



**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 major developments in English debt collection procedures which shaped modern insolvency law are as follows:

The act of 1542:

Ref : (Reeves, p.381, in University of Pennsylvania Law Review, 1919, p.14),(INSOL International 2021 p.5)

This act introduced the compulsory sequestration of a dishonest or absconding debtor.

The fundamental principle of this act was that in the cases of fraudulent debtors, there should be a compulsory administration and distribution on the basis of a statutable equity among all creditors. It introduced the appointment of a body of commissioners who could act on a creditor's application.

Some of the fundamentals of modern insolvency law have the origins in the 1542 act:

- Summary collection or realization of assets

- Collective participation of creditors

- Administration or distribution for the benefit of all creditors on pari-passu basis

The Act of Elizabeth 1570:

This was the first act designed as a true bankruptcy statute rather than a fraud prevention law. It relates specifically to merchants or traders. The management of the bankrupt's property and affairs for the benefit of creditors, was entrusted to the persons appointed by the Lord Chancellor by commission, the commissioner could summon people for questioning and also imprison. **It would be beneficial to elaborate upon how this shaped modern insolvency thinking.**

The Statute of Ann of 1705

This statute introduced the notion of a statutory discharge. This was not automatic and was granted upon the adjudication but the commissioners and that the bankrupt had conformed to the law. **It would be beneficial to elaborate upon how this shaped modern insolvency thinking, for example by discussing modern thinking of 'fresh start'.**

The introduction of the office of the Official Receiver in 1883, with the responsibility of administering the debtor's estate before the commencement of the bankruptcy procedure or of the friendly agreement with creditors. **It would be beneficial to elaborate upon how this shaped modern insolvency thinking.**

Ref: (University of Pennsylvania Law Review, 1999, pp.16-18), (INSOL International, 2021, pp. 5-6)

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.

Ref: (Hobbs et al., 2020), (GOV.UK, 2020)

The UK Corporate Insolvency and Governance Act 2020 was passed in May 2020 and set out reforms both temporary and permanent.

The temporary reforms put forward were to help companies during the corona virus pandemic.

The main purposes of the act are:

1. New restructuring procedure will be introduced
New Corporate restructuring tools to give companies breathing space to increase their chances of survival. This is similar to the schemes of arrangement and requires 75% in value of creditors to approve
2. New Moratorium rules
A company can benefit from a moratorium from creditor action and get breathing space while they prepare a rescue plan and without entering into administration
3. Termination clauses in suppliers' contracts will cease on insolvency.
Companies going through rescue process can continue to receive supplies by prohibiting use of termination clauses by suppliers which kick in on insolvency, also prohibit them from asking additional payments during this period
4. Suspension of liability for wrongful trading
The act suspends parts of the insolvency law to support directors to continue trading through the emergency without issues of personal liability and protect the company from creditor action
5. Prohibition of filing statutory demand
The creditors cannot file statutory demands and winding up petitions for coronavirus related debts
6. Amend company Law for Filing and AGM
Temporary easement for statutory filings and conduct of AGM. General meetings of companies can be held by any other means, even if not permitted in the articles of association.

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.

Solutions for societal issues may not always take the form of written laws. Many problems are resolved through other means such as moral sanctions, education, information and negotiations outside of the legal system.

Similarly, at the international level, apart from legal, basic requirements of behaviour emerge from morality, courtesy and social norms and customs. Compliance of such norms may be expected, and violations sanctioned.

Soft law is more of a social norm rather than a legal one. It is generally a written international instrument other than a treaty, containing the norms or standards of expected behaviour and the principles on which they are based.

Common forms of soft laws include resolutions of international organisations, concluding texts of summits, recommendation of treaty bodies Memorandum of understanding, guidelines on code of conduct adopted.

Soft Law can be categorised as follows:

Primary- Texts not adopted in treaty form that are addressed to the international community. Such instruments can declare new norms, which are later incorporated in the treaty.

Secondary- Recommendations and comments of International Supervisory organs and committees, jurisprudence of courts, decisions of special rapporteurs, resolutions of political organs if International organisations.

The non-binding instruments have limited juridical effect, they play an important role in International relations and the development of International law. Non-binding norms are a precursor to treaties and international law. Non-binding instruments are faster to adopt and easier to change for technical matters which may need to be revised later.

Treaties: these are binding formal agreements, contract, or other written instruments that establish obligations between two or more subjects of international law (primarily states and international organizations). Establishment of treaties are governed by their own rules (Malcolm Shaw, 2021).

Soft law texts are linked in one way or another to binding instruments and can become hard law through adoptions by the states in their domestic laws. These are then enforceable in the domestic courts. These may then form a part of the States's hard law on Insolvency.

More success has been achieved by Soft law options than hard law in insolvency law issues. The most successful soft law option has been undertaken by UNCITRAL. The model law on Cross Border insolvency (MLCBI). This did not take the form of a treaty or convention, but a draft Model law, legislation to be adopted with or without modification. A number of states have adopted this into their laws for Cross border Insolvency.

(Shelton, 2008) (Mevorach, 2018) and (INSOL International, 2021, p.47)

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.

Insolvency laws in any state depend on many laws that apply and these may be found in legislations or codes. Systems based on common law may rely on common law principles to plug the lacunae that may exist in the legislation (INSOL International, 2021, p.19).

A single Bankruptcy legislation is used by some systems to cover all the aspects of bankruptcy. E.g. USA- the bankruptcy Code of 1978 applies across USA, as it is a federal legislation. In other systems multiplicity of legislation exists and these must be read in conjunction with the Bankruptcy legislation and each other, to understand the impact on different aspects of bankruptcy and understand the overall system. E.g. when there are separate laws for individual bankruptcy and another statute for the winding up of companies.

Many legal principles forming part of General law (non- bankruptcy law) will have effect on the insolvency matters. These are not found in the bankruptcy legislation but have a huge impact on the insolvency law.

Some of these are:

Law on security- vesting of real rights like ownership, rights to real security.

Employment Law: the rights of employees and their treatment varies in all states and this could have a bearing on the insolvency.

Land laws: ownership and rights

In Malaysia for example, the Insolvency laws for corporations are defined under the Companies Act 2016, along with the Winding up Rules 1972. The Bankruptcy (Amendment) Act 2020 for individuals is a separate Act.

The Employment Act 1955, National Land Code (Revised, 2020) are also to be considered for the full view of the Insolvency regime in Malaysia.

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.

Ref: (INSOL International, 2021, p.42)

The three fundamental issues raised by Fletcher which need addressing in cross border insolvencies are:

- Choice of Forum
- Choice of Law and
- Recognition and Enforcement

Choice of Forum:

This raises questions of jurisdiction. It means, which court or courts will have jurisdiction to open insolvency proceedings in respect of the debtor. In a multi-state legal problem, choice of forum is an essential matter, as different countries apply different insolvency proceedings or test for opening proceedings (the commencement order). It requires understanding of the connection with the jurisdiction of the parties in dispute. During the local insolvency proceedings other disputes can also arise which involve foreign elements. It is also possible that when the the case is brought in multiple jurisdictions, the local court will consider whether it can decide on the case if foreign proceedings are already in progress. Hence the issue of jurisdiction must be resolved for opening an insolvency proceeding. **It would be beneficial to elaborate upon difficulties that arise in concurrent proceedings.**

Choice of Law:

Like the choice of forum, the choice of law is important, and this happens when the law of more than one country is considered, which is the one to apply. When the local court has determined that it will hear the matter, then it may need to decide on which countries law to apply. Different systems adopt different approaches and domestic laws and private international law are very different in each country. In common law systems, the choice of law issues arises if parties invoke them, otherwise the choice of forum will dictate the choice of law. This issue will normally arise if it is to the party's advantage to apply the foreign law. In civil law systems it is expected that foreign law will be applied despite the way in which the parties plead.

Recognition and enforcement:

Where there is a foreign judgement on the same matter, private international law raises questions of recognition (*res judicata*) and enforcement or effect of a judgement (the execution of the judgement and compliance by the defendant). This stems from the concept that some states may not accept and enforce a foreign proceeding with questions on the court that issued the judgement, the type of judgement and the effect of the same. For Insolvency, the type of judgement is significant, as it may commence insolvency proceedings against the debtor or an order during the course of an insolvency proceeding like order for third parties to pay to the estate.

This issue may arise as soon as an office holder has to take actions in other jurisdictions than the one he was appointed in. The issue of recognition of his authority in other jurisdiction arises and the extent of the same.

In bringing these together and harmonise the structure and proceedings, the solutions to be employed between states can be bi-lateral treaties, agreements between states, cooperation in form of protocol or domestic legislation following the Uncitral Model law (Sirjaroensuk, n.d) and (Anderson, 2016).

4.5

Question 3.3 [maximum 5 marks]

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

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

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

Ref: (Lutkus, 2016), (Misra, 2020), (Westbrook, 1994) (INSOL International, 2021, pp.68-69).

Protocols:

Protocols have no set formats and may contain provisions regarding jurisdictional determination, data sharing, notices, recognition of rights of creditors to the communication among courts and rights of representatives of other countries. Their success is dependent on the relationship between the countries.

Maxwell Communication Corp. (“Maxwell”) v. Barclays Bank plc (FindLaw, 1996)

Maxwell cross-border insolvency case in 1991, marks the success of protocols and is a prominent example of the court’s approval of agreements for purposes of coordinating insolvency proceeds in different states. In this case concurrent principal insolvency proceedings in the United States (Chapter 11 proceedings) and England (administration proceedings) were co-ordinated through an “Order and Protocol” approved by the courts in the respective States.

The parent company was incorporated in the UK, and majority of the operating subsidiary companies were situated in the USA. The parent company governed the entire group, but assets of the group were handled by subsidiaries that were located in the USA.

In this case, two primary insolvency proceedings were initiated by a single debtor, one in the United States and the other in the United Kingdom, and 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, the main objectives set to guide the insolvency representatives were:

- 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.

It was agreed that:

- Some existing management would be retained in the interests of maintaining the debtor's going concern value;
- The English insolvency representative could select new and independent directors, with the consent of their United States counterpart;
- The English insolvency representative should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; The English insolvency representative 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.

The joint administrators and other parties worked together to produce a plan and simultaneously filed a plan of reorganisation in the US and a scheme of arrangement in the UK. Though these were filed separately, these were mutually dependent and constituted a single mechanism as an integrated common system, consistent with the laws of both the countries, for reorganizing Maxwell for sale of assets as a going concern for distribution of assets to its creditors.

The plan and scheme treated all of Maxwell's assets as a single pool and leave them under Maxwell's control for distribution to claimants. It allowed any creditor to submit a claim in either jurisdiction. It was proposed to pay in full all holders of secured claims and of claims enjoying preferential status under United States or English law. And, in addition to overcoming many of the substantive differences in the insolvency laws of the two jurisdictions, the plan and scheme resolved many procedural differences.

5
Marks awarded 14.5 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 EIR Recast applies to UK until the Brexit deadline of 31st Dec 2021. The EIR allocates jurisdictional competence to the courts of a member State within which is situated the “centre of the debtor’s main interests” (COMI). In this case, the UK is the COMI, of Ryder and the primary proceedings have been opened there.

Primary jurisdiction under the EIR is based on the centre of the debtor’s main interests (main proceedings), it does also allow for the possibility of subsidiary territorial proceedings in other member States.

These are permitted where the debtor has an “establishment”. An establishment is defined as meaning “any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets”. Such subsidiary proceedings may be either “independent proceedings”, opened prior to the main proceedings, or “secondary proceedings”, opened subsequent to the bankruptcy adjudication in the State with the centre of main interests.

The information needed to help better understand the question is, if there is an “establishment” in the other country where Fernz is planning to open the proceedings. If so, then subsidiary territorial proceedings can be opened and may benefit the creditors.

“Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason, the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires”. (Clause 19, Official Journal of the European Communities L160/3, Date: 30.06.2000).

There is some scope to refer to specific provisions of the EIR Recast, but otherwise this is well answered.

6

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.

If the proceedings were opened in the UK on 18 June 2021, the EIR would not apply as the transition period for Brexit ended on 31st December 2020. UNCITRAL Model Law on Cross-Border Insolvency would apply for UK.

It would be beneficial to discuss what further information might be useful regarding the MLCBI.

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?

Under UK Insolvency Act, 1986, the provisions under sec 220 and 221(5) will be relevant in this case.

The act allows for:

Jurisdiction may also be established to wind up an “unregistered company”, which includes a company formed under foreign law. (Section 220 of the UK insolvency Act - Meaning of “unregistered company”. For the purposes of this Part “unregistered company” includes any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom.)

Section 221(5) Insolvency Act 1986 provides for a court- ordered winding-up of unregistered companies 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 opinion that it is just and equitable that the company should be wound up.

However, these provisions in paragraph (a) have been applied by the English courts only in those circumstances that the court is satisfied that there is a “sufficient connection” with England and Wales.

Ref: Latreefers Inc [2001] BCC 174 (CA), and (INSOL International, 2021, p.48)

“(1) There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;

(2) There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for a winding-up order.

(3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.”

Ref: Fletcher, supra note 4, [30-017], referring to Re Real Estate Development Co [1991 BCLC 210 (Ch D), per Knox J.

5

**Marks awarded 13 out of 15
TOTAL MARKS 47/50**

*** End of Assessment ***

Bibliography:

Anderson, H. (2016) 'An Introduction to Corporate Insolvency Law', *Plymouth Law and Criminal Justice Review*, 8, pp. 16-47. Available at:
<https://pearl.plymouth.ac.uk/handle/10026.1/9038> <http://hdl.handle.net/10026.1/9038>

Companies Act Malaysia 2016. Act 777.

Dinah L. Shelton, *Soft Law in HANDBOOK OF INTERNATIONAL LAW* (Routledge Press, 2008).

Findlaw - For Legal Professionals. 1996. *MAXWELL COMMUNICATION CORPORATION plc*. [online] Available at: <<https://caselaw.findlaw.com/us-2nd-circuit/1121034.html>>.

GOV.UK. 2020. *Government introduces legislation to relieve burden on businesses and support economic recovery*. [online] Available at:
<<https://www.gov.uk/government/news/government-introduces-legislation-to-relieve-burden-on-businesses-and-support-economic-recovery>>.

Hobbs, V., Hargrave, J., Quinlan, J. and Cooper, J., 2021. *UK: Corporate Insolvency and Governance Act 2020 – An overview of the main changes and how companies can use the reforms to their best advantage*. [online] Bird & Bird. Available at:
<<https://www.twobirds.com/news/articles/2020/global/corporate-insolvency-and-governance-act-2020>>.

Insolvency Act 1986. 220 and 221.

Insolvency Act Malaysia 2020. Act A1624.

Lutkus, S., 2016. *COURT-TO-COURT COMMUNICATION IN CROSS-BORDER INSOLVENCY CASES*. Eighteenth Annual International Insolvency Conference. [online] New York: International Insolvency Institute. Available at:
<<https://www.iiiglobal.org/sites/default/files/Court-to-Court%20Communication%20%28Stacy%20Lutkus%29.pdf>>.

Mevorach, I., 2018. *The Future of Cross-Border Insolvency*. *Oxford Scholarship Online*, [online] Available at:
<<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198782896.001.0001/oso-9780198782896#>>.

Misra, P. (2020) 'Cross-border Corporate Insolvency Law in India: Dealing with Insolvency in Multinational Group Companies—Determining Jurisdiction for Group Insolvencies', *Vikalpa*, 45(2), pp. 93–103. doi: 10.1177/0256090920946267.

National Land Code Malaysia 2020. Act 828.

Official Journal of the European Communities, 2000. Council Regulation (EC) No 1346/2000 on Insolvency Proceedings. [online] pp.1-18. Available at: <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF>>.

Shaw, M., 2021. *treaty | Definition, Examples, & Facts*. [online] Encyclopedia Britannica. Available at: <<https://www.britannica.com/topic/treaty>>.

Sirijaroensuk, S., n.d. *General Problems and Issues of Principle Relating to International Insolvency*. [online] Available at:
<<https://oia.coj.go.th/th/file/get/file/20190208eccbc87e4b5ce2fe28308fd9f2a7baf3102505.pdf>>.

University of Pennsylvania Law Review, 1919. *THE EARLY HISTORY OF ENGLISH BANKRUPTCY*. [online] University of Pennsylvania Law Review. Available at:
<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=7675&context=penn_law_review>.

Westbrooke, J., 1994. Comment: A More Optimistic View of Cross-Border Insolvency. *Washington University Law Review*, [online] 72(3), pp.957-953. Available at:<https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1735&context=law_la_wreview>.