



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.**

*The legal systems largely reflect the systems of the developed countries that colonised them.*

*English speaking countries like Kenya, Uganda, Tanzania, Nigeria have a common law system which is based on English law whereas West African francophone countries have a civil law system which is rooted in French law. Mozambique and Angola which were colonised by the Portuguese have a civil law system which is based on Portuguese law. Countries like South Africa which were colonised by both the Dutch and the British at different times have a mixed system of Roman-Dutch law and English law.*

3

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.**

*In 1997-1998 there was a financial crisis in East and South Asia. It started in Thailand in 1997 when she ran out of US dollars and was forced to float the Thai baht. The baht was previous pegged to the US dollar. That resulted in a massive currency devaluation of the baht and loss of capital from Thailand. The currency crisis quickly spread to other countries including Indonesia, Singapore and South Korea. South Korea, Thailand and Indonesia had to receive loans from the IMF in order to avoid bankruptcy. The crisis led South Korea and other countries in Asia to change their insolvency laws. How? Which countries?*

*In the 1970s, China started to carry out economic reforms. Previously, only the state could own companies. There was no private ownership of companies. Most companies were state owned enterprises (SOEs) and the state supported them when they were in financial difficulty. After the economic reforms started, China resumed efforts to formulate a workable insolvency law. It started with the Enterprise Bankruptcy law of 1986 which applied to the SOEs. Over the years the private sector in China developed and China joined the World Trade Organisation in 2001. 5 years later, China reviewed its bankruptcy legislation and formulated its first rescue-oriented Enterprise Bankruptcy Law of 2006 which applies to corporate entities only. This Act was heavily influenced by the Chapter 11 process in the US. The Civil Code of China took effect in 2021 and may have an effect on certain aspects of Chinese insolvency law such as creditor rights.*

*There are no treaties or conventions which deal with international insolvency matters in Asian countries. That may be why Japan and South Korea have adopted the UNCITRAL Model law on Cross Border Insolvency.*

*It would be beneficial to focus on insolvency specific reforms, such as in Thailand and Singapore.*

1.5

**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.**

*The US and Canada attempted to draft a bilateral insolvency treaty in the 1970s but did not succeed in their efforts as they couldn't agree on its terms.*

*Later in the 21<sup>st</sup> century, the American Law Institute Transnational Insolvency Project came up with *Principles of Co-operation amongst NAFTA Countries* (the "Principles") which were to apply to the countries that had entered into the*

*North American Free Trade Agreement being the US, Mexico and Canada. It was supposed to be a form of soft law which enhances communication and co-operation in insolvency cases in the NAFTA countries. The Principles only apply to companies and other corporate entities but exclude not-for-profit entities and financial institutions. The Principles proved to be fairly successful so much so that the American Law Institute and the International Insolvency Institute later commissioned a project to look into applying the Principles globally.*

*The ALI Transnational Insolvency Project has also developed the ALI NAFTA Guidelines Applicable to Court to Court Communication in Cross Border Cases 2000 which is an annexure to the Principles. The Guidelines are based on actual cross border cases that had taken place where cross border insolvency protocols were used. These guidelines were also successful as they were adopted by the International Insolvency Institute and it was reported that they were used in the restructuring of LATAM airlines- the largest airline group in Latin America.*

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

2.5

Marks awarded 7 out of 10

### 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.***

Civil law systems

*Civil law really developed from Roman law. In Europe, bankruptcy laws developed from the customs that were used by merchants and these customs influenced the legal systems in countries that had a more Roman or Germanic way of doing things. Bankruptcy started off as an individual debt collection mechanism. A debtor would usually pledge his body to secure debts and could be imprisoned or put to death or sold as a slave if he failed to pay. Later, it changed to a collective debt collection*

*mechanism and execution was done against assets rather than the individual person. In fact the word bankruptcy is said to come from the Italian word "banca rotta" which means to "break the bench". This refers to a situation where the bench of a merchant who used to sell goods in the market would be broken by his creditors if he failed to pay his debts. The concept of a debtor being discharged was a much later feature of civil law bankruptcy systems.*

*The concept of Actio Pauliana, which is founded in Roman Law, is intended to protect creditors from fraudulent transactions done by a debtor which reduce the debtor's estate that is available for distribution to creditors or put assets out of the reach of creditors. These types of fraudulent transactions can be set aside by creditors. This concept still exists in many civil law systems today such as the Dutch system, French system, Polish system and allows creditors to set aside voidable transactions.*

English law systems

*In English law, the origins of bankruptcy were similar to civil law systems in the sense that it started off as an individual debt collection mechanism and then evolved to be a collective debt collection mechanism. Debtors were imprisoned for failing to pay debts in the 13<sup>th</sup> century but this was abolished in the 19<sup>th</sup> century by the Debtors Act of 1869. The first Bankruptcy Act 1542 of the UK was drafted as a fraud prevention law and was aimed at dealing with dishonest or fraudulent debtors. Debtors were regarded as some sort of criminals.*

*The Act of Elizabeth 1570 is the first Act that operated as a true Bankruptcy Act. A creditor could take action against a debtor if they committed an act of Bankruptcy. Creditors could petition the Lord Chancellor to call a bankruptcy meeting and the Chancellor could appoint commissioners to supervise the process. The commissioners were quite powerful and could investigate the debtor's conduct. They had the power to question people. The debtor was required to transfer his property to the commissioners.*

*This bears some similarity with present day laws where a creditor can institute insolvency proceedings against a debt and the insolvency practitioner who is appointed can investigate the debtor's pre-insolvency conduct and if they found that a voidable transaction was done, they can apply to court to have it set aside. In present day, the debtor's property does not vest in the insolvency practitioner. It still remains part of the debtor's assets which are available for distribution to creditors.*

*The Statute of Ann 1705 then introduced the concept of a debtor being discharged from bankruptcy if the commissioners thought that the debtor had conformed and co-operated with the bankruptcy proceeding.*

*In 1881, Joseph Chamberlain was appointed as the president of the Board of Trade and he indicated that one of the tenets of a good insolvency law is that there is an*

*independent examination of the debtor's conduct and the circumstances leading to his insolvency. This remains a part of present day English law and is embodied in the concept of voidable transactions as well as the offences that directors can be held liable for. Under modern day English law, examples of voidable transactions are (i) preferences -whereby a certain creditor is preferred by the debtor over other creditors, (ii) transactions at an undervalue where the debtor sells assets for little or no consideration or (iii) fraudulent transactions where the debtor deliberately puts assets outside the reach of creditors through fraudulent means such as giving gifts to family members.*

*Further changes to English insolvency law took place over time. In the 20<sup>th</sup> century, the bankruptcy laws of the UK were reviewed and that led to the passing of the Insolvency Act 1986. The Act still applies to date but has been amended over the years including recently, during the Covid 19 pandemic, by the Corporate Insolvency and Governance Act 2020.*

*Most emerging and developing countries have laws which are similar to the laws of their colonial masters. They either have English law systems like India, Nigeria, Ghana or civil law systems like in francophone African countries and South American countries.*

*While the concept of voidable transactions is in most countries, each country has its own specific requirements about what type of transactions can be set aside and how far back an insolvency representative needs to look.*

This sub-question also required consideration of the nature and importance of voidable transactions in greater detail.

2

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.***

*The definition has limitations because it is premised on the existence of a national legal framework that regulates insolvency. However, the world is now global and national borders are largely becoming irrelevant. Companies and*

*individuals operate across borders which means there will be more and more cases of cross border insolvency.*

*Therefore, it is important that there is a standardised approach to insolvency matters in different countries. This will provide clarity and predictability when dealing with cross border insolvencies which is crucial for the development of international trade and investment. Recognition of foreign insolvency proceedings cannot just be based on a country's good will. This is recognised in certain countries like the US where insolvency law is a federal matter which applies to all states. Similarly, in EU member states, European Insolvency Regulations regulate insolvency matters in those states.*

*National laws have traditionally not included a structure for dealing with cross border insolvencies. Many countries have laws that are outdated or improperly drafted and are therefore not fit for purpose to deal with insolvency in a cross - border context. Additionally, different countries have different norms and approaches to insolvency which are influenced to some extent by socio-economic factors such as how employees are treated in insolvency cases.*

*Without co-ordination and co-operation between courts in different countries, cross border insolvencies will become very unpredictable, challenging and expensive to carry out. If multiple proceedings are opened in different countries which have different approaches to insolvency, this could lead to creditors being treated inequitably, creditors competing for the debtor's assets and possibly diminish the value of the debtor's estate where conflicting proceedings are instituted.*

*There is also the heightened risk of fraud and detrimental form shopping by creditors where creditors can choose to institute proceedings in countries where the debtor carries on business that are creditor friendly.*

*It is because of these shortcomings that various soft law and hard law initiatives have been undertaken by multilateral organisations, legal associations and other stakeholders to make insolvency laws in various countries or blocks of countries around the world, uniform.*

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. It would be beneficial to reference the author's comments and other definitions, eg Fletcher.

4

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.***

*Treaties and Conventions govern states not persons- natural or corporate persons. Treaties and conventions form part of public international law and will usually only bind a member state if it ratifies the treaty or convention and domesticates it into its national laws. It is at that point that the national law will bind persons. Treaties and conventions have been very effective at harmonising national laws in the member states that have adopted them. They do however, require a lot of effort and goodwill to put together.*

Latin America

*Latin and Middle American states are said to have one of the most uniform insolvency systems in the whole. There are four main treaties which apply in those states as set out below.*

*(a) Montevideo Treaty on International Commercial Law (1889)- ratified by Argentina, Bolivia, Columbia, Paraguay, Peru, Uruguay.*

*It promotes one set of proceedings in the member states where a debtor has a single commercial domicile even if they trade in another state. If the debtor has economically similar businesses, they provide for the possibility of concurrent proceedings.*

*(b) Montevideo Treaty on International Commercial Terrestrial Law (1940) and Montevideo Treaty on International Procedural Law (1940) - adopted by Argentina, Paraguay, Uruguay only*

*(c) Havana Convention on Private International Law (1928)- adopted by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, EL Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela*

*Under this convention, one insolvency proceeding applies to all member states where the debtor has a single commercial domicile but it does also make provision for concurrent proceedings in certain situations. However, it does not have procedures on co-operation and co-ordination in concurrent proceedings.*

Nordic countries

*The Nordic countries of Denmark, Sweden, Finland, Iceland and Norway have adopted the Nordic Convention on Bankruptcy which applies to insolvency proceedings in member states. The Convention grants recognition of domiciliary adjudication (adjudication in the state where the company has its registered office) in other member states. A domiciliary bankruptcy order has universal effect in all member states. It also provides for a stay against creditor action. It provides for recognition of insolvency representatives and co-operation by the courts in other members states. It has proven to be very effective at harmonising the national laws in those countries.*

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

Marks awarded 10 out of 15

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 are proceedings set out in legislation be it in a specific Insolvency Act or a Corporate/Companies Act which also contains insolvency provisions. An informal insolvency arrangement is a bilateral arrangement between a debtor and one or more of its creditors which is done out of court.*

*Below is a summary of the advantages and disadvantages of each process:*

	ADVANTAGES	DISADVANTAGES
<b>Formal Proceeding</b>	<ul style="list-style-type: none"><li><i>It is possible to obtain a moratorium either automatically or by application to the court which protects the debtor against adverse action from creditors. A moratorium would allow FPPL's creditors including Lobo to be dealt with in an orderly manner.</i></li></ul>	<ul style="list-style-type: none"><li><i>It is usually a public process</i></li><li><i>It can be very expensive</i></li></ul>

	<ul style="list-style-type: none"> <li>• <i>It is possible to cram down dissenting creditors using a formal process</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>It can lead to loss of goodwill in FPPL's brand</i></li> </ul>
<i>Informal proceeding</i>	<ul style="list-style-type: none"> <li>• <i>It is a private and confidential process between Lobo and FPPL.</i></li> <li>• <i>It is costs less than a formal process</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>No moratorium is available to stop other creditors from going to court</i></li> <li>• <i>It is not possible to cram down creditors using an informal process. It requires a lot of good will from creditors in order for them to agree to make concessions</i></li> </ul>

Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

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.**

*It is not stated in the facts whether there is a treaty or convention that both countries have domesticated that deals with cross border insolvency or whether both countries have adopted soft law measures that have helped to harmonise their laws.*

*In light of this ambiguity, the following issues may arise for the insolvency representative:*

*Choice of law - the insolvency representative may face choice of law issues when conducting the insolvency process in Asgard if issues connected to Encanto are raised. This will depend on the legal system applicable in Asgard i.e. whether it is a civil law system or a common law system. In civil law systems, choice of law would be considered by the courts whether or not it is pleaded by the insolvency representative whereas in common law systems, the issue would only arise if the insolvency representative raised it.*

*Recognition of the insolvency representative- the insolvency representative will need to establish whether Encanto has private laws that allow for the recognition of the foreign representative in Encanto. If the laws in Encanto do not allow for recognition, the foreign representative will need to apply for the enforcement of the judgement issued in Asgard in relation to the insolvency proceedings in Encanto. How easy it is to enforce the judgement will depend on whether Encanto has domestic laws that provide for recognition of foreign judgements. If it does not, the foreign representative, either directly or through an insolvency representative in Encanto, would have to commence insolvency proceedings against FPPL in Encanto in order to get access to its assets in Encanto or enter into an insolvency protocol with the insolvency representative in Encanto. This will be difficult if the proceeding in Asgard conflicts with the proceeding that was commenced in Encanto.*

*Creditor Priority issues - each country will have its own payment waterfall for distributing assets to creditors thus if there is no co-operation and co-ordination between the courts in both countries, certain creditors are likely to be disadvantaged- particularly those in Asgard as most of the assets are likely to be in Encanto. It may be that the laws of Encanto are protective of domestic creditors and will not allow foreign creditors to be paid until the domestic creditors are paid in full.*

*Transactions that can be set aside- the insolvency representative will need to consider and look into any transactions that may have been done by FPPL in Asgard that are voidable such as preferential or undervalue transactions. The insolvency representative will also be keen to establish how he/she can do the*

**same in Encanto. If there is no scope for co-operation between the two countries, this will be a challenging to do in Encanto**

**Executionary contracts- the insolvency representative will need to determine how to deal with contracts where performance has not been completed; will he adopt or disclaim those contracts? Ultimately, it will come down to whether completing the contract benefits the FPPL's creditors. The socio-economic policies of each state may determine how certain contracts are dealt with for example employment contracts.**

**Creditor participation and co-ordinated claims procedures- the insolvency representative will need to manage creditor participation and the process of submitting proofs of claim so that he ensures that all creditors are treated equally. This will be difficult to do if the laws in Encanto do not provide for co-operation and co-ordination between the two courts.**

**Discharges- if there are no harmonised laws in the two countries which promote co-operation and co-ordination, the insolvency representative may find themselves in a position where the legal principles pertaining to FPPL's discharge may differ in Asgard and Encanto. The legal systems in both countries could conflict such that one is creditor friendly, and the other is debtor friendly.**

**Moratorium- one of the benefits of a formal insolvency process is that it gives the company a moratorium whereby creditors are prohibited from taking enforcement action against the company without the consent of the court. However, this depends on the type of insolvency process that has been instituted. Some processes like liquidation do not provide for a moratorium. Whether the insolvency representative will have the benefit of a moratorium depends on the type of proceeding that was commenced in Asgard.**

International Insolvency Instruments

Why are they important?

**There are a number of hard and soft law measures that have been taken globally to harmonise insolvency laws in various countries in order to promote among other things co-operation and co-ordination between courts in cross border cases.**

**Development of these instruments is very important because in the global world we live in clarity and predictability on how cross border insolvencies will be dealt with is key to promoting international trade and investment and cross border financings.**

Examples of international insolvency instruments

*Some of the soft law International insolvency instruments that have been developed are set out below:*

*UNCITRAL has developed various model laws and guides which have been instrumental in harmonising domestic insolvency laws in various countries in which they have been adopted. For example, the UNCITRAL Model Law on Cross Border Insolvency mandates co-operation and co-ordination between courts and insolvency representatives involved in cross border insolvency cases. The Model Law does not require reciprocity.*

*A lot of laws, especially in African countries, were put in place by colonial masters and have not been revised post-independence to capture the global interconnected world we live in. The World Bank and IMF carry a lot of influence in developing countries because of the financial support they give to countries. It is common for them, as part of a funding condition, to require a developing country to follow the UNCITRAL Legislative Guide on Insolvency Law and/or the World Bank Principles of Effective Insolvency and Creditor/Debtor Regimes to reform her insolvency laws which helps in bringing about consistency in African national approaches to insolvency laws.*

*In the EU, there have been a number of steps taken to harmonise EU insolvency laws and to encourage better communication between courts in EU member states such as:*

- A project funded by the EU and the International Insolvency Institute led to the development of the EU JudgeCo Guidelines 2015*
- INSOL Europe helped to publish the European Guidelines on Communication and Co-operation 2007 which contains non-binding rules and a draft protocol for international insolvencies subject to the European Insolvency Regulation which guidelines were reviewed in 2017 by a joint working group of members of the Conference of European Restructuring and Insolvency Law and INSOL Europe. The working group focussed on the duty to co-operate and communicate under the EIR Recast 2015.*

*Across the sea, the American Law Institute (ALI) Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court to Court Communications in Cross-Border Cases (2000) for cross border insolvency cases in NAFTA countries being the US, Canada and Mexico . The ALI together with the International Insolvency Institute subsequently developed the ALI -III Global Principles for Co-operation in International Insolvency Cases and Global Guidelines Applicable to Court to Court Communications in Cross-Border Cases (2012)*

*The Judicial Insolvency Network (JIN) has developed the Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters. These guidelines encourage court to court operation and co-ordination in cross border cases and have been adopted by courts in Asia, UK and other courts in the Americas.*

***Subsequently, JIN developed the Modalities of Court to Court Communication which goes into the detail of how communication between courts should be done.***

Asian Business Institute jointly with the International Insolvency Institute have embarked on a project to come up with Asian Principles of Business Restructuring. In 2020, they published a report on *Corporate Restructuring and Insolvency in Asia* which sets out the business rescue regimes in Australia, China, Hong Kong, India, Japan and South Korea.

***Some of the hard law international instruments that have been developed are:***

- ***Latin America states have ratified various multilateral conventions and treaties that address cross border insolvency issues such as the Montevideo Treaties of 1889 and 1940.***
- ***The Nordic countries of Denmark, Sweden, Finland, Iceland and Norway have adopted the Nordic Convention on Bankruptcy which applies to insolvency proceedings in member states.***

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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.***

***The UK left the European Union (EU) at 11pm on 31 January 2020. There was a transition period up to 31 December 2020 where EU legislation that was directly applicable in the UK continued to apply and the UK was treated as if it were still a member of the EU. The EIR Recast 2015 still applies to the UK in respect of main proceedings commenced before 11pm on 31 December 2020.***

***As this proceeding was commenced on 30 June 2022, the EIR 2015 recast will not apply to the UK. The EIR Recast determines the appropriate jurisdiction for commencement of a debtor's insolvency proceedings, the law that should apply in those proceedings and provides for mandatory recognition of those proceedings in EU member States.***

Forum for insolvency proceedings

***Under the EIR recast, where a debtor's centre of main interests (COMI) is within an EU member state, the EIR recognises that State as the appropriate forum for the main insolvency proceedings. These proceedings must be automatically recognised by the courts in other EU states. If any other proceedings are to be commenced in another member state where the debtor conducts its business,***

*those proceedings are secondary to the main proceeding concerning the debtor and relate only to assets in that second state.*

*The facts do not say whether the UK is the debtor's COMI. However, a determination by the UK court that the COMI of a debtor is in the UK will not automatically be recognised by the courts of an EU state unless that is in line with the national laws of that state. The question of whether additional insolvency proceedings can or cannot be commenced in a EU member state and whether they are secondary to the UK proceeding will be determined by the domestic law of that member state.*

The law that applies to insolvency proceedings

*Under the EIR Recast, the law applicable to an insolvency proceeding in an EU member state is the national law of that state. However, there are certain circumstances set out in Articles 8-18, where the national law of the state in which the insolvency proceedings have been opened can be overridden by another law, but only that of a member state. As UK is no longer a member state, a creditor could not rely on the EIR to disapply English law in respect of matters which affect an EU member state such as real estate assets that may be located in an EU member state. It will now be a question of whether English law to determine which law should apply.*

Recognition of insolvency proceedings

*The insolvency proceedings in the UK and the insolvency representative will not automatically be recognised in the EU member states now that the UK is no longer a part of the EU. He/she will need to apply for recognition in the EU member states under the relevant local laws. The facts do not indicate which countries in the EU and non-EU member states have adopted the UNCITRAL Model Law which has provisions on recognition of foreign insolvency representatives. The UK has adopted the Model Law. Yes, it would be beneficial to seek further information regarding adoption of the MLCBI.*

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Marks awarded 14.5 out of 15

\* End of Assessment \*

**TOTAL MARKS 40.5/50**

**A very good paper that generally addresses the questions asked and substantiates its answers.**