INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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**.

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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.

i. Abolition of 'debtors' prison' by virtue of the Debtors Act 1869. This persists in most developed countries to date. Although the principle of imprisonment for the civil matter of insolvency, it is still, in theory, possible to be imprisoned for non-payment of a debt where that is contained in a court order and failure to comply with the court order constitutes contempt.

ii. Statute of Ann 1705 introduced the concept of a statutory discharge a version of which persists to this day allowing debtors to become 'discharged bankrupt' following cooperation with the insolvency proceedings.

iii. The Act of Elizabeth 1570 was the first law that could be described as a true bankruptcy statute (as opposed to a law on the prevention and detection of fraud). Although there was no discharge (see, Statute of Ann, above) for over 150 years after its enactment. The 1570 Act allowed creditor to petition the Lord Chancellor (whom jurisdiction vested in under the 1570 Act) to convene a bankruptcy meeting and if so advised appoint bankruptcy commissioners to oversee the bankruptcy process and where indicated the debtor would require to transfer his property to the commissioners. **There is scope to elaborate on how this development shaped modern insolvency thinking.**

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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 Corporate Insolvency and Governance Act 2020 introduced the following provisions for business support to combat the impact of Covid-19:

i. New restructuring plan process (similar to schemes of arrangement) supervised by the court (and which can be used without the new moratorium outlined below), and with the introduction of a cross class cram down mechanism for dissenting classes of creditors potentially binding them to the plan subject to the conditions in the 2020 Law.

ii. Suspension/relaxation of the wrongful trading rules, removing the threat of personal liability for directors to allow them to continue to trade during the pandemic (this is distinct from fraudulent trading).

iii. Suspended winding up petitions and statutory demand. This prevents court-based action and insolvency on a temporary basis (ended in September 2021) unless it can be shown there are reasonable grounds to believe the pandemic has not had a financial impact on the company or that it would be unable to pay its debts irrespective of the economic impact of Covid-19 on the business.

The 2020 Act also introduced a new free-standing moratorium (for distressed but viable companies) this was not a specific Covid-19 measure, but its use during the pandemic has

been instrumental in keeping businesses afloat during the difficult economic conditions created by the pandemic.

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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 form part of the arsenal of public paw instruments to bind States and shape domestic law and, by extension, the discretion and remit of the courts. Once ratified, treaties will form part of the domestic law of the signatory States. The advent of the European Union has resulted in greater success for the "hard law" approach of treaties and conventions although the ratification of these treaties is often poor, it nevertheless shapes the development of the conversation and approach to international insolvency. Treaties, at their core, are an attempt to bind signatories to a common set of principles applied and maintained in States where domestic law (private law) differs.

Much of the international insolvency law regime relies on the successful implementation and adoption of 'soft law' measures. These are non-binding agreements, principles or recommendations devised by multilateral organisations or inter-governmental bodies (as opposed to Nation States) whose remit is to improve the harmonisation of international insolvency regimes and improve the co-operation between different domestic rules that are often in conflict or asymmetric. It is often considered to be more of an external influence over domestic regulation rather than a strictly enforced principle or mandated rule.

The 'soft law' model required buy-in of an international initiative from domestic governments. The most pertinent example of this has been undertaken by UNCITRAL who developed the Model Law on Cross-Border Insolvency. This was a draft piece of recommended legislation that UNCITRAL encourages member States to adopt wholesale or with certain modifications. The snowball effect of the adoption of the model law becomes more evident the more nations that adopt the MLCBI across various disparate jurisdictions leading to greater harmonisation and consistency in the application of insolvency rules in cross-border insolvency matters.

An example of regional soft law initiative was launched by the Asian Business Law Institute's joint project with the International Insolvency Institute to develop the Asian Principles of Business Restructuring.

It is worth noting the categorisation of treaties as 'hard law' and non-treaties *e.g.* non-binding instruments such as the MLCBI as 'soft law' is being abandoned in some quarters as not being indicative of the nature of these instruments (see, I Mevorach, 2018).

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Marks awarded 10 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.

Statutory Law: Primary Insolvency legislation – this includes by way of example the Insolvency Act 1986 (in addition to sections of the Corporate Insolvency Governance Act 2020) in England & Wales, The unified Bankruptcy Code of 1976 in the US is a federal statute covering the whole of the US. Although several States have single predominant piece of

legislation others have a multiplicity of primary laws that interact to provide the overall statutory insolvency regime in a given State.

Statutory Law: Non-Insolvency legislation – most insolvency regimes will rely on aspects of non-insolvency law to derive the tools to allow an effect insolvency system to flourish. These include laws pertaining to securities, priority of debts, vesting of property, company and banking law and laws relating to property, both corporeal and incorporeal and the mechanisms for how such property can be transferred applied in an insolvency context. The domestic laws relating to set-off, consumer contracts and duties of directors, although not expressly insolvency related will be of general application in an insolvency context.

Subordinate legislation: Insolvency rules: some States will contain a set of rules as subordinate legislation that will inform the primary legislation. The Insolvency Rules (England & Wales) 2016 (replacing the Insolvency Rules 1986 (SI 1986/1925)) is an example of this and such rules give effect to the express provision in the 1986 Law for example setting time limits and prescribing the forms and documents to be used in complying with aspect of the 1986 Law. The subordinate legislation goes hand in hand with the primary legislation giving it the practical tools for practitioners to give effect to the provisions of the primary legislation in a consistent and ordered manner. The subordinate legislation is also used to give effect to policy decisions taken at governmental level, *e.g.* The Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015; in particular amendments enabling modern methods of communication and decision making to be used in place of paper communications and physical meetings – these were incorporated into the 2016 Rules. The rules in tandem with the primary insolvency statute can also inform how insolvency proceedings are commenced and the framework for proceedings going through the court.

Post Brexit, other regulations came into place to take into account the UK's position relative to the EU. The Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/146) make changes to reflect the non-application of the Recast Insolvency Regulation in the UK from 1 January 2021, other than in a limited way preserved in UK domestic law.

Common law: Certain common law states will rely on the common law to fill in gaps where the statutory regime may not cover a certain scenario. The common law will typically run parallel with the statutory regime although the statutory regime ought to be utilised in the first instance. If a country does not have a statutory mechanism for *e.g.* recognition of a foreign liquidator, this is an example which may in states *e.g.* Guernsey may look to the common law and the inherent jurisdiction of the court as a source of law for dealing with the issue.

Case law: Case law is used to assist (and in some cases dictate) the operation of the statutory provisions. This may apply to the interpretation of *e.g.* a liquidator's duties or around more general principles such as comity. The courts will apply the legislation (domestic and in certain cases international) principles and laws in giving effect to the State's insolvency laws.

International Law: The adoption of the MLCBI by states (although 'soft law') is a source that provides a framework for domestic legislation to reconcile international/multinational insolvency matters without creating conflicts of laws issues or problems with an asymmetry between domestic regimes. Treaties are also a form of (typically) binding instruments that operate as a source of domestic law. The EIR has had success in effecting the laws of EU countries and creating consistency across their domestic regimes. Similarly, the Bustamante Code in the Americas and the Montevideo treaties (despite the low ratification rate) operate as a source of law in these regions relating to issues of private international law and NAFTA and the Nordic Convention have a similar impact as a source of law in their respective regions, influencing and harmonising the domestic regimes to which they relate.

Question 3.2 [maximum 5 marks]

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

Fletcher poses the following questions:

1) In which jurisdictions may insolvency proceedings be opened?

Questions of jurisdiction can be governed by the law of the contract or the location/domicile of a party to insolvency proceedings. It may also be governed by the law of an individual state. A court may have jurisdiction to wind up a company formed in another state that has a connection to the state the court is situated even where that company is not registered in the country of the court hearing the case (see, *e.g.* the Insolvency Act 1986 sections, 220-221).

Equally there are questions of connection to the jurisdiction such that a court can legitimately seize jurisdiction of a particular matter.

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

Even where a proceedings are to be held in one country does not dictate that the court has to apply the law of that country (*e.g.* a Guernsey Court can hear a case based on Danish law) although this approach differs between states. In common law states, such as Guernsey, choice of law issues only arise where parties invoke them (either through agreement or more typically through the express provisions in a contract). In other systems the law of the forum will dictate the choice of law (*i.e.* that of the forum). In civil systems proof of foreign law is a question of law, as opposed to common law systems where proof of foreign law is a question of fact, pleaded and supported usually by expert evidence.

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

Recognition of a foreign judgment and enforcement of the same raise issues including the status/competency of the court to grant judgment (certain judgments may be deemed unsafe due to the jurisdiction they are granted, particularly where there are instances of judicial corruption or allegations of the same) as well as the effect of any given judgment – this may be relevant in cases where a transaction or disposition is voidable or where there is a transaction at undervalue that can be reversed.

These issues were grappled with in the development of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) following the UK Supreme Court decision in *Rubin v Eurofinance, SA & Oths* [2012] UKSC 46 where the apparent failure of the MLCBI to address the issues of recognition and enforcement of insolvency related judgments was highlighted. In this case the conflict between modified universalism and the common law rules on recognition and enforcement were discussed and in effected diluted the significance of universalism referring to it as "only a trend" (para 16).

What underpins Fletcher's observations the live possibility of proceedings being commenced concurrently in two or more states, each applying its own laws (including its own position of conflict of laws) leading to judgments with little or no territorial effect or recognition.

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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.

In *re Maxwell Communications Corporation plc.* a dispute arose about *inter alia* the appointment of the administrator in connection with the company, which was unable to pay its debts as they fell due. 80% of the value of the assets of the company was held in the US where there had been a Ch.11 petition for bankruptcy filed at the same time as proceedings in the UK at been initiated, i.e. the Company was placed into administration in England and the US at the same time. Two set of insolvency practitioners were tasked in connection with the same ultimate responsibility. Judges in both jurisdictions independently raised the prospect of the parties entering into an insolvency agreement between the two administrators to resolve the conflict and for the exchange and provision of information sharing.

Under the insolvency agreement (there was, in fact two agreements, one at the outset of the case, an operating agreement, addressing issues of stabilisation and asset preservation and second agreement relating to distributions to creditors etc. although these are typically referred to as the one agreement), two sets of goals were agreed: maximising the value of the estate, and harmonising proceedings to minimise expense, waste and remove the need for any jurisdictional conflict. With regard to the latter, the insolvency agreement in *Maxwell* resulted in the US and UK representatives performing their respective obligations in such a way that there was no need for judicial intervention on the question of jurisdictional conflict thereby obviating the need for complex principles of private international law to be tackles in multiple jurisdictions.

The insolvency agreement dealt with issues that may otherwise present the court with contentious issues and questions of international law. The *Maxwell* agreement contained provisions on retaining staff to maintain the business as a going concern (with the English IP's being allowed to select independent directors (with the consent of their US counterparts) prior notice was to be given in connection with major transactions although there was provision for pre-authorised "lesser" transactions.

Maxwell is an example of a 1992 use of insolvency agreements by parties to achieve a similar effect to the Model Law but which pre-date the model law. These cases demonstrate that agreements of this nature have been used historically and how co-operation and co-ordination between judges, courts and professionals can aid the harmonisation of the international insolvency regime even in the absence of a unified international solution.

Maxwell highlights how a voluntary agreement to co-ordinate matters of multijurisdictional and complex international law, with the blessing of the courts, can lead to more effective means of resolving international insolvency issues.

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Marks awarded 15 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 proceedings are commenced after 26 June 2017 the EIR Recast will apply to insolvency proceedings. The EIR Recast grants jurisdiction to the court of a member state (in this case the UK) which is the centre of the debtor's main interests (COMI) (*i.e.* where the debtor conducts the administration of its interests on a regular basis which is ascertainable by third parties (Art. 3(1)). This would mean the UK proceedings against Rydell would have primary jurisdiction based on Rydell's COMI. Hoever there is the possibility of subsidiary territorial proceedings in the EU country which Fernz is based, where Rydell has an "establishment" *i.e.* "*a place of operations… where the debtor carries out non-transitory economic activity with human means and assets.*" This may allow Fernz to open secondary proceedings against Rydell.

Additional information:

i. Does Rydell have an "establishment" in the country which Fernz is based?
ii. Is Fernz a Danish company as the EIR Recast will not apply.
iii. Is Fernz based in a member state bound by the EIR.
iv. Can Rydell continue to trade as a going concern? Can it continue to carry on business.

This is answered well. There is some scope to elaborate.

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.

From 11pm on 31 of December 2020 the EIR Recast ceased to have application in the UK following the UK's exit from the EU. The Recast Insolvency Regulations apply to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (31 Dec 2020).

Recognition post-Brexit is also likely to create some issues. The pre-Brexit regime for recognition was relatively straightforward, however

Without the EIR Recast there would be a choice of law issue that would require reference to the terms of the original contract between Rydell and the creditor seeking to initiate insolvency proceedings.

Similarly, the automatic recognition of judgments will cease post 31 December 2020 and different mechanisms will be required to obtain recognition.

Additional information:

i. Whether the creditor member state has adopted MLCBI.
This is answered well. There is some scope to elaborate.

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?

The Insolvency (Amendment) (EU Exit) Regulations 2019 (as mended by the 2020 Regulations) addressed the amendments to EU insolvency law that previous were of direct application in the UK. The effect of the Insolvency Amendment Regulations gives the UK Courts scope to open insolvency proceedings after the exit date where the proceedings are opened for the purpose of *e.g.* adjustment of debt given that Rydell's COMO is in a member state (and assuming Rydell still has establishment in the UK).

The minor UK based creditor has jurisdiction to wind up Rydell as section 221(5) of the Insolvency Act 1986 provides for a court ordered winding up of an unregistered company where:

i. the company is has ceased to carry on business;
ii. is unable to pay its debts; and
iii. it is just and equitable to wind up the company.

In such circumstances the matter will likely turn on whether there is a "sufficient connection" with the UK as the court held in *Re Latreefers Inc.* [2001] BCC 174 (CA). This will encompass the following requirements:

i. Sufficient connection including but not limited to assets within the jurisdiction;
ii. Reasonable possibility of benefit from the winding up order
iii. There must be one or more persons interested in the distribution of assets of the company over whom the company can exercise jurisdiction (in this case the UK creditor).

The Insolvency Act 1986 will also apply to the winding up of Rydell as a foreign company in this context as English law applies to such winding ups on matters of procedure and substance.

CIGA and the moratorium on creditor actions may prevent the minor creditor from engaging in formal insolvency proceedings as an overseas company can apply for a moratorium where it has sufficient connection to the UK.

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Marks awarded 13.5 out of 15
TOTAL MARKS 48.5/50

*** End of Assessment ***