



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).**
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- 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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Many developing countries' insolvency laws are based on the insolvency law systems in England or civil countries due to most developing countries being colonies and inheriting their laws from the countries that previously colonised them.¹

The same applies to African countries. In particular, Nigeria, Kenya, Botswana, Zambia, and countries in Eastern Africa like Tanzania find the roots of their insolvency laws in the English system.² By contrast, insolvency laws in Angola and Mozambique are based on civil Portuguese law, while those in French-speaking countries in West Africa are based on French civil law.³ Interestingly, South Africa and Namibia have mixed legal systems since both English law and Roman-Dutch civil laws have impacted their systems.⁴

¹ Professor André Boraine and Professor Rosalind Mason, *Module 1 Guidance Text – Introduction to International Insolvency Law*, September 2022, p 10.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

Nonetheless, a number of African States are now developing new and more modern insolvency legislation.⁵

3

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 financial crisis of 1998 in East Asia as well as the 2008 global financial crisis especially gave rise to insolvency law reform in Eastern Asia. For example, Thailand overhauled its bankruptcy laws as a result.⁶ In particular, the 1998 crisis spurred the revamp of Thai bankruptcy laws to allow for corporate reorganization, and filings of court rehabilitation increased significantly.⁷

As a result of the financial crises, Singapore has also passed its new Insolvency, Restructuring and Dissolution Act in October 2018 to consolidate Singapore's corporate and personal insolvency and restructuring laws into a unified Act, effective 30 July 2020.⁸

3

Question 2.3 [maximum 4 marks]

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

The various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada include:

- In the 1970s, Canada and the United States were working towards a bilateral insolvency treaty but failed to reach agreement given the proposed agreement was too ambitious in scope.⁹ However, both States have since adopted the 1997 Model Law on Cross-Border Insolvency by the United Nations Commission on International Trade Law and have through this made more practical progress.¹⁰
- The North American Free Trade Agreement (NAFTA) Principles of 2000 (prepared and approved by the American Law Institute (ALI) Council and members), which focuses on insolvency and other legal entities engaged in commercial operations.¹¹ These Principles focus on cooperation (general principle I) and recognition (general principle II), amongst others.¹² The Principles also include a recommendation that each NAFTA country adopt the 1997 Model Law on Cross-Border Insolvency by the United Nations Commission on International Trade Law. The NAFTA Principles have been relatively successful given they assist with the resolution of insolvency issues between its member countries (the United States, Canada and Mexico). All three

⁵ *Ibid.*

⁶ Borraine and Mason, *supra* note 1, p 11.

⁷ <<<https://iclg.com/briefing/12818-tilleke-and-gibbins-guide-to-bankruptcy-law-in-thailand-2020>>>, accessed 13 November 2022.

⁸ Borraine and Mason, *supra* note 1, p 12.

⁹ *Idem*, p 62.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Idem*, p 63.

countries have since and as a result of the NAFTA Principles, adopted the 1997 Model Law (Mexico in 2000, and Canada and the United States in 2005).¹³

- Also in 2000, the ALI Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases for international insolvencies not only involving the United States and Canada, but also Mexico.¹⁴ These guidelines were relatively successful and subsequently resulted in the 2012 ALI – III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases.¹⁵

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

3

Marks awarded 9 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.

'Voidable dispositions' refer to transactions that may be set aside if certain conditions are met, with any benefits received by the beneficiary to be repaid to the insolvent estate.¹⁶ Voidable dispositions transactions are usually aimed at preventing fraud (for example, where a debtor is trying to hide assets), ensuring fair treatment of all creditors by avoiding favouritism and preventing sudden losses in assets immediately before court supervision is imposed.¹⁷

The basis of voidable disposition law in civil law stems from the *actio Pauliana*.¹⁸ *Actio Pauliana* is a right that is owned by creditors in certain circumstances and can view null and void certain actions that have been done by the debtor to harm the creditor.¹⁹ Debt collecting

¹³ *Ibid.*

¹⁴ *Idem*, p 57.

¹⁵ *Ibid.*

¹⁶ *Idem*, p 22.

¹⁷ *Ibid.*

¹⁸ *Idem*, p 23.

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<<https://www.researchgate.net/publication/335655670_Actio_Pauliana_as_the_Rights_Protection_Efforts_for_Creditors_in_the_Bankruptcy_Case>>, p 27, accessed 13 November 2022.

procedures in civil law developed from individual debt collecting procedures, and subsequently developed into collective debt collecting mechanisms.²⁰ In the English system, the Act of Elizabeth of 1570 forms the basis of voidable disposition law.²¹ Similarly to the civil system, the English system initially focused on individual debt collecting procedures prior to its collective bankruptcy procedure.

Voidable disposition rules are important in insolvency given they provide a mechanism to avoid fraud, ensure equitable treatment of all creditors and ensure assets are not illegally dispersed prior to proceedings, thereby ensuring the best possible outcome for creditors. [There is scope to elaborate upon the importance of voidable transactions. But this is answered well.](#)

4.5

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.

The definition on international insolvency law referred to is by B Wessels. Wessels believes his definition is limited given "...it is connected to the existence of a national legal framework of insolvency law."²²

I believe Wessels treats this as a limitation as most domestic laws are ill-equipped when it comes to dealing with cross-border insolvency situations. A state's enforcement of its jurisdiction ends, generally speaking, with its national borders.²³ Furthermore, in the current economy, national borders are becoming more irrelevant. Given the present-day mobility of people and the speed at which assets can be transferred, recognitions of insolvency proceedings in one state where the debtor holds assets at the commencement of proceedings in another state of the common market, cannot depend solely on the goodwill of the first state.²⁴

The limitation in Wessels' definition is further exposed when considering other definitions of 'international insolvency'. For instance, Fletcher defined 'international insolvency' as a situation where an insolvency "...transcends the confines of a single legal systems..."²⁵

²⁰ Boraine and Mason, *supra* note 1, p 4.

²¹ *Idem*, p 23.

²² *Idem*, p 34.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid*, citing B Wessels, *International Insolvency Law* (Kluwer, 2006), p1.

Again, this demonstrates that the notion of a national legal system is somewhat misplaced when considering internal insolvency law.

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.

Treaties and conventions are instruments accepted or ratified by States which amend or add to States' domestic laws in order to resolve cross-border insolvency issues.²⁶ Once States have bound themselves to the relevant treaty or convention, that treaty or convention then becomes part of the State's hard law.²⁷

The effectiveness of treaties and conventions as a successful way of establishing cross-border insolvency law depends largely on how many States become signatories, as well as how many States out of the signatories then ratify the relevant treaty or convention.

For example, the Nordic Convention of 1933 is a successful multilateral treaty from the Scandinavian region. The reason for its success is that it continues in effect between Denmark, Finland, Iceland, Norway and Sweden and displays great comity between its members.²⁸ For example, it allows for local recognition to the courts for bankruptcy related acts in other member States, as well as promotes the "ideal of universality of a nominated insolvency".²⁹ The Nordic Convention is therefore a successful example of a convention that establishes cross-border insolvency law, but it would be markedly less successful in doing so if not as many Nordic states had acceded and ratified the convention.

A less successful example of a convention establishing cross-border insolvency law is the 1990 Istanbul Convention, Council of Europe Treaty Series No 135.³⁰ Although this convention was signed by 8 member states, it did not enter into force due to an insufficient number of signatories ratifying the convention.³¹ Even so, the Istanbul Convention has been said to go on and influence the development of the European Union's response to international insolvency issues.³²

There is scope to discuss further examples. But this is answered well.

4.5

Marks awarded 14 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.

²⁶ *Idem*, p 46.

²⁷ *Ibid.*

²⁸ *Idem*, p 64.

²⁹ *Ibid.*

³⁰ *Idem*, p 46.

³¹ *Ibid.*

³² *Ibid.*

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?

In general, formal insolvency proceedings are commenced under and governed by the relevant country's/state's law, which can include liquidation, debt recovery or rescue proceedings.³³

On the other hand, informal insolvency proceedings are not always governed by the relevant country's/state's law and will depend on voluntary negotiations involving the debtor and creditor/creditors.³⁴ Those voluntary negotiations often will provide for some type of restructuring of the debtor. Furthermore, the effectiveness of the negotiations will often depend on the relevant country's/state's insolvency law, as although it does not regulate the informal proceeding, it may provide incentives or persuasive force.³⁵

More information on Encanto's insolvency laws is required to accurately analyse the differences and advantages Lobo should consider between any formal or informal arrangements.

Generally speaking, however, Lobo should consider that:

- An informal out-of-court arrangement would mean that no moratorium would be put in place to prevent other creditors from commencing proceedings³⁶ against FPPL, which may affect the pool of assets available to satisfy the outstanding debt owed to Lobo. If formal proceedings were initiated, a statutory moratorium would be in place, which would prevent legal proceedings.³⁷
- An informal out-of-court arrangement would also mean that there is no way to bind dissenting creditors to any agreement reached.³⁸ This would mean that there is less incentive for FPPL to enter into an informal arrangement with Lobo as there is no guarantee another creditor will not pursue FPPL. As such, an informal procedure would provide Lobo with less certainty.

³³ *Idem*, p 17.

³⁴ *Ibid.*

³⁵ *Idem*, p 18.

³⁶ *Idem*, p 25.

³⁷ *Idem*, p 25-26.

³⁸ *Idem*, p 25.

- On the other hand, Lobo's costs would be significantly lower with an informal arrangement as the courts are not involved.³⁹
- With an informal arrangement, there would also be no publicity involved⁴⁰ with the fact that FPPL is facing solvency issues. While this is likely more important to FPPL than to Lobo, Lobo can use this fact to its advantage as it may mean FPPL is more likely to agree to favourable terms.
- Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

• 4.5

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

The difficulties that may arise for the insolvency representative here pertaining to co-operation and co-ordination is that the two concurrent proceedings may compete with each other or be incompatible in nature.⁴¹ Ultimately, this may mean that the two insolvency representatives may 'race' for FPPL's assets, with the 'fittest' representatives coming out on top. The issue with this is that it runs counter to the basic global principle of insolvency – '*par conditio creditorum*' – which is the principle of equality between creditors.⁴²

Generally speaking, in cases of cross-border insolvency, states would apply its own laws, including its choice of law rules, to determine how to resolve a situation as the one faced by the Asgardian insolvency representative. More information would be required on the relevant laws of Encanto and Asgard, and how these extend to co-operation and co-ordination to analyse the impact and likely resolution of the cross-border insolvency issue here.

Multiple international insolvency instruments have been developed to assist with the above issues, which accept that there are likely to be multiple states with which an insolvent debtor may be connected, raising the risk of multiple concurrent proceedings.⁴³ For example:

- The 2004 Legislative Guide on Insolvency Law by the United Nations Commission for International Trade Law (UNCITRAL),⁴⁴ which is intended to be used as a guideline and reference by countries and states when developing new laws or reviewing existing laws. In particular, note part 1 of recommendation 5, which states that "the

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Idem*, p 35.

⁴² *Ibid.*

⁴³ *Idem*, p 56.

⁴⁴ <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>>, accessed 13 November 2022.

insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency".⁴⁵

- The IBA Cross-Border Insolvency Concordat (1996), which proposes co-ordination between states involved in concurrent proceedings, subject to a governance protocol in certain cases, which would set out the responsibilities and jurisdiction of each proceeding.⁴⁶ This formed the basis for some court-approved protocols to assist with the administration of concurrent proceedings.⁴⁷
- The 1997 Model Law on Cross-Border Insolvency by the United Nations Commission on International Trade Law (UNCITRAL MLCBI),⁴⁸ a key principle of which is co-operation and co-ordination. Articles 25 and 26 of the UNCITRAL MLCBI effectively require both courts and insolvency representatives in different states to co-operate and co-ordinate as much as possible to ensure the debtor's assets are dealt with fairly and efficiently, thereby ensuring the maximum benefit for creditors.⁴⁹ Article 27 then provides examples of appropriate mechanisms of co-operation such as the approval or implementation by courts of agreements concerning the coordination of proceedings.⁵⁰
- The Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines),⁵¹ whose aim is to "improve the efficiency and effectiveness of parallel proceedings in an international insolvency by enhancing co-ordination and cooperation amongst courts under whose supervision such proceedings are being conducted."⁵²

The development of the above instruments is important as without these, states would simply be left to apply their own laws to determine how to resolve cross-border issues. Unfortunately, however, most domestic legal systems are ill-equipped when it comes to dealing with cross-border issues.⁵³ The above-described international solvency instruments are therefore vital for establishing clear and uniform rules relation to cross-border insolvency issues.

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

⁴⁵ Boraine and Mason, *supra* note 1, p 53.

⁴⁶ *Idem*, p 56.

⁴⁷ *Ibid*.

⁴⁸ <<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency>>, accessed 13 November 2022.

⁴⁹ Boraine and Mason, *supra* note 1, p 56.

⁵⁰ *Idem*, p 57.

⁵¹ <<<http://www.jin-global.org/jin-guidelines.html>>>, accessed 13 November 2022.

⁵² Boraine and Mason, *supra* note 1, p 58.

⁵³ *Idem*, p 34.

The current European Insolvency Regulation (EIR) (Recast) 2015 has been applicable since mid-2017.⁵⁴

Given the UK ceased to be a member of the EU at 11 pm on 31 January 2020, the EIR Recast no longer applies under UK law to proceedings in the UK post 11 pm on 31 December 2020.⁵⁵ However, the EIR Recast will continue to apply to insolvencies where the main proceedings were opened prior to the expiry of the transitional period, this being 11 pm, 31 December 2020.⁵⁶

The EIR Recast will not apply to the proceedings commenced by the minor creditor in the UK given the transitional period has expired.

If the EIR Recast did apply, primary jurisdiction would be based on the center of FPPL's main interests, while subsidiary territorial proceedings in other members states would be possible where the debtor has an establishment.⁵⁷ Based on the information provided, it is not clear which state would be allocated as the primary jurisdiction, but Lobo would either way be likely to be allowed to commence subsidiary proceedings given FPPL likely has establishments in the same country where Lobo is situated.

Given the EIR Recast does not apply to the UK proceedings, however, means that it cannot here be relied on by Lobo to issue subsidiary proceedings.

Consequently, Lobo would have to rely on the UK's own domestic laws, whichever country's laws Lobo is based in (further information on which would be required) as well as other international insolvency instruments to determine the cross-border issues here.

In particular, England and Wales have adopted the UNCITRAL Model Law on Cross-Border Insolvency, article 25.1 of which requires cooperation to the maximum extent possible with foreign courts or representatives.⁵⁸ Given the UNCITRAL Model Law on Cross-Border Insolvency does not require reciprocity, it does not matter whether the country in which Lobo is considering bringing proceedings in has adopted the UNCITRAL Model Law on Cross-Border Insolvency.

In addition to the above, also note section 462 of the UK's Insolvency Act 1986,⁵⁹ which deals with co-operation between courts exercising jurisdiction in relation to insolvency, continues to apply to relevant countries.⁶⁰ Depending on whether the country in which Lobo was considering to open proceedings in is captured by section 462 of the UK's Insolvency Act 1986, Lobo may also be able to commence proceedings and rely on the principles of co-operation and co-ordination in reliance on the UK's Insolvency Act 1986.

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Marks awarded 14.5 out of 15

*** End of Assessment ***

⁵⁴ *Idem*, p 64.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Idem*, p 65.

⁵⁸ <<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency>>, accessed 15 November 2022.

⁵⁹ <<<https://www.legislation.gov.uk/ukpga/1986/45/section/426>>>, accessed 13 November 2022.

⁶⁰ Boraine and Mason, *supra* note 1, p 7.

TOTAL MARKS 46.5/50
Excellent paper