



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

Question 1.6

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

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

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

Question 1.7

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

Question 1.9

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 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 historical roots of the insolvency law systems in African jurisdictions may be traced to the laws or legal traditions of the former colonial powers that ruled these countries. Most African jurisdictions still follow the laws imposed by their former colonial powers. For instance, former British colonies such as Nigeria, Kenya, Botswana, Zambia and Tanzania retain an English law tradition, while Angola and Mozambique have a civil law tradition based on Portuguese law. The legal systems of French-speaking countries in West Africa follow a civil law tradition, particularly based on French law. Some countries (eg, South Africa and Namibia) have mixed legal systems influenced by both civil law and English law.

While the legal systems of African jurisdictions may be tied to their colonial past, some African states have started moving away from this by introducing new and more modern legislation.

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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.

First, the aftermath of the 1998 Asian Financial Crisis prompted multiple countries in East Asia to undertake reform of their insolvency laws. For instance, Thailand passed a new Bankruptcy Act in 1998, which allowed reorganisation for the first time, as an alternative to liquidating a debtor's assets. It was hoped that the new legislation would provide more liquidity to the Thai economy, boost investor confidence, and help resuscitate the commercial sector: Kitipong Urapeepatanapong, "New Bankruptcy Act to boost Thai economy", *17 International Financial Law Review* 4, 33.¹ Likewise, Indonesia passed Law No. 4/1998, which amended its insolvency legislation to provide for the new positions of bankruptcy receivers and voluntary debt compromise administrators: Roman Tomasic, *Insolvency Law in East Asia*, Hampshire, Ashgate (2006), p 356.

Second, insolvency law reform in East Asian countries was also prompted by the economic development that took place in these countries post-WWII. For instance, following economic reforms in 1986, Vietnamese lawmakers adopted laws suited to a mixed-market economy. In particular, the Law on Business Bankruptcy 1993 was passed: Roman Tomasic, *Insolvency Law in East Asia*, Hampshire, Ashgate (2006), p 239.

There is some scope to focus, in parts, more directly on the question posed.

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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.

In the 1970s, Canada and the USA attempted to negotiate a bilateral insolvency treaty, but no agreement was reached. Other initiatives undertaken by Canada and the USA have achieved more success, of which I highlight three below.

First, the Principles of Cooperation among the North American Free Trade Agreement Countries ("NAFTA Principles") were approved in 2000. The NAFTA Principles were a result of efforts by the American Law Institute ("ALI") to resolve international insolvency issues between the NAFTA countries of the USA,

¹ This is also available at <https://www.iflr.com/article/2a644i5fuqxtao9ihy0hs/new-bankruptcy-act-to-boost-thai-economy>

Canada and Mexico. The NAFTA Principles provide that the bankruptcy of a debtor in one NAFTA country should be recognised and given effect in the other NAFTA countries. They also recommend the adoption of the Model Law on Cross-Border Insolvency (“MLCBI”), which all NAFTA countries have since done so.

Second, the ALI also finalised the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases in 2001 (the “Court-to-Court Guidelines”), which applies to international insolvencies involving the NAFTA countries. The Court-to-Court Guidelines complement the MLCBI,² which obliges local courts and insolvency representatives to cooperate with foreign courts or representatives in an international insolvency. I suggest that the success of the Court-to-Court Guidelines is indicated by the fact that the ALI subsequently led another project to consider the application of the Court-to-Court Guidelines globally, which resulted in the ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

Third, USA and Canadian courts have co-operated to agree on protocol to facilitate cross-border communication in certain insolvency cases. One key example is the *Nortel Networks* case,³ which involved a joint electronic trial via video-link in the Ontario Court of Justice (Commercial List) and the US Bankruptcy Court for the District of Delaware.

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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.

Voidable dispositions can generally be characterised as either fraudulent conveyances or preferences. A fraudulent conveyance refers to a disposition of property by the debtor, at either an undervalue or for nothing in return, which causes or worsens the debtor’s insolvency. A preference refers to settling a pre-existing

² I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th Ed, 2017), para 32-058.

³ *In re Nortel Networks, Inc.*, 669 F.3d 128 (3d Cir. 2011).

debt with a creditor, or giving a creditor security for a previously unsecured debt, which thus improves the creditor's position vis-à-vis other creditors.

Different jurisdictions tend to have different criteria for when a transaction qualifies as a voidable disposition. This difference in approach may be attributed to the fact that some countries have a civil law tradition while others have a common law tradition. In civil law systems, the basis of fraudulent conveyance law was *actio Pauliana*, whereas in English law, the basis of fraudulent conveyance law was the Act of Elizabeth of 1570. In countries with civil law systems, modern insolvency laws on voidable dispositions are thus likely to be modelled after *actio Pauliana* to some extent, whereas common law systems are more likely to follow English law on voidable dispositions.

Another difference between civil law and common law systems is that floating charges are recognised under common law, but not civil law. Avoidance of certain floating charges may thus constitute one type of voidable disposition in common law jurisdictions (see *eg*, s 245 of the UK Insolvency Act 1986) but would not exist in civil law jurisdictions.

Given that it is a generally accepted principle in insolvency law that collective action is more efficient in maximising assets available to creditors, rules on voidable dispositions preserve the integrity of the debtor's estate and ensure that creditors receive a fair allocation of the debtor's assets.⁴ Rules on voidable dispositions may also deter creditors from pursuing individual remedies in the lead-up to the commencement of insolvency proceedings, as they know that their transactions may be voided. Voidable dispositions can generally prevent (or reverse) fraud, prevent favouritism among creditors, and prevent a sudden drop in the assets of the debtor. The rules on voidable dispositions may also incentivise creditors to opt for out-of-court settlements or alternative arrangements, since any transfers of assets shortly prior to insolvency may be at risk of being voided.

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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."

⁴ UNCITRAL Legislative Guide to Insolvency Law, p 136.

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

The limitation of Wessels' definition is that it is connected to the existence of a national legal framework of insolvency law. In other words, Wessels' definition places a narrow focus on the specific domestic provisions under which insolvency proceedings are commenced (eg, the specific provision that stipulates the requirements for commencing the winding-up of a company), and how those provisions may apply to insolvencies with an international element. His definition therefore glosses over other important sources of international insolvency law, of which I highlight three:

- a) "Hard" law in the form of international conventions and treaties. For instance, the Nordic Convention (1933) grants local recognition to legislative, executive or judicial acts connected with bankruptcy and composition adjudications in other member states. It is undoubtedly a source of international insolvency law in member states but would not fall squarely within Wessels' definition of international insolvency law.**
- b) "Soft" law - for example, the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"). While the MLCBI still has to be adopted via domestic legislation, it is also a source of international insolvency law not covered by Wessels' definition.**
- c) Private international law. Where a country's legislation is silent on the application of its domestic insolvency laws to international insolvencies, recourse may be had to the country's conflict of law rules. Private international law therefore arguably forms a part of international insolvency law but is not included in Wessels' definition.**

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

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 a source of "hard" cross-border insolvency law, given that signatory States bind themselves and are obliged to change their domestic law accordingly. There is scope to elaborate upon the nature of treaties / conventions.

If the success of treaties and conventions is measured based on how many have been successfully concluded, then I suggest that treaties and conventions have had limited success in creating cross-border insolvency law. This is because there have been several failed attempts at concluding treaties. For instance, an attempt by the USA and Canada to negotiate a bilateral insolvency treaty in the 1970s was unsuccessful. Likewise, while the Council of Europe concluded a

Convention on Certain International Aspects of Bankruptcy in 1990, it was not ratified by a sufficient number of States to enter into force.

It appears that successful cross-border insolvency treaties tend to occur on a regional and relatively smaller scale. For instance, the Nordic Convention (1933) was concluded between five Scandinavian countries. Similarly, the Montevideo Treaties were ratified by 3 to 5 Latin American States, while the Havana Convention on Private International Law was ratified by 15 Latin American States.

That said, I also note that not all regions in the world have adopted treaties or conventions - for instance, the Middle East, Asia and the Pacific do not have any treaties or conventions addressing international insolvency issues. I therefore suggest that treaties and conventions have had limited success in creating cross-border insolvency laws.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

Marks awarded 13 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?

The main difference in formal and informal insolvency processes lies in whether they are regulated by insolvency law. Formal insolvency proceedings are commenced under the insolvency law of a particular jurisdiction and are governed by that law. Examples of formal insolvency proceedings are liquidation, reorganisation or rescue proceedings. In contrast, informal

insolvency arrangements are not always regulated by the insolvency law of a particular jurisdiction, and generally take the form of voluntary arrangements between the debtor and some or all of its creditors. These informal arrangements tend to have been developed through the banking or commercial sectors, and usually provide for restructuring of the debtor. While informal arrangements are not regulated by insolvency law *per se*, their effectiveness may nonetheless depend on the existence of an insolvency law that provides indirect incentives for the voluntary arrangement to be complied with.⁵ For instance, a company may be induced by the prospect of a creditor commencing formal insolvency proceedings, to comply with a voluntary arrangement reached with its creditors.

The advantages of an informal arrangement are that a) the cost tends to be significantly lower as the courts are not involved; and b) an informal arrangement is more flexible in how it might be structured. Since an informal arrangement is contractual in nature, it may contain any kind of terms so long as they are legal, binding and enforceable. While an informal arrangement also means that there is no publicity that FPPL is facing financial difficulties, this is likely of limited relevance to Lobo. Privacy is also relevant.

The disadvantages of an informal arrangement are that a) there is no moratorium preventing other creditors from commencing formal insolvency proceedings against FPPL; and b) there is no way of binding other dissenting creditors to any agreement reached. Any informal agreement reached between FPPL and Lobo may therefore end up being wasted time and resources if another of FPPL's creditors commences formal insolvency proceedings against FPPL. Should Lobo want to enter an informal arrangement with FPPL, it should therefore first consider if FPPL has any other outstanding creditors. If so, Lobo should consider including those creditors in the informal arrangement it reaches with FPPL.

The advantages of formal insolvency proceedings are that a) there will be a statutory moratorium preventing any legal proceedings from being taken out against FPPL and b) dissenting creditors may possibly be bound by an arrangement proposed by FPPL. Formal proceedings may also have the benefit of providing more certainty to Lobo, assuming the relevant insolvency law provides a fixed procedure for recovering debts from a company (as opposed to a voluntary arrangement, for which there is no guarantee that FPPL would abide by the arrangement).

On the other hand, the main disadvantage of formal insolvency proceedings is that they are likely to be costlier since the courts are involved. While formal proceedings will also result in publicity of FPPL's financial difficulties, this is likely to be a consideration of limited relevance from Lobo's perspective.

⁵ UNCITRAL Legislative Guide to Insolvency Law 2004, pp 9–10.

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.

The insolvency representative may face the following difficulties:

- a) Risk of competing proceedings. *The proceeding in Encanto and the proceeding in Asgard may be incompatible (eg, if one proceeding seeks the winding-up of FPPL while the other seeks corporate restructuring). More information is needed on the nature of the proceedings taken out in Asgard and Encanto to determine if this is the case.***
- b) Difficulty in determining applicable law. *The insolvency representative has to determine the law that Asgard and Encanto would apply to insolvency proceedings - in the absence of any treaties or harmonised choice of law provisions, this question may be difficult to answer (eg, if the private international laws of both Asgard and Encanto seem to suggest that the laws of the other country should apply).***
- c) Difficulty in co-ordinating assets. *If the courts in Encanto do not recognise any insolvency proceedings (or orders) made in Asgard (and vice versa), the insolvency representative may be limited in how the assets of FPPL can be distributed to creditors. For instance, even if FPPL has more debts in Encanto but more assets in Asgard, it may be the case that FPPL's assets in Asgard cannot be used to pay creditors in Encanto.***
- d) Differing terminology across jurisdictions. *There may be differences in the terminology used in insolvency legislation in Asgard and Encanto, which could give rise to confusion.***
- e) Risk of multiple proceedings. *If FPPL has outstanding creditors in other jurisdictions as well, there remains the risk of further insolvency proceedings being commenced against FPPL in other jurisdictions, which would compound the difficulties listed above.***

International instruments that have been developed to overcome the above difficulties generally fall into the following categories:

- a) Harmonisation of domestic insolvency laws. *Greater harmony across domestic insolvency laws helps to minimise the significance of there being an***

international element in the insolvency, and the need to resolve international insolvency issues. Instruments that help harmonise domestic laws include the UNCITRAL Legislative Guide on Insolvency Law, which serves as a reference to national authorities when creating or reviewing national insolvency laws. From the early 2000s, the World Bank has also developed its “Principles for Effective Insolvency and Creditor / Debt Regime”, which are sometimes stipulated as a condition of loan support from the International Monetary Fund or the World Bank.

- b) Uniform choice of law rules. Having the same choice of law rules across jurisdictions reduces the need to resolve complicated choice-of-law issues, and ensures the same outcome regardless of where insolvency proceedings are commenced. For example, the Nordic Convention (1933) recognises the law of the place of insolvency adjudication as determining almost all the effects of the order in all member States, without further formalities.**
- c) Uniform recognition laws accept that there will be concurrent proceedings in multiple jurisdictions, but minimise the prospect of competing proceedings by stipulating which proceeding will be the main proceeding. The UNCITRAL Model Law on Cross-Border Insolvency (“MLCBI”) proposes the adoption of uniform recognition laws.**
- d) Co-operation and co-ordination to promote recognition and enforcement. This approach also accepts that there will be concurrent proceedings in multiple jurisdictions, and aims to overcome difficulties associated with co-ordination by promoting cooperation between States. For instance, the MLCBI obliges local courts and insolvency representatives to cooperate with foreign courts or representatives.**

I suggest that the development of international insolvency instruments is highly important. The root of most difficulties associated with international insolvency proceedings is the lack of (guaranteed) communication between courts of different jurisdictions, which may potentially result in incompatible outcomes or complicated choice-of-law issues. International insolvency instruments provide clarity and predictability in this area by promoting a harmonised approach to dealing with insolvency cases, and greater communication between courts.

A discussion of relevant international instruments is needed. **It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.**

2.5

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 EIR Recast ceased to apply in the UK from 11.00pm on 31 December 2020 following the UK's exit from the European Union,⁶ and thus does not apply to the proceedings commenced against FPPL in the UK on 30 June 2022. Assuming that the European country in which Lobo is considering opening proceedings is bound by the EIR Recast, this means that the European country does not have to consider if the UK is FPPL's centre of main interest (and therefore whether the UK proceeding is a main insolvency proceeding) under Art 3(1) of the EIR Recast. Any judgment handed down by the UK courts would also not be conferred automatic recognition by the European country under Art 19 of the EIR Recast. The European country would also not be obliged to apply UK law pursuant to Art 7 of the EIR Recast. Instead, these questions would likely be resolved with regard to the European country's own laws on recognition of foreign judgments and choice of law (in the absence of any bilateral treaties or other conventions between it and the UK).

From the perspective of the UK court, the UK court will also determine questions of jurisdiction, applicable law and recognition of foreign insolvency judgments with regard to its own domestic law. In relation to the question of jurisdiction, a UK court will most likely find that it has jurisdiction to hear insolvency proceedings since FPPL is incorporated in the UK. As for the applicable law, UK law will likely apply as a matter of procedure, while the Rome I and Rome II statutes should continue to apply to the choice of law applicable to contractual and non-contractual obligations. In relation to the recognition of foreign judgments, it may still be the case that UK courts will "so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution" (*McGrath v Riddell* [2008] UKHL 21 at [30], *per* Lord Hoffmann).

It would also be beneficial to consider the MLCBI

3.5

Marks awarded 10 out of 15

* End of Assessment *

TOTAL MARKS 42/50

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

⁶ <https://www.legislation.gov.uk/uksi/2019/146/contents>.