



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.**

- Historically, much of Africa was colonised, and therefore its insolvency law follows the patterns of colonialization.**
- For example, English law is reflected in Botswana, Kenya, Nigeria and Zambia, and many countries in East Africa such as Tanzania.**
- Portuguese civil law is seen in Angola and Mozambique, and formerly French colonies in West Africa usually reflect French civil law.**
- A small number of countries experienced both civil and common law influences, leading to, for example, Namibia and South Africa having mixed legal systems.**

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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.**

*The most obvious event impacting East Asia was the 1998 financial crisis which especially affected Indonesia and Thailand, but had reverberations around the entire region.*

*For example, in 2001, Japan adopted the UNCITRAL Model Law. Prior to this it had a strict territorialism model in which it neither claimed extra-territorial effect for domestic judgements nor recognised or foreign insolvency proceedings in respect of assets in Japan. Since adopting the Model Law however, it has recognised foreign proceedings with the caveat that foreign proceedings are not granted automatic relief; rather, foreign representative must request relief on a case-by-case basis.*

*More recently, Singapore is now becoming a major regional legal hub and is well known for its arbitration centre and the recent eponymous mediation convention. While prior to 2017 it lacked a statutory cross-border insolvency mechanism, it had mostly adopted the UNCITRAL Model Law approach through development of its common law regime. In 2017, it became the second country in Southeast Asia, after the Philippines, to adopt the UNCITRAL Model Law. Then, in October 2018 it passed a new Insolvency, Restructuring and Dissolution Act to consolidate its corporate and personal insolvency and restructuring laws.*

- Tomasic, Roman. "Diversity and Convergence in Insolvency Laws in East Asia." In *Insolvency Law in East Asia*, pp. 11-22. Routledge, 2016.
- Tomasic, Roman, and Bahrin Kamarul. "The rule of law and corporate insolvency in six Asian legal systems." In *Law and Society in East Asia*, pp. 73-89. Routledge, 2017.
- Watters, Casey G. "Cross-border insolvency in East Asia: cooperation and convergence." In *Research Handbook on Asian Financial Law*. Edward Elgar Publishing, 2020.

3

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 North America, the most major initiative is American Law Institute (ALI) / North American Free Trade Agreement (NAFTA) Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases. Issued in 2000, this was drafted for international insolvencies involving the USA, Canada and Mexico.*

*In an influential 2002 article *The Quest for Global Insolvency Law*, Professor Ian Fletcher laid out key challenges for global insolvency law and explained that countries' insolvency laws correspond closely to their cultural and economic attitudes to debt, with wide variation between countries. Similarly, countries' differing approaches to transnational elements have also made 'universalist' or 'internationalist' resolution of insolvency proceedings difficult.*

**Two further reports, *Principles of the Law, Transnational Insolvency*, in 2003 and *Transnational Insolvency: Global Principles of Cooperation*, Report to ALI in 2012, built on the 2000 guidelines.**

**These reform efforts have successfully influenced bankruptcy cooperation among the USA, Canada, and Mexico, and both the 2000 guidelines and the 2003 principles have been endorsed by several organizations, including the National Conference of Bankruptcy Judges, the National Bankruptcy Conference, and the Canadian Judicial Council.**

- Fletcher, Ian F. "The Quest for global Insolvency Law: A Challenge for Our Time." *Current Legal Problems* 55, no. 1 (2002): 427.
- Leonard, Bruce, Cassels Brock, and L. L. P. Blackwell. "The Development of Court-to-Court Communications in Cross-Border Cases." *Norton Journal of Bankruptcy Law and Practice* 17 (2008): 619ff.
- Moustaira, Elina, Moustaira, and Reschke. *International Insolvency Law*. Springer International Publishing, 2019.

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 8.5 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.***

Explain how such rules developed in English law

***As early as 1570, in the Act of Elizabeth, Parliament acted to outlaw transfers of property by a debtor with the intent and effect of delaying, hindering, or defrauding creditors. The Act made such a transfer a crime and punished parties to it, except for transferees for "good consideration and bona fide". Punishment included imprisonment and forfeiture of one year's value of real property and "the whole value" in the transfer, with one half of the recovery going to the "party or parties grieved". The common law also interpreted the Act to the effect that a judgment creditor could treat a fraudulent conveyance as void, as if the transaction had not been made. Many states either re-enacted this ancient English statute or treated it as a part of their inherited common law.***

Explain how such rules developed in civil law jurisdictions

***Civil law jurisdictions evolved in arguably a more piecemeal manner, as they did not benefit from the power of the British Empire to influence other jurisdictions. The oldest source of the voidable transactions concept in such jurisdictions however is the *actio Pauliana*, an action in Roman law intended to protect creditors from fraudulent legal transactions, specifically transactions intended to reduce a debtor's estate by transfers to third parties in bad faith. This therefore forms the original basis of fraudulent conveyance law in many civil law systems.***

Possible historical reasons different treatment of voidable dispositions

- ***Different countries began their development of insolvency law from different points, as noted above.***
- ***Economic priorities in different countries vary, for example between prioritising payment of tax, employees or creditors.***
- ***Political power, and thus the focus of countries' legislature and executive, will influence legislation and executive orders.***
- ***Cultural and social approaches to debt vary greatly.***
- ***The treatment of voidable dispositions will depend in part on the ordinary law apply outside insolvency situations. This will differ greatly, e.g. when assignments are given effect under normal circumstances.***
- ***There will simply be different views on how far back the 'critical period before bankruptcy' should be.***
- ***As far back as the Second International Congress of Comparative Law in 1937, the report by Professor Percerou, dean of bankruptcy lawyers, noted that "...the statutory law of bankruptcy and compositions, in text and even more in practical application, is, generally speaking, still very divergent in all countries. It is, of course, not surprising that each legislature should seek the solution best fitted to the economic, social, and political conditions of the country. To believe in the possibility of complete uniformity of the law in a field where the course of legal evolution has been so different and where the character and special customs of each country play such an important part, is to fail to recognize that nations are different. Complete uniformity, therefore, is presently an utopian dream". (Nadelmann, p42)***

Context for the treatment of these rules in insolvency systems and why these rules are important in insolvency

***Voidable dispositions target debtor transactions conducted to 'preference', i.e. favour one or more creditors over all creditors. Such a preference is a benefit received by a creditor either in the form of pre-bankruptcy settlement of a debt or by improvement in the creditor's status, e.g. being elevated from an unsecured creditor to secured creditor shortly before the bankruptcy.***

***Laws against voidable dispositions seek keep assets together, to allow them to eventually be handled in a structured process. This prevents creditors from destroying***

**the value of the debtor's estate's by selling it piecemeal and in an uncontrolled manner. For example, a company in insolvency may be more valuable if all the assets are sold together. Further, such control offers administrators more possibilities, including potentially reorganising a so that it becomes a going concern.**

- Glenn, Garrard. *Fraudulent Conveyances and Preferences*. Vol. 1. Baker, Voorhis, 1940.
- Nadelmann, Kurt H. "Creditor equality in inter-state bankruptcies: A requisite of uniformity in the regulation of bankruptcy." *U. Pa. L. Rev.* 98 (1949): 41.
- Aleksonytė, Arūnė. "Avoidance of transactions in insolvency: a comparative analysis of preference law in German, English and Lithuanian law." (2013): 49.
- Boraïne, Andre. "Comparative notes on the operation of some avoidance provisions in a cross-border context." *SA Mercantile Law Journal* 21, no. 4 (2009): 435-469.

It would be beneficial to discuss the importance of the rules in more detail.

3.5

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 ", 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.**

- **Wessels concedes that his definition above is limited because it relies on national legal frameworks governing insolvency.**
- **He cites Fletcher's definition which includes an explanation that some proceedings transcend a single legal system, and therefore they require the foreign aspects of the case to also be considered.**
- **A fuller explanation or definition would note that international insolvency law represents attempts to develop unified mechanisms for dealing with international insolvency, to address three particular issues:**
  - **(1) whether foreign representatives can act in domestic bankruptcy proceeding;**
  - **(2) whether domestic courts should recognize foreign ancillary proceedings; and**
  - **(3) if domestic courts *should* recognize foreign ancillary proceedings, whether they should defer to conflicting foreign law.**
- **These factors touch upon issues which are controlled by domestic law systems:**

- *The first concerns the ability of a foreign office holder (e.g. administrator, liquidator, etc.) to be recognised as such in another jurisdiction. This impinges on a range of areas including domestic qualification and regulatory regimes and is therefore a departure from the ordinary position that these issues are strictly domestically focused.*
- *Recognition of foreign proceedings effectively cedes power to another jurisdiction, and considering the range of issues which insolvency law encompasses (most obviously tax and employee rights) this can have political implications.*
- *Finally, in the event of conflicting foreign laws, questions of judicial comity and cross-border cooperation risk clashing with sovereignty.*

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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.***

***The EU provides one of the most prominent example of cross border treaties and conventions.***

***The earliest roots of European bilateral international insolvency conventions appear in the 13<sup>th</sup> and 14<sup>th</sup> centuries, addressing absconding debtors and later gathering in assets. The most recent treaties however are from 2000 and 2015. The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000) applies in all EU member states except Denmark. It was reviewed after a decade's operation and an amended Recast European Insolvency Regulation, (EU) 2015/848 (the Recast Insolvency Regulation) was adopted in 2015, taking effect in June 2017. The Recast Insolvency Regulation addresses, *inter alia*, the following aspects of international insolvency:***

***Article 1: Proceedings to restructure a debtor that is facing the likelihood of insolvency.***

***Article 3: A definition of "centre of the debtor's main interests".***

***Article 60: Co-operation and co-ordination provisions applicable to corporate groups.***

***It has been hugely successful and has significantly aided the smooth operation of the EU single market because courts in EU member states have clear and consistent rules guiding the handling of insolvencies.***

***For example, Article 6(1) of the Recast Insolvency Regulation provides that "The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions." This protects insolvency proceedings in one member state***

**being interfered with by 'spoiling actions' by creditors in another state seeking to gain an unfair advantage and displace the *pari passu* principle of equal distribution.**

**The Recast Insolvency Regulation operates in conjunction with Regulation (EU) No 1215/2012 (the Recast Brussels Regulation), which as a matter of European law, primarily governs jurisdiction in civil and commercial matters. In effect, the Recast Insolvency Regulation displaces the ordinary jurisdictional rules in the Recast Brussels Regulation.**

**In practical operation both Regulations have been extremely effective. An example of a case in which a party sought to (wrongly) use the Recast Insolvency Regulation to prevent proceedings from being brought was *Emerald Pasture Designated Activity Company & Ors v Cassini SAS & Anor* [2021] [EWHC 2010 \(Ch\)](#) (16 July 2021). The matter was dealt with in an expedited jurisdiction challenge, the judge concluding:**

**For the above reasons, I conclude that:**

**(1) The claim for declaratory relief in the Claim Form does *not* derive directly from the French insolvency proceedings and is thus *not* within Article 6(1) of the Recast Insolvency Regulation;**

**(2) If the claim had been commenced prior to 31 December 2020, this court would have had jurisdiction under the Recast Brussels Regulation. Since it was commenced after that date, this court has jurisdiction over Emerald's claim by reason of the exclusive jurisdiction clause in the SFA, pursuant to common law principles.**

**This was a case which I was involved in, on the successful side, hence citing it. What was apparent throughout the case was the coherence enabled by the Recast Insolvency Regulation and the wealth of case law which existed to assist with its interpretation. Treaties and conventions are therefore, in practice, a very successful way in establishing cross-border insolvency law.**

This is answered quite well. But it would be beneficial for you to elaborate upon the nature of treaties / conventions.

3.5

Marks awarded 12 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?**

**The UNCITRAL Legislative Guide on Insolvency Law states that:**

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

*While not regulated by an insolvency law, these voluntary negotiations nevertheless depend for their effectiveness upon the existence of an insolvency law, which can provide indirect incentives or persuasive force to achieve reorganization. (emphases added)*

*UNCITRAL Legislative Guide on Insolvency Law 2004 Parts 1 and 2, pp. 9-10,  
[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf) (Accessed 11 November 2022)*

**I have cited this verbatim, and referenced it, to avoid plagiarism. To explain these further in my own words, and using English law as an example in lieu of that of Encanto/Asgard:**

- Formal insolvency proceedings
  - *In England and Wales, formal insolvency proceedings are those governed by the Insolvency Act 1986 and the Companies Act 2006. The former was significantly amended during the Covid crisis by the Corporate Insolvency and Governance Act 2020 (CIGA), which came into force on 26 June 2020. This was described as the biggest change to insolvency law since the Enterprise Act 2002 or even since key insolvency legislation itself, the Insolvency Act 1986.*

- **Formal proceedings typically lead to one of several options:**
- Administration. ***In administration, a company is protected from creditors while a qualified insolvency practitioner takes over the company's affairs. Their role is to realise maximum value for the company's creditors.***
- Liquidation. ***In liquidation, as the name suggests, insolvency practitioners will dispose of the company's assets for distribution to creditors.***
- Company voluntary arrangement (CVA). ***In a CVA, the debtor company seeks to comprise its debts with its creditors, and enter into a voluntary arrangement to discharge them.***
- Scheme of arrangement. ***This is a court-sanctioned scheme between a debtor company and its creditors. It requires considerable greater court involvement, and thus legal costs.***
- Part 26A restructuring plan. ***This was introduced by CIGA, and introduced into English law a 'cross-class cram down' mechanism to bind dissenting creditors.***
- Informal insolvency processes. ***As the definition above notes, these are negotiations between the debtor and some or all of its creditors.***
- Advantages and disadvantages. ***When considering informal processes, Lobo should have regard to the following:***
  - ***Informal processes require a greater degree of trust in FPPL's management, as the latter will have less scrutiny imposed on them. Formal proceedings by contrast introduce scrutiny by insolvency practitioners, lawyers and judges.***
  - ***Informal processes should incur fewer legal costs, both for FPPL and Lobo.***
  - ***Informal processes will not however bind other creditors, and therefore Lobo should consider the extent to which FPPL is more widely indebted.***
  - ***Informal processes are likely to be inferior to formal proceedings in terms of Lobo's ability to be guaranteed a definitive outcome, particularly in the context that FPPL has assets in both Encanto and Asgard (conversely, the cross-border nature of FPPL's business will increase costs for any formal proceedings).***
  - ***Formal procedures carry a degree of reputational risk for the debtor company, and can impede its ability to carry out business. The most obvious example is supplier unwillingness to continue existing contracts. This is in part ameliorated by CIGA's de facto prohibition so-called ipso facto clauses, and moratorium powers.***
  - ***If FPPL is not viable and insolvency is inevitable then engaging in informal processes may only prolong the inevitable, and deplete FPPL assets which might otherwise be available to Lobo.***



**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.**

	Debtor	Creditor
Company	<b>Flor Prim Pty Ltd (FPPL)</b>	<b>Lobo Lending Ltd (Lobo)</b>
Head office & significant operations	<b>Encanto</b>	<b>Asgard</b>
Registered as a foreign company in:	<b>Asgard</b>	

Difficulties that may arise for the insolvency representative re. co-operation and co-ordination

- **Insufficient of FPPL's assets may be located in Asgard to allow Lobo to make good its losses without recourse to FPPL assets in Encanto.**

Access of foreign representatives and creditors

- **Lobo may not have same rights to claim and to receive communications in relation to the FPPL's insolvency proceedings as Encanto creditors.**
- **The Encanto courts may not:**
  - **recognise the Asgard proceedings; or**
  - **recognise the Asgardian insolvency representative's right to appear.**
  - **confer on the Asgardian insolvency representative immunity in Encanto for acts carried out in the course of its duties (i.e. leaving it open to guerrilla tactics by competing creditors to undermine their ability to act in Encanto).**

Recognition of a foreign proceeding and relief

- **Even if they may in due course recognise the Asgardian proceedings and their Asgardian representative, from the time an application for recognition is made the Encanto courts may not:**
  - **stay execution by other creditors against FPPL's assets in Encanto;**
  - **suspend FPPL's right to deal with its assets;**

- *provide for the Asgardian insolvency representative's ability to examine witnesses and secure information regarding FPPL's affairs;*
- *grant any other relief that would be available to an equivalent office-holder or proposed office holder under the laws of Encanto.*
- *Even if they recognise the Asgardian proceedings and the Asgardian representative, the Encanto courts may not allow the Asgardian representative to:*
  - *initiate actions under Encanto law to challenge antecedent transactions governed by Encanto law; or*
  - *intervene in any Encanto proceedings regarding FPPL.*

Cooperation with foreign courts and foreign representatives

- *The Encanto courts may not communicate directly with the Asgard courts and the Asgard representative.*

Concurrent proceedings

- *There may not be the ability to determine which proceedings (Encanto or Asgard) should be main proceedings (and the concept may not even be recognised).*
- *There may be no rules governing control of assets in another jurisdiction, i.e. the Encanto courts may seek to secure assets in Asgard for the benefit of the Encanto proceedings/creditors, to the exclusion of Asgard creditors.*
- *There may be no rules governing cooperation between the courts of Encanto and Asgard.*

***In summary, the Asgardian representative would not have the powers of an equivalent Encanto office holder.***

International insolvency instruments developed to assist with respect to such difficulties

***The UNCITRAL Model Law on Cross-Border Insolvency and the Cross-Border Insolvency Regulations 2006 (the Model Law), was drafted to provide uniform legislative provisions for the recognition of foreign insolvency proceedings and the coordination of concurrent proceedings. It is not binding but serves as a model which jurisdictions can adopt, with or without modification.***

***In the interests of concision, I will not simply repeat the points made in the previous part of the question but in inverse. Rather, I simply note that the Model Law addresses each potential problem I have listed above, as follows:***

Access of foreign representatives and creditors. ***Chapter 2 deals with the access that the Asgard representative, and Lobo as an FPPL creditor, would require to the Encanto courts.***

Recognition of a foreign proceeding and relief. ***Chapter 3 contains the core of the substance of the Model Law. It effectively allows the enacting state to confer upon***

**a foreign office holder powers akin to those which a domestic office holder would have.**

Cooperation with foreign courts and foreign representatives. **Chapter 4 enables Encanto courts to engage with the Asgard insolvency representative.**

Concurrent proceedings. **Chapter 5 of the Model Law deals with concurrent insolvency proceedings in more than one jurisdiction and seeks to ensure consistency.**

Whether these international insolvency instruments are important, and why or why not

**All of the above issues are potentially critical in a cross-border insolvency, and therefore their absence would significantly impede the ability of Asgard insolvency office holders and Encanto courts to (1) allow Asgard representatives to act in Encanto bankruptcy proceeding; (2) for Encanto courts to recognise Asgard ancillary proceedings; and (3) if Encanto courts to recognise Asgard ancillary proceedings, whether and under what circumstances they should defer to conflicting Asgard law.**

**The Model Law and enabling domestic instruments are therefore critical.**

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.**

	Debtor	Creditor
Company	<b>Flor Prim Pty Ltd (FPPL)</b>	<b>Lobo Lending Ltd (Lobo)</b>
Incorporated company with offices in	<b>UK</b>	<b>A country in Europe</b>
Offices also	<b>Throughout Europe and other non-European countries</b>	

Whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings

***The UK left the EU on 31 January 2020 (Brexit), and there was a transitional period following that date until 31 December 2020. Prior to 31 December 2020, the UK proceedings would have been considered, under the Recast European Insolvency Regulation, (EU) 2015/848 (the Recast Insolvency Regulation), to have been main proceedings. However, the Recast Insolvency Regulation ceased to apply in the UK for matters commenced after 31 December 2020, due to the UK's departure from the EU.***

***The Recast Insolvency Regulation would therefore *not* apply with respect to the UK commenced insolvency proceedings.***

The consequences of Brexit

- ***The UK is no longer treated as an EU member state for the purpose of the Recast Insolvency Regulation.***
- ***The jurisdictional reach of the UK courts in opening insolvency proceedings has therefore now vastly reduced.***
- ***The co-ordination mechanisms set out in the Recast Insolvency Regulation between EU member states and the UK therefore no longer apply.***
- ***A determination by a UK court or insolvency officeholder that FPPL's COMI is in the UK will not bind the courts of an EU member state (unless that member state's domestic law is to this effect).***
- ***Even if FPPL's COMI is in the UK, the Recast Insolvency Regulation will not apply to insolvency proceedings relating to FPPL in the EU.***
- ***UK insolvency judgments will now be subject to stricter review by EU member state courts.***
- ***The Recast Insolvency Regulation does not cover third countries' judgments. All Member States have their own rules.***
- ***Recognition and enforcement of any UK judgments regarding FPPL in EU member states would more costly, time-consuming and burdensome for FPPL and Lobo (and other creditors) than previously.***

What further information, if any, you might need

- ***Where is FPPL's COMI? I have inferred for the purposes of the question so far that it is the UK, but it (i) is not explicitly stated; (ii) will be highly pertinent to determine the conduct of proceedings; and (iii) may be disputed - i.e. it may not simply be part of the common ground agreed between the parties, but may be something which a court is called upon to determine.***
- ***In which country is Lobo is incorporated?***
- ***In which country is Lobo considering opening proceedings?***

***I take it as implicit that Lobo is an EU state and/or considering opening proceedings in an EU state, or the issue of the Recast Insolvency Regulation would be far less pertinent. Assuming therefore that Lobo is in an EU state and/or considering opening proceedings in an EU state:***

- ***Only a few EU member states have implemented the Model Law, and would therefore generally recognise UK insolvency proceedings:***
  - ***Romania (since 2002)***
  - ***Poland (2003)***
  - ***Slovenia (2007)***
  - ***Greece (2010).***
- ***The statutory laws of Germany and Spain would provide a nearly similar approach, as would current case law in the Netherlands.***
- ***The UK's Cross Border Insolvency Regulations 2006 (implementing the UK version of the Model Law) however recognises proceedings from all EU member states.***
- ***Generally, in member states not mentioned above, UK insolvency office holders, such as FPPL's administrators in the proceedings opened by a minor creditor, would now have need to seek recognition under the local laws of each of the member states.***
- ***In summary, the consequences of Brexit are that insolvency professionals' ability to seek recognition may be difficult or impossible - or conditional, e.g. on reciprocity.***

5

Marks awarded 13.5 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.**