



**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.

#### Answer:

It has been observed that legal systems of the respective former colonial powers are still substantially being followed in African nations. Accordingly, countries like Nigeria, Kenya, Botswana, and Zambia, as well as those in Eastern part of Africa like Tanzania, have a tradition of using English law. On the other hand, countries like Angola and Mozambique have a history of civil law rooted in Portuguese law. The civil law, particularly French law, is deeply ingrained throughout Francophone countries of West Africa. Few nations, including South Africa and Namibia, have mixed legal systems as a result of the impact of both English law and Roman-Dutch law (Civil law) on their respective legal system.

Accordingly, it can be concluded that many of the older imported laws, still lays the foundation for current legislation in African countries, however with changing times many States have begun implementing modern insolvency laws in order to ensure fair and harmonized framework.

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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.

#### Answer:

The repercussions of 1998 financial crisis in East Asia which severally impacted Indonesia and Thailand gave rise to insolvency reforms in this region. Few examples of reforms initiatives are as under:

(i) Thailand made significant changes to its outdated bankruptcy laws to permit company reorganisation akin to Chapter 11 in the United States. The amendment, which took the form of an additional section on Corporate Reorganization under Chapter 3/1, w.e.f 1998. Its contents and concepts have undergone numerous modifications over time.<sup>1</sup>

(ii) In 2004 Indonesia enacted Bankruptcy Law which quickly become a promising means for foreign lenders to enforce their security rights by levelling the playing field with Indonesian debtors. <sup>2</sup>

(ii) Between 2010 and 2018 Singapore conducted a corporate rescue reform process. The reform process culminated in the enactment of an omnibus insolvency statute known as the Insolvency Restructuring and Dissolution Act (IRDA) in 2018. <sup>3</sup>

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### Question 2.3 [maximum 4 marks]

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

#### Answer:

In North America, Canada and the United States attempted to achieve an agreement on a bilateral insolvency treaty in the 1970s, but they failed to reach a consensus as same was too ambitious in scope. Thereafter, both the countries have made tangible advancements through adoption of Model Law and through other mechanisms like Protocols. However, it may be noted that even prior to these initiatives there has been bilateral co-operation and co-ordination between the two states based on current legislation and long-standing case laws around comity. **There is scope to elaborate and discuss the relevant case law.**

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<sup>1</sup> Pornavalai, C. M. (2008). Bankruptcy Law in the Kingdom of Thailand. Tilleke & Gibbins International Ltd., 1-11.

<sup>2</sup> Sulaiman, D., & Tandjung, H. B. (2020). Indonesia's Bankruptcy Law in Urgent Need for reform. Asia - Pacific Restruturing Review 2021, 66-73.

<sup>3</sup> Tan, M., Han, K., Phoon, A., & LLP, Z. C. (2020). Recent Developments in Singapore's Restruturing Regime. Asia - Pacific Restruturing Review 2021, 84-99.

While the question says 'briefly' it is for 4 marks.

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Marks awarded 8 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.

#### **Answer:**

Most jurisdictions provide a number of ways to contest certain transactions entered into by a debtor prior to the commencement of the insolvency proceeding. These mechanisms, generally known as avoiding powers, voidable dispositions, or claw-back actions, which allows the retrospective avoidance of certain transactions<sup>4</sup>. Therefore, the existence of avoiding powers may create several benefits i.e., promote a fair and efficient insolvency system – which treats stakeholders equitably, minimises costs inherent to insolvency and maximises stakeholder's wealth<sup>5</sup>. Further, such provisions address opportunistic, value-destroying behaviour usually faced by debtors in the zone of insolvency, ensuring that creditors as a whole are treated equitably by allowing payments made or property transferred under certain transactions to be returned to the debtor estate or their effect reversed. Thus, the existence of avoidance powers may help maximize the value of the firm, not only ex-post (i.e., once the debtor is in insolvency) but also ex ante, since it may discourage market participants to enter into transactions with an insolvent debtor. Further, transaction avoidance rules are widely considered to be an important tool for the regulation of related party transactions in insolvency<sup>6</sup>.

With regard to question of possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions it may be noted that in civil law systems, fraudulent conveyance law is based on the *actio pauliana*, but English law bases this remedy on the Act of Elizabeth of 1570. In actuality, the specific requirements for applying the remedies may vary amongst laws addressing these issues.

**This is well answered. There is some scope to elaborate in parts.**

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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:

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<sup>4</sup> Jackson, T. H. (1984). Avoiding powers in bankruptcy. *Stanford Law Review*, 725-787

<sup>5</sup> Mevorach, I. (2011). Transaction Avoidance in Bankruptcy of Corporate. *ECFR*, 235-258.

<sup>6</sup> Zwieten, K. v. (2018). Related Party Transactions in Insolvency. *ECGI Working Paper Series in Law*, 1-21



“[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.

**Answer:**

The author acknowledges that this definition has limitations because it is connected to the particular country national legal framework governing insolvency law. He further refers to various other definition which highlighted such limitations, such as the definition provided by Professor Ian Fletcher, a renowned scholar on aspects of commercial insolvency<sup>7</sup> where he proposes that:

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

**It would be beneficial to also elaborate in your own words.**

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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.

**Answer:**

Treaties or conventions are international agreements/instruments to which states become signatories and as such bind themselves and affect their domestic law accordingly. The Vienna Convention on the Law of Treaties defines a ‘treaty’ as *“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”*<sup>8</sup> (Article 2(1)(a)). Before the adoption of UNCITRAL Model law only a limited number of countries have a legislative framework for dealing with cross-border insolvency that is well suited to the needs of international trade and investment. Accordingly, in the absence of specific legislation to deal with Cross Border Insolvency treaties and agreements are entered between two states for ensuring cooperation and communication between them in the cases of Cross Border insolvency.

While there have been limited success in achieving success through treaties or conventions in the area of international insolvency law. The Nordic Convention (1933), a rare successful multilateral treaty, originated in Scandinavia. For many years, European attempts to establish multilateral international insolvency conventions were unsuccessful. The Council of Europe, which is having 47 members countries at present, was setup in 1949 to develop Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. It completed the Istanbul Convention,

<sup>7</sup> Bogdan, M., 2000. Ian F. Fletcher, Insolvency in Private International Law: National and International Approaches. Nordic Journal of International Law, 69(4), pp.527-528

<sup>8</sup> (1969). *Vienna Convention on the Law of Treaties*. Vienna: United Nations.

Council of Europe Treaty Series No. 136, which is a Convention on Certain International Aspects of Bankruptcy. However, same is signed by 8 member states only and accordingly not ratified by, despite having 8 member states who signed it, not enough of them ratified by a sufficient number for it to enter into force. The reasons for achieving less success through treaties and convention may be due to the following reasons:

- (i) Requires long-term negotiations between states.
- (ii) Time-consuming and costly process.
- (iii) Lack of uniformity in treaties signed on same subject between different States.
- (iv) Procedural complexities in implementing bilateral agreements at multilateral level.

Accordingly, instead of “*hard law*” solutions like treaties to international insolvency law issues, more success has been gained through the use of “*soft law*” options like Model Law, draft legislation that UNCITRAL recommended its member States to adopt, with or without modification.

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Marks awarded 13 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?

##### **Answer:**

As per the UNCITRAL Legislative Guide on Insolvency Law <sup>9</sup>there are two general forms of corporate restructuring:

(i) Formal insolvency proceedings are those that are started and governed by the insolvency law. It particularly includes both liquidation and reorganisation or rescue proceedings.

(ii) Informal or “private” insolvency arrangement often entails speaking with creditors directly to outline the present financial status of your business and attempt to reach a settlement (for example, an agreement to accept delayed payment, to settle a debt by a one-time payment, or to implement a new payment arrangement). Usually, these negotiation techniques have emerged in the banking and commercial sectors, and they frequently call for restructuring the

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<sup>9</sup> As per UNCITRAL Legislative Guide on Insolvency Law

bankrupt debtor in some way. Although they are not regulated by the formal insolvency law, however availability of formal insolvency law act as incentive measure for parties to enter into informal insolvency arrangement.

Lobo may consider following advantages and disadvantages while entering into informal out-of-court workout arrangement with FPPL. The details of the same is as under:

**Advantages:**

(i) Lower cost: A Formal insolvency is much more expensive for the company than an informal insolvency arrangement. Additionally, it provides the business in pink health a greater freedom to bargain and suggest different strategies for the benefit of the creditor (Lobo).

(ii) Faster Process: An informal insolvency arrangement is comparatively faster and completed in less time than the formal insolvency arrangement.

(iii) Greater privacy: An informal insolvency arrangement is less bureaucratic as compared to the formal process which has variable reporting requirements. Further privacy ensure that reorganisation strategies are not known to the public and ultimately result in less business disruptions, no impact on employee morale and trade creditor relationships.

(iv) Avoiding complexity involved in cross Border insolvency cases: If Lobo may enter into informal out-of-court workout arrangement with FPPL, it may avoid the complexities involved in dealing with cross border insolvency cases.

**Disadvantages:**

(i) Moratorium protection not available: One of the purposes of the insolvency law is to ensure the suspension of debt collection actions by the creditors, and provide time for the debtors and creditors to re-negotiate their contract. Accordingly, moratorium provisions provide a rapid “freeze” to prevent fraud and to protect the legitimate interests of the parties involved. Accordingly, this benefit will not be available in case of informal arrangement to the Lobo. Accordingly, FPPL may not be protected from collection effort by other creditors.

(ii) Lack of finality in the process: One of the major disadvantages of the informal out-of-court workout arrangement is risk of not attaining finality in the process. In the instant case if FPPL failed to reach an agreement with Lobo it will result in unnecessary delay in recovering money and they have to explore option to use formal insolvency process.

(iii) Statutory Sanction not available: Informal arrangement is not binding on all parties concerned and is under the threat of subsequent challenges by the creditors.

**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.

**Answer:**

Co-operation and co-ordination between insolvency representative's play an important role in case of concurrent insolvency proceedings which make it easier for them to monitor and supervise the insolvent debtor's assets and affairs. However, insolvency representatives across jurisdictions may face various issues in co-operation and co-ordination during concurrent insolvency proceedings and details of the same is as under:

(i) Non availability of Cross border insolvency framework: Major issues which the insolvency representatives may face in cooperation and coordination is the lack of availability of Cross border insolvency framework in one or both states. This may result in lack of mandatory duty upon the respective insolvency representative to communicate and cooperate in concurrent proceeding.

(ii) Restriction on foreign representative's to directly access courts of the domestic jurisdiction – Some jurisdictions restrict the direct access to foreign representative in home jurisdiction. Accordingly, cooperation and co-ordination will be impacted severally in those cases for example in Japan, cooperation and communication are limited to domestic insolvency practitioners<sup>10</sup>.

(iii) Multiple concurrent insolvency proceedings: In those cases where assets of the debtor are situated in more than two jurisdiction and multiple insolvency proceeding are ongoing against the debtor make cooperation and coordination difficult among insolvency representatives which are from different states.

**International insolvency instruments to address the issue of cooperation and coordination:**

The additional complexities surrounding cross-border insolvencies necessarily result in uncertainty, risk and ultimately costs to businesses. To resolve these concerns holistically, the need for having robust institutional arrangement to deal with cross border insolvency issues in an efficient and swift manner has gained momentum in the last few decades. The details of international insolvency instruments to address the issue of cooperation and coordination to address these issues is as under:

**(i) Cross-border insolvency agreements and protocols:**

To coordinate the concurrent insolvency proceeding in a better manner, the relevant parties in each country may enter into an agreement to help co-ordinate the entire cross-border insolvency process. This will help in reducing costs associated with the process and to maximise the value of the assets of the debtor. By resolving the conflict of laws and other related difficulties, protocols have proven to be quite effective in lowering the costs of litigation associated with cross-border insolvency processes.

As per the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, protocols can increase the value of recovery in insolvency proceedings by about 40% by preventing stakeholders from initiating detrimental actions. Accordingly, protocols have the potential to resolve a wide range of procedural concerns in cross-border insolvency procedures and establish the best framework for a speedy and effective resolution of the debtor within the

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<sup>10</sup> Look Chan Ho, *A Commentary on the UNCITRAL Model Law* (Vol. 1 4th Edn., 2017), p. 328; Kazuhiko Yamamoto, New Japanese legislation on cross-border insolvency as compared with the UNCITRAL model law (2002) Vol. 11:67-96 *International Insolvency Review*.

confines of the domestic laws of the states involved. The parties shall not, however, utilise a protocol as a means of getting out of any legal obligations that they may have under the relevant applicable laws.

## **(ii) UNCITRAL Model Law on Cross-Border Insolvency**

The adoption of the UNCITRAL Model Law on Cross-border Insolvency ('Model Law' or 'MLCBI'), which provides a broad procedural framework for access, recognition, cooperation and coordination in cross border insolvencies can fill the gaps in domestic laws to facilitate the growth of a harmonious and co-operative ecosystem with uniformity in all the adopting jurisdictions. The Model Law was adopted by the UNCITRAL in 1997 and since then it has been adopted by 53 States in a total of 56 jurisdictions. There is enough jurisprudence that has developed under the Model law to assist jurisdictions which are in the process of adopting it or have recently adopted it. The guide to enactment of Model Law has been revised by the UNCITRAL based on experiences in different jurisdictions. In 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation was adopted by the Commission. In 2018, UNCITRAL has come up with Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The MLCBI does not require reciprocity and Chapter IV of the MLCBI authorises cooperation and direct communication between a local court and foreign courts or foreign representatives.

(iii) Other attempts consist of soft law approaches which try to achieve the goal of cooperation and coordination through joint administration between national courts with jurisdiction over different assets of the same insolvent debtor. The detail of the same is as under:

a) the ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases

published by The American Law Institute (ALI) and The International Insolvency Institute (III) in

2000 – The object of the guidelines “to provide a non statutory basis for cooperation in international insolvency cases involving two or more of the North American Free Trade Agreement (NAFTA) States”<sup>11</sup>

b) the ALI-III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published in 2012 - The primary goal of these Guidelines is to ensure Court-to-Court Communications in International Insolvency Cases is to improve coordination and harmonisation of insolvency processes that involve multiple States through communications between the States involved.

c) the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Matters in 2016 - The JIN Guidelines address “key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs”<sup>12</sup>

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<sup>11</sup> I F Fletcher and B Wessels, “Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases” (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012), p xvii.

<sup>12</sup> Judicial Insolvency Network. (2022, November 5). *JIN Guidelines*. Retrieved from <https://www.jinglobal.org/jin-guidelines.html>

### 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.

#### Answer:

It may be noted that following the UK exit from the European Union, the European Insolvency Regulation (EIR) ceased to apply w.e.f 11 p.m. of December 31, 2020.<sup>13</sup> Accordingly, in the instant matter EIR shall not apply with respect to the UK commenced insolvency proceedings. However, prior to the aforementioned time period, recognition and enforcement of restructuring and insolvency procedures and judgments between the UK and EU Member States was subject to EIR regulations which had direct effect and broadly offered automatic recognition. Accordingly, from the prospective of Insolvency Courts and Creditors in EU member states a Brexit would mean *inter alia*,

- (i) that insolvency proceedings started in the UK wouldn't be immediately recognised in other EU Member States.
- (ii) there is no mandatory duties of cooperation and communication between courts and insolvency representative.
- (iii) the main insolvency proceeding in EU member states would not have as an auxiliary measure of non-main proceeding in UK.

Notwithstanding with the above, there is still effective framework in form of Cross-Border Insolvency Regulations 2006 (Great Britain's enactment of the UNCITRAL Model Law on Cross-Border Insolvency) is in place for the UK to recognise proceedings and judgments originating from EU Member States.<sup>14</sup> However, the matter will not remain straight forward as it was prior to Brexit. Accordingly, recognition of proceeding from other country in Europe may require additional procedural hurdles and requiring expert examination of the issues involved.

Further, any court in UK may assist courts with equivalent insolvency jurisdiction in any part of UK or any relevant country or territory and may apply comparable insolvency law applicable by either court under Section 426 of the Insolvency Act of 1986. However, request for assistance needs to be come from foreign courts rather than foreign insolvency representative. In addition to this Insolvency Service has published a guide titled "*Cross-border Insolvencies: Recognition and Enforcement in EU Member States*" on March 24, 2021 to provide insolvency representative with some basic information regarding the applicable frameworks in the different EU member states, as a starting point towards seeking recognition for UK insolvency proceedings and dealing with assets in the EU.<sup>15</sup>

#### Additional information requirement:

This question can be answered in better manner if the name of the country in Europe in which Lobo is considering initiating insolvency proceeding, could be provided as this will help in answering question in better way after taking reference from the Insolvency Service guide on

<sup>13</sup> <https://www.legislation.gov.uk/ukxi/2019/146/contents>.

<sup>14</sup> Oliver, R., Craggs, M., & Thorn, M. (n.d.). How will Brexit impact cross-border insolvencies? *Norton Rose Fulbright*.

<sup>15</sup> The Insolvency Service . (2021). *Cross-border Insolvencies: Recognition and Enforcement in EU Member States*.

Cross-border Insolvencies: Recognition and Enforcement in EU Member States. This guide provide information about summary of the arrangements for recognition of foreign insolvency proceedings regarding seven of the UK's most significant EU trading partners.

**5**  
**Marks awarded 14.5 out of 15**

**\* End of Assessment \***

**TOTAL MARKS AWARDED 44.5/50**  
**An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.**