



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the summative (or formal) assessment for Module 1 of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment1summative]. An example would be something along the following lines: 202223-363.assessment1summative. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 15 November 2022. The assessment submission portal will close at 23:00 (11 pm) GMT on 15 November 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Civil Law and English (Common) Law countries have the same historical roots. Select from the following the best response to this statement.

- (a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.**
- (b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.**
- (c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.**
- (d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.**

Question 1.2

Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response to this statement.

- (a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.**
- (b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.**
- (c) This statement is untrue since discharge of debt never became part of any of these systems.**

(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.

Question 1.3

England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.

(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.

Question 1.4

There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.

(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.

(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved" after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.

(c) The statement is untrue since insolvency law rules are not collective in nature.

(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.

Question 1.5

All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.

- (a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.**
- (b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.**
- (c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.**
- (d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.**

Question 1.6

The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

- (a) Public International Law.**
- (b) UNCITRAL Legislative Guide on Insolvency Law.**
- (c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.**
- (d) Private International Law.**

Question 1.7

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is true?

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).**
- (b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.**
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.**
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.**

Question 1.8

Which of the following best describes international insolvency law?

- (a) It is public international law governing insolvency law between States.**
- (b) It is private international law governing insolvency law between States.**
- (c) It may involve aspects of both public international law and private international law.**
- (d) It involves a simple classification within either public international law or private international law.**

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.**
- (b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.**
- (c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.**

(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

Question 1.10

Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response to this statement.

- (a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.**
- (b) This statement is untrue because North America was not a party to these agreements.**
- (c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.**

(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.

Marks awarded 8 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.

ANS:*The Insolvency laws of emerging markets and developing countries are based on existing insolvency law systems as those found in England or Civil Law countries. Most of these countries were colonies and thus inherited the laws from their former colonial masters. In the Eastern part of Africa such as Tanzania, Zambia, Kenya, Botswana, Nigeria have English law Tradition. Countries of West Africa are based on Civil Law. Angola and Mozambique have Civil law Tradition based on Portuguese law. Some Countries like South Africa and Namibia have mixed system of both Roman and English Law. However, some of the African states have started introducing more modern legislation.*

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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.

ANS:*The 1998 financial crises affected Indonesia and Thailand. This gave rise to some insolvency Law Reforms in Thailand in particular. How so? Singapore is major Role player. In October 2018 Singapore passed a new Insolvency, Restructuring and Dissolution Act. This was a unifying Act passed for consolidating personal insolvency and corporate insolvency and Restructuring laws. This came into force on 30th July, 2020.*

2.5

Question 2.3 [maximum 4 marks]

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

ANS:*In the 1970's North America and Canada were working towards bilateral insolvency treaty. The scope of this was too ambitious and they failed to reach an agreement. Later more practical progress has been made through adoption of the Model Law. Earlier also there had been coordination and co-operation based on existing legislation.*

American Law Institute (ALI) has taken steps to resolving insolvency issues between NAFTA Countries of the United States, Canada and Mexico. A project: Transnational Insolvency project was an initiative take by ALI in this direction. Principles of Cooperation among the NAFTA Countries, were prepared and approved by the ALI Council and expert members in 2000.

These NAFTA Principles FOCUS on insolvency of Corporations and other Legal Entities engaged in commercial operations. They exclude the insolvency of individuals (natural persons) and also Non-Profit organisations. These were structured around the basic principles i.e General Principles, Procedural Principles, Recommendations for Legislation or International Agreement.

In general co-operation between the Courts and Administrators was advised. Recognition be given to the case of member of NAFTA Country.

Recommendation that each NAFTA Country adopt the Model Law on Cross Border Insolvency. Other recommendations were as to make the process simplified, address automatic stays, notice to creditors, priority claims be looked into, adoption of procedural principles, simplified authentication of documents etc.

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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Marks awarded 8.5 out of 10

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

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

ANS:

There is not a single set of insolvency rules that would apply globally. States with developed legal system have some Bankruptcy /Insolvency system.

There are differences in approach and policy. There are differences in substantive and procedural rules. There are differences in areas of General Law also. Considering all these the International Organizations like UN Commission of International Trade Law (UNCITRAL) World Bank as well as the Courts are trying to pave out solutions for Transnational insolvency issues.

Many National or say the domestic legal Systems are based on English Law or Civil Law.

Roots of Civil law can be traced to Roman Law. From individual Debt collecting procedures, (assignment of property, forced liquidation), developed the Collective Debt collecting mechanisms.

In Europe this law developed as a result of Lex Mercatoria-Customs and Usages.

These influenced laws of Countries that had more Roman character or Germanic Law mostly termed to as Civil Law. Bankruptcy laws were developed in many European Countries between 13th and 17th Century. During this there was a gradual move from execution against the person towards dispensation against the Assets of the Debtor. At one stage merchants or traders could be declared bankrupt and harsh sentences were imposed on Debtors.

Earlier the mechanisms were in favour of Creditors. Later the laws were much more humane. Imprisonment was abolished in 1869 by Debtors Act.

In English Bankruptcy Act of 1542, The Debtors were viewed as quasi -Criminals. Body of Commissioners were provided for administration and distribution on the basis of equality amongst the Creditors. The Principles of Collective Participation by creditors and Pari Passu distribution among them from the available Assets have become basis of modern Insolvency laws. Later by the Act of 1570, provided for Lord Chancellor to consider the petitions by the Creditors. The Commissioners further appointed would examine the debtors transactions. The Debtors would transfer the property to the Commissioners. The Statute of Ann of 1705 introduced notion of statutory discharge. These Principles have remained part of Modern Bankruptcy. Office of Official Receiver was introduced in 1883. This became the foundation of English Insolvency law. Later Cork Committee Report 1977 led to promulgation of Insolvency Act 1986. Amended aspects were brought in Insolvency Act 2000,

Enterprise Act 2002. In 2009 The Debt Relief Order for individuals was introduced. Certain relaxations were provided during Covid-19.

UNCITRAL Model Law was adopted in 2006, by England and Wales. However, till it was a member State of EU.

The USA being a federation has Bankruptcy Code under Federal Legislation. This was revised in 1978 providing for Liquidation, municipalities, Reorganization (Rescue), Family Farmer, Rescheduling of Debt repayment plan.

Reforms of 2005 in the Bankruptcy Abuse Prevention and Consumer Protection Act introduce -Means Testing. There is liberal fresh Start Approach regarding discharge of Debt and chapter 11 Reorganization mechanism, as also the sub chapter V to chapter 11 to address small business reorganization.

Australian law is based on English common law.

Dutch Insolvency Law is based on Civil Law.

Germany reformed its laws during 1990's. It is an example of Unified Insolvency Legislation.

Spanish Insolvency Act 2003 is utilized both by individuals and corporations. African Countries largely follow the laws of their former Colonial Powers. A number of African States have started introducing new modern legislation.

Indian laws for insolvency are rooted in English Law. It used to reflect different legislation for individuals and companies. However, reforms over the years have brought in change. New Bankruptcy Code was adopted in 2016. In Russia there have been developments since 1992 when finally adoption Bankruptcy law 2002 took place. In China after 1976 developments took shape and of the Law in 2006. January 2021 Civil Code of Peoples Republic of China brought in changes in the Bankruptcy Laws in respect of Debtors properties and Creditors Rights. Latin America are mainly Civil Law countries. East Asia has also seen many Reforms

Voidable Dispositions can be either fraudulent conveyances or preferences.

Settlement of preexisting debt to a creditor or by affording such a creditor real security for a preexisting unsecured debt thus improving position of the creditor.

Legislation dealing with these matters may differ in Civil Law system and Act of Elizabeth of 1570 is the basis for this remedy in English law.

Since it is difficult to work with one particular system in order to explain many basic concepts of insolvency law , UNCITRAL Legislative guide will form the basis for dealing with various aspects.

Developments in laws in favor of Debtors i.e pro debtor, all over should be the aim. Corporations should be reorganized and debts if restructured shall favour the economy of the country. While addressing the Resolution as the common goal there may be different proceedings and different terminology may be used.

Mechanism must strike balance not only between the different interest of the stake holders but also interest in the social political and other policy considerations.

Collective nature of proceedings is helpful to avoid multiplicity of litigation.

Insolvency Legislation if single Act or Code will favor overriding effect of the Code over the old laws.

Automatic Stay or Effect of Moratorium on piecemeal debt collecting procedures would ease the procedures. Set-off and netting would help the individuals as well as the corporations to start fresh.

Administrators appointed shall follow ethics and rules formulated in the context of proceeding with the liabilities of the Debtor.

Administration shall be done by qualified persons for fair distribution to the creditors. Distribution would be done by identifying the classes of Creditors their claims secured or unsecured, tracing of assets and realization of the Assets giving effect to priorities laid down. Creditors are paid *Pari Passu* as far as possible.

Businesses are rescued to continue as going concern.

Taking into account the Importance of the Committee of Creditors. Initiate prescribed rescue procedures are initiated. Thus, the essence of the Insolvency law should be in conjunction with the policy of the state as well as take care of the stake holders, preserve businesses and avoid harassment to individuals.

You needed to respond more directly to the issues put to you. **As to the historical roots of this aspect of insolvency law: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 (as you noted) is the basis for this remedy in English law. You also needed to address the framework for voidable transactions in more detail and discuss the importance further.**

2.5

Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which 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.

Ans:

Cross-border or international restructuring and insolvency law provides limited options for such questions as which court has jurisdiction to decide in matters of restructuring or insolvency, which law is applicable, which powers does an insolvency holder have.

International insolvency cases can give rise to different complex legal questions. Typical examples are the international jurisdiction of a court, the law applicable to insolvency proceedings and the substantive and procedural effects of these proceedings. An additional dimension plays a role when relevant legal systems of

insolvency law differ, because of the economic structure of the market, the policies underlying the general legal system, the interests protected in the insolvency law system and the order of the private law.

Founding fathers of the USA declared in their constitution that Insolvency law is federal question. European Union where common market between nation states exists, has also realized this. Interactions between individuals and also among businesses and states has given rise to cross border cases of Insolvency. International insolvencies are the norm and not exceptions in modern times. Most domestic legal systems are ill - equipped to deal with insolvencies with implications across national borders. Without co-ordination and co-operation between courts of different states in a cross-border situation, there will be risk of multiple proceedings against the same debtor. It may be impossible to predict which law will govern the prevailing situation.

Harmonization and insolvency law in Europe was regarded just impossible combination as of water and fire. Professor Ian Fletcher concluded: 'National attitudes towards the phenomenon of insolvency are extremely variable, as are the social and legal consequences for the debtors concerned.

Various initiatives have been launched to address the issues. EU Regulations, UNCITRAL, World bank initiatives.

The main reason for establishing clear and uniform rules relating to cross-border insolvency issues is to provide clarity which is important for the purpose of international trade and investment.

Take care to very directly respond to the sub-question.

2.5

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.

ANS: In early 1889,1940 the Montevideo Treaties, Havana Convention were the early ones ratified in the Americas. OHADA , OHBLA established in sub Saharan Africa was signed by 17 members.

International insolvency matters may be thought of as a subset of international trade law. States have ratified or acceded to treaties or conventions which import into their domestic laws, principles to resolve insolvency issues having connection with another state. These may then form part of state's hard law.

In Europe international conventions appeared in 13th and 14th centuries, addressing the absconding debtors. Later in in 19th century modern forms of bilateral treaties appeared to address the issues of jurisdiction, recognition and enforcement. Council of Europe was founded in 1949 based on the European convention on Human Rights. Istanbul Convention, 1990 was not ratified by sufficient no. of countries, therefore did

not enter into force. This had an influence on further development of European Union response to the problem of international insolvencies.

EIR (2000) European Insolvency Regulations helped in achieving more success than by way of conventions. The amended EIR (Recast) 2021 became effective for most member states. Some success was achieved to some extent in respect of Hard Laws.

More success has been gained through use of Soft Law developed by efforts of Multilateral organizations other than state /Governments.

The Hague conference had been established in the 19th century towards unification of Private International Law. Model Treaty initiative of 1925 on Bankruptcy was never ratified, though it contributed to deliberations to international insolvency. The World Organization for Cross border cooperation in civil and Commercial Matters (previously Hague Conference coordinates with the activities of UNIDROIT and operation with UNCITRAL in the preparation of UNCITRAL Legislative guide on insolvency law (2004). This has been the most successful Soft Law.

In 1990's Model law on Cross border insolvency (MLCBI) in the form of Model law draft legislation recommended to the member states to adopt is gaining good response. In 2015, OHADA members adopted UNCITRAL Model Law. Middle East and North Africa surveyed by INSOL, OECD, World Bank initiative. Middle East States have reformed their laws. Dubai, Asia -Pacific region have adopted the Model Law on Cross -Border Insolvency. Initiative of Asian Business Law Institute in 2020 published report on corporate restructuring and insolvency in Asia.

Thus, it is being observed that uniformity in the various states adopting Model law would be better approach to simplify the complications which otherwise would arise in case there are only bilateral treaties.

You raise some relevant issues. The discussion on success could be elaborate upon.

3.5

Marks awarded 8.5 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?

ANS:

Most Legal systems contain Rules on various types of Insolvency proceedings. The common goal is Resolution. It may include formal and informal elements.

Formal proceedings are those governed by Insolvency Law.. These generally include Liquidation and Reorganisation or Rescue proceedings.

Informal proceedings may not always be regulated by Insolvency Law and would involve voluntary negotiations.

Formal **Proceedings can involve the following:**

Company Voluntary Arrangement

A company Voluntary Arrangement is used to facilitate a rescue of a business which may have suffered an event and would have otherwise been viable. It is a formal insolvency procedure. Directors remain in control of the business whilst it is subject to the CVA, with a Licensed Insolvency Practitioner overseeing the process, firstly as Nominee and then, following the approval of the CVA, as Supervisor. It is dependent upon 75% of creditors voting in favour of the proposals for the CVA and secured and preferential creditors’ rights remain unless they consent to any changes.

Once approved, creditors are bound by the terms of the CVA, which usually lasts over a period, and allows the company to make contributions into the CVA for the benefit of creditors from its ongoing trading.

Administration

Administrations are the most common of company insolvency procedures. If the directors are seeking to rescue the business as a going concern and a CVA is not appropriate, then an Administration can be used instead. An Administration can be instigated by the company or its directors, a secured lender, can be Lobo in this case, or bank or via a Court order.

An Administrator is appointed to manage the business, assets and property of the company and the directors lose control of the business whilst the company is in Administration. Whilst the process can be used to rescue the company as a going concern. It is more often used to maximize realizations for the benefit of the creditors, either through a sale of the business as a going concern, or through a

managed wind-down, if a business rescue is not achievable. A sale of the business can also be achieved where a purchaser agrees the sale prior to the appointment of Administrators.

The Administration also comes with a moratorium, which prevents creditors from continuing with any enforcement or legal action. This can prove helpful where assets may be at risk, where creditor pressure is increasing and there is threat of winding up petitions being served or a landlord is looking to enforce their rights under the terms of the lease.

Liquidation

A Liquidation is the more appropriate option where there is no likelihood of rescuing the business or where the business has come to the end of its lifecycle.

Where the company is solvent, the shareholders can place the company into a Members' Voluntary Liquidation where a Liquidator is appointed to distribute the remaining assets to the shareholders in a tax-efficient manner. The Liquidator is able to distribute assets as well as cash to the members and the distributions are treated as capital distributions rather than as income distributions from a tax perspective. The Liquidator is also able to deal with any contingent liabilities, therefore bringing peace of mind to the members during the closure process.

Where the company is insolvent and unable to pay all of its debts and there is no chance of rescuing the business, then the directors can choose to place the company into a Creditors' Voluntary Liquidation. The members will need to resolve to the company being wound up and appoint a Liquidator, but the creditors will then have the final say in who is appointed Liquidator. Once the company is in Liquidation, the Liquidator will seek to realise any assets for the benefit of creditors. Once the Liquidator has finalised the position, the company will then move to dissolution.

The final type of Liquidation is a Compulsory Liquidation which is initiated through the Court through the presentation of a winding-up petition. The Court will then grant a Winding Up Order and the Official Receiver is appointed as the Liquidator. A Licensed Insolvency Practitioner may be subsequently appointed as Liquidator if the creditors seek an appointment or if the OR decides to appoint a Liquidator.

Receivership

A receiver is appointed by a lender of a fixed charge over some or all of the company's assets.

INFORMAL Proceedings:

- *FPPL can be reached by reaching an informal agreement with creditor (Lobo) to pay off their debt, based upon the level of assets and the ability to comply with this style of agreement.*

These types of agreements are generally not legally binding, so you need to ensure that any proposal made to creditors is achievable; otherwise, you may likely need to revisit.

- ***Another option is by obtaining an unsecured loan to simplify debt structure and turn it into one manageable monthly amount. FPPL will again need to ensure that any loan secured is affordable, depending on monthly income and outgoings.***

- ***If FPPL owns either a property or a high-value asset, it may be that a lender will offer it a loan that is secured against that property or asset, rather than the loan being treated as unsecured depending upon the value of the property or asset and the existing borrowings against it..***

Any failure to service this loan may end up in losing its asset.

- ***An informal insolvency arrangement involves negotiating directly with Lobo, to come to some agreement over how FPPL will pay back the money it owes. An agreement of this type can be entered into relatively simply, so long as creditor co-operative, and will not be legally binding on any party.***
- ***When creditor pressures are becoming too much to handle and debt is continually piling up, a suitable solution must be sought as soon as possible to minimise the threat of liquidation. However, negotiating with creditors independently probably will not yield positive results as consistently as having a formal proposal drawn up and submitted on your behalf by a professional.***

There are risks and disadvantages associated with any kind of informal procedure as they are often not legally binding.

- ***Since an informal agreement is not documented in writing and involves no binding contracts, the creditor is not legally obligated to uphold their end of the bargain. This depends on a number of factors.***
- ***In other words, they can back out at any time and suddenly petition for company to be liquidated even after agreeing to an arrangement previously proposed.***
- ***Such unofficial negotiations leave company completely unprotected, as there are unlikely to be any legally binding terms and conditions that the party must abide by.***
- ***The chances of creditors accepting a proposal written note and proposed by a licensed insolvency practitioner are better.***
- ***It would be beneficial to consider lack of moratorium and inability to bind dissenting creditors.***

Formal Arrangement Is Safer and More Effective.

A formal arrangement gives the leverage needed to defend from legal action if a lending party decides to petition the court. Once the agreement is made, as long as you keep to the terms there will be no further issues between you and the creditor.

Formally drafted proposals tend to result in successful arrangements more often than informal proposals. It would be beneficial to consider costs and privacy.

2.5

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.

ANS:

Different jurisdictions approach insolvency from different philosophical perspectives. Some jurisdictions are more pro-debtor than others while some may favour judicial rather than administrative procedures for dealing with the insolvency procedures. Some of the problems also include conflicts of laws, differences of procedure, different treatment of assets and different approaches to set-off and netting .

Comity

This has been defined as the “the courteous and friendly understanding, by which each

nation respects the laws and usages of every other, so far as may be without prejudice to

its own rights and interests” and “that body of rules which the states observe towards one another from courtesy or convenience, but which are not binding as rules.

The approach taken by countries to the recognition of foreign proceedings tends to be quite variable but is, of course, of great significance. The courts have a discretion to refuse recognition if this would be contrary to public policy.

An example: United States Bankruptcy Code provides the approach taken in that jurisdiction. In the United States the courts have to take various factors into account including the protection of United States creditors plus the existence in the other jurisdiction of a broadly similar legal framework to the United States. This will obviously limit the number of situations where a court in the United States will be either willing or able to assist a request from a foreign court.

There is therefore a need for effective regulatory co-operation in addition to adequate supervision. Despite the existence of agreements, treaties and other forms of cooperation there is a need for confidence in the other regulators.

Universality and Territoriality

Universality is the concept of the 'home' country of a bank having jurisdiction over a single insolvency proceeding. The major problem with the universal approach is that without adequate international agreement it cannot be enforced. As things stand at present international cooperation and enforcement will be largely discretionary.

Territoriality is the concept of the use of separate proceedings in each jurisdiction on the basis that the proceedings in the 'home' country do not extend beyond its borders. This approach is still used widely internationally.

Cross-Border Insolvency, 1997 ("UNCITRAL Model Law") provides for legislative guidance for states on cross-border insolvency. The UNCITRAL Model Law has been strongly recommended for providing a wide-ranging solution for resolving cross-border insolvency issues. The international aspects of insolvency proceedings have been acknowledged by the World Bank, which has further noted that the insolvency laws should provide for rules of jurisdiction, choice of law, cooperation amongst courts of different countries and recognition of foreign judgments. Further, the IMF encourages the adoption of the UNCITRAL Model Law as the same would provide for an effective means of reducing the difficulties faced in cross-border disputes and further in achieving cooperation and coordination amongst courts and concerned authorities in different jurisdictions.

The four main principles governing the UNCITRAL Model Law are: Access, Recognition, Cooperation and Coordination. It aims to provide the foreign professionals and creditors with a direct access to domestic courts, which in turn enables them to participate and/or commence domestic insolvency proceedings against the concerned debtor. In terms of recognition, the UNCITRAL Model Law accounts for the recognition of foreign proceedings in domestic courts and enables the courts to accordingly determine the relief to be granted. Further, the UNCITRAL Model Law provides for bringing about effective cooperation between insolvency professionals and courts of different countries and also ensuring coordination so as

to efficiently manage the conduct of concurrent proceedings in different jurisdictions.

Reciprocity: The requirement of reciprocity would be applicable, to those foreign countries which have also adopted the UNCITRAL Model Law into their domestic legal framework. As such, it leaves the question of cross-border insolvency process with countries not having adopted the UNCITRAL Model Law, still unanswered.

Determination of Centre of Main Interests ("COMI"):. It provides for a prima facie presumption that the corporate debtor's registered office is its COMI, unless there is proof to the contrary.

UNCITRAL GUIDE QUOTE:

ARTICLE 2

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

Referring to the above Article if the two states have adopted the UNCITRAL Model Law, the position be that FPPL having its head office in Encanta and having its Significant operations in Encanta As mention in the proposition there are Proceeding already going on in Encanta would be the Main proceedings.

The proceedings which have begun in Asgard would be guided by factors like any Bilateral Instruments having been signed by the two or not. The Administrator of proceedings initiated at Asgard would need co-operation and co-ordination with that of the Administrator / Representative appointed by the Encanta courts in managing the affairs of FPPL. There are a range of guidelines available to which courts refer parties to promote cooperation and coordination in the context of recognition and enforcement of concurrent foreign insolvency proceedings. ALI NAFTA guidelines were developed Applicable to court to court communication.

In Europe within the context of EIR, European guidelines on communication and cooperation 2007 contain non binding rules . In 2017the Conference of European Restructuring and Insolvency law (CERIL)in collaboration with INSOL Europe established working group to review guidelines focusing o the duty to cooperate and communicate under EIR Recast. Subsequently in 2015,EU Judge Co and 18 EU Cross Border Insolvency court to court communication guidelines were set up. In 2016, JIN Judicial insolvency Network took initiative for framing guidelines. These have been developed to encourage closer cooperation. Increase number of states have now shown interest in adopting these principles which play significant role in cross border insolvency.

The domestic laws of Encanta in case having adopted the principles and intent of UNCITRAL would provide for effective cooperation. Significantly some states have amended their domestic insolvency laws to address the international insolvency issues., through uniform laws on recognition of insolvency proceedings and insolvency representatives.

The UNCITRAL Model Law provides for bringing about effective cooperation between insolvency professionals and courts of different countries and also ensuring coordination so as to efficiently manage the conduct of concurrent proceedings in different jurisdictions. The intent of the UNCITRAL Model Law seems to be to assist states to mould their insolvency laws in a modern, harmonised and fair framework so as to address the instances of cross border insolvency more effectively. It respects the differences in various national laws and primarily focuses on improving cooperation and coordination between countries, instead of attempting to unify the national laws.

There is some scope to elaborate regarding international instruments.

4

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.

ANS:

The main piece of legislation regulating English Insolvency Act 1986. This is a unified legislation, as it deals with personal and corporate bankruptcy. This was amended as Insolvency Act 2000 and Enterprise Act 2002, further amended in 2016, and then by Governance Act 2020 was passed which sets out reforms.

UNCITRAL Model Law was adopted as part of Cross -Border rules, by England and Wales in 2006. Section 426 of the Insolvency Act 1986 still applies to relevant countries and common law principles still apply.

Prior to 1 January 2021, recognition and enforcement of restructuring and insolvency procedures and judgments between the UK and EU Member States was subject to common EU regulations which had direct effect and broadly offered automatic recognition. Those common regulations no longer apply to the UK.

The Recast EU Insolvency Regulation 2015 (the EIR) determines the proper jurisdiction for a debtor's insolvency proceedings, the applicable law to be used in those proceedings and provides for mandatory recognition of those proceedings in EU Member States. The EIR no longer applies to the UK. Following 31 December 2020, the UK has left the scope of the EU's Insolvency Regulation.

The Insolvency Regulation is of central importance to insolvency proceedings in respect of debtors based in Europe. The EU Insolvency Regulation governs, in relation to all Member States of the EU (except Denmark), the jurisdiction to commence insolvency proceedings and the recognition and enforcement of judgments arising from such proceedings. The EU Insolvency Regulation seeks to allocate jurisdiction to open main proceedings and secondary proceedings within the EU.

The Insolvency (Amendment) (EU Exit) Regulations 2019 (as amended by the Insolvency (Amendment) (EU Exit) Regulations 2020) (the Insolvency Amendment Regulations) dealt with necessary amendments to EU insolvency legislation which formerly had direct effect in the UK. They came into force on 31 January 2020, exit day.

Broadly, the effect of the Insolvency Amendment Regulations is to give jurisdiction to UK courts to open insolvency proceedings following the exit date.

Here the Centre of the debtor's (FPPL) main interests is in the United Kingdom. The Debtor's COMI is primarily in the UK.

For EU Members: As for recognition and assistance for insolvency proceedings and jurisdiction to open insolvency proceedings, much will depend on the determination of a debtor's COMI by the courts of the EU Member State concerned. If that court decides that the debtor's COMI is in an EU Member State then it will be obliged to apply the EU Insolvency Regulation. If courts in the EU determine that the COMI is in an EU jurisdiction, EU insolvency proceedings commenced in that jurisdiction would be recognised across the EU, whereas UK insolvency proceedings would not.

This is not the case considering the facts of the case as FPPL is incorporated in UK having its offices in European and Non-European Countries.

The general scheme of the EU Insolvency Regulation is that the jurisdiction to open insolvency proceedings in respect of a company with its Centre of main interests ('COMI') within the EU is conferred on the courts of the Member State where the debtor's Centre of main interests is situated. These proceedings are known as 'main proceedings. Where a debtor's Centre of main interests is located in a Member State, the courts of other Member States only have jurisdiction to open insolvency proceedings in relation to the debtor if he has an 'establishment' in that Member State; the effects of such proceedings (known as 'secondary proceedings') are restricted to the assets situated in that Member State.

The Corporate Insolvency and Governance Act 2020(CIGA 2020) received Royal Assent on 25 June 2020. Its measures fall into two sets: permanent measures to

update the UK insolvency regime, and temporary measures to insolvency law and corporate governance to assist businesses during the pandemic.

The permanent measures would include:

...A new restructuring plan to help viable companies struggling with debt obligations. Courts can sanction a restructuring plan (that binds creditors) if it is "fair and equitable".

..... A free-standing moratorium to give UK companies a "breathing space" in which to pursue a rescue or restructuring plan. During this moratorium no creditor action can be taken against the company without the court's permission.

Thus the Creditor 'Lobo' being the main creditor of FPPL will be unable to take action against it in case the moratorium period is applicable and he would be voting for or against it being a creditor.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 10 out of 15

*** End of Assessment ***

TOTAL MARKS 35/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.