



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 16th 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 10 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 insolvency law systems found in African jurisdictions mainly have their roots in the insolvency law systems of their former colonial powers. For example, the roots of insolvency law systems in countries such as Nigeria, Kenya, Botswana and Zambia, and countries in Eastern Africa such as Tanzania, are those of English law as they were former English colonies.

The roots of the systems to be found in Angola and Mozambique, on the other hand, are in the civil law system based on Portuguese law, given they were colonies of Portugal. For example, Angola's legal system is based on a written constitution as most civil law countries

are.¹ The French-speaking countries of West Africa also have their roots in civil law, particularly French law. This means that their insolvency law systems tend to be based on Roman law, which is the law from which the insolvency law systems of civil law countries such as France and Portugal developed.

Some countries, including South Africa and Namibia, have mixed legal systems due to influences by both Roman-Dutch law (civil law system) and English law. For example, South Africa has a constitution, but also has a common law system.²

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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 1998 economic crisis in East Asia, Thailand made substantial revisions to its Bankruptcy Act (1940), including the assignment of a Bankruptcy Court dedicated to bankruptcy and reorganisation matters. The amendments were for the purpose of updating Thailand's law to bring it into line with the concepts used in international bankruptcy practice.³

Indonesia also amended its Law on Bankruptcy of June 1905 in 1998, which was also as a result of the economic crisis in East Asia.⁴ The government of Indonesia took the view that the 1905 bankruptcy law was out of date and irrelevant to modern commercial needs. It therefore made amendments by regulation. However, a completely new Indonesian bankruptcy law was later made in 2004, which completely revoked the 1998 law.⁵

Singapore introduced its new Insolvency, Restructuring and Dissolution Bill to parliament on 10 September 2018. The Bill was passed on 1 October 2018. The Bill was passed to consolidate Singapore's corporate and personal insolvency and restructuring laws into a single piece of legislation. It also introduced a significant number of new provisions, particularly relating to corporate insolvency, including making licensing and qualifications mandatory for insolvency practitioners, and voidable transactions provisions. The Bill was part of a series of reforms of Singapore insolvency and restructuring law, following significant changes to Singapore's Companies Act of May 2017, which had introduced concepts inspired by Chapter 11 of the US Bankruptcy Code into its legislation.⁶

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¹ <https://www.lexafrica.com/wp-content/uploads/2022/05/Guide-to-Insolvency-and-Business-Restructuring-in-Africa-Digital.pdf>, accessed 7 November 2022.

² *Ibid.*

³ [Publication_A4_WP357465_CCook_LON \(bakermckhttp://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Thailand.pdf\)](http://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Thailand.pdf), accessed 7 November 2022.

⁴ <https://www.oecd.org/indonesia/38184160.pdf>, accessed 7 November 2022.

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http://www.gbgindonesia.com/en/main/legal_updates/bankruptcy_law_and_suspension_of_debt_payments_in_indonesia.php, accessed 13 November 2022.

⁶ <https://www.herbertsmithfreehills.com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill>, accessed 7 November 2022.

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.

In the 1970s, Canada and the United States sought to enter into a bilateral insolvency treaty, however they failed to reach an agreed approach, which was thought to be due to the treaty being too ambitious in its scope.

More recently, progress has been made through both states adopting the UNCITRAL Model Law on Cross-Border Insolvency, Canada having adopted the Model Law in 2009,⁷ and the United States in 2005.⁸ This means that both jurisdictions will apply the same law when addressing situations involving cross-border insolvency and should therefore adopt the same approach.

There has also been progress made through mechanisms such as protocols, which are agreements between the courts of two different states to coordinate insolvency proceedings. For example, Nortel Networks Corporation, a publicly-traded Canadian company, which carried on business in Canada and through subsidiaries in the US, Caribbean, Latin America and Asia, filed on 14 January 2009 in Canada under the *Companies' Creditors Arrangement Act* in relation to the Canadian companies, and under chapter 11 of the US Bankruptcy Code in Delaware for the US incorporated companies. There were also administration orders sought in the UK. In June 2009, the Canadian and US debtors and certain committees negotiated a Cross-border Insolvency Protocol, which received the approval of the Canadian and US courts. The Protocol set out the exclusive jurisdiction of each court to determine matters arising in the Canadian and US proceedings, and the independence of each court, but also provided the judge in the US court and the justice in the Canadian court with the power to communicate with each other to determine whether consistent rulings could be made by both courts and coordinating the terms of those rulings. Both the US and the Canadian judges have made statements that this was instrumental in being able to come to the same decision in relation to the allocation of US\$7.3 billion.⁹

This is a very clear example of substantial progress having been made in the resolution of international insolvency issues between Canada and the United States and demonstrates the practical application of such resolution to a real insolvency matter.

Another example is the American Law Institute ("**ALI**"), which has sought to resolve international insolvency law issues between the North American Free Trade Agreement ("**NAFTA**") countries, being the United States, Canada and Mexico. One ALI initiative was the ALI Transnational Insolvency Project, which sought to improve cooperation in international insolvency matters across the NAFTA countries. An advisory group of experts from each country produced a statement on that country's insolvency law as applied in international cases. Following this, Principles of Cooperation among the NAFTA countries were prepared and approved in 2000, focusing on corporate insolvency. The Principles contain the general principles that there should be cooperation between courts and administrators in an international insolvency, to maximise the value of the worldwide assets of the debtor, and that the bankruptcy of a debtor in one NAFTA country should be recognised and given effect in

⁷ <https://www.nortonrosefulbright.com/en/knowledge/publications/e7e4132d/the-model-law-in-canada#:~:text=On%2030th%20May%202022,insolvencies%20more%20effectively%20and%20efficiently>, accessed 7 November 2022.

⁸ <https://unis.unvienna.org/unis/pressrels/2005/unisl97.html>, accessed 7 November 2022.

⁹ <https://www.lexology.com/library/detail.aspx?g=767ff069-ed48-4eb9-8dc8-035b2c2f1749>, accessed 7 November 2022.

each of the other NAFTA countries. There are also recommendations relating to the administration of such cases and parallel proceedings, as well as other procedural matters. As a result of the recommendations, all three NAFTA countries adopted the UNCITRAL Model Law on Cross-Border Insolvency, Mexico in 2000, and Canada and the USA in 2005. This means that all three will be applying consistent laws in relation to international insolvency proceedings, and so the ALI Principles have been successful in that respect.

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Marks awarded 10 out of 10

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

Question 3.1 [maximum 5 marks]

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.

Voidable dispositions generally fall into two categories: (1) fraudulent conveyances, which are transactions disposing of property interests for either no consideration or for consideration at an undervalue, or (2) preferences, whereby one creditor's debt is satisfied by being paid or secured so as to improve that creditor's position from how it otherwise would have been upon the onset of insolvency.

The rules as to prohibiting preferences are important because insolvency is a collective procedure of all creditors, and one creditor should not be treated more favourably than others, at the expense of the other creditors. Prevention of fraudulent conveyances is important for preventing transactions designed to conceal property for the subsequent benefit of the debtor, its owners, directors or officers, again at the expense of creditors. The rules as to avoidable dispositions generally are aimed at preventing the sudden decrease in value of the entity just before a formal insolvency proceeding is initiated. They can also encourage informal settlements between creditors and debtors, who will both be aware that transactions entered into shortly before the onset of insolvency are liable to be set aside, and will seek to come to an arrangement that avoids the need for court proceedings.

Different jurisdictions apply different rules to the treatment of such transactions. For example, BVI law, which is based on English law, provides the court with discretion (section 249 of the BVI Insolvency Act, 2003) to set aside an unfair preference, or an undervalue transaction. Section 245 of the BVI Act provides that there is no unfair preference where the transaction is shown to have taken place in the ordinary course of business. Section 246 of the BVI Act provides that there is no undervalue transaction, where the transaction takes place in the ordinary course of business and was entered into in good faith by the company, at a time when there were reasonable grounds for believing the transaction would benefit the company. The "vulnerability period" in the BVI is 6 months before the date on which a liquidator is appointed, for both preferences and undervalue transactions, rising to 2 years where the transaction is with a connected party.

On the other hand, French law, which is a civil law jurisdiction, provides for a "hardening period" of 18 months before the insolvency judgment opening the insolvency proceedings. It also provides that certain transactions are automatically void, rather than merely voidable. This is different to the BVI, which gives the court discretion. Transactions which are automatically void in France include any deed entered into without consideration transferring

title to moveable or immovable property and any bilateral contract in which the debtor's obligations significantly exceed those of the other party. Other transactions entered into in that period are voidable at the option of the court.¹⁰

The likely reasons for these differences are that the historical roots of insolvency law in civil law jurisdictions, such as France, are traced back to Roman law, and it was the *Actio Pauliana* which was the basis for setting aside fraudulent transactions. In English law, the *Statute of Elizabeth 1570* was the historical basis for the setting aside of fraudulent conveyances. This statute is said to be the first English law that was designed to be a bankruptcy law rather than a fraud-prevention law.¹¹ It was at this point that English law had a collective procedure for creditors rather than individual debt-collecting methods. English law and the civil law have therefore developed separately and so it is understandable that the rules as to avoidable dispositions in different jurisdictions are different.

Well answered!

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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 referred to above is that of Wessels.¹² He concedes that this definition of international insolvency law is limited because it requires the existence of a national legal framework of insolvency law. For example, certain territories, such as the USA, have both federal and state laws, and so a country will not necessarily have an overarching national insolvency law, though in the USA insolvency law is a federal matter rather than a state matter. If different states in one country have different laws, then not only do they need to consider international aspects, but also differing national aspects. It is this in particular which is a limitation on Wessels' definition.

An alternative definition of international insolvency is proposed by Fletcher:

"'international insolvency' or 'cross-border insolvency' should be considered as a situation '...in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case.'¹³

¹⁰ <https://www.whitecase.com/sites/default/files/2022-07/france-restructuring-insolvency-2022.pdf>, accessed 9 November 2022.

¹¹ J C Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) *Fundamina* 1, p. 13.

¹² B Wessels, *International Insolvency Law* (Kluwer, 2006), p 1.

¹³ *Idem*, p 1 *et seq.*

Wessels' definition also does not explain precisely why the applicable law cannot be executed immediately and exclusively. The issues raised by the foreign elements of the case that Fletcher refers to may include the fact that the debtor may have, for example, assets, creditors or obligations spanning across one or more jurisdictions, which each have their own separate insolvency rules and regulations. This is particularly so in a common market with free-flowing goods, services, capital and people between states and recognition by one state of a formal insolvency procedure initiated in another is required.

The key point across both definitions is that there is not one single insolvency law that can easily be applied because the different jurisdictions in which assets, creditors and obligations are sited will each have their own separate insolvency rules and regulations. This means there is a risk of more than one insolvency proceeding being commenced, in different jurisdictions, against the same debtor. It is also possible that these proceedings may be inconsistent with each other and may not be recognised by the other.

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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 are agreed between two or more states and then form part of each state's public international law ie the law which governs states. In the context of cross-border insolvency law, states have agreed and signed treaties or conventions that regulate the resolution of international insolvency law issues between those particular states. The effect is that the principles set out in those treaties and conventions form part of the state's domestic laws. This means that they may then form part of a state's "hard law" on insolvency, and so they will be binding on the state and enforceable by the courts of that state.

The major advantage of treaties and conventions is that once ratified, they are binding on states and have to be applied. This means that there is a binding obligation on those states to apply the provisions of those treaties and conventions. In the context of international insolvency law, that will mean states are bound to apply consistent principles and approaches contained in a treaty or convention that prescribes how international insolvency issues are to be dealt with. In comparison, "soft law" instruments are not binding on states and only provide guidance to the approaches to be adopted. This means that states will not necessarily be bound to apply the relevant principles in soft law instruments.

The disadvantage of treaties and conventions is that they are only binding on those states who accede to them. Therefore one state may enter into a number of bilateral treaties with other states, all of which provide for slightly different approaches to matters of insolvency.

One example of a successful multilateral treaty is the Nordic Bankruptcy Convention of 1933, which was concluded between the five Scandinavian states of Denmark, Finland, Iceland, Norway and Sweden. The Convention grants recognition to the legislative, executive or judicial acts relating to insolvency in the other member states. It is based on the principle of universality, which means that there is one set of proceedings in one jurisdiction, but concurrent proceedings in the other jurisdictions are permitted in certain circumstances. This means that one feature of the Convention is that it recognises the law of the country in which the proceedings are taking place as determining almost all of the impact of the insolvency order in the other states, without there being a requirement for further formalities such as recognition.

Attempts in Europe to agree multilateral international insolvency conventions were not successful for a long time. The Council of Europe, formed in 1949, currently has 47 member countries. In 1990, the Convention on Certain International Aspects of Bankruptcy (Istanbul Convention) was concluded and signed by 8 member states. However, it was not ratified by a sufficient number of Council members to enable it to enter into force. Notwithstanding this, it did influence the development of an effort by the European Union to resolve the issues of international insolvencies. This was achieved by way of the European Insolvency Regulation ("EIR") 2000, as revised by Regulation (EU) 2015/848. The EIR gives jurisdiction to the courts of the EU Member State where the debtor's centre of main interests is located, though it does permit related proceedings in other Member States.

Latin American countries have also had success in agreeing treaties that included provisions on bankruptcy. For example, the Montevideo Treaties were concluded in 1889 and 1940, and the Havana Convention on Private International Law was concluded in 1928. The 1889 treaty covers both personal and corporate insolvency and has been ratified by Bolivia, Columbia, Paraguay, Peru, Uruguay and Argentina. The 1940 treaty was less successful, only being ratified by three states: Argentina, Paraguay and Uruguay. The Havana Convention was even more successful, being ratified by 15 states and takes the approach that there should be only a single proceeding with universal effect across all the states. However, only two of the states who ratified the Montevideo Treaty of 1889 ratified the Havana Convention and so there are three separate treaties that have to be given consideration. This means that the issue of having separate legal systems dealing with insolvency matters has not really been resolved, just consolidated into fewer separate systems.

Some regions such as the Middle East have no treaties or conventions. Overall, it would appear that while treaties and conventions reduce the legal difficulties with cross-border insolvency matters to an extent, they do tend to be regional or operate between only a limited number of states. It would be much better from a practical point of view if all states and regions signed up to a single treaty or adopted the UNCITRAL Model Law on Cross-Border Insolvency, in order to minimise the number of different approaches being taken.

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Marks awarded 15 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 those commenced under a state's insolvency legislation and which proceed in accordance with those laws. Examples include liquidation and proceedings to reorganise a corporate entity and therefore "rescue" it, such as administration. "Informal" insolvency arrangements are in general not always subject to legal regulation and include negotiations between the debtor and some or all of its creditors, which are entered into voluntarily by the parties. Typical negotiations involve the agreement of some form of restructuring of debt in order to enable the debtor to continue in business.

The advantages to Lobo of an out of court settlement are that it will be much cheaper than having to go through a formal court process and is likely to be quicker. An out of court settlement is more likely to retain a good relationship between Lobo and FPPL, so that if FPPL resolves its staffing issues and the market has a turn around there is the possibility of future business for Lobo from FPPL. As the agreement between them will be contractual, they can choose their terms and can agree the best way to resolve the debt. This could include an extension to the payment period, a discharge of some of the debt, or a debt for equity swap. As long as the agreement complies with legal requirements as to the formation of a contract, they can agree absolutely anything. **Avoiding publicity is also relevant.**

The disadvantages to Lobo of an out of court settlement are that there will be no moratorium (stay) in place while negotiations are ongoing, which means that other creditors of FPPL could commence insolvency proceedings before a settlement is concluded. In addition, the agreement that is reached will only be between Lobo and FPPL, and will not bind any other creditors of FPPL. This means that it is possible that other creditors could subsequently seek to wind up FPPL. Further, if FPPL subsequently goes into liquidation, a settlement payment to Lobo could be unwound as an unfair preference in the course of those proceedings.

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.

FPPL has its head office and carries on significant operations in Encanto. It also carries on business on Asgard. It is not known whether FPPL has assets in any other states, or creditors in any other states. The Asgardian insolvency practitioner ("**IP**") has a duty to collect in the assets of FPPL and it will depend on the states in which FPPL has assets and the insolvency laws of those states as to whether the Asgardian IP will be recognised in those foreign states and therefore able to collect FPPL's assets.

The issues with having two IPs in different jurisdictions will include ensuring that all of FPPL's creditors across all states are treated equally and are able to access a fair share of all the assets of FPPL. For example, if the IP in Encanto collects all of FPPL's assets in Encanto and divides them between all creditors in Encanto, that would be unfair to the creditors of FPPL who are based in Asgard, if the Encanto assets are greater in value than the assets in Asgard.

Other issues will include deciding which of the IPs will deal with assets located in a third state, which of the proceedings will deal with any claims to unwind potentially voidable transactions,

and how the IPs will be remunerated. There is the possibility that the courts of Asgard and Encanto may issue conflicting judgments in any of these matters. There may also be difficulties in cooperating and communicating with respect to attempting to restructure FPPL, and administering FPPL's business. **Concurrent proceedings warrants elaboration.**

In order for these issues to be resolved, it would be helpful for the IPs and the two courts to agree on ways in which they can cooperate and coordinate. One option would be for the IPs to agree a protocol setting out the responsibilities they will each undertake and the extent of the jurisdiction of Encanto and Asgard. This was the approach endorsed by the IBA Cross-Border Insolvency Concordat in 1996. There are examples of protocols entered into where there are concurrent insolvency proceedings, for example the *Nortel Networks* case, where the US and Canadian courts had a protocol to ensure that they came to similar decisions in the case. This would be the best approach because the IPs themselves will have to discuss the protocol and come to an agreement, however if there are difficulties with coming to an agreement the parties may be stuck.

Another option will depend if either or both of Asgard and Encanto have adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**"). One of the main principles of the Model Law is an obligation on both the courts and IPs to communicate and cooperate to the maximum extent possible. The Model Law mandates a court or IP to cooperate with a foreign court or IP, for example by entering into a protocol or cross-border insolvency agreement. Further information is required as to whether Encanto and/or Asgard have adopted the Model Law. The Model Law does not require reciprocity, and so it would be useful in this situation even if only one of Asgard or Encanto has adopted it. In this respect, the development of the Model Law is important because even if only one state has adopted it, it will assist significantly with the IPs cooperating and communicating in this situation.

It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

3.5

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's membership of the European Union ("**EU**") ended at 11pm on 31 January 2020. The European Insolvency Regulation Recast ("**EIR Recast**") ceased to apply to the UK in respect of insolvency proceedings commenced there after 11pm on 31 December 2020. The proceedings commenced by the minor creditor in the UK were commenced on 30 June 2022, well after the EIR Recast no longer applied to the UK. The EIR Recast therefore will not apply in the UK in respect of the UK commenced proceedings.

Following 11pm on 31 December 2020, the Insolvency (Amendment) (EU Exit) Regulations 2019 (the "**2019 Regulations**") apply in the UK. While the European Union (Withdrawal Agreement) Act 2020 has the effect of transplanting EIR Recast into English law, the 2019

Regulations have a significant impact upon its scope and effect.¹⁴ This means that there will be no automatic recognition of the UK insolvency proceedings in other EU countries pursuant to Article 19 of the EIR Recast. The EIR Recast provides in Article 3(1) that the courts of the EU Member State in which the centre of the debtor's main interests is situated have the jurisdiction to open insolvency proceedings ("main insolvency proceedings") and the courts of another Member State have jurisdiction to open "secondary insolvency proceedings" if the debtor has an establishment in that other Member State (Article 3(3)). As the UK is no longer an EU Member State, there will be no automatic recognition of those proceedings in EU Member States and any proceedings commenced by Lobo in an EU Member State would not automatically be classed as secondary insolvency proceedings.

Article 3(2) of EIR Recast provides that where the centre of a debtor's main interests are situated within the territory of an EU Member State, the courts of another EU Member State have the ability to open insolvency proceedings, but only if it possesses an establishment in that territory, and the proceedings are restricted to the assets of the debtor which are situated in that territory. Article 3(1) defines the centre of main interest as the place of the registered office unless there is proof to the contrary. For FPPL, its centre of main interests would be the UK. As the UK is not a Member State of the EU, it would suggest that Article 3(2) does not apply and it would depend on the particular Member State's insolvency law as to whether insolvency proceedings operating beyond its territorial borders could be opened against FPPL.

This means that there is the potential for two sets of insolvency proceedings to be opened under two different procedures and applying two different laws. This will cause issues in terms of which jurisdiction deals with which assets and creditors of FPPL, and how the two insolvency practitioners will communicate and cooperate with each other, as well as which law applies to the proceedings and how voidable transactions are treated. That will to an extent depend upon whether there is any treaty in place between the UK and the EU Member State. The UK has adopted the UNCITRAL Model Law and, while the Model Law does not require reciprocity to be applied by the UK, if the particular EU Member State in question has also adopted the Model Law they will at least be applying consistent principles.

5
Marks awarded 13 out of 15

*** End of Assessment ***

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

TOTAL MARKS 48/50

¹⁴ <https://kennedylaw.com/thought-leadership/article/brexit-and-eu-cross-border-insolvency-what-comes-next/>, accessed 13 November 2022.