INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 1 Guidance Text

Introduction to International Insolvency Law

2022 / 2023

CONTENTS

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

Welcome to **Module 1**, dealing with an **Introduction to International Insolvency Law**. This Module is a compulsory module for all candidates registered for the Foundation Certificate. The purpose of this module guidance text is to provide you with the necessary background you will need for the study of the course as a whole.

In this Module, you will be introduced to the concept of international law generally and will cover aspects such as:

- the history and background to insolvency law generally;
- an international framework for insolvency law;
- what is meant by cross-border insolvency or international insolvency law;
- the terminology used in insolvency law generally and more specifically the terminology used in an international context;
- important concepts for understanding the principles of international insolvency law, such as territorialism and universalism;
- what is meant by hard law and soft law;
- the various initiatives for dealing with cross-border insolvency cases; and
- the various instruments that can be used in cross-border cases, for example treaties and conventions.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Important information relating to the assessments for this Module

Please note that this module contains both a **formative** and a **summative** assessment. The formative assessment is to assist you in preparing for the eight summative assessments on this course and does not count towards your mark for this Module or the course as a whole.

While the formative assessment is not compulsory, **all students are urged to complete the formative assessment with a view to successfully completing the course**.

The summative assessment for this module is your formal assessment for Module 1 and will determine whether you pass or fail the module. Details regarding the submission dates of the two assessments are provided immediately below.

Formative assessment

Please note that the formative assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 15 October 2022**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 15 October 2022 will be considered.

Formal (summative) assessment

Please note that the formal (summative) assessment for this module must be submitted by **11 pm (23:00) GMT on 15 November 2022**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 15 November 2022 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of international insolvency law:

- the background and historical development of insolvency law generally;
- the framework for insolvency law generally and how domestic insolvency laws fit into the framework (or not);
- understand what is meant by cross-border insolvency law or international insolvency law;
- understand and apply the terminology used in insolvency law generally and specifically in respect of cross-border insolvencies;
- understand the concepts and underlying principles that apply in a cross-border context, for example territorialism and universalism;
- understand what is meant by hard and soft law and be able to provide examples of both;
- the various initiatives for dealing with the problems associated with cross-border or international insolvency law; and
- the various instruments that can be used in cross-border insolvency cases, such as treaties, conventions and Model Laws.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of international insolvency law; and
- be able to answer questions based on a set of facts relating to international insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through the text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. GENERAL RESEARCH SOURCES

(1) I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005);

(2) P R Wood, *Principles of International Insolvency* (Sweet & Maxwell, 2007);

(3) B Wessels, *International Insolvency Law*, (Kluwer Law International, 2006);

(4) B Wessels and J Boon, *Cross-Border Insolvency Law: International Instruments and Commentary*, (Kluwer Law International, 2nd ed, 2015);

(5) I Mevorach, *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018);

(6) B Wessels, BA Markell and J Kilborn, *International cooperation in bankruptcy and insolvency matters*, (Oxford University Press, 2009).

4. GENERAL BACKGROUND TO INTERNATIONAL INSOLVENCY LAW

4.1 Historical background to (and some comparative aspects of) international insolvency law

There are various points of view regarding the notion of international insolvency law. The point of departure is that there is not a single set of insolvency rules that applies globally. [1] In fact, all States with a developed legal system do have some kind of bankruptcy / insolvency system - also referred to as a collective debt collecting procedure - but there are differences in approach and policy as well as differences in substantive and procedural rules. Apart from different approaches in insolvency law, essential areas of the general law also differ. Amidst these differences, scholars, legislatures international organisations – such as the United Nations Commission for International Trade Law (UNCITRAL) and the World Bank – and courts are continuously trying to devise solutions for dealing with insolvency issues on a transnational basis.

[1] B Wessels, *International Insolvency Law* (Kluwer, 2006), p 1.

Consequently, the point of departure on this course is that there is no single set of insolvency rules that apply on a global basis.[2] It is, nevertheless, important to have a basic knowledge of the historical roots and essential characteristics of insolvency law in order to understand the various initiatives in trying to establish a more effective and uniform approach to cross-border insolvency law dispensation; this in spite of the differences in legal systems, insolvency dispensations and approaches.

4.1.1 Historical roots of insolvency law

For the purpose of this course, the development of insolvency or bankruptcy in civil law and English law will be taken as a point of departure, since many national or domestic legal systems are still based on one or the other.

The roots of civil law can be traced to Roman law and Table 3 of the Twelve Tables dealt with the execution of judgments. In this sense, debt execution developed from the debtor pledging his own body for the repayment of the loan and he could be imprisoned, sentenced to death or sold as a slave in order to secure repayment of the debt.[3]

In the context of insolvency as such, Fletcher[4] states that the roots of bankruptcy law (as a collective debt collecting procedure) are to be found in the following procedures of the Roman law, namely: *cessio bonorum* (assignment of property); *distractio bonorum* (forced liquidation of assets); *remission* and *dilatio* (compositions with creditors). These procedures developed from individual debt collecting procedures, which in turn gave rise to the development of collective debt collecting mechanisms (insolvency law) when the debtor was found to be insolvent.

Insolvency law in Europe further developed as a result of the *Lex Mercatoria*, being the customs and usages that developed between merchants on the continent and thus influenced the laws of the countries that had a more Roman or Germanic law character (loosely termed "civil law").

Many European countries introduced some form of bankruptcy legislation between the 13th and 17th century. The word "bankruptcy" is said to stem from the Italian *banca rotta*, which means to "break the bench". This referred to the situation where a merchant who operated his business in the medieval market place could not pay his debt and his creditors closed his business by breaking his bench or counter.[5] A central theme of the development of debt collection and insolvency law was the gradual move from execution against the person towards a dispensation of execution against the assets of the debtor.[6]

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2 P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), pp 1 - 30.
3 J C Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) *Fundamina* 1, p 5.
4 I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1, p 6; and see generally L E Levinthal, "The Early History of Bankruptcy Law", (1918) 66 *Uni of Pennsylvania Law Review and American Law Register*, p 223.
5 Wood, *supra* note 2, pp 11 – 12.
6 Levinthal, *supra* note 4, p 232.

At one stage only merchants (traders), as opposed to ordinary wage-earning individuals, could be declared bankrupt and hard sentences were imposed on debtors by incarcerating those who could not pay.[7]

It is evident, then, that bankruptcy started off as a collective debt-collecting mechanism that favoured creditors (pro-creditor). The development of the concept of a discharge of debts (sometimes referred to as "fresh start" or "rehabilitation") and the abolishment of imprisonment for debt, only arrived at a much later stage,[8] providing insolvency law with a far more "humane" face.

In English law, the word "bankrupt" first appeared in the early part of the 16th century. Initially, English law did not provide for imprisonment for debt but this option was introduced by the end of the thirteenth century by the Statute of Marlbridge of 1267. Imprisonment for the non-payment of debt was as a principle only abolished in 1869 by the Debtors Act.[9]

This first English Bankruptcy Act of 1542 provided for a form of compulsory sequestration, to be applied to a dishonest and absconding debtor. This statute viewed debtors as *quasi*-criminals (also called "offenders").[10] The 1542 Act also provided for the appointment of a body of commissioners who, on a creditor's application, could proceed against a trading debtor who fled from the country, who barricaded himself in his house, or who neglected to pay his debts or otherwise defrauded his debtors. The fundamental principle of this Act was that in the case of a fraudulent debtor, there should be a compulsory administration and distribution on the basis of equality amongst all the creditors. It therefore contained the two fundamental principles on which modern insolvency laws are based: collective participation by creditors and a *pari passu* distribution among them of the available assets.

As was the case on the continent, the development of insolvency under English law also first provided for individual debt-collecting procedures prior to the development of a collective (bankruptcy) procedure. The 1570 Act introduced during the reign of Queen Elizabeth I followed and was known as the Act of Elizabeth. This is said to be the first law designed specifically as a true bankruptcy statute, rather than as a fraud-prevention law.[11] This Act provided additional acts of bankruptcy but did not contain a discharge provision, something that was only introduced in the early part of the 18th century. The 1570 Act also transferred jurisdiction of the supervision of the estate from the previously mentioned commissioners, introduced in terms of the Bankruptcy Act of 1542, to the Lord Chancellor. A bankruptcy proceeding could be opened by a creditor following an "act of bankruptcy" by the debtor. Creditors could thus petition the Lord Chancellor to convene a bankruptcy meeting, who could then also appoint bankruptcy commissioners to supervise the process. The commissioners would then typically examine the debtor's transactions and property and the debtor was obligated to transfer his or her property to the commissioners. They could also summon persons to appear for questioning and they could even commit people to prison.

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7 Fletcher, *supra* note 4, p 9.
8 *Ibid*.
9 Levinthal, *supra* note 4, p 3; Calitz, *supra* note 3, p 13.
10 Calitz, *supra* note 3, p 13 and other writers referred to.
11 *Ibid*.

The Statute of Ann of 1705 was an important piece of legislation since it introduced the notion of a statutory discharge.[12] The discharge was not an automatic entitlement and the commissioners had to confirm that the debtor had "conformed" and had co-operated during the proceedings. Most of the principles introduced by these acts have remained part of modern bankruptcy. During the next few decades, a formal system having been introduced by legislation, quickly fell under the control of courts of equity.

Further legislative reforms followed and a new office, namely the office of the Official Receiver, was introduced in 1883 with the responsibility of administrating the debtor's estate before the commencement of the bankruptcy procedure or of the friendly agreement with creditors.[13]

The late 19th century is marked by a return in "officialism" by the appointment of Joseph Chamberlain as president of the Board of Trade in 1881.[14] Chamberlain set out three principles essential to a good bankruptcy law, namely:[15]

- the assets of the debtor in each insolvency case belonged to the creditors and therefore they should have the fullest control subject to the least possible interference;

- the second principle held that "the trustee should be subject to official supervision and control as regards his pecuniary administration … and his accounts should in every case be audited by authority"; and

- thirdly, he called for an independent examination of the debtor's conduct and circumstances leading to his insolvency.

The law of 1883 is viewed by certain writers as the foundation of the present system of English bankruptcy law, with the aim of the Act being a fair procedure with adequate supervision and means to discourage dishonesty. The machinery for dealing with bankruptcy matters created by the Act of 1883 essentially remains in force in present-day insolvency law.

The 1883 Act remained the basic approach of English insolvency law for most of the 20th century, until the period when a comprehensive review of English bankruptcy law took place under the auspices of the Cork Committee in 1977, leading to the famous Cork Report that ultimately led to the promulgation of the Insolvency Act of 1986.[16]

4.1.2 Different systems of insolvency law (or insolvency law "families")

There are a number of ways to classify the legal systems or families of the world but in general legal families across the globe will in many States either have an English law, or what can broadly be termed, a Civil law orientated foundation.[17] When analysing the insolvency laws of various

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12 *Idem*, p 9.
13 *Idem*, p 12.
14 *Idem*, p 13.
15 *Idem*, pp 17 to 18.
16 *Idem*, pp 15-18.
17 Wood, *supra* note 2, p 55.

States, such foundations will also show up in the variety of insolvency laws. But certain aspects of insolvency law will be affected by local legal culture, basic rights and the way in which a system deals with related matters such as the security rights provided for or the approach to labour issues, for instance. Terminology will also differ although one may find that the same principle may be designed by way of different terminology used.[18]

4.1.2.1 Anglo-American (common law) systems

English insolvency law[19]

The main piece of legislation regulating English insolvency law, is the Insolvency Act 1986. As indicated above, the famous Cork Report led to the introduction of this Act and it applies to England and Wales.

The Insolvency Act 1986 is an example of unified insolvency legislation in that it deals with consumer (personal) and corporate bankruptcy in one and the same Act but the Act basically duplicates many of the provisions as these apply to individuals and companies respectively.

It is to be noted that the Insolvency Act 2000 and the Enterprise Act 2002 amended aspects of the 1986 Insolvency Act. The Debt Relief Order for individuals was introduced in 2009 and further amendments allowing for an online application for bankruptcy relief was introduced in 2016. It must also be noted that apart from special financial aid schemes, the UK, like some other jurisdictions, adopted a number of insolvency related reform measures following the Covid-19 pandemic. In this regard the Corporate Insolvency and Governance Act 2020 was passed, which sets out certain reforms to insolvency law that amongst others introduced a new restructuring plan, new moratorium rules, the relaxation of wrongful trading liability and also the suspension of winding-up petitions and statutory demands.[20]

As part of its cross-border rules, England and Wales also adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006. Section 426 of the Insolvency Act 1986 still applies to "relevant" countries as listed and common law principles still apply as well. Although the UK is now a former Member State of the EU, for the period it had been a member, the EU Insolvency Regulation also applied to cross-border insolvency matters between the UK and other EU Member States. The changes due to the UK leaving the EU are briefly discussed in paragraph 6.4.3 below.

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18 *Ibid*.

19 Fletcher, *supra* note 4, chap 1.

20 For a good overview of the Covid-19-related insolvency measures introduced by various States, see the updated *INSOL International – World Bank Group Global Guide* (see at https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/2-covid-map-17-may.pdf - 2021 updated version). Apart from the UK these will not be referred to below. For a detailed discussion of the amendments brought about by the Corporate Insolvency and Governance Act 2020, see G Mc Cormack, "Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19" (published by INSOL International as a Special Report, October 2020).

American insolvency law[21]

The USA is a federation and, as a rule, a distinction must be drawn between federal and state law. It is important to recognise that the Bankruptcy Code is federal legislation, thus applying to all US states. Following the work of the Review Commission of 1973, American bankruptcy law was revised and gave rise to the Bankruptcy Code of 1978. The Code provides for the following procedures:

- liquidation – chapter 7;
- municipalities – chapter 9;
- reorganisation (rescue) – chapter 11;
- family farmer – chapter 12;
- rescheduling of debt (repayment plan) – chapter 13.

The work of the Review Commission of the 1990's lead to the reforms of 2005 in the form of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (BABCPA).

Although the US system is seen as a prime example of a pro-debtor system due to its rather liberal approach to rehabilitation or fresh start, also referred to as a discharge, the Code was amended following the work of the Review Commission of the 1990's.

The reforms to the 1978 Code effected by the reforms of 2005 in the BABCPA introduced "means testing" as a basis to determine which individual debtors may file for chapter 7 (straight bankruptcy / liquidation) or chapter 13 relief (repayment plan, linked with a discharge). Chapter 15 of the Code contains the adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency that has replaced the former section 304 of the Code to deal with international insolvency.

The American system is viewed as trendsetting regarding its rather liberal fresh start approach (discharge of debt) and the chapter 11 reorganisation mechanism. For example, in 2019 it introduced Sub-Chapter V to Chapter 11 to address small business debtor reorganisation.[22]

Australian insolvency law[23]

Australian law is also based on English common law. However, it has a number of Acts dealing with aspects of insolvency, and does not have a single unified Bankruptcy or Insolvency Act. Australia has also adopted the UNCITRAL Model Law on Cross-Border Insolvency.

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21 See JT Ferriell and EJ Janger, *Understanding Bankruptcy* (LexisNexis, 3rd ed, 2012).

22 HR 3311 — 116th Congress (2019-2020), Small Business Reorganization Act of 2019.

23 See M Murray and J Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Lawbook Co, 10th ed, 2018).

In general, the Corporations Act 2001 regulates corporate insolvency and the Bankruptcy Act 1966 regulates the insolvency of individuals or natural persons. There have been a number of recent reforms in Australia, including the introduction of a new restructuring and liquidator process for small businesses into the Corporations Act.

4.1.2.2 Continental European (civil law) systems

Dutch insolvency law[24]

The Dutch insolvency law is an example of a civil law system. In earlier times, various ordinances such as the ordinance of Amsterdam of 1772 applied in parts of the Netherlands. The *Faillisementswet* of 1897 provides for *failliet* or *surcheance van betaling* (moratorium) but the work of the *Commissie van Onderzoek* (Research Commission) gave rise to *Schuldsaneringswet* that allows for a fresh start in Dutch bankruptcy law. The *Faillissementswet* provides for bankruptcy of individuals and businesses.

Before the introduction of *schuldsanering*, Dutch law was typical of many West-European countries in being very much pro-creditor - no discharge was allowed unless creditors agreed. However, new developments in the area of consumer credit compelled them to introduce the concept of a "fresh start" in view of over-indebtedness.

The Netherlands is currently in the process of reforming its insolvency laws and the Dutch Scheme of Arrangement entered into force on 1 January 2021. In Dutch it is referred to as the "*Wet Homologatie Onderhands Akkoord*" – "WHOA" in short.

French insolvency law[25]

The *Ordonnance de Commerce* of 1673 is an important piece of legislation in the history of French commercial and insolvency law, since its Chapter XI formed the foundation of later French insolvency law in the commercial codes of 1807 and 1838. (This in turn formed the basis of Napoleonic insolvency codes in a number of States.)

The 1807 code is said to have been harsh towards debtors, since it allowed for the arrest and detention of debtors. A French law of 1889 introduced the concept of judicial liquidation and in 1935 the severe treatment of bankrupts and managers of failed business was revised, apparently by way of ancillary bankruptcy proceedings against the owners of such insolvent businesses and penalties and disqualifications for directors. A new dispensation followed in 1955 and a complete revision in 1967, which introduced a reorganisation procedure with a moratorium followed by a court approved plan. These developments led to the 1985 Act that is broadly still in force.

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[24] As to the Bill and Explanatory memorandum as adopted by Parliament on a proposed "scheme of arrangement" see https://resor.nl/dutch-scheme/ for an unofficial translation of the text.

[25] See https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/france.

German insolvency law[26]

Germany reformed its bankruptcy laws during the 1990s and the *Insolvenzordnung* (InsO), which came into operation on 1 January 1999, is the current bankruptcy code that applies in Germany. The InsO is also an example of unified insolvency legislation.

Spanish insolvency law[27]

In Spain insolvency is regulated by a single procedure that can be utilised by individuals and corporations (Spanish Insolvency Act 2003). This Act has been amended several times over the past 15 years.[28]

4.1.2.3 Emerging market and developing country systems

General

To a large extent the insolvency laws of emerging market and developing countries are based on the main existing insolvency law systems such as those found in England or civil law countries; this is due to the fact that most of these countries were colonies and inherited their laws from the former colonial masters.

Africa[29]

African countries still largely follow the laws of the respective former colonial powers. In this regard countries such as Nigeria, Kenya, Botswana and Zambia, and countries in the Eastern part of Africa such as Tanzania, have an English law tradition, whilst Angola and Mozambique have a civil law tradition based on Portuguese law. The Francophone countries of West Africa are steeped in civil law, in particular French law. Some countries, such as South Africa and Namibia, have mixed legal systems since both the Roman-Dutch law (civil law) and English law influenced their respective legal systems.

The pattern concerning insolvency law is that many of the older imported laws form the basis of current legislation; however, a number of African States have started introducing new, more modern legislation.

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26 https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/germany.
27 https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/spain.
28 http://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Spain.pdf.
29 http://www.lexafrica.com/wp-content/uploads/2016/09/LEX-Africa-Guide-to-insolvency-in-Africa.pdf.

India[30]

The insolvency laws of India are rooted in English law and used to reflect the older English model that provided for different legislation for companies and personal bankruptcy respectively. Following various attempts at law reform over the years, a relatively new Insolvency and Bankruptcy Code was adopted in 2016.

Russia[31] **and China**[32]

Developments in Russia have seen a development of insolvency law since 1992 that started with the Law on Bankruptcy of 1992 and which contained a general reorganisation provision. Further developments finally gave rise to the adoption of the 2002 Bankruptcy Law. The law is marked by stringent qualifications for insolvency administrators and their ethical conduct, although creditors enjoy a rather high degree of control.

In China, the insolvency law developments after 1979 finally gave rise to a rather extensive bankruptcy law in 2006. However, this legislation applies to business entities but not to individuals. The Civil Code of the People's Republic of China took effect on 1 January 2021, and may have some effect upon insolvency laws such as with respect to identification of debtor's properties and creditor's rights.[32A]

Latin America[33]

South American countries are largely civil law countries. It is said that the law of South America is one of the most unified systems in the world. All the South American countries have also recently signed up to the Union of South American Nations agreement, which aims to establish a system of supra-national law along the lines of the European Union.[34] A number of South American States are reviewing their insolvency laws.

East Asia[35]

The aftermath of the 1998 financial crisis in East Asia affected especially Indonesia and Thailand. As far as insolvency law is concerned, this gave rise to some insolvency law reforms and Thailand in particular overhauled its bankruptcy laws.

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30 https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/india. S Batra, *Corporate Insolvency and Practice*, (EBC, 2017); CAG Sekar, *Handbook for the Insolvency and Bankruptcy Code*, (Wolters Kluwer, 2018).

31 See https://gettingthedealthrough.com/area/35/jurisdiction/26/restructuring-insolvency-2019-russia/.

32 See https://uk.practicallaw.thomsonreuters.com/7-502-0018?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk; http://www.chasecambria.com/site/journal/article.php?id=149.

32A See https://practiceguides.chambers.com/practice-guides/insolvency-2020/china/trends-and-developments.

33 Wood, *supra* note 2, p 124 *et seq*; http://www.arabruleoflaw.org/bankruptcyreform/wpcontent/uploads/2014/02/IR_1999_WB_Reforming-Insolvency-Systems-in-Latin-America.pdf.

34 https://www.unasursg.org/en.

35 R Tomasic, *Insolvency in East Asia*, (Ashgate, 2006). On Singapore, see https://www.herbertsmithfreehills.com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill.

Singapore is also now becoming a major role-player in the region and in October 2018 passed a new Insolvency, Restructuring and Dissolution Act to consolidate Singapore's corporate and personal insolvency and restructuring laws into a unified Act. It came into force on 30 July 2020.

Self-Assessment Exercise 1

Question 1

Why is it so difficult to deal with insolvency matters spanning more than one State?

Question 2

What does Fletcher deem to be the roots of bankruptcy law?

Question 3

Would you say that insolvency or bankruptcy carried a severe stigma and penalty in earlier centuries? Explain.

Question 4

Explain the importance of the Statute of Ann of 1705 for modern day insolvency.

Question 5

Explain the difference between the sources of insolvency/ bankruptcy in the USA, England and Australia.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

4.2 Framework for insolvency law generally

4.2.1 Framework[36]

The general framework of a developed insolvency system set out below can be used to analyse any such system. It therefore contains the framework and essential features of insolvency law.

[36] This "framework" has been compiled by the module author in view of generally recognised essential features of insolvency and rescue principles.

<table>
<tr><td colspan="3">FRAMEWORK OF ESSENTIAL FEATURES OF AN INSOLVENCY SYSTEM</td></tr>
<tr><td colspan="3">A.

Essence of insolvency / bankruptcy

• Collective (individual) nature / procedure
• Meaning of insolvency?
• Liquidation of assets versus rescue</td></tr>
<tr><td colspan="3">B.

Policy considerations

• Pro-creditor
• Pro-debtor</td></tr>
<tr><td colspan="3">C.

Sources

• Insolvency legislation (single Act or Code, or fragmented)
• General law (see 4.2.2.3 below)</td></tr>
<tr><td>Personal insolvency (individuals)</td><td>D.

Common characteristics</td><td>Corporate insolvency</td></tr>
<tr><td></td><td>E.

Gateways and commencement (how insolvency proceedings are opened)

• Court?
• Other?
• Who can apply? (locus standi)

NB: Importance of commencement of formal insolvency, that is, bankruptcy or liquidation</td><td></td></tr>
</table>

	F. **Effects**	
	F. 1 **Automatic stay** Moratorium on piecemeal debt collecting and execution procedures	
	F. 2 **Estate / assets**	
Rights, duties, liabilities and limitations of debtor as an individual	**F. 3** **Personal consequences and liability**	Rights, duties, liabilities and limitations of directors and officers
	F. 4 **Executory contracts** • General powers of insolvency representative • Exceptions, for example, labour contracts?	
	F. 5 **Set-off and netting (pre- and post-commencement)**	
	F. 6 **Avoidable dispositions**	

	G. **Administration of estate** • Regulator (Structure) • Court involvement (special court/ other body?) • Insolvency representative (qualifications etc.?) • Proof of claims • Meetings of interested parties • Creditors • Tracing of assets • Examinations • Realisation of the assets	
	H. **Distribution** • Classes of creditors • Types of claims • Secured • Priorities • Concurrent	
	I. **Cost of administration**	
	J. **Rehabilitation**	
Discharge		**Corporate rescue**
• Process • Time periods		• Initiate - formal • Moratorium • Debtor in Possession / Rescue Practitioner

		• Post-commencement finance • Discharge • Creditors' committee
• Formal (statutory) repayment plans • Hybrids	**K.** **Alternatives (creditor workouts: consensual)**	• Formal / prescribed rescue procedures • Non-formal: work outs • Pre-packs
	L. **Cross-border dispensations**	
• Some systems: no collective procedures for individuals or restricted to traders	**M.** **Special rules**	For example: • Banks, financial institutions • Groups of companies / corporations; • State Owned Enterprises • Non-profit associations • Municipalities • Sovereign debt

4.2.2 Background to framework

There are a number of ways of classifying the legal systems or families of the world, but in general legal families across the globe will in many States have either an English law (or English common law), or what can broadly be termed a Civil law-orientated foundation. When analysing the insolvency laws of various States, these foundations will be quite obvious in a variety of insolvency law systems.[37] However, certain aspects of insolvency law are affected by local legal culture, basic rights and the way in which a system deals with related matters such as security rights or the approach to labour issues. Terminology will also differ, although one may find that a similar principle may be described by using different terminology. Approaches towards socio-economic issues will also be reflected in aspects of the country-specific laws. As a result, it is rather difficult to select a single insolvency or bankruptcy system to use as point of departure for the purposes of a course of this nature.

Since it is difficult to work with one particular system in order to explain many of the basic concepts of insolvency law, the UNCITRAL *Legislative Guide on Insolvency Law* will largely form the basis for dealing with the various aspects or elements of a developed and efficient

[37] Wood, *supra* note 2, pp 1 -30.

insolvency law system. Candidates are therefore also encouraged to read through the *Legislative Guide* in conjunction with this guidance text.[38] It is interesting to note that the *Legislative Guide* was designed to be used by member States of the United Nations when reforming their existing insolvency laws. The advantage is that the *Legislative Guide* sets uniform standards and approaches to the subject-matter and sets the tone for a more coherent and uniform approach to insolvency law reform on a global basis.

In Part 1 of the *Legislative Guide*, which deals with the design of an insolvency law, the key objectives and structure of an effective and efficient insolvency law are explained as follows:

> "When a debtor is unable to pay its debts and other liabilities as they become due, most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor. A range of interests needs to be accommodated by that legal mechanism: those of the parties affected by the proceedings including the debtor, the owners and management of the debtor, the creditors who may be secured to varying degrees (including tax agencies and other government creditors), employees, guarantors of debt and suppliers of goods and services, as well as the legal, commercial and social institutions and practices that are relevant to the design of the insolvency law and required for its operation. Generally, the mechanism must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings. To the extent that it is excluded from the scope of such legal mechanisms, a debtor and its creditors will not be subject to the discipline of the mechanism, nor will they enjoy the protections provided by the mechanism."

Most legal systems contain rules on various types of proceeding (which are referred to in this *Legislative Guide* by the generic term "insolvency proceedings") that can be initiated to resolve a debtor's financial difficulties. While addressing that resolution as a common goal, these proceedings take a number of different forms for which uniform terminology is not always used and may include both what might be described as "formal" and "informal" elements. Formal insolvency proceedings are those commenced under the insolvency law and governed by that law. They generally include both liquidation and reorganization or rescue proceedings. Informal insolvency processes are not (*always*) regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and some or all of its creditors. Often these types of negotiations have been developed through the banking and commercial sectors and typically provide for some form of restructuring of the insolvent debtor. While not regulated by an insolvency law, these voluntary negotiations nevertheless depend for their effectiveness upon

[38] The UNCITRAL Legislative Guide on Insolvency Law (2004), has been used extensively to compile this section of the notes. See Part One (Designing the Key Objectives and Structure of an Effective and Efficient Insolvency Law) and Part Two (Core Provisions for an Effective and Efficient Insolvency Law), at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

the existence of an insolvency law, which can provide indirect incentives or persuasive force to achieve reorganization."[39]

4.2.2.1 Essence of insolvency

When looking at the above framework, it raises questions as to the meaning of insolvency (or bankruptcy) as well as other important matters. Firstly, it must be noted that some systems use the term "insolvency" and others "bankruptcy". Although these terms carry the same meaning in many systems, one explanation is that "insolvency" sometimes means the state of financial affairs of a debtor, whilst "bankruptcy" refers to the formal state of being put into a formal bankruptcy proceeding. However, these terms are used as synonyms in many systems.[40] Insolvency itself may refer to the situation where the liabilities of a debtor exceed the assets of a debtor (balance sheet insolvency) or where the debtor cannot repay debts as they fall due by reason of a cash flow problem (cash flow or commercial insolvency).

Wood[41] lists the following possible essential features of insolvency or bankruptcy law that are said to be universal principles - but he then goes on to discredit them to some extent as well:

- Actions by individual creditors against the bankrupt are frozen- thus individual pursuit is stayed. This is also referred to as the automatic stay, signifying a moratorium against individual debt enforcement. This is the only truly universal feature according to Wood.

- The assets are pooled which become available to pay creditors – replacing the piecemeal seizure of assets by individual creditors. This feature has been eroded as a universal principle in that different States provide for different exceptions to this rule.

- Creditors are paid *pari passu*, that is, on a proportionate basis out of the available assets based on their claims. Wood terms this as a piece of ideology "which is nowhere honoured", since priority creditors and secured creditors form exceptions to this rule in most, if not all, States.

Sealy and Hooley[42] distinguish as follows between the objectives of insolvency for individuals and corporations:

- Individuals: to protect the debtor from harassment by his creditors; to enable the debtor to make fresh start – especially in less blameworthy cases (where insolvency has not been brought about by the actions or conduct of the debtor); to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration.

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39 UNCITRAL *Legislative Guide on Insolvency Law* 2004 Parts 1 and 2, pp. 9-10.
40 Fletcher, *supra* note 4, Ch 1.
41 Wood, *supra* note 2, p 3.
42 In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017), chap 28.

- Corporations – where possible to preserve the business, or viable parts thereof – not necessarily the company; where personal liability has been abused, to impose personal liability on responsible persons.

- Principles that apply to both situations are: to ensure *pari passu* distribution as far as possible, except in so far as creditors have priority; ensure that secured creditors deal fairly towards the debtor and the other creditors; to investigate reasons for failure; to reclaim voidable dispositions where the insolvent debtor dealt improperly with assets.

Although some topics overlap in individual (consumer insolvency or bankruptcy) and corporate insolvency, there are also pertinent differences between the two. For example, it is only in relation to individuals that the notion of exempt or excluded assets will apply (this means that some systems allow the insolvent individual to keep some of the assets required to maintain him or herself and his or her dependents).[43]

4.2.2.2 Policy considerations

Although there are many policy considerations at play when analysing or reforming a particular insolvency system, a broad and very generalised approach to follow is firstly to ask if a particular system is more pro-creditor oriented (that is, following a more conservative approach towards the granting of a discharge of debt to debtors) or more pro-debtor oriented (that is, States that follow a rather liberal approach towards a discharge of debt, also referred to as "rehabilitation" or "fresh start").[44]

4.2.2.3 Sources of insolvency law

When analysing the insolvency laws of a particular State, it is extremely important to find the main sources of law that apply. In modern times, these rules will usually be found in legislation or codes. However, systems still based on the common law may also rely on common law principles to plug any possible *lacunae* (gaps) in the existing legislation.

It must also be noted that some systems have a single, unified piece of bankruptcy legislation covering all aspects of bankruptcy. In the USA, for example, the Bankruptcy Code 1978 applies throughout the USA due to the fact that it is federal legislation. In many other systems a multiplicity of legislation exists and these must be studied in conjunction with each other in order to understand the system in full. Examples of this is where the laws for individual bankruptcy is contained in one statute, while the laws relating to the winding up of companies is contained in another, different statute.

Over and above insolvency legislation, it is a fact that many legal principles forming part of the so-called general law, in other words non-bankruptcy law, will also have an effect in insolvency, for example the rules that regulate the vesting of real rights such as ownership, or rights of real security. These rules are usually not found in insolvency legislation, but they have a huge impact

[43] Fletcher, *supra* note 4, Ch 1.
[44] Wood, *supra* note 2, p 1.

on insolvency law generally. It should also be noted that legal systems can differ quite substantially in respect of the generally applicable law.

4.2.2.4 Common characteristics of consumer and corporate insolvency

In order to analyse the various rules in a particular system, it is necessary to distinguish between these two main areas of insolvency law, that is, individual and corporate insolvency.[45] Some principles may largely be the same and may apply in both instances, but there are also some pertinent differences due to the very nature of the type of debtor being dealt with. It should be quite obvious that individual bankruptcy (involving natural persons)[46] is quite different in nature from corporate insolvency (involving artificially-created legal persona in the form of companies / corporations). One obvious difference is that individuals are not "dissolved" after bankruptcy in the same way a company is dissolved once its affairs have been wound up.

4.2.2.5 Commencement of insolvency proceedings and gateways

All insolvency systems make provision for a procedure whereby formal insolvency or bankruptcy commences. This procedure may be by way of a court order and in this regard it must be noted that some systems have specialised bankruptcy courts, such as the US, while in other systems the general courts decide such matters. It is also possible that the bankruptcy proceeding may be opened by way of a more informal process, in other words where the process can be opened by way of an administrative process outside the ambit of the courts. In the case of corporate insolvency some systems allow for the opening of the procedure by way of a resolution by the members (for example, equity holders) of the company. Another important aspect to consider is who may apply for the opening of the procedure, in other words, who has the legal standing (*locus standi*) to do so? For a number of reasons, it is also crucial to determine the exact moment when the procedure commences. Many aspects of insolvency law hinge on the time the proceedings commence, for example voidable dispositions, the status of various creditors, the vesting of rights and so on.

4.2.2.6 Effects of insolvency

After the commencement of an insolvency proceeding, a number of consequences or effects will follow. Some deal with the legal position or status of the insolvent debtor, the debtor's assets and pre-commencement transactions, while others deal more with the administration of the insolvent estate.

Automatic stay / moratorium

One of the most general features to be found upon the commencement of an insolvency proceeding, is that individual creditor actions against the debtor are stayed. The reason for this is that insolvency or bankruptcy signifies a collective procedure that must in principle be binding on all the creditors. If a single creditor were allowed to continue with his or her individual debt

[45] Fletcher, *supra* note 4, Ch 1.
[46] World Bank, *Report on the Treatment of the Insolvency of Natural Persons*, 2012.

enforcement mechanisms after commencement, that would render the collective proceeding ineffective.

What the "estate" comprises

One of the important aspects to be considered at the commencement of an insolvency or bankruptcy proceeding is what assets (or property) are deemed to be estate assets. This aspect is of particular importance in the case of natural person insolvency since many systems allow for certain assets to be exempt or excluded from the estate, such as essential household goods.

Although this notion of exempt or excluded assets does not really come into play in the case of corporate liquidations, it may nevertheless be important to work out which assets are in fact assets of the insolvent entity (and not for example, a related entity in a group enterprise) in order to trace and collect them for the purpose of realisation and distribution.

Rights, duties, liabilities and limitations of the consumer debtor

The formal insolvency or bankruptcy of individuals may affect them in a number of different ways. Some systems limit their contractual capacity to obtain new credit by requiring the consent of their estate representative in order to do so. In addition, in some instances a bankrupt individual is not allowed to take up certain positions, such as being a member of parliament or to serve as a director of a company or to be appointed as the officeholder in an insolvent estate.

Rights, duties, liabilities and limitations of directors and other officers of corporations

The liquidation of a company may give rise to certain personal consequences for its (former) directors and officers. For example, there could be personal liability claims against the directors or officers of the company in the case of reckless or fraudulent trading, or the directors could be subject to disqualification of some kind due to their role in the financial demise of the corporation. The extent of any such liability by directors and / or officers of the corporation will depend on the specific laws of a particular State.

Executory contracts

Although the existing rights and obligation of parties are in principle acknowledged and respected by an insolvency law, most insolvency systems usually allow the estate officeholder (insolvency representative) to deal with (uncompleted) contracts entered into by the insolvent with another party prior to commencement of an insolvency proceeding. This can occur in a number of ways, for example, the law may allow the insolvency representative to decide if he or she will abide by the contract or not, in which case the solvent party will have certain remedies against the estate depending on what the insolvency representative decides. Normally an insolvency representative would only continue or complete an executory contract if the estate (that is, the creditors) will obtain some benefit by doing so.

There may also be special legal rules that apply to specific types of contract, for example in the case of a lease or the purchase of immovable property. Local culture and conditions may require

contracts of employment to be dealt with in a specific way, depending on the relevant approach to socio-economic issues and the political dispensation in a specific State. In some systems contracts of employment are terminated or suspended at the commencement of a liquidation proceeding. Such contracts may even be transferred to a new owner / employer where the business is as a going concern.

Set-off

With regard to set-off, a distinction must be drawn between pre- and post-commencement set-off that may have taken place in regard to claims between the insolvent and a third party. Some systems provide specific remedies whereby pre-commencement set-off may be ignored under certain conditions, while in the case of post-commencement set-off some systems allow it under certain conditions and others do not.

In relation to transactions on the financial markets, some systems have special rules that apply to netting and set-off, providing that the transactions must be honoured even where one of the parties to the contract is insolvent. The rationale behind this is to prevent systemic risk in the financial markets.

Vulnerable / voidable transactions

The *Legislative Guide* states[47] that since insolvency law establishes a collective debt-collecting mechanism, it is essential to discourage individual creditors from continuing with individual debt enforcement measures as from the commencement of an insolvency proceeding. However, policy considerations dictate that some transactions that took place prior to commencement may (and should, under certain circumstances) also become subject to investigation. If certain requirements are met, these transactions may be set aside, and any benefits received by the beneficiary will need to be repaid to the insolvent estate. Transactions that are typically subject to these provisions are those aimed at: preventing fraud (for example, transactions designed to hide assets for the later benefit of the debtor, or to benefit the owners (equity holders), directors or officers of the debtor); ensuring the equitable treatment of all creditors by preventing favouritism when the debtor makes preferential dispositions preferring some creditors at the expense of others; preventing a sudden loss of value for the business entity just before the supervision of the insolvency proceeding is imposed; and, in some States, creating a framework for encouraging out-of-court settlements because creditors will be aware that last-minute transactions or seizures of assets are susceptible to being set aside and will therefore be more likely to work with debtors to arrive at workable settlements without the need for court intervention.

Voidable dispositions can be classified as either fraudulent conveyances (disposition of property without receiving adequate value in return) or preferences. A fraudulent conveyance entails a disposition of property by the insolvent, usually in the form of a donation or undervalue transaction, that causes or increases the debtor's insolvency. Preferences are characterised by the settlement of a pre-existing debt to a creditor, or by affording such a creditor real security

[47] *UNCITRAL Legislative Guide on Insolvency Law*, Part 1, cl 1.

for a pre-existing unsecured debt, thereby improving the creditor's position once insolvency commences.

The *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law. In practice, legislation dealing with these matters may differ in detail regarding the requirements for the remedies to be applied.

4.2.2.7 Administration of the estate

The administration of an insolvent estate is the main part of the post-commencement proceedings and a broad number of aspects fall under this very general term.

Many systems provide for a type of insolvency regulator, or at least an official administrative office, that has certain prescribed functions (such as the supervision of the administration process of an insolvent estate generally, or extensive regulatory functions in regard to the appointment, licensing, etc of insolvency practitioners / representatives). In some systems these functions are overseen by the courts.

The majority of insolvency systems provide for an officeholder of some description to be appointed to oversee the insolvency process. The term used to describe the officeholder can vary from State to State; depending on their role and the State concerned, the officeholder could be called a trustee, liquidator, receiver, curator, syndic administrator or business rescue practitioner. It can also be mentioned that the appointment procedure, prescribed qualifications and regulation of officeholders differ significantly from system to system. Some systems prefer qualified accountants to be appointed as officeholders, others prefer attorneys or solicitors and some have no formal prescribed qualifications at all.

The fact that someone has been declared bankrupt must be publicised, usually by way of a notice placed in the official gazette or in a widely-circulated newspaper. This informs everyone who may have an interest regarding the status of the debtor. In addition, provision will usually be made for creditors' meetings and the filing of claims.

The officeholder of an insolvent estate must be appointed in accordance with the prescribed rules of the relevant State and provision must be made for the administration of the estate by such person, including the power to investigate, the verification of claims, the realisation of assets and distribution of the proceeds of the assets in accordance with the prescribed rules. Another important task of the officeholder is to trace assets of the estate and sell them, so that the proceeds can be available for distribution amongst the creditors.

Creditors usually participate in the insolvency process by way of creditors' meetings, creditors' committees or committees of inspection, depending on which State one is dealing with.

4.2.2.8 Distribution

The distribution rules in respect of payments to creditors will differ from State to State, but most systems draw a distinction between secured and unsecured creditors. Secured creditors are those creditors who hold a valid form of security for their claims, while unsecured creditors do not. Most States also make a further distinction in the sub-class of unsecured creditors, by making a distinction between preferential (priority) and concurrent claims. Preferential or priority claims are usually prescribed by legislation and usually consist of amounts owing to employees (for example arrear salary, wages and leave pay) or the State (for example, arrear or unpaid taxes). However, some systems have abolished the so-called "Crown preference" (which is a reference to the priority afforded to revenue authorities)[48] and some systems grant employees a "super preference" that enjoy priority over other priority creditors and in some States will even enjoy preference above secured creditors.

Since there are a number of important differences between the types of real security found in various States, this remains one of the most difficult aspects to deal with in a cross-border context. For example, in States based on English law the notion of a floating charge is commonplace, while this form of security is generally not known in civil law States.

Many instruments are based on the principle that pre-acquired rights in terms of the general law of a particular State, such as the law relating to security, must be acknowledged during bankruptcy or insolvency. UNCITRAL has also finalised a Model Law on Secured Transactions (2016), which is an attempt at harmonise the rules relating to security interests around the world.[49]

The general body of unsecured creditors, who enjoy no priority at all, are only considered for payment from the funds remaining after the secured and priority / preferential creditors have been paid. These are the creditors, sometimes referred to as "concurrent creditors", who may receive a dividend in payment or may receive no payment at all.

Where a system allows for the subordination of certain claims, such creditors are even lower down the payment ladder (or "waterfall" as this is sometimes referred to) and will rank behind the unsecured creditors.

4.2.2.9 Cost of administration

The cost of administering an insolvent estate must usually be paid out of the proceeds of the assets after they have been realised. These costs rank above the claims of creditors, although most States provide for the hierarchy of such payments in their insolvency legislation. In some cases there may be a shortfall – that is, insufficient assets or realisations to pay the costs of administration – and some systems then oblige those creditors who have proved claims against the estate to pay the shortfall in accordance with their claims, in other words to make a contribution towards settling such a shortfall. Alternatively, some States may require insolvency

[48] Notably the United Kingdom and Germany, although the United Kingdom is now looking to reintroduce it in December 2020.

[49] See www.uncitral.org/uncitral/en/commission/working_groups.

representatives to bear the cost and in other States, there may be a State insolvency trustee or liquidator. Where litigation is required, for instance to reclaim estate assets, creditors will sometimes finance such litigation and may then usually enjoy some benefit should the litigation be successful.

In some States there may be a special dispensation whereby a very small estate, or one with no income and no assets (so-called NINA estates), is administered and finalised by the regulator in that State.

4.2.2.10 Rehabilitation and discharge

The term "rehabilitation" usually refers to a debtor receiving a discharge of unpaid debts at the end of the bankruptcy administration. This wiping the slate clean is often referred to as a "fresh start". The underlying principles and conditions attaching to a discharge may differ from State to State, although it is to be noted that there are still some States that do not provide for a discharge at all, or where the discharge is obtained under very stringent conditions. Insolvency systems are sometimes classified as being either pro-debtor or pro-creditor based on the discharge provisions in a particular State.

Discharge of individuals

Rehabilitation in the case of an individual bankrupt will afford the insolvent debtor a discharge and, once discharged, the debtor will be able to continue without the pre-bankruptcy debt burden. Corporations cannot be "rehabilitated", so those that are liquidated normally end up being dissolved after the winding up of its affairs has been concluded.

Rehabilitation or rescue of corporations / businesses

The rehabilitation or rescue of corporations (corporate rescue) has become one of the main areas of reform in many insolvency systems over recent years. Wherever possible, corporate rescue is preferred to the liquidation or winding up of companies where they are financially distressed. There are many reasons for this, but the two main ones that can be advanced are i) the fact that there is evidence to show that a better price can be obtained for a business sold as a going concern as opposed to selling the assets of the corporation piecemeal and ii) the preservation of businesses holds advantages for society in that jobs are preserved (both the economy and the fiscus will thus benefit from a corporate rescue).

Corporate rescue can either be on an informal basis, where an out-of-court workout can be agreed between the parties, or by way of a formal, statutory corporate rescue mechanism. The disadvantages of informal creditor workouts are that i) there is no moratorium in place preventing other creditors from approaching the courts and commencing an insolvency proceeding and ii) there is no way of binding dissenting creditors to any agreement reached. However, the advantages of an informal creditor workout are that i) the cost is significantly lower in that the courts are not involved and ii) there is no publicity regarding the fact that the debtor company is experiencing financial difficulties. In the case of formal statutory corporate rescue regimes, the advantages are that i) there is the benefit of a statutory moratorium preventing any

legal proceedings being taken against the corporation (for say liquidation or the enforcement of execution proceedings) and ii) it may be possible to bind dissenting creditors to whatever workout is proposed by the officeholder or the corporation itself. The two disadvantages usually associated with formal rescue mechanisms are that i) there is publicity regarding the financial distress of the company which can have a negative impact on the goodwill of the corporation and ii) formal mechanisms can be quite expensive, especially if there is court involvement (which is often the case).

Agreements reached between the parties are contractual in nature and may therefore provide for just about anything, as long as it is legal, binding and enforceable. Agreements could contain provisions dealing with deferments or extensions of payment, a discharge of some of the debt owing (sometimes referred to as a "haircut") and debt for equity swaps as some examples. The agreement (in the form of a rescue plan) could be pre-packed (in other words worked out in advance) and may then be either adopted by way of agreement or in terms of a formal corporate rescue procedure.

Formal, statutory procedures usually provide for a commencement procedure, an automatic stay / moratorium, provisions dealing with the displacement of existing management by the appointment of an independent officeholder (or, in some States, debtor-in-possession provisions where existing management remain in charge of the process, as is the case in the USA), the role of stakeholders (such as creditors, employees and shareholders) and the development and implementation of a rescue plan, to name but a few. In order to make a rescue viable, it may be necessary to inject new or fresh capital into the company, to discharge at least some of the existing debts, to close down some of the unprofitable units of the business or to sell off non-core assets of the company. Usually there will also be a provision for the recue procedure to be converted to a liquidation procedure when it becomes evident that the rescue attempt will not succeed. The essence of corporate rescue is to preserve at least the business (or parts of it) of the financially distressed debtor.

4.2.2.11 Alternatives to liquidation and consumer bankruptcy

It has already been mentioned that debtors may approach their creditors with a view to reaching an agreement that will allow for a new arrangement in regard to existing debts. Such agreements may provide for an extension of the repayment periods (rescheduling of debts) and / or discharge from some of the debt. Such agreements will normally be in the form of a compromise or composition and will usually lead to a contractual novation of the former debt. Corporate rescue as an alternative to liquidation has already been discussed above.

It should also be mentioned that some systems also make provision for formal repayment plans as alternatives to the formal bankruptcy of individuals. Such repayment plans may in some prescribed instances follow a majority vote of acceptance by the debtor's creditors, or creditors may be bound by way of a court order. Not all systems allow for a discharge in these instances.

4.2.2.12 Cross-border insolvency dispensations

A variety of methods exist for dealing with the assets of insolvent estates that are situated in foreign States, that is, States where an insolvency proceeding has not yet been commenced. Some systems have statutory provisions in place for dealing with these situations. However, in some States there is no statutory dispensation, but the local courts can be approached on an *ad hoc* basis for an order that may allow for a foreign insolvency representative to deal with assets in the local jurisdiction. In common law States the courts can be approached to assist in providing a remedy in the absence of statutory rules covering such support, or where legislation exists but a *lacuna* arises due to a gap in the legislative provisions. In this context the rules of private international law may also find application, or there may be a treaty or convention regulating how these situations should be dealt with.

4.2.2.13 Special rules

In some systems it is not possible to subject an individual to a collective insolvency proceedings and in others this may only be allowed where such an individual is a trader or entrepreneur.

Insolvency involving groups of companies and the insolvency of financial institutions (such as banks) and insurance companies also pose some specific difficulties.

Despite the reality of enterprise groups, legislation in many legal systems treats corporations or companies as single entities (based on the most basic rules of company law). Insolvency laws generally respect the separate legal status of each enterprise group member and separate applications for the commencement of insolvency proceedings are usually required in respect of each of the companies that is a member of the group.

In some States the law makes provision for limited exceptions that allow for a single application to be made in regard to more than one company in a group, for example where all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members; the parties to the application are economically integrated (such as by the intermingling of assets or a specified degree of control or ownership). In some instances, judges have also developed the law to be more in line with modern business realities.[50]

The financial distress of banks, insurance companies and other institutions taking deposits from the public can pose the danger of systemic risk to the financial system not only in a specific State, but across the world. This poses a significant risk to both local economies and the global economy. Due to the danger of systemic risk, most States have special provisions relating to these institutions when they are facing financial distress, and these are usually strictly regulated.

[50] See further UNCITRAL Legislative Guide on Insolvency Law "Part three: Treatment of enterprise groups in insolvency at http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf.

4.2.2.14 Dissolution of corporations

It is often said that liquidation (or winding up) is the process that precedes the dissolution of a company. Once a company's affairs have been completely wound up, provision is normally made for its dissolution.

4.3 Core terminology / glossary of terms

4.3.1 Introduction

Although the terms discussed below are intended to provide an orientation to the reader of the *UNCITRAL Legislative Guide*, they can also be useful in understanding the different terminology you will be faced with when looking at the laws of various States.

Terms such as "secured creditor", "security interest", "liquidation" and "reorganisation" may have fundamentally different meanings in different States. An explanation of the use of the terms in the Guide may assist candidates in understanding the various terms in their correct context.

4.3.2 Selected terminology

The section below explains the meaning and use of certain expressions that appear frequently in the *UNCITRAL Legislative Guide* and also in other UNCITRAL insolvency-related texts.

Administrative claim or expense: claims that include costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative's functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings.

Assets of the debtor: property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets.

Avoidance provisions: provisions of the insolvency law that permit transactions or the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.

Burdensome assets: assets that may have no value or an insignificant value to the insolvency estate or that are burdened in such a way that retention would require expenditure that would exceed the proceeds of realisation of the asset or give rise to an onerous obligation or a liability to pay money.

Cash proceeds: proceeds of the sale of encumbered assets to the extent that the proceeds are subject to a security interest.

Centre of main interests: the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties.

Claim: a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent.
Note: Some States recognise the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim.

Commencement of proceedings: the effective date of insolvency proceedings whether established by statute or a judicial decision.

Court: a judicial or other authority competent to control or supervise insolvency proceedings.

Creditor: a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings.

Creditor committee: representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law.

Debtor in possession: a debtor in reorganisation proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative.

Discharge: the release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings.

Disposal: every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part.

Encumbered asset: an asset in respect of which a creditor has a security interest.

Equity holder: the holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise.

Establishment: any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Financial contract: any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above.

Insolvency: when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets (Added note: this definition denotes commercial

insolvency or cash flow insolvency and balance sheet insolvency respectively. The term bankruptcy is also sometimes used but it usually refers to the formal state of being in bankruptcy).

Insolvency estate: assets of the debtor that are subject to the insolvency proceedings.

Insolvency proceedings: collective proceedings, subject to court supervision, either for reorganisation or liquidation.

Insolvency-related judgment:

> "(i) Means a judgment that:
>
> a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and
>
> b. Was issued on or after the commencement of that insolvency proceeding; and
>
> (ii) Does not include a judgment commencing an insolvency proceeding."

Insolvency representative: a person or body, including one appointed on an interim basis, authorised in insolvency proceedings to administer the reorganisation or the liquidation of the insolvency estate.

Liquidation: proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.

***Lex fori concursus*:** the law of the State in which the insolvency proceedings are commenced.

Lex rei situs: the law of the State in which the asset is situated.

Netting: the setting-off of monetary or non-monetary obligations under financial contracts.

Netting agreement: a form of financial contract between two or more parties that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (ii) of this definition under two or more netting agreements.

Ordinary course of business: transactions consistent with both:

(i) the operation of the debtor's business prior to insolvency proceedings; and

(ii) ordinary business terms.

Pari passu: the principle according to which similarly situated creditors are treated and satisfied proportionately to their claim out of the assets of the estate available for distribution to creditors of their rank.

Party in interest: any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest.

Post-commencement claim: a claim arising after commencement of insolvency proceedings.

Preference: a transaction which results in a creditor obtaining an advantage or irregular payment.

Priority: the right of a claim to rank ahead of another claim where that right arises by operation of law.

Priority claim: a claim that will be paid before payment of general unsecured creditors.

Protection of value: measures directed at maintaining the economic value of encumbered assets and third party owned assets during the insolvency proceedings (in some States referred to as "adequate protection"). Protection may be provided by way of cash payments, provision of security interests over alternative or additional assets or by other means as determined by a court to provide the necessary protection.

Related person: as to a debtor that is a legal entity, a related person would include:

(i) a person who is or has been in a position of control of the debtor; and

(ii) a parent, subsidiary, partner or affiliate of the debtor.

As to a debtor who is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity.

Reorganisation: the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern.

Reorganisation plan: a plan by which the financial well-being and viability of the debtor's business can be restored.

Sale as a going concern: the sale or transfer of a business in whole or substantial part, as opposed to the sale of separate assets of the business.

Secured claim: a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default.

Secured creditor: a creditor holding a secured claim.

Security interest: a right in an asset to secure payment or other performance of one or more obligations.

Set-off: where a claim for a sum of money owed to a person is applied in satisfaction or reduction against a claim by the other party for a sum of money owed by that first person.

Stay of proceedings: a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate.

Suspect period: the period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the date of commencement.

Unsecured creditor: a creditor without a security interest.

Voluntary restructuring negotiations: negotiations that are not regulated by the insolvency law and generally will involve negotiations between the debtor and some or all of its creditors aiming at a consensual modification of the claims of participating creditors.

Self-Assessment Exercise 2

Question 1

Using the framework provided above, cast your home country's (domestic) insolvency system into this framework.

Question 2

Write a brief essay on the history and essentials of an insolvency system and indicate if your home country's (domestic) system stems from English common law or civil law.

Question 3

Discuss if your domestic system is pro-debtor or pro-creditor.

Question 4

Mention who the insolvency regulator in your domestic system is, how insolvency representatives are appointed and if you have specialised insolvency courts, special insolvency tribunals and the role of the general courts in your system.

Question 5

Explain if and on what grounds or basis your system will deal with cross-border insolvency matters, for instance recognising a foreign insolvency order or assist a foreign insolvency representative.

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

5. THE NATURE AND SOURCES OF INTERNATIONAL INSOLVENCY LAW

5.1 Introduction

There are various points of view regarding the notion of international insolvency law. The point of departure is that there is not a single set of insolvency rules that applies globally. It is fair to state that all States with a developed legal system do have some form of bankruptcy / insolvency system – also referred to as a collective debt collecting procedure – but there are differences in approaches and policies as well as differences in substantive and procedural rules. Amidst these differences, scholars, legislatures, international organisations (such as UNCITRAL and the World Bank) and courts are continually striving to devise statutory dispensations and solutions as to how to deal with insolvency issues on a transnational basis.

Due to globalisation, trade and the movement of assets across borders, creditors may be compelled to deal with the estate(s) of their debtor in a number of States in an attempt to reclaim their debts. Such a scenario will inevitably give rise to cross-border legal and in many instances cross-border or transnational insolvency law issues.

Wessels[51] defines international insolvency law as that part of the law that:

> "[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."

However, the author concedes that this definition is limited since it is connected to the existence of a national legal framework of insolvency law. He also refers to various other definitions that exposes such limitations, such as the definition provided by Fletcher[52] where he proposes that:

> "international insolvency" or "cross-border insolvency" should be considered as a situation "…in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

Friman[53] states that it was no coincidence that the founding fathers of the USA declared in their Constitution of more than 200 years ago that insolvency law is a federal question (that is, an aspect that should be addressed by federal law and not state law). A common market with a free flow of goods, services, capital and persons (labour) requires an overarching, standardised regulation of insolvency matters. Recognition of insolvency proceedings in one state (whether federal or national in nature) where the debtor holds assets at the commencement of proceedings in another state of the common market, cannot depend solely on the goodwill of the first state. The European Union – where a common market between nation States exists – has also realised this. Irrespective of the existence of a formalised common market, today's communications and interaction between individuals, businesses and States have given rise to transnational or cross-border cases of insolvency. Investments and the establishment of branches and subsidiaries in foreign countries are common, the capital markets have (generally speaking) been deregulated and foreign exchange controls relaxed or even scrapped. In the current world economy, national borders are becoming increasingly irrelevant. It has even been claimed that in modern times the majority of significant corporate collapses involve more than one State and that international insolvencies are therefore the norm and not the exception.[54]

This development has highlighted the fact that most domestic legal systems are ill-equipped when it comes to dealing with insolvencies with implications across national borders. Generally speaking, a State's enforcement of its jurisdiction ends with its national borders. The problems are obvious in relation to the present-day mobility of people, the great speed at which assets can be transferred from one place to another and the complexity of many business transactions.

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51 Wessels, *supra* note 1, p 1.

52 *Idem*, p 1 *et seq*.

53 H Friman. The discussion on cross-border insolvency rules are largely based on the master class notes initially drafted by the late Judge, Hakan Friman for the LLM in the international insolvency law module presented at the University of Pretoria, and when he served as extra-ordinary professor in that faculty.

54 Wood, *supra* note 2, p 29; P J Omar, "The Landscape of International Insolvency", (2002) 11, *IIR* 173, pp 173 to 174.

Without co-ordination and co-operation between Courts of different States in a cross-border situation, there will always be a risk of multiple insolvency proceedings against the same debtor. If these proceedings compete with each other, or are incompatible in nature (for example, winding up or liquidation versus corporate rescue / restructuring), they may lead to unnecessary capital losses for the creditors as attempts to resolve financial distress under a rescue or reconstruction scheme, may be prevented. It may be impossible to predict which law will ultimately govern the many questions that may arise on questions such as security rights and priority payments in an insolvency. Such a situation may also result in a race between creditors for assets, a race in which "only the fittest" would survive. Creditors who are unable to join the race for assets would be the major losers and this would run counter to one of the most basic global principles of insolvency, namely the principle of equality between creditors (*par conditio creditorum*). The risk of fraud and detrimental forum shopping could also arise in relation to cross-border insolvency proceedings.

These shortcomings have, of course, been observed over the years and various stakeholders and representative bodies have launched various initiatives in order to address these issues. The most significant of these initiatives are addressed below.

The main, overarching reason for establishing clear and uniform rules relating to cross-border insolvency issues, is to provide clarity and predictability which is extremely important for the purpose of international trade and investment.

5.2 Cross-Border insolvency cases and some doctrinal perspectives

5.2.1 Generally

Cross-border insolvency cases may arise due to many different reasons, for example, the debtor having:

(a) economic affairs with a foreign counter-party;

(b) interests in property located in more than one State;

(c) foreign creditors;

(d) contractual obligations that may fall under a foreign State's jurisdiction and be governed by foreign law; or

(e) obligations that have been incurred outside the debtor's home State, or that are to be performed in a foreign State.

The implications of this may be that insolvency proceedings can be commenced in more than one State and, once opened, each proceeding giving rise to cross-border matters. One of the most basic of these matters would be how to co-ordinate, if possible or desirable, multiple concurrent insolvency proceedings against the same debtor. The fact that the debtor's affairs

are in some way connected to more than one State (or jurisdiction), brings them into the sphere of "private international law".

A cross-border insolvency case may, in its simplest form, involve an insolvency proceeding in one State and creditors in another. But the case can be much more complex than that, involving subsidiaries, assets in multiple States, operations and creditors in multiple States, as well as multiple insolvency proceedings running simultaneously in different States.

There are numerous problems and questions that arise in cases of cross-border insolvency and the question remains as to how to best resolve these. Generally speaking, independent and sovereign States govern their own legislation and must therefore be involved in amending their legislation in order to meet these challenges. (However, in some places, most notably in the European Union, nation States have decided to transfer some of these powers to a supranational body.) Both national and international laws on insolvency traditionally show a lack of structure, both formally and informally, to deal with cross-border insolvency cases. But insolvency proceedings could possibly be opened concurrently in more than one State, each State would then apply its own laws (including its choice-of-law rules) and no, or very limited, extraterritorial effect would in some instances be granted to foreign proceedings. In spite of difficulties, there is nevertheless often room for both primary (universal) proceedings in the State where the centre of main interest is and secondary (territorial) proceedings in States where the same debtor has assets or a fixed interest. A strict territorial approach in such instances would cause difficulties – especially if there is lack of co-operation and co-ordination between different States to deal with the cross-border insolvency elements in such cases.

One aspect of this is that the standard of insolvency laws in many countries is relatively low. Many laws are outdated (perhaps a remnant of a colonial past) or otherwise framed in a way that is not suited to modern day trade and investment. A number of initiatives have been taken in order to create debate around the issues and to provide international best practice standards. Such initiatives include The World Bank's *Principles for Effective Insolvency and Creditor / Debtor Regimes*, the *UNCITRAL Legislative Guide on Insolvency* and a project by the European Commission called *Bankruptcy and fresh start: stigma on failure and legal consequences of bankruptcy*.[55A] A generally higher standard of national insolvency laws would of course go a long way to resolving many of the problems experienced in cross-border insolvency, but does not really address what is really needed, that is, co-operation and co-ordination in the case of multiple concurrent insolvency proceedings.

Another difficulty, once discussions on cross-border insolvency issues have started, is to reconcile the various national approaches to insolvency. A basic dividing line is the general view as to the interests that insolvency proceedings should provide for. A common distinction made is between pro-creditor and pro-debtor systems (that is, looking at the interests of the creditors in recovering their claims, or looking at the interests of the debtor in continuing to do

[55A] https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-andcreditor-rights; https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law; http://edz.bib.uni-mannheim.de/daten/edz-h/gdb/02/stigma_study.pdf.

business).[55] However, other systems may emphasise other interests that are important in a domestic context, for example labour rights (for example, France). There may also be a reluctance based on other public policy reasons, such as an unwillingness to recognise foreign public claims (for taxes, social security, etc) or simply a desire to protect local creditors. All this results in various States competing with each other for the debtor's assets. In addition, insolvency proceedings can be complicated by the fact that they relate not only to aspects of procedural law, but also in regard to significant areas of substantive law (in both private and public law). Generally speaking it can be said that States are more willing to export than import insolvency proceedings.

In seeking solutions to the problems associated with cross-border insolvency, there are two main approaches or theories, both of which have their supporters and detractors. The two principles, or theories, are **universalism** on the one hand and **territorialism** on the other. However, the problem is that the two theories are diametrically opposed to each other.[56] While both theories are supported by very legitimate and reasonable arguments, international observers and commentators generally seem to favour the principle of universality, in spite of the problems and shortcomings created by this approach. Nevertheless, it is a fact that national governments cannot disregard national interests (and constituencies) that may be easier to identify and defend under the principle of territoriality.

5.2.2 Universalism

A simplified explanation of universalism or universality is that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide. Hence, once the proceedings are opened, no other insolvency proceedings ought to be possible nor any other forms of execution of the debtor's assets. Ideally, only one forum should have jurisdiction.[57] The chosen State could be where the centre of the debtor's interests is located. There could also be other approaches, however, for example a worldwide insolvency law (but not a single forum), which could also include contractual elements.[58] Whatever the approach, it is based on the premise that all the debtor's assets should be included in the insolvency proceeding and the officeholder should be provided with the tools to control and obtain all the assets. All creditors worldwide should have the opportunity of participating in the proceedings with all claims being treated on an equal basis.

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55 For a comprehensive survey, see P R Wood, *Maps of World Financial Law*, Allen & Overy Global Law Maps: World Financial Law, 3rd ed, 1997.

56 For a more elaborate explanation, where the principles of "unity" and "plurality" are added, see I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005), pp 11-17. For further discussion on the terminology, see J L Westbrook, "The Lessons of Maxwell Communications", (1996) *Fordham Law Review* 64 2531, pp 2531 to 2533.

57 For proponents of this approach, see J L Westbrook, "A Global Solution to Multinational Default", (2000) 98 *Michigan Law Review* 2276, pp 2276 to 2328; A T Guzman, "International Bankruptcy: In Defence of Universalism", (2000) 98 *Michigan Law Review* 2177, 2177 to 2215; P Perkins, "A Defence of Pure Universalism in Cross-Border Corporate Insolvencies", (2000) 32 *New York University Journal of International Law and Politics* 787, pp 787 to 828.

58 See, eg, R K Rasmussen, "A New Approach to Transnational Insolvencies", (1998) 19 *Michigan Journal of International Law* 1, pp 1 to 36.

The proponents of universalism regard it as the best approach in satisfying the interests of those involved in cross-border insolvency cases, with lower costs being argued as an added incentive. While the principle of universalism relates well to globalisation and the large multinational corporations that operate in international markets, it requires a very high level of trust in foreign legal systems and foreign insolvency proceedings, since a single insolvency proceeding would have to have extraterritorial effect. In order to be effective, a universal approach would also have to address difficult legal issues such as choice-of-law and priority rules.[59]

Opponents of universalism point out the difficulty in establishing a single State (the "home" State) for the debtor where insolvency proceedings will exclusively be opened. One of the main drawbacks, according to opponents of universalism, is that this principle will create uncertainty in the domestic markets and that "home" country standards may be indeterminate (in particular when the debtor is a corporate group) and vulnerable to strategic manipulation.[60]

5.2.3 Territorialism

The principle of territorialism is diametrically opposed to the principle of universalism and is based on the premise that insolvency proceedings may be commenced in every State / jurisdiction where the debtor holds assets, but that they should be territorially limited and restricted to property within the State where the proceedings are opened. In terms of this principle, it would be possible to have multiple insolvency proceedings running concurrently in regard to the same debtor. The proceedings would also then be restricted in respect of which creditors may file their claims and the officeholder would have a mandate which would be confined to the national borders of the State where the insolvency proceedings are taking place. In terms of this principle, the national interest should be protected (that is, the interests of local creditors) before any assets are transmitted abroad.

Territorialism addresses local interests and local creditors who act within the domestic market and where only an evaluation of local assets is often made before credit is given. Such creditors may also suffer huge practical and economic challenges in participating in foreign insolvency proceedings (even if they are regarded as being equal under the law (*de jure*), the factual (*de facto*) situation may be a lot different, causing hardship for the creditors). Without the benefit of a local insolvency proceeding, it could happen that only the strongest creditors would receive any payment.

One major drawback when applying the principle of territorialism, is that the debtor may be declared insolvent in one State (where the debts are) but not in another (where the assets are). This would mean that the debtor could be solvent in one State but hopelessly insolvent in another. The proponents of territoriality do appreciate the problems associated with this

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[59] See, eg, J L Westbrook, "Choice of Avoidance Law in Global Insolvencies", (1991) 17 *Brooklyn Journal of International Law* 499, pp 499 to 538; J L Westbrook and D T Trautman, "Conflict of Laws Issues in International Insolvencies", in J S Ziegler, (ed), *Current Development in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 pp 655 to 669; J L Westbrook, "Universal Priorities", (1998) 33 *Texas International Law Journal* 27, pp 27 to 45.

[60] For one of the most prominent critics of universalism, see L M LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", (1999) 84 *Cornell Law Review* 696, pp 696 to 762.

approach; however, they do not believe that the answer lies in universalism. Rather, they see the solution in a co-operative form of territoriality.[61]

It is sometimes said that civil law countries are more inclined to take a territorial approach to jurisdiction and that common law countries are more closely aligned with universalism.[62] In practice, however, national States do not adopt either of these approaches in their purest form and this is where "modified universalism" and "modified territorialism" have their genesis. Territoriality has been found to be too costly and an essentially universal approach is often politically and practically difficult to achieve. Other more pragmatic approaches have been suggested, for example an "internationalist principle" approach based on the common law concept of comity,[63] or a non-territory oriented approach based on a choice-of-law rules.[64] Even where there are international efforts in remedying the lack of co-operation and co-ordination between States, they will seek to modify and to find compromises based on the elements of both principles. The truth is, in practice there is often room for both primary (universal) and secondary (territorial) insolvency proceedings.[65]

5.2.4 Other approaches

Within the context of international insolvency the different approaches or doctrinal perspectives proposed by various commentators[66] may for the purposes of this guidance text be summarised as below (this includes a brief discussion of universalism and territorialism which have already been discussed above).

5.2.4.1 Universalism

This is an approach that allows for more than one insolvency proceeding pending / originating in different States to be dealt with under the provisions of one insolvency law, for example in the State where the debtor has its centre of main interests (COMI). This means that the law of the "main proceeding" will have worldwide effect, even outside the territorial jurisdiction of the State where the so-called main proceeding has been opened. It calls for so-called "unity of

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61 *Ibid*.

62 See, eg, P J Omar, "A Panorama of International Insolvency Law: Part 1", (2002) *International Company and Commercial Law Review* 366, p 366 to 376. In this article, as well as in its second part, 2002 *ICCLR*, pp 416 to 422, the author compares the procedures for dealing with cross-border insolvencies in Australia, Belgium, France, New Zealand and Switzerland. See also P Torremans, *Cross Border Insolvencies in EU, English and Belgian Law,* The Hague / London / New York: Kluwer Law International, 2002.

63 See I F Fletcher, *supra* note 56, at pp 12 to 14. On international comity, see also S L Bufford *et al*, *International Insolvency*, Federal Judicial Center, Washington, 2001, pp 36 to 42 (with reference to US insolvency law).

64 See H L Buxbaum, "Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory", (2000) 36 *Stanford Journal of International Law* 23, pp 23 to 71.

65 This is sometimes referred to as "procedural universalism" (as opposed to "substantive universalism" which endorses a single insolvency law irrespective of the debtor's location).

66 See B Wessels, *supra* note 1, pp 2 to 33 for a discussion of the various approaches. See also PJ Omar, *supra* note 54, p 173.

proceedings", allowing the law of the State where the "main proceeding" is opened (the *lex concursus*) to regulate the matter.[67]

5.2.4.2 Territorialism

This approach prescribes that the consequences of an insolvency proceeding will only apply to the State where the insolvency proceeding has been opened and can lead to a plurality of insolvency proceedings.[68]

5.2.4.3 Modified universalism

Since global consensus regarding universalism has not been (and probably never will be) reached and many States are closer to an approach based on territoriality, the notion of "modified universalism" has emerged. Where this approach is adopted, the "main proceeding", opened in the State where the centre of main interests has been determined, is supported by secondary or ancillary proceedings in another State. In such instances, the courts dealing with the respective proceedings are supposed to co-operate with each other.

5.2.4.4 Co-operative territorialism

In terms of this approach, every State has jurisdiction over the assets in its jurisdiction; where assets are located in more than one State, the courts should communicate and collaborate with each other.[69]

5.2.4.5 Contractualism

This approach calls for companies to elect which legal systems will apply by stating same in their articles of association.[70]

5.2.4.6 Co-operation following a protocol (the Maxwell case)

The famous *Maxwell* case provides a good example of a case where courts in the USA and the UK co-operated with each other by way of court orders recognising an agreement / protocol between the estate representatives in the two main States where the debtor had most of its interests.

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[67] See also J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, *St Louis University Law Journal* 753, pp 753 to 757; and J L Westbrook, "Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court" (2018) 96 *Texas Law Review*, p 1473.

[68] See also LoPucki, *supra* note 60, p 2216.

[69] *Ibid*.

[70] R K Rasmussen, "Resolving Transnational Insolvencies through Private Ordering" (2000) 98(7) *Michigan Law Review*, p 2252.

5.2.4.7 Internationalist principle[71]

This principle follows a pragmatic approach by calling for the use of the various options available in order to find the best available solution in each case. Under this principle all of the approaches mentioned above are available to be used, depending on the circumstances of each case. In essence this approach follows a kind of modified universalism based on co-ordination between the States where the debtor has property and / or contractual interests.

5.3 Difficulties that arise in a cross-border context (and some suggested solutions)

Apart from the difficulties arising due the non-existence of a global insolvency law system and a global court to deal with cross-border insolvency matters, there are a host of other difficulties to deal with as well. These are briefly touched on below.

Friman mentions that the problems in addressing "cross-border insolvency cases" already start in finding a common insolvency language. "Insolvency" – that is, the reason for commencing proceedings – is normally quite clearly defined in a domestic context. Traditionally, "insolvency" means a situation where the combined total of the outstanding liabilities exceeds the measurable value of all the debtor's assets and some degree of durability of this state of negative net worth is normally required. However, a more short-term inability to service debts, for example, a liquidity crisis, is sometimes also considered sufficient for the commencement of "insolvency proceedings". As a result, at an international level it may be quite difficult to define the term "insolvency".[72] Indeed, it appears so difficult that international conventions and other instruments do not even attempt to provide a proper definition and instead focus their attention on defining "insolvency proceedings" (with or without exhaustive lists of proceedings that are to be covered). "Insolvency proceedings" are somewhat easier to define, although there can be some confusion regarding terminology. Friman also mentions that cross-border insolvency cases usually deal with insolvency (or collective proceedings) and that these must also be sufficiently defined or ascertained, since systems the world over apply a variety of procedures to deal with non-payment of debt.[73]

Omar[74] states that "[a]part form the general situation in conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one State, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws."

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71 I F Fletcher, *supra* note 56, pp 16 to 19.

72 *Idem*, pp 3-5.

73 On insolvency or collective proceedings, see further H Eidenmuller, "What is an insolvency proceeding?" (2018) 92 *American Bankruptcy Law Journal*, p 53.

74 Omar, *supra* note 54 p 175.

Westbrook, a strong proponent of universalism,[75] has identified nine key issues in cross-border cases:

(1) standing for (recognition of) the foreign representative;

(2) moratorium on creditor actions;

(3) creditor participation;

(4) executory contracts;

(5) co-ordinated claims procedures;

(6) priorities and preferences;

(7) avoidance provision powers;

(8) discharges; and

(9) conflict-of-law issues.[76]

The proposition that harmonisation offers a solution sounds like an obvious solution, but to what extent this is a feasible and a likely prospect, seems debatable.[77] It has still been argued, however, that since the fundamental differences between the legal systems and the laws of countries are both the root problem of cross-border insolvencies and the major obstacle to their solution, the goal of harmonisation must continue to be pursued.[78]

In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions:[79]

(1) In which jurisdictions may insolvency proceedings be opened?

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

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

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[75] See J L Westbrook, "Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court" (2018) 96 *Texas Law Review*, p 1473.

[76] See J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, *St Louis University Law Journa*l 753, pp 753-757.

[77] Compare Westbrook, *supra* note 57, at 2291 to 2298 (a universalist with a positive outlook), and LoPucki, *supra* note 60, pp. 2216 (a territorialist with a more pessimistic view).

[78] See D McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?", (1997) 26(3), *University of Baltimore Law Review* 15, pp 15 to 29.

[79] See Fletcher, *supra* note 56, pp 3 to 5.

In answering the three questions posed by Fletcher, insolvency proceedings could possibly be opened concurrently in more than one State, each State would apply its own laws (including its choice-of-law rules), and no or very limited extraterritorial effects would be granted to foreign proceedings. This is a reflection of the difficulties that one may encounter in trying to bring about co-operation and co-ordination between different States.

In the paragraphs that follow, a closer look will be taken at how the problems in cross-border insolvency cases can be dealt with and the regulatory instruments that exist in addressing these problems.

Self-Assessment Exercise 3

Question 1

Discuss what is meant by "international insolvency law".

Question 2

What approaches are followed in cross-border insolvency matters in regard to recognising foreign insolvency orders?

Question 3

Briefly indicate the circumstances when a secondary insolvency procedure in a cross-border context may be opened.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6. REGULATORY INSTRUMENTS IN INTERNATIONAL INSOLVENCY LAW

6.1 Regulatory approaches

6.1.1 Introduction

As has been stated above, no single set of insolvency rules applies globally to insolvency, certainly not purely domestic insolvencies nor insolvencies that have connections with more than one country (State). This part of the Module examines different approaches to regulating the latter - international insolvencies, the circumstances of which transcend a single legal system. A typical scenario is where businesses operate across country borders – such as through trade, increasingly involving e-commerce; through foreign investor finance; or through being a local company under foreign control as part of a multinational enterprise. In this context, what approaches have evolved to regulate such international insolvencies?

6.1.2 Domestic dimension

In the general background to international insolvency law, you have read about the historical roots of insolvency law in civil law Europe and in English law - tracing its development from Roman Law through the *lex mercatoria* or law merchant of the Middle Ages as it applied to the insolvency of individual traders up until the modern era. Between the 13th and 17th century, as the notion of the sovereign State evolved, so did domestic sovereign laws addressing an individual's insolvency - often known as bankruptcy law.

From the 19th century as trade and commerce became more complex, domestic laws regulating business introduced new commercial entities. Trade and commerce were increasingly undertaken by a corporate entity (company) rather than by sole traders (individuals in their own right). Domestic laws then developed to address circumstances where a company which engaged in trade and commerce became insolvent.

Often these domestic personal and corporate insolvency laws concentrated on debtors operating within the State (or jurisdiction) and did not cater in a comprehensive way with international or cross-border dimensions. By way of example, legislation may only refer to these cross-border dimensions in an *ad hoc* way, such as permitting local registration of foreign companies and providing for a simple liquidation locally after a process to wind them up had commenced in their place of foreign incorporation.

Because of this limitation in many domestic insolvency laws, when an insolvency raises an issue connected with another legal system or State, it brings private international law (or conflicts of law) into play. The fundamental legal issues that arise in an "international" legal problem are described below. They are the same as the pertinent questions asked by Fletcher in a cross-border insolvency matter,[80] although expressed in slightly different order:

- the choice of forum to exercise jurisdiction in the matter;
- the recognition and effect accorded foreign proceedings in the same matter; and
- the choice of law to apply to the matter.

First, choice of forum raises questions of jurisdiction - whether a court can and will hear and determine the matter. This requires examination of the connection with the jurisdiction of the parties or the dispute. In an insolvency resulting in a liquidation of the debtor's estate rather than a reorganisation or restructuring, typically the initial matter for determination by the court is the commencement order, which results in the liquidation of the corporation. During the course of such a local insolvency proceeding, other disputed issues may arise. These may involve foreign elements, such as assets or examinable corporate officers in another State. (Also, while a foreign insolvency proceeding is in progress, issues may come before the local court, which must then determine the effect, if any, of the foreign proceeding upon whether the local court can and will hear the matter.)

[80] See Fletcher, *supra* note 56.

Secondly, where there is a foreign judgment on the same matter, private international law raises questions of: "recognition" (the conclusive or *res judicata* effect of a judgment) and "enforcement" or "effect" (the execution of a judgment or the defendant's compliance with its terms). Foreign judgments raise questions concerning the court that issued the judgment, the type of judgment and the effect of the judgment. In insolvency, the type of judgment can be significant - in particular whether it is a judgement commencing insolvency proceedings against a debtor (such as an order to liquidate a company) or an order during the course of an insolvency proceeding (such as an order that a third party pay monies to the estate following a successful action setting aside a voidable disposition). This distinction underpinned the development of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).[81]

Thirdly, where the local court has determined that it will hear a matter, it may then have to decide upon the law to apply. Different systems of law adopt different approaches to this question.[82] In a common law system such as England, choice of law issues only arise if the parties invoke them, otherwise the law of the forum applies. This will naturally only occur where it is to that party's advantage to apply the foreign law. Also, proof of foreign law is a question of fact whereas in civil law systems, foreign law is presumed to be a question of law to be applied regardless of whether it is pleaded by the parties or not.

6.1.3 International dimension

6.1.3.1 What is "international law"?

Turning now from the domestic dimension to regulating international insolvency to the 'international' dimension, we consider multilateral approaches that seek to regulate international insolvencies by way of binding "hard law" or to influence its regulation by way of "soft law".[83]

"International law" is typically categorised as either public international law or private international law. In simplistic terms, public international law governs States (when adopted domestically) and private international law (which is in fact domestic law) governs parties.

An example, in a non-commercial context, of a significant public international law area is that surrounding the law of human rights. A "supra-national" instrument is the United Nations International Bill of Human Rights which consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International

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[81] https://uncitral.un.org/en/texts/insolvency. This project was initiated following the United Kingdom Supreme Court decisions in Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant [2013] 1 AC 236.

[82] On this aspect of choice of law, see Y Nishitani (ed) 2017, "Treatment of Foreign Law - Dynamics towards Convergence?", *Ius Comparatum* – Global Studies in Comparative Law 26, DOI 10.1007/978-3-319-56574-3_1.

[83] However, I Mevorach in *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps (*Oxford University Press, 2018) draws upon behavioural and economic analyses to examine the merits or otherwise of hard or soft instruments, of treaties and model laws, and (at 150) abandons "the notion that treaties are hard and binding and non-treaty instrument are soft and non-binding".

Covenant on Civil and Political Rights and its two Optional Protocols. If a country ratifies or accedes to the covenants and protocols, these are imported into its domestic laws.

By comparison, private international law principles are those domestic principles that a State (or legal system) applies to determine an action between parties. As a non-commercial example, legal advisers would need to consider private international law principles where a plaintiff passenger is injured in a motor vehicle accident in which the driver of each car involved, the injured passenger and the accident itself are all, from a private international law perspective, from different States (or legal systems).
However, this classification of "international legal issues" as falling within either the public international law domain or the private international law domain, is not that simple.

In the case of international insolvency matters, which may be thought of as a sub-set of international trade law, various States have ratified or acceded to treaties or conventions which import into their domestic laws principles to resolve insolvency issues that have a connection with another State. If this has not occurred, then the State's own private international law principles will determine the three pertinent questions of forum, recognition and enforcement and, importantly, the choice of insolvency (or related) law that will resolve the matter for the debtor, creditors or other parties involved.

6.1.3.2 Treaties and conventions

Classic public international instruments are treaties and conventions to which States become signatories and as such bind themselves and affect their domestic law accordingly. As part of domestic laws enforceable in the courts, these may then form part of a State's "hard law" on insolvency.

In Europe, bilateral international insolvency conventions appeared from the 13th and 14th centuries - addressing absconding debtors and later gathering in assets. From the 19th century, more modern forms of bilateral treaties or conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions involving their State, appeared. A rare successful multilateral treaty, the Nordic Convention (1933), hails from the Scandinavian region.

European efforts at achieving multilateral international insolvency conventions were unsuccessful for many years. The Council of Europe, which currently has 47 member countries, was founded in 1949 to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. It is based in Strasbourg, France.

In 1990, it concluded a Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe Treaty Series No 136. While it was signed by 8 member States, it was not ratified by a sufficient number for it to enter into force. Nevertheless, it had an important influence on the development of a European Union response to the problems of international insolvencies among its member States.

More success has been achieved by the European Union, albeit not by way of Convention, rather by way of the European Insolvency Regulation (EIR) (2000) which has also influenced broader multilateral developments in international insolvency law. It has been reviewed and slightly amended so that the current multilateral "instrument" on international insolvencies within the European Union is Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast). From 11pm on 31 December 2020, the EIR Recast ceased to apply in the UK following its exit from the European Union.[83A] There has been recent amendment to the EIR Recast by way of Regulation 2021/2260 of 15 December 2021 to replace Annexures A and B, which became effective for most member States in January 2022.

6.1.3.3 Soft law

While there has been variable success in achieving "hard law" solutions to international insolvency law issues, more success has been gained through the use of "soft law" options. A range of multilateral organisations (to be distinguished from States / governments working on treaties or conventions) have focussed their efforts on this approach over recent decades.

The Hague Conference on Private International Law (the Hague Conference) was established in the 19th century to work towards the progressive unification of private international law. The adoption of a Model Treaty on Bankruptcy at the 1925 conference was an early initiative. While never ratified, this Model Treaty likewise has contributed to the international deliberations on regulating international insolvency. For example, it allocated jurisdiction in respect of a corporation to the court where the statutory registered seat was located "provided that it be neither fraudulent nor fictitious". The Hague Conference now describes itself as "The World Organisation for Cross-border Co-operation in Civil and Commercial Matters".[84] It coordinates its activities with the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL). One example was its co-operation with UNCITRAL in the preparation of the UNCITRAL Legislative Guide on Insolvency Law (2004).

The most successful "soft law" approach to date has been undertaken by UNCITRAL. In the mid-1990s, it developed a Model Law on Cross-border Insolvency (MLCBI). This initiative did not take the form of a treaty or convention, but rather that of a Model Law, draft legislation that UNCITRAL recommended member States to adopt, with or without modification. Given the number, economic size and geographic spread of States that are now adopting the MLCBI, it is gathering momentum as an influential response to international insolvency law.[85]

[83A] https://www.legislation.gov.uk/uksi/2019/146/contents.
[84] https://www.hcch.net/index.cfm?oldlang=en.
[85] See Mevorach, *supra* note 83.

6.2 Domestic laws

6.2.1 Introduction

Domestic laws, which have typically been enacted to address domestic insolvency circumstances, have over time been interpreted to apply to facts that include an international dimension. Increasingly, courts have had to deal with international aspects to insolvency matters and, in common law States, decisions by superior courts have assisted in the development of an international insolvency jurisprudence. In addition, domestic insolvency laws have been amended specifically to address international issues.

6.2.2 Domestic insolvency law – the example of English corporate insolvency law

As an example of domestic laws, we will refer to the English domestic laws on the insolvency of companies where there is an international dimension, but where the matter falls outside the scope of the EIR Recast. This material draws upon Professor Fletcher's authoritative text on the law of insolvency for England and Wales.[86]

To begin with the threshold question of jurisdiction of a court to hear a matter with an international element, the English court has jurisdiction to wind up a foreign company, that is, one which was incorporated under the law of a country other than the United Kingdom.[87] This jurisdiction may be based on that foreign company complying with a requirement to register its presence and nominating a resident person or persons to accept service of process and other formal notices on its behalf.

Jurisdiction may also be established to wind up an "unregistered company", which includes a company formed under foreign law.[88] Section 221(5) Insolvency Act 1986 provides for a court-ordered winding-up[89] of unregistered companies in the following circumstances:

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) if the court is of opinion that it is just and equitable that the company should be wound up.

Despite the potential breadth of their application, these provisions in paragraph (a) have been applied by the English courts in circumstances where the court is satisfied that there is a "sufficient connection" with England and Wales.[90] The relevant principles underpinning this approach consist of the following three core requirements:

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86 Fletcher, *supra* note 4, Ch 30.
87 Companies Act 2006 (UK), s 1044 defines an "overseas company".
88 Insolvency Act 1986 (UK), s 220.
89 Voluntary winding up of foreign companies is not permitted (unless within the scope of the EIR).
90 *Re Latreefers Inc* [2001] BCC 174 (CA).

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

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

(3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction." [91]

A different question is what effect might an English winding-up order of an English company have in respect of an international insolvency, where the international elements are, say, foreign assets or foreign creditors. Liquidators have a duty to take into custody and under their control all the tangible and intangible property to which the company is entitled and of which it remains the legal owner.[92] The ability of liquidators to do so, in a practical sense, will depend upon the extent to which the winding up and their appointment as liquidators is recognised in the foreign State in which the assets are situated. Liquidators are also authorised to accept proofs lodged by foreign creditors in respect of the company's liabilities incurred overseas or governed by foreign law.[93]

Domestic laws on choice of law are also applicable in a winding up by an English court where international elements are involved. In an English winding up under the Insolvency Act 1986, including of a foreign company, English law applies to matters of procedure and substance.[94] It is possible that reference may be made to a foreign law to establish some matter. For example, while English law may apply to the procedure of lodging a proof of debt, English law may require reference to a foreign law to establish the validity of the actual claim where that claim is for a debt governed by foreign law.[95]

More detail on English domestic insolvency laws and their application where there is an international element in the proceedings, is found in the Module on the Insolvency System of the United Kingdom.

6.2.3 Domestic international insolvency provisions

Significantly, some States have amended their domestic insolvency laws to address international insolvency issues through provisions for the recognition and enforcement or the effects of a foreign insolvency proceeding. Some States have also provided for co-operation and co-ordination where there are concurrent proceedings.

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91 Fletcher, *supra* note 4, [30-017], referring to *Re Real Estate Development Co* [1991 BCLC 210 (Ch D), per Knox J.
92 *Idem*, [30-040].
93 *Idem*, [30-041].
94 *Idem*, [30-052-053].
95 *Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

A number of States permit recognition of and co-operation with foreign insolvency adjudications or proceedings. A case that resulted in the turnover of assets in a local ancillary liquidation to a foreign principal liquidator for distribution under foreign laws was the House of Lords decision in *McGrath v Riddell*.[96] Lord Hoffmann referred to the court's "jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution". At paragraph 30, he stated:

> "[t]he primary rule of private international law ... applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

While Lord Scott also allowed the appeal, he did so on the basis of the statutory provision, section 426 of the Insolvency Act 1986 (UK), on co-operation between courts exercising jurisdiction in relation to insolvency and "not from any inherent jurisdiction of the court".[97] Lord Scott stated at paragraph 62:

> "... if the country of the principal winding up is a 'relevant country or territory' for section 426 purposes and the liquidators in that country have requested English liquidators to remit to them the assets collected in England so that they (the principal liquidators) can, pursuant to the insolvency law of that country, implement a universal scheme of *pari passu* distribution to ordinary unsecured creditors, the request is one to which, in principle, the English liquidators ought, in my opinion, to accede."

Then in 2012, the Supreme Court (successor to the House of Lords) in *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant*[98] considered the question of recognition and enforcement of judgments concerning avoidance provisions. In that case, the court declined to accept there was a *sui generis* (unique) category of insolvency orders or judgments subject to special rules. Instead Lord Collins stated:[99]

> "A change in the settled law of the recognition and enforcement of judgments … has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law."

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96 [2008] UKHL 21.
97 *McGrath v Riddell* [2008] UKHL 21 at [62].
98 [2012] UKSC 46.
99 [2012] UKSC 46 at [128].

Further, Lord Collins held at paragraph 143 that "there is nothing to suggest that [Article 21 of the Model Law on Cross-Border Insolvency] applies to the recognition and enforcement of foreign judgments against third parties."

Australia has statutory provisions similar to section 426 Insolvency Act 1986 (UK), in sections 580-581 of the Corporations Act 2001 (Cth). These permit co-operation between Australian and foreign courts in "external administration" matters, such as liquidations. Even with the domestic adoption of the UNCITRAL Model Law on Cross-border Insolvency in Australia through the Cross-border Insolvency Act 2008 (Cth), parties still make use of these recognition and enforcement provisions,[100] especially where the Model Law as adopted does not apply.[101]

New Zealand also provides, in section 8 of the Insolvency (Cross Border) Act 2006 (NZ), that if a foreign court requests the aid of the New Zealand High Court in relation to an insolvency proceeding, the High Court can act in aid of and be auxiliary to that court. This provision has likewise proved useful in a number of cases where it was found that the Model Law on Cross-Border Insolvency did not apply.[102]

Nevertheless, the United Kingdom goes further than both Australia and New Zealand in that section 426(5) of the Insolvency Act 1986 (UK) authorises the local court to "apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction."

Self-Assessment Exercise 4

What three key questions may be relevant for a court to consider where a matter has an international element? Provide examples of how these may be relevant in a company liquidation which has an international element.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.3 International instruments

6.3.1 Introduction

Multilateral bodies with an interest in international trade and commerce have addressed international insolvency matters. First, as already mentioned, regional groupings of nation

[100] In *Re Chow Cho Poon (Pte) Ltd* [2011] NSWSC 300, an Australian court granted assistance to a foreign liquidator upon a request under s 581, thus enabling control of assets in a bank account. The court specifically discussed *Cross-border Insolvency Act 2008* (Cth) s 22 on the interaction of the MLCBI with the *Corporations Act 2001* (Cth) s 581 as invoked in that case.

[101] See *Tannenbaum v Tannenbaum* [2012] FCA 904 (24 August 2012); and *Cooksley v Cooksley* [2017] FCA 1193 (6 October 2017).

[102] *Williams v Simpson* [2010] NZHC 1786 (12 October 2010); *Batty v Reeves* [2015] NZHC 908 (4 May 2015).

States such as the European Union have drafted treaties or conventions to address international insolvencies within their geographical region. Also, inter-governmental bodies such as UNCITRAL have been active in promoting soft law responses to international insolvency issues.

Secondly, multilateral commercial or professional bodies have worked on a range of proposed solutions. These include bodies of practising lawyers such as the International Bar Association (IBA), as well as bodies specialising in insolvency practice with a diverse professional membership, such as INSOL International.
The strategies that have been adopted by both groupings have covered a range of approaches that in essence may be categorised under the following headings:

- harmonisation of domestic insolvency laws;
- uniform choice of law principles;
- uniform recognition laws;
- co-operation and co-ordination to promote recognition and enforcement.

6.3.2 Harmonisation of domestic insolvency laws

You have already read about initiatives to promote harmonised insolvency systems, such as the *UNCITRAL Legislative Guide on Insolvency Law*. Below is a summary of some of the more significant attempts at the harmonisation of domestic insolvency laws, in particular as they may impact on international insolvency.

The first draft of an EC Convention on Bankruptcy and Related Matters[103] in 1970, if it had been adopted, would have required contracting States to enact a "Uniform Law" into domestic law, while permitting States under Article 76 to make reservations on their incorporation. Its provisions covered issues such as "actions for fraud against creditors; the doctrine of set-off; the extension of the bankruptcy of firms or legal entities to persons directing or managing them; proof of the spouse's claim to property, which would otherwise be presumed to be acquired with the funds of the bankrupt; and the bankruptcy of the vendor in the case of a contract of sale with retention of title." However, subsequent draft European insolvency conventions did not attempt to achieve uniform laws, other than as they related to international issues such as jurisdiction, choice of law and recognition and enforcement.

The International Bar Association (IBA) in 1997 commenced drafting a Model Bankruptcy Code to be available for any State to consider when developing their domestic insolvency laws. However, this project did not proceed and instead the IBA contributed to the development of the UNCITRAL project which later resulted in the Legislative Guide and was endorsed by the IBA.

[103] Commission Document 3.327/1/XIV/70-E.

In 2004, UNCITRAL promulgated a *Legislative Guide on Insolvency Law*,[104] which is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations". As you have already read, it addresses a wide range of aspects of insolvency law and it has been expanded in subsequent years, addressing in Part Three insolvency of enterprise groups and Part Four directors' obligations in the period approaching insolvency, including for directors of enterprise group companies. Specifically, on international insolvency, Part One Recommendation 5 states "The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended."

Beginning in the early 2000s, the World Bank also produced guidelines on the regulation of insolvency, entitled *Principles for Effective Insolvency and Creditor / Debtor Regimes*.[105] The Principles have been revised in 2005, 2011, 2015 and in April 2021 there was a further revision of these Principles.[105A] These principles gain some significance in the context that the International Monetary Fund (IMF) and the World Bank sometimes require bankruptcy reform in developing countries as a condition of loan support. They may refer countries to the *Legislative Guide* and the Principles and thereby promote a convergence of insolvency law. The UNCITRAL Legislative Guide together with the World Bank Principles form the international best practice standard for insolvency regimes (the Insolvency Standard).[106]

On international considerations, the World Bank's Principle C15 states:

> "Insolvency proceedings may have international aspects, and a country's legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries, and choice of law. Key factors to effective handling of cross-border matters typically include:
>
> i) A clear and speedy process for obtaining recognition of foreign insolvency proceedings;
>
> ii) Relief to be granted upon recognition of foreign insolvency proceedings;
>
> iii) Foreign insolvency representatives to have access to courts and other relevant authorities;
>
> iv) Courts and insolvency representatives to cooperate in international insolvency proceedings; and
>
> v) Non-discrimination between foreign and domestic creditors"

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[104] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf.

[105] https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights

[105A] https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf.

[106] Mevorach, *supra* note 83, p 40.

The European Union is also moving towards greater uniformity in the domestic insolvency laws of member States. In 2010, the European Parliament published a report on the Harmonisation of Insolvency Law at EU Level.[107] The report outlined differences between domestic insolvency laws within the EU and identified a number of areas of insolvency law where harmonisation at EU level is believed to be worthwhile and achievable. Primarily these comprise:

- a possible common test of insolvency as a requirement of a formal insolvency process;
- the formal aspects of lodging and dealing with claims in a formal insolvency;
- certain aspects of the manner in which reorganisation plans are adopted and their contents;
- the rules regarding so-called detrimental acts;
- the interrelationship between contractual rights of termination and insolvency; and
- directors' responsibilities.

In its Action Plan on Building a Capital Markets Union (CMU) (30 September 2015), the European Commission stated "Convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress." The CMU Plan has been reviewed and the High Level Forum (HLF) published its Final report on the CMU, 'A new Vision for Europe's capital markets' on 10 June 2020.[108]

These moves to harmonise domestic insolvency laws can reduce the significance of an insolvency crossing a State boundary and the need for regulators or courts to resolve international insolvency issues.

6.3.3 Uniform choice of law rules

Where States can agree on a uniform approach to choice of law, even if domestic insolvency laws differ, a uniform referral by the States to the same applicable (local or foreign) insolvency law produces the same outcome regardless of the State in which the dispute arose.

A largely successful example of this approach is the Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden (1933). The Nordic Convention recognises the law of the place of insolvency adjudication (the "home State") as determining almost all the effects of the order in all member States without the need for further formalities.

The EIR Recast (as the EIR beforehand) regulates the applicable law in proceedings subject to the Regulation. Article 7.1 states that "[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of … the 'State of the

[107] https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf.
[108] https://ec.europa.eu/info/news/cmu-high-level-forum-final-report_en.

opening of proceedings'." Article 7 goes on to address the law determining "the conditions for the opening of those proceedings, their conduct and their closure." The following Articles 8-18 contain provisions on the law to apply in respect of specific matters such as rights *in rem*; set-off; immoveable property; employment; and detrimental acts.

While these choice of law rules apply to international insolvencies that are subject to the relevant convention or regulation, there have also been attempts to harmonise domestic choice of law principles. The *UNCITRAL Legislative Guide on Insolvency Law* (2004)[109] includes recommendations on applicable law in insolvency proceedings.[110] Likewise, Fletcher and Wessels annexed recommendations on Global Rules on Conflict-of-Laws Matters in International Insolvency Cases to their ALI - III *Report on Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012).[111]

6.3.4 Uniform recognition laws

A more successful strategy to address international insolvency issues has been through uniform laws on the recognition of insolvency proceedings and insolvency representatives. This approach accepts that States are unlikely to agree on fundamental issues, such as the State which is to exercise jurisdiction over an insolvent corporate debtor whose activities cross State borders.

This approach accepts that there are therefore likely to be concurrent insolvency proceedings – whether concurrent proceedings all claiming to be plenary proceedings or whether concurrent proceedings comprising (ideally only one) plenary main proceeding with non-main proceedings that assist the main proceeding.

In 1989, the International Bar Association (IBA) led an early multilateral attempt to achieve uniform recognition laws. It developed a Model International Insolvency Cooperation Act (1989) (MIICA), and recommended the enactment of this draft model statute as domestic legislation. MIICA accepted the notion of concurrent proceedings and encouraged a primary proceeding with supportive auxiliary proceedings. It also provided mechanisms by which courts would act in aid of foreign insolvency proceedings. While this was a useful step in the evolution of modern approaches to dealing with international insolvency issues, no jurisdiction adopted MIICA as domestic legislation.

In 1996, the IBA promoted a different approach. Instead of recommending domestic legislation for adoption by States, it proposed a Cross-Border Insolvency Concordat that was directed towards assisting practitioners instead. The Concordat provided some generalised principles intended to guide practitioners themselves in harmonising cross-border insolvencies. Its first

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[109] UNCITRAL Legislative Guide on Insolvency Law (2004) Pt 2 at 68. (Legislative Guide) Recommendations 30-34 address the law applicable to the validity and effectiveness of rights and claims, the law applicable in insolvency proceedings and exceptions thereto.

[110] These were drafted by UNCITRAL in close co-operation with the Hague Conference on International Law and in consultation with the UNCITRAL Working Group on secured transactions. Jenny Clift, "Choice of Law and the UNCITRAL Harmonisation Process" (2014) 9 *Brooklyn Journal of Corporate Financial & Commercial Law* 29, 47.

[111] https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf.

principle was that there should be a single administrative forum that would have primary responsibility for co-ordinating all relevant insolvency proceedings. However it was of limited value in achieving uniform recognition laws because it did not prescribe a principal forum or seat for the insolvency proceedings, merely referring to the debtor's "centre of management control". The Concordat's greater contribution to the evolving regulatory responses to international insolvency issues was in the area of co-operation and co-ordination of concurrent proceedings, which is discussed in the next section.

Meanwhile, in 1997 the United Nations Commission on International Trade Law (UNCITRAL) completed a Model Law on Cross-Border Insolvency(MLCBI),[112] and recommended that all member States "review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the [MLCBI], bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency."

The MLCBI is discussed in detail in subsequent material. For present purposes, it is sufficient to highlight that it proposed uniform recognition laws, using concepts derived from the European Insolvency Regulation (the precursor to the current EIR Recast). It also promoted co-operation and co-ordination, discussed in the next section.

6.3.5 Co-operation and co-ordination to promote recognition and enforcement

Finally, another approach, which is achieving some success in resolving international insolvency issues, is one in which the parties agree on avenues for co-operation and co-ordination. It accepts that there are likely to be multiple States with which an insolvent debtor is connected and that multiple concurrent insolvency proceedings have been initiated or are threatened.

The IBA Cross-Border Insolvency Concordat (1996) accepted that there may be concurrent plenary proceedings. Thus, it proposed their co-ordination, subject in appropriate cases to a governance protocol setting out the responsibilities and jurisdiction of each proceeding. The strategy proposed a way forward based on action by practitioners rather than on draft legislation for adoption by States and formed the basis for some court-approved protocols to assist in the administration of concurrent proceedings.[113]

One of the key principles of the UNCITRAL MLCBI is likewise co-operation and co-ordination. This places obligations on both courts and insolvency representatives in different States to communicate and co-operate to the maximum extent possible. This is with a view to ensuring that a single debtor's insolvent estate is administered fairly and efficiently, with a view to maximising benefits to creditors.[114] The Model Law, as drafted, mandates a local court or insolvency representative to co-operate with foreign courts or foreign representatives - either

[112] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.
[113] B Leonard, "Committee J's Initiatives in Cross-border Insolvencies and Reorganisations: The Experience of the Everfresh Case" (1997) 6 *International Insolvency Review* 127.
[114] UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2001). https://uncitral.un.org/en/texts/insolvency/explanatorytexts/cross-border_insolvency/judicial_perspective.

directly or through representatives.[115] It then provides examples of appropriate means of co-operation including the "[a]pproval or implementation by courts of agreements concerning the coordination of proceedings".[116] Increasingly, this is being implemented through the use of Protocols or Cross-Border Insolvency Agreements, which may then be approved by the relevant courts.[117]

There are a range of guidelines now available to which courts may refer parties to promote co-operation and co-ordination in the context of recognition and enforcement of concurrent foreign insolvency proceedings.

In North America, the American Law Institute (ALI) Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000)[118] for international insolvencies involving the United States of America, Canada and Mexico. As Fletcher writes in respect of the ALI NAFTA Principles, "that the Principles themselves would be complementary to the Model Law [on CBI], and they also hoped as the latter came to be enacted by an increasing number of States worldwide a compelling case would emerge for the development of supplementary provisions and guidelines based on the NAFTA Principles."[119]

Subsequently, the ALI and the International Insolvency Institute (III) initiated a project led by Fletcher and Wessels to consider the application of the ALI NAFTA Principles worldwide, resulting in the ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).[120]

In Europe, within the context of the EIR and developed under the aegis of INSOL Europe's academic wing by Wessels and Virgós, the European Guidelines on Communication and Cooperation 2007[121] contain non-binding rules and a Draft Protocol for international insolvencies subject to the EIR. In 2017, the Conference of European Restructuring and Insolvency Law (CERIL),[122] in collaboration with INSOL Europe,[123] established a Joint Working Group to review the Guidelines in light of recent practice, focusing on the duty to co-operate and communicate under the EIR Recast.

Subsequently within the EU insolvency law context, a project funded by the European Union and the III resulted in the EU JudgeCo Guidelines, comprising 26 EU JudgeCo Principles and 18 EU Cross-Border Insolvency Court-to-Court Communications Guidelines 2015.[124] Their

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[115] Articles 25-26.
[116] Article 27.
[117] UNCITRAL itself developed a Practice Guide on Cross-Border Insolvency Agreements (2009), to provide a potential framework for co-operation under the MLCBI.
[118] https://www.iiiglobal.org/sites/default/files/7-_ali.pdf.
[119] Fletcher, *supra* note 4, [32-058].
[120] https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf.
[121] https://www.insol-europe.org/download/documents/1113.
[122] http://www.ceril.eu/.
[123] https://www.insol-europe.org/.
[124] http://www.ejtn.eu/PageFiles/16467/EU_Cross-Border_Insolvency_Court-to-ourt_Cooperation_Principles.pdf.

object is to "strengthen efficient and effective communication between courts in EU Member States in insolvency cases with cross-border effects".[125]

A recent initiative emanated from the inaugural Judicial Insolvency Network (JIN) conference in Singapore in 2016. Members contributed to the drafting of Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines).[126] Their overarching objective is to improve the efficiency and effectiveness of parallel proceedings in an international insolvency "by enhancing co-ordination and cooperation amongst courts under whose supervision such proceedings are being conducted." They have since been adopted by courts in countries in the Americas; Asia and the United Kingdom.[127] Subsequently, the JIN has developed Modalities of Court-to-Court Communication (JIN Modalities),[128] which focuses on the mechanics for initiating, receiving and engaging in such communication.

The development of these international instruments in conjunction with an increased number of States adopting the UNCITRAL Model Law on Cross-border Insolvency, indicate the important role of co-operation and co-ordination as a strategy to address international insolvency matters.

Self-Assessment Exercise 5

Question 1

What multilateral instruments have been developed for countries to consider when reviewing and potentially reforming their domestic insolvency laws? Where a country's domestic insolvency laws have not been amended since initially adopted in a colonial era, what factors may influence a country to consider these multilateral instruments?

Question 2

What is an example of conventions or other binding international instruments that contain choice of law rules for an international insolvency? Describe the significance under this instrument of the domestic insolvency laws in the State in which the insolvency proceedings opened.

[125] https://www.universiteitleiden.nl/en/news/2015/07/publication-of-eu-judgeco-principles.
[126] http://www.jin-global.org/jin-guidelines.html.
[127] At the time of writing, versions have been adopted by courts in Australia (Federal Court of Australia, New South Wales); Bermuda; Canada (Ontario); Cayman Islands; Eastern Caribbean; England and Wales; Singapore; South Korea (Seoul); the Netherlands (Midden-Nederland); and the United States (Delaware, Southern District of Florida, Southern District of New York Bankruptcy Courts).
[128] http://jin-global.org/content/jin/pdf/Modalities_for_court-to-court_communication.pdf.

Question 3

The domestic adoption of the UNCITRAL Model Law on Cross-Border Insolvency by an increasing number of States is helping to achieve more uniform recognition laws across those States. What international instruments have been developed to encourage closer co-operation and co-ordination of concurrent proceedings and so promote recognition and enforcement?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

6.4 Regional perspectives

6.4.1 Introduction

You will now examine the regulatory approaches from a different angle. You have seen the different ways in which States or parties may seek to resolve international insolvency law issues. You will now study the different instruments that have been adopted within parts of the regions listed in earlier materials.

As Fletcher has noted, multilateral arrangements are more likely to be successfully put in place "among states which are regionally grouped in such a way that functional interaction takes place constantly, and at many levels."[129]

6.4.2 The Americas

Latin American States have achieved some of the most long-lasting multilateral agreements on managing international insolvency issues. A series of general treaties were concluded on private international law and commerce that included a chapter or title on bankruptcy or insolvency. These treaties, among different groups of Latin America States, are:

- The Montevideo Treaties (1889) and (1940);
- Havana Convention on Private International Law (1928) (Bustamante Code)[130]

6.4.2.1 Montevideo treaties

The Montevideo Treaty on International Commercial Law (1889)[131] has been ratified by:

- Argentina

[129] Fletcher, *supra* note 56, [5.02].
[130] For the insolvency provisions in these texts, see I F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005), App V.
[131] https://www.uncitral.org/pdf/english/texts/general/Register_Texts_Vol2.pdf.

- Bolivia
- Columbia
- Paraguay
- Peru
- Uruguay

The Montevideo Treaty on International Commercial Terrestrial Law (1940)[132] contains Title VIII on Bankruptcy. Note there is also a 1940 Montevideo Treaty on International Procedural Law containing Title IV on Civil Meetings of Creditors. These treaties have been ratified by:

- Argentina
- Paraguay
- Uruguay

Given that the 1940 treaties have only been ratified by three of the original treaty States, this means that an international insolvency between any two or more of the Montevideo Treaty States requires careful analysis as to which treaty or treaties may apply.[133]

The 1889 Treaty covers personal and corporate insolvency. It allocates bankruptcy jurisdiction based on the debtor's commercial domicile:

- where a debtor has a commercial domicile in one treaty State, even if the debtor occasionally trades in more than one State or has branches or agents in another State, it provides for one set of proceedings in the commercial domicile;
- where the debtor has two or more economically autonomous businesses in different treaty States, it provides for the possibility of concurrent proceedings. When insolvency proceedings are open in one of the States, then a local creditor in the other State(s) containing an economically autonomous business may open bankruptcy proceedings in that State or take other civil action against the debtor.

6.4.2.2 Havana Convention on Private International Law (the Bustamante Code)

The Havana Convention on Private International Law[134] was concluded in 1928 between the following Latin and Middle American States:

- Bolivia

[132] https://www.jstor.org/stable/2213807?seq=1.
[133] Fletcher 2005, *supra* note 56, [5.06].
[134] http://www.oas.org/en/sla/dil/inter_american_treaties_A-31_Bustamente_Code_signatories.asp.

- Brazil
- Chile
- Costa Rica
- Cuba
- Dominican Republic
- Ecuador
- El Salvador
- Guatemala
- Haiti
- Honduras
- Nicaragua
- Panama
- Peru
- Venezuela

Thus Bolivia and Peru are parties to both the Montevideo Treaty (1889) and the Bustamente Code (1928). Argentina, Colombia, Mexico, Paraguay and Uruguay did not ratify the treaty and are not parties.

The Havana Convention is more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout its region. Its first Chapter is entitled 'Unity of Bankruptcy or Insolvency':

> "Article 414: If the insolvent or bankrupt debtor has only one civil or commercial domicile, there can be only one preventive proceeding in insolvency or bankruptcy, or one suspension of payments, or a composition (*quita y espera*) in respect of all his assets and his liabilities in the contracting States."

Nevertheless, there may be concurrent proceedings in Havana Convention States that contain commercial establishments operating entirely separately economically.[135] It therefore adopts a similar approach to the Montevideo Treaties of providing for a single proceeding if the debtor

[135] Article 415.

is only occasionally trading in more than one State, or only has branches or agents in another contracting State. However, where there are concurrent proceedings, the Havana Convention does not provide procedures for co-operation or co-ordination of any concurrent proceeding.[136]

Chapter II is entitled "Universality of Bankruptcy or Insolvency, and Their Effects". The Havana Convention accepts that insolvency proceedings commenced in one member State will have extraterritorial effect in another member State. It enforces their courts' decrees from the time of their pronouncement, subject only to complying with local rules for registration or publicity.

Self-Assessment Exercise 6

What are some of the differences between the various treaties between Latin American States on managing international insolvency issues?

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

6.4.2.3 North America

In North America, in the 1970s, Canada and the United States were working towards a bilateral insolvency treaty; however, it was probably too ambitious in its scope and they failed to reach an agreement. Subsequently, more practical progress has been made through both States' adoption of the Model Law and, importantly, through mechanisms such as Protocols.[137] (Even prior to that, there had been bilateral co-operation and co-ordination based on existing legislation and long-standing case law around comity).

A United States professional body, the American Law Institute (ALI) has taken steps to assist with the resolution of international insolvency issues between the North American Free Trade Agreement (NAFTA) countries of the United States, Canada and Mexico. The ALI Transnational Insolvency Project was an initiative to improve co-operation in international insolvencies across the NAFTA States. It appointed Professor Westbrook as designated Reporter and formed advisory groups with experts from each of the three countries. These prepared an International Statement on the relevant country's insolvency law as applicable to international cases. In light of these, Principles of Cooperation among the NAFTA Countries, were prepared and approved by the ALI Council and Members in 2000.

The NAFTA Principles focus on insolvency of corporations and other legal entities engaged in commercial operations. They exclude the insolvency of individuals (natural persons). They also

[136] See Fletcher, *supra* note 56, [5.23].

[137] *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128 (3d Cir. 2011). For a discussion of the Nortel case, see Jay Lawrence Westbrook, 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 *Texas Law Review* 1473.

exclude rules regarding insolvency of non-profit organisations and of financial institutions. The Principles are structured around:

- General Principles;
- Procedural Principles;
- Recommendations for Legislation or International Agreement.

The general principles commence with:

- General Principle I: Cooperation
    - Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the Debtor's worldwide assets and furthering the just administration of the proceedings
- General Principle II: Recognition
    - The bankruptcy of a debtor in one NAFTA country should be recognized and given appropriate effect under the circumstances in each of the other NAFTA countries.
    - Recognition should be granted as quickly and inexpensively as possible, with a minimum of legal formalities.

Additional General Principles address Moratorium; Information; Sharing of Value; National Treatment and Adjustments of Distributions. The following 27 Procedural Principles are grouped under:

- Topic A. The Structure of an International Bankruptcy Case;
- Topic B. Initiation - recognition; Stay; Court access; Information and communication;
- Topic C. Administration - Single full bankruptcy proceedings; Parallel proceedings; Corporate groups;
- Topic D. Resolution - Distribution.

It concludes with Recommendations for Legislation or International Agreement, commencing with a recommendation that each NAFTA country adopt the Model Law on Cross-border Insolvency.[138] Other recommendations address automatic stays; notice to creditors; priority claims; binding effect of reorganisation plans; adoption of procedural principles that cannot be implemented under existing domestic laws; and simplified authentication of documents.

[138] Canada (2005), Mexico (2000) and the USA (2005) have all since done so.

[138A] See https://www.thegazette.co.uk/insolvency/content/103914.

6.4.3 Europe

6.4.3.1 Introduction

From the early 1960s, the Common Market States formed committees of experts to work on a bankruptcy convention. This resulted in various draft conventions between 1970 and 1996, when the final draft lapsed. Thereupon, the document was revised and adopted in the form of the European Insolvency Regulation (EIR) (2000) which has subsequently been reviewed to become the current EIR (Recast) 2015, applicable since mid-2017.

Please note the UK's departure from the EU. The UK ceased to be a member of the EU at 11pm on 31 January 2020. Under UK law, the EIR Recast no longer applies to post-11pm 31 December 2020 proceedings in the UK. The Recast Insolvency Regulation applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (being 11pm on 31 December 2020). [138A]

6.4.3.2 The Nordic Convention

The Nordic Convention was concluded between five Scandinavian States: Denmark, Finland, Iceland, Norway and Sweden in 1933. It continues in effect and is remarkable for the comity it displays.

It grants local recognition to the legislative, executive or judicial acts connected with bankruptcy and composition adjudications in the other member States. It promotes the ideal of universality of a nominated insolvency, adopting unity of proceedings whilst permitting concurrent proceedings in limited circumstances.

While it does not mandate the basis upon which a member State must exercise jurisdiction, it does accord special recognition and enforcement of a "domiciliary" adjudication in the other member States, that is, in the State containing the registered office of a corporate debtor.

Nordic member States recognise a "domiciliary" bankruptcy order as applying to property throughout the member States. Notably, the convention recognises the law of the place of adjudication as determining almost all the effects of the order in all member States without the need for further formalities, such as registration.[139] There is an immediate general stay of creditor action. An insolvency administrator is recognised abroad and may directly request the assistance of the other States' courts and public authorities in respect of property situate there.[140]

6.4.3.3 The European Insolvency Regulation

After the final draft of an EU convention lapsed in 1996, the European Union passed a Council Regulation on Insolvency Proceedings (European Insolvency Regulation, EIR) in 2000 (effective

[139] Article 1.
[140] Article 3.

2002) on essentially the same terms.[141] As required by the EIR after a decade of operation, a report on its application and on any proposed adjustments was instigated for the European Commission. While the EIR had been generally successful, some amendments were made resulting in the EIR (Recast) which was adopted in 2015 and took effect (with changes in numbering to the Articles) in mid-2017.[142] There was amendment by Regulation 2021/2260 of 15 December 2021 to replace Annexures A and B, which became effective for most member States in January 2022.

The EIR allocates jurisdictional competence to the courts of a member State within which is situated the "centre of the debtor's main interests" (COMI).[143] While the EIR allocates primary jurisdiction based on the centre of the debtor's main interests (main proceedings), it does allow for the possibility of subsidiary territorial proceedings in other member States. These are permitted where the debtor has an "establishment". An establishment is defined as meaning "any place of operations … where the debtor carries out a non-transitory economic activity with human means and assets".[144] Such subsidiary proceedings may be either "independent proceedings", opened prior to the main proceedings, or "secondary proceedings", opened subsequent to the bankruptcy adjudication in the State with the centre of main interests.

Areas of amendment in the EIR Recast included extending its scope to pre-insolvency / hybrid proceedings; expanding the provisions on the "centre of the debtor's main interests"; recognising the existence of insolvency proceedings outside the EU for the purposes of co-ordinating proceedings both inside and outside the EU; extending secondary proceedings to include rescues; providing for an electronic register and standard forms; and acknowledging corporate groups through enhanced co-operation and co-ordination provisions.

6.4.4 Africa and the Middle East

6.4.4.1 OHADA

The *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) or Organisation for the Harmonisation of Business Law in Africa (OHBLA) has been established in Sub-Saharan Africa.[145] A Treaty was signed in 1993 that took effect from 1995. OHADA has the following members:

- Benin
- Burkina Faso
- Central African Republic

[141] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF.
[142] https://eur-lex.europa.eu/eli/reg/2015/848/oj.
[143] "The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.". (Article 3(1) EIR Recast).
[144] See the slightly revised EIR Recast definition.
[145] https://www.ohada.org/index.php/en/.

- Comoros
- Equatorial Guinea
- Gabon
- Guinea
- Guinea-Bissau
- Ivory Coast
- Congo
- Mali
- Niger
- Senegal
- Chad
- Togo
- Cameroon
- Democratic Republic of Congo.

OHADA aims to add to, renew or harmonise the domestic laws of its member States on a range of topics – including insolvency proceedings. Significantly in 2015, all 17 OHADA member States adopted the UNCITRAL Model Law on Cross-border Insolvency upon the Council of Ministers passing the Uniform Act on Insolvency (*Acte uniforme portant organisation des procédures collectives d'apurement du passif*).[146]

6.4.4.2 Middle East

While it appears that there are currently no international insolvency instruments regulating insolvencies across borders in the Middle East, the Gulf Cooperation Council countries of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates have worked closely with the World Bank for some forty years.

The first regional, comparative survey of insolvency systems in the Middle East and North Africa (MENA) region was launched in 2009 as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International. It was based on the World

[146] http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl222.html.

Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) as an indicator of best practice.

In recent years a number of Middle East States have reformed their domestic insolvency laws, such as the UAE in 2016 and 2019,[147] Saudi Arabia in 2018[148] and Dubai in 2019.[149] On international insolvency specifically, Bahrain adopted the Model Law on Cross-Border Insolvency in 2018 as did the Dubai International Financial Centre in 2019.[150]

6.4.5 Asia and the Pacific

There are currently no treaties and conventions that address international insolvency issues within the Asian region. There are however an increasing number of countries in the Asia-Pacific region that have adopted the Model Law on Cross-Border Insolvency, including substantial economies such as Australia, Japan, New Zealand, Philippines, Republic of Korea and Singapore. India released a draft chapter in 2018 as part of its consultation on adoption of the Model Law.[151]

A recent regional initiative in insolvency and restructuring, albeit on soft law rather than a binding treaty, has been the Asian Business Law Institute joint project with the International Insolvency Institute, to develop Asian Principles of Business Restructuring. In 2020, it published its report on Corporate Restructuring and Insolvency in Asia. , mapping business reorganisation regimes (both in-court and out-of-court) in ASEAN, Australia, China, Hong Kong, India, Japan, and South Korea. [152]

7. RECENT MULTILATERAL DEVELOPMENTS

7.1 Introduction

This part of the guidance text provides an overview of some recent multilateral developments in the regulatory responses to international insolvency issues. The aim is to provide you with an overview and "mind map" of some of the multilateral contributors in this field of international insolvency. It will also be a framework around which you can build more detail if some of these developments are relevant to the evolving jurisprudence in the States covered in subsequent modules.

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[147] Federal Law by Decree No. (9) of 2016 on Bankruptcy (https://www.mof.gov.ae/en/lawsAndPolitics/financial-banking-sector/Bankruptcy/pages/Laws.aspx) and Federal Decree Law No. (19) of 2019 on Insolvency https://www.mof.gov.ae/en/lawsAndPolitics/financial-banking-sector/Insolvency/Pages/law19insolvency.aspx.

[148] https://www.thenational.ae/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236.

[149] https://www.difc.ae/newsroom/news/dubai-international-financial-centre-enacts-new-insolvency-law/.

[150] https://www.difc.ae/newsroom/news/difc-announced-proposed-new-insolvency-law-regime-public-consultation/.

[151] http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf.

[152] https://abli.asia/Projects/Asian-Principles-of-Business-Restructuring.

7.2 Cross-border insolvency agreements

7.2.1 Introduction

The insolvency profession and their specialist advisers play a key role in negotiating commercial solutions to overcome the many legal issues in cross-border insolvencies as they are faced with attempting on a daily basis to navigate the minefield of managing insolvency proceedings that have links to multiple States, each with differing insolvency laws and other key commercial laws (such as property, secured credit, employment law etc). In circumstances where there are concurrent insolvency administrations for the same debtor, which may often itself be part of a complex multinational enterprise, the co-ordination of administrations is hampered by the lack of domestic laws or treaties and conventions addressing international insolvency.

Consequently, as the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009) notes:

> "[t]he absence of formal treaties or domestic legislation to address the problems arising from international insolvencies has encouraged insolvency practitioners to develop, on a case-by-case basis, strategies and techniques for resolving the conflicts that arise when the courts of different States attempt to apply different laws and enforce different requirements upon the same set of parties. The terms and duration of agreements vary, and amendment or modification in the course of the proceedings takes account of the changing dynamics of a multinational insolvency to facilitate solutions for unique problems that arise in the course of the proceedings."[153]

While such agreements are not adopted in all instances (and, even where they are proposed, not all parties may participate)[154] they are becoming increasingly important. Also, the expanding adoption of the UNCITRAL Model Law on Cross-Border Insolvency, notably by States with diverse insolvency laws, means that it can increasingly provide a framework for agreements to aid co-operation and communication.

7.2.2 UNCITRAL Model Law on Cross-Border Insolvency

Where the Model Law on Cross-Border Insolvency (MLCBI) has been adopted, its provisions that facilitate co-operation and co-ordination of concurrent proceedings are significant. The MLCBI does not require reciprocity.

Chapter IV of the MLCBI authorises (and if adopted as drafted by UNCITRAL, mandates) co-operation and direct communication between a local court and foreign courts or foreign representatives. A key example for these purposes of the co-operation permitted under the

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[153] *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, p 16.

[154] A notable example is the US-court approved Lehman protocol from which the subsidiary Lehman Brothers International (Europe) abstained, to its ultimate benefit. For a summary of the first ten years of the UK-based administrations, see https://www.pwc.co.uk/business-recovery/administrations/assets/LBIE_10_Year_Chronology_and_Key_Events.pdf.

relevant Articles (25 and 26) is "Approval or implementation by courts of agreements concerning the coordination of proceedings".[155]

Such 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*. In some States, such as Australia, these instruments are being recommended as guidance to parties in Court Practice Notes.[156]

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. A prominent example is the *Maxwell Communications Corporation plc* cross-border insolvency case in 1991, in which concurrent principal insolvency proceedings in the United States (Chapter 11 proceedings) and England (administration proceedings) were co-ordinated through an "Order and Protocol" approved by the courts in the respective States.[157]

The UNCITRAL Practice Guide provides the following summary:

> "The case of Maxwell Communication Corporation plc. involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two States, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that an insolvency agreement between the two administrations could resolve conflicts and facilitate the exchange of information.
>
> Under the agreement, 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. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present.
>
> Specificities included that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the English insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; and the English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major

[155] Article 27(d)).
[156] https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-xbdr.
[157] See the summary in *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, pp. 128-129.

> transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the agreement to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the agreement."

This approach of the parties, in effect, voluntarily putting in place a workable structure to co-ordinate a complex international insolvency and obtaining the approval of the courts, received further impetus through the work of professional bodies such as the IBA and its Concordat.

The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* was adopted by the Commission on 1 July 2009. It provides information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases - focusing on the use and negotiation of cross-border agreements.

It is not intended to be prescriptive, but rather 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, in particular the use of such agreements, tailored to meet the specific needs of each case and the particular requirements of applicable law.

It includes:

- a number of sample clauses (not model provisions) to illustrate how different issues have been, or might be, addressed; and

- summaries of various cases involving cross-border agreements that form the basis of the Practice Guide analysis (including for example, the Lehman Brothers case).[158]

These Agreements typically come into effect through negotiation between the parties prior to their presentation to courts for review and approval, while providing for "the independence of the courts" and affirming "the principle of comity".

A notable international insolvency, the Protocol for which had been approved by US and Canadian courts not long before the UNCITRAL Practice Guide was published, was the *Nortel Networks* case.[159] Subsequent co-ordination and co-operation shown in the conduct of Nortel's concurrent insolvency proceedings in North America extended to a joint electronic trial, using video link, in the Ontario Court of Justice (Commercial List) and the US Bankruptcy Court for the District of Delaware on an allocation dispute. In issue was the distribution of some USD 7.3billion in funds from the sale of Nortel business lines and intellectual property. The joint trial arose out of arrangements by the parties as part of the process of selling the assets as well as from the Protocol that had been approved by the relevant US and Canadian courts.[160]

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[158] *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, pp 123-124.

[159] *Idem*, p131.

[160] For the background to the case, see the decision of the Ontario Supreme Court decision at http://www.ontariocourts.ca/scj/files/judgments/2015ONSC2987.pdf.

Subsequent significant global developments facilitating this approach of using Protocols or Cross-Border Insolvency Agreements have included:

- the ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published by The American Law Institute (ALI) and The International Insolvency Institute (III) in 2000;

- the ALI-III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published in 2012; and

- the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Matters in 2016.

7.2.3 American Law Institute (ALI) / International Insolvency Institute (III)

Annexed to the ALI NAFTA Transnational Insolvency Project: Cooperation among NAFTA Countries, is an Appendix entitled "Guidelines Applicable to Court-to-Court Communications in Cross-border Cases". These Guidelines were finalised in 2001 and are intended to be adapted and modified as required to fit the circumstances of individual cases. The Guidelines were subsequently adopted by the International Insolvency Institute.

The object of the ALI's Transnational Insolvency Project (1993–2000) was "to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the North American Free Trade Agreement (NAFTA) States".[161] The ALI *NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (2000) were largely based on examples from actual cross-border cases involving cross-border insolvency protocols.[162] The Guidelines were not intended to alter or change the domestic rules or procedures in any country, nor to affect or curtail any substantive rights of any parties in court proceedings.

Subsequently, the ALI in conjunction with the III appointed Fletcher and Wessels to consider the application of the ALI NAFTA Principles worldwide. The project resulted in a Report entitled Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases (2012) (ALI - III Report).

The ALI - III Report contains: 37 Global Principles for Cooperation in International Insolvency Cases; 18 Global Guidelines for Court-to-Court Communications in International Insolvency Cases; a list of 158 terms and expressions with definitions; and, as an Annex, the Reporters' Statement with 23 Global Rules on Conflict-of-Laws Matters in International Insolvency Cases. The report was approved by ALI and III in 2012.

A global research survey and systematic evaluation was undertaken to assess the feasibility of worldwide acceptance of the ALI NAFTA Principles and their accompanying ALI NAFTA

[161] I F Fletcher and B Wessels, "Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases" (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012), p xvii.

[162] B Leonard, "The Development of Court-to-Court Communications in Cross-Border Cases", (2008) 17 *Norton Journal of Bankruptcy Law and Practice* 619, 622.

Guidelines on Court-to-Court Communications to be endorsed as "global best practice". The following groups participated in the project: International Advisers appointed by ALI and III; an ALI Members Consultative Group; an III Working Group; and International Consultants, consisting of recognised experts with an interest in the project who were not ALI[163] or III members. In addition, discussions and debates were convened in many international gatherings, seminars and lectures.[164] The Joint Reporters also took into account recent multilateral developments such as the UNCITRAL MLCBI and the EIR, as well as numerous other attempts to develop modes of international co-operation in international insolvency.[165]

The overriding objective of the ALI - III Global Guidelines for Court-to-Court Communications in International Insolvency Cases is to enhance co-ordination and harmonisation of insolvency proceedings that involve more than one State through communications among the States involved. They are not intended to interfere with the independent exercise of jurisdiction by the relevant States' courts. Also, they impose an obligation on the court, except in urgent circumstances, to be satisfied that its communication is consistent with the applicable rules of procedure.

In early 2021, ALI noted that the ALI-III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases played a prominent role in cross-border airline restructuring, such as the ongoing restructuring of the LATAM Airlines Group with a cross-border insolvency protocol being approved by the Grand Court of the Cayman Islands in July 2020.[165A]

7.2.4 Judicial Insolvency Network (JIN)

The Judicial Insolvency Network (JIN) is "a network of insolvency judges from across the world with the aim of providing judicial thought leadership, developing best practices and facilitating communication and cooperation amongst national courts in cross-border insolvency and restructuring matters."[166]

In October 2016, judges from Australia, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, England and Wales, Singapore and the United States of America, as well as a judge from Hong Kong SAR, who joined as an observer, participated in an inaugural conference in Singapore. Judges have subsequently joined, as members or observers, from States in Argentina, Brazil, Japan and the Republic of Korea.

At the inaugural conference, members contributed to the drafting of Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN

163 http://www.jin-global.org/about-us.html.
164 Fletcher and Wessels, *supra* note 161, p 27.
165 *Idem*, p 21.
165A See https://www.law.ox.ac.uk/business-law-blog/blog/2020/11/when-soft-law-instruments-matter-oblb-influences-cayman-islands and https://www.ali.org/news/articles/alis-work-provide-guidance-drafting-cross-border-insolvency-protocols/.
166 https://www.supremecourt.gov.sg/news/media-releases/judges-of-the-worldwide-judicial-insolvency-network-to-meet-in-new-york-city-this-september.

Guidelines).[167] Their overarching objective is to improve the efficiency and effectiveness of parallel proceedings in an international insolvency "by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted." The JIN Guidelines have since been adopted by courts in countries in the Americas; Asia and the United Kingdom.[168]

Projects initiated by JIN in 2018 address core principles on recognition of foreign insolvency proceedings; modalities for court-to-court communication (published in 2019); guidelines when maritime and insolvency law intersect, especially the arrest of ships and Articles 19, 20 and 21 of the MLCBI; and identification of insolvency disputes which parties consider sending for alternative dispute resolution.[169]

7.3 Other recent multilateral developments

This material concludes with a brief summary of a range of initiatives that are being undertaken by multilateral organisations at the time of writing, or that have been raised in the past and may be taken up in the future. It also mentions projects already completed by these bodies that may touch on international insolvency issues, so that you can appreciate the broad range of issues that may touch upon an international insolvency and appreciate that there may be related multilateral instruments that assist with analysing the issues and potential responses.

7.3.1 United Nations Commission on International Trade Law (UNCITRAL)

In 2017, to acknowledge its 50th Anniversary, UNCITRAL hosted a General Colloquium entitled Modernizing International Trade Law to Support Innovation and Sustainable Development.[170] The Congress addressed the broad range of areas on which UNCITRAL has worked and included papers on potential topics for future consideration. A number of papers were presented on insolvency issues.[171]

Working Group V (WGV) is currently investigating the insolvency of micro, small and medium-sized enterprises (MSMEs). It is to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. The Secretariat has prepared a draft text on a simplified insolvency regime reflecting deliberations of the Working Group. That text takes the form of a list of principles applicable to a simplified insolvency regime that would supplement the texts of UNCITRAL Working Group I (MSMEs). It is under active consideration by WGV.

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[167] http://www.jin-global.org/jin-guidelines.html.

[168] At the time of writing, versions have been adopted by courts in Australia (Federal Court of Australia, New South Wales); Bermuda; Brazil, Canada (Ontario, British Columbia); Cayman Islands; Eastern Caribbean; England and Wales; Singapore; South Korea (Seoul); The Netherlands (Midden-Nederland); and the US (Delaware, Southern District of Florida, Southern District of Texas, and Southern District of New York Bankruptcy Courts).

[169] http://www.jin-global.org/news-events.html.

[170] http://www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary-papers.html.

[171] https://uncitral.un.org/en/colloquia/general.

Completed UNCITRAL texts on Insolvency are:

- UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013)[172] (MLCBI) – discussed earlier

- UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018) (MLIJ).[173]

  As mentioned earlier, the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) project followed the 2013 decision of the United Kingdom Supreme Court in *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant,*[174] in which the court declined recognition of a foreign judgment that arose in an insolvency context.

  To gain a sense of the judgments intended to be covered by this new MLIJ, Article 2(d) defines "Insolvency-related judgment" as follows:

  > "(i) Means a judgment that:
  >
  > (a) Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and
  >
  > (b) Was issued on or after the commencement of that insolvency proceeding; and
  >
  > (ii) Does not include a judgment commencing an insolvency proceeding."

- UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019) (MLEGI).[175]

  Legislation in many legal systems treats corporations or companies as single entities (based on a basic rule of their company law). This creates complexities for insolvency laws where a business operates as a corporate group or enterprise comprising several corporations or companies. It has also complicated efforts to draft a multilateral instrument dealing with the insolvency of two or more members of a group enterprise.

  The MLEGI Guide to Enactment (2019) states at [26] "the [MLEGI] is intended to provide a legislative framework to address the insolvency of an enterprise group, including both domestic and cross-border aspects of that insolvency. Part A is a set of core provisions, dealing with matters that are regarded as key to facilitating the conduct of enterprise group

[172] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.
[173] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf.
[174] [2013] 1 AC 236.
[175] At the time of writing, this text is available as part of the July 2019 Commission documents at https://uncitral.un.org/sites/uncitral.un.org/files/972-annex-e.pdf.

insolvencies. Part B, comprising articles 30–32, includes several supplemental provisions that go further than the measures provided in the core provisions,"[175A]

- UNCITRAL Legislative Guide on Insolvency Law, Parts One - Four.[176] Part One is on Designing the Key Objectives and Structures of an Effective and Efficient Insolvency Law Part Two is on Core Provisions for an Effective and Efficient Insolvency Law; Part three is on Treatment of Enterprise Groups in Insolvency; and Part four on Directors' Obligations in the Period Approaching Insolvency. In July 2019, the Commission approved an additional section for Part Four addressing the obligations of directors of enterprise group companies in the period approaching insolvency.

- UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective[177]

- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)[178]

Working Group V has also received proposals for future work on harmonising applicable law in insolvency proceedings and on asset-tracing and recovery. It convened an UNCITRAL Colloquium on Civil Asset Tracing and Recovery on 6 December 2019 and held a colloquium on applicable law in insolvency proceedings (virtually) on 11 December 2020.

Completed UNCITRAL texts on issues that may intersect with international insolvencies include:

- UNCITRAL Legislative Guide on Secured Transactions (2007).[179]

  This Working Group VI on security Interests closely collaborated with Working Group V (Insolvency) in order to ensure co-ordination of the treatment of security interests in insolvency with the UNCITRAL Legislative Guide on Insolvency Law. It also co-operated closely with the Permanent Bureau of the Hague Conference on Private International Law in the preparation of the chapter on conflict of laws. In addition, it co-ordinated with the International Institute on Private International Law (UNIDROIT) to avoid overlap with the Convention on International Interests in Mobile Equipment (Cape Town, 2001) and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva, 2009).

- UNCITRAL Legislative Guide on Secured Transactions Supplement on Security Rights in Intellectual Property (2010).[180]

175A https://undocs.org/en/A/CN.9/WG.V/WP.165.

176 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf; https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf; https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part4-ebook-e.pdf.

177 https://uncitral.un.org/en/texts/insolvency/explanatorytexts/cross-border_insolvency/judicial_perspective.

178 https://uncitral.un.org/en/texts/insolvency/explanatorytexts/practice_guide_cross-border_insolvency.

179 https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured_transactions.

180 https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured_transactions/supplement.

In preparing this supplementary legislative guide, Working Group VI on Security Interests referred certain insolvency-related matters to Working Group V (Insolvency Law). It also co-operated with the World Intellectual Property Organisation (WIPO) and other intellectual property organisations from the public and the private sector, which attended its meetings as observers, to ensure that the Supplement would be sufficiently co-ordinated with law relating to intellectual property. In addition, it co-operated closely with the Permanent Bureau of the Hague Conference on Private International Law in the preparation of chapter X of the Supplement, on the law applicable to a security right in intellectual property.

- UNCITRAL Model Law on Secured Transactions (2016);[181] Guide to Enactment (2017) and Practice Guide (2019)

  This "deals with security interests in all types of tangible and intangible movable property, such as goods, receivables, bank accounts, negotiable instruments, negotiable documents, non-intermediated securities and intellectual property with a few exceptions, such as intermediated securities… [It] follows a unitary approach using one concept for all types of security interest, a functional approach under which the Model Law applies to all types of transaction that fulfil security purposes, such as a secured loan, retention of title sale or financial lease, and a comprehensive approach under which this Model Law applies to all types of asset, secured obligation, borrower and lender...The Model Law includes a set of Model Registry Provisions (the "Model Provisions") that can be implemented in a statute or other type of legal instrument, or in both."[181A]

7.3.2 International Institute for the Unification of Private Law (UNIDROIT)

Founded in 1926, the *Institut International pour l'Unification de Droit Privé* (International Institute for the Unification of Private Law), commonly known as UNIDROIT, is based in Rome.[182] It is an independent intergovernmental organisation whose purpose is "to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives."

Completed UNIDROIT texts on issues that may have some relevance for international insolvencies include its Conventions on Mobile Equipment (2001), including aircraft equipment (2001), railway rolling stock (2007) and space assets (2012), and its ALI / UNIDROIT Principles of Transnational Civil Procedure (2016).

At its 99th session in September 2020, a feasibility study was discussed regarding separate proposals from the Bank of Italy and the European Banking Institute pertaining to the harmonisation of rules in cases of the insolvency of a bank. UNIDROIT website notes that the "preparation of a guidance document on Bank Insolvency is expected to take place over five sessions of the UNIDROIT Working Group on Bank Insolvency in 2021-2023, with a view to be adopted by 2024".[182A]

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181 https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions.

181A See https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions.

182 http://unidroit.org/.

UNIDROIT's other works-in-progress may also have relevance for international insolvencies, such as the Working Group established with the objective to develop a future legal instrument containing principles and legislative guidance in the area of private law and digital assets. At the time of writing, the website still stated that the "preparation of a guidance document on Digital Assets and Private Law is expected to take place over four in-person sessions of the Working Group in 2020-2021 and to be adopted by early 2022."[182B]

7.3.3 International Lawyers Association (UIA)

The International Lawyers Association (*Union Internationale des Avocats* - UIA),[183] founded in 1927, describes itself as a global, multilingual and multi-cultural organisation for the legal profession and includes as one of its constituent parts, the UIA Bankruptcy Law Commission.[184]

At the 37th session of the UNCITRAL Working Group in Vienna in November 2009, the UIA proposed the development of an international convention in the field of international insolvency law, which might cover the following issues:

(a) Granting of access to courts to foreign insolvency representatives;

(b) Recognition of foreign insolvency proceedings (with the effect of granting the foreign proceeding the rights of a national proceeding or triggering a secondary proceeding); and

(c) Co-operation and communication between insolvency representatives and courts.

While there were expressions of support in favour of the goal of developing an international convention, there were also reservations with respect to the feasibility of reaching agreement, particularly in view of difficulties encountered in the past in doing so in the area of international insolvency law.

7.3.4 International Bar Association (IBA)

The International Bar Association (IBA)[185] was founded in 1947 as a professional association of individual lawyers and member associations. It contributes the expertise of its members to influence international law reform, including in insolvency and creditors' rights.

The IBA Insolvency Section[186] has also expressed support for an international insolvency convention, specifically in order to encourage judicial and administrative co-operation and co-ordination in cross-border insolvency cases, including enterprise group cases.[187]

182A See https://www.unidroit.org/work-in-progress/bank-insolvency/.
182B See https://www.unidroit.org/work-in-progress/digital-assets-and-private-law.
183 https://www.uianet.org/en/about-us.
184 https://www.uianet.org/en/commissions/bankruptcy-law.
185 https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx.
186 https://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/Projects.aspx.
187 See 2010 comments by the IBA on the UIA proposal at UNCITRAL Working Group V document A/CN.9/WG.V/WP.93/Add.6.

7.3.5 International Insolvency Institute (III)

The International Insolvency Institute (III) is a "non-profit, limited-membership organization dedicated to advancing and promoting insolvency as a respected discipline in the international field. Its primary objectives include improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings."[188]

The Institute's projects and activities focus on a number of goals and objectives, including promoting greater international co-operation and co-ordination in insolvencies and reorganisations through improvements in the law and in legal procedures. One example, supplementing the UIA proposal for a convention, is a III proposal "on the specific question of choice of law in cross-border bankruptcy cases".[189]

7.3.6 INSOL International

INSOL International is a world-wide federation of national associations of accountants and lawyers who specialise in turnaround and insolvency. There are currently over 40 Member Associations with over 10,000 professionals participating as members of INSOL International across more than 100 countries and jurisdictions.[190]

Its goals include participating in Government, NGO and intergovernmental advisory groups and to liaise with these institutions on relevant issues; participating in Government advisory groups and to liaise with Governments on cross-border insolvency issues; and assisting in developing cross-border insolvency policies, international codes and best practice guidelines. Its library includes many special reports; technical updates and other materials. INSOL also plays a significant role in co-sponsoring international colloquia, Such as the INSOL / UNCITRAL / World Bank Judicial Colloquium on Insolvency[191] and the Forum on Asian Insolvency Reform (FAIR) cosponsored the World Bank Group and significant legal institutions within the relevant host country.[192]

Its members contribute their expertise to various projects to improve the regulatory approaches to improving the outcomes on issues that may arise international insolvencies.

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[188] https://www.iiiglobal.org/mission-statement.
[189] UNCITRAL Working Group V document A/CN.9/WG.V/WP.117 at paragraph 12.
[190] https://www.insol.org/Membership.
[191] https://www.insol.org/judicialgroups/.
[192] https://www.insol.org/FAIR.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Question 1

Why is it so difficult to deal with insolvency matters spanning more than one State?

Question 2

What does Fletcher deem to be the roots of bankruptcy law?

Question 3

Would you say that insolvency or bankruptcy carried a severe stigma and penalty in earlier centuries? Explain.

Question 4

Explain the importance of the Statute of Ann of 1705 for modern day insolvency.

Question 5

Explain the difference between the sources of insolvency / bankruptcy in the USA, England and Australia.

Commentary and Feedback on Self-Assessment Exercise 1

Question 1

It is so difficult since different States have different insolvency laws and policies towards insolvency. There are also different cross-border insolvency rules being applied by different States.

Question 2

Fletcher states that the roots of bankruptcy law are to be found in the procedures of Roman law, namely *cessio bonorum* (assignment of property; *distractio bonorum* (forced liquidation of assets); remission and *dilatio* (compositions with creditors). These procedures developed from individual procedures that developed into collective debt collecting mechanisms.

Question 3

Yes, since in early Roman times the bodies of debtors could be cut up into pieces and distributed amongst the creditors or they could be enslaved. In early English debt collection law, they could be imprisoned.

Question 4

The Statute of Ann of 1705 introduced the notion of a statutory discharge of debt and this had a significant impact on the development of insolvency policy.

Question 5

The USA has a single, unified Bankruptcy Code of 1978, as well as England in the form of the Insolvency Act of 1986. Australia has legislation dealing with companies including corporate insolvency and separate legislation dealing with personal insolvency.

Self-Assessment Exercise 2

Question 1

Using the framework provided above, cast your home country's (domestic) insolvency system into this framework.

Question 2

Write a brief essay on the history and essentials of an insolvency system and indicate if your home country's (domestic) system stems from English or Civil law.

Question 3

Discuss if your domestic system is pro-creditor or pro creditor.

Question 4

Mention who the insolvency regulator in your domestic system is, how Insolvency Estate Representatives are appointed and if you have specialised insolvency courts, special insolvency tribunals and the role of the general courts in your system.

Question 5

Explain if and on what grounds or basis your system will deal with cross-border insolvency matters, for instance recognising a foreign insolvency order or assist a foreign Insolvent Estate Representative.

Commentary and Feedback on Self-Assessment Exercise 2

Question 1

In drafting the framework, you must indicate the general sources of your insolvency system and cross-reference the various components with references to the sources, sections / article of legislation or common law principle that may apply in each instance in accordance with your home State. Clearly indicate the applicable provisions in each block of the table.

Question2

For the essay re the history follow the guidance text as well as sources cited. Your answer should deal with the fact that debt collection developed from rudimentary individual debt collecting procedures until they gained a distinct collective characteristic in those instances where the debtor was insolvent.

In your essay you should discuss with the early Roman Law mechanisms as well as the early English Law procedures.

An important aspect is the brutal way in which both systems dealt with defaulting debtors and you should discuss these undoubtedly coercive measures as well.

It is important to note in your essay that Roman Law principles largely formed the backbone of the many civil law countries whilst English Law spread throughout the common law States.

The statutory developments of English insolvency law are important and you should list important aspects flowing from these, such as the establishment of a kind of regulator, acts of bankruptcy and the notion of a discharge.

Question 3

Analyse in view of for instance the availability and requirements of a discharge for debt. Is it easily granted in your State, what are the requirements and the time periods before a debtor may qualify for a discharge?

Question 4

Follow your local laws and textbooks but your answer must clearly indicate who the regulator is and its powers relating to insolvency. The answer must also indicate who is eligible to become insolvent estate representatives and what the requirements are.

Question 5

Discuss whether you have a distinct legislative provision, whether your State has adopted the UNCITRAL Model Law on Cross-Border Insolvency and whether there is perhaps no legislation in place to deal with the matter. (In the last-mentioned instance you should indicate if common law or rules of practice will be applicable, or whether your State does not offer assistance in cross-border insolvency matters.

Self-Assessment Exercise 3

Question 1

Discuss what is meant by "international insolvency law".

Question 2

What approaches are followed in cross-border insolvency matters in regard to recognising foreign insolvency orders?

Question 3

Briefly indicate the circumstances when a secondary insolvency procedure in a cross-border context may be opened.

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

Wessels defines international insolvency law as that part of the law that:

"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."

Question2

Broadly speaking *universalism* which is an approach that allows for more than one insolvency proceeding pending / originating in different States to be dealt with under the provisions of one insolvency law, for example in the State where the debtor has its centre of main interests (COMI). This means that the law of the "main proceeding" will have worldwide effect, even outside the territorial jurisdiction of the State where the so-called main proceeding has been opened. It calls for so-called "unity of proceedings", allowing the law of the State where the "main proceeding" is opened (the *lex concursus*) to regulate the matter; or

Territorialism which is an approach that prescribes that the consequences of an insolvency proceeding will only apply to the State where the insolvency proceeding has been opened and can lead to a plurality of insolvency proceedings, in other words the insolvency laws of more than one State being involved; or

Modified universalism: since global consensus regarding universalism has not been (and probably never will be) reached and many States are closer to an approach based on territoriality, the notion of "modified universalism" has emerged. Where this approach is adopted, the "main proceeding", opened in the State where the centre of main interests has been determined, is supported by secondary or ancillary proceedings in another State. In such instances, the courts dealing with the respective proceedings are supposed to co-operate with each other.)

Question 3

A secondary procedure may be opened if a State where assets of the debtor are for instance situated does not follow an approach of universality although a (main proceeding) had been opened in the State where the centre of main interest of the debtor is.

Self-Assessment Exercise 4

What three key questions may be relevant for a court to consider where a matter has an international element? Provide examples of how these may be relevant in a company liquidation which has an international element.

Commentary and Feedback on Self-Assessment Exercise 4

Three key questions are:

1. The choice of forum to exercise jurisdiction in a matter.

2. The recognition and effect accorded foreign proceedings in the same matter; and

3. The choice of law to apply in the matter.

Examples drawn from an English company liquidation with an international element outside the ambit of the EIR (Recast) and the UNCITRAL Model Law on Cross-Border Insolvency are:

1. Does an English court have jurisdiction to wind-up a company formed in another State and that has carried on business in England however has not complied with the requirements to register in England?
Yes, see *Insolvency Act 1986*, ss 220-221.

2. Will an English court recognise winding-up proceedings for that foreign company? If so, will it refuse to grant a local winding-up order over the same company and instead give effect to the foreign proceedings by recognising the authority of the foreign liquidator to gain control over local assets?
Yes, see *Insolvency Act 1986* s 426.

3. What law applies to the English winding-up of the foreign company?
English law applies to matters of procedure and substance, although a foreign law may be relevant to aspects of the administration of the winding-up e.g. if a claim is properly governed by foreign law.

Where the English court is acting under the aid and assistance statutory provisions in Insolvency Act 1986 s 426 to recognise and cooperate with a foreign insolvency proceeding, then it may apply either the English law or the foreign law (s 426(5)).

Self-Assessment Exercise 5

Question 1

What multilateral instruments have been developed for countries to consider when reviewing and potentially reforming their domestic insolvency laws? Where a country's domestic insolvency laws have not been amended since initially adopted in a colonial era, what factors may influence a country to consider these multilateral instruments?

Question 2

What is an example of conventions or other binding international instruments that contain choice of law rules for an international insolvency? Describe the significance under this instrument of the domestic insolvency laws in the State in which the insolvency proceedings opened.

Question 3

The domestic adoption of the UNCITRAL Model Law on Cross-Border Insolvency by an increasing number of States in helping to achieve more uniform recognition laws across those States. What international instruments have been developed to encourage closer co-operation and co-ordination of concurrent proceedings and so promote recognition and enforcement?

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

UNCITRAL Legislative Guide on Insolvency Law (2004)
World Bank *Principles for Effective Insolvency and Creditor /Debtor Regimes* revised in 2021.

Factors may include pressure from foreign investors seeking clarification for creditor protection; the political implications of a low ranking on the World Bank Doing Business Report; the IMF and World Bank may require some insolvency law reform as a condition of loan support.

Question 2

The Nordic Convention on Bankruptcy (1933): the law of the member State in which the insolvency adjudication was made to commence the insolvency administration determines almost all the effects (for example, impact on local assets, other than real property) granted to the order in all member States without the need for further formalities.

European Insolvency Regulation (Recast): See Articles 7 – 18: The law in the "State of the opening of proceedings" that are applicable to insolvency proceedings and their effects is the law which determines "the conditions for the opening of those proceedings, their conduct and their closure." This is subject to specific provisions dealing with rights *in rem*; set-off; immoveable property; employment; and detrimental acts.

Question 3

Some examples are:
- European Guidelines on Communication and Cooperation (2007)
- ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012)

- EU JudgeCo Principles and EU Cross-border Insolvency JudgeCo Guidelines (2015)
- Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Self-Assessment Exercise 6

What are some of the differences between the various treaties between Latin American States on managing international insolvency issues?

Commentary and Feedback on Self-Assessment Exercise 6

Differences include the actual States that are members of the Montevideo Treaties (1889) and (1940) and the Bustamente Code (1928). Also, they differ in the extent to which they allow for a single proceeding with universal effect throughout the member States.

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