



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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



**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

Question 1.6

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

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

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

Question 1.7

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

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

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

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

Question 1.8

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

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

Question 1.9

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 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 various insolvency law systems found in African jurisdictions are the laws of those jurisdictions' former colonial powers. Today, African jurisdictions still largely follow the laws of their respective former colonial powers. Countries such as Nigeria, Kenya, Botswana and Zambia, and countries in East Africa such as Tanzania, have an English law tradition. On the other hand, Angola and Mozambique have a civil law tradition based on Portuguese law. The insolvency law systems of West African countries previously under French colonial rule are steeped in civil law, particularly French law. Finally, some countries such as South Africa and Namibia have mixed legal systems because both Roman-Dutch law (civil law) and English law influenced their respective legal systems.*

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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 aftermath of the 1998 financial crisis in East Asia affected the region, especially Indonesia and Thailand, and gave rise to insolvency law reform. For example, Thailand overhauled its bankruptcy laws, amending the Bankruptcy Act of 1940 in 1999 and 2000. The amendments to the Bankruptcy Act in the late 1990s introduced a reorganisation system to salvage failing companies and an automatic discharge. In this way, the amendments sought to encourage debt restructuring for insolvent businesses. The amendments also adjusted upwards the value of indebtedness in line with developments in the economy. These amendments were complemented by the Bankruptcy Court Act, which was enacted on 8 April 1999 and set up the Bankruptcy Court as a specialised court with a specialised legal procedure and sole jurisdiction to hear and decide bankruptcy cases (Roman Tomasic, *Insolvency in East Asia* (Ashgate, 2006) at pp 295 to 296).*

*Similarly, in the wake of the 1998 financial crisis in Indonesia, Law No. 4/1998 was produced under IMF conditionality in the form of an emergency regulation early in the Asian Financial Crisis, based upon revisions to the 1906 colonial law. Following a six-year trial of the new bankruptcy law, largely minor amendments were made with Law No. 37/2004. The chief innovations under Law No. 4/1998 involved the creation of entirely new commercial courts (*Pengadilan Niaga*) and the opening of bankruptcy administration to the private sector by providing for the new positions of bankruptcy receivers (*kurator*) and voluntary debt compromise administrators (*pengurus*) registered with the state. This rework of insolvency institutions was intended to inject commercial sophistication into insolvency proceedings, since *kurator* and *pengurus* would be drawn from accounting firms and the sophisticated commercial bar. The new commercial courts also intended to create a cadre of judges familiar with sophisticated commercial problems while attempting to rise above perceived general problems with existing Indonesian courts (Roman Tomasic, *Insolvency in East Asia* (Ashgate, 2006) at pp 355 to 356).*

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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 United States were working towards a bilateral insolvency treaty. However, the endeavour was probably too ambitious in its scope and the countries were unable to reach an agreement. Subsequently, both States have seen more success with their adoption of the UNCITRAL Model*

*Law on Cross-border Insolvency (the “Model Law”) and through mechanisms such as Protocols.*

*Another successful initiative was one undertaken by the American Law Institute (ALI), a professional body in the United States. The ALI initiated the ALI Transnational Insolvency Project to improve co-operation in international insolvencies across the NAFTA States of the United States, Canada and Mexico. Professor Jay L Westbrook was appointed as the initiative’s designated Reporter, and advisory groups with experts from each of the three countries were also formed. An International Statement on the relevant country’s insolvency law was prepared, which led to the eventual preparation and approval of the Principles of Cooperation among the NAFTA Countries (the “NAFTA Principles”) in 2000. The NAFTA Principles focus on the insolvency of corporations and other legal entities engaged in commercial operations. The NAFTA Principles underscore the importance of cooperation and recognition, and also address other areas such as moratorium and sharing of value. It concludes with Recommendations for Legislation or International Agreement, with recommendations on the adoption of the Model Law and automatic stays, among others.*

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 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.***

*One possible historical reason for the difference in approaches regarding the treatment of voidable dispositions is the historical basis for the remedy in English law and civil law jurisdictions. The *actio Pauliana* forms the basis of fraudulent conveyance law in civil law jurisdictions, while the Act of Elizabeth of 1570 is the basis for the remedy in English law. Therefore, in practice, legislation dealing with the treatment of voidable dispositions may differ in terms of the requirements for the remedies to be applied.*

*A framework to better understand the treatment of these rules in insolvency systems is as follows:*

- 1. What do the various jurisdictions view to be the essence of insolvency? In this regard, the following questions are relevant:
  - a. What is the definition of insolvency in those jurisdictions?*
  - b. What is seen as the goal(s) of insolvency - liquidation of assets or rescue?**
- 2. What are the policy considerations the jurisdictions prioritise? Are the jurisdictions pro-creditor or pro-debtor in their approach?*
- 3. What are the sources of insolvency law in those jurisdictions? In addition, since we are interested in the historical reasons for the different approaches, a relevant question would be whether the source of those laws was the common law or civil law.*
- 4. Are there common characteristics between consumer and corporate insolvency within each insolvency jurisdiction? Are the rules governing voidable dispositions one of them?*
- 5. What are the gateways to the respective insolvency systems and how are insolvency proceedings commenced in those jurisdictions?*
- 6. What are the effects of insolvency legislation? The following effects can be considered alongside voidable dispositions:
  - a. Automatic stay (moratorium on piecemeal debt collecting and execution procedures)*
  - b. Personal consequences and liability*
  - c. Executory contracts*
  - d. Set-off and netting (both pre- and post-commencement of insolvency proceedings)**

*From the above framework, a pattern may emerge. For instance, pro-creditor systems may impose less onerous requirements before the court may find there to be a voidable disposition (and therefore make it easier for creditors to challenge such transactions and recover the debtor's assets).*

*The importance of rules prescribing the treatment of voidable dispositions is as follows. According to the UNCITRAL Legislative Guide on Insolvency Law (Part 1, cl 1), since insolvency law establishes a collective debt-collecting mechanism, it is essential to discourage individual creditors from continuing with individual debt enforcement measures upon the commencement of an insolvency proceeding. However, policy considerations dictate that certain transactions which took place prior to commencement may (and should, where certain conditions are met) also become subject to investigation. If these requirements are met, the transactions may be set aside, and any benefits received by the beneficiary will need to be repaid to the insolvent estate.*

*There is scope to elaborate upon the classification of voidable 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.**

*The definition is perceived to have limitations since it is connected to the existence of a national legal framework of insolvency law. The author (Wessels) also refers to various other definitions which expose such limitations. For instance, Fletcher proposes the definition of insolvency law as follows (B Wessels, *International Insolvency Law* (Kluwer, 2006), p1):*

*“international insolvency” or “cross-border insolvency” should be considered 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.”*

*This is indeed a valid criticism of Wessels’ definition, as he too astutely pointed out. The existence of an international cross-border insolvency regime exposes the limitation in Wessels’ definition. Where insolvency proceedings are commenced, and recognition and enforcement of those proceedings are sought in countries that have adopted a regime like the UNCITRAL Model Law on Cross-border Insolvency (the “Model Law”), Wessels’ definition of international insolvency laws as rules that “cannot be fully enforced” is less accurate. This is because the Model Law puts in place rules to allow for automatic recognition and enforcement of foreign main proceedings.*

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, once signed and ratified by a State, become a part of the State’s domestic “hard law” on insolvency and are enforceable in the courts of that State. Generally, treaties and conventions were not successful in*

*establishing cross-border insolvency rules. The unsuccessful efforts in Europe to achieve multilateral international insolvency conventions are a key case in point. Bilateral international insolvency conventions appeared from the 13<sup>th</sup> and 14<sup>th</sup> centuries to address absconding debtors and later gathering in assets. From the 19<sup>th</sup> century, more modern forms of bilateral treaties or conventions on, *inter alia*, jurisdiction and recognition and enforcement related to bankruptcy appeared, with the Nordic Convention (1933) being a rare successful multilateral treaty.*

*In 1990, the Council of Europe (which currently has 47 member countries) concluded a Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe Treaty Series No 136. While it was signed by 8 member States, it was not ratified by enough States for it to enter into force. It is arguable, however, that it had an important influence on the development of a European Union ("EU") response to the problems of international insolvencies among EU member States.*

*Treaties or conventions as a source of "hard law" were less successful in establishing cross-border insolvency rules as compared to regulations. While not by way of Convention, the EU has achieved success by way of the European Insolvency Regulation (EIR) (2000) which has also influenced broader multilateral developments in international insolvency law. The EIR has since been reviewed and amended; the current multilateral instrument on international insolvencies within the EU is Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast).*

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

3.5

Marks awarded 12.5 out of 15

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

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

***FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.***

***If you require additional information to answer these questions, briefly state what it is and why it is relevant.***

Question 4.1 [Maximum 5 marks]

**What are the main differences between “formal” insolvency proceedings and “informal” insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?**

*One major difference between “formal” insolvency proceedings and “informal” insolvency arrangements pertains to how they are regulated. “Formal” insolvency proceedings are those commenced under the insolvency law and governed by that law. In contrast, “informal” insolvency arrangements are not always regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and some or all of its creditors.*

*Another key difference are the types of remedies provided for under both proceedings. While “formal” insolvency proceedings generally include both liquidation and reorganization or rescue proceedings, “informal” insolvency arrangements typically provide for some form of restructuring of the insolvent debtor.*

*Finally, the enforcement mechanisms involved in both are also different. “Formal” insolvency proceedings rely on the courts of that State for directions and enforcement. In contrast, while voluntary negotiations are not regulated by an insolvency law, they depend for their effectiveness upon the existence of an insolvency law, which can provide indirect incentives or persuasive force to achieve reorganization.*

*One key advantage of “informal” insolvency arrangements arising from the above differences is that such arrangements can result in cost savings as there is no need to go through formal court procedure. However, more information is required on the informal payment arrangements FPPL is proposing, for instance, do they rely on or are they regulated by Asgardian insolvency law? (I assume that any formal debt recovery options commenced by Lobo will be before the Asgardian courts, given that FPPL is struggling financially in Asgard and Lobo is incorporated in Asgard.) Cost savings would likely be greater if the informal payment arrangements are not regulated by Asgardian insolvency law; however, the enforceability and effectiveness of such arrangements would also be reduced. I elaborate more on the enforceability and effectiveness of informal payment arrangements below.*

*Another key advantage from the above differences is that “informal” insolvency arrangements often allow for greater flexibility, allowing parties to negotiate and tweak the arrangement to best serve their interests.*

*Finally, an out-of-court workout arrangement has the advantage of ensuring a certain degree of confidentiality and privacy regarding FPPL’s financial status. In contrast, as “formal” insolvency proceedings such as a liquidation are public,*

*commencing such proceedings may alarm FPPL's other creditors and decrease creditor/investor confidence in FPPL, even though FPPL may still be a going concern. FPPL may also face competing creditor claims. This may plunge FPPL into further insolvency and decrease Lobo's chances of recovering the payments it is owed.*

*One disadvantage of "informal" insolvency arrangements when compared to "formal" insolvency proceedings is that the effectiveness of such informal arrangements depends significantly on the incentives of (in this case) Asgardian insolvency law (assuming Asgardian insolvency law regulates informal insolvency arrangements) or where Asgardian law does not, the will of the debtor and its creditors. Therefore, the effectiveness of "informal" insolvency arrangements is significantly reduced where such arrangements are not regulated by Asgardian insolvency law and where there are hold-out creditors. Nevertheless, given that we only have information on one creditor at the moment (Lobo), the significance of this disadvantage is reduced. It would be beneficial to discuss moratorium and ability to bind dissenting creditors.*

*Overall, Lobo is still advised to consider and discuss with FPPL possible informal workout arrangements, and may choose to adopt the informal workout arrangement if it proves favourable to Lobo's interests.*

3.5

Question 4.2 [Maximum 5 marks]

***Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.***

*One difficulty that may arise to render co-operation and co-ordination between the Asgardian and Encanto proceedings difficult is the possible lack of a common insolvency language. "Insolvency" traditionally means a situation where the combined total of the debtor's outstanding liabilities exceeds the measurable value of all the debtor's assets and some degree of durability of this state of negative net worth is normally required. However, a more short-term inability to service debts, for example, a liquidity crisis, is sometimes also considered sufficient for the commencement of "insolvency proceedings". This would correspondingly affect the type of proceedings commenced and the corresponding relief creditors are entitled to.*

*The differences in domestic insolvency norms would also render co-ordinating the position of creditors in both jurisdictions and the priorities they assert in insolvency difficult (P J Omar, "The Landscape of International Insolvency" (2002) 11 IIR 173 at p 175). Where the debtor faces creditors' claims in more than one State, conflicts of laws issues will inevitably arise. The conflict may be made more complex where there is, for instance, the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in Asgard's and Encanto's national laws. The extent to which these arrangements are provided for in domestic legislation and can affect creditors' rights are in turn affected by the general view Asgard and Encanto may adopt towards insolvency law; for instance, Asgard may have a more pro-debtor regime while Encanto may have a more pro-creditor regime. If so, Asgard may allow for a more liberal approach towards a discharge of FPPL's debt as opposed to Encanto.*

*International insolvency instruments such as the UNCITRAL Model Law on Cross-border Insolvency (the "Model Law") have been developed to assist with these difficulties. The Model Law places obligations on courts and insolvency representatives in different States to communicate and co-operate to the maximum extent possible, with a view to ensuring that the debtor's insolvent estate is administered fairly and efficiently and that benefits to creditors are maximised. The Model Law also provides guidelines and examples of appropriate means of co-operation, including the approval or implementation by courts of agreements concerning the coordination of proceedings.*

*The UNCITRAL Legislative Guide on Insolvency Law (the "Legislative Guide") was also promulgated in 2004 to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. In this way, the Legislative Guide facilitates the incremental harmonisation of insolvency laws. The Legislative Guide addresses a wide range of aspects of insolvency law and has been expanded in subsequent years. It also recommends the enactment of the Model Law as "a modern, harmonized and fair framework to address effectively instances of cross-border insolvency".*

*In my view, the development of such international insolvency instruments has been an extremely influential response to the international insolvency landscape. First, the development of such instruments has fostered the development of a common insolvency language and common norms in the international insolvency landscape, mitigating many of the problems previously observed in international insolvency law. Second, as these instruments are soft law instruments, States are allowed to tailor the instruments according to their domestic needs before implementing them in their domestic law. This has led to a greater take-up rate among States, allowing for the harmonisation of international insolvency law *along with* the preservation of individual State interests. Finally, the empirical data also underscores the importance and*



*influence of these international insolvency instruments: legislation based on the Model Law has been adopted in more than 50 jurisdictions ([https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)).*

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

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 (the “EIR Recast”) would not apply with respect to the UK commenced insolvency proceedings. Under UK law, following the UK’s departure from the European Union, the EIR Recast no longer applies to post-11pm 31 December 2020 proceedings in the UK. The EIR Recast only applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (being 11pm on 31 December 2020). Therefore, since the UK proceeding was commenced by the minor creditor on 30 June 2022, the EIR Recast does not apply.*

*The consequence is that recognition of UK commenced insolvency proceedings will not be as straightforward as before the UK left the EU. Previously, recognition and enforcement of restructuring and insolvency procedures/judgments between the UK and EU member States were subject to the EIR Recast which had direct effect and broadly offered automatic recognition. The EIR Recast would have determined the proper jurisdiction for FPPL’s insolvency proceedings and the applicable law to be used in those proceedings. It also would have provided for mandatory recognition of those proceedings in EU member States. Now, recognition of the UK commenced insolvency proceedings in the European country Lobo is considering opening proceedings in will be subject to the local laws (including EU law) of that individual member State. In that regard, more information is required on the European country’s applicable cross-border insolvency law. If the European country has adopted the UNCITRAL Model Law on Cross-border Insolvency, recognition of the UK commenced insolvency proceedings will be governed by similar principles, e.g.*

*automatic recognition of insolvency proceedings commenced in the debtor's centre of main interests. If not, more specialised legal advice on the European country's insolvency law is required.*

5

Marks awarded 12 out of 15

**\* End of Assessment \***

**TOTAL MARKS 43.5/50**  
**Excellent Paper**