



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

Question 1.6

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

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

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

Question 1.7

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

Question 1.9

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 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.

In general, the historical roots of the various insolvency law systems across African jurisdictions can be traced to the laws of their former colonial powers. For example, the legal systems of Nigeria, Kenya, Botswana, Zambia and Tanzanian have more similarities with the English insolvency law system and common law practices. In contrast, Angola and Mozambique - former Portuguese colonies - have civil law legal systems grounded in Portuguese legal traditions. Many former West African French colonies, such as Benin, also have civil law systems stemming from French law. Though less common, some countries such as South Africa and Namibia have mixed legal systems, reflective of both the Dutch, civil law system, and English, common law systems of their former colonisers.

However, whilst imported insolvency laws form the basis of existing legislation, some African States are introducing modern legislation. For example, the Treaty on the

Harmonization of Business Law in Africa, originally signed on 17 October 1993 and revised on 17 October 2008, established the Organization for the Harmonization of Business Law in Africa ("OHADA"). To date, seventeen States are members of the OHADA, which aims to harmonize business law in Africa in order to guarantee legal and judicial security in member States.

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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 gave rise to a number of insolvency law reforms, for example in Thailand, and highlighted a greater need for further harmonisation amongst Asian financial centres and legal systems. It would be beneficial to elaborate on resulting country reforms.

In the mid-1990s, the UNCITRAL developed the Model Law on Cross-Border Insolvency ("MLCBI"). The MLCBI is a form of draft legislation that that UNCITRAL recommends member States adopt, with or without amendments. To date, many Asia-Pacific region countries have adopted the MLCBI, including Australia, Japan, New Zealand, the Philippines, the Republic of Korea and Singapore.

More recently, the Asian Business Law Institute (the "ABLI") are, in partnership with the International Insolvency Institute, seeking to develop the Asian Principles of Business Restructuring. As a first step, in 2020 the ABLI published the results of its multi-jurisdictional mapping exercise, which mapped business reorganisation regimes (both in-court and out-of-court) in 16 jurisdictions including ASEAN, Australia, China, Hong Kong, India, Japan, and South Korea. As a second step, the ABLI now aim to examine this report to determine areas of similarity and make recommendations for more effective cooperation across East Asian jurisdictions (the Asian Principles of Business Restructuring).

1.5

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.

During the 1970s, Canada and the United States sought to negotiate a bilateral insolvency treaty in respect to cross-border insolvency law. However, negotiations were unsuccessful, which was mainly attributed to such negotiations being too ambitious and broad in scope.

Since the 1970s, the United States have adopted the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"), of which cooperation and coordination between States is a key principle, irrespective of reciprocity.

However, the development in the use of Protocols and/or Cross-Border Insolvency Agreements has been most significant in assisting with the resolution of international insolvency issues between North America and Canada. Specifically, the objective of the American Law Institute ("ALI") North American Free Trade Agreement ("NAFTA") Transitional Insolvency Project: Cooperation among NAFTA Countries (the "Project") was "to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the North American Free Trade Agreement (NAFTA) States." The United States, Mexico and Canada are all parties to NAFTA. The Project resulted in the publication of ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases by ALI and the International Insolvency Institute ("III") in 2000 and the publication of the ALI-III Global Guidelines Applicable to Court-to-Court Communications in Cross Border Cases in 2012 (the "ALI-III Guidelines"). As B. Leonard identifies, the Guidelines were based predominantly on live cross-border cases involving cross-border insolvency protocols. The guidelines were intended to be adapted and modified as required to fit the circumstances of individual cases, rather than alter or amend domestic rules of procedures, and have been adopted by the International Insolvency Institute ("III").

In 2021, ALI noted that the ALI-III Guidelines played a prominent role in the recent aviation cross-border restructuring of LATAM Airlines Group. In that matter, the ALI-III Guidelines were approved by the Grand Court of the Cayman Islands in July 2020.

*There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128*

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Marks awarded 7.5 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.

In some circumstances, transactions that occurred prior to the commencement of formal insolvency proceedings may become subject to investigation by the appointed insolvency practitioner or court. If certain conditions are met, these transaction will be set aside and any benefit received by the beneficiary will be 'clawed back' and repaid

to the insolvent estate. These transactions are commonly known as 'voidable transactions'.

*Claw-back provisions in insolvency law hold an important public policy function. They are largely designed (i) to prevent fraud; (ii) to preserve the principle of *pari passu* by ensuring the equitable treatment of all creditors of the same rank; (iii) to ensure the equitable distribution of available assets amongst all creditors of the same rank and otherwise avoid preferential treatment to some creditors; (iv) to preserve business value and avoid value erosion of an insolvent estate; and (v) encourage out-of-court settlements between the debtor and creditors. As such, 'voidable transactions' are often classified as either fraudulent or 'undervalue' transactions or preferential transactions. There is some scope to elaborate on their importance. But this is well considered.*

*The roots of civil law systems can be traced to Roman law. In respect to European insolvency law, bankruptcy law as a collective debt collection mechanism developed from pre-existing individual debt collection mechanisms. These individual debt collection mechanisms stemmed from customs that developed between continental merchants (known as *Lex Mercatoria*). Historically, only merchants, as opposed to individuals, could be declared bankrupt. Where a merchant could not pay his debts, harsh sentences of incarceration were imposed.*

*As Levinthal notes, "a central theme of the development of debt collection and insolvency law was the gradual move from execution against the person towards a dispensation of execution against the assets of the debtor." In shifting focus towards the assets of the debtor, more attention is given to transactions involving the assets of an insolvent estate. The *actio Pauliana*, the return of property transferred to third parties, aims to restore an insolvent estate to the position it would be in had a fraudulent transaction not occurred. The essence of this action forms the basis of voidable dispositions in common law systems.*

*In England, the law on voidable dispositions originates from fraud-prevention law, rather than customs or bankruptcy law. Under the Bankruptcy Act of 1542, a creditor could apply to a body of commissioners to request the commencement of proceedings against dishonest or absconding debtors who did not or were otherwise unable to pay their debts. In the case of a fraudulent debtor, the 1542 Act required compulsory administration and the equitable distribution of available assets amongst all creditors. It therefore contained two principles fundamental to the insolvency law on voidable transactions : collective participation and the principle of *pari passu*.*

The Act of Elizabeth of 1570, the first true bankruptcy statute, further developed common law principles relating to voidable transactions. It transferred supervision from the body of commissioners detailed in the Bankruptcy Act of 1542 to the Lord Chancellor. Creditors could petition the Lord Chancellor to commence proceedings, who may then also appoint commissioners to supervise the proceedings. Under the

1570 Act, a debtor was obliged to transfer his property to the commissioners, who held the ability to examine the debtor's transactions.

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Question 3.2 [maximum 5 marks]

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

“[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case.”

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

Wessel's definition of international insolvency law is limited by its reference to domestic legal frameworks of insolvency law. Generally, domestic legal systems have been limited in their ability to address cross-border insolvencies as the scope of a State's enforcement of its jurisdiction is typically limited to its national borders.

In contrast, for example, Fletcher's definition of international insolvency law contextualises international insolvency law in reference to a situation “in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regards to the issues raised by the foreign elements of the case.” This definition more suitably reflects the modern realities of a significant proportion of corporate insolvencies that are cross-border and/or involve multi-jurisdictional aspects. Where a debtor operates overseas with assets and liabilities in several jurisdictions, there is a risk that multiple and competing insolvency proceedings may be commenced by creditors in multiple different States that have jurisdictions to hear and determine an insolvency proceeding. Concurrent, competing proceedings may result in unnecessary value destruction of the debtor's estate and thus increased capital losses for creditors. As a result, coordination and cooperation between the courts of different States is important. How insolvency proceedings will be recognised and given effect in foreign States is critical to a proceedings effectiveness, in order to avoid the risk that multiple insolvency proceedings may arise in multiple jurisdictions against the same debtor.

4.5

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in

establishing such rules by providing examples in this regard.

Treaties and conventions are instruments of public international law. Upon signing such instruments, States become bound by their provisions, which are adopted into domestic law. A State's courts are then able to enforce such provisions as part of domestic insolvency law. Attempts at multilateral international insolvency treaties and conventions have been met with varying degrees of success.

In Europe, the 1933 Nordic Convention is considered a rare example of a successful multilateral treaty. On the other hand, the Council of Europe, which has 47 member States, concluded a Convention on Certain International Aspect of Bankruptcy in 1990. This is commonly known as the "Istanbul Convention". The Istanbul Convention was not ratified by a sufficient number of member States in order for it to enter into force (out of the 47 member States, only 8 member States signed). Irrespective of this, key principles from Istanbul Convention have had an important influence on the European Union's response to international insolvency issues amongst its member States. However, more success has been achieved in Europe not by way of Convention but the European Insolvency Regulation 2000 ("EIR"), which afford automatic recognition to insolvency proceedings of member States.

In Latin America, attempts at multilateral international insolvency agreements have been more successful. The Montevideo Treaty on International Commercial Law (1889) has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. However, the 1940 Montevideo Treaty on International Commercial Terrestrial Law, which includes Title VIII on Bankruptcy, and the 1940 Montevideo Treaty on International Procedural Law, which includes Title IV on Civil Meetings of Creditors, have only been ratified by Argentina, Paraguay and Uruguay. As Fletcher notes, careful analysis as to which treaty or treaties is applicable is therefore required.

The 1928 Havana Convention on Private International Law has also been signed by 15 Latin and Middle American States (the "Bustamante Code"). The Montevideo Treaty and Bustamante Code take a similar approach: concurrent proceedings are only possible where a debtor has two or more economically autonomous and separate commercial businesses. If the debtor only occasionally trades in more than one States, only a single proceeding should be commenced in the jurisdiction where it is domiciled.

In North America, during the 1970s, Canada and the United States sought to negotiate a bilateral insolvency treaty in respect to cross-border insolvency law. However, negotiations were unsuccessful, which was mainly attributed to such negotiations being too ambitious and broad in scope. The adoption of the UNICITRAL Model Law on Cross-Border Insolvency ("MLCBI") and the American Law Institute ("ALI") North American Free Trade Agreement ("NAFTA") Transitional Insolvency Project: Cooperation among NAFTA Countries; the ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases and ALI-III Global Guidelines

Applicable to Court-to-Court Communications in Cross Border Cases are viewed as more successful.

There are no treaties or conventions that address international insolvency issues within the Asian region or the Middle East. In these regions, the MLCBI has been more broadly adopted including by Bahrain, Dubai, Australia, Japan, New Zealand, Philippines, Republic of Korea and Singapore. All 17 OHADA member States have also adopted the MLCBI.

These examples suggest that 'soft law' approaches to issues of international insolvency law have been more widely successful than 'hard law' treaties and conventions. [There is some scope to elaborate.](#)

4.5

Marks awarded 14 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

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 commenced under and governed in accordance with insolvency law. Informal insolvency proceedings are not typically governed by insolvency law and usually take the form of voluntary negotiations between the debtor (e.g. FPPL) and creditors (e.g. Lobo). [There is scope to elaborate.](#)

There are various disadvantages to informal insolvency proceedings:

- *FPPL does not benefit from a moratorium, under which creditors (including Lobo) are prevented from approaching the courts and commencing formal insolvency proceedings; and*
- *there is no mechanism to bind dissenting creditors to any agreement achieved. This is more relevant where the debtor has multiple creditors, which FPPL would need to confirm.*

The advantages of informal insolvency proceedings are:

- *it is an out-of-court process, which is typically significantly cheaper; and*
- *because it is an out-of-court process, proceedings are not public. Any other creditors of FPPL would not be aware of any agreement reached with Lobo or that it is experiencing financial difficulties. This would preserve FPPL's goodwill.*
- *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.

There is no single set of insolvency rules that apply globally. Generally speaking, each State has different insolvency laws and policies towards insolvency and insolvency proceedings. Reconciling these differences can mean it is difficult to deal with cross-border insolvency issues in a uniform manner. International insolvency instruments such as the UNCITRAL Legislative Guide on Insolvency Law and UNCITRAL Model Law on Cross-Border Insolvency ("UNCITRAL MLCBI"); the World Bank Principles for Effective Insolvency and Creditor/ Debtor Regimes or the European Union's Action Plan on Building a Capital Markets Union) have therefore focused on the harmonisation of domestic insolvency laws to deal with these difficulties.

Further, where a debtor operates overseas with assets and liabilities in several jurisdictions, there is a risk that multiple and competing insolvency proceedings may be commenced by creditors in multiple different States that have jurisdictions to hear and determine an insolvency proceeding. Concurrent, competing proceedings may result in unnecessary value destruction of the debtor's estate and thus increased capital losses for creditors. Co-ordination and co-operation is a key principle of the

UNCITRAL MLCBI, which emphasises a fair and efficient administration of a debtor's insolvent estate in order to maximise benefits to creditors.

*Concurrent competing proceedings may also give rise to a situation in which creditors race to acquire the debtor's assets, where more sophisticated creditors are more likely to benefit. This undermines the basic tenant of insolvency, *par conditio creditorum*: equality between creditors. An insolvency representative therefore has to consider the choice of forum to exercise jurisdiction and the choice of law that will therefore apply to rules of cross-border recognition and enforcement.*

It is therefore important to establish clear and uniform cross-border insolvency rules in order to provide both clarity and predictability to cross-border insolvency proceedings. International insolvency instruments such as the Nordic Convention on Bankruptcy and the European Union is Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast)) have developed uniform choice of law principles in response to this challenge.

The application of the laws of each State have no or very limited extraterritorial effect in respect to those proceedings commenced in another State. This gives rise to cross-border insolvency issues relating to enforcement and recognition. Therefore, it is important for the insolvency representative to carefully consider what recognition and effect will be afforded to both insolvency proceedings and their appointment as an insolvency representative in foreign States. The International Bar Association ("IBA") Model International Insolvency Cooperation Act 1989 and UNCITRAL MLCBI have, for example, promoted uniform laws on the recognition of insolvency proceedings and insolvency representations.

There a number of additional international instruments which are relevant to consider.

3.5

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 ("EIR Recast") allocates primary jurisdiction to the courts of a member State within which a debtor's centre of main interest (COMI) is situated. Proceedings commenced in the State where a debtor's COMI is situated are considered 'main proceedings', although EIR Recast does permit

'subsidiary territorial proceedings' in other member States where a debtor has an 'establishment'. Such proceedings would be considered either 'independent proceedings' if opened prior to main proceedings, or 'secondary proceedings' if opened after a 'main proceeding'. But does it apply given the date?

In respect to the present fact pattern, first, you would need to know the State in which FPPL is incorporated in order to establish its COMI. Art. 3(1) EIR Recast prescribed that COMI "shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties." If FPPL is not incorporated in the UK, the English courts still have jurisdiction to hear the proceedings, as they have jurisdiction to (i) wind up a foreign company, i.e. one that is incorporated under the laws of a country other than the UK, under s.1044 Companies Act 2006; or (ii) wind up an 'unregistered company' under s.221(5) Insolvency Act 1986. Once jurisdiction is established, the Court would also need to satisfy itself if there is 'sufficient connection' with England.

Second, an 'establishment' is defined as "any place of operations... where the debtor carries out a non-transitory economic activity with human means and assets." You would therefore require more information on FPPL's activities in the UK, Europe and the other non-European countries to consider whether they constitute an 'establishment', particularly in the State in which Lobo is seeking to commence proceedings.

Following the UK's exit from the European Union, from 11p.m. on 31 December 2020, the EIR Recast ceased to apply in the UK and only applied to insolvency main proceedings that were commenced prior to 11 p.m. on 31 December 2020. Whilst the EIR Recast does recognise the existence of insolvency proceedings outside the EU for the purposes of coordinating proceedings both inside and outside the EU, the proceedings commenced against FPPL on 30 June 2022 fall outside of the scope of EIR Recast and recognition of English insolvency proceedings by European member States is no longer automatic. Good. It would be beneficial to elaborate re automatic recognition not applying.

As a result, you would need to know both whether the State in Europe where Lobo is seeking to commence proceedings is a European member State and the domestic insolvency law of that State., whether the insolvency proceedings commenced in the UK would be recognised and given effect in the foreign State in which Lobo seeks to bring proceedings will depend largely upon the domestic insolvency laws of that State.

It would be beneficial to consider the MLCBI.

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Marks awarded 10.5 out of 15

* End of Assessment *

TOTAL MARKS 42/50

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