



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

***This is the summative (or formal) assessment for Module 1 of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment1summative]. An example would be something along the following lines: 202223-363.assessment1summative. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 15 November 2022. The assessment submission portal will close at 23:00 (11 pm) GMT on 15 November 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**



**ANSWER ALL THE QUESTIONS**

QUESTION 1 (multiple-choice questions) [10 marks in total]

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow.** Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

**Civil Law and English (Common) Law countries have the same historical roots. Select from the following the best response to this statement.**

- (a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.**
- (b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16<sup>th</sup> century onwards.**
- (c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.**
- (d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.**

Question 1.2

**Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response to this statement.**

- (a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.**
- (b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.**
- (c) This statement is untrue since discharge of debt never became part of any of these systems.**

**(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.**

Question 1.3

**England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.**

**(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.**

**(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.**

**(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.**

**(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.**

Question 1.4

**There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.**

**(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.**

**(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved" after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.**

**(c) The statement is untrue since insolvency law rules are not collective in nature.**

**(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.**

Question 1.5

**All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.**

**(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.**

**(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.**

**(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.**

**(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.**

Question 1.6

**The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.**

**In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?**

**(a) Public International Law.**

**(b) UNCITRAL Legislative Guide on Insolvency Law.**

**(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.**

**(d) Private International Law.**

Question 1.7

**Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign**

**insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.**

**Which of the following statements, concerning the request for recognition and enforcement in England, is true?**

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).**
- (b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.**
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.**
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.**

Question 1.8

**Which of the following best describes international insolvency law?**

- (a) It is public international law governing insolvency law between States.**
- (b) It is private international law governing insolvency law between States.**
- (c) It may involve aspects of both public international law and private international law.**
- (d) It involves a simple classification within either public international law or private international law.**

Question 1.9

**To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.**

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.**
- (b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.**

**(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.**

**(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.**

Question 1.10

**Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response to this statement.**

**(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.**

**(b) This statement is untrue because North America was not a party to these agreements.**

**(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.**

**(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.**

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

**Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.**

*Countries in Africa continue to apply and be influenced by the laws of their colonial heritage. According to the LEXAfrica Guide to Insolvency and Business Restructuring in Africa,<sup>1</sup> the following list records a brief overview of the historical roots of a number of African countries:*

- *Angola - Roman-Germanic matrix;*
- *Botswana - mixture of Roman-Dutch and English common law principles. Rural areas are typically governed by tribal laws and customs;*
- *Burkina Faso - French civil law system;*

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<sup>1</sup> <<https://www.lexafrica.com/guide-to-insolvency-and-business-restructuring-in-africa-2/>> (accessed 13 November 2022).



- *Côte d'Ivoire - inspired by French civil law;*
  - *Democratic Republic of the Congo - Belgian law, due to the colonial occupation by Belgium;*
  - *Egypt - French civil law and Sharia laws;*
  - *Eswatini - dual legal system, comprising of Roman-Dutch law (which is codified in the country's Constitution and legislation and applied by numerous courts and tribunals) and Swazi Customary Law (which is applied by the Swazi Courts). Despite the dual legal system, the High Courts and the King retain supervisory powers over both legal systems;*
  - *Ghana - common law;*
  - *Republic of Guinea Conakry - French civil law and customary law;*
  - *Kenya - common law;*
  - *Lesotho - Roman Dutch Law;*
  - *Malawi - English common law, but customary law may also be applied by the relevant courts;*
  - *Mali - French civil law;*
  - *Mauritius - mixture of importing laws from English and French systems. For example, corporate, administrative, constitutional, etc, laws are based on English law, but private international law is based on French law;*
  - *Mozambique - Roman and German law mixture;*
  - *Namibia - substantial law based on civil law, however, procedural law based on common law systems. Customary laws may also be recognised for Indigenous persons;*
  - *Nigeria - predominately based on English common law and equity, however, customary laws and Sharia laws may be used in prescribed circumstances;*
  - *Senegal - French civil law system;*
  - *South Africa - Roman Dutch law, with English law influences;*
  - *Tanzania - predominately based on common law, however, customary laws and Sharia laws may be used in prescribed circumstances;*
  - *Uganda - English common law and equity ;*
  - *Zambia - dual legal system, comprising of English common law and customary law; and*
  - *Zimbabwe - Roman Dutch law, with commercial law influenced by English law.*
- Notwithstanding the colonial heritage of many African countries' laws, attempts to unify insolvency law across Africa have led to the adoption and enactment of the Uniform Act on the Organisation of Collective Procedures for the Discharge of Liabilities (2015)<sup>2</sup> and the Uniform Act Organising Simplified Recovery Procedures and Measures of Execution (1998)<sup>3</sup> (collectively, the OHADA). Currently, there are*

<sup>2</sup> <<https://www.ohada.org/en/organizing-simplified-recovery-procedures-and-measures-of-execution/>> (accessed 13 November 2022).

<sup>3</sup> <<https://www.ohada.org/en/insolvency-law/>> (accessed 13 November 2022).

approximately 17 signatory States to the OHADA, including Cameroon, Congo and Guinea.<sup>4</sup>

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Question 2.2 [maximum 3 marks]

**Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.**

*Following the 1997/98 financial crisis in East Asia,<sup>5</sup> a number of multilateral agencies (eg IMF and the World Bank) sought to promote "neo-liberal models of reform and market[liberalisation]."<sup>6</sup> The following are some examples of countries that amended their insolvency reforms following the 1997/98 financial crisis:*

- *Philippines - the "debtor-friendly"<sup>7</sup> SEC Rules of Procedure on Corporate Rescue was passed into law on 15 January 2000.<sup>8</sup> These laws were replaced by the Financial Rehabilitation and Insolvency Act of 2010 (FRIA); and*
- *Thailand - introduced rehabilitation and reorganisation amendments to the Bankruptcy Act (1940) and implemented a specialist bankruptcy court through the Bankruptcy Court Act (1998).<sup>9</sup>*

*Not only was the 1997/98 financial crisis a driving force in making some East Asian countries to change their insolvency laws, Singapore made the policy decision<sup>10</sup> in 2016 to position itself as a powerhouse in cross-border insolvency/restructuring.<sup>11</sup> On 30 July 2020, Singapore brought into force the Insolvency, Restructuring and Dissolution Act; which consolidates the insolvency laws in the former Bankruptcy Act and Companies Act, introduces ipso facto clause modifications/restrictions and provides a greater reorganisation/turnaround opportunity for companies in financial distress.<sup>12</sup>*

*I also note that the following Asian countries are members of the Judicial Insolvency Network: Supreme Court of Singapore, Seoul Bankruptcy Court, High Court of Hong*

<sup>4</sup> <<https://www.ohada.org/en/state-members/>> (accessed 13 November 2022).

<sup>5</sup> Spuling, N. (2021) *Cross-border insolvencies in Southeast Asia: Regional insolvency framework for ASEAN*, pages 10 to 14.

<sup>6</sup> Antons, C and Tomasic, R, *Law Reform and Legal Change: An Introduction to Law and Society in East Asia* (Surrey, England, Ashgate Publishing, 2013, Chapter 1, page 3). Also accessible at <<https://ssrn.com/abstract=2253930>> (accessed 13 November 2022). See also generally Halliday, Terence C and Carruthers, Bruce G (2009) *Bankrupt – Global Lawmaking and Systemic Financial Crisis* (Stanford University Press).

<sup>7</sup> Spuling, N. (2021) *Cross-border insolvencies in Southeast Asia: Regional insolvency framework for ASEAN*, page 92 citing I C Nam and S Oh, 'Asian Insolvency Regimes from a Comparative Perspective: Problems and Issues for Reform' in Organisation for Economic Cooperation and Development (ed.), *Insolvency Systems in Asia: An Efficiency Perspective. Conclusions of the Conference on 'Insolvency Systems in Asia: An Efficiency Perspective'* (Paris: OECD Publishing, 2001), pp. 19–103, at p. 92.

<sup>8</sup> Spuling, N. (2021) *Cross-border insolvencies in Southeast Asia: Regional insolvency framework for ASEAN*, page 92.

<sup>9</sup> *Ibid*, page 94.

<sup>10</sup> In a report filed by the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (CSSICDR), dated 20 April 2016.

<sup>11</sup> <<https://www.herbertsmithfreehills.com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill>> (accessed 10 November 2022).

<sup>12</sup> <<https://www.mlaw.gov.sg/news/press-releases/omnibus-bill-introduced-to-update-singapore-insolvency-debt-restructuring-laws>> (accessed 10 November 2022).

*Kong SAR (observer), Tokyo District Court (observer) and the Supreme Court of Japan (observer).*<sup>13</sup>

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Question 2.3 [maximum 4 marks]

**Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.**

Westbrook wrote in 2001/02 that:

*"global enterprises operating in global markets must inevitably produce global bankruptcies. ... Because bankruptcy has traditionally been among the most parochial legal fields, with each country grabbing and distributing assets within its grasp with little attention to foreign courts and foreign laws, there has been a developing recognition of the need for better coordination."*<sup>14</sup>

Various attempts have been made across the world to deal with these global bankruptcies and cross-border insolvency issues, for example, the enactment of the **United Nations Commission on International Trade Law (UNCITRAL): Model Law on Cross-Border Insolvency (1997)** (Model Law) and the **Final Report of the High Level Forum on Capital Markets Union (2020)**.<sup>15</sup>

In North America, a number of initiatives have been undertaken in an attempt to harmonise cross-border insolvency issues between North American Free Trade Agreement (NAFTA) members.

Draft Treaty

In 1979, the **Draft of the United States of America-Canada Bankruptcy Treaty** (Draft Treaty) failed, following various ambitious attempts to harmonise a single administration of cross-border insolvency cases. *Burman* claims that this Draft Treaty failed due to (*inter alia*) an impasse over rules to determine which of the two countries would qualify as the forum State in prescribed circumstances.<sup>16</sup>

ALI NAFTA Principles

In 2000, the **ALI NAFTA Principles of Cooperation Among the NAFTA Countries and Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000)** (ALI NAFTA Principles) was produced, following the workings of the American

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<sup>13</sup> <<http://www.jin-global.org/about-us.html>> (accessed 10 November 2022).

<sup>14</sup> Westbrook, Jay L, *The Transnational Insolvency Project of the American Law Institute*, 17 Connecticut Journal of International Law 99 (2001-2002), 99.

<sup>15</sup> Final Report of the High Level Forum on Capital Markets Union – A new vision for Europe's Capital Markets (2020), p 114.

<sup>16</sup> Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 Fordham Law Review 2543 (1996), 2556.

**Law Institute's (ALI) Transnational Insolvency Project.<sup>17</sup> Important components of the ALI NAFTA Principles include (*inter alia*):**

- **they enable a "non-statutory basis of cooperation in international insolvency cases"<sup>18</sup> between NAFTA members (being the USA, Canada and Mexico);**
- **general principles require cooperation between courts and administrators with the main goal of maximising the debtors' assets and timely/efficient recognition of a bankruptcy across all NAFTA countries (where required);**
- **approximately 27 procedural principles dealing with (without limitation) corporate groups, stay on enforcement proceedings, moratoriums, priority creditor rights, secured creditors and dividend distributions; and**
- **a recommendation that NAFTA members adopt the Model Laws (which occurred in 2005).<sup>19</sup>**

**I note that the ALI NAFTA Principles are limited in that they do not deal with personal insolvencies (including those that arise out of sole trader businesses, partnerships, etc), non-profit organisations and financial institutions and are not binding on any non-NAFTA member.**

#### ALI - III Global Principles

**In 2012, the International Insolvency Institute (III) and ALI led a project (and produced a Transnational Report)<sup>20</sup> to implement the ALI NAFTA Principles worldwide (whether common law or civil law based)<sup>21</sup> in circumstances where insolvency proceedings involve more than one State. This project developed the ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (ALI - III Global Principles).<sup>22</sup>**

**According to the Transnational Report, the ALI - III Global Principles contain approximately 236 Global Principles, Guidelines, Rules, terms and definitions and the Transnational Report was produced with the assistance of expert consultants from approximately 30 different countries, following numerous consultations, seminars and draft report releases.**

**Fletcher and Wessels concluded in the Transnational Report that Recommendations 1 and 6 of the ALI NAFTA Principles are codified in Chapter 15 of the United States Bankruptcy Code<sup>23</sup> and several key issues addressed by the ALI - III Global Principles**

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<sup>17</sup> I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5<sup>th</sup> ed, 2017), 32-058.

<sup>18</sup> 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*, 20 March 2012), p xvii.

<sup>19</sup> <[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)> (accessed 15/10/2022).

<sup>20</sup> 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*, 20 March 2012).

<sup>21</sup> 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*, 20 March 2012), p xvii.

<sup>22</sup> <<https://www.iiiglobal.org/initiatives/projects-sponsored-by-iii/>> (accessed 13 November 2022).

<sup>23</sup> American Law Institute, "Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries," 2003, p. 93 and 99.

are already binding on 26 out of the 27 EU members (at that time, excluding Denmark), following the passage of the Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000) (EU Regulations).<sup>24</sup> Some of the key issues addressed in the EU Regulations include cooperation between State courts, claims filing and anti-avoidance provisions.<sup>25</sup> According to *Wessels*, a number of principles from the ALI - III Global Principles are also picked-up by the EU Insolvency Regulation (recast) (Regulation 848/2015) and the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2017) (JIN Guidelines).<sup>26</sup>

However, *Fletcher* and *Wessels* also remark that principles-based soft law may have some disadvantages, including (*inter alia*):<sup>27</sup>

- (i) uncertain legal effect or legitimacy;
- (ii) problem of ascertaining the text, including a lack of clarity/quality;
- (iii) lack of reporting on application or enforcement; and
- (iv) lack of testing effectiveness.

*Mason, Jackson* and *Wellard* provide a handy comparative table between the ALI - III Global Principles and the *Cross-Border Insolvency Act 2008 (Cth)*<sup>28</sup> and argue that Australia would benefit in the following ways from adopting the ALI - III Global Principles:<sup>29</sup>

- it is a valuable resource for courts and policy makers in developing and implementing domestic and cross-border insolvency law;
- courts only need to update published Practice Directions and Notes, which would promote further international support; and
- assist practitioners in advising global businesses and persons.

#### JIN

The JIN Guidelines, which were implemented in 2017, are a collection of guidelines between adopting Courts that provide best practice communication and cooperation leadership between Courts, insolvency practitioners and other parties involved in cross-border proceedings.

Relevant Courts within North America that have adopted the JIN Guidelines are: United States Bankruptcy Court for the District of Delaware, the United States

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<sup>24</sup> 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*, 20 March 2012), p xviii.

<sup>25</sup> *Ibid*, p xliv.

<sup>26</sup> <<https://bobwessels.nl/blog/2017-09-doc1-ali-iii-global-principles-and-guidelines-2012/>> (accessed 14 November 2022).

<sup>27</sup> 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*, 20 March 2012), p xliii.

<sup>28</sup> Mason, R, Jackson, S and Wellard, M, "What further benefit, if any, might Australia get from the ALI-III Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases" (*Queensland University of Technology*, 2014), 97.

<sup>29</sup> *Ibid*, 6.

***Bankruptcy Court for the Southern District of New York, the United States Bankruptcy Court for the Southern District of Texas, the Commercial List of Users' Committee of the Superior Court of Justice - Ontario (Commercial List), the Supreme Court of British Columbia and Brazil.***<sup>30</sup>

***I note that the major limitation with the JIN Guidelines is that only a handful of Courts within North America (and only 16 across the world) have adopted these guidelines.***

There is some scope to discuss additional matters such as the cases *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

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Marks awarded 9 out of 10

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<sup>30</sup> <<http://www.jin-global.org/jin-guidelines.html>> (accessed 11 November 2022).

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

***It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.***

*According to Westbrook, voidable transactions are designed to protect and vindicate "the priorities set by each national distribution scheme" from creditor self-help and/or fraud.<sup>31</sup> This is supported by the Legislative Guide, which recognises the following relevant key objectives to an effective and efficient insolvency law: (i) promote strong incentives to maximise asset values and reduce the threat/harm of voidable transactions; (ii) ensure equitable treatment of similarly ranked creditors; (iii) preserve the estate and mitigate creditor self-help (in the appropriate circumstances); and (iv) promote coordination and cooperation between insolvency representatives and courts in different States.<sup>32</sup>*

*In Australia, voidable transactions are important given the prevalence of illegal phoenixing activity, which is said to be costing our economy many billions of dollars each year.<sup>33</sup> Part 5.7B of the *Corporations Act 2001* (Cth) contains the majority of Australian corporate voidable transaction laws, and Subdivision A of Division 3 of the *Bankruptcy Act 1966* (Cth) contains the majority of personal voidable transaction laws.<sup>34</sup> There is scope to elaborate upon the importance more broadly, beyond just Australia.*

*The genesis of voidable transactions in civil law systems is believed to be the *actio Pauliana*<sup>35</sup> and in common law systems it is believed to be the *Act of Elizabeth of 1570*.<sup>36</sup> Notwithstanding the genesis of these laws, Westbrook acknowledges that the threshold requirements of proving or defending these claims vary greatly between States, but that most share a common underlying link or flavour of avoiding transactions that are fraudulent, preferential or undervalued.<sup>37</sup>*

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<sup>31</sup> J L Westbrook, "Choice of Avoidance Law in Global Insolvencies" (1991) 17 *Brooklyn Journal of International Law* 499, 500.

<sup>32</sup> UNCITRAL Legislative Guide on Insolvency Law 2004 Part 1, pages 10 to 14.

<sup>33</sup> According to a report published by Pricewaterhouse Coopers on behalf of the Australian Taxation Office, Fair Work Ombudsman and Australian Securities and Investments Commission, "the Economic Impacts of Potential Illegal Phoenix Activity" (2018).

<sup>34</sup> Another example includes s 228 of the *Property Law Act* (QLD).

<sup>35</sup> *Ibid*, 505.

<sup>36</sup> Page 23 of the course material.

<sup>37</sup> *Ibid*, 505 to 507.

*Given the broad variations in the way States deal with voidable transactions, conflict of laws issues can arise, for instance, where concurrent insolvency proceedings exist in different States or where an insolvency representative is attempting to pursue voidable transactions against a creditor in a different State (where each State has different laws and a different legal genesis). An example of this problem was seen in the Rubin<sup>38</sup> decision where the United Kingdom Supreme Court refused to recognise and enforce a voidable transaction judgment from a foreign main proceedings because: (i) there was no *sui generis* or special category of insolvency laws; and (ii) it was not up to the courts to develop the law (rather it was up to the legislature).<sup>39</sup> In *Singularis*,<sup>40</sup> which dealt with the refusal by the Court to grant disclosure orders to liquidators in a foreign insolvency proceedings, the Privy Council held that modified universalism was primarily still the subject of "local law and local policy" and that courts must only ever act within the realm of their stated powers.<sup>41</sup>*

*Two major "soft law" instruments have been developed by the international community to assist with defining criteria for impugning voidable transactions and dealing with the conflict of law issues faced by concurrent insolvency proceedings dealing with voidable transactions. These instruments are:*

- *UNCITRAL Legislative Guide on Insolvency Law (2004); and*

*The Legislative Guide provides the following generally accepted criteria/elements necessary to create a national voidable transaction framework:<sup>42</sup>*

- (i) objective criteria, including pre-defined relation-back periods, defined characteristics to determine preferential or undervalued effect, related party definitions, or what would a reasonable person do in the circumstances of the defendant or debtor;*
- (ii) subjective criteria, including intention or knowledge (of the effect of the transaction or the insolvency of the debtor);*
- (iii) mixture of subjective and objective criteria - for instance, Australian law contains a defence of good faith to voidable transactions,<sup>43</sup> such that the defendant is not liable (or at least partially not liable) if they did not know or suspect (subjective), or could not reasonably have known or suspected (objective), that the debtor was insolvent at the time of the relevant voidable transaction;*
- (iv) whether the transaction was in the ordinary course of business, such that an extraordinary payment may be more likely to be voidable. By way of example,*

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<sup>38</sup> *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant* [2012] UKSC 46.

<sup>39</sup> *Ibid*, 128. See also I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), page 43.

<sup>40</sup> *Singularis Holdings Limited (Appellant) v PricewaterhouseCoopers (Respondent)* [2014] UKPC 36. See also I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), page 43.

<sup>41</sup> *Ibid*, 33. The *Singularis* decision was also applied in the Scottish decision of *Hooley Ltd v Titaghur plc, The Samnugger Jute Factory and the Victoria Jute Co Ltd* [2016] CSOH 141.

<sup>42</sup> UNCITRAL Legislative Guide on Insolvency Law (2004), pages 137 to 141.

<sup>43</sup> See, for instance, s 588FG of the *Corporations Act 2001* (Cth).



*an easy check as to whether a transaction is in the ordinary course of business is to look at the company's constitution, which typically will contain a clause that defines the nature of the business allowed to be conducted by the board of directors. However, a transaction in the ordinary course of business does not necessarily mean it cannot or will not be clawed back as a voidable transaction;<sup>44</sup> and*

*(v) prescribed defences ought to be clear and predictable to reduce the risk of: (a) lengthy/costly disputes; (b) uncertainty and (c) liquidators being disincentivised from bringing said action.*

- *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) (MLIJ).*

*The MLIJ provides a framework (or recommended legislative text) for States to adopt a simple regime when evaluating how to recognise and enforce concurrent insolvency proceedings, including those involving voidable transactions. According to page 11 of the MLIJ, MLIJ was borne out of an acknowledgement that articles 7 and 41 of the UNCITRAL Model Law on Cross-Border Insolvency may not provide sufficient authority to deal with this recognition issue.<sup>45</sup>*

4.5

Question 3.2 [maximum 5 marks]

***A Dutch commentator on international insolvency law 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 has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.***

*A number of authors attempt to define international insolvency law (IIL),<sup>46</sup> by explaining the limitations of applying domestic insolvency law where there are international elements to the specific case. Fletcher opines that although this is true of domestic laws, it is also true of each country's divergence "on many of the private*

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<sup>44</sup> See, for instance, the unfair preference regime in s 588FA of the *Corporations Act 2001* (Cth), which typically involves clawing back payments to trade creditors (despite potentially being in the ordinary course of business).

<sup>45</sup> The MLIJ was downloaded and extracted from this website: <<https://uncitral.un.org/en/texts/insolvency/modellaw/mlij>> (accessed 8 November 2022).

<sup>46</sup> For example, see B Wessells, *International Insolvency Law* (Kluwer, 2006), p 1 and Fletcher, Ian F, "International Insolvency: The Way Ahead" 28 *International Insolvency Review* 1993, Vol 2, p 7.

*international law aspects of insolvency.*<sup>47</sup> Therefore, the limitations in this definition are as follows, in that each country (*inter alia*):

- *may not have a refined national insolvency legal framework;*<sup>48</sup>
- *may have a national insolvency legal framework that is ill-equipped to deal with cross-border insolvencies that may arise due to the common marketplace that many States operate in (for example States that participate in the Road-and-Belt Initiative);*
- *has its own rules, laws, approaches, cultures, politics, customs, policies, etc, that may be incompatible with another State,*<sup>49</sup> *as well as there being no global set of insolvency laws.*<sup>50</sup>

*Omar records that the way in which creditors are treated by domestic laws can also have an influence.*<sup>51</sup>

*Other international elements may include (on a non-exclusive basis) the way employee entitlements are subrogated by the relevant State, secured creditor enforcement rights (for example, New Zealand, Australia and Canada (at least) have Personal Property Securities Registers), contractual or statutory set-off rights, automatic stays on ipso facto clauses, moratoriums against personal guarantees, choice of forum disputes (which may arise from contractual jurisdictional clauses), location of recoverable assets or businesses of the debtor,<sup>52</sup> foreign pre-appointment insolvency proceedings, executory contracts, avoidance provisions, etc;*<sup>53</sup> and

- *generally requires reciprocity, recognition, cooperation and coordination between courts of different States. This is to provide clarity and predictability for investors, creditors and debtors (at least).*

*Where cooperation is possible, a court of the main proceeding (*lex fori concursus*) may regulate the relevant insolvency proceeding world-wide (or at least to the extent of the cooperation and recognition). The *lex fori concursus* may be determined by the choice of forum (ie centre of main interests or jurisdictional clauses in a written contract/document) or a worldwide implemented insolvency law.*<sup>54</sup>

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<sup>47</sup> Fletcher, Ian F, "International Insolvency: The Way Ahead" 28 *International Insolvency Review* 1993, Vol 2, p 11.

<sup>48</sup> For example, on 3 September 2022, the Asian Development Bank published for tender an expression of interest campaign to develop an appropriate insolvency regime for the country of Bhutan. See <[https://selfservice.adb.org/OA\\_HTML/OA.jsp?OAFunc=XXCRS\\_CSRN\\_PROFILE\\_PAGE&csrKey=AECDED9BFEF300E53B1B0A451A9DCCA2308926D713936B48DF3231669E70A34D&fromDER=Y&refresh\\_csrn=true](https://selfservice.adb.org/OA_HTML/OA.jsp?OAFunc=XXCRS_CSRN_PROFILE_PAGE&csrKey=AECDED9BFEF300E53B1B0A451A9DCCA2308926D713936B48DF3231669E70A34D&fromDER=Y&refresh_csrn=true)> (accessed 13 November 2022).

<sup>49</sup> For example, debtor versus creditor friendly systems, or a focus on winding-up versus corporate turnaround/restructure.

<sup>50</sup> B Wessells, *International Insolvency Law* (Kluwer, 2006), p 1.

<sup>51</sup> P J Omar, "The Landscape of International Insolvency", (2002) 11, *IIR* 173, p 175.

<sup>52</sup> I am adopting the definition of insolvency representative on page 30 of the course material. It was not apparent to me on the material how one is to go about referencing the course material.

<sup>53</sup> See generally the list of nine key issues of universalism described in 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.

<sup>54</sup> R K Rasmussen, "A new Approach to Transnational Insolvencies" (1998) 19 *Michigan Journal of International Law* 1, 1-36.

*Where cooperation is not possible, or only partially possible, it may cause a material increase in costs in administering the affairs of the debtor,<sup>55</sup> duplication of proceedings, “grab-rule”<sup>56</sup> or “ring-fencing,”<sup>57</sup> fraud, forum shopping, prioritise the ‘strongest’ creditors or creditors that exist within the State with the most assets (rather than adhering to the *par conditio creditorum*), or may prejudice non-national creditors whose State the debtor has no material assets, etc.*

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<sup>55</sup> Harold S Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 *Fordham L. Rev.* 2543 (1996), 2544.

<sup>56</sup> J L Westbrook, “The Lessons of Maxwell Communications” (1996) *Fordham Law Review* 64 2531, p 2532.

<sup>57</sup> Ian F Fletcher, “International Insolvency: A Case Study and Treatment” (1993) 27 *International Lawyer* 429, 430.

Question 3.3 [maximum 5 marks]

**Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.**

*International law regulation may typically take the form of “soft law” (eg model laws, the World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes, with revisions in 2005, 2011, 2015 and 2021,<sup>58</sup> etc) or binding<sup>59</sup> “hard law” (eg treaties, conventions, regulations, European Insolvency Regulation (EIR) Recast (2015), etc), however, this distinction is arguably less important than effective instrument design to combat behavioural biases between States.<sup>60</sup>*

*Treaties and conventions are typically regarded as “hard law”, binding regulations that States become signatories to. An example is the United Nations International Bill of Human Rights.*

*Despite a number of treaties and conventions being implemented in various neighbouring jurisdictions around the world, there are no current global treaties binding States to a prescribed set of cross-border insolvency laws.*

*Rather, many States have preferred soft law instruments (like the Model Laws),<sup>61</sup> which, according to Mevorach, is gaining momentum.<sup>62</sup> The ALI - III Global Principles is another example of a soft law instrument; which aims to provide “global best practice,” rather than a binding set of rules and regulations.<sup>63</sup> Many of the reasons for this soft law preference, were addressed in my answers at question 3.2, however, these reasons may include: social, religious, moral or cultural differences between nations (including ongoing wars and breaching of the peace) and differences in civil and common law jurisdictions. Nonetheless, despite the relatively successful Model Laws being in effect for some 25 years or so, only 53 States are signatories.<sup>64</sup> Noticeable absentees<sup>65</sup> include: Russia, China, India, Nigeria, Germany, France, etc.*

<sup>58</sup> <<https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>> (accessed 15/10/2022).

<sup>59</sup> The notion of binding and non-binding was challenged in the works of I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), page 150.

<sup>60</sup> Ibid. See also Mason, Rosalind and Streton, Elizabeth (2018) “The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Book Review),” *International Insolvency Review* 27(3), pages 447-450.

<sup>61</sup> Commonwealth Treasury of Australia, Corporate Law Economic Reform Program Proposal for Reform: Paper No. 8: Cross-Border Insolvency: Promoting international cooperation and coordination (2002), page 18.

<sup>62</sup> The notion of binding and non-binding was challenged in the works of I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), page 83.

<sup>63</sup> 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*, 20 March 2012), p xlvi.

<sup>64</sup> <[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)> (accessed 15 November 2022).

<sup>65</sup> See generally S Chandra Mohan, “Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?” (2012) 21 *Int Insolv Rev* 199.

*Accordingly, this has led some commentators to call for the Model Law to be transformed into a binding treaty.<sup>66</sup>*

*An example of a failed attempt of implementing an international insolvency treaty was the Draft Treaty between the United States of America and Canada in 1979. Burman claims that this Draft Treaty failed due to (*inter alia*) an impasse over rules to determine which of the two countries would qualify as the forum State in prescribed circumstances.<sup>67</sup>*

*An example of relatively successful treaty implementation is the adoption and enactment of the Uniform Act on the Organisation of Collective Procedures for the Discharge of Liabilities (2015)<sup>68</sup> and the Uniform Act Organising Simplified Recovery Procedures and Measures of Execution (1998)<sup>69</sup> (collectively, the OHADA). Currently, there are approximately 17 signatory States to the OHADA, including Cameroon, Congo and Guinea.<sup>70</sup>*

*Some of the longest lasting international insolvency treaties are ratified by a number of Latin American States. These treaties include the Montevideo Treaty on International Commercial Law (1889) (1889 Treaty), the Montevideo Treaty on International Commercial Terrestrial Law (1940) (1940 Treaty), and the Havana Convention on Private International Law (1928) (Havana Convention).*

*I note that the 1889 Treaty covers both personal and corporate insolvencies. The major problem with the 1889 Treaty and 1940 Treaty is that, respectively, only six and three States are signatories. This can create uncertainties and conflict of laws issues for stakeholders involving these different States.*

*Fifteen States are signatories to the Havana Convention, however, only two States (Bolivia and Peru) are also signatories to the 1889 Treaty. Article 414 of the Havana Convention provides for a mechanism for local courts to apply a singular proceeding to debtors, where the debtor has only one civil or commercial domicile. Article 415 of the Havana Convention (similar to the 1889 Treaty) also allow for concurrent proceedings (but without any appropriate cooperation or coordination mechanisms)<sup>71</sup> whether the debtor has more than one civil or commercial domicile.*

*A final example of a successful “hard law” framework has been the implementation of the Council Regulation on Insolvency Proceedings (European Insolvency Regulation)*

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<sup>66</sup> I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), page 45, Chapter 4, section 4.2.2.

<sup>67</sup> Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 *Fordham Law Review* 2543 (1996), 2556.

<sup>68</sup> <<https://www.ohada.org/en/organizing-simplified-recovery-procedures-and-measures-of-execution/>> (accessed 13 November 2022).

<sup>69</sup> <<https://www.ohada.org/en/insolvency-law/>> (accessed 13 November 2022).

<sup>70</sup> <<https://www.ohada.org/en/state-members/>> (accessed 13 November 2022).

<sup>71</sup> I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford University Press, 2<sup>nd</sup> ed., 2005), pages 11-17.

*(2000) (EU Regulations) and the European Insolvency Regulation (EIR) Recast (2015). Some of the key issues addressed in the EU Regulations (and the EIR) include cooperation between State courts, claims filing and anti-avoidance provisions.<sup>72</sup> I note that the EIR Recast has successfully bound all but one EU Member (other than Denmark).*

There is some scope to discuss existing treaties in more detail. But this is well answered.

4.5

Marks awarded 14 out of 15

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<sup>72</sup> Ibid, p xliv.

QUESTION 4 (fact-based application-type question) [15 marks in total]

**Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.**

**FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.**

**If you require additional information to answer these questions, briefly state what it is and why it is relevant.**

Question 4.1 [Maximum 5 marks]

**What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?**

*Formal insolvency proceedings<sup>73</sup> are commenced under a relevant insolvency law, like a statute, court order, or other instrument.<sup>74</sup> Examples of formal insolvency appointments are administrations, liquidations, receiverships, bankruptcies, court ordered reorganisations, or (in Australia) the Small Business Restructuring Process.<sup>75</sup> This is in contrast to an informal insolvency arrangement,<sup>76</sup> which typically is not regulated by an insolvency law and may involve voluntary negotiations, pre-packs<sup>77</sup> or other negotiations between the debtor and creditor.*

*It is possible to have a hybrid of formal and informal appointments to a debtor. Take the example of Company X Pty Ltd appointing a Voluntary Administrator under s 436B of the Corporations Act 2001 (Cth) (Act) and a subsequent Holding Deed of Company Arrangement (HDOCA)<sup>78</sup> resolution is approved by creditors at the second meeting of creditors. The HDOCA of Company X Pty Ltd may involve an informal workout of*

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<sup>73</sup> I am adopting the definition of insolvency proceedings on page 30 of the course material, but also include formal member-initiated or director-initiated external administration appointments where an insolvency representative is appointed. For example, in Australia, directors of a company can appoint a Voluntary Administrator by resolution, pursuant to s 436A(1) of the *Corporations Act 2001* (Cth). Although a court is not required to commence this Voluntary Administration process, it is still regarded as a formal external administration appointment.

<sup>74</sup> UNCITRAL Legislative Guide on Insolvency Law 2004 Part 1, page 9.

<sup>75</sup> See generally Part 5.3B of the *Corporations Act 2001* (Cth).

<sup>76</sup> UNCITRAL Legislative Guide on Insolvency Law 2004 Part 1, pages 7, 9-10, 21 and 238.

<sup>77</sup> I use this word in the Australian sense, not the United Kingdom sense. In Australia, many small business owners are approached by unlicensed pre-insolvency advisors to conduct these pre-packs, which can lead to illegal phoenix allegations.

<sup>78</sup> *Mighty River International Limited v Hughes* [2018] HCA 38.

*secured creditor debts, a recapitalisation event, negotiations with key suppliers to pay less under the DOCA to keep trading, or an informal turnaround.*

*According to the UNCITRAL Legislative Guide on Insolvency Law 2004 (Legislative Guide), the following preconditions are typically required to produce an effective informal negotiation:<sup>79</sup>*

*(a) FPPL to owe significant debt to numerous creditors;*

*On the information provided it is not clear how much is owed by FPPL to Lobo or the quantum of any other debts owed by FPPL to other creditors (including secured creditors, trade creditors, employees, contingent creditors, subordinated creditors, and related parties). Lobo may consider requesting updated financial statements (including a balance sheet, aged creditors, profit and loss statement, and (my personal favourite report) the general ledger) for FPPL before it agrees to commence any such informal negotiation.<sup>80</sup> This may assist Lobo in understanding what debts are owed by FPPL, the priority order of those debts and what the quantum (and liquidity) of realisable assets are available to pay those debts. Should FPPL enter liquidation, Lobo needs to be careful that in accessing this information it does not itself become susceptible to any relevant voidable transaction provisions, by potentially knowing the financial impecuniosity of FPPL.*

*(b) FPPL's inability, or likely inability, to service that debt;*

*As above in (a), it is important that Lobo understands what debts are owed by FPPL, the priority order of those debts and what the quantum (and liquidity) of realisable assets are available to pay those debts. However, Lobo needs to be careful of any voidable transaction provisions. The factual matrix claims that FPPL is able to pay its debts in Encanto, but is not able to in Asgard. Lobo needs to consider whether the FPPL branch in Encanto is able to provide financial comfort to its Asgard branch or whether FPPL is deemed insolvent in Asgard by reason of its inability to pay the Lobo debt when it fell due and payable.*

*(c) acceptance that it is preferable to negotiate, rather than the alternative (being a default and/or insolvency proceedings being commenced);*

*At least in my own practice, creditors can be open to commercial settlements to save on the costs and time of having to commence insolvency proceedings or other forms of recovery actions. This may arise due to the age of the debt, the creditors own financial affairs, fear of going to court, relationship with the debtor (whether business or personal), reputation in the industry, etc. I would seek to understand from Lobo what it's main drivers and concerns are, as well as its WATNA and BATNA,<sup>81</sup> before recommending any informal negotiation.*

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<sup>79</sup> UNCITRAL Legislative Guide on Insolvency Law 2004 Part 1, pages 22-23.

<sup>80</sup> UNCITRAL Legislative Guide on Insolvency Law 2004 Part 1, pages 24-26.

<sup>81</sup> MLA. Fisher, Roger, et al. *Getting to Yes*. 2nd ed., Penguin Putnam, 2006. WATNA means worst alternative to a negotiated agreement and BATNA means best alternative to a negotiated agreement.



- (d) FPPL has sophisticated alternative solutions (eg refinancing, recapitalisation, security from related third parties, guarantees, etc);*
- (e) FPPL acknowledges that the creditor(s) (including Lobo) can apply for the insolvency proceeding at any time, if an agreement cannot be reached;*
- (f) FPPL does not require relief from a moratorium (eg guarantees), automatic stay or to disclaim burdensome facilities/loans; and*

*As above in (a), it is important that Lobo understands what debts are owed by FPPL, the priority order of those debts and what the quantum (and liquidity) of realisable assets are available to pay those debts. This may allow Lobo to identify any guarantee or moratorium risks that FPPL may have, including whether they have a burdensome lease that may be causing these financial problems.*

- (g) consideration of tax treatments between Asgard and Encanto.*

*The facts do not brief me on what the tax treatment differences are between Asgard and Encanto. I would seek Lobo's instructions (should same be required) to identify whether there are any tax benefits for Lobo in entering into an informal arrangement.*

*Some of the major disadvantages that Lobo may face in conducting an informal negotiation may include:<sup>82</sup>*

- not all creditors may wish to participate in the negotiations and may instead just commence insolvency proceedings. It will depend on Lobo's priority position as a creditor, whether it can influence other creditors to participate;*
- an informal negotiation not agreed to by other creditors is not typically legally binding on the other creditors;*
- FPPL or other creditors may not negotiate in good faith or not disclose all pertinent information required by Lobo before it makes a decision to agree to a settlement offer;*
- Lobo needs to be careful that by receiving a settlement payout (assuming the payment is from unsecured sources) Lobo is not putting itself into a position of receiving a voidable transaction;*
- Lobo may not know, or receive, the necessary financial information about FPPL before (or during) the negotiation to make an informed decision. This necessary financial information was described above in my answers;*
- In the event FPPL defaults under the informal settlement agreement, Lobo's recourse will generally be limited to the terms of the underlying agreement. It is important that Lobo, during the negotiation, makes use of as many security mechanisms as possible to protect its position. This may include, elevating its*

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<sup>82</sup> UNCITRAL Legislative Guide on Insolvency Law 2004 Part 1, pages 24-26, 29 and 238.

*security position, seeking guarantees from third parties and/or directors (in the appropriate circumstances), seeking an upfront (partial) payment, or lodging caveats or other charging clauses against real or personal property, etc;*

- *FPPL may not be able to rely upon moratoriums, stays of action and disclaimer rights that are normally available in formal insolvency proceedings;*
- *FPPL may have creditors around the world, any of whom may commence proceedings at any time in their locality to collect said debt; and*
- *FPPL may be deemed to have a Centre of Main Interest (COMI) in another part of the world separate to Asgard or Encanto.*

*Some examples of possible benefits to Lobo in undertaking these informal negotiations include: elevation of security position (through a formal settlement agreement with appropriate charging clauses), reduced costs, potential to continue trading with FPPL, less likelihood that insolvency representatives will effectively expend the assets of FPPL on fees and costs during the external administration, reduce the stigma attached to insolvency proceedings, and the flexibility that comes with negotiating a WATNA/BATNA.<sup>83</sup> Privacy is also relevant.*

4.5

Question 4.2 [Maximum 5 marks]

***Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.***

*Typically, a secondary insolvency proceeding<sup>84</sup> (like that commenced in Asgard) may be commenced where the State of the primary insolvency proceeding (like that in Encanto) does not follow a universality<sup>85</sup> approach to dealing with cross-border*

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<sup>83</sup> Ibid, pages 21 to 22.

<sup>84</sup> I presume in my answer that the question is utilising the definition of insolvency proceedings on page 30 of the course material.

<sup>85</sup> Universality is a theory in which upon the commencement of an insolvency proceeding in a given country (the *lex fori concursus*), no other proceedings or forms of execution against a debtors' assets should be possible in any other country. The *lex fori concursus* may be determined by the choice of forum (ie centre of main interests or jurisdictional clauses in a written contract/document) or a worldwide implemented insolvency law. See: R K Rasmussen, "A new Approach to Transnational Insolvencies" (1998) 19 *Michigan Journal of International Law* 1, 1-36.

*insolvency disputes. It may also be that FPPL failed to inform the Courts of Encanto or the Encanto Liquidator<sup>86</sup> as to the debt owed to Lobo in Asgard.<sup>87</sup>*

*Assuming that Encanto (and/or Asgard) does not adopt an approach of universality or modified universalism<sup>88</sup> than it may be that they adopt a territoriality approach. Territoriality is a theory in which States retain plenary power over all local assets and creditors and can mean that multiple insolvency proceedings are required in different jurisdictions. Westbrook remarked that territoriality was akin to a "self-serving ... international free-for-all."<sup>89</sup>*

*The factual matrix does not provide any information regarding whether either Asgard or Encanto adopt any of the universality, modified universalism or territoriality theories to cross-border insolvency. I would seek instructions from Lobo to conduct an examination of the legislative frameworks of each State's cross-border insolvency laws (if any).*

*Notwithstanding the unknown nature of Asgard's or Encanto's cross-border insolvency laws, I note that a number of instruments globally have been implemented to assist with the difficulties faced by States dealing with said cross-border issues. These initiatives include (without limitation):*

*a) **European Guidelines on Communication and Cooperation (2007)** (EU 2007 Guidelines)*

*In 2007, the EU 2007 Guidelines were implemented with a view to provide non-binding rules and protocols for dealing with concurrent insolvency proceedings between members of the European Union (EU) that are signatories to the **European Insolvency Regulation (EIR) Recast (2015)** (EIR Recast). I have assumed that neither Asgard nor Encanto are signatories to the EIR Recast.*

*The EU 2007 Guidelines provide the following relevant rules/protocols when dealing with concurrent insolvency proceedings:*

- the liquidator of Asgard ought to provide all reasonable information and assistance to the liquidator of Encanto (Guideline 8);*
- assets in Encanto ought to be included in the pool of assets available to fund the liquidator of Asgard, presumably in priority to the liquidator in Encanto (Guideline 11);*

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<sup>86</sup> For ease of reference, I am assuming that the Encanto insolvency proceedings also caused FPPL to enter liquidation in Encanto (similar to Asgard). If the insolvency proceedings in Encanto caused FPPL to enter some other type of formal insolvency appointment, I do not consider this would change my answer.

<sup>87</sup> The ALI – III Global Principles provide a duty to provide full and frank disclosure in all insolvency proceedings. See 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*, 20 March 2012), p xcv and xcvi.

<sup>88</sup> Modified universalism typically involves the primary and secondary courts in different States cooperating with each other. See page 43 of the course material.

<sup>89</sup> J L Westbrook, "The Lessons of Maxwell Communications" (1996) *Fordham Law Review* 64 2531, pp 2532.

- *both liquidators ought work on a protocol to maximise the cooperation between each estate (Guideline 12), including where asset sales (Guideline 13) or reorganisation (Guideline 14) are possible; and*
- *Courts in Asgard and Encanto ought to work together to implement the intent of the EU 2007 Guidelines (Guideline 16).*

**b) ALI - III Global Principles**

*In 2012, the International Insolvency Institute (III) and ALI led a project (and produced a Transnational Report)<sup>90</sup> to implement the ALI NAFTA Principles worldwide (whether common law or civil law based)<sup>91</sup> in circumstances where insolvency proceedings involve more than one State. This project developed the ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (ALI - III Global Principles).<sup>92</sup> The ALI - III Global Principles include*

*The ALI - III Global Principles provide the following relevant principles when dealing with concurrent insolvency proceedings (*inter alia*):*

- *all stakeholders involved in concurrent proceedings ought conduct themselves with the overriding objective of meeting Global Principle 1.1<sup>93</sup> (Global Principle 1.3);*
- *courts in Asgard and Encanto ought actively manage their respective insolvency proceedings to coordinate and harmonise the respective proceedings, subject to various exemptions (Principle 4);*
- *obligation for courts and liquidators in Asgard and Encanto to actively share information (Principle 9); and*
- *obligation for the liquidators in Asgard and Encanto to work on a protocol to maximise the cooperation between each estate (Principle 26) and coordination between courts (Principle 27).*

**c) EU JudgeCo Principles and EU Cross-border Insolvency JudgeCo Guidelines (2015) (JudgeCo Guidelines)**

*The JudgeCo Guidelines promote the strengthening of communication between EU member States. The ALI - III Global Principles provide the following relevant principles when dealing with concurrent insolvency proceedings (*inter alia*):*

<sup>90</sup> 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*, 20 March 2012).

<sup>91</sup> 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*, 20 March 2012), p xvii.

<sup>92</sup> <<https://www.iiiglobal.org/initiatives/projects-sponsored-by-iii/>> (accessed 13 November 2022).

<sup>93</sup> Main goal is to maximise the value of the debtor's assets or business(es) globally in the furtherance of the "just administration of the proceeding" (Global Principle 1.1).

- *all stakeholders involved in concurrent proceedings ought conduct themselves with the overriding objective of meeting Principle 3.1<sup>94</sup> (Principle 3.3);*
- *courts in Asgard and Encanto ought actively manage their respective insolvency proceedings to coordinate and harmonise the respective proceedings, subject to various exemptions (Principle 5.1);*
- *where there are concurrent insolvency proceedings, each respective court should minimise conflicts that arise between the applicable stays/moratoriums (Principle 9);*
- *obligation for the liquidators in Asgard and Encanto to work on a protocol to maximise the cooperation between each estate (Principle 16) and coordination between courts (Principle 19).*

d) **JIN**

*The Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2017) (JIN Guidelines), are a collection of guidelines between adopting Courts<sup>95</sup> that provide best practice communication and cooperation leadership between Courts, insolvency practitioners and other parties involved in cross-border proceedings.<sup>96</sup>*

Importance

*Where cooperation is not possible, or only partially possible, it may cause a material increase in costs in administering the affairs of the debtor,<sup>97</sup> duplication of proceedings, “grab-rule”<sup>98</sup> or “ring-fencing,”<sup>99</sup> fraud, forum shopping, prioritising the ‘strongest’ creditors or creditors that exist within the State with the most assets (rather than adhering to the *par conditio creditorum*), or may prejudice non-national creditors whose State the debtor has no material assets, etc.*

<sup>94</sup> Overriding goal is to maximise the value of the debtor’s assets or business(es) globally in the furtherance of the “just administration of the proceeding” (Principle 3.1).

<sup>95</sup> United States Bankruptcy Court for the District of Delaware, the United States Bankruptcy Court for the Southern District of New York, the United States Bankruptcy Court for the Southern District of Texas, the Commercial List of Users’ Committee of the Superior Court of Justice – Ontario (Commercial List), the Supreme Court of British Columbia and Brazil.

<sup>96</sup> <<http://www.jin-global.org/jin-guidelines.html>> (accessed 11 November 2022).

<sup>97</sup> Harold S Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 *Fordham L. Rev.* 2543 (1996), 2544.

<sup>98</sup> J L Westbrook, “The Lessons of Maxwell Communications” (1996) *Fordham Law Review* 64 2531, p 2532.

<sup>99</sup> Ian F Fletcher, “International Insolvency: A Case Study and Treatment” (1993) 27 *International Lawyer* 429, 430.

Question 4.3 [Maximum 5 marks]

**Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FPPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.**

- 1. The relevant legislation referred to herein are the amended European Insolvency Regulation (EIR) Recast (2015) (EIR Recast) was adopted in 2015 and took effect in June 2017 and the United Kingdom Insolvency (Amendment) (EU Exit) Regulations 2019 (IXIT).**

**The EIR Recast does not apply to proceedings opened in the UK after 31 December 2020.**

Standing for recognition

- 2. Paragraph 2 (inclusive) of IXIT relevantly amends Article 2 of the EIR Recast to grant jurisdiction to open insolvency proceedings for the purposes of "rescue, adjustment of debt, reorganisation or liquidation", where either the COMI<sup>100</sup> is in the United Kingdom (UK) or the COMI is in a Member State and an establishment in the UK.**

**2.1. Insolvency proceedings is defined in paragraph 2(3)(1B) of IXIT as including liquidations (whether voluntary or court ordered) and voluntary administrations. I assume that the factual matrix is adopting the definition of insolvency proceedings on page 30 of the course material. I would seek further information from Lobo as to the nature of the insolvency proceedings in the UK.**

**2.2. Member State is defined in paragraph 3 of IXIT as a member of the European Union, other than Denmark. I assume that Lobo is not considering opening proceedings in Denmark.**

**2.3. For the meaning of COMI see paragraph 3 (inclusive below) and for the meaning of establishment see paragraph 4 (inclusive below).**

- 3. COMI is defined in Article 3 of the EIR Recast (which is amended by paragraph 4 of IXIT) as the place where FPPL "conducts the administration of its interests on a regular basis and which is ascertainable by third parties."**

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<sup>100</sup> COMI means the centre of the debtor's main interest.

- 3.1. I note that the High Court of England and Wales recently held that COMI shall be determined by reference to the EIR Recast's principles and jurisprudence.<sup>101</sup>**
- 3.2. The registered office of FPPL is also presumed to be the COMI, in the absence of contrary proof. The factual matrix does not provide details on what FPPL's registered office is, rather it just records that FPPL has offices throughout the EU and the UK. I would perform company searches on FPPL in the UK and EU to determine whether this presumption arises.**
- 3.3. The presumption in 3.1 above does not arise though if the registered office was moved from, or to, the UK to, or from, the EU (respectively) within the preceding 3 months.<sup>102</sup>**
- 3.4. I note that the time for determining COMI is not defined in the EIR Recast. The Guide to Enactment and Interpretation (UNCITRAL Guide) argues that the relevant date is at the date of commencement of the foreign proceedings (ie as at the date of the FPPL winding-up order).<sup>103</sup> However, I understand that not all countries adopt this approach.<sup>104, 105</sup>**
- 3.5. I note that sub-paragraphs (2) to (4) of Article 3 of the EIR Recast have been omitted entirely by paragraph 4(4) of the IXIT. This is particularly relevant given sub-paragraph (2) of Article 3 of the EIR Recast otherwise grants permission to courts of Member States to open secondary insolvency proceedings against FPPL (in the appropriate circumstances).**
- 4. Establishment is defined in Article 2(10) of the EIR Recast (which is amended by paragraph 3(f) of IXIT) as the place of operations where FPPL carries out (or within the prior 3 months, carried out), "prior to the request to open insolvency proceedings a non-transitory economic activity with human means and assets."**
- 4.1. I note that non-transitory economic activity with human means and assets is not defined in the EIR Recast.<sup>106</sup> Justice Snowden had regard<sup>107</sup> instead to**

<sup>101</sup> *Barings (UK) Ltd & Ors v Galapagos SA* [2022] EWHC 1633.

<sup>102</sup> Article 3 of the EIR Recast and paragraph 4(3) (inclusive) of IXIT.

<sup>103</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraphs 31 and 157-160.

<sup>104</sup> The United States (see page 11 of *In re Paul Zeital Kemsley* [2013] Case No 12-13570 (JMP), U.S. Bankruptcy Court) and the United Kingdom (*Re Videology Ltd* [2018] EWHC 2186 (Ch)) positions appear to follow the UNCITRAL Guide on this issue. The Australian position on this issue is still not decided (see for instance *Kapila, in the matter of Edelsten* [2014] FCA 1112, 39 and *In the matter of Hydrodec Group Plc* [2021] NSWSC 755, 139).

<sup>105</sup> Nicki Gunn, Hugh Raisin and Amelia Kelly, "A Saad compromise? Different interpretations of the model law promoting inconsistency in a law meant to remove it" <<https://www.dlapiper.com/ko/korea/insights/publications/2019/12/global-insight-issue-31/a-saad-compromise/>> (accessed 15/10/2022).

<sup>106</sup> *In the Matter of Videology Limited and In the matter of the Cross-Border Insolvency Regulations 2006* [2018] EWHC 2186 (Ch) (herein defined as the **Videology Case**).

<sup>107</sup> *Ibid*, paragraph 78.

*the Virgos-Schmit Report<sup>108</sup> to provide the following further explanation of the word "establishment:"<sup>109</sup>*

- *Human resources require a minimum level of organisation; and*
- *Non-transitory requires that the place not be occasional, such that stability is required. Based on paragraph 3(f) of IXIT, I understand that this time limit must have been within the prior 3 months.*

*The factual matrix does not provide sufficient factual evidence to determine the operations of FPPL in the 3 month period leading up to the insolvency proceedings. It does however record that FPPL has offices throughout the EU and the UK, which presumably meets the definition of establishment.*

5. *An EU Member court must have regard to paragraph (1) of IXIT and shall specify the grounds for making a decision (Article 4 of the EIR Recast and paragraph 5 (inclusive) of IXIT).*
6. *Pursuant to IXIT, given the UK insolvency proceedings was commenced first, it is likely that the UK liquidator will have some difficulties in applying to EU Member States for recognition. This is particularly so if Lobo was to commence a main insolvency proceeding in the EU.<sup>110</sup> Practically, the liquidator in the UK may also have issues with costs, lack of assets, delays and dissipation of asset risks that they may not be able to control or cover.*
7. *It is not clear on the factual matrix which EU Member State Lobo may consider filing insolvency proceedings in. The UK Government has provided a handy guide on cross-border insolvency recognition in each of the different EU Member States, post BREXIT.<sup>111</sup> I would seek instructions from Lobo on identifying the strategically favourable EU Member State to consider seeking recognition of the main insolvency proceeding in.*

1.5

Marks awarded 11 out of 15

**\* End of Assessment \***

TOTAL MARKS 43/50

**An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.**

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<sup>108</sup> M Virgos and E Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels 3 May 1996.

<sup>109</sup> *Ibid*, para 7.1.

<sup>110</sup> <<https://www.herbertsmithfreehills.com/insight/cross-border-insolvencies-in-the-uk-and-eu-%E2%80%93-a-post-brex-it-guide>> (accessed 15 November 2022).

<sup>111</sup> <<https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states>> (accessed 15 November 2022).