



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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



**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

- (a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.**
- (b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.**
- (c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.**
- (d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.**

Question 1.4

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

- (a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.**
- (b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved" after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.**
- (c) The statement is untrue since insolvency law rules are not collective in nature.**
- (d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.**

Question 1.5

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

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

Question 1.6

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

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

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

Question 1.7

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

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

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

Question 1.8

**Which of the following best describes international insolvency law?**

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

Question 1.9

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

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

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

Question 1.10

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

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

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

Marks awarded 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.**

The historical roots of various insolvency law systems in African jurisdictions are as follows:

- Eastern jurisdictions of Africa have an English law tradition (common law); **Examples of specific countries would be beneficial**
- Francophone west African countries are based on civil law, in particular French law; **Examples of specific countries would be beneficial**
- Angola and Mozambique as based on Portuguese law of civil law tradition; and
- Southern African countries like South Africa and Namibia have mixed legal systems which consist of both Roman-Dutch Law (civil) and English law because of their influence.

These historical roots of the various law systems are based off of the former colonial powers.

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Question 2.2 [maximum 3 marks]

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



The 1998 financial crisis in East Asia was an important event that gave rise to some insolvency law reform in Eastern Asia. Perhaps the weaknesses in the financial sector among other shortfalls in adequate legislation to govern the financial transactions and other matters were part of the reason for this crisis. The impact of this occurrence forced Thailand to overhaul its bankruptcy laws. It also wreaked havoc in various other economies in the region. This event caused Singapore to pass new insolvency, Restructuring & Dissolution Acts to consolidate personal and corporate insolvency into the Act.

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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.**

The various initiative undertaken to assist Canada and North America to resolve international insolvency issues are:

- The ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) which principles would be complementary to the Model Law on Cross-Border Insolvency – these guidelines were developed by ALI Transnational Insolvency Project for international insolvencies between United States of American and Canada as well as Mexico.
- ALI –III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Application to Court-to-Court Communication in Cross-Border Cases (2012)
- Case law around comity- courts were quite familiar with issues presented by cross- border insolvency and had established various principles in these instances like jurisdictional rules to govern the issues and recognition of foreign proceedings; which created bilateral cooperation and coordination between states and courts. **Which cases?**
- The adoption of UNCITRAL Model Law on Cross-Border Insolvency also allowed them to achieve more cohesive recognition laws across the states which was a success in providing a common ground for making more practical progress between the countries.

These initiatives taken by the ALI Transnational Project and other advisory groups assisted countries, such as North America and Canada, in dealing with concurrent proceedings and understanding the importance of coordination and cooperation in regards to the recognition and enforcement of concurrent foreign insolvency proceedings. They were successful in creating statements on relevant insolvency laws which then birthed the Principles of Cooperation among NAFTA countries which provided guidance for dealing with cross-border cases.

There is some scope to elaborate

3

Marks awarded 8 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.**

There are various historical reasons for the difference in approaches regarding the way voidable dispositions are treated throughout jurisdictions. Firstly, the historical roots of English law and civil law differ and therefore, can affect the approaches taken by these jurisdictions. For instance, the civil law can be traced back to having Roman law roots whereby debtors sacrificed their own bodies as a means of securing repayment of loans or they could be sold as a slaves, imprisoned or given a death sentence.<sup>1</sup> The development of Roman law procedures like cession bonorum, distraction bonorum and remission and dilation provided a foundation for developing collective debt collecting mechanisms to deal with insolvent debtors.

The Lex Mercatoria also aided in further developments of insolvency law as collective debt collecting mechanisms in Europe and other civil law jurisdictions which then led to legislation being implemented between the 13<sup>th</sup> and 17<sup>th</sup> century. However, there was still a situation where the execution was against the debtors, like in medieval market place, when creditors would break the bench or counter in a debtor's business if debtors found themselves unable to pay their debts. The Actio Pauliana action in Roman law was also to protect creditors from fraudulent transactions where such transactions were done to reduce a debtor's estate by transfers done in bad faith to third parties (no protection for third parties if known). Hence, developing the debt collection and insolvency laws in civil law jurisdictions took away the opportunity for execution against debtors and created the platform for a dispensation of execution against the debtor's assets for repayment.<sup>2</sup> Here you can see that the original civil system was one that benefitted creditors but further developments and the concept of discharge of debts created less harsh methods between debtors and creditors in regards to repayment and invited the idea of a fresh start for bankrupt individuals/companies.

**The *actio Pauliana* (as you have identified) forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law.**

On the other hand, the roots of English law did not initially provide for imprisonment for non-payment of debts but it was later introduced by the Statute of Marlbridge 1267 and then abolished by the Debtors Act 1869. Dishonest and absconding debtors were dealt with by virtue of the English bankruptcy Act of 1542 which provided for compulsory sequestration which meant creditors had to approach the court to have debtors declared insolvent. A body of commissioners would be appointed upon the creditor's application to proceed against a debtor who was fraudulent, fled the country or neglected to pay debts owed. This birthed the principle that when there is a fraudulent debtor, compulsory administration of his assets should take place and equal distribution (*pari passu*) should be made to all creditors involved. Hence, this provided the platform which is used today in common law jurisdictions whereby creditors petition to court (back then the Lord Chancellor) to open proceedings and appoint commissioners (now liquidators) to supervise and examine the transactions made by the debtor who would have transferred all his assets to the insolvency representatives. This also takes away the opportunity for one creditor to be preferred over another. The English law method did not allow creditors to go after debtors personally or for debtors to be sacrificed like in civil law but instead creditors approached an intermediary (the court) to resolve disputes

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<sup>1</sup> J C Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010), p 5

<sup>2</sup> L E Levinthal, "The Early History of Bankruptcy Law", (1918) 66 *Uni of Pennsylvania Law Review and American Law Register*, p 223

regarding the debtor's unpaid debts and to satisfy the repayment of such debts; thus, creating a fair procedure to discourage dishonesty.

Therefore, with the different treatments or platforms used under civil law and English law, there will most likely continue to be various approaches in dealing with voidable dispositions under different legal systems. Some systems (like civil) may be harsher than other common law systems in dealing with voidable disposition because of their roots. However, these rules became important in insolvency as they provided a basis for dealing with debt execution and is the foundation of how bankruptcy law has developed and is applied in matters dealing with creditors and insolvent debtors.

You also needed to provide a framework for the rules and discuss their importance.

1.5

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.**

This definition is perceived to have limitations because some insolvency matters are outside the scope of laws dealing with a particular legal system (transcend the confines of a single legal system);<sup>3</sup> which means that a single set of insolvency law provisions governing one state cannot be exclusively applied without taking into consideration potential issues raised by foreign elements of the case. Also, most countries have legal systems which are ill-equipped to deal with insolvencies with an international or cross-border element and this may as a result of having outdated laws or no insolvency law at all which are applicable. Having said this, the national laws governing a particular state ends with its borders and this limits what that state can rule on in terms of not being able to apply that specific legislation in a matter dealing with an asset located outside that state's borders because they may be governed by another piece of legislation which takes priority.

Moreover, certain systems may be conflicting so the existence of national legislation in one state cannot be automatically applied or depended upon in another state, as independent states govern their own legislation. Enforcing orders or making claims in one state may cause the court or a representative of another state to exceed its powers or conduct activities that are incompatible with the national laws of a particular state. With some states not having any legislation at all, this become problematic in dealing with international insolvencies and therefore, prevents a court from recognising a foreign representative or foreign proceedings. A court may be reluctant to enforcing foreign orders not only to not be in contravention of its

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<sup>3</sup> Professor Andre Boraine and Professor Rosalind Mason, Module 1 Guidance Text, Introduction to International Insolvency Law 2022/2023, p34; I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2005)

own laws but for the protection of domestic creditors who may not be able to compete financially for assets with other big international creditors.

These limitations may always exist for the reasons listed above and the lack of stable legal systems to deal with cross-border insolvencies can continue creating situations where multiple insolvency proceedings commencing simultaneously to deal with one particular debtor's assets internationally. Having competing proceedings will cause losses for the creditors owed, as one proceeding may have thought for restructuring while another court may have already ordered that the debtor be wound up in a different state. The lack of structure in dealing with international insolvencies widens the gap for adverse dealings for administering assets which would not be an effective way in resolving the issues pertaining to debtors. Therefore, the creation of a cohesive set of rules is imperative in providing a basis for ensuring that states/courts can co-operate and coordinate proceedings and recognise representatives involved when dealing with a debtor's assets in a cross-border context to achieve the best result.

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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.***

There is a large debate on the extent treaties or conventions play an important role in cross-border insolvency law. While some believe they have been successful in some instances, others believe treaties or conventions cannot be a universal tool to deal with international insolvencies. Treaties and conventions are classic public international instruments that are ratified or acceded to by states which then become a part of domestic laws as a mechanism for dealing with cross-border insolvency issues connected to another state. The ratification of such treaty or convention essentially binds signatory states and affects their domestic legislation by becoming a part of the hard law of those states and enforceable in courts for insolvency purposes.

Currently, there are relatively few multilateral and bilateral treaties and conventions in operation. For instance, the Nordic Convention of 1933 is a successful treaty that is used in the Scandinavian region (between Sweden, Denmark, Norway and Finland) which created a common understanding for those countries that a bankruptcy declared in one Nordic country is automatically recognised in other Nordic countries applying to any assets (property) in those countries. This obviously prevents competing proceedings among the countries and enables cooperation and coordination between the different courts when resolving international insolvency issues regarding the same debtor.

Other examples of long standing treaties or conventions managing international insolvency issues are the Montevideo treaties of 1889 and 1940 between Argentina and Peru, Colombia, Bolivia, Uruguay and Paraguay and the Havana Convention of 1928. The success of the 1940 Montevideo treaties can be questionable considering the fact that they have only been ratified by only three countries which means that any international insolvency issues between Montevideo Treaty States (whether 1940 or 1889) must be carefully assessed in terms of which treaty applies and what consequences each may have, if it cannot be applied. Conversely, the Havana Convention poses great difficulty for states because courts do not have to co-operate or coordinate when dealing with any concurrent proceeding; which means that confusion can arise between states in dealing with a debtor's assets and how they are to be administered.

Despite many European efforts achieving multilateral conventions being unsuccessful, greater success came through the efforts of the European Union through the European Insolvency Regime (2000) which had a major impact on other multilateral developments in international insolvency law. This creation of a uniform regime made it easier for the member states to be able to resolve insolvency issues in the same way being regulated by the European Union. These treaties and conventions are operating with limitations, as some countries may not be signatories of them which means that the domestic laws of those particular countries will prevail when dealing with insolvency issues with another state as oppose to follow the same hard law as those who have ratified such treaty. Hence, the greater the number of countries involved, the more differences in their legal systems which the higher possibility of a particular treating being ineffective, as it may possibly be conflicting with a state's domestic laws. This would make it more difficult to reach a solution which is acceptable to all.

While bilateral treaties may achieve success faster being that cooperation is needed by only two signatories, this may not be the case with countries from different regions with different systems. It should be noted that while some treaties may appear to be acceptable in finding a resolution in some states, I don't think realistically it can provide a widely acceptable solution because most appear to be purely regional. The states ratifying it may see that it works well in their own context based off close links with neighboring states that have similar systems and insolvency laws but would not necessarily work well outside of that particular region. Hence, fundamental differences in legal systems and laws of countries will often times hinder the success of treaties or conventions in creating harmonization or cooperation among states when dealing with international insolvency issues unless the states are of similar systems or have similar laws regulation such matters.

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Marks awarded 11.5 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?***

There are various differences between “formal” insolvency and “informal” insolvency arrangements. One of the main differences between the two arrangements is informal arrangements involve voluntary negotiations between a debtor and its creditors and are not always governed by law while formal proceedings are commenced and governed by insolvency law and usually are dealt with in court. **PG 17** – Another pertinent difference under formal proceedings is there can be liquidation proceedings regarding a debtor or restructuring proceedings which allows the company to execute a restructuring plan as a way to try and get out of debt while paying off creditors. Conversely, voluntary arrangements and negotiations between parties usually take place in commercial sectors without the court but they depend on the existence of insolvency laws as persuasive force to achieving reorganization.

The key advantages of informal arrangements that should be considered by Lobo are as follows:

- It would give some incentive to Lobo as a creditor because allowing for some form of reorganization to be executed by FPPL would provide a means for repayments to be made to Lobo;
- Having an arrangement out of court would be more cost effective for Lobo, as it would not have to incur court and legal fees for the matter and would be cheaper to reach a resolution;
- Despite the negotiations being voluntary, the fact that they would be dependent upon some sort of insolvency law acts as a persuasive force to the benefit of Lobo because if FPPL does not comply with the terms of what is agreed between Lobo and FPPL, then Lobo would be able to bring an action should FPPL decide to not pay. Obviously, with law governing the agreement one party would have an action against the other should that party breach the agreement.
- Also, FPPL may be more willing to comply with any agreement and repay debts owed to Lobo under this mechanism, as it saves FPPL’s reputation since nobody would know they are facing financial difficulties and Lobo would be sure to get money owed.
- **Privacy is relevant also**

On the other hand, involuntary arrangements have some disadvantages that Lobo should be aware of such as:

- Due to negotiations being voluntary in these arrangements, FPPL does not have to participate in discussions to find a resolution for repayment.
- It may also be a longer process for recovering monies owed to Lobo, as FPPL being in financial distress may mean it cannot afford to make large payments and instead have to make various smaller payments over a longer period of time.
- No moratorium would be in place to prevent other creditors from commencing insolvency proceedings against FPPL which may mean that Lobo could fall down the pecking order in terms of his creditor status.
- There is also no way of formally binding any dissenting creditors to any agreement Lobo may reach with FPPL so other creditors may bring an action against FPPL should they wish to which may obviously hinder or delay what FPPL is capable of repaying to Lobo.

Informal arrangements are more beneficial to Lobo as oppose to formal proceedings for the reasons above and they will offer a more passive way of finding some sort of resolution for repayment for the debtor and creditor oppose to going to court. Although Lobo can bring an action to court to bind parties to a court order may, the process itself will be costly having to pay court and legal fees. Formal proceedings may add a level of protection to Lobo by having the benefit of a statutory moratorium which prevents other creditors from taking action against FPPL. However, there is publicity and potential reputational damage for FPPL which may cause a severe breakdown in relations between Lobo and FPPL which isn’t ideal for commercial business.

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.**

There are many difficulties that may arise for the insolvency representative in this cross-border context. Firstly, Encanto may not have up-to-date insolvency laws to deal with this international element or no insolvency legislation at all. This will, at first instance, hinder the insolvency representative from being recognised in the foreign state and the court may not be willing to adhere to the order made in Asgard. Therefore, with no co-operation and coordination between the states, this can potentially create concurrent proceedings occurring and problems for the representative being able to gather the assets of FPPL to effectively carry out its job in managing or administering such assets to the benefit of creditors. Also, public policy reasons (like taxes, social security, etc.) often times may prohibit courts from co-operating with orders made in a foreign country or the fact that such order may be contrary to the laws of that state and therefore, cannot be enforced.

Another major issue for representatives in cross-border contexts is having to deal with states that have conflicting systems (ie. One being pro-debtor while the other may be pro-creditor) which is important when it comes to managing and distributing the assets of the company – some states may be hesitant to co-operate as a way of protecting local creditors who may not be able to compete with other financially stable international creditors. If Encanto has a system which is territorial, it may allow concurrent proceedings but not to deal with any assets within its borders. This may cause state courts to compete with each other and the home country orders to supersede an outside order made. Therefore, the representative may not be recognised in Encanto as a representative to act on behalf of or manage the affairs of FPPL.

However, there have been many international insolvency instruments created to help countries to deal with insolvency issues, especially regarding the co-operation and coordination of states in a cross-border context. One important initiative is the UNCITRAL Legislative Guide on Insolvency Law (2004) and UNCITRAL Model Law on Cross-Border Insolvency (2012) which created a higher standard of insolvency laws to use to resolve problems in international insolvency proceedings. This essentially provided the basis for developing insolvency systems that can deal with different aspects of international insolvency matters while also setting out a uniform approach when dealing with such issues. Another initiative created is the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes revised in 2021. These guidelines play an important part in promoting co-operation and coordination among courts in states involved in concurrent insolvency proceedings. Both initiatives were successful in resolving international insolvency issues, as they set out the international best practice standard for insolvency regimes which can assist countries in

recognising foreign representatives and dealing with cross-border issues in a cohesive manner.<sup>4</sup> The UNCITRAL MLCBI in particular obliges courts and insolvency representatives to be open to communicating and co-operating with each other to ensure that the insolvent estate of FPPL can be administered efficiently and fairly to the benefit of its creditors.

It would be beneficial to elaborate on relevant international instruments.

4.5

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 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.**

The European Insolvency Regulation Recast would not apply to the UK commenced insolvency proceedings because the proceedings were opened on 30 June 2022; which is after 31 December 2020 – the date (post Brexit) that the EIR Recast ceased to apply to the UK. This means that the automatic recognition of proceedings opened in Europe in a UK court would fall away and the German representatives would have to make an application to the English court for recognition of such proceedings under either the Cross-Border Insolvency Regulations 2006 (“CBIR”) (Great Britain’s enactment of the UNCITRAL Model Law on Cross-Border Insolvency) or English common law.

Further information which may be needed is whether the country in Europe that Lobo is considering opening proceedings are signatories to any treaties or conventions that the UK may be also a signatory to which can regulate the applicable laws in such proceedings. **It would be beneficial to consider the MLCBI specifically.** This may allow for recognition to be made simpler having both acceded to such treaty – hence, cooperation and coordination between courts would be achieved quicker. Perhaps finding out which state holds FPPL’s centre of main interests would be relevant. Knowing this would allow one to know if any territorial proceedings or concurrent can occur and which private international law is to prevail (although secondary proceedings are limited to the debtor’s assets in the member state where they are opened) or if there can be any enhanced co-operation and co-ordination provisions used between states to resolve the internal insolvency issues.

4

Marks awarded 13 out of 15

\* End of Assessment \*

**TOTAL MARKS 41.5/50**

**A very good paper that generally addresses the questions asked and substantiates its answers.**

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<sup>4</sup> I Merovah in *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018)



