



**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 first English Bankruptcy Act 1542 was a type of compulsory sequestration in relation to absconding and dishonest bankrupts. The statute viewed debtors as quasi criminals and would barricade them to their homes for defrauding creditors. This also introduced the concept of Pari Passu to distribute assets in the order of priority on an equal basis. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

In 1570 the Act of Elizabeth was introduced, as a bankruptcy statute rather than fraud prevention. It allowed creditors to open bankruptcy proceedings to appoint a bankruptcy commissioner to supervise the process. They could summon the bankrupt for questioning and commit them to prison. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

The Statute of Ann in 1705 introduced statutory discharge to confirm that bankrupts had confirmed to the proceedings. Reforms were then made in 1883 to introduce Official Receivers to be responsible for administering estates or reaching friendly agreements. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

The reform in 1883 stated that the bankrupt belonged to his creditors, that the Trustee should be subject to official supervision and independent examination of the circumstances leading to the Bankruptcy. **It would be beneficial to elaborate and clearly state how this shaped the way of thinking concerning modern insolvency law.**

These reforms largely remaining in place until the Cork committee in 1977, which ultimately led to the Insolvency Act 1986 being drafted. **This question required you to think through developments rather than just describe legislation and to explain the concepts which have shaped modern thinking.**

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.

During 2020, the UK introduced the Corporate Insolvency and Governance Act in response to the negative economic fall out of the pandemic. Some of the main measures included:

A Moratorium to provide companies with short periods to resolve financial issues, free of creditor action. The process must be overseen by an IP and last for between 20 business days and 12 months. Any entity with over £10m in capital markets is ineligible.

A Restructuring Plan to allow companies to restructure finances in a flexible, court process. The process can be sanctioned by the court, notwithstanding creditors voting against it, providing that the creditor was no worse off in any alternative process, in the Courts view.

Termination Clauses were also made unenforceable, for certain occasions. This stopped suppliers changing contract terms or terminating at short notice. Suppliers still had the right to apply to Court, who may agree to terminate the contract if there was a consequential hardship to the supplier.

There was a temporary suspension of section 214 of the Insolvency Act 1986. This section covers Wrongful Trading and the suspension retrospectively suspended any liability against Directors for Wrongful Trading under the provisions of s214 until 20 September 2020.

There was also a temporary suspension on all statutory demands, winding up proceedings and possession proceedings in the Courts in E&W. The suspension was initially until 20 June 2021 but was subsequently extended to 30 September 2021. This was to provide creditors with additional breathing space during financial distress as a result of Covid-19.

3

Question 2.3 [maximum 4 marks]

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

A treaty is a formal agreement which has been ratified by a number of states or countries, with the aim of bringing unity between them. This often assist insolvency matters given the disparity in insolvency laws in different jurisdictions. In terms of insolvency, Treaties are seen to form part of hard law to a State.

International Insolvency Instruments are treaties, which states sign to become bound by and affect their domestic law. Treaties first appears in the 13th and 14th centuries, to create measures to stop bankrupts absconding and later generating significant assets. In the 19th century, Treaties were developed to enforce jurisdiction, enforcement, recognition and winding up.

The first successful multilateral treaty was in Scandinavia, in the form of the of 1933 Nordic Convention. The Council of Europe followed successfully in 1949 with 47 members. It developed democratic principles to protect individuals.

The most successful Treaty was formed by the EU in 2000, being the European Insolvency Regulations, which facilitated a broader, multilateral insolvency law. It was reformed in 2015 to bring proceedings into the European Parliament and didn't apply to the UK from 2021, due to the UK's exist from the EU.

More success however has been gained from Soft Law approaches. Soft Laws are quasi legal instruments that do not legally bind the parties or bind them in a weaker way that traditional law. They are often formed between government bodies but can also be formed between nations.

The Hague Convention first worked towards the unification of private international law and the Model Treatment of Bankruptcy in 1925 was an early initiative, despite never being ratified. The Model Treatment of Bankruptcy regulated international insolvency by creating a statutory registered seat of jurisdiction where the insolvency would be located.

The Hague Conference now uses UNIDROIT and UNCITRAL to coordinate its activities and in 2004 created the Legislative Guide on Insolvency Law alongside UNCITRAL.

UNCITRAL has been the most successful soft law approach, created the Model Law on Cross Insolvency in the 1990s. It recommended that states adopted the approach of draft legislation, rather than creating anything that was binding. Given the volume of countries involved it is now seen as a great response to international 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.

For different Insolvency Laws in each state, you can find the main sources of law that will apply. More recently, this is found in codes or legislation. Historically, where common law systems are in place, common law principles may be used for any gaps in the current legislation.

Some jurisdictions have a single system of unified legislation covering all the areas of Bankruptcy. In the US, the Bankruptcy Code 1978 is federal legislation, therefore applies throughout the state.

In other states, multiple pieces of legislation are enacted, which all need to be understood to use the system in full. An example of this is where certain states used separate law for the bankruptcy of individuals compared to the winding up of companies.

Examples of this are, the USA and England & Wales, have single unified legislation, in the form of the Bankruptcy Code 1978 and Insolvency Act 1986. On the other hand, Australia has different legislation for corporate insolvency of companies, compared to the legislation dealing with personal insolvency.

Aside from the obvious different of individuals and companies, an obvious difference in the separate legislation, is that companies are dissolved after insolvency, where as an individual is discharged from bankruptcy.

In the UK, personal insolvency is generally a Court driven process for Bankruptcy (less so for IVAs, unless an Interim Order is required), and a similar process is used for winding up process of companies, by the Court. However, companies also have the ability to pass resolutions to commence voluntary winding up proceedings, were solvent or insolvent.

Furthermore, many legal principles also are a part of the general law (the non-bankruptcy law) which have an impact on insolvency. These rules are not defined in the insolvency legislation but will still have a general impact on insolvency law. These legal systems will differ substantially between jurisdictions, and different laws will generally apply.

It would be beneficial to also discuss common law in common law countries as filling any gaps in law.

4

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.

Insolvency proceedings can be brought concurrently in more than one jurisdiction, where each jurisdiction will apply their own law. In these circumstances, there are naturally very little extraterritorial effects in the foreign proceedings. This reflects certain difficulties in bringing co-operation and co-ordination between different states.

The three questions raised by Fletcher are listed below, which the respective discussion underneath.

1. In which jurisdiction may insolvency proceedings be opened?

To understand whether a Court is willing and able to hear a matter, there is an examination of how the jurisdiction connects to the parties or dispute. When liquidating an estate, the matter will be heard in the Court that deals with the proceedings. During the Liquidation, other disputes with foreign elements may arise and assets held in foreign jurisdictions or in foreign proceedings may be heard by the local Court.

2. What country’s law should be applied in respect of different aspects of the case?

If there is foreign judgement on a matter, recognition may be required by private international law, and the enforcement of the judgement. In insolvency, this can be a big issue, particularly where insolvency proceedings are commenced or a Court Order in the process of Liquidation proceedings. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments in 2018 helped to give guidance on this,

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

Where a local Court is willing to hear a matter, it will have to make the decision on which law to apply, as difference approaches are taken by different systems. For example, in England & Wales, the common law statement gives parties the choice of whether to invoice them, or else the law of the forum will apply. This generally happens when someone has the advantage of applying foreign law, which will become a question of fact rather than civil law systems. Foreign law is always a question of law notwithstanding whether parties chose to plead it.

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

3.5

Question 3.3 [maximum 5 marks]

It is said that “co-ordination agreements are sometimes known as Protocols or Cross-border Insolvency Agreements. Their growing acceptance internationally is evident in the work by the ALI-III in their *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; by 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.

A prominent example of case law for the quotation is the matter of Maxwell Communications Corporation plc, which was a cross border insolvency case in 1991.

The case had concurrent proceedings in the US, by means of Chapter 11, and in England & Wales, by means of Administration proceedings. The proceedings were then co-ordinated using an ‘Order and Protocol’, which had to be approved by the Courts in the US and England & Wales.

The Order was useful to resolve any conflicts and to facilitate clear terms on which information should be exchanged. The terms stated that there were 2 clear goals to dictate the proceedings, being to maximise value and realisations, whilst mitigating costs (mainly by means of conflict between jurisdictions). I stated that the US proceedings would defer to the E&W proceedings once certain criteria had been met.

The voluntary nature of the approach created a working structure in complex international insolvency proceedings, using Court approval. Further guidance was also provided by professional bodies, such as IBA and Concordat.

UNCITRAL’s Practice Guide was adopted in 2009, providing further information to Judges and IPs on practical aspects of managing and co-operating in cross border cases, using negotiations and agreements. The Guide was not meant to be prescriptive, but to show how resolving issues can be resolved using agreements which are tailored to meeting the specific circumstances of the cases, using the relevant laws. It provided sample clauses to uses and various case law, including the Lehman Brothers case.

The agreements are usually drafted and agreed by parties, prior to be filed with the Court, who will confirm the independence.

A further piece of case law where this became prevalent was Nortel Networks in the US and Canada. By creating an agreement between the concurrent insolvency proceedings, a joint electronic trial was extended using a video link (between Ontario Court of Justice and US Bankruptcy Court) on an allocation dispute. This resulting in US\$7.3b being distributed from the sale proceedings of Nortel business lines and IPR.

The joint trail was only possible due to agreements between parties to sell the assets and participate, which were approved by the respective Court.

Further significant international developments to aid this approach include the ALI NAFTA Guidelines Applicable to Court to Court Communication (2000), ALI-III Global Guidelines Application to Court to Court Communication (2012) and Judicial Insolvency Network Guidelines for Communication and Cooperation (2016).

5

Marks awarded 12.5 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.

As the UK was still a member of the EU on 18 June 2020, the EIRR will apply to Rydell, based on the information available in the question.

The EIR states that wherever a company's Centre of Main Interest is, is the jurisdiction which will be the seat for the proceedings. Therefore, as Rydell's COMI is the UK, the primary proceedings will be held in the UK under the EIRR.

However, EIRR also allows for secondary proceedings in other states that are a member of the EU, provided that the company has an establishment in that jurisdiction. An establishment is any place of economic activity including assets or human resources. **There is scope to elaborate upon establishment.**

These secondary proceedings are either independent, if they are opened before the main proceedings, or secondary proceedings, if they are opened after the insolvency has commenced in the COMI.

From the information it is not clear whether Rydell has an economic activity in the other jurisdictions, to understand whether secondary proceedings could be commenced under EIRR.

In the event that Rydell did have economic activities in the jurisdictions that Fernz operates, then it may have the ability to commence proceedings too. However, given that the proceedings are subsequent to the Rydell insolvency proceedings which are pre-existing, the proceedings would only be secondary proceedings, rather than independent proceedings.

Based on the assumption that Rydell does not have economic activities in the jurisdiction that Fernz operates, then any proceedings would also be secondary proceedings, notwithstanding the timing of those proceedings.

In addition, universalism will allow any different insolvency proceedings in alternate jurisdictions to be dealt with under one insolvency law. The insolvency law in the COMI will have a worldwide effect, even outside of the jurisdiction that the main proceedings were commenced in.

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.

In the event that Rydell commenced the insolvency proceedings on 18 June 2021, then the UK would have left the EU. As the UK would not have been an EU member state, then it would not have been subject to EIRR. **What does that mean for recognition?**

As such, Fernz would have had the ability to commence independent proceedings in its own jurisdiction, regardless of whether Rydell had any economic interest in that jurisdiction or not.

The other creditors throughout the other countries which are also members of the EU, would also have the ability to commence their own independent proceedings as a result.

Consequently, there will be no conventions or treaties that would dictate the proceedings of Rydell on 18 June 2021 and EIRR and COMI would not apply.

It would be beneficial to consider MLCBI or other local laws and further information required.

1.5

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 minority creditor could commence those formal insolvency proceedings in the UK?

Under the UK's domestic laws, there would be an ability for the minority creditor to commence proceedings. Section 221(5) of the Insolvency Act 1986 in E&W provides the ability to establish jurisdiction to wind up an unregistered company, providing the following circumstances are met:

1. The company is dissolved or has ceased to carry on business.
2. The company is unable to pay its debts
3. That the Court believes it is just and equitable to wind the company up

Therefore, providing that this criterion is met, there would be the ability for the minority creditor to commence proceedings.

Notwithstanding the wide area of the application, there have been test in the English Courts to understand whether there is a sufficient connection between the parties. It has been found that there are 3 core requirements.

1. There is a sufficient connection with E&W which may consist of assets in the jurisdiction
2. There must be a reasonable possibility of a benefit to the party making the order
3. At least one person interested in the distribution of the assets must be a person who the Court can exercise jurisdiction over

Therefore, there are additional requirements that the minority creditor would have to meet to commence proceedings against Rydell. It is not clear from the information contained within the question as to whether these tests would be satisfied.

In addition, a further consideration may be the effect of an English winding up order may have on international insolvency, particularly foreign assets and creditors. The extent to which a Liquidator would have the ability to take control of any assets would remain with the legal owner. A key factor would be whether the Liquidator was recognised in the jurisdiction which the assets are held. A Liquidator would have the ability to receive and adjudicate on claims received from foreign jurisdictions.

The Insolvency Act 1986 goes further to state that domestic laws are applicable where there are other international elements to consider. For instance, whilst the IA86 would apply to the receipt of a claim, it may be that the foreign law dictates whether that claim is valid, for a debt governed by the foreign law.

Therefore, these would all be key consideration that may apply to the minor creditor before commencing any proceedings in E&W.

5
Marks awarded 12.5 out of 15
TOTAL MARKS 43.5/50

*** End of Assessment ***