



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

Question 1.6

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

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

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

Question 1.7

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign

insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

Question 1.9

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

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.*
- (b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.*

(c) *This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.*

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

Question 1.10

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

(a) *This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.*

(b) *This statement is untrue because North America was not a party to these agreements.*

(c) *This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.*

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

The Historical roots of various insolvency law systems in African jurisdictions are a result of the legal system which predisposed their domestic laws which are in turn a result of their colonial past and occupation of colonialists who influenced the legal systems¹. An attempt has been made to categorise them as under:

- a. *Common Law legal systems: Ghana, Kenya, Malawi, Uganda;*
- b. *Civil Law legal system (Roman, Germanic, French, Belgian etc.): Angola, Burkina Faso, Cote D'Ivoire, Congo, Lesotho, Mali, Mozambique, Senegal, Zimbabwe;*
- c. *Multi Legal system (mix of civil and common legal systems along with at times Islamic law, customary laws etc.): Botswana, Egypt, Guinea Conakry, Mauritius, Namibia, Nigeria, South Africa, Tanzania, Zambia.*

¹ Guide to Insolvency and Business Restructuring in Africa, <<<https://www.lexafrika.com/wp-content/uploads/2022/05/Guide-to-Insolvency-and-Business-Restructuring-in-Africa-Digital.pdf>>> accessed on November 12, 2022.

Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

The 1997/1998 Economic Crises, that affect the East Asian countries is often given to be the backdrop against which many countries in East Asia began to overhaul their insolvency law systems. The main contributing factors to the economic crisis were large external deficits, lack of enforcement of prudential norms, governmental and political uncertainties, lack of availability of data for market participants etc.² In the wake of the Asian financial and economic crisis in the late 1990s, insolvency reform had risen to the top of the policy agenda of many Asian economies³:

- a. ***FAIR:** The Forum for Asian Insolvency Reform ("FAIR") was created by the Organisation of Economic Co-operation and Development ("OECD"), the Asia-Pacific Economic Cooperation forum (APEC) and the Asian Development Bank ("ADB"). Along with the support of the public and private sector experts, FAIR intended to serve as a policy dialogue platform to discuss and promote the formulation and implementation of insolvency reform strategies in the Asian economies.⁴ But is it a reform per se.*
- b. ***The Bangkok Framework (1998):** To generate a more coordinated informal workout approach, the Board of Trade of Thailand, Federation of Thai Industries, the Thai Bankers' Association, the Association of Finance Companies and the Foreign Banks' Association jointly prepared a Framework for Corporate Debt Restructuring in Thailand in early 1998. The framework is non-binding and non-statutory but was a statement of the approach that was at least expected to be adopted in corporate workouts involving multiple creditors⁵.*

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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.

Since the 1970s, there have been many efforts to enter into bilateral agreements between North America and Canada, which were deemed as too determined and then

² International Monetary Fund, The Asian Crisis: Causes and Cures

<<<https://www.imf.org/external/pubs/ft/fandd/1998/06/imfstaff.htm>>>, accessed on November 12, 2022

³ Forum for Asian Insolvency Reform, Insolvency Reforms in Asia: An Assessment of the Implementation Process and Role of Judiciary, <<https://www.oecd.org/daf/ca/corporategovernanceprinciples/1873992.pdf>>, accessed on November 12, 2022.

⁴ *Ibid*, Background and Summary.

⁵ FAIR, Maximizing Value of Non-Performing Assets

<<<https://www.oecd.org/daf/ca/corporategovernanceprinciples/20215534.pdf>>>, accessed on November 12, 2022.

resultantly weren't successful. The true progress qua the resolution of international insolvency issues between these countries came via the following efforts:

- a. **ALI NAFTA Principles:** American Law Institute's ("ALI") Principles of Cooperation among the member-states of the North American Free Trade Association (being the United States, Canada and Mexico) (the "ALI NAFTA Principles") was one such attempt. These Principles have evolved from the American Law Institute's Transnational Insolvency Project, conducted between 1995 and 2000, for which the Reporter was Professor Jay L. Westbrook (University of Texas). The objective of that project was to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states of the United States, Canada and Mexico⁶. Furthermore, account has been taken of the fact that some of the central issues addressed in the original ALI NAFTA Principles (including recognition, relief, and cooperation) have, since ALI's adoption of the text in 2000, found their way into national or federal legislations⁷.
- b. **ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases ("Court-to-Court Guidelines):** These guidelines in their original form were included in Appendix B of the ALI NAFTA Principles and represent procedural suggestions for increasing communications between courts and between insolvency administrators in cross-border insolvency cases. The Court-to Court Guidelines have been used in many cross-border cases, such as *the Lehman Brothers Case*, in which some 70 insolvency proceedings in 17 countries all over the world were initiated.⁸
- c. **Global Principles for Cooperation in International Insolvency Cases ("Global Principles"):** These principles reflect a non-binding statement, drafted in a manner to be used in both civil law as well as common-law jurisdictions and aim to cover all jurisdictions in the world. Ian F. Fletcher and Bob Wessels were appointed by the ALI to draft the same. The Global Principles further build on the ALI NAFTA Principles. The Global Principles cover mainly three areas, after an introduction, Section II constitutes the heart of the statement. Then follows Section III, which includes a review of the appreciation of the Court-to-Court Guidelines⁹. The Global Principles are the result of a global research survey that established the extent to which it is feasible to achieve a worldwide acceptance of the ALI NAFTA Principles, either in their existing form or, if necessary, with modifications or variations.
- d. **UNICTRAL Model Law on Cross-Border Insolvency ("Model Law"):** The Model Law has been adopted by all the NAFTA countries (By United States and Canada in 2005 and by Mexico in the year 2000).

There is scope to elaborate on matters relevant to the question at hand. 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

⁶ Wessels, Bob, "A Global Approach to Cross-Border Insolvency Cases in a Globalizing Word", (The Dovensmidt Quarterly, Issue 1, 2013).

⁷ *Ibid*

⁸ *Ibid*

⁹ *Ibid*

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.

*The genesis of the voidable dispositions in the Roman or the Civil Law can be found in the 'actio paulina', while under the English or Common Law the same can be found in the 'Act of Elizabeth of 1570', dealing with fraudulent conveyances. The modern-day insolvency systems of different states may differ greatly in relation to the qualifications, remedies, defences, procedure etc., vis a vis voidable dispositions and fraudulent conveyances and hence the same has proven to be a hurdle in transnational insolvency matters. For instance, under German law which is based on civil law, the main aim of voidable transactions provisions is to support equal treatment of all creditors. Only on a secondary level, unrighteous advantages are corrected. Thus, the rules governing voidable transactions under German law are in general, a specification of the *pari passu* principle. While, on the other hand, The English rules governing voidable transactions are rather narrow. According to some legal writers, the rules pursue various aims. They serve to increase the assets of the insolvent debtor; protect against unrighteous advantages of single creditors; and secure the principle of *pari passu*.¹⁰ I'd love to hear what you think the purpose and importance of the rules are.*

It can be said that the management of a corporate has the first sense of the impending insolvency, and the same can be months or even years before any formal insolvency process is initiated against the body of the corporate. Hence in anticipation of the same, certain transactions can be entered which are not in the ordinary course of its business which leads to unjust enrichment and also erosion of the value of the corporate's estate, which ultimately leads to the non-effective implementation of insolvency provisions. For this reason, insolvency laws are required to set forth a mechanism that recaptures assets whose transfer prior to the commencement of the proceedings has such a detrimental effect¹¹.

¹⁰ Dr Beissenhirtz, Volker, "Clawback of Transactions before Insolvency: Comparison of the German and English Provisions on Voidable Transactions"

¹¹International Monetary Fund, Orderly & Effective Insolvency Procedures, <<<https://www.imf.org/external/pubs/ft/orderly/>>>, accessed on November 12, 2022

The framework dealing with voidable transactions can be generic in the sense, can prescribe a period before the insolvency commencement, which will be taken as a benchmark to view and judge which transactions may fall under the said category of voidable or the same can be case-specific and lay down subjective criteria such as, undervaluation, intention of the parties etc. Below are the various kinds of voidable transactions which are usually investigated and sought to set aside to restore the positions as it existed before such a transaction:

- a. ***Transactions to defraud the creditors:*** *When the corporate has entered into transactions with a specific aim of keeping the assets beyond the reach of a person who are entitled to make a claim over it, or in order to adversely affect the interests of the aforementioned claimants and moreover, where the intention is to defraud the creditors, or the claimants is clear for the facts.*
- b. ***Undervalued Transactions:*** *Transactions where the corporate has made a gift/donation to any person or transactions qua an asset where the consideration of the same is significantly less, or not at arm's length and outside the ordinary course of business of the corporate are also subject to review and claw back*
- c. ***Preferential Transactions:*** *Where the corporate has transferred a property or an interest for the benefit of any creditor which has put such a creditor in a more beneficial position qua the other prejudiced creditors and qua what that creditor may have usually received from the estate distribution of the corporate in the normal course of liquidation/insolvency. In such cases the said benefit or preference is often subject to a claw back from such creditors.*
- d. ***Extortionate Credit Transactions:*** *The ordinary credit transactions which are entered close to the commencement of insolvency are often nullified and there is a presumption that insolvency already existed when the payment was made.*

In relation to the above transactions, the law can either make them void or voidable, which is often left to the liquidator/insolvency practitioner to determine in relation to whether the same will or will not be beneficial to the estate. Some jurisdictions also allow the creditors of an estate to make an application to avoid such transactions before the insolvency court. One another question to be determined is that where will the benefit of such a set-aside, claw back order of a bankruptcy court flow? The same in many instances could be to the estate of the corporate, or the new incoming investor or also the creditors of the corporate.

I'd love to see you elaborate on the importance of the rules.

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Question 3.2 [maximum 5 marks]

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

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

which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case.”

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

The above definition as well as the one provided by Ian Fletcher, reveal the limitations with which the concept of international insolvency law and its scope is plagued. The implementation of harmonised insolvency laws has not been applied and adopted internationally at the pace at which globalisation has spread and instances of transnational asset holdings, business operations and just the international presence of corporates has set in. It is obvious that such multinational asset and business portfolios have in the recent past triggered instances of cross-border insolvencies, which the domestic laws and insolvencies systems of states have proven very unprepared and redundant to handle.

First off, there is a fundamental disparity between the meaning of the term’s ‘insolvency’, ‘liquidation’, ‘bankruptcy’ etc. The words are sometimes used synonymously, while sometimes the meaning attached to each is highly specific, which can mean the complete opposite in another state. In addition to the same, the relevant domestic laws qua topics such as set-off, netting, voidable dispositions, priorities, treatment of secured transactions, executory contracts etc. is also varied and have varied thresholds. In addition to the above, many states also have the option of restructuring, out-of-court debt workouts, fresh start processes etc., before any formal insolvency process can be initiated. There can also a more fundamental difference in the nature of the insolvency systems, the same being debtor-in-possession or creditor-in-possession. In addition to the above, the influence of the customary laws or laws relation to property, labour, contracts etc. which are very intrinsically woven in the fabric of insolvency law also greatly differ from state to state.

The absence of a harmonized international insolvency law system leads to a situation where are multiple concurrent proceedings in various states which are all are following their own set of domestic laws which hugely vary. Furthermore, there have been different recommendations on how international insolvency provisions should be adopted by various nation states:

- a. If the states should adopt the same insolvency law?*
- b. If the states should adopt the same insolvency law principles?*
- c. If the states should adopt the same recognition laws?*

All of the above propositions should go on to answer the following questions raised by Fletcher¹²:

- a. In which jurisdictions may insolvency proceedings be opened?*

¹² I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005)

- b. *What country's law should be applied in respect of different aspects of the case?*
- c. *What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?*

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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.

In the absence of a uniform international insolvency law, many states and nations have entered into treaties and conventions which are then imported into their domestic laws and have a binding effect on them. Treaties and conventions are a type of 'hard law' which have enforceable qualities and can be met with punitive measures¹³, which is the point of diversion from 'soft law'. Treaties and conventions are governmental actions. The same falls in the category of addressing the drawbacks of international insolvency laws by adopting the approach of 'if all member states follow the same set of rules qua insolvency'. The following are the examples of successful treaties and conventions in the space of international insolvency laws:

- a. ***Nordic Convention:*** *Entered into on November 7, 1933, between the states of Denmark (which included Greenland), Finland, Iceland, Norway and Sweden. According to the convention, a bankruptcy declared in one Nordic country is recognised in other Nordic countries as automatically applying to the bankrupt's property in those countries (bankruptcy here refers to both individuals and corporates)¹⁴*
- b. ***Istanbul Convention/ European Convention on Certain Aspects of Bankruptcy (ETS No. 136):*** *The same is an example of the efforts of the European Union (EU) to implement a standard set of cross-border insolvency rules. The Convention allows for liquidators appointed in one EU state in which bankruptcy is opened to exercise some powers in other states where the assets are located, however in doing so the liquidators are required to adhere to the domestic laws of that state. It also allows for opening of secondary bankruptcies. Though the same was not ratified by many member nations.*
- c. ***ALI NAFTA Principles:*** *American Law Institute's ("ALI") Principles of Cooperation among the member-states of the North American Free Trade Association (being the United States, Canada and Mexico) (the "ALI NAFTA*

¹³Harvard International Law Journal, Ecocide Law: The Use of Hard Law to Complement Soft Law, <<
[¹⁴ Thomson Reuters Practical Law, Nordic Bankruptcy Convention, <<
\[202223-909.assessment1summative\]\(https://uk.practicallaw.thomsonreuters.com/5-504-9659?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#:~:text=The%20Nordic%20Bankruptcy%20Convention%20of,applies%20between%20these%20Nordic%20countries>>>, accessed on November 13, 2022</p></div><div data-bbox=\)](https://harvardilj.org/2021/05/ecocide-law-the-use-of-hard-law-to-complement-soft-law/#:~:text=In%20contrast%20to%20soft%20law,that%20soft%20law%20instruments%20lack>>>, accessed on November 13, 2022.</p></div><div data-bbox=)

Principles”), provided a non-statutory basis for cooperation in international insolvency cases.

- d. *The Montevideo Treaties of 1889 and 1940: Entered between the Latin American countries, the same is one of the foremost instances of multilateral treaties in the space of international insolvency. The 1889 treaty provided for the concept of concurrent proceedings as well as one main proceeding in the domiciled state.*
- e. *The Havana Convention on Private International Law 1928: the Bustamante Code was adopted on 20 February 1928 by 15 Latin American States. The Code provides that the debtor’s domicile, whether determined on a civil or commercial basis, is the required link to establish jurisdiction to open insolvency proceedings. The principle of unity is respected where the debtor has only one domicile, insolvency proceedings are only to be opened in that state¹⁵.*

While treaties and conventions may be viewed as more binding and confirmative and resultantly being more transparent in their approach, there have been instances where a many states who have participated in these conventions, or for whom these treaties can be made applicable have not ratified the same. Furthermore, the same is always observed to be amongst countries and states that are geographically located closer to each other or are considered a part of the same region and have had a long-standing trade cooperation and moreover have the same historical roots of legal system. For example the Nordic Convention is only between the Nordic Countries, while the Havana Convention addressed the Latin American States. Such treaties and conventions will be difficult to implement across all jurisdictions worldwide. There is some scope to elaborate on success discussions.

4.5

Marks awarded 13.5 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.

¹⁵ Omar. J Paul, “The Landscape of International Insolvency Law (Wiley InterScience, *Int. Insolv. Rev.*, Vol. 11: 173-200 (2002))

Question 4.1 [Maximum 5 marks]

What are the main differences between “formal” insolvency proceedings and “informal” insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

The main difference between ‘formal’ and ‘informal’ insolvency arrangement is that ‘formal’ processes are based on the insolvency law of the state, while the ‘informal’ arrangements are not and are based on the voluntary negotiations between the debtors and the creditors. ‘Informal’ procedures can though be influenced by the principles of the domestic insolvency law. Further, ‘formal’ procedures will allow a codified procedure qua the insolvency process or liquidation of a corporate, while ‘informal’ procedures mostly provide restructuring procedures which can be moved around. While ‘formal’ arrangements are prescribed by the legislature, ‘informal’ workouts are often prescribed by a sector specific regulatory bodies which are often quasi-judicial in nature. There are also instances of a hybrid model in many states which prescribe formal affirmation of an ‘informal’ arrangement by a formal insolvency court.

Lobo must keep in mind that the typical factors that premise an ‘informal’ process include, inadequacy of normal cash flows, uncertain extraneous factors, whether the current working capital is intact or expected to be eroded beyond any meaningful correction in the future, adequacy for resolution measures, any alternative resolution to resolve liquidity issues, group company support etc. A vanilla out of court restructuring could involve interest rate reduction, extension of repayment tenure etc. A common trend in such situations is also to take a high degree of promotor support, in the nature of pledge, personal guarantee and/or additional collateral. Standstill clauses may be included in all informal and consensual restructurings along with clauses pertaining to a workable and credible treatment of dissenting creditors. Assuming that Lobo is the only creditor to FPPL in Asgard, Lobo can explore the option of entering into a bilateral settlement agreement with FPPL, where the terms of settlement can be explored one-on-one, without having to involve any other parties. If we are assuming that Lobo is not the only creditor of FPPL in Asgard, then the same may involve certain restructuring guidelines (which are state/authority prescribed) kick in, wherein the procedure may be a lot more complex and may involve a majority voting system amongst the creditors before accepting any settlement/restructuring proposal.

Apart from the characteristics of an ‘informal’ procedure as pointed out above, Lobo should note the more advantageous aspects of the same such as:

- a. cost effective;*
- b. more time efficient;*
- c. often, confidential in nature;*
- d. participation of certain types of creditors only (if there are other creditors);*
- e. more negotiation power with the creditor and hence more commercially viable;*

- f. *more flexibility in terms of the procedure to be enforced, as often the contracts can be bilateral;*
- g. *in hybrid cases, the same can have the approval of the formal bankruptcy court as well.*

Lobo should also note the following disadvantages:

- a. *treatment of dissenting creditors can be tricky (if there are other creditors);*
- b. *challenge can be faced from the sects/classes of claimants and creditors who did not participate in the out of court workout, specially the claims of the cross-border creditors;*
- c. *Risk of the same being scrutinized as 'preferential' transaction and sought to be set aside, in the event a formal insolvency action is initiated against FPPL soon;*
- d. *may or may not prescribe any moratorium;*
- e. *no or less punitive measures in case of a breach;*
- f. *the failure of an informal workout may lead to initiation of a formal process anyways, which leads to a loss in respect to the time value of money;*
- g. *incumbent on the performance or promise of the very management which dragged the corporate into insolvency;*
- h. *higher haircuts leading from extensive negotiations.*

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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.

One of the many approaches which have been recommended to resolve the issues involved in cross border or international insolvencies is that states should adopt the same set of recognition laws.

In the above fact set, the Asgardian insolvency representative can possibly face the following challenges¹⁶:

- a. *Whether the Asgardian formal court order against FPPL would be recognised in Encanto or not and vice a versa whether the Encanto court order would be recognised in Asgard or not;*

¹⁶ J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, St Louis University Law Journal 753, pp 753-757.

- b. *If yes, then what would be the extent of the recognition, would they be able to apply for injunctions and stays;*
- c. *Which would be the main centre of proceedings;*
- d. *Whether the domestic court would be able to exercise jurisdiction at all or not;*
- e. *Which country's law and procedure will be applicable;*
- f. *Which set of creditors would have priority and preference over the estate of FPPL;*
- g. *What would be the treatment of assets located in Asgard;*
- h. *What would be the treatment of insolvency related topics such as netting, set-off, voidable transactions, executory contracts etc.;*
- i. *Status of moratorium;*
- j. *How will the various classes of creditors participate in the proceedings;*
- k. *What will the qualification and threshold of the discharge mechanism be.*

The international insolvency instruments that have been developed to assist with respect to the above difficulties are:

- a. ***UNCITRAL Model Law on Cross-Border Insolvency (1997) ("Model Law"):*** *The Model law has been formulated to assist states to equip their insolvency laws with a modern legal framework to more effectively address cross border insolvencies.¹⁷ It focuses on authorising coordination and cooperation rather than attempting the unification of substantive insolvency law and respects the differences among national procedural laws¹⁸. The Model law is based on the following elements:*
 - *Access: give insolvency representatives right to access and assistance from courts;*
 - *Recognition: establishes simplified procedures for recognition of foreign proceedings;*
 - *Relief: relief is considered crucial for orderly and fair conduct of cross border events;*
 - *Cooperation and Coordination: between nations states where concurrent proceedings are on-going and the debtor's assets are located¹⁹.*
- b. ***Judicial Insolvency Network (JIN):*** *Formed in 2016, the JIN is a network of insolvency judges from across the world²⁰, which in its inaugural conference in Singapore on 10th and 11th October 2016, concluded the issuance of a set of guidelines titled "Guidelines on Communication and Cooperation between Courts in Cross-Border Insolvency Matters" ("JIN Guidelines"). The JIN Guidelines address key aspects of and the modalities for communication and*

¹⁷ United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency (1997), <<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency>>, accessed on November 13, 2022

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ Judicial Insolvency Network, About us, <<<https://www.jin-global.org/about-us.html>>>, accessed on November 13, 2022.

cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.²¹ Furthermore, Modalities of Court-to-Court Communication (the “Modalities”), which were formulated in the second conference of JIN, prescribe the issues that need to be addressed to facilitate communication. These include arrangements as to the time, method and language of communication, the nature of the case (with due regard to confidentiality concerns) and whether the parties before the initiating court have consented to the communication taking place²².

- c. *EU JudgeCo Guidelines: The 2014, 8 EU Cross-Border Insolvency Court-to-Court Communications Guidelines were adopted with an aim to strengthen efficient and effective communication between courts in the EU Member States. They promote international cooperation in the area of insolvency, achieving greater and timely co-ordination among countries in multinational business reorganisations or restructurings²³*

The UNCITRAL Model Law has been accepted as the gold standard for mature and developing insolvency regimes in relation to governance of international and cross border insolvencies and more and more states are moving towards the adoption of the same. The legislation based on the Model Law has been adopted in 53 states in a total of 56 jurisdictions²⁴, which go on to state the success of the Model Law. The adoption and influence of the aforementioned initiatives has been considered critical as they recommend ways of coordination and recognition between jurisdiction while also wholly not disturbing the domestic insolvency regimes.

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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 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

²¹ Judicial Insolvency Network, JIN Guidelines, <<<https://www.jin-global.org/jin-guidelines.html>>>, accessed on November 13, 2022.

²² Judicial Insolvency Network, Modalities of Court-to-Court Communications, <<<https://jin-global.org/modalities.html>>>, accessed on November 13, 2022

²³ Wessels. Bob, “Cross Border Insolvency Court-to-Court Cooperation Principles gain wide support”, <<<https://www.leidenlawblog.nl/articles/cross-border-insolvency-court-to-court-cooperation-principles-gain-wide-sup>>>, accessed on November 13, 2022.

²⁴ UNCITRAL, Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), <<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>>, accessed on November 13, 2022.

proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

Its to be noted that the United Kingdome (UK) ceased to be a part of the European Union at 11 p.m. on January 31, 2020. The Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 in Insolvency Proceedings (Recast) ("EIR Recast") is applicable to all insolvency proceedings commencing after June 26, 2017 (hence also applicable to the ones in the UK before January 31, 2020). After Brexit, the benefit of the EIR Recast between the UK and the EU was lost²⁵ (because the Brexit deal did not cover aspects of insolvencies). The EIR Recast will only continue to apply to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (11 p.m. on 31 December 2020)²⁶.

Furthermore, as per Article 3 of the EIR Recast, jurisdiction is awarded to open main proceedings to the courts within whose jurisdiction the corporate has centre of main interest ("COMI"). Also, Article 19 of the EIR Recast provides automatic recognition of the main proceedings in all the other member states and other member states are only then entitled to initiate secondary proceedings in case the corporate affairs in such other jurisdiction.²⁷

In the above fact set, we hence know that the EIR Recast will not apply to the UK commenced insolvency proceedings as the same was initiated after December 31, 2020. In terms of the other options available qua the UK proceedings, the same can turn to the UNICTRAL Model Law, The Insolvency Act of 1986 and the common law principles of comity.

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Marks awarded 15 out of 15

*** End of Assessment ***

TOTAL MARKS 46.5/50
Excellent Paper

²⁵ The Gazette is published by TSO (The Stationery Office) under the superintendence of His Majesty's Stationery Office (HMSO), part of The National Archives, What is the Impact of Brexit on Cross-Border insolvency, <<<https://www.thegazette.co.uk/insolvency/content/103914>>>, accessed on November 13, 2022.

²⁶ *Ibid*

²⁷ EUR-Lex, Access to European Union Law, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) <<<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848>>>, accessed on November 13, 2022.