



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
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- 6. The final submission date for this assessment is 15 November 2022. The assessment submission portal will close at 23:00 (11 pm) GMT on 15 November 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

Question 1.6

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

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

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

Question 1.7

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

Question 1.9

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

[The insolvency law systems in most African jurisdictions is based on the regimes of their former colonial powers.

Most countries that were formerly English colonies such as Nigeria, Kenya, and Zambia base their insolvency laws on English Insolvency Law.

On the other hand, French speaking countries, mostly in west Africa such as Ivory Coast have an insolvency regime that is inspired by French Law. Other countries such as the Democratic Republic of Congo based their legal system on the Belgian law as a result of the colonial past.

Angola and Mozambique which were colonized by Portugal, have a civil law regime that is based on Portuguese law.

Some jurisdictions such as South Africa and Namibia have a mixed legal system as a result of the mix in colonial rule (English and Dutch) in those counties.]

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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.

[In East Asia, the 1998 financial crisis gave rise to insolvency law reforms. The crisis first started in Thailand in 1997 when the Thai bhat experienced pressure from speculative investors with and subsequently the markets losing confidence in the economy. The crisis severely affected countries such as Thailand, Korea and Indonesia as they experienced liquidity crises as investors did not trust that there were adequate reserves to service maturing debts.

Following the crisis Thailand made significant reforms to its bankruptcy laws. Thailand made reforms to its bankruptcy act, foreclosure procedures and foreign investment restrictions. Following the crisis, reform efforts were made to privatize some of the banks, asset disposal from finance companies and the restructuring of corporate debt.

Following the crisis, in Korea, the Korea Asset Management Corporation created a special fund whose role was to buy impaired assets from banks. Further, while the focus in Korea was initially directed towards improving governance and competition policies, following the crisis the focus moved towards financial and operational restructuring with the main objective being being the reduction of debt levels and creating stronger capital structure.]

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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.

[Some of the insolvency initiatives undertaken to resolve insolvency issues between North America and Canada include:

The attempt to develop a bilateral insolvency treaty between the US and Canada. This was an effort made in the 1970s by the US and Canada to reach an agreement that would be an insolvency treaty between the US and Canada. However, the scope of the project may have been too wide and ambitious and agreement was not reached.

Despite the failure to achieve the bilateral treaty, the US and Canada have adopted the Model Law through principles and protocols.

North American Free Trade Agreement (NAFTA) - the American Law Institute (ALI) has assisted with the resolution of insolvency matters between the United States, Mexico and Canada which are the parties to the NAFTA. The ALI carried out a projected with a

designated Reporter, Professor Westbrook, who worked together with various advisory groups and prepared a statement with the respective country's insolvency law as applicable to international cases. This led to the preparation and approval of the Principles of Cooperation between the United States, Mexico and Canada (the NAFTA Countries) in 2000 by the ALI Council and Members.

The NAFTA principles primarily address the insolvency of corporations and other legal entities with commercial operations. There are general and procedural principles. The general principles are primarily around cooperation and recognition.

The general principles provide guidance that courts and administrators should cooperate with transnational bankruptcy proceedings with the aim of achieving the best outcome of the debtors assets.

The general principles also provide guidance that bankruptcy of a debtor in on NAFTA country should be recognized in another country. Further, recognition should be granted as quickly and the most cost-efficient manner possible.

The American Law Institute Transnational Insolvency Project created the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases. These guidelines were for international insolvencies involving the United States, Canada and Mexico.

The various initiatives are important as they assist with cooperation across the jurisdictions and make it easier to achieve the objectives of insolvency in an effective and cost-efficient manner.]

There is scope to elaborate on relevant matters. 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.

[The main difference between English law or common law jurisdictions and civil law jurisdictions is the way laws are formed/developed. Civil law is codified while common law is uncodified. With civil law, judicial precedents are usually not binding, however, with common law, judicial precedent is binding. Common law judges can in a way shape how the law of a jurisdiction evolves through precedent, however, civil law judges do not have such authority.

For common law jurisdictions, the main source of the law is the case law more than legislation and custom and practice whereas for civil law jurisdictions, the main source of the law is the legislation/constitution.

The purpose of insolvency laws is to put in place a collective debt-collecting mechanism. In order to achieve this, it is important to deter or discourage individual creditors from pursuing individual debt enforcement measures once an insolvency proceeding has commenced. Additionally, certain transactions that may have taken place prior to commencement of investigation proceedings may also be subject to investigation. Depending on the specific considerations, in some instances, transactions may be isolated, and any benefits received may need to be repaid to the insolvent estate.

The main transactions that are subject to these provisions are aimed at:

Preventing fraud - where a debtor seeks to hide assets from the insolvent estate for their own benefit, or the benefits of other stakeholders (equity holders, directors, or officers) at a later date.

Equitable treatment of all creditors: ensuring there is not preferential treatment where a debtor prefers some creditors at the expense of others

Preventing loss of value: - preventing a sudden loss of value for an entity just before insolvency proceedings are commenced.

Out-of-court settlements - in some jurisdictions, the provisions create a framework to encourage out-of-court settlements as creditors will know that certain transactions or enforcement action will be set aside and are more likely to consider working with the debtor to arrive at workable settlements.

Voidable dispositions are classified as either fraudulent conveyances or preferences. Fraudulent conveyancing involves the disposal of property without the receipt of adequate value in return. Fraudulent conveyancing may be in the form of a donation or intentionally undervaluing transaction that causes or increases a debtor's insolvency. Preference entails the settlement of a pre-existing debt to a creditor by improving their position once insolvency commences.

*In civil law jurisdictions, the *actio Pauliana* was the basis for fraudulent conveyance law while the Act of Elizabeth of 1570 is the basis for the remedy in English Law. From a practical perspective, the legislation in various jurisdictions may differ on the remedies that are to be taken. The *actio Pauliana* was based on Roman law and set rules regarding fraudulent conveyance law much earlier. The Act of Elizabeth, the 1570 Act, is said to be the first law that was designed as a specifically tailored towards bankruptcy. Possibly, the *actio Pauliana* came into place before the Act of Elizabeth due to the Roman law influence.]*

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.

[Wessels in providing the definition above notes that the definition is based on the assumption that there exists a national legal framework of insolvency law. However, even with the existence of national legal frameworks in different jurisdictions, in some instances there is little co-ordination and co-operation between Courts in different States which further complicates international insolvency.]

Wessel also noted that other definitions such as the definition given by Fletcher expose the limitations in the definition that he provides. Fletcher’s defines international insolvency as

“as a situation “...in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that 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.” Based on Fletcher’s definition, international insolvency law is more complex because it goes beyond the borders of a single system. As such, the domestic insolvency laws of a single jurisdiction cannot be adopted by default without considering matters arising from other jurisdictions. Therefore, the existence of the insolvency laws is only one step.

With increased common market and the free flow of goods, services, capital and labour an “overarching, standardized regulation” of insolvency matters is required. Wessels definition appears to suggest that the laws of different states can be applied where consideration is given to the international case. However, Friman points out that the founding fathers of the USA appear to have resolved part of this problem for the United States by making the questions of insolvency law a federal matter and not a matter to be addressed by State Law.

The existence of a domestic insolvency system does not automatically mean that the legal system is well equipped to deal with insolvency and the implications of cross

border insolvency. The enforcement of a particular State's laws ends within national borders and one State's laws may not always be automatically applicable to another jurisdiction.]

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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.

[Treaties or conventions are ratified by countries and adopted into domestic laws in order to resolve insolvency issues between the States that are party to the treaty or convention. Countries that choose to become signatory to treaties and/or conventions choose to effectively bind themselves and impact their domestic law in accordance with the treaties or conventions.

The treaties and conventions may be adopted and form part of a country's "hard law" on insolvency and be enforceable in the courts.

Examples of international insolvency treaties and conventions include:

The Nordic Convention of 1933 from the Scandinavian Region. This was one of the treaties that developed in the 19th century in continental Europe. Earlier in the 13th and 14th centuries, bilateral insolvency treaties had surfaced in Europe and were mainly to deal with matter relating to absconding debtors and later the gathering of assets in insolvency estates. Later in the 19th century, the treaties and conventions were focused on bankruptcy, winding up, arrangements and compositions.

In Europe, the steps made toward achieving multilateral insolvency conventions did not yield much fruit for many years. However, in 1990, the Istanbul Convention, Council of Europe Treaty Series No. 136 was development. Despite only being signed by about 8 member states and not being ratified by enough member states to be enforced, it had an important influence on the European Union's response to challenges relating to international insolvencies among member states.

Treaties and conventions are therefore helpful in achieving the overall objective of the harmonization of insolvency laws across jurisdictions and make it easier for creditors with actions against debtors to have a degree of certainty to the way that insolvency proceedings in certain jurisdictions may proceed. However, success in getting states to ratify treaties and conventions that impact their domestic laws has been varied. However, soft law approaches, such as the involvement of multilateral organizations have made some progress by developing guidance that can be adopted by different jurisdictions. One of the most successful approaches has been the Model Law on Cross Border Insolvency which was undertaken by the United Nations Commission on International Trade Law. While this did not take the form of a treaty or convention, but rather a Model, UNCITRAL made recommended that States adopt part or the model

laws, with or without modification. The Model laws are gaining momentum as an influential response to international insolvency law.

Therefore, while treaties or conventions may be ideal and may assist to harmonize insolvency laws across various jurisdictions, the territorial nature of most jurisdictions makes it difficult to achieve much traction with treaties and conventions. The approach adopted to develop Model Laws for consideration by various states has achieved more success in recent years as States may choose to adopt the Model Laws without modifications or with modifications to suit their domestic environments.]

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Marks awarded 15 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?

[Formal insolvency proceedings are proceedings that are commenced under insolvency law and governed by the insolvency law under which they are commenced. Formal proceedings include administration, receiverships, liquidation and reorganization or rescue proceedings.

Informal proceedings on the other hand are not always commenced under or governed by insolvency law. Informal proceedings may involve voluntary negotiations between a debtor and some or all creditors. In most instances, informal proceedings are structure and developed with the support of professionals in the banking and commercial sector with a view to restructuring an insolvency or distressed debtor.

While informal proceedings are not regulated or governed by insolvency law, the effectiveness of informal proceedings is greatly dependent on the existence of an insolvency law which may be a persuasive force in achieving reorganization.

Most formal insolvency proceedings are commenced by way of a court order while an informal process may be opened by way of a discussions between parties outside the courts. In some jurisdictions, a procedure may be commenced, for example, by way of a resolution of the member of the company.

In both proceedings it is important to decide the party that will commence the proceedings and the timing that the proceedings will commence.

For Lobo, some of the main disadvantages with an information proceeding is that there is no moratorium to stop other creditors from taking action and commencing a formal insolvency proceeding. Formal insolvency proceedings will usually result provide a moratorium, during which other creditors cannot commence insolvency proceedings against the same entity.

For Lobo, if there are other creditors involved, there is no way to bind dissenting creditor to an agreement once it is reached. Therefore, the implementation of an informal proceeding will be greatly dependent on whether any additional creditors involved agree to the restructuring or reorganization plan that will be put together.

Some of the key advantages for Lobo to consider are that, firstly, the cost of informal insolvency proceedings are much usually lower than the costs of formal insolvency proceedings. This may lead to Lobo achieving a greater realization from the assets of the FPPL. Additionally, there will be minimal publicity in relation to the fact that the Company is experiencing financial difficulties.

The main advantages for Lobo to consider with formal insolvency proceedings is that there will be a moratorium and other creditors cannot commence recovery action against FPPL. Additionally, with formal proceedings, it may be possible to bind dissenting creditors and achieve the most favourable outcome.

However, formal insolvency proceedings can be expensive, and considering that FPPL has a presence in more than one jurisdiction, there may be additional advantages or disadvantages depending on whether the formal proceedings in Asgard needs to be recognized in Encanto and whether there is any treaty or convention between Asgard and Encanto.]

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Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that

may arise for the insolvency representative pertaining to co-operation and coordination 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.

[Insolvency laws vary among different states and there where there is no treaty or convention between States, the insolvency proceedings comments in one state would then need to be recognized in another State. Due to the differences in insolvency laws between States, some jurisdictions have taken steps to provide for co-operation and coordination where there are concurrent proceedings. In the case of Lobo, the insolvency representative would need to check the insolvency framework between the Asgard and Encanto in order to assess and determine whether there are any provisions for co-operation and coordination between the two jurisdictions.

Another method that is available is the recognition of foreign insolvency proceedings. However, since a formal insolvency proceed was already commenced in Encanto, it may be difficult for the Asgardian representative to have the Asgardian Insolvency proceedings be recognized in the Encanto. However, depending on the laws between the two countries, the Asgardian Insolvency representative may need to consider whether there is any benefit in the proceedings in Encanto being recognized in Asgardia.

Cooperation between courts is also another alternative. The courts in the two jurisdictions may already have a framework where they work together in order to identity ways and areas in which to cooperate.

The cross-border law in Encanto might provide additional guidance on how concurrent proceedings commenced in foreign jurisdictions are addressed.

Some of the international insolvency instruments developed to assist with cross-border insolvency matters are:

- *European Guidelines or Communication and Cooperation*
- *American Law Institute (ALI) - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border cases*
- *EU JudgeCo Principles and EU Cross-border Insolvency JudgeCo Guidelines*
- *Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross Border Insolvency Matters]*
- *UNCITRAL Model Laws*
- *Nordic Convention on Bankruptcy (1933)*
- *The IBA Cross-Border Insolvency Concordat (1996)*
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The development of international insolvency instrument for coordination and cooperation is important as it may assist creditors in maximizing the value from the debtor's assets. Without coordination and cooperation, insolvency proceedings may be costly and the cost will have an impact on the amount that is recovered for creditors.

The main objective of cooperation and coordination is to maximize recovery for the benefit of creditors.

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Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FPPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

[The UK ceased being a member of the European Union at 11pm on 31 January 2020. However, the Recast Insolvency Regulation still applied to insolvencies that were commenced prior to the expiry of the transition period, which was 11pm 31 December 2020. As such, the EIR Recast does not apply to proceedings commenced after 11pm on 31 December 2020.

As such in this case, the EIR Recast would not apply with respect to the UK commenced insolvency proceedings as the proceedings were commenced on 30 June 2022, after the expiry of the transition period and the UK ceased being a member of the European Union.

However, if the proceedings had been opened after 31 December 2020, then the EIR Recast would not apply as the UK was no longer a member of the European Union. Since the EIR Recast does not apply, parties will need to look at the domestic law of various jurisdictions including the relevant EU law for recognition. Therefore, if the insolvency practitioner appointed in the UK proceedings would like to take action in another jurisdiction, then they will be required to seek recognition in those jurisdictions.

The UK has adopted the Hague Convention which EU members states are a party to. The conventions allowed for "allocation of jurisdiction and enforcement of judgements given by a court designated by an exclusive jurisdiction clause".

The UK is also making efforts to become a party to the Lugano Convention as an independent contracting state. The Lugano convention provides governs on jurisdiction, recognition and enforcement of judgements in civil and commercial matters that may arise between the EU and other contracting parties. However, the Lugano Convention requires unanimous agreement between the contracting parties.

With Brexit, there will continue to be a requirement and need for cross border recognition of UK proceedings in Europe and vice versa, however, additional requirements will also need to be met in order to achieve the goal of recognition. Some

of the challenges that will be faced will include costs to attend the scheduled hearing, delays in receiving judgements and uncertainties.

In order to provide further guidance on the matter we would need to know the following:

- *Which European countries does FPPL have offices/operations in?*
- *Which non-European countries does FPPL have offices/operations in?*
- *Which European country is Lobo considering opening proceedings in?*
- *It the UK party to any convention or treaty with the country where Lobo would like to commence proceedings?*
- *Can Lobo commence parallel proceedings in another jurisdiction when there are proceedings that are already underway in the UK?]*

It would also be beneficial to consider the MLCBI
3.5

Marks awarded 13.5 out of 15

TOTAL MARKS 47.5/50

Excellent Paper

*** End of Assessment ***