges on practical aspects of recognition and enforcement in cross-border insolvency cases.

Question 1.10

What **best describes** the overriding objective of the ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases?

(a) To interfere with the independent exercise of jurisdiction by the relevant States' courts and ensure an effective outcome.

(b) In urgent situations only, to interfere with the independent exercise of jurisdiction by the relevant States' courts in order to ensure an effective outcome.

(c) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than one State through communications among the States involved.

(d) To enhance co-ordination and harmonisation of insolvency proceedings that involve more than three States through communications among the States involved.

Marks Awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate three significant (historical) developments regarding debt collection procedures in English law that shaped the way of thinking concerning modern insolvency law.

The earliest English law in the insolvency area applied only to merchants who could be declared bankrupt and hard sentences were imposed on those who could not pay. These roots were a collective debt collection mechanism as opposed to a mechanism for forgiving debts. The first English Bankruptcy Act of 1542 viewed debtors as quasi-criminals. However it also introduced the concept of a supervisory body for the bankruptcy called commissioners. At this stage in legal development their role was to proceed against a trading debtor who had committed a number of actions which were considered to be defrauding his or her creditors. This act established two fundamentals principals of modern insolvency law; firstly the concepts of collective participation by creditors in a bankruptcy, and, secondly, the concept of pari passu distribution amongst the creditors from available assets.
The Act of Elizabeth passed in 1570 was the first English law designed specifically as a bankruptcy statute rather than an anti-fraud measure. Under this Act the Lord Chancellor replaced the commissioners as the supervisor of the estate and creditors could petition the Lord Chancellor to open and supervise a bankruptcy process. **It would be beneficial to elaborate upon how this shaped modern insolvency law thinking.**
The Statute of Anne passed in 1705 was an important milestone in the development of English bankruptcy law in that it established the principal of statutory discharge of a debtor if the Lord Chancellor's commissioners confirmed that the debtor has 'conformed' and co-operated during the bankruptcy. **It would be beneficial to elaborate upon modern thinking of 'fresh start' and how it derived from this development.**
Joseph Chamberlain was appointed to the Lord Chancellorship in 1881 and he set out three core principals of insolvency law. These can be summed up as: firstly, the principal of creditor in possession; secondly, the principal of judicial oversight of insolvency practitioners, and, thirdly and lastly, the ability to review antecedent transactions for probity. Chamberlain passed the 1883 Bankruptcy Act which enshrined these principals and established the Official Receiver as the chief administrator of debtor estates. The 1883 Act remained the source of the legal architecture of English insolvency law into the late 20C when it was replaced by the widely reforming Insolvency Act 1986. **It would be beneficial to explain how it shaped modern insolvency thinking by elaborating further.**

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 UK government introduced the following three measure that relate to insolvency:

- It temporarily suspended the wrongful trading rules to remove the threat of directors incurring personal liability from 1 March 2020 under section 12 of the Corporate Insolvency and Governance Act 2020 (CIGA).
- Under CIGA Section 10 the UK Government introduced provisions providing that certain statutory demands being ineffective; it prohibits a winding up petition being brought against a company on the grounds it is unable to pay its debts where the inability is as a result of COVID.
- The Miscellaneous Insolvency Practice Direction 2021 which applies to notices of intention to appoint filed by a company or its directors; notices of appointment of an

Administrator filed by a company or its directors; and, notices filed by qualifying floating charge holders. The PD allows of e-filing in respect of each of these notices in the light of COVID restrictions.

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 an agreement between states which, once ratified (if required by each state), forms 'hard law' for those states. An example of a Treaty is the Treaty on the European Union, once ratified by member states it qualifies of the supremacy of domestic law and subordinates it to EU law in a number of ways. It is hard law in each member state and is enforceable through the EU's judicial organisations and via the mechanisms built into the EU Treaty for infractions.

Soft law is not 'law' in the sense it is not enforceable but it is internationally agreed 'approaches' to particular legal issues. Soft law may be used as a source of influence for domestic legal consideration or may be the basis for drafting and incorporation of law into domestic law. There have been a number of examples of 'soft law' initiatives that have influenced domestic legislation in their areas of debate. The Hague Conference on Private International Law first convened in 1893 and is now a permanent diplomatic conference with its own secretariat. It has produced a wide range of instruments on matters of PIL. Some of these have been directly ratified by member states (and so are 'hard 'aw' for those states). Even where the relevant instrument has not been ratified each of used as a benchmark for PIL in that area having great influence. The most widely used source of 'soft law' has been the work of the various chapter of the United Nationals Commission on International Trade Law (UNCITRAL). The Model Law subject to Part 2 of this course being a very good example of soft law in that it is the primary guide for states considering issues of cross border recognition. It may be implemented by states in its entirety or only partially with amendment or used as a source for domestic legislation. The key point being that it is soft law as it required adoption or being used as a source, it is not law in and of itself anywhere.

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.

As a generality there are three principal sources of law in a state:
1 – domestic legislation
2 – if the legal system permits the use of judicial precedent (such as the English common law system), the judicial decisions
3 – treaties between states which are ratified and incorporate into domestic law

Sources of bankruptcy and insolvency law within domestic legislation can be multifold. Generally more sophisticated systems have different legislative footing between insolvency bankruptcy and corporate insolvency. In relation to corporate insolvency, as well as legislation specifically related to insolvency (such as the English Insolvency Act 1986 and the new CIGA), general corporate legislation will touch on insolvency as matters relating to corporate existence are generally found under corporate legislation (for example the general powers to establish and dissolve an English company are found in the Companies Act and the same Act provides the statutory footing for priority of registerable security). The legislation and process

related to legal process in a state will also effect insolvency laws. More sophisticated systems will have court rules that specifically relate to insolvency related cases and some, such as the USA and England, have courts and judges dedicated to hearing only Insolvency related work. Where there are legal forum's and adjudicators specifically dedicated to insolvency hearings you may also have a government funded service that supports that bench and will influence how it operates and the various sources of the law interact, such a service exists in England and Wales. Clearly smaller jurisdictions such as Hong Kong (where I practice) do not have the scale for such systems but we do have two judges who specialise in insolvency work albeit not exclusively.
In common law systems the approach of judges to insolvency law and its interactions are the key to how the system operates across all sources. In civil law systems the lack of precedence may result in less conformity of application of the various sources of law relating to insolvency. However the existence of civil service organisations in mature civil law jurisdictions help to build a conformity of application between the various sources within civil law countries.

Treaties are directly applicable (once ratified) in domestic law and usually prevail over domestic legislation. The best example of recent times is the EU Treaty and consequential subsidiary legislation which includes the EIR Recast. The Treaty and the EU Regulations are directly effective in domestic state legislation meaning that for example the EIR Recast prevails over domestic legislation and is part of individual state law.

5

Question 3.2 [maximum 5 marks]

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

Fletcher asks the following three questions:

- Where should proceedings be opened?
- What law should apply to the various aspects of a case?
- What effect will a proceeding have outside the state where the proceedings are taking place?

Fletcher first asks about the forum for proceedings, this raises issues of what is a proper choice of forum for insolvency proceedings, both in terms of the choice by the applicant and the choice to be seized of a matter by the court applied to. This needs the court to look at the level of connection to that jurisdiction of the parties to the dispute. Usually the first issue to be looked at by a court at the start of an insolvency related matter is whether to start or commence an insolvency proceeding. It may also require a consideration of other jurisdictions in relation to connected proceedings or issues arising outside of the jurisdiction. **It would be beneficial to elaborate upon the possibility of concurrent proceedings and the difficulties that could arise as a result.**
Secondly hew asks what law to apply. The fact that a particular court may take jurisdiction under the first of his questions does not automatically mean that the law of that jurisdiction should apply to all issues. Common law systems generally use the law of the jurisdiction of the court unless a party invokes the relevance of another law. If that happens then the court would ask the parties to plead the relevant law for it to make decisions. It is easy to see in modern commercial disputes how another law might be relevant given that laws of contracts tend to vary depending on relevance of performance and bargaining powers. In civil law systems issues of other laws are applied whether or not the parties raise them.
Thirdly, Fletcher asks the extra territorial effect of proceedings in one state as regards their effect in another state. These are issues of PIL: the issue of recognition of a judgment given in a court of a different state and the issue of how a judgement given on one state is enforced

in another. We can see in the context of the EIR Recast how this is a very pertinent issue because the nature of the proceedings in another state directly governs whether or not a proceeding and its judgement would be given recognition under the EIR Recast in another state. The issue of 'recognition' is really the first question that arises under any cross-border insolvency case, "is the foreign proceeding one which we recognise?' From that question flows the cross border results.

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 UNCITRAL 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.

A prominent example of a cross border cooperation agreement arose in the insolvency of Maxwell Communications plc. In that case the company had significant assets and liabilities in both England and Wales and the USA. Concurrent insolvency proceedings took place in both jurisdictions with a Chapter 11 bankruptcy taking place in the USA and administration under the Insolvency Act 1986 taking place in England and Wales. Insolvency professionals were appointed in both the US and England and Wales each purporting to have a supervisory role over the same debtor, Maxwell Communications. The presiding judges over each process suggested to the respective insolvency professionals that they should consider a way in which to work in a coordinated manner so that information could be exchanged and where possible conflicts avoided. In the subsequent agreement between the two insolvency professionals two goals were made, to maximise overall value of the Maxwell estate and to avoid waste, expense and conflict between the processes. In principal, the US proceedings would defer to the English proceedings once certain thresholds were met. A number of specific agreements were reached on certain actions. Many other issues were not dealt with in the protocol as a recognition of the fluidity of the situation and the need to deal with these issues as they arose. The Maxwell Protocol predated the publishing of the UNCITRAL Model Laws in the area of insolvency but in practice it operated in a very similar way to the intentions and mechanics of the Model Law 1.

There is some scope to elaborate.

4.5

Marks awarded 13 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 first set of proceedings were opened prior to the end of the transitional period relating to UK's exit from the EU and therefore the EIR Recast remains in effect between the UK and the EU states.
According to EIR Recast article 1 the EIR Recast applies to any public collective proceedings based on laws relating to insolvency and which relate to the purpose of rescuing, adjusting the debt of, reorganisation or liquidation. Annex A lists the proceedings covered; so far at the UK is concerned Annex A lists the main insolvency proceedings. Clearly we would need to check that the proceedings actually opened by the minor creditor fall within Annex A. Assuming that they do then EIR Recast would prima facie apply.
EIR Recast separates proceedings into main proceedings and independent proceedings or secondary proceedings. Article 3(1) EIR Recast provides that the member state in which the debtor's centre of main interests are situate shall have primary jurisdiction to open insolvency proceedings. Other proceedings may be opened in other member states of the EU in order to deal with issues within that second member state and such proceedings are secondary proceedings. In the fact pattern of this question the COMI of Rydell is the UK and so its main proceedings are those opened in the UK by the minor creditor. Fernz may open secondary proceedings in another EU state where Rydell has an 'establishment' (Article 3(2)). An establishment is a place where a person carries out 'any place of operations in a non-transitory economic activity with human means and assets'. Whether Fernz is able to open secondary proceedings will therefore depend on whether Rydell does carry on such activity in that second member state. This will need further information to ascertain.
The opening of secondary proceedings by Fernz in another member state would qualify the primary universality of the UK proceedings by creating an insolvency estate for Rydell in that other state and applying that other EU state's laws to those proceedings. Such secondary proceeding can only have effect in the relevant member state in which secondary proceedings were opened and not in any other EU state (where the relevant UK laws would apply). Whether Fernz is advised to open secondary proceedings would need an understanding of the assets of Rydell, if there are no meaningful assets in that second state there will be no point in opening secondary proceedings. Secondly Fernz needs to consider whether opening of secondary proceedings would change the outcome on a distribution from that which they would have received as a participant in the main proceedings in the UK. If it does not then the expense of participating in a second proceedings would not make commercial sense for Fernz.

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.

Post 11pm on 31 December 2020 EIR Recast no longer applies in the UK. Therefore the automatic recognition of UK proceedings in EU member states (and vice versa) no longer applies. Therefore there is no automatic recognition of the UK proceedings in other member states. Advice would need to be taken in the UK in relation to the effect of Rydell being subject to proceedings in the EU and advice would need to be taken in the relevant EU state on any recognition that may be given to the UK Proceedings. Of relevance in this analysis is whether the relevant state in the EU has adopted the UNCITRAL Model Law 1. The UK has adopted the UNCITRAL Model Law and the UK adopting regulations do not require mutual adoption by the other state. Therefore, so far as the proceedings in the UK are concerned, any practitioner appointed in the other state may seek recognition under the Model Law (as adopted in the UK) if the relevant requirements are met. To ascertain whether the requirements are met we will need an understanding of the proceedings in the EU State. As, according to the facts, an insolvency proceedings has been opened in the UK those proceedings should come within Model Law 1 if it has been adopted by the relevant EU State.

It would be beneficial to obtain information regarding the MLCBI and local laws.

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?

Whether a proceeding could be started in the UK would be a question of UK law as the date in the question is after the transition period from the UK exit from the EU has ended and EIR Recast would have no effect.

The Act relevant for commencement of formal insolvency proceedings in England Wales is the Insolvency Act 1986. This Act was amended by the Insolvency Act 2000, the Enterprise Act 2002 and CIGA.

The two main issues are whether the English court would consider itself to have jurisdiction over an unregistered entity with a COMI outside of the jurisdiction. I understand that the English courts take a broad and encompassing view of 'connection' to the English jurisdiction in considering whether to take jurisdiction in a matter. This is a question of fact, as Rydell is 'unregistered' consideration needs to be had as to the type of entity it is, it may or may not come within the English insolvency law as a result.

The second issue is the suspension of certain aspects of the insolvency laws by CIGA. In particular the block on winding up petitions where the debtor could show that its solvency issues arose as a part of COVID. From the facts that appears to be the case here. If no winding up petition is capable of being issued the grounds for an English insolvency are not met and the court will not order the appointment of an insolvency practitioner.

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 42.5 OUT OF 50

End of Assessment *