



**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.

There are three significant (historical) developments in English law that have shaped the thinking concerning modern insolvency laws. These are:

1. **The First was the English Bankruptcy Act of 1542-** It provided a form of compulsory sequestration that was to be applied to a dishonest and absconding debtor. This enactment viewed debtors as quasi-criminals/offenders. It also provided for the appointment of a body of commissioners who, on a creditor's application, could proceed against a debtor who fled from the country, who barricaded himself in his house, or who neglected paying his debts or otherwise defrauded his debtors. ***The fundamental principle of this Act was that in the case of a fraudulent debtor, there should be a compulsory administration and distribution on the basis of equality amongst all the creditors.*** Through the Act of 1542, two fundamental principles of modern insolvency law were derived. These were:

- ***Collective participation by the creditors;***
- ***A pari passu distribution of the proceeds from the available assets amongst the creditors.***

2. The second event that led to the development of modern insolvency law was the enactment of the **Act of 1570 that transferred the jurisdiction of supervision of the estate from commissioners to the Lord Chancellor.** The Act of 1570 allowed the initiation of a bankruptcy proceeding by a creditor following an "act of bankruptcy" by the debtor. The Creditors could then petition the Lord Chancellor to convene a bankruptcy meeting, who could then also appoint bankruptcy commissioners to supervise the process. The Commissioner was then empowered to examine the debtor's property and transactions and the debtor was obligated to transfer his or her property to the commissioners who in turn could summon the persons and even commit them to prison. The modern concept of having a Committee of Creditors as in the Indian Insolvency and Bankruptcy Code is based upon this principle. The role of Lord Chancellor can be equated to that of a Resolution Professional or Administrator of the assets that oversees the procedure and conduct of the insolvency process.

3. The third major enactment was the **Statute of Ann of 1705** which **introduced the notion of a statutory discharge** for the very first time. The discharge was not an automatic

entitlement and the commissioners had to confirm that the debtor had “conformed” and had cooperated during the proceedings. **It would be beneficial to elaborate on how this shaped modern insolvency law principles such as ‘fresh start’**

4. Lastly, the Act of 1883 which is viewed as the foundation of present system of modern English bankruptcy law. **The Act of 1883 led to the creation of the office of the Official Receiver with the responsibility of administering the debtor’s estate before the commencement of the bankruptcy procedure or of the friendly agreement with the creditors.** The machinery for dealing with bankruptcy matters created by the Act of 1883 essentially remains in force in present-day insolvency law.

Therefore, one can say that these events have led to the establishment of certain basic principles of conduct of the insolvency and bankruptcy process.

3

### **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 U.K. government introduced the Corporate Insolvency and Governance Act, 2020, which included measures designed to help businesses through the COVID-19 pandemic and featured important substantive reforms to the U.K. restructuring law, whose introduction has been accelerated by the crisis. Some of these steps were:

1. Creditors frequently pressed companies to pay debts by issuing statutory demands followed by winding up petitions. The Act prevented a creditor from issuing a winding up petition based on a statutory demand initially issued between 1 March and 30 June 2020 and the deadline was extended subsequently to enable more relief until July 2021.

2. New provisions were added to the Companies Act 2006 to add a new type of scheme of arrangement specifically for companies facing financial difficulty. Importantly, it will enable a scheme to be implemented without the approval of classes of creditors or members who do not have an economic interest in the company (i.e., those who are "out of the money"). The requirement that a majority in number of creditors/members voting in a class must approve a scheme has not been included. The sole requirement is that holders representing 75% in value of those voting approve the scheme. A further important difference from the existing scheme jurisdiction was that the court will be able to sanction a scheme where one or more classes have not approved it, provided that-



- (a) none of the dissenting class or classes would be worse off under the scheme than under the likely alternative scenario (e.g., liquidation) and
- (b) the scheme has been approved by at least one class that would receive a payment or have an economic interest under the alternative scenario.

3. A new moratorium was introduced that did not require a company to begin any other insolvency proceedings. Thus, the company would remain under the control of the directors' but an insolvency practitioner would be involved as a "monitor." A moratorium will be available where a company is, or is likely to become, unable to pay its debts and it is likely that the moratorium would result in the rescue of the company. A moratorium will commence by the company filing papers at court and the initial moratorium period will be 20 business days, though this can be extended with creditor approval for up to a year in total. During the moratorium, no insolvency proceedings may be commenced except by the company and the secretary of state. Secured creditors will not be able to take enforcement action(s) and floating charges will not crystallise. The company also will be required to meet its trading liabilities incurred during the moratorium as they fall due.

In India, the Central Government suspended the initiation of any kind of insolvency proceedings by the financial as well as operational creditors for a year with effect from 24.03.2020 for a period of one year in order to curb any kind of bankruptcy arising due to the economic fallout of Covid-19 pandemic. Needless to say, the provisions relating to Voluntary Liquidation were not suspended.

3

**Question 2.3 [maximum 4 marks]**

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

Treaties and conventions form a part of the "hard law". Classic public international law instruments such as treaties and conventions to which states become signatories and as such bind themselves and alter their domestic law appear to present the formation of a cross-border insolvency rule in the State. As a part of the domestic laws enforceable in the courts, these may form a part of the State's "hard law" on insolvency. From the 19<sup>th</sup> century onwards, more modern forms of bilateral treaties or conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions involving the State appear and present a sort of regulation for cross border insolvency.

In 1990, the Council of Europe concluded a Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe Treaty Series No. 136. While it was not enforced, it had an important influence on insolvency laws amongst the member states.

The European Insolvency Regulation (EIR), 2000, drafted by the European Union was another instrument that can be considered as a cornerstone of a modern insolvency regime applicable for the EU member states. The current multilateral instrument on international insolvency within the European Union is Regulation (EU) 2015/848. This presents hard law on cross border insolvency and can be used by member jurisdictions.

On the other hand, multi-lateral organizations have focused on the soft law approach to streamline procedures and enable the harmonization of international insolvency law issues.

The adoption of a Model Treaty on Bankruptcy at the 1925 Hague Convention was an initiative to unify private international law related to insolvency. The Hague Convention in fact coordinated with the UNCITRAL to formulate the UNCITRAL Legislative Guide on Insolvency Law (2004). The UNCITRAL presents a more successful approach to insolvency since it formulated the Model Law on Cross Border Insolvency in 1997. It was a draft law that the UNCITRAL encouraged the member states to adopt with or without modification. Needless to say, it has garnered attention and support from a lot of jurisdictions and is also part of the Model Cross Border Insolvency framework in countries such as India which are yet to have the law of cross border insolvency notified.

**There is scope to elaborate upon the difference between 'hard' and 'soft' law.**

**3**

**Marks awarded 9 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.

First and foremost, the domestic laws of any state form the primary source of any insolvency law. Such a law is expected to clearly deal with issues relating to jurisdiction, matters of significance, rules of procedure, authorities and officials involved. The domestic laws reign supreme in the country of home jurisdiction and should not encourage clashes of any sort whatsoever. This, as the experts would call it becomes the "hard law" of the land. The

domestic, individual and corporate insolvency laws concentrate on debtors operating within the state and do not deal with cross-border dimensions.

The next comes the international law. In the case of international insolvency issues, which may be thought of as a sub-set of international trade law, various states have ratified or acceded to treaties or conventions which import into their domestic laws principles to resolve insolvency issues that have a connection with another State. If this has not occurred, then the State's own private international law principles will determine the three pertinent questions of forum, recognition and enforcement and most importantly, the choice of insolvency or related law that will resolve the matter for the debtor, creditors or other parties involved.

Then come the Treaties and Conventions to which a State is signatory to and bind themselves accordingly. The domestic laws are drafted and adapted or reworked in order to comply with the conventions. This is followed by the adoption and usage of soft law techniques such as the UNCITRAL Legislative Guide on Insolvency that present a model law and can be adapted as it is or suited to the domestic needs and issues for effective compliance.

Lastly, the sources include International Instruments such as Best Practices Guide on various aspects of insolvency law. Some of the examples include *Principles for Effective Insolvency and Creditor/Debtor Regimes developed by the World Bank, European Principles and Best Practices Guide for Insolvency Office Holders and documents and Best Practices Guide issued by organizations such as Insol International.*

The laws are coherent and do not conflict due to the exclusive jurisdiction and applicability of their provisions.

**Your answer could have instead been structured to discuss the sources of law across all States and to recognise how and why there may be differences between certain States. It would be beneficial to discuss insolvency legislation as either a code or multiplicity of legislation, common law in common law countries as filling any gaps in law, and general law and its relevance and impact upon insolvency law.**

**.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 raises three pertinent questions as far as cross border insolvency is concerned.***

***1. In which jurisdiction may the 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)?***

As far as jurisdiction is concerned, it is important to determine whether a court can hear a matter or not. This requires examination of the connection with the jurisdiction of the parties or the dispute. For example, in an insolvency resulting in liquidation of the debtor's estate rather than a reorganization or restructuring, other disputed issues may arise. These may involve foreign elements such as assets or examinable corporate offices in another state.

The second issue is more complex. If a local court decides to hear a matter, it will then have to decide upon which law to apply. Different systems of law adopt different approaches to the question. Proof of foreign law is a question of fact whereas in civil law systems, foreign law is presumed to be a question of law to be applied regardless of whether it is pleaded by the parties or not. Any cross-border model law must aim to answer such questions.

Where there is a foreign judgement or decree on similar issues, private international law raises issues of "recognition" and "enforcement" or "effect". A judgement pronounced by a foreign court in a matter related to insolvency can be significant- it can dictate initiation of insolvency proceedings against a debtor (including an order for liquidation) or an order affecting the assets of the debtor during the course of an insolvency proceeding (such as an order directing that a third party pay monies to the estate following a successful action setting aside a voidable disposition. This distinction has led to the development of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgements (2018) following the decision of the UK Supreme Court in ***Rubin vs. Eurofinance SA; New Cap Reinsurance Corp (in liq) vs. Grant [2013] 1 AC 236.***

**In answering the three questions posed by Fletcher, could insolvency proceedings possibly be opened concurrently in more than one State? What cooperation difficulties does this raise ?**

### **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.**

***Case Title: Maxwell Communication Corporation PLC***

**Case Citation:** 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), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991)

Brief Facts of the case are as follows:

The case of Maxwell Communication Corporation plc. involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two States, each charged with a similar responsibility.

***The United States and English judges independently raised with their respective counsel the idea that an insolvency agreement between the two administrations could resolve conflicts and facilitate the exchange of information. Under the agreement, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present.***

Some of the specificities of the agreement was as follows:

1. Some existing management would be retained in the interests of maintaining the debtor's going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors;
2. The English insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court;
3. The English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions.

Many issues were purposely left out of the agreement to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the agreement.

Therefore, this case law presents an accurate and relevant description of mutual agreements that were entered into by parties prior to the enactment of a law on cross border insolvency.

5

Marks awarded 9.5 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.

The law which is applicable in the state where the insolvency proceedings are first initiated is the law which ultimately determines the conditions of the business for which insolvency was initiated and also helps in determining their conduct or subsequent closure. This is subject to specific provisions dealing with rights in rem; set-off; immoveable property; employment; and other such types of detrimental acts. The concept emerges from the established principle of “Centre of Main Interest” or “COMI”. In Rydell’s case, the COMI is United Kingdom (UK).

The European Insolvency Regulation Recast applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

I) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; or

II) the assets and affairs of a debtor are subject to control or supervision by a court; or

(III) ***There is a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).***

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

This Regulation shall not apply to proceedings concerning:

(a) insurance undertakings;

(b) credit institutions;

(c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or

(d) collective investment undertakings.

In my view, the European Insolvency Regulation Recast would apply to the case of Rydell and the questions that one must need to ask would be similar to the ones asked by Fletcher in his study on any modern insolvency law.

Fletcher's question:

- In which jurisdiction must the insolvency proceedings be initiated?
- Which system will rule the elements of enforcement and procedure?
- International effects of the orders passed by a particular forum and how it impacts the enforcement.

**This sub-question requires consideration of timing of the proceedings and the application of the EIR Recast to UK proceedings. It also requires consideration of secondary proceedings and ‘establishment’.**

1

**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 Corporate Insolvency and Governance Act of 2020 granted a time-limited exemption for “small suppliers” to help them mitigate the effects of the COVID-19 crisis. Such suppliers were exempt if their distressed counterparty entered the relevant insolvency procedure within one month of the Act coming into force (a period now extended until 30 June 2021). Assuming Fernz is a small creditor, we have reason to believe that it can be small supplier for Rydell. A supplier is categorised as “small” if it generally satisfies at least two of the following criteria: (i) annual turnover of less than £10.2 million; (ii) balance sheet assets of £5.1 million or less; and (iii) no more than 50 employees.

Since it is given that Fernz is a minor creditor, the answer would change depending primarily on the date when Rydell went under insolvency as that would ultimately help in determining whether it was granted by the relief of Covid-19 or not.

**It would also be beneficial to consider the timing of the proceedings and when UK proceedings were no longer subject to the EIR Recast.**

1

**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 per Section 221(5) of the Insolvency Act of 1986, a court ordered winding-up of unregistered companies may be conducted in the following circumstances:

- a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- b) if the company is unable to pay its debts;



c) if the court is of the opinion that it is just and equitable that the company should be wound-up.

Therefore, in view of this provision in the UK Insolvency Act of 1986, if Frenz is able to comply with these provisions, it can clearly initiate formal proceedings in the UK against Rydell.

**It would also be beneficial to consider 'sufficient connection' requirements**

**3**

**Marks awarded 5 out of 15**

**TOTAL MARKS 32.5/50**

**\* End of Assessment \***