INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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***.***

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6. ***The final submission date for this assessment is*** 15 November 2022***. The assessment submission portal will close at*** 23:00 (11 pm) GMT on 15 November 2022***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages***.***

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.

(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.

(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.

(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.

Question 1.2

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

(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.

(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.

(c) This statement is untrue since discharge of debt never became part of any of these systems.

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.

(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.

(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

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

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

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

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.8

Which of the following best describes international insolvency law?

(a) It is public international law governing insolvency law between States.

(b) It is private international law governing insolvency law between States.

(c) It may involve aspects of both public international law and private international law.

(d) It involves a simple classification within either public international law or private international law.

Question 1.9

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

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

As is to be expected, given the extent to which colonial powers imposed their legal systems and norms on the countries which they occupied, the insolvency law systems present in Africa today are largely dependent on which colonial masters occupied the particular jurisdiction. Using this factor, three broad categories can be seen:

i. ***For countries which were colonised by the British, their insolvency system usually follows the English common law system of which received colonial law is a fundamental part. These pieces of received law are supplemented by various common law principles as are applied by the English courts. This category includes former British colonies like Nigeria, Uganda, Kenya, and Zambia.***

ii. ***For countries that were colonised by continental European powers, their insolvency systems have been significantly influenced by the civil law tradition and that influence continued post-independence. Countries such as Senegal, Algeria and Ivory Coast apply traditional French civil law principles while countries such as Democratic Republic of the Congo apply Belgian civil law principles which are themselves influenced by ancient Roman law and the French Civil Code.***

iii. ***The third category covers countries which, due to their mixed colonial heritage, apply principles influenced by two or more legal systems. The most prominent examples is South Africa which applies principles emanating from Roman-Dutch law as well as English common law.***

Source: https://www.lexafrica.com/wp-content/uploads/2022/10/LEX-Africa-Insolvency-Guide-Digital.pdf

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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.

There have been two primary catalysts for insolvency reform in East Asia, particularly South East Asia: (1) globalisation and the resultant increases global trade which saw East Asia companies conduct cross border trading in a wider variety of goods and services with the world and (2) the Asian Financial Crisis of 1997. (See Spuling, N, (2021) Cross Border Insolvencies in South East Asia: Regional Insolvency Framework for ASEAN at page 10.)

Arguably, a third catalyst has been the return to democracy in some Eastern Asian countries such as South Korea and the prosperity which followed. This particular development showed the need for a modern insolvency system that was free from corruption and was also responsive to the needs of companies functioning, largely for the first time, as part of the global democratic and economic system. (See Halliday, Terrence C. and Carruthers, B.G. (2004) Institutional Lessons from Insolvency Reforms in East Asia published in Credit Risk and Credit Access in Asia, OECD 2006 at pages 21 – 24)

These catalysts resulted in several reform initiatives which include the following:

a. ***Reform of the Court system: This was particularly the case in Korea and Indonesia. In Korea, the judicial system was overhauled beginning with the establishment of a specialised Insolvency court in the Seoul district. A similar development took place in Indonesia with the establishment of the Commercial Court in 1998. The establishment of these courts enabled the judicial system in***

both countries to apply specialised legal solutions when treating with insolvency issues.

b. ***Reform of substantive insolvency law: as a corollary to the relatively modern judicial system, most countries in East Asia also reformed their substantive insolvency laws. Thailand put in place new bankruptcy laws in 1998 and 1999 as did South Korea in that same period. Existing bankruptcy laws were also substantially amended in the case of Indonesia which amended its Bankruptcy Regulation in 1998***

Source: Rocha, Bruno, At Different Speeds: Policy Complementarities and the Recovery from the Asian Crisis (2009) published in Asian Development Bank Research Paper Series No. 74, July 2009 at pages 20 - 22

It would be beneficial to elaborate on reforms resulting from the crisis. But this is generally well answered.

2

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.

Over the years, North American countries have participated in various initiatives with the ultimate goal being a functional system of international insolvency as between them. these initiatives were quite important mainly due to the economic closeness and interdependence which the countries enjoyed. These initiatives include the following:

a. ***Judicial comity: this was a long-standing ground of cooperation in international insolvency disputes. It permitted municipal courts to have regard to the ongoing procedures in other states with a view to as far as possible, avoiding conflicting decisions which could have a material impact on the overall legal process. While this was a welcome creature of judicial cooperation, it was not a harmonisation of procedural rules and at times, conflicting decisions were unavoidable. Further, it did not reduce the procedural hurdles which made it necessary for concurrent proceedings to exist in different states. It also did not provide an effective response to the need to treat with the assets of the insolvent company in a holistic way.***

b. ***NAFTA Principles as the basis for multilateral cooperation on insolvency matters. These Principles fell into three main categories: General, Procedural and Recommendations. The General Principles were basic agreements obliging the courts and administrators to cooperate in international insolvency proceedings. This was with a view to achieving two of the primary goals of the***

insolvency proceedings: obtaining the highest possible value for the insolvent entity's assets, ensuring proper and as far as possible, equitable distribution, and achieving these goals in a just legal framework. These have been moderately successful in that while they have set out basic principles to which all participating countries have agreed to adhere (and in that light, go further than judicial comity), they still fall short of the ultimate goal of harmonisation and the specific drawbacks that unharmonized laws bring.

c. ***American Law Institute also generated (1) Guidelines Applicable to Court-to-Court Communications in Cross-border Cases and (2) ALI – III Report. These were important developments which, building on the NAFTA Principles, sought to enhance and harmonise cross border insolvency cases as a blueprint for international adoption and implementation. Their main drawback was that they did not go far enough in actually harmonising the procedures in the various states nor did they seek to substantively affect the insolvency process in individual countries.***

There is scope to elaborate. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

3

Marks awarded 8 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

The greatest challenge to the formulation of a comprehensive international insolvency framework has been the extent to which the individual jurisdictions apply different rules with varying objectives.

While there are broad similarities in those objectives, developing a unified international insolvency system requires states to adopt rules and laws which may fundamentally disrupt their local system. In the vast majority of cases, these

differences in rules and law have their origin in the historical development of insolvency procedures in the individual jurisdictions.

It is accepted that one of the primary purposes of the insolvency process is to realise the assets of the debtor for the benefit of its existing creditors. (See Wood, Phillip. R., Principles of Insolvency (Part 1), International Insolvency Review – Spring 1995 at page 95). This explains why there is usually an automatic stay of proceedings which bars individual collection by creditors.

It also explains why, arguably, the interest of the creditors in the distribution of assets is paramount once insolvency proceedings have been commenced. In securing the assets of the debtor entity for realisation and thereafter distribution, it is often necessary, in the appropriate circumstances, to consider pre-insolvency transactions entered into by the company to ascertain whether they were fraudulent or whether they had the effect of preferring one creditor (s) over another. This is critical to achieving one of the core goals of insolvency proceedings: recovering as much as possible for distribution to creditors.

The policy basis on which such an exercise can be undertaken has been set out in UNCITRAL Legislative Guide on Insolvency Law, Part 1, cl. 1.

An example of the differences between the civil law tradition versus the English common law tradition is the manner in which voidable dispositions are treated.

In most civil law countries, early developments in relation to insolvency proceedings started with the customs between merchants and tradesmen. The principle of voidable disposition or *actio Pauliana* as it is called in the civil law tradition was designed to prevent debtors from transferring property to other parties for less than valuable consideration and with a view to reducing the assets available to his creditors.

(See Commissioner of Customs v Excise v Bank of Lisbon International 1994 (1) SA 928 (A) at para. 208H-I as well as Boraine, Andre, Towards Codifying the Actio Pauliana (1996) 8 S. Afr. MerL.J. 213 at page 224 – 225.

In contrast, this rule has its beginning in statute in English common law commencing with the Act of Elizabeth 1570. Critically, it has been said that this Act originated as part of an attempt for the low to properly treat with the bankruptcy process as opposed to being mainly geared towards prevention of fraud. See Calitz, J.C, "Historical Overview of State Regulation of South African Insolvency Law " 2010 16(2) Fundumina 1, at page 13.

A critical difference is that English common law shields a bona fide purchaser without notice while in civil law, enforcement could be undertaken against that third party once it is shown that the transaction was at an undervalue.

There was scope to elaborate such as with respect to the framework and nature of voidable transactions.

3.5

Question 3.2 [maximum 5 marks]

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

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

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

This definition is perceived to have limitations due to the following:

a. ***International insolvency law is extremely difficult to navigate since there are varying legal structures which deal with insolvency matters domestically. Those structures are far from uniform with the result that there is no central body of international law which can be properly said to constitute international insolvency law. While there are common principles, namely that the assets of an insolvent entity are to be preserved for the collective benefit of creditors, the practical distribution of those assets and the procedure governing same are, for the most part, domestic. There are no international rules adopted by countries to deal with this issue.***

b. ***The latter statement that the applicable law cannot be executed immediately without consideration being given to the international aspect of a case is not reflective of the current system. One of the gaps in international insolvency law is the lack of comprehensive rules dealing concurrent proceedings. While a domestic court dealing with a cross border will, usually as a matter of judicial comity, have regard to foreign proceeding with a view to avoiding conflicting decision, that comity has to give way to the actual law governing the process. This may mean that, at times, conflicting decisions are rendered. Based on the definition above this ought not to happen. However, the absence of agreed and comprehensive rules dealing with cross border insolvency such decisions will continue to occur.***

c. ***Further, while it is possible to enforce cross border insolvency measures in various countries, this is usually done under domestic law via common law or***

private international law. The Model Laws regarding recognition and enforcement of foreign insolvency proceedings have not been universally adopted with the result being a patchwork of regulations rather than a complete system of rules as the definition contemplates.

d. ***For that reason, it may not be correct to say that insolvency proceedings or measures cannot be fully enforced. Invariably, they can; however, the means of doing so are usually complicated and costly.***

There is some scope to elaborate, such as in relation to the author's comments and other's definitions (eg Fletcher)

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 undeniably untapped sources for cross border insolvency law
which by its very nature is highly dependent on the cooperation between states in the insolvency process. Treaties and convention are arguable best placed achieve important goals in cross border insolvency, namely, (1) uniformity in procedure for commencement and recognition of insolvency proceedings, wherever commenced; (2) fair distribution of assets for the benefit of as many creditors as possible; and (3) avoidance of the duplication of proceedings. These goals are becoming increasingly important given the globalised nature of commerce. It would be beneficial to explain the nature of treaties/conventions in more detail.

While many attempts have been made by varying states to formalise cross border insolvency treaties dealing with a wide variety of issues, arguably, the most successful have been the Nordic Convention of 1933, the Montevideo treaties of 1889 and 1940.

It is immediately apparent why these groups of countries have been able to negotiate and implement cross border insolvency treaties over such a long period of time:

a. ***All of the countries come from the civil law tradition. The laws of civil law countries have historically been much more codified than those found in the English common law tradition;***
b. ***The said countries are already in political unions to varying degrees and as such there appears to be sufficient confidence in each other's judicial system; (See Wood, Philip; Law and Practise of International Finance – Principles of International Insolvency (1996) at page 293)***
c. ***The signatories to the Montevideo treaties are very culturally similar and have a shared colonial history with Spain which gives them a high degree of***

uniformity in the first place

As has been noted and for the same reasons, it is fair to see that these treaties are more regional than international in nature. It is therefore likely that countries without the shared political and cultural history are much less likely to be able to agree comprehensive cross border insolvency frameworks.

Source: McKenzie, Donna (1996) "International Solutions to International Insolvency: An Insoluble Problem?" University of Baltimore Law Review: Vol. 26: Iss. 3, Article 4 at pages 24 – 26.

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

3.5

Marks awarded 11.5 out of 15

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

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

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

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

Question 4.1 [Maximum 5 marks]

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

The main differences between "formal" insolvency proceedings and "informal insolvency arrangements are as follows:

a. ***In informal insolvency proceedings, the debtor entity has the opportunity to meet and agree repayment obligations with individual creditors without judicial oversight. These arrangements are contractual and do not require the consent or approval of anyone other than the creditors and the debtor entity. This is not usually the case in formal insolvency proceedings where the applicable legal rules set out how the arrangements between creditors and the***

debtor entity are to be conducted. Further any arrangements in those circumstances have to be approved by the Court having conduct of the insolvency proceedings unless otherwise stated.

b. ***Informal insolvency arrangements can be used to arrest financial issues early whereas by the time formal insolvency proceedings are instituted, the debtor entity is already in a legal position where it cannot meet its debts as they fall due.***

c. ***Unlike formal insolvency proceedings, there is no automatic stay and individual creditors are still allowed to commence proceedings against FPPL individually if they so wish***

There is some scope to elaborate.

The key advantages and disadvantages that Lobo should consider in deciding whether to enter into informal insolvency arrangements with FPPL are as follows:

a. ***If an agreement can be reached as to the settlement of FPPL's debts then out of court arrangements are likely to result in FPPL's Asgard's operations being put on track to normalcy. This would allow FPPL to meet any current and future indebtedness to Lobo. This is especially the case since FPPL's Encanto operations are doing quite well. This suggests the issue is not necessarily an operation issue and is likely an issue of cash flow since the underlying business may be viable.***

b. ***Out of court arrangements are likely to be less costly and time consuming than formal court supervised insolvency which can take years to resolve with a significant portion of the assets being used to settle the costs of the insolvency. Out of court arrangements may also be attractive to Lobo since it would not have to deal with the intricacies of the legal system since FPPL is a multinational company;***

c. ***Lobo is much likelier to secure more favourable repayment terms of the debt owed by FPPL in out of court arrangements than in formal insolvency proceedings where its interests have to be balanced against that of other creditors;***

d. ***The success of the out of court arrangement is completely dependent on the agreement of all of FPPL's creditors. Assuming that Lobo is the largest creditor, then it is likely that other, smaller credits would agree once Lobo agrees to the arrangements. A court process is usually definitive and there is no need for the creditors to agree since decisions as to distribution of assets are vested into the administrator subject to the approval of the court.***

There are additional matters to consider including binding of dissenting creditors and privacy.

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.

Some of the chief difficulties that would arise in a situation like that set out above are as follows:

a. ***The biggest risk is likely to be that of concurrent proceedings having already sequestrated the assets of FPPL in Encanto. This means that much fewer assets are available for the settlement of outstanding creditor obligations in Asgard.***

b. ***This may possibly lead to a situation where those assets in Asgard are further depleted by the commencement of insolvency proceedings and the associated costs.***

c. ***There is likely to be a pointed lack of uniformity between the two courts with the result that conflicting decisions as to the entitlement of creditors and the priority of claims which could trigger further disarray in the insolvency process.***

d. ***Issues as to applicable law governing assets of FPPL and the distribution of those assets***

In a situation like this, the main international insolvency instruments that would be available to assist Lobo would be the UNCITRAL Legislative Guide, particularly paras. 80 – 85. However, a marked draw back of the Legislative Guide is that it does not itself creates rules by which different states seised of insolvency proceedings in relation to the same company, can negotiate the difficulties identified above. Instead, reliance is placed on established rules between nations, in private international law.

It is fundamentally important that these rules be developed further since it would go a long in providing legal certainty and clarity in cross border insolvency. It would also make the process less costly and time consuming.

There are a number of relevant international instruments including MIICA and the MLCBI which should be considered.

2

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 FFPL 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.

It is noted that the insolvency proceedings in the UK were commenced on 30 June 2022. In light of that, the European Insolvency Regulation Recast would not apply to the UK following Brexit and the end of the transitional period as per the Withdrawal Agreement. Those proceedings would have had to have been commenced before 31 December 2020.

The applicability of the Regulation would have allowed the insolvency proceedings to continue in the country where FPPL has its principal place of business or centre of main interests as provided for in the Regulation. Assuming that this centre of main interests was outside the UK, then the Regulation would have required the minor creditor to make representations there so as to avoid the risk of conflicting decisions regarding the proof of claims and the distribution of assets.

In the absence of the Regulation, additional legal procedures need to be undertaken in the other European country by Lobo in order to initiate insolvency proceedings there. However, if the country is one that has adopted UNCITRAL Model Law then the UK insolvency proceedings may be recognised and enforced in that other European state.

5

Marks awarded 10.5 out of 15

* End of Assessment *

TOTAL MARKS 40/50

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