INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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.

[Type your answer here]

Nigeria, Kenya, Botswana, Zambia and countries in the eastern part of Africa eg, Tanzania largely follow the laws of the respective colonial powers having an English Law tradition. Angola and Mozambique have a civil law tradition based on Portuguese Law. South Africa and Namibia have mixed legal systems due to the Roman Dutch law and English law influence their legal systems respectively. The French speaking countries of West Africa follows civil law, particularly French Law.[1]

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[1] Introduction to International Insolvency Law, Module 1 Guidance Text, http://www.lexafrica.com/wp-content/uploads/2016/09/LEX-Africa-Guide-to-insolvency-in-Africa.pdf

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.

[Type your answer here]

The 1998 financial crisis and its aftermath in East Asia, affected mostly Indonesia and Thailand, gave rise to insolvency reforms and in particular Thailand overhauled its bankruptcy laws.

The Omnibus Bill is one of the series of reforms in the Singapore insolvency and restructuring sphere which has a wide range and substantive changes to Singapore's Companies Act (Cap. 50) (Companies Act) which was enacted in May 2017. This Act included the introduction of concepts which was inspired by Chapter 11 of the US Bankruptcy Code.[2]
Some of the changes are:

- Mandating licensing, qualifications, Standards and disciplinary measures for insolvency practitioners;
- Standalone voidable transactions provisions for corporate insolvency. The new regime reduces the 'twilight period' for transactions at an undervalue from 5 to 3 years, and it increases from 6 months to 1 years the avoidance period of unfair preferences given to non-related parties.

Further Singapore as a major role player in the above region, p-assed a new Insolvency, Restructuring and Dissolution Act to consolidate Singapore's personal insolvency, corporate and restructuring laws into a Unified Act, which came into force on 30 July 2020.[3]

The new legislation seeks to facilitate;

- the understanding and practice of insolvency law in Singapore which will also serves as a valuable tool to support the real economy by facilitating the re-organization of viable companies in financial distress;
- the liquidation of non-viable businesses in a fair and efficient manner, and the maximization of returns to creditors.

Furthermore, by implementing a sophisticated restructuring framework, this package of reforms which culminates in the enactment of the IRDA (Insolvency, Restructuring and Dissolution Act) seeks to enhance Singapore's leadership as an international hub for debt restructuring.

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[2] Introduction to International Insolvency Law, Module 1 Guidance Text, R Tomasic, Insolvency in East Asia, (Ashgate, 2006). On Singapore, see https://www.herbertsmithfreehills. com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill.

[3] https://ccla.smu.edu.sg/sgri/blog/2020/07/23/singapores-new-insolvency-restructuring-and-dissolution-act

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.

[Type your answer here]

A bilateral insolvency treaty in the 1970's was being worked towards in North America, between Canada and the United States. This however failed in reaching any agreement as it probably was too ambitious. Thereafter both states adopted the Model Law and progress was made through mechanisms such as protocols.[4] Prior to that, there had been bilateral co-operation and co-ordination based on existing legislation and long-standing case law around comity.

The American Law Institute (ALI) a professional US body, took steps to assist with the resolution of international insolvency issues between the North American Free Trade Agreement (NAFTA) countries of the United States, Canada and Mexico.

The ALI Transnational Insolvency Project was an initiative to improve co-operation in international insolvencies across the NAFTA States.
Principles of Cooperation among the NAFTA Countries, were prepared and approved by the ALI Council and Members in 2000.

The NAFTA Principles excludes the insolvency of individuals, rules regarding insolvency of non profit organisations and financial institutions and focus on insolvency of corporations and other legal entities engaged in commercial operations.

This principles are structured around:

- General Principles;
- Procedural Principles;
- Recommendations for Legislation or International Agreement.

1. The general principles

Which commence with:

1.1 Cooperation

1.1.1 Courts and administrators should cooperate in a transnational bankruptcy proceeding. Their goals being:

1.1.1.2 the maximizing the value of the Debtor's worldwide assets; and

[4] Introduction to International Insolvency Law, Module 1 Guidance Text, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128 (3d Cir. 2011). For a discussion of the Nortel case, see Jay Lawrence Westbrook, 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 *Texas Law Review* 1473.

1.1.1.3 and furthering the just administration of the proceedings.

1.2 Recognition

1.2.1 Should a debtor become bankrupt in one NAFTA country the debtor should be recognized and given appropriate effect under the circumstances in each of the other NAFTA countries.

1.2.2 Recognition should be granted as efficiently and in a cost effective manner , with a minimum of legal formalities.

There are various general Principles in addition to the above which address Moratorium; Information; Sharing of Value; National Treatment and Adjustments of Distributions.

It further contains 27 Procedural Principles which are grouped :

- Topic A. The Structure of an International Bankruptcy Case;
- Topic B. Initiation - recognition; Stay; Court access; Information and communication;
- Topic C. Administration - Single full bankruptcy proceedings; Parallel proceedings; Corporate groups;
- Topic D. Resolution - Distribution.

The NAFTA principle concludes with Recommendations for Legislation or International Agreement, commencing with a recommendation that each NAFTA country adopt the Model Law on Cross-border Insolvency, which Canada (2005), Mexico (2000) and the USA (2005) have adopted the Model Law.

Other recommendations address automatic stays; notice to creditors; priority claims; binding effect of reorganisation plans; adoption of procedural principles that cannot be implemented under existing domestic laws, and simplified authentication of documents.[5]

According to authors Scott Atkinson and John Martin[6] this framework leads to greater efficiency and cost-effectiveness that may increase the return for creditors through coordination in the collection and distribution of assets.
It also leads to the concentration of proceedings and assist in the avoidance of duplicate insolvency proceedings and or multiple court applications, as well as court orders which may be potentially inconsistent.

They further discuss that the optimal framework remains the MLCBI due to f the potential to:

- its widespread adoption and implementation,
- achieve multilateral uniformity and consistency.
- Ad hoc bilateral arrangements –
  - be it at a government-to-government level
  - or a court-to-court level

  which are not only difficult to negotiate, but also only necessarily deal with a limited demarcation of economic activity.

When a jurisdiction does negotiate multiple bilateral arrangements, then in that event inherently the expansion of those arrangements adds to the potential for inconsistency and

[5] Introduction to International Insolvency Law, Module 1 Guidance Text, page 63
[6] https://www.nortonrosefulbright.com/en/knowledge/publications/87d4ce21/the-model-law-on-cross-border-insolvency-turns-25#section3

very complexity. the MLCBI which is designed to overcome this, and it is therefore necessary that same be adopted and implemented.

There are some other relevant matters to consider. 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 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.

[Type your answer here]

The roots of civil law can be traced to Roman Law Table 3 of the twelve tables that deals with the execution of judgements. Here debt execution developed from the debtor had to pledge his own body for the repayment of his debt and he could be imprisoned, sold as a slave in order to secure repayment of the debt sentenced to death.[7]

In the context of insolvency as such, Fletcher[8] states that the roots of bankruptcy law as a collective debt collecting procedure are to be found in the following procedures of the Roman law: -

- *cessio bonorum* (assignment of property);
- *distractio bonorum* (forced liquidation of assets);
- *remission* and *dilatio* (compositions with creditors).

These procedures developed from individual debt collecting procedures, which in turn gave rise to the development of collective debt collecting mechanisms (insolvency law) when the debtor was found to be insolvent.

Insolvency law developed further in Europe as a result of the *Lex Mercatoria*, development between merchants and thus influenced the laws of the countries that had the characteristics of Roan and German Law ("Civil Law")

Between the 13th and17th century there was an introduction of some form of bankruptcy legislation.

[7] Introduction to International Insolvency Law, Module 1 Guidance Text page 4

[8] Introduction to International Insolvency Law, Module 1 Guidance Text page 4, F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1, p 6; and see generally L ELevinthal, "The Early History of Bankruptcy Law", (1918) 66 *Uni of Pennsylvania Law Review and American Law Register*, p 223.

The development of insolvency law and debt collection was move from execution against the person towards the execution against the assets of the debtor.[9]

English law did not provide for imprisonment for debt but introduced this option by the thirteenth century by the Statute of Marlbridge of 1267. This was only abolished in 1869 by the Debtors Act.9.

The English Bankruptcy Act of 1542 provided for a form of compulsory sequestration, which applied to a dishonest and absconding debtor. This statute viewed debtors as *quasi*-criminals (also called "offenders").[10]

The *actio Pauliana* remained the remedy of the general law until the codification of the Dutch law.

To conclude, one may say that, just as the Act of Elizabeth of 1571 was important for the development of avoidance transactions in common-law jurisdictions, so the *actio Pauliana* became the backbone of this important part of the law in the civil-law jurisdictions. This is said to be the first law designed specifically as a true bankruptcy statute, rather than as a fraud-prevention law.

In most jurisdictions either the common law, the civil law, or a blend of these legal systems, the avoidable transactions as provided for in each jurisdiction and share certain core characteristics.[11]

Countries that are in the process of reforming their local bankruptcy laws, various international instruments emanating from important bodies, such as UNCITRAL and the World Bank, contain principles and guidelines designed to assist such countries when conducting the actual reform.

Voidable dispositions can be classified as either fraudulent conveyances or preferences.

- A fraudulent conveyance entails a disposition (disposing) of property by the insolvent, usually in the form of a donation or undervalued transaction which may be the cause or increases the debtor's insolvency.
- Preferences is when the debtor settle of a pre-existing debt to a creditor, or affords such a creditor real security.

With reference the above Woods lists the possible essential features of insolvency or bankruptcy law that are said to be universal principles –

• Creditors are paid pari passu, that is, on a proportionate basis out of the available assets based on their claims. Wood terms this as a piece of ideology "which is nowhere honoured", since priority creditors and secured creditors form exceptions to this rule in most, if not all,

[9]Introduction to International Insolvency Law, Module 1 Guidance Text page 4, Levinthal, supra note 8, p 232
[10] Introduction to International Insolvency Law, Module 1 Guidance
[11] Comparative Notes on the Operation of Some Avoidance Provisions in a Cross-Border Context ANDRÉ BORAINE* University of Pretoria

States.[12]

This principle that apply to both situations is to ensure *pari passu* distribution, with the exception of those creditors having priority claims and to ensure that secured creditors deal fairly towards the debtor. The other creditors, to investigate reasons for failure and to reclaim voidable dispositions when the insolvent debtor dealt improperly with assets.

The commencement and time of the proceedings will determine the voidable dispositions. The effective date is extremely important to calculate relevant time periods for the purposes of avoidance provisions.

The UNCITRAL *Legislative Guide on Insolvency Law* will largely form the basis for dealing with the various aspects or elements of a developed and efficient insolvency law system including standards for avoidance provisions.[13]

For a sound and uniform approach to insolvency law reform , the advantage is that the Legislative Guide sets the tone on a global basis.

There is scope to elaborate further on the importance of voidable transaction rules.

3.5

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.

[Type your answer here]
The Dutch Commentator being Wessels concedes the limitations due to the following:

- It is connected to the because there is an existence of a National legal framework of Insolvency Law.[14]

He further states that other definitions that exposes such limitations. And refers to the definition provided by Fletcher [15]:

"international insolvency" or "cross-border insolvency" should be considered as

[12] Introduction to International Insolvency Law, Module 1 Guidance Text, page 18

[13] Comparative Notes on the Operation of Some Avoidance Provisions in a Cross-Border Context ANDRÉ BORAINE* University of Pretoria

[14] Introduction to International Insolvency Law, Module 1 Guidance Text page 34, Wessels, supra note 1, p 1.

[15] Introduction to International Insolvency Law, Module 1 Guidance Text page 34,

a situation "…in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

Friman[16] *states that it was no coincidence that the founding fathers of the USA declared in their*
Constitution of more than 200 years ago that insolvency law is a federal question, to be addressed by federal law and not state law.

In a common market with a free trade requires a standardised regulation of insolvency matters.

It cannot be expected or depended on that the recognition of insolvency proceedings in one state where the debtor holds assets at the commencement of proceedings in another state of the common market.

The European Union has also realised this because a common market between nation States exists. In the global platform where communication and interactions between individual, states and businesses has given rise to cross border insolvency cases.

One has to consider the current world economy and they way in which businesses and individuals operates wherein investments and subsidiaries in foreign countries, different branches are established and are now common practises because of some of the incentives on foreign exchange controls being relaxed and capital markets deregulated, which encourages foreign trade.

Friman[17] further states International insolvencies are the norm and not the exception that in in modern times most significant corporate collapses involve more than one State.

In this regard, the fact that most domestic legal systems are ill equipped when it comes to insolvencies across borders. Due to the States enforcement of jurisdiction within its nations borders and reference be made to the current mobility of people and the speed at which assets that can be transferred and complex business transactions creates problems.

There will always be a risk of multiple insolvency proceedings against the same debtor without co-ordination and co-operation between courts of different states. There could be other issues like competing matters or incompatible due to, eg, liquidation verses a corporate rescue. These are aspects that could lead to costs to creditors, or a restructure or a resolution to the distress may be prevented. This creates a position wherein it maybe

[16] H Friman. The discussion on cross-border insolvency rules are largely based on the master class notes initially drafted by the late Judge, Hakan Friman for the LLM in the international insolvency law module presented University of Pretoria, and when he served as extra-ordinary professor in that faculty.

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[17] H Friman. The discussion on cross-border insolvency rules are largely based on the master class notes initially drafted by the late Judge, Hakan Friman for the LLM in the international insolvency law module presented University of Pretoria, and when he served as extra-ordinary professor in that faculty.

impossible to predict which law may be applicable to govern the questions that the situation may arise. Situations like this creates a situation that may also result in a race amongst the creditors for the assets and sometimes only those that has the ability to fight the challenge will survive other creditors would be losers and this runs against the basic global principle of insolvency being the principle of equality between creditors (*par conditio creditorum*).

In relation to cross-border insolvency proceedings there are also risk of fraud and detrimental forum shopping could also arise.

These are some of the issues that have been observed over time.
The various stakeholders and representative bodies have launched various initiatives in order to address these issues.

The main reason for establishing clear and uniform rules relating to cross-border insolvency issues, is to provide clarity and predictability which is extremely important for the purpose of international trade and investment.[18]

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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.

[Type your answer here]

There are numerous problems and questions that arise in cases of cross-border insolvency and the question remains as to how to best resolve these. Independent and sovereign States govern their own legislation, therefore must be involved in amending their legislation in order to meet these challenges.

Treaties and conventions are instruments are to which States become signatories and bind themselves and affect their domestic laws. These treaties and conventions then form part of the States “hard law” on insolvency and enforceable in courts.

From the 19th century, more modern forms of bilateral treaties or conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions involving their State, appeared.

The Nordic Convention (1933), a successful multilateral treaty , hails from the Scandinavian region.
Professor Michael Bogdan[19] said of the Nordic Convention that it functions very well but would recommend it for universal use because the Nordic countries are geographically close, their legal systems are similar, and they have a high level of confidence in each other's legal systems.

[18] Introduction to International Insolvency Law, Module 1 Guidance Text page 35
[19] https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1672&context=ublr Professor of Law at the University of Lund.

It is accepted if a Swedish creditor may in another country get less, or more, than he would receive in a Swedish bankruptcy. Therefore, the Convention works well and is generally accepted.

European efforts at achieving multilateral international insolvency conventions were unsuccessful for many years. It concluded a Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe Treaty Series No 136, which was in 1990. It was signed only by 8 member States, and was not ratified for it to be in force. It did have ab influence on the development of a European Union response to the problems of international insolvencies among its member States.

The European Insolvency Regulation (EIR) (2000) did achieve more success and also influenced broader multilateral developments in international insolvency law albeit not by way of Convention but a regulation.[20]

It is trite to say that the legal systems of the world are different. It is the root of the problem in international insolvencies and the main reason why it is so difficult to find a universally acceptable solution to international insolvency problems. This is another reason why harmonization of insolvency laws is the ideal answer to the problems of international insolvency.

Whilst there has been varied amount of success in achieving "hard law" solutions to international insolvency law issues, "soft law" options have gained more success.
A range of multilateral organisations have focussed their efforts on this approach recently.

In the 19th century the Hague Conference on Private International Law (the Hague Conference) was established to work towards the progressive unification of private international law.
The adoption of a Model Treaty on Bankruptcy at the 1925 conference was an early initiative but was never ratified, nevertheless it has contributed to the international deliberations on regulating international insolvency. An example, it allocated jurisdiction in respect of a corporation to the court in terms of the statutory registered seat being located "provided that it be neither fraudulent nor fictitious".

The Hague Conference now describes itself as "The World Organisation for Cross-border Co-operation in Civil and Commercial Matters".[21] It works together with the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL). It cooperated with UNCITRAL in the preparation of the UNCITRAL Legislative Guide on Insolvency Law (2004).

The "soft law" approach to date has been undertaken by UNCITRAL has been the most successful. It developed a Model Law on Cross-border Insolvency (MLCBI).
This initiative was in a form of a Model Law, not a treaty or convention, and a draft legislation that UNCITRAL recommended member States to adopt.

[20] Introduction to International Insolvency Law, Module 1 Guidance Text page 47
[21] Introduction to International Insolvency Law, Module 1 Guidance Text page 47
https://www.hcch.net/index.cfm?oldlang=en

States that are now adopting the MLCBI, and the momentum is increasing as an influential response to international insolvency law due to the number, economic size and geographic spread.[22]

- UNCITRAL Legislative Guide on Insolvency Law (2004)
  World Bank *Principles for Effective Insolvency and Creditor /Debtor Regimes* revised in 2021.
  - Foreign investors may seek clarification for creditor protection;
  - A low ranking on the World Bank Doing Business Report could cause political implications;
  - Some insolvency law reform as a condition of loan support may be required by the IMF and World Bank

It is those states that become signatories to treaties and conventions bind themselves which assist in the domestic laws being inclusive of the international cross border law.

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.

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?

[Type your answer here]

Corporate rescue can either be on an informal basis, where an out-of-court workout can be agreed between the parties, or by way of a formal, statutory corporate rescue mechanism.[23]
There is scope to elaborate on this issue.

The disadvantages of informal creditor workouts are that:-

i) There is no moratorium in place which prevents other creditors from approaching the courts to commence an insolvency proceeding; and

[22] Introduction to International Insolvency Law, Module 1 Guidance Text 47https://www.legislation.gov.uk/uksi/2019/146/contents. See Mevorach

[23] Introduction to International Insolvency Law, Module 1 Guidance Text page 25 & 26

ii) There is no way of binding dissenting creditors to any agreement reached as can be done in a formal process.

The advantages of an informal creditor workout are that:-

i) The costs is significantly lower in that the courts are not involved; and
ii) There is no publicity regarding the fact that the debtor company is experiencing financial difficulties as there is no requirement to inform all affected persons.

The advantages are that of formal statutory corporate rescue are that:-

i) The benefit of a statutory moratorium preventing any legal proceedings (being enforcement action and or a liquidation); and
ii) it may be possible to bind dissenting creditors to whatever the restructure or plan is proposed by the officeholder or the corporation itself.

The disadvantages usually associated with formal rescue mechanisms are that:-

i) There is publicity regarding the financial distress of the company due to ensuring that all affected persons are given the due and necessary notices. This can have a negative impact on the value of the corporation and affected persons may react in a manner that will cause them to become uneasy and sometimes not co-operate; and
ii) The costs related to formal mechanisms can be quite expensive, especially if there is court involvement.

In this case it can be negotiated, and an agreement (agreements reached between the parties are contractual in nature and may therefore provide for just about anything, as long as it is legal, binding and enforceable) reached with Lobo due to the fact that FPPL can meet its debts as they fall due in Ecanto.

The positives are the low costs and no publicity.

But due the fact that the other problems they face in Asgard and especially with the staffing issues(not known what type of issues), depending on the type of issue , eg.

1. staff// shortage, then production or sales etc could affect turnover which in turn affects profitability which may lead to inability to keep up the agreement, unless the operations in Ecanto can sustain the losses experienced in Asgard.
2. Staff salary issues could have a different outcome. Should they find out about the payment arrangement and depending on the effect it may have on them it could be also negotiated with them**.**

At this stage if an agreement is reached it can avoid any formal proceedings, not withstanding that it is unknown about any other creditor.

The formal, statutory procedures usually provide for a commencement procedure, an automatic stay, provisions dealing with the immediate displacement of existing management by the appointment of an independent officeholder, the role of stakeholders (such as creditors, employees and shareholders) and the development and implementation of a rescue plan. Sometimes to rescue the company, certain contracts could be amended and restructured, the employees are protected by statutory provisions and funding may be required.[24]
The essence of corporate rescue is to preserve at least the business (or parts of it) of the financially distressed debtor as an alternative to liquidation.

[24] Chapter 6, Companies Act 71 of 2008

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

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.

[Type your answer here]
FPPL has its head office and significant operations in Ecanto
FPPL is also registered as a foreign company in Asgard where it also carries on business. (Carries on business in more than one state)
Lebo is incorporated and has it's head office in Asgard.
Lobo obtained a Formal Court Order against FPPL for a court supervised insolvency proceeding in Asgard. The practitioner has discovered there is already a concurrent proceeding commenced against FPPL in Ecanto.

The unknown is the insolvency laws of each state.

The Court order was granted in against FPPL where it had it's head office and significant operations in Ecanto.

Cross-border insolvency cases and problems may arise due to many different reasons. In this case it is due to that insolvency proceedings commenced in more than one State and once opened, each proceeding giving rise to cross-border matters. Some of the issues that would be faced the insolvency practitioners would be how to co-ordinate, if possible, standing for (recognition of) the foreign practitioner; moratorium on creditor actions; creditor participation; executory contracts; co-ordinated claims procedures; priorities and preferences; avoidance provision powers; discharges; and conflict-of-law issues.[25]

The fact that the debtor's affairs are in some way connected to more than one State, brings them into the sphere of "private international law". Insolvency proceedings could possibly be opened concurrently in more than one State, each State would then apply its own laws and no, or very limited, extraterritorial effect would in some instances be granted to foreign proceedings. Often there is room for both primary (universal) proceedings in the State where the centre of main interest is and secondary (territorial) proceedings in States where the same debtor has assets or a fixed interest. A strict territorial approach in this case would cause difficulties especially if there is lack of co-operation and co-ordination between different States to deal with the cross-border insolvency elements. It is important to note that an aspect of this is that the standard of insolvency laws in many countries is relatively low. Many laws are outdated or otherwise framed in a way that is not suited to the current trade and investment. In general, independent and sovereign States govern their own legislation

[25] Introduction to International Insolvency Law, Module 1 Guidance Text page 42, See J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, St Louis University Law Journal 753,pp 753-757.

and must therefore be involved and amend their legislation in order to meet these challenges. [26]

Chapter IV of the MLCBI authorises cooperation and direct communication between a local court and foreign courts or foreign practitioners.

The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* provides information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases and focusing on the use and negotiation of cross-border agreements. This is not prescriptive but provides resolution of issues and conflicts that could be facilitated by cross border co-operation and use of agreements as required to meet specific needs of each case and the requirements of the applicable law.[27]

The domestic adoption of the UNCITRAL Model Law on Cross Border Insolvency by an increasing number of states which will help to achieve uniform recognition laws and harmonise insolvency systems across different states. The international instruments that have been developed to encourage closer co-operation and co-ordination of concurrent proceedings and promote the aspects of recognition and enforcement are:

- UNCITRAL Model Law on Cross Border Insolvency (MLCBI)
- European Guidelines on Communication and Cooperation (2007)
- ALI - III Global Principles for Cooperation in International Insolvency Cases and Global
- Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012)
- EU JudgeCo Principles and EU Cross-border Insolvency JudgeCo Guidelines (2015)
- Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

The World Bank also produced guidelines, Principles for Effective Insolvency and Creditor/Debtor Regimes.[28]

If the MLCBI has been adopted, then in that event its provisions that facilitate co-operation and co-ordination of concurrent proceedings are significant.
The instruments developed to assist is important to be adopted so that issues can be resolved expeditiously, maximising the value of the estate, harmonising the proceedings, avoid judicial conflict.

5

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 FFPL 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

[26] Introduction to International Insolvency Law, Module 1 Guidance Text page 36
[27] Introduction to International Insolvency Law, Module 1 Guidance Text page 70, UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp 123-124
[28] https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvencyand-creditor-rights

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.

[Type your answer here]

FPPL is an incorporated company with office in the UK and throughout Europe and other non European countries.

Lobo is a major creditor and is incorporated in a country in Europe.

A minor creditor in the UK 30 June 2022 filed proceedings against FPPL.

Lobo was considering filing proceedings in another country in Europe.

The Insolvency (Amendment) (EU Exit) Regulations 2019 ("the Regulations") repeal part of the retained EUIR and make consequential amendments to insolvency and related legislation in the three jurisdictions of the United Kingdom.
The EUIR deals with cross-border jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU. The principal impact of the United Kingdom's exit from the EUIR without a deal on withdrawal or a future relationship would be that restrictions on UK insolvency jurisdiction will be removed and proceedings commenced in the UK would no longer enjoy automatic recognition in EU member States.[29]

The UK ceased to be a member of the EU 31 January 2020. Under UK law, the EIR Recast no longer applies to post proceedings in the UK.

The minority creditor brought his application in the UK, the Insolvency Act 1986 (UK) on 30 June 2022. (EIR Recast no longer applies to post proceedings). The effective date is extremely important in order to calculate relevant time periods for the purposes of avoidance provisions. The Insolvency Act 1986 is a unified insolvency legislation in that it deals with consumer (personal) and corporate bankruptcy in one and the same Act. The Court does have jurisdiction to wind up the company, one assuming that the company was incorporated in Encanto.[30] This may be based on the foreign company complying with a requirement to register its presence and nominating a resident person or persons to accept service of process and other formal notices on its behalf.

In any event the as part of its cross-border rules, England and Wales also adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006. Section 426 of the Insolvency Act 1986 still applies to
"relevant" countries as listed and common law principles still applies as well.

[29] https://www.legislation.gov.uk/uksi/2019/146/pdfs/uksiem_20190146_en.pdf, EXPLANATORY MEMORANDUM TO THE INSOLVENCY (AMENDMENT) (EU EXIT) REGULATIONS 2019 2019 No. 146
[30] Introduction to International Insolvency Law, Module 1 Guidance Text page 48, Companies Act 2006 (UK), s 1044 defines an "overseas company".

Albeit the UK is now a former Member State of the EU, for the period it had been a member, the EU Insolvency Regulation also applied to cross-border insolvency matters between the UK and other EU Member States.

The Recast Insolvency Regulation applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (being 11pm on 31 December 2020). [31] There has been recent amendment to the EIR Recast by way of Regulation 2021/2260 of 15 December 2021 to replace Annexures A and B, effective January 2022.
European Insolvency Regulation (Recast): See Articles 7 – 18: The law in the "State of the opening
of proceedings" that are applicable to insolvency proceedings and their effects is the law which
determines "the conditions for the opening of those proceedings, their conduct and their closure."

This is subject to specific provisions dealing with rights *in rem*; set-off; immoveable property; employment; Reservation of title, Contracts relating to immoveable property, Payment systems and financial markets, Contracts of employment, Effects on rights subject to registration, European patents with unitary effect and Community trade marks, Detrimental acts, Protection of third-party purchasers, and Effects of insolvency proceedings on pending lawsuits or arbitral proceedings

The EIR allocates jurisdictional competence to the courts of a member State within which is situated the "centre of the debtor's main interests" (COMI).[32]

FPPL is an incorporated company with office in the UK and throughout Europe and other non European countries, the COMI of FPPL will be required to be considered.

While the EIR allocates primary jurisdiction based on the centre of the debtor's main interests (main proceedings), it does allow for the possibility of subsidiary territorial proceedings in other member States. These are permitted where the debtor has any place of where the debtor carries out a non-transitory economic activity with human means and assets, the revised EIR Recast definition, considering the various states that business are being carried out.

Such subsidiary proceedings may be either "independent proceedings", opened prior to the main proceedings, or "secondary proceedings", opened subsequent to the bankruptcy adjudication in the State with the centre of main interests.

Areas of amendment in the EIR Recast included extending its scope, expanding the provisions on the "centre of the debtor's main interests"; recognising the existence of insolvency proceedings outside the EU for the purposes of coordinating proceedings both inside and outside the EU; extending secondary proceedings to include rescues; providing for an electronic register and standard forms; and acknowledging corporate groups through enhanced co-operation and co-ordination provisions.

The first steps to take in this regard, and under circumstances in which only a main proceeding is in place, will be to approach all the various jurisdictions where the company

[31] https://www.legislation.gov.uk/uksi/2019/146/contents.
[32] "The center of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.". (Article 3(1) EIR Recast).

operates through its established branches. The first aim would be to establish whether the English insolvency representative could gain recognition based on the foreign main bankruptcy order by way of an ancillary proceeding within those jurisdictions.

The practitioner should trace and attach the relevant assets for the benefit of the UK creditors. Such recognition will firstly be subject to the cross-border dispensation that will apply between UK and each particular jurisdiction if such a recognition be obtained.

5

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS 44.5/50
Excellent Paper