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).

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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.

Three significant historical developments from English law that impacted and shaped modern insolvency law are as follows:

The English Bankruptcy Act of 1542, *inter alia*, provided for some important principles for debt collection, two of which significantly influence modern insolvency laws,

1. **collection participation by creditors**, by appointing a body of commissioners who could take action against a defaulting debtor on behalf of creditors; and
2. ***pari passu* distribution of the defaulting debtor's available assets** amongst all the creditors.

3. The Statute of Ann, 1705 introduced the concept of a **statutory discharge** of debtors in default for the first time in England. Such discharge was only possible once the commissioners had examined the debtor's assets and confirmed that the debtors has "conformed" and co-operated during the insolvency proceedings.

There is scope to elaborate with respect to how this shaped modern thinking, for example by discussing modern concepts of 'fresh start' and how they were underpinned by the introduction of statutory discharge.

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.

The UK government implemented some insolvency related reforms in light of Covid-19 pandemic. Key insolvency measures were implemented through the Corporate Insolvency and the Governance Act 2020 (***CIG Act 2020***). 3 such measures are as follows:

1. **Statutory moratorium** under the CIG Act 2020 was initiated to aid financially distressed companies, certain conditions for obtaining such moratorium were relaxed and a company that had been subject to insolvency proceedings in the preceding 12 months could also enter into a moratorium through such relaxations. Moratorium would be for an initial time period of twenty business days which could be extended to another twenty business days by the directors of a company by making certain filings with the court and without prior approval of the creditors.
2. **New Restructuring plan** was introduced by the CIG Act 2020, to support the debtors (similar to the scheme of arrangement and related processes available under Part 26 of the Companies Act 2006). The New restructuring plan provided for a cross-class clam down, meaning that dissenting creditors would also be bound by the plan to rescue a company, if sanctioned and approved by the court. This feature was a new addition as against the scheme process under the Companies Act 2006.
3. **Suspension of statutory demands and Winding-up petitions** against companies that were insolvent owing to the Covid-19 Pandemic. This is a temporary measure and during the relevant period (i.e. until 30 September 2021), no statutory demand served (and unfulfilled), could be a basis for presenting a winding-up petition in court, and the creditors would have to produce compelling evidence to show that the company was

insolvent owing to reasons other than a Covid-19 pandemic, if they had to enforce the demand.

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.

In order to establish cross-border insolvency rules in States, and ensure its wider applicability globally, international law, *inter alia*, comprises and derives assistance from "hard law" and "soft law".

Hard Law: Treaties and International Conventions, are public international instruments, like multi-lateral agreements to which states become signatories and ratify them in order to be legally binding on the signatory States. These States (i.e. countries) then incorporate these instruments into their domestic law. These are considered as hard law as they become part of the respective State's local laws and are enforceable by courts.

Whilst obtaining the relevant ratifications from the requisite number of countries has its challenges, especially in light of the difference in domestic laws of all such States, a successful example of hard law convention in relation to cross-border insolvency is the Nordic Convention signed by 5 Scandinavian countries (Norway, Sweden, Denmark, Finland and Iceland) in 1933. It is still in effect and the states grant recognition to each other's bankruptcy related legal acts (legislative, executive and judicial). Pursuant to Article 1 and 3 of the Convention, the member States recognise the local bankruptcy orders to apply all member States without any need for registration or other formalities and an insolvency administrator may directly request assistance from the other member States' authorities without prior need for recognition and other procedures.

Another key public instrument is the European Insolvency Regulation (effective 2002) (***EIR***) passed by the European Union and further amended as EIR Recast (taking effect in 2017). The EIR, among other things, allocates primary jurisdiction to the member State that is considered to be the Centre of Debtor's main interests (***COMI***), with a possibility of further subsidiary proceedings in other States where the debtor has a place of operation or "establishment".

Soft Law: Soft law consists of guidelines and recommendations, that are not legally binding as against the legally enforceable hard law. The adaptation is allowed to be flexible and does not force the States to be adhering to such law. It is often described as "quasi-legal instruments". Instead of States or countries, these instruments are initiated by organisations such as the United National Commission on International Trade Law (UNCITRAL), American Law Institute, INSOL International etc. The implementation of such instruments is more democratic in nature and allows the countries/ States to decide whether or not they wish to abide by this.

The most successful insolvency related and globally acknowledged instrument of soft law is the UN Model law on cross-border insolvency (***Model Law***), which took the form of a model law i.e. a draft legislation encouraging the States to adopt this (without modification) as a part of their domestic laws. Several countries have adopted this

Model Law (with or without modification). The legislations based on Model Law have been adopted by 49 States in a total of 53 jurisdictions.[1]

Both hard law and soft law instruments have influenced the cross-border insolvency landscape over the years, some projects receiving wider acceptance than others. While hard law binds the member States and is thus legally enforceable and soft law instruments are persuasive, but are also increasing in their popularity especially because there are recommendations which can be modified and implemented in the local legislative acts of the countries.

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.

As the insolvency laws in all States are not the same, each State has its own set of insolvency related laws, both substantive and procedural.
Below are some possible sources of law across jurisdictions and states:

1. Local/ Domestic insolvency legislation:

Most countries have their own set of domestic statutes and legislations governing insolvency matters. Some developed jurisdictions have a single insolvency code that governs all matters in relation to insolvency disputes such as the United States Bankruptcy Code 1978. It is a federal legislation that applies throughout the countries across all states. Apart from corporate bankruptcy, it has provisions and chapters for personal bankruptcy, Debtor-in-possession Chapter 11 re-organisation of an insolvent or distressed company and even recognition provisions (Chapter 15) for foreign insolvency orders and office holders. It is an all-encompassing legislation. Similarly, in England, the English Insolvency Act 1986 is a unified bankruptcy legislation which deals with both personal and corporate bankruptcy. Other jurisdictions may have multiple insolvency statues, one for personal or consumer bankruptcy and another for corporate winding up and related legislations. One such example is Australia, which does not have a single unified insolvency legislation covering all insolvency related provisions. Emerging markets and developing nations have also made significant advancements in developing their insolvency statutes such as India, which now provides for a uniform Insolvency and Bankruptcy Code covering insolvency matters. Whilst it was adopted in 2016, the complete and proper implementation is still in progress as the practice area develops in the country.

2. Local laws not specifically relating to insolvency:

Prior to developed insolvency legislations in States, and when debt collection was at its nascent stage, most provisions relating to bankruptcy were found in related laws such as fraud prevention laws, general companies law etc. Similarly, one of the sources for insolvency laws could be related legislations in a State especially where there is no single unified insolvency statute. Several States have insolvency related provisions in the Companies law statute with a separate set of winding-up/ insolvency related rules governing the nuances and procedures

[1] *See* Status: UNCITRAL Model Law on Cross-Border Insolvency (1997) at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

of insolvency disputes. A few examples could be from offshore jurisdictions such as Bermuda, and Cayman Islands. Apart from these, in many countries, the procedures and functioning of such disputes is usually governed by the civil procedure laws. Some provisions in relation to administration of estate can also be found in different statutes.

3. International Insolvency law/ Common law:

Whilst each State may have their own domestic set of rules and regulations, there may be issues arising which do not find resolution within their statutory framework. In such cases, to fill in the gap and lacuna, courts often rely on international practices and principles. For instance, in common law jurisdictions, precedents from mature common law countries that have an experienced insolvency literature or just general common law principles that may apply to a particular set of situation, may be utilised in addition to the local laws. In jurisdictions where there are no specific provisions in relation to cross-border insolvency, or to fill in some gaps in their local laws pertaining to cross-border insolvency, the UN Model Law is also often considered to be a guiding factor in instances of deadlock or to provide assistance in adjudication. Another key example is the UNCITRAL Legislative guide on Insolvency Law which maybe used as a reference for national authorities and legislative bodies to draft, amend or clarify certain provisions in the local laws.99

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.

The three pertinent questions, raised by Fletcher, in the cross-border insolvency context are as follows:

1. In which jurisdiction may insolvency proceedings be opened? (***Choice of Forum***);

This pertains to the jurisdictional issues concerning the commencement of an insolvency proceedings. It involves understanding and assessing the connection between the debtor/ its assets/ business operations and the place of initiating the insolvency proceedings. The initial determination of an insolvency will involve the status of the debtor and whether winding up is the only recourse or restructuring/ plan or scheme of arrangement is a viable option.

Even if there is ground and connection to the forum of commencing insolvency proceedings, there is a possibility that adjudication of a particular issue, for instance involving the treatments of assets in another state, may require assistance and co-operation with another country. Accordingly, this will lead to enforcement issues, whether the insolvency officer/ commissioner is recognised in either state to co-ordinate the local and foreign insolvency proceedings.

2. What country's law should be applied in respect of different aspects of a case? (***Choice of Law***); and

Different jurisdictions have different rules in relation to which law will apply in cross-border insolvencies. Usually, as default, the forum applies its own law. For instance, in common law systems such as England, law of the forum applies unless parties invoke choice of law rules and proof of foreign law is a question of fact. Therefore, parties may choose to exercise this option by pleading However, in civil law jurisdictions, foreign law is usually a question of law irrespective of being pleaded by parties.

3. What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)? (***Recognition and effect to Foreign Proceedings***).

Broadly, two issues can be included in this question posed by Fletcher, one of "recognition" and another of "enforcement".

Recognition can be further classified in two branches, one would be recognition to a foreign judgment or order (i.e. if a foreign court adjudicates and orders on an insolvency matter which has implications on other jurisdictions) and second, recognition of foreign insolvency officers (i.e. if foreign officers appointed in one jurisdiction can be recognised in another jurisdiction, for eg. to take over the administration of the debtor's estate in a foreign State). Foreign orders can further involve several issues basis the type of order/ judgement involved. If it is just a commencement of proceedings, the implications are different as against a positive order to compel a third party in another jurisdiction to pay back the debtor's estate in relation voidable transaction under a state's insolvency law.

The above indicates that there could be concurrent proceedings and each State may apply its own set of domestic laws and also refer to its own choice of law rules, with recognition or co-ordination with proceedings in a different State being challenging. The issues may be at all stages of an insolvency proceedings from commencement, administration of estate, distribution amongst creditors globally and also the costs for administration. For any cross-border insolvency to be successfully and smoothly handled, it is important that the relevant States co-operate and communicate with each other to ensure the best results for the concerned parties.

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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.

MLCBI was promulgated in 1997 to assist countries and jurisdictions in harmonising, co-operating and co-ordinating the adjudication and administration of cross-border insolvencies effectively.

However, co-ordination agreements, do pre-date the MLCBI. ***Maxwell Communications Corporation plc (1991),*** is one such example.

This case law involved concurrent insolvency proceedings in 2 jurisdictions, one in the United States (Chapter 11 proceedings) and another in the United Kingdom (administration proceedings). There were 2 different insolvency officers in both jurisdictions and the proceedings were ongoing. A court initiated agreement (i.e. by judges in the English and American courts) was reached between the two jurisdictions to co-operate, facilitate exchange of information and resolve conflicts to effectively administer the insolvency proceedings (***Maxwell Agreement***).

A summary of the Maxwell Agreement and key features have been set out in the UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation (2009)[2]:

- Under the Maxwell Agreement, "*two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict*";
- Both States, through their respective counsels and judiciary were required to co-operate, seek permission to administer assets in each other's jurisdiction;
- The underlying principle for the Maxwell arrangement was to ensure that the debtor's business value is maintained to ultimately benefit its creditors;
- Specifically, the English insolvency officers were allowed to appoint new directors, incur debt and undertake major truncations, with the consent of the US Courts. However, small transactions and administration of the estate were pre-authorised.
- Accordingly, *the administrators and the US examiner proposed a plan of reorganisation in the US and a scheme of arrangement in the UK under the Companies Act whereby, after the secured and preferential creditors had been paid, the net balance of the English and US assets would be pooled for payment pari passu to the unsecured creditors in both jurisdictions.*[3]
- As anticipated, there were several issues that arose during the course of the proceedings which were resolved by way of an extension agreement.

This case and the Maxwell Agreement is an example of a very successful co-operation in cross-border insolvency. Its management in two concurrent jurisdictions and the way it evolved throughout the proceedings is a remarkable co-ordination exercise and success story in international insolvency.

5
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.

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[2] *Practice Guide on Cross-Border Insolvency Cooperation by the United Nations Commission on International Trade Law*, United Nations Publication Sales No.: E.10.V.6 ISBN 978-92-1-133688-7.
[3] *Maxwell Communications Corp Plc (No.2), Re*, Case Analysis, [1993] 1 W.L.R. 1402

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 member States of the European Union (***EU***) are governed by the EIR (recast) in relation to cross-border collective proceedings within the EU.

As on 18 June 2020, UK was a member of the EU and is thus required to abide by the EIR (Recast).

Jurisdiction:
Pursuant to Article 3(1) of the EIR (Recast) which deals with the jurisdiction of insolvency proceedings, the courts within the territory where the COMI of a particular debtor is situated, has the jurisdiction to open insolvency proceedings. These proceedings will be referred to as the "main insolvency proceedings". As the creditor is initiating proceedings against Rydell in UK, which is the COMI, the courts are likely to open such proceedings as the main insolvency proceedings.

COMI, Main Insolvency Proceedings and Secondary Insolvency Proceedings

Article 3(1) of EIR (Recast), now clearly specifies what constitutes COMI i.e. "*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*". Accordingly, not just the place of incorporation but all factors must be reviewed comprehensively to ascertain COMI of a company. As such fact is established, more details on COMI may not be necessary but queries could be asked on what interests does the debtor have in the UK for the COMI to have been established here, what is the perception of all the creditors in the COMI being in UK etc.

As the minor creditor has opened proceedings in the UK, as UK is the COMI, it will be the main insolvency proceedings.

However, if Fernz wishes to open proceedings in an EU Member State, this is possible too under the EIR (recast). This will not be main, but secondary insolvency proceedings. Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened. The effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened. (Article 34 EIR (Recast)).

This are also referred to as territorial proceedings. It must be noted that Fernz will have to prove that the proceedings initiated are in an EU Member State where Rydall has an "establishment". "Establishment" under EIR(recast) means where the debtor has a place of operations and there is "*non-transitory economic activity with human means and assets*."
What further information is required regarding establishment?
Applicable Law:

Article 7 of EIR(Recast) provides that the law applicable to the insolvency proceedings will be the law of the COMI of the debtor where the insolvency proceedings were initiated i.e. UK in this case. The law of UK (i.e. opening of the proceedings) will determine the procedure, conditions, conduct and closure of the proceedings.

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.

Yes, the answer would be different if the proceedings were opened in the UK on 18 June 2021. This is because the EIR (Recast) ceased to apply to the UK from 31 December 2020 (11pm onwards) pursuant to its exit from the European Union. To this end, UK would not be governed or required to follow the EIR (Recast). The laws of the U.K. i.e. the English Insolvency Act would apply even for the cross-border insolvency proceedings related aspects.
It would be beneficial to consider the MLCBI and what information would be required to determine its relevance.

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

If Rydell's COMI was established to be in a foreign country (as UK would not be a part of the EU on 18 June 2021 and any company with its place of incorporation outside of UK, even if within EU will be a foreign company), then UK insolvency laws would apply. Considering it is an unregistered company, meaning that the company has not registered its presence in the UK, jurisdiction may still be established to commence insolvency proceedings against the company formed under foreign law under the English Insolvency Act 1986 ***(Act***).

Section 221(5) of the Act provides for certain circumstances where an unregistered company can be wound up:
(i) if the company is dissolved, or ceased to carry on business (or is on the verge of dissolution of its affairs);
(ii) if the company is unable to pay its debts;
(iii) if the court is of the opinion that it is just and equitable to wind up the company.

Accordingly, first we need to understand if Rydell falls into any of the above two requirements, i.e. if it is dissolved/ on verge of dissolution or unable to pay its debts. Seemingly, Rydell seems to be facing certain issues and maybe unable to pay its debts. However, basis English precedents in courts, in order to allow the commencement of insolvency proceedings against a foreign company, the courts require that a "sufficient connection" be proved between the company and the England and Wales.

We will need to understand if there is such connection between Rydell and the UK, i.e. if any assets are situated in the UK, will a winding-up order reasonably benefit the minor creditors and if the minor creditors or parties initiating such insolvency proceedings are persons over whom the English courts can exercise their jurisdiction.

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Marks awarded 12.5 out of 15
TOTAL MARKS 47/50

*** End of Assessment ***