



**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 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.

- 2.1 The African jurisdictions inherited, and continue to use the insolvency laws of their respective former colonial powers. For example:
- (a) With the British Empire as their former colonial master, **Nigeria, Kenya, Botswana, Zambia and Tanzania** have their insolvency laws steeped in the common law or **English law tradition**;
  - (b) With Portugal as their former colonial master, **Angola and Mozambique** have their insolvency laws rooted in the civil law tradition based on **Portuguese law**;

- (c) With both Netherlands and the British Empire as their former colonial masters, **South Africa** and **Namibia's** legal systems and insolvency laws have features of **both Roman-Dutch law and English law.**

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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.

2.2 The important events and/or developments that gave rise to insolvency law reform in Eastern Asia are as follow:

- (a) The **1997 Asian financial crisis** provided impetus for insolvency law reform in Eastern Asia, in countries such as:
- (i) **Thailand:** Amendments to the Bankruptcy Act in April 1998 and March 1999, to allow the development of rehabilitation plans under insolvency; and
  - (ii) **Indonesia:** Amendments to the Bankruptcy Act in April 1998, which provide *inter alia*, definite time-lines in the insolvency process, establishment of a new commercial court, and encouraging corporate rehabilitation by limiting the ability of secured creditors to foreclose on loans during rehabilitation procedures.
- (b) With aspirations to become the **Asian insolvency and debt-restructuring hub**, **Singapore** has undertaken a reform of its corporate restructuring and insolvency framework. This culminated in the amendments to the Companies Act in 2016, and the omnibus legislation in **Insolvency, Restructuring and Dissolution Act 2018** ("IRDA"):
- (i) The IRDA consolidated both the individual insolvency provisions in the Bankruptcy Act and corporate insolvency and restructuring provisions in the Companies Act;
  - (ii) The reforms aimed at improving the schemes of arrangement regime, which is a debtor-in-possession regime, and draws from features from both the English scheme of arrangement and Chapter 11 US Bankruptcy Code. The reforms provide for the schemes of arrangement regime *inter alia*, an enhanced moratorium, super-priority for rescue financing, cross-class cram-downs and pre-packs;
  - (iii) In March 2017, Singapore adopted the **UNCITRAL Model Law on Cross-Border Insolvency** ("Model Law"), to enable Singapore courts to recognise and provide assistance and relief to foreign corporate insolvency and restructuring proceedings.

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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.

2.3 The various initiatives undertaken to resolve international insolvency issues between North America i.e. U.S. and Canada include the following:

- (a) A **draft bilateral treaty** between the U.S. and Canada on cross-border insolvency was produced in 1979. The draft Canada-U.S. treaty envisioned a single administration of insolvency proceedings under the law of the nation in which the bankrupt retained the greater value of its assets at the time of the filing,<sup>1</sup> and all proceedings (including proceedings in the opposite nation) were to be determined by the laws of the nation of the main forum.<sup>2</sup> The draft treaty appears to be overly ambitious with its universalism aspirations. The project was **not successful** as the draft treaty was **never ratified** by both countries;
- (b) Prior to the enactment of the Model Law and adoption of protocols, there had already been **long-standing tradition of cooperation** in cross-border insolvency issues between Canada and U.S. based on **existing legislation**<sup>3</sup> and **case-law on comity or reciprocity**;<sup>4</sup>
- (c) Much progress for co-operation was made when Canada<sup>5</sup> and U.S.<sup>6</sup> each adopted the **Model Law**. Cooperation between Canadian and U.S. courts and insolvency practitioners had been effected via the **Memoranda of Understanding on Court to Court Communication** and use of **protocols** respectively.<sup>7</sup> It has been commented that the protocols have been **practical, successful, “very useful”** and **“indispensable”**,<sup>8</sup> in dealing with cross-border insolvency cases involving the two jurisdictions as such setting time bars to claims, sale of assets and proposed distribution of sale proceeds, classification of creditor claims for purposes of reorganisation plans;<sup>9</sup>
- (d) The **American Law Institute**<sup>10</sup> (“ALI”) **Transnational Insolvency Project**<sup>11</sup> was an undertaking to promote co-operation amongst the North American Free Trade Agreement<sup>12</sup> (“NAFTA”) states. The **Guidelines Applicable to Court-to Court Communications in Cross-Border Cases** and the 2003 Principles have been **adopted and widely endorsed by several bodies**, including the National Conference of Bankruptcy Conference and the Canadian Judicial Council.<sup>13</sup>

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

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<sup>1</sup> Article 15(1) of the United States of America – Canada Bankruptcy Treaty.

<sup>2</sup> See *Ibid*, arts.3, 15(2).

<sup>3</sup> Section 268(3) of the Canadian Bankruptcy and Insolvency Act; s.18.6(3) of the Canadian Companies’ Creditors Arrangement Act; s. 304 of the U.S. Bankruptcy Code.

<sup>4</sup> For example, the Canadian courts have used the Supreme Court of Canada’s decision in *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 as a basis to recognize U.S. insolvency proceedings in Canada, and to issue moratorium orders on proceedings commenced in Canada against the U.S. debtor.

<sup>5</sup> Canada adopted the Model Law in 2009, at Part IV of the Companies’ Creditors Arrangement Act.

<sup>6</sup> The U.S. adopted the Model Law in 2005, as Chapter 15 of its Bankruptcy Code.

<sup>7</sup> This is exemplified in the U.S. and Canadian administration of Olympia and York’s U.S. subsidiaries and Canadian parent companies. Justice Blair in Toronto agreed with Bankruptcy Garrity in New York on use of a protocol for communication between the judges and on Principles of Cooperation between the U.S. and Canadian insolvency representatives: J.S. Ziegel and D.E. Baird, *Case Studies in Recent Canadian Insolvency Reorganisations: In Honour of The Honourable Lloyd William Houlden*, Casewell Legal Publications (1997) at p 177.

<sup>8</sup> Jacob Ziegel, “Canada-United States Cross-Border Insolvency Relations and the UNCITRAL Model Law” 32 *Brook. J. Int’l L.* (2007) at 1053.

<sup>9</sup> *Ibid*.

<sup>10</sup> The ALI is a U.S. professional body comprising of research and advocacy group of judges, lawyers, legal scholars top promote the U.S law and to adapt the U.S. law to changing social needs.

<sup>11</sup> ALI states that this is a joint project with the International Insolvency Institute, on ALI’s website: <https://www.ali.org/publications/show/transnational-insolvency/>, accessed on 7 July 2022.

<sup>12</sup> The NAFTA states include the U.S., Canada and Mexico.

<sup>13</sup> ALI’s website, *supra* n. 11.



**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.

3.1

- (a) The insolvency avoidance rules are shaped by many factors such as the **jurisdiction's history, culture, and the kind of legal system**.<sup>14</sup>The possible historical reasons for the difference in approaches regarding treatment of voidable disposition in English law vs civil law jurisdictions can be traced to the **sources of the avoidance rules**:
- (i) The rules on voidable dispositions in **civil law jurisdictions** can be traced back to ancient Roman remedies,<sup>15</sup> the most well-known being **actio pauliana**. *Actio pauliana* is to grant protection to a creditor by reversing fraudulent transactions by a debtor undertaken to defraud creditors.
  - (ii) The rules of voidance dispositions in **English law** can be traced back as early as to the reigns of Edward III (1376) , Henry VIII (1542) and Elizabeth I (1570).<sup>16</sup>
- (b) The **context or framework for the treatment** of these avoidance rules in insolvency systems are as follow:
- (i) The rules allow the certain past transactions to be **retrospectively set aside** by the Court, on application by the insolvency administrator. These transactions must occur in a **specific period of time** ("suspect period") before the commencement of insolvency proceedings, to which the insolvent debtor was a party, if the transactions have certain effects; **Which transactions?**
  - (ii) The effects may include either the transfer of the debtor's result in a **diminution of the debtor's net worth** (either by disposal of its assets for no value or at less than fair market value) or a payment that **contravenes the pari passu principle** (i.e. payment of a creditor of the same class ahead of other creditors) and the **transaction or payment has caused the debtor to become insolvent**;
  - (iii) Some systems may provide that a **presumption that the debtor is deemed to be insolvent**, if the debtor had entered into the **transaction or made**

<sup>14</sup> Keay, A, "The Harmonization of the Avoidance Rules in European Union Insolvencies" (2007) ICLQ 66(1). pp 79-105 at p 83.

<sup>15</sup> *Ibid*. The other three ancient Roman remedies being *interdictum fraudatorium*, the *action in factum*, the *action in integrum restitutio*.

<sup>16</sup> Hamish Anderson, "The Nature and Purpose of Transaction Avoidance in English Corporate Insolvency Law" (2014) 2 NIBLeJ 2 at 4.

**payment which has the effect set out at [3.1(b)(ii)] with a third party that is related to the debtor;**

- (iv) However, an insolvency system would usually have a **“safe-harbour” defence** for **“unsuspecting” third parties/creditors** who may have entered into a transaction with, or received payment in good faith or in the ordinary course of business, from the insolvent debtor during the suspect period, which has the effect set out at [3.1(b)(ii)] with the insolvent debtor. Such property and/or payments transferred would not be ordered by the court to be set aside or clawed back by the administrator under such a defence.
- (c) However, despite the differences in details in avoidance rules between the civil law jurisdictions and English law, **avoidance rules are important as they share the following objectives and the balance of competing policy interests** in an insolvency system:
  - (i) **Support the collective goal of insolvency proceedings:** The general objective of insolvency laws is that it is a collective system, that seeks to maximise recovery and realisation of assets on behalf of all creditors, and it requires all like creditors to be treated the same, and eschews individual creditor action which is less efficient. Avoidance provisions ensure that creditors receive a fair dividend of an insolvent debtor’s estate consistent with the statutory priorities, and prevents an individual creditor by having an unfair advantage over another creditor by receiving payments and/or assets (at less than fair market value) made by the debtor prior to insolvency;<sup>17</sup>
  - (ii) **Deterrent effect against individual creditor action:** Avoidance provisions may have a deterrent effect on creditors who may wish to pursue individual remedies against the debtors when they know that these remedies may be reversed or set aside upon commencement of the debtor’s insolvency;<sup>18</sup>
  - (iii) **Deterrent effect against debtor committing fraud:** Avoidance provisions deter insolvent debtors from hiding assets, and/or transferring assets to, or making unfair payments to “friendly” related parties in the suspect period, as such transactions are liable to be re-opened and/or set aside;
  - (iv) **Preservation and/or augmentation of a debtor’s assets for distribution to a creditor:** Avoidance provisions also result in recovery of assets, to swell up a debtor’s available pool of assets for distribution to the creditors, by allowing a ‘wrongful’ transaction to be set aside, and allow an insolvency administrator recover property transferred or payments made by the debtor;<sup>19</sup>
  - (v) **Encouraging framework for out-of-court settlement:** Creditors armed with the knowledge that payments received by them in the period leading up to a debtor’s insolvency may be set aside, would be incentivised to enter into out-of-court work-outs;<sup>20</sup>

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<sup>17</sup> UNCITRAL Legislative Guide on Insolvency, pp 136, para 151.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Op cit*, pp 136, para 152.

<sup>20</sup> *Ibid.*

- (vi) **Protection of legitimate expectations of innocent third parties:** the avoidable disposition rules usually have “safe-harbour” defences for third parties who have entered into a transaction at arm’s length in good faith without knowledge of the debtor’s insolvency. Such transactions or payments would not be aside even though they may deplete the debtor’s estate, as they fulfil the legitimate expectations of third parties who have entered into such transactions in good faith or in the ordinary course of business.

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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.

3.2 The above definition is perceived to have limitations for the following reasons:

- (a) The definition is limited to a certain extent, as it appears to be **rooted in the assumption and existence of a national legal framework of insolvency law**.
- (b) Fletcher provides an alternative definition of international insolvency law, as **an insolvency case that is not bound by a single legal system**, such that the insolvency rules of one jurisdiction could not be determinative of the foreign elements of the case;<sup>21</sup>
- (c) Omar states that the **conflict of law issues** are brought into sharp relief in a cross-border insolvency situation. This is because where a debtor is faced with claims from creditors from different jurisdictions, there will be a conflict between the statutory priorities rules of the debtor’s domicile jurisdiction, and the foreign laws that provide security and/or statutory priorities which the foreign creditors may enjoy in their home jurisdiction.<sup>22</sup>
- (d) Fletcher expands on the conflict of law issue, and states that three questions could be posed:<sup>23</sup>
  - (i) The **choice of forum** i.e. which court can exercise the right to hear and determine the matter. This would require an inquiry whether there is a sufficient nexus between the debtor and the jurisdiction in which the matter is brought;

<sup>21</sup> I F Fletcher, *Insolvency in Private International law- National and International Approaches*, Oxford University Press (1999), pp 5.

<sup>22</sup> P J Omar “*The Landscape of International Insolvency*”, (2002) 11 IIR 173, p 175.

<sup>23</sup> *Ibid*.

- (ii) The **recognition and enforcement or effect of a foreign judgment** on the same matter. This raises the issue of the conclusive and determinative nature of a foreign judgment, and the question whether and to what extent the terms of the foreign judgment would be carried out or executed in the local jurisdiction;
  - (iii) The **choice of law i.e.** a court may have to decide which law to apply (i.e. the local or foreign law), after it has determined that it will hear a matter. Different legal systems have different approaches to this issue. For example, in common law jurisdictions, the law of the forum applies, where a party raises the choice of law issue.
- (e) The above definition in the quotation also **does not take into the complexity of issues that could arise in a cross-border insolvency case**. Westbrook has identified at least **nine (9) key issues** that could arise:<sup>24</sup>
- (i) Locus standi for recognition of the foreign representative;
  - (ii) Moratorium on creditor actions;
  - (iii) Creditor participation;
  - (iv) Status of executory contracts;
  - (v) Co-ordination of claim procedures;
  - (vi) Statutory priorities in claims;
  - (vii) Avoidance provision powers;
  - (viii) Discharges of debts;
  - (ix) Conflict of law issues.

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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.

3.3 Treaties and conventions are public international law instruments to which nations agree with each other, and become signatories. After entering into a treaty or convention, a country would enact domestic law to comply with their international treaty obligations:

- (a) It has been commented that the **early successful examples** of treaties or conventions as a source of cross-border insolvency, has been **bilateral treaties** entered into between **countries with close geographical, historical, social and commercial relationships**,<sup>25</sup>

<sup>24</sup> J L Westbrook, "Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court", (2018) 96 Texas Law Review, p 1473.

<sup>25</sup> I F Fletcher, *op cit*, at pp 221.

- (b) However, it has been noted that there are **very few successful large multi-lateral treaties or conventions** addressing cross-border insolvency issues that have been concluded, and brought into force for the countries that have participated in the negotiation process. This is due to the **technical and practical difficulties of finding common ground** on all the terms that are acceptable to all parties on complex issues of cross-border insolvency:
- (i) In North America between the **United States and Canada**, there were attempts at a **bilateral agreement** in cross-border insolvency matters in the 1970s, but the attempts did not come to fruition;
  - (ii) Europe has attempted at achieving multi-national insolvency conventions for many years to no avail. For example, the **Council of Europe concluded a Convention on Certain International Aspects of Bankruptcy**<sup>26</sup> (known as the Istanbul Convention) in 1990. It was signed by eight (8) member States only. However, it was not ratified by a sufficient number of states for the convention to come into force;
- (c) The few **successful multilateral treaties** are due to the **close proximity** amongst the different countries in terms of **legal systems, cultural heritage, social, economic and international outlook**:
- (i) **The Montevideo Treaties (1889) and (1940)**:<sup>27</sup> The 1889 Treaty cover both individual and corporate insolvency. It provides for a singular set of proceedings in the commercial domicile of the debtor in a treaty state even if the debtor has branches or agents or occasionally conducts business in another treaty state. It also provides for the possibility of concurrent proceedings where the debtor has economically autonomous businesses in different treaty states;
  - (ii) The **Havana Convention on Private International Law 1928 (Bustamante Code)** amongst Latin and Middle American States:<sup>28</sup> The treaty provides for a single insolvency proceeding if the insolvent debtor has its civil or commercial domicile in one of the treaty states.<sup>29</sup> A secondary proceeding may be commenced strictly for economically autonomous entities operating in other contracting states;<sup>30</sup>
  - (iii) The **Nordic Convention 1933** amongst Scandinavian countries:<sup>31</sup> The Convention covers technical matters such as jurisdiction, recognition, and rules of choice of law, which is still in force today. The treaty has universalist aspirations as it provides for example, that a declaration of bankruptcy in any contacting State shall also apply to the bankrupt's property in the territory of the other States.<sup>32</sup> This extraterritorial effect as to the bankrupt's property is immediate and automatic and no further formality of registration of the order in the other member state is required.

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<sup>26</sup> Council of Europe Treaty No. 136.

<sup>27</sup> The 1889 treaty had been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru, Uruguay whilst the 1940 treaties were ratified by Argentina, Paraguay and Uruguay.

<sup>28</sup> The signatory countries include Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama., Peru, Venezuela.

<sup>29</sup> Article 414 of the Bustamante Code.

<sup>30</sup> Article 415 of the Bustamante Code.

<sup>31</sup> Denmark, Finland, Iceland, Norway and Sweden.

<sup>32</sup> Article 1 of the Nordic Convention.

**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?

4.1 (a) The main differences, advantages vs disadvantages between “formal” insolvency proceedings and “informal insolvency proceedings” are as follow:

<b>“Formal” insolvency and rehabilitation proceedings</b>	<b>“Informal” insolvency and rehabilitation proceedings</b>
<p>(a) In formal corporate insolvency or rehabilitation proceedings, there is usually an <b>automatic statutory moratorium</b>, to prevent individual creditor enforcement action against the debtor, and piece-meal dismemberment of the debtor’s assets.</p>	<p>(a) In informal work-outs, there is <b>no automatic statutory moratorium</b>, to prevent individual creditor action against the debtor. An <b>individual creditor who is not bound by the informal work out may commence or continue proceedings</b> against the debtor.</p>
<p>(b) In formal corporate insolvency or rehabilitation proceedings, there <b>may be a displacement of existing management</b> (i.e. directors of the company) by an <b>independent third party insolvency administrator</b>.</p> <p>If the <b>management of the company has become dysfunctional and/or there are allegations of wrongdoing by the management</b>, such a process may be <b>preferable/advantageous</b> to Lobo, as a third party administrator will replace the management.</p>	<p>(b) In informal corporate work-outs, the <b>management of the company usually remains in place, and the company continues carrying on business</b>.</p> <p>Lobo may find this to be a <b>disadvantage</b>, as there is no independent third party administrator to take over the management of the company, if the <b>management has become dysfunctional and/or there are allegations of wrongdoing by the management</b>.</p>

<p>However, the <b>management of the company may also remain in place</b>, if the formal corporate <b>rehabilitation process elected is a “debtor-in-possession”</b> (for example, the U.S. Chapter 11 process).</p>	
<p>(c) The <b>rehabilitation plan</b> is usually <b>voted on by a statutory requisite majority of creditors</b> either in value and/or number, and <b>may be required to be reviewed and/or approved by the Court</b>, before the plan may be implemented.</p> <p>For the plan to be voted on by creditors and approved the court, there are usually requirements for the <b>Company to make sufficient disclosure of its financial status in a report</b>, and must include a <b>commercially viable rehabilitation plan that include fresh capital injection and the restructuring/discounting of existing debts</b>.</p> <p><b>Dissenting creditors (depending on the rules in the rehabilitation regime) may be crammed down. Key or secured creditors may be given powers to veto the rehabilitation plan.</b></p>	<p>(c) There may or may not be a rehabilitation plan put forward by the company with all of its creditors. The company <b>may enter into individual agreements with an individual or some of its creditors</b>. The company is <b>not obliged to disclose its financial status and/or put forward a rehabilitation plan to be voted on by creditors</b>.</p> <p><b>Dissenting creditors are not bound</b> by any informal workout (and they may have recourse to formal proceedings which may scuttle any informal work-outs), and that there is <b>no court oversight/supervision on the implementation of the plan. Is this an advantage or disadvantage?</b></p>
<p>(d) In the event that the <b>rehabilitation is not successful</b>, there is usually a statutory mechanism for the <b>process to be converted into a liquidation</b>. place the company into liquidation. From Lobo’s perspective, this would be an <b>advantage</b>, as there would be continuity of formal restructuring process into liquidation.</p>	<p>(e) In the event that the informal work-out is not successful, there is no automatic conversion into a liquidation, and <b>the company may be left in a limbo</b>, unless a creditor makes a formal application to place the company into liquidation. From Lobo’s perspective, this would be a <b>disadvantage</b>.</p>
<p>(d) Other disadvantages with a formal rehabilitation process is that there would be <b>publicity</b> with the commencement of the process, which <b>may draw unwanted attention to Lobo (especially if Lobo is a key creditor)</b>. Another possible <b>disadvantage</b> from Lobo’s</p>	<p>(f) Other advantages with an informal work-out is that it is entirely <b>private, confidential and consensual process</b> which would preserve <b>the goodwill and/or reputation of the FPPL and all parties involved</b>. From Lobo’s perspective, another possible <b>advantage</b> of Informal work-outs is</p>

<p>perspective is that formal processes could be <b>time-consuming and costly</b> (though such a disadvantage may be alleviated if a streamlined “pre-pack” process with little court involvement is elected instead).</p>	<p>that they are generally and <b>comparably less costly</b> and time-consuming than formal processes</p>
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(b) **Additional information** that may be useful for Lobo to decide whether an formal or informal process is suitable:

- (i) Is Lobo a **major/key and/or secured creditor of FFPL in Asgard**? This may determine whether Lobo has effective bargaining/veto powers as a major/key and/or secured creditor in formal rehabilitation process.
- (ii) Find out if the **number pending or concluded formal court actions against the FPPL** (e.g. by conducting a litigation/cause-book search against FFPL in Asgard), if so, the amounts claimed against FPPL. **If there are many pending and/or actions against FPPL, formal insolvency or rehabilitation process may be very likely or inevitable.** This will enable Lobo to gauge whether formal insolvency or corporate rehabilitation processes may be likely to be commenced against FFPL;
- (iii) Find out **the nature and to what extent FFPL’s assets are encumbered** (e.g. doing a company registry search of FPPL in Asgard) and whether the **key secured creditors are willing to enter into an informal work-out with FPPL** (by asking CEO of FPPL, the CEO is willing to share/disclose) or enter into **formal rehabilitation process**. If these major creditors are not willing to enter any informal workout or formal rehabilitation process, then liquidation may be highly likely instead.

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**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.

4.2 The difficulties that may arise for the Asgardian insolvency representative (“AIR”) and the Encanto insolvency representative (“EIR”), relating to co-operation and co-ordination of the concurrent insolvency proceedings commenced against FPPL in Asgard and Encanto include:

- (a) **Difficulties of the administration and supervision of the FPPL’s assets and affairs:** The issues may include determining the location of FPPL’s assets; determination of the governing law for those assets (especially for security interests and real property); identification of the parties for the disposal of FPPL’s assets (i.e. whether by AIR, EIR, the courts in Asgard or Encanto, or FPPL) and the approvals required; how responsibility for the assets may be shared between AIR and EIR, and how information on FPPL’s assets may be shared between AIR



and EIR.<sup>33</sup> AIR and EIR may wish to coordinate to investigate into the affairs of FFPL, and consider avoidance action.<sup>34</sup> One example of an international instrument that addresses such a difficulty is the **Model Law**,<sup>35</sup> which rules provide **guidance on the coordination of the administration and supervision of the debtor's assets and affairs**;

- (b) **Difficulties arising in the administration of concurrent insolvencies:** AIR may wish to clarify with EIR on the following issues/difficulties that may arise in the concurrent administration of the same debtor in insolvency proceedings in more than one jurisdiction:<sup>36</sup>
- (i) Whether the existing management of FFPL in Asgard would be retained in the interests of maintaining FFPL's value, but AIR may be allowed to select new and independent directors;
  - (ii) Whether AIR may only incur a new debt or file a reorganisation plan with the consent of EIR or the Encanto court;
  - (iii) Whether AIR may give prior notice to EIR before undertaking any major transaction of sale of FFPL's assets in Asgard, and whether there should be a monetary threshold for which AIR is entitled to undertake minor transactions;
  - (iv) Proposed distribution of FFPL's assets, and the modes of filing claims by creditors in Asgard and Encanto.

AIR may wish to approach EIR with the possibility of using an insolvency agreement/protocol to coordinate the administration of FFPL's assets. The *Maxwell Communications Corporation plc* and *Nortel Network* cases are notable examples of such agreement/protocols being used to address cross-border insolvency issues.<sup>37</sup> Once again, the **Model Law** addresses this issue, **by providing rules<sup>38</sup> on the approval or implementation by the courts on protocols or agreements concerning the coordination of proceedings**. Another international instrument is the **UNCITRAL Practice Guide on Cross-Border Insolvency Agreements**, which provides another framework of co-operation, complementary with the Model Law framework;

- (c) **Difficulties in coordinating concurrent court proceedings against FFPL in Asgard and Encanto:** One issue that may arise is that a proceeding or relief granted by the court in one jurisdiction may not proceed as it is being hindered by operation of a stay in the opposite jurisdiction. Thus, AIR may wish to approach EIR to coordinate the concurrent proceedings in Asgard and Encanto, and the relief sought and provided by the Asgard and Encanto courts. The **Model Law addresses the coordination of concurrent proceedings**,<sup>39</sup> with a view to encourage courts to arrive at decisions that would best serve the objectives of the said proceedings;

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<sup>33</sup> UNCITRAL Practice Guide on Cross Border Insolvency Cooperation 2009, pp. 21 at [11].

<sup>34</sup> *Ibid.*

<sup>35</sup> Article 27(c) of the Model Law.

<sup>36</sup> These are some of the issues considered between the English and New York administrators in *Maxwell Communications Corporation plc*.

<sup>37</sup> UNCITRAL Practice Guide on Cross Border Insolvency Cooperation 2009, pp. 128 to 129 and 131.

<sup>38</sup> Article 27(d) of the Model Law.

<sup>39</sup> Articles 29 to 32 of the Model Law.

- (d) **Difficulties in facilitating communication between the AIR and EIR, and the courts in Asgard and Encanto regarding FFPL’s concurrent insolvency proceedings:** An important part of cooperation and coordination of concurrent insolvency proceedings in Asgard and Encanto would be to facilitate the channels of communication between the courts in Asgard and Encanto. There may be **difficulties and challenges of the courts communicating to each other directly in the absence of legislative authorisation, and may have to resort to time-consuming traditional methods such as letters rogatory. The Model Law authorise direct communication between courts, between the judiciary and the insolvency representatives, and amongst the insolvency representatives.**<sup>40</sup> Further important international insolvency instruments that facilitate the communication between the courts, include:
- (i) The **ALI NAFTA Guidelines** Applicable to Court-to-Court Communication in Cross-Border Cases published by the ALI and III in 2000;
  - (ii) The **ALI-III Global Guidelines** Applicable to Court-to-Court Communication in Cross-Border Cases published in 2012;
  - (iii) The **Judicial Insolvency Network (“JIN”) Guidelines** for Communication and Cooperation between the Courts in Cross-Border Matters in 2016.
- (e) The development and importance of the following **international insolvency instruments** in adopting cooperation and coordination as a strategy in addressing cross-border insolvency issues has seen much success:
- (i) The **Model Law** is an important vehicle for the harmonisation of cross-border insolvency. The Model Law’s adoption in 53 States in a total of 56 jurisdictions,<sup>41</sup> stands testimony to its success as a tool to address cross-border insolvency issues;
  - (ii) The **ALI NAFTA Guidelines** was developed to address international insolvencies involving the United States of America, Canada and Mexico, and they were intended to be complement the Model Law;
  - (iii) The **ALI-III Global Guidelines** was initiated with the objective of developing and promoting the **ALI NAFTA Guidelines** for worldwide adoption;
  - (iv) The **JIN Guidelines** are intended to improve the efficiency of parallel proceedings by enhancing the coordination and cooperation amongst courts before which insolvency proceedings have commenced. These guidelines have been adopted by at least 16 jurisdictions.<sup>42</sup>

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#### Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FPPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo

<sup>40</sup> Articles 25 and 26 of the Model Law.

<sup>41</sup> UNCITRAL website, [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status) accessed on 7 July 2022.

<sup>42</sup> Australia (Federal Court of Australia, New South Wales); Bermuda; Canada (British Columbia, Ontario); Cayman Islands; Eastern Caribbean; England and Wales; Singapore; South Korea (Seoul); Netherlands (Midden-Nederland); and the United States (Delaware, Southern District of Florida, Southern District of New York) .

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.

4.3 The response is as follows:

- (a) The **European Insolvency Regulation Recast**<sup>43</sup> (“EIR”) **does not apply** to the to the insolvency proceedings against FFPL commenced in the UK by the minor creditor on 30 June 2022 (“UK proceedings”). This is because:
- (i) The EIR only applies to a European Union (“EU”) member state. The **UK is no longer a EU member state**,<sup>44</sup> and
  - (ii) The Insolvency (Amendment) (EU Exit) Regulation 2019 (SI 2019/146) (“**Exit Regulation**”)<sup>45</sup> provides that the EIR continues to apply to UK insolvency proceedings, provided main proceedings were commenced before 31 December 2020. The UK proceedings were commenced on 30 June 2022, which is a date **after 31 December 2020**;
- (b) The **consequences** of the EIR not applying to the UK proceedings are as follow:
- (i) The EIR provides that the courts of a member state have the **jurisdiction** to commence main insolvency proceedings, if the debtor’s centre of main interests (“COMI”) is situated within that member state.<sup>46</sup> Since the EIR does not apply to the UK proceedings, the **UK courts have greater flexibility to commence insolvency proceedings even where FFPL’s COMI is outside UK**. Conversely, the courts of the European country (assuming it is a EU member state) where insolvency proceedings are commenced by Lobo against FFPL (“European proceedings”), will not be prevented from commencing insolvency proceedings, where FFPL’s COMI is within the UK. This may give rise to a **possibility of multiple and parallel proceedings in relation to FFPL**,<sup>47</sup>
  - (ii) The EIR provides for mandatory automatic recognition of insolvency proceedings commenced in any of the EU member states, with no further formalities.<sup>48</sup> There is **no automatic recognition of the UK proceedings by the courts of the European country, and vice versa**. Lobo may seek recognition and relief from the UK Court for the European proceedings under UK’s other cross-border insolvency legislation i.e. the UK’s Model Law on

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<sup>43</sup> Regulation (EU) No. 2015/848.

<sup>44</sup> The UK left the EU at 11pm on 31 January 2020 pursuant to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (“Withdrawal Agreement”).

<sup>45</sup> Article 67(3) of the Withdrawal Agreement. The Exit Regulations are in effect for a transitional period from 31 January 2020 to 31 December 2020, and retain the effect of the EIR where the main proceedings were commenced before 31 December 2020.

<sup>46</sup> Article 3(1) of the EIR. If a debtor’s COMI is located in one member state, insolvency proceedings can only be commenced in another member state if the debtor has an establishment there: article 3(2) of the EIR.

<sup>47</sup> Devi Shah and Alexandra Wood “*Cross border insolvency – an overview of the current EU legal framework and the impact of a “no deal” Brexit on UK/EU cross border insolvency under the Recast Regulation*” at [https://www.mayerbrown.com/en/perspectives-events/publications/2020/12/cross-border-insolvency-an-overview-of-the-current-eu-legal-framework-and-the-impact-of-a-no-deal-brex-it-on-uk-eu-cross-border-insolvencies-under-the-recast-regulation\\_](https://www.mayerbrown.com/en/perspectives-events/publications/2020/12/cross-border-insolvency-an-overview-of-the-current-eu-legal-framework-and-the-impact-of-a-no-deal-brex-it-on-uk-eu-cross-border-insolvencies-under-the-recast-regulation_), accessed on 7 July 2022.

<sup>48</sup> Articles 19(1) and 20(1) of the EIR.

cross-border insolvency,<sup>49</sup> s 426 of the UK Insolvency Act 1986, and the common law. Conversely, the administrator appointed under the UK proceedings would have to seek recognition and relief from the courts in which the European proceedings are commenced, under that European country's domestic laws.

- (iii) The EIR provides the **applicable law** to be the laws of the member state that commenced insolvency proceedings, to govern the commencement, conduct and closure of those insolvency proceedings.<sup>50</sup> This will no longer apply to the UK proceedings.
- (iv) The EIR provides for the **mandatory cooperation and coordination** amongst the courts of the member states of the EU,<sup>51</sup> between the insolvency practitioner and the courts,<sup>52</sup> amongst the insolvency practitioners,<sup>53</sup> and for insolvent group of companies,<sup>54</sup> where insolvency proceedings are commenced or contemplated to be commenced within more than one member state. There is **no mandatory cooperation and coordination between the insolvency administrator and courts in the UK proceedings and European proceedings**. Therefore, the **administration of these two proceedings, in the absence of insolvency protocols entered into between the UK and European administrators, may be less effective and efficient**.

(c) **Further information** is required on:

- (i) Whether the **European country** wherein proceedings contemplated by Lobo are to be commenced is a **European Union ("EU") member state or not**. The EIR only applies to a EU member state. If the European country mentioned is not a EU member state, Lobo will need to consider the domestic cross-border insolvency legislation of that European country to determine the issues of jurisdiction, recognition, coordination and cooperation in relation to the UK proceedings;
- (ii) **Whether FPPL has a COMI in at least a EU member state**. The EIR only applies if a debtor has its COMI in a EU member state. The EIR provides that there is presumption that a corporate debtor has its COMI a jurisdiction where it has a registered office.<sup>55</sup> The presumption only applies if the registered office has not moved to another member state within 3-months prior to the request for the commencement of insolvency proceedings.

**5**  
**Marks awarded 14 out of 15**

**\* End of Assessment \***

**TOTAL MARKS 47/50**  
**Excellent paper.**

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<sup>49</sup> Implemented by the UK Cross Border Insolvency Regulations 2006.

<sup>50</sup> Article 7(1) of the EIR.

<sup>51</sup> Article 42(1) of the EIR.

<sup>52</sup> Article 43(1) of the EIR.

<sup>53</sup> Article 41(1) of the EIR.

<sup>54</sup> Articles 60 to 70 of the EIR.

<sup>55</sup> Article 3(1) of the EIR.