



**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.

1. The introduction of statutory discharge

The Statute of Ann of 1705 introduced many principles still applicable today in English insolvency law, including the principle of discharge – where the debtor is released from claims that were or could have been the basis for insolvency proceedings. Every English insolvency law since the Statute of Ann has included provisions for discharge and it is a useful tool in insolvency law.

It would be beneficial to elaborate on how this development has shaped modern thinking pertaining to ‘fresh start’ for insolvents.

2. The 1883 Act – investigative procedures and officialism

The 1883 Act introduced mechanisms that emphasised fair procedures and adequate supervision. For example, the Act introduced mechanisms for an investigation into the debtor’s state of affairs and the causes of bankruptcy through a procedure called ‘public examination.’ The Act also emphasised the importance of official supervision of the bankruptcy process. “Officialism” found momentum in the late 1880s especially through certain principles proposed by Joseph Chamberlain which he found essential to effective bankruptcy proceedings.

The mechanisms introduced by the 1883 Act for investigating the affairs of the debtor and the reasons for the debtor’s bankruptcy, as well as the importance of official supervision to ensure fairness in the insolvency procedure are principles that still shape the application of modern insolvency law. **How so?**

3. The Cork Committee

In 1977 a Review Committee on Insolvency Law and Practice was established to perform a comprehensive review of British insolvency law under the Chairmanship of Sir Kenneth Cork (the Cork Committee). In its Final Report, the Committee made several recommendations for amendments to the insolvency laws of the UK. For example, it proposed new procedures as alternatives to winding up and advocated for dealing with individual cases having regard to its own circumstances. The Report was the impetus for the Insolvency Act of 1986, which is still applicable in the UK and which emphasises a “rescue culture”, transparency and accountability.

1977 is more a modern development rather than a historical one.

1.5

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 introduced the Corporate Insolvency and Governance Act in 2020 to deal with the negative economic fall out of the pandemic. Three of the measures introduced under the Act include:

1. The temporary suspension of statutory demands and winding up petitions where the debtor's financial difficulties were attributed to the pandemic

All statutory demands issued between 1 March 2020 and 30 September 2020 are void. In all winding up petitions commenced presented between 1 March and 30 September 2020, the court will assess whether the company is unable to pay its debt due to the pandemic, and if so, the court will not grant a winding up order.

2. The temporary suspension of the wrongful trading regime

The Act requires that the court should not assume that the director is responsible for the worsening financial position of a company or its creditors between the period of 1 March 2020 and 30 September 2020 and also between 26 November 2020 and 30 June 2021.

3. The introduction of a new restructuring plan

The new restructuring plan is similar to a scheme of arrangement where the company can propose a new restructuring plan to its members and creditors. The plan will be binding on all creditors and members so long as the plan is approved by a sufficient number of creditors and members, and is sanctioned by the court.

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

Treaties are international agreements entered into between or among States. Treaties (also known as Conventions, or sometimes Protocols) can be bilateral (between two states) or multilateral (among three or more States).

Treaties can be used to establish cross-border insolvency rules in States. They have been commonly used in this way by States that share a similar economic or geographic region. These States will use treaties to introduce rules aimed at accomplishing harmonisation of domestic insolvency laws, a unification of choice of law rules, and to promote co-operation and co-ordination in the recognition and enforcement of judgments/orders from other member states.

Multilateral treaties have been the most commonly used mechanism for accomplishing this. For example, the Nordic Convention on Bankruptcy entered among Norway, Sweden, Denmark, Iceland and Finland provide rules for the recognition and enforcement of insolvency adjudications in these States. Similarly, the Montevideo Treaties of 1889 and 1940 as well as the Havana Convention on Private International Law 1928, are general treaties entered into by certain Latin American countries, and these treaties contain chapters providing for cross-border insolvency rules.

Additionally, several African countries who form part of the States of the Organization for Harmonization of Business Law in Africa (OHBLA) treaty, recently adopted the UNCITRAL Model Law on Cross-Border Insolvency, thus creating uniform cross-border insolvency rules in those States.

Soft law

Soft law generally refers to international instruments that are not treaties/conventions and have no binding effect on States (quasi-legal instruments). While soft laws are not binding, they contain principles and “rules” which affect the interpretation and application of “hard law” and can be used to “regulate” insolvency proceedings.

Soft law in cross-border insolvency includes international instruments crafted by international intergovernmental or professional bodies such as UNCIRTRAL, UNIDROIT, and the IBA. These bodies use soft law, similar to treaties, to encourage States to implement harmonised cross-border insolvency rules. For example, the UNCITRAL Model Law on Cross-Border Insolvency, is a model domestic legislation that States are encouraged to enact, with or without modification. Several States have implemented the model law (with or without modifications) including the UK, Canada and Australia.

Also, soft law may be used as a source of information and guidance when amending domestic laws and regulations on cross-border insolvency. The UNCITRAL Legislative Guide on Insolvency Law– to which the IBA contributed and endorsed – while it is not binding, has been referred to by domestic bodies when drafting or amending laws and legislations on cross-border insolvency. Similarly, the World bank also introduced the Principles of Effective Insolvency and Creditor/Debtor Regimes. Sometimes the IMF and World Bank will require States seeking IMF loans to enact reforms to their insolvency laws in a manner consistent with these principles. In this way, these bodies use soft law to create unification of insolvency law.

4
Marks awarded 8.5 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.

Sources of Law

There are several possible sources of insolvency laws in any State. These may be broken down into two major categories, which are

1. Domestic law (legislation/codes, common law, and “general principles of law”); and
2. International law:
 - a. Treaties, conventions, binding regulations
 - b. Soft law

These rules may interact with each other in various ways. To show how these may interact, I will mainly refer the possible sources in the UK as an example. There are numerous possible sources of insolvency law in the UK that may be applicable to an insolvency proceeding. These include:

3. Domestic legislation
4. The common law on insolvency law as well as other general principles of law
5. EU law – and in particular The EU Insolvency Regulation (Recast)
6. The UNCITRAL Model Law on Cross-Border Insolvency
7. Soft law instruments

Domestic laws

When considering the various possible sources of insolvency laws in any State, one must first consider the domestic laws of that State. Domestic legislation may provide rules for commercial and personal insolvency. In some cases, both will be covered by a single legislation, such as in the UK where the Insolvency Act of 1986, deals with both consumer and commercial bankruptcy.

Many times there are more than one piece of legislation covering an insolvency matter, and so it can become very technical. For example, in the UK the 1986 Insolvency Act must be read alongside the Insolvency Act 2000 which amended provisions of the 1986 Act. Additionally, regard must be had to the Debt Relief Order 2009, and its amendments in 2016. Finally, one may consider the Corporate Insolvency and Governance Act 2020, which introduced measures meant to deal with the negative economic fallout of the coronavirus pandemic.

Common law and general principles of law

Apart from legislation, common law States will also look to the common law for guidance on insolvency rules. Most common law jurisdictions will have a body of judicial precedents applicable to bankruptcy cases. Additionally, the courts may also refer to what is often called “general principles of law” which although not strictly “insolvency law”, may influence the application of insolvency rules.

The common law relevant to insolvency law was generally developed as a means of interpreting domestic legislation and for filling gaps in legislation. There is therefore an

inevitable interaction between these two sources of insolvency law in common law States such as the UK.

International Conventions/Treaties/ Binding Agreements

Some States have ratified international conventions that provide rules applicable to insolvency. For example, the Montevideo Treaty of 1889, to which some Latin American countries have ratified, provides rules that allocate jurisdiction in cross-border insolvency cases based on the debtor's commercial domicile. Similarly, the Nordic Convention of 1933 between Denmark, Finland, Norway, Iceland and Sweden provides rules that provides for local recognition of legislative, judicial and executive acts relating to insolvency proceedings in another Member state.

In other cases, such as in Europe, Regulations made pursuant to authority emanating from a treaty will regulate cross-border insolvency among Member States. In the EU, this is done via the European Union's Council's European Insolvency Regulations (Recast) – the EIR Recast.

The UK was a member of the European Union up to 11pm 31 January 2020 (the transition date). Prior to that the State was bound by the EIR Recast. There is therefore a question to be determined in some cross-border insolvency cases in the UK, whether domestic insolvency laws apply or whether EU law applies.

Soft Law

While not binding, soft law will also a relevant source of law. This is because some domestic laws, especially some modern insolvency legislations, tend to be influenced by soft law instruments from intergovernmental or professional bodies. In some cases, as with the UNCITRAL Model Law on Cross-Border Insolvency, the soft law would have been adopted, in whole or part as domestic law. When this occurs, the domestic courts will need to refer to the jurisprudence that developed in respect of the Mode Law and its provisions.

The UK's adoption of the Model Law (soft law) causes an interesting analysis in cross border insolvency cases. In the UK one would need to consider the 1986 Insolvency Act (which still applies to certain countries), the EIR Recast (which applies for insolvency cases commenced within a certain period) and common law.

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 3 pertinent 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 the different aspects of the case?
3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)

Where proceedings may be opened?

Given its nature, it is unsurprising that a determination as to where the proceedings will be opened in cross-border insolvency cases is a pertinent question. Fletcher’s first question is therefore one of choice of forum.

The choice of forum in cross-border insolvency cases will generally turn on the relationship between the jurisdiction on the one hand and the dispute and the parties on the other. The essential question that a potential forum State will have to determine is whether it, or another State, is the most appropriate forum for hearing and determining the matter. This is because the choice of forum also raises issues as to whether the potential forum State can exercise jurisdiction in matters that could arise in the insolvency proceedings.

The question whether a specific State is the most appropriate forum for an insolvency proceeding concerning the liquidation of the debtor’s estate is an important one. This is because when the court orders that a company be put in liquidation, numerous other issues will follow. These other issues may have international dimensions, which the court may have to hear and determine. Additionally, the court may have to determine the effect of any foreign proceedings. The court must therefore consider whether it has jurisdiction to hear and determine not only the initial commencement proceedings but also future proceedings relating to the debtor’s insolvent estate.

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 ?

What country’s law should apply?

Given its cross-border nature, an insolvency case will raise the possibility of the application of more than one State’s law to resolving the matter. Generally, in determining what country’s laws will apply, each state will apply its own rules, including its own choice of law rules, to determining this question. However, there may be cases where international treaties provide specific choice of law rules which assists in determining the applicable law.

Choice of law issues in common law States only arise when a party invokes it and so the default position is that the law of the forum applies. Proof of foreign will be considered a

question of fact and therefore there will need to be expert opinion going to proving the foreign law when parties wish to rely on it.

In civil law States, on the other hand, foreign law is presumed to be a question of law and will be applied whether or not it is raised by the parties.

The recognition and effect of the foreign proceedings

Given its, cross-border nature, an insolvency related judgment will need to be recognisable and enforceable, not only in the forum State, but also in other States – including States where other assets of the debtor are located.

This pertinent question therefore concerns one State recognising the final and conclusive judgment or orders of another State – recognising its res judicata effect.

The State in which someone is trying to have a judgment recognised and enforced will raise questions relating to the competency of the court that issued the judgment (including whether it had jurisdiction, whether it applied the correct law etc), the kind of judgment and the effects of the judgment.

The UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments 2018 was introduced to address the varying rules applicable to recognition and enforcement of insolvency judgments, and need for efficient means of recognition and enforcement. The Model Law aims to assist States with the establishment of a uniform framework for the recognition and enforcement of insolvent-related judgments.

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 co-operation and co-ordination of cross-border insolvency proceedings among courts from differing States is crucial to the effective resolution of concurrent cross-border insolvency cases. While the Model Law encourages court approval of co-ordination agreements, this actually pre-dates the Model Law.

Co-ordination agreements are useful because they save costs and ensure the effective handling of cross-border insolvency cases. The benefits of these agreements were realised from as early as 1991 in the case concerning the insolvency of Maxwell Communications plc. In that case, there was a co-ordination agreement between the UK and USA insolvency courts. Insolvency proceedings had commenced in the UK (with the company being placed under administration), and concurrent proceedings were commenced in New York (under Chapter 11 of the Bankruptcy Code). Administrators had been appointed in the UK and Examiners had been appointed in New York.

Although the US and UK insolvency laws are based on the fair distribution of the debtor's assets among its creditors, there were significant differences between the legal regimes. Because of this lack of harmonization of insolvency rules, co-ordination agreements were needed. Both courts therefore agreed to an operating agreement with the goal of (i) stabilisation and asset preservation and (ii) to minimize costs, waste and conflicts.

Initially, the UK court deferred to the jurisdiction of the USA court, with the agreement of the parties that the use of USA law in this case would be territorial. However, upon consideration of the applicable law, the USA court concluded that the law of the jurisdiction having the greatest interest in the outcome of the controversy was that of the UK. It was agreed between the parties that the USA court would defer to the UK court so long as certain requirements were met.

The agreement between the courts included several matters, for example:

- (a) That existing management would be retained in the company so as to maintain the company's going value, consistent with USA Chapter 11 rules. However, since the UK

rules required independent insolvency practitioners to be appointed, it was agreed that the UK administrators could, with approval from the US examiners, select new and independent directors;

- (b) The UK administrators could only incur debt or file a reorganisation plan with the consent of the USA examiners;
- (c) The UK administrators would give notice before undertaking major transactions;

A second agreement was reached between the parties at the end of the proceedings to address distribution to creditors and closure of the proceedings.

The Maxwell case therefore supports the position that even before the Model Law, courts and parties had been willing to co-operate in seeking the effective resolution of cross-border insolvency.

5

Marks awarded 14 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 applicable legal principles

It is first important to set out the legal principles under the EIR Recast and UK law.

The EIR Recast only applies to proceedings in respect of a debtor whose COMI is located in the European Union. Article 3(1) of the EIR Recast provides that the courts of the Member State within the territory of which the COMI is situated shall have jurisdiction to open insolvency proceedings. This is known as the main insolvency proceedings.

Under the EIR Recast the main proceedings have universal scope and are aimed at encompassing all the debtor's assets. However, the EIR Recast also permits secondary insolvency proceedings, which can be opened in other Member States and which can be run concurrently to the main insolvency proceedings.

Secondary insolvency proceedings may, however, only be opened in the Member States where the debtor has an establishment. The secondary proceedings will also be limited to the assets located in that State.

An establishment under the EIR Recast is defined in Article 2 to mean any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

The UK left the European Union on 31 December 2020. Under the Insolvency (Amendment) (Exit) Regulations 2019, the EIR Recast will apply to all cross-border insolvency proceedings opened in the UK before 31 December 2020. Additionally, under the 2019 Regulations, the UK may open proceedings after 31 December 2020 where the COMI was the UK or the debtor has an establishment in the UK.

Whether the EIR Recast applies

The COMI of Rydell is the UK and so the main proceedings were, prima facie, properly opened in the UK. The proceedings commenced before 31 December 2020, before Brexit, and so the UK was still a part of the EU and the EIR Recast would therefore still apply to the proceedings.

Further information

Before Fernz can open secondary proceedings in another Member State we would need further information as to:

- a. Whether Rydell has an establishment in the Member State in which Fernz intends to open proceedings in. In particular, we would need to know
 - i. Whether Rydell carries out operations in that State or has done so within the last 3 months of the proceedings being opened in the UK; and
 - ii. Whether those operations/activities are non-transitory economic activity with human means and assets
- b. The value of Rydell's assets located in that Member State – this is important as the secondary proceedings would be limited to this value;
- c. Whether the debt is secured or unsecured

Since the proceedings were commenced within the period of 1 March 2020 and 30 September 2020, the court will assess whether the company is unable to pay its debt due to the pandemic, and if so, the court will not grant a winding up order pursuant to the Corporate Insolvency and Governance Act in 2020. We will therefore need more information into how the pandemic affected Rydell.

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.

The 18 June 2021 Proceedings

If proceedings were opened on 18 June 2021, one would have to consider whether the EIR Recast applies or the domestic insolvency laws of the UK apply.

As noted above, under the Insolvency (Amendment) (Exit) Regulations 2019, the EIR will apply to insolvency proceedings opened in the UK before 31 December 2020, but even after this date, the UK may open proceedings where the COMI was the UK or the debtor has an establishment in the UK. On this basis it is therefore possible for the 18 June 2021 proceedings to be opened in the UK.

However, such proceedings would not benefit from the automatic recognition of its judgments/orders in other Member States of the European Union. This is because the Brexit deal between the UK and the EU did not deal with cross-border insolvencies.

Since the proceedings were opened outside the relevant period specified in the Corporate Insolvency and Governance Act in 2020, the court would not consider the impact of the covid 19 pandemic on the winding up order. However, the court may consider the effects of the pandemic in terms of other relief specified in the Act.

Could the MLCBI apply? What further information might be beneficial?

2.5

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?

In such a case, the EIR would not apply because proceedings were commenced after 31 December 2020.

Regard would have to be had to the provisions of the Insolvency (Amendment) (Exit) Regulations 2019. As noted above, the UK may open proceedings after 31 December 2020 where the COMI was the UK or the debtor has an establishment in the UK. Since the COMI was not the UK, the only basis for which the UK may open proceedings is if Rydell had an establishment in the UK.

One would also need to consider section 221(5) of the Insolvency Act of 1986, which provides that the UK courts can wind up an unregistered company where:

- a. The company is dissolved or has ceased to carry on business, or carrying on business only for the purpose of winding up its affairs;
- b. The company is unable to pay its debts;
- c. The court is of the opinion that the company should be wound up on just and equitable grounds.

It is important to note that an unregistered company under section 221(5) of the Insolvency Act includes a foreign company, such as Rydell in this case.

The UK courts have established that the court will only have jurisdiction where in respect of (a) above where

- a. There is a sufficient connection with the UK – there is not necessarily a requirement for assets within the jurisdiction
- b. There is a realistic possibility of benefit to those applying for the wind up of the company; and
- c. One or more persons interested in the distribution of the assets of the company must be a person over whom the court can exercise jurisdiction.

Therefore, section 221(5) and the case law applicable to it, could be used by a minor creditor to commence formal proceedings in the UK, provided that the UK has a sufficient connection to insolvency and there is a realistic benefit to the minor creditor over whom the UK court has jurisdiction.

Regard may also be had to Corporate Insolvency and Governance Act in 2020 which deals with the negative economic fall out of the covid-19 pandemic in the UK and may be applicable.

5
Marks awarded 14.5 out of 15
TOTAL MARKS 47/50

*** End of Assessment ***