



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: 20223-363.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 9 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.**

**African countries, in many cases, follow the legal traditions and systems of their former colonists. In this regard, some African countries follow the English law traditions (such as Nigeria, Tanzania, Kenya, Botswana and Zambia) whereas French-speaking African countries largely follow the civil law system, particularly French law (such as Benin, Senegal, and Gabon). Some African countries have a mixed system of English law and civil law (such as South Africa, Cameroon and Namibia).**

**There is a pattern in African insolvency law in that the countries' legislation is often based on the laws of their respective former colonists but there has been a move by a number of African countries to start introducing their own, 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.**

**The Asian financial crisis was precipitated by the financial crash of the Thai Bhat in July 1997 after the Thai government was forced to float the Thai Bhat due to the lack of foreign currency to support its currency peg to the US dollar.<sup>1</sup> The crisis led to the Thai government making a number of significant changes to its Bankruptcy Act (1940) and establishing a dedicated Bankruptcy Court for dealing with bankruptcy and reorganisation matters.<sup>2</sup>**

**Singapore has also recently overhauled its insolvency and restructuring regime by the enactment of the Insolvency, Restructuring and Dissolution Act which consolidates Singapore's personal and corporate insolvency laws into a unified piece of legislation. The legislation came into force on 30 July 2020. It follows amendments brought in in 2015 and 2017 which refined the process of discharging bankrupts and brought in proposals to mirror US and European reorganisation processes (such as a cross-cram down mechanism).<sup>3</sup>**

3

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.**

**Canada and the United States sought to agree a bilateral insolvency treaty in the 1970s but were unable to do so. Despite their inability to agree a bilateral treaty, both countries have adopted the UNCITRAL Model Law of Cross Border Insolvency (the "Model Law") which marks significant practical progress. Cross-border insolvencies which straddle Canada and the United States may also seek to coordinate efforts by the approval of court-to-court protocols between the courts of the United States and Canada (such as those approved in the Nortel insolvency in *Nortel Networks Corporation (Re)*, [2016] ONCA 332 which e.g., included a protocol which was to set out the "binding procedures for determining the allocation of the Sales Proceeds among the Selling Debtors" and provided for a joint hearing to determine allocation between the Canadian court and the US Bankruptcy court (para 15). Even prior to the adoption of the Model Law, there was cooperation between the jurisdiction based on existing legislation and on authorities supporting principles of comity.**

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<sup>1</sup> Asian Financial Crisis (<https://corporatefinanceinstitute.com/resources/economics/asian-financial-crisis/>, accessed 13/11/2022)

<sup>2</sup> Baker McKenzie Global Restructuring & Insolvency Guide (<http://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Thailand.pdf>, accessed 13/11/2022)

<sup>3</sup> S S Boey, S Toh, Suchitra Kumar and Emerick Tan, "Singapore transforms its insolvency framework" (<https://www.iflr.com/article/2af6prhc4lcu3f542o1kw/sponsored/singapore-transforms-its-insolvency-framework>, accessed 13/11/2022).

**A project has also been instituted by the American Law Institutes ("ALI") to assist with the resolution of insolvency issued between the countries which are parties to the North American Free Trade Agreement ("NAFTA"), namely the United States, Canada and Mexico. The ALI Transnational Insolvency Project sought to improve cooperation in international insolvencies between those states and appointed Professor Westbrook as designated Reporter. Under these auspices, advisory groups with experts from each member state prepared an International Statement which set out the relevant jurisdiction's insolvency laws as they relate to international proceedings. These Statements formed the basis of the Principles of Cooperation among the NAFTA countries which were approved by the ALI council and its members in 2000 (the "NAFTA Principles").**

**The NAFTA Principles focus on the insolvency of corporations and other entities engaged in commercial enterprises and exclude personal bankruptcy, non-profit organisations and financial institutions.**

**The ALI also instituted the ALI NAFTA Guidelines Applicable to Court to Court Communications for proceedings between the United States, Canada and Mexico which were to be complementary to the Model Law.**

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Marks awarded 10 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 be described as transactions which ought to be set aside to ensure that the collective debt-collection mechanism in insolvency proceedings is fair. In English law, it can be seen as supporting the rule that creditors should be paid out of the insolvent estate *pari passu*, in that transactions which are unfair to the general body of creditors can be set aside so that those monies can be returned to the insolvent estate for their later distribution to the company's creditors to the extent that certain conditions are satisfied. A voidable disposition may be (i) a fraudulent disposition in the sense that it is a transaction at an undervalue (ie whereby proper value is not given to a particular transaction) or where assets are given away and which causes the company to become insolvent; or (ii) a preference given to a creditor which places it in a better position than the general body of creditors on the company's insolvency**

*(whether eg by settling a pre-existing debt with a creditor or giving security which gives that creditor a better position in the insolvency).*

*The provisions dealing with voidable transactions are generally aimed at preventing fraud, ensuring the fair treatment of all creditors in the insolvency proceedings and preventing a sudden decrease of the company's assets available for distribution to its creditors immediately before the onset of insolvency.*

*The origins of voidable dispositions have different roots in the civil and common law traditions. In the civil law tradition, it derives from an action in Roman law, *Actio Pauliana*, which was intended to protect creditors from fraudulent legal transactions, specifically those which were intended to reduce a debtor's estate by transfers to third parties in bad faith. The overall aim of the action is to return the property which has been transferred fraudulently to third parties. It finds modern expression, for example, in Poland, Switzerland, France, the Netherlands, Belgium, Italy and Brazil.<sup>4</sup>*

*Voidable dispositions in English law find their origin in the Statute of Elizabeth (also known as the Fraudulent Conveyances Act) of 1571 which laid down the principles on which a fraudulent transaction should be unwound when a person had gone insolvent. It was enacted to prohibit transfers intended to defraud creditors or impede their collection efforts and was required because prior to the 1600s, England had numerous sanctuaries which were not subject to the King's writ such as churches or areas defined by custom or royal grant. Debtors were known to sell their property to family or friends at an undervalue who would move to a sanctuary where they could not be compelled by the monarch and wait for the creditors to exhaust their efforts.<sup>5</sup>*

*The different origins of voidable dispositions demonstrate, for example, that the civil law origins date back far further than the common law remedy. It is possible therefore that they will have evolved more over the years, and in response to the jurisdictions in which the provisions were adopted. In England, they were developed to respond to a very specific problem and have only developed over the last 400 years rather than the last 2000 years. They will therefore likely have very different conditions which need to be met in order to access the remedy. In other words, they were created to deal with similar but distinct issues and therefore the underlying conditions to access the remedies will be different and different considerations will apply when analysing the insolvent's transactions to determine whether they can, and should, be set aside.*

There is scope to elaborate upon why these rules are important in insolvency.

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:***

<sup>4</sup> Wikipedia, "Actio Pauliana" ([https://en.wikipedia.org/wiki/Actio\\_Pauliana](https://en.wikipedia.org/wiki/Actio_Pauliana), accessed on 13/11/2022).

<sup>5</sup> Wikipedia, "Fraudulent Conveyances Act 1571"

([https://en.wikipedia.org/wiki/Fraudulent\\_Conveyances\\_Act\\_1571#:~:text=The%20Fraudulent%20Conveyances%20Act%201571,had%20gone%20insolvent%20or%20bankrupt](https://en.wikipedia.org/wiki/Fraudulent_Conveyances_Act_1571#:~:text=The%20Fraudulent%20Conveyances%20Act%201571,had%20gone%20insolvent%20or%20bankrupt), accessed 13/11/2022).

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

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

**Wessels concedes his definition has limitations because international insolvency law cannot exist without reference to domestic insolvency law. In fact, it exists *because of domestic insolvency law*. Where a company goes into an insolvent process, if it has an international element, it cannot be dealt with solely by reference to domestic law. As Wessels points out, the applicable (domestic) law cannot be executed immediately and exclusively without a consideration of the international element. Fletcher makes a similar point by recognizing that an international or cross-border insolvency transcends the confines of a single legal system. A practical way of describing it is to say that if a French company is in an insolvent process in the United Kingdom, English law is not equipped to say what will happen to assets which are situated in France without having regard to French law. In other words, international insolvency law is not really *international* (in the sense that it comprises a single set of legal rules which apply universally across the globe) but rather could be described as the interplay of different domestic laws and state-to-state relations as they relate to an insolvent company.**

**By way of further practical example, while the English court may appoint liquidators over the French company mentioned above (assuming the relevant test is met), the powers conferred on the liquidators as a matter of English law are confined to England's territorial borders - they cannot go beyond that without the cooperation of the other state. This obviously poses problems where our economy is becoming increasingly global and commerce crossing international borders happens all of the time. If the French courts' assistance cannot be obtained, for example, to stay proceedings against the company in France or to allow the English liquidators to act in France as the company's duly appointed office holders, the company may be attached by creditors in France who are not bound by the English order appointing liquidators. The company may have assets or creditors in other countries and creditors may consider seeking to wind the company up there. In other words, without some overarching principles as to how the insolvency process should proceed given its international element, there is a risk of multiple proceedings being issued; of creditors not knowing what law will govern priority of payments or the recognition of their security interests; of conflicting relief being available in different jurisdictions (eg rehabilitation versus liquidation), all of which will potentially lead to less assets being available for distribution to creditors once the confusions and contradictions in the applicable domestic laws have been worked through.**

## 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.**

There is a lack of global treaties in place to govern cross-border insolvencies with the result that courts, insolvency representatives and lawyers are required to look to many different sources to determine how the liquidation should proceed. This means that insolvency practitioners have developed skills and strategies to deal with cross-border issues on a case by case basis. Indeed there has been limited success in achieving multilateral insolvency conventions or treaties with the result that "soft law" has been more successful in regulating the rules governing cross-border insolvencies and providing solutions to the practical issues faced by practitioners.

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

2

Marks awarded 10.5 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?**

**Formal insolvency proceedings are proceedings which are commenced under a particular domestic law and will be governed by that law, for example, an application to appoint liquidators in the United Kingdom if successful would commence English**

***insolvency proceedings which would be governed by English insolvency law and regulations.***

***An informal process will typically constitute commercial negotiations by a debtor and its creditors whereby the parties will seek to reach a consensual arrangement to restructure the debtor's liabilities. Such a process may not be governed by a particular law, per se, but rather may have reference to a number of different laws - the governing law(s) of the debt instruments, the law of insolvency of the company's incorporation etc.***

***There are pros and cons to a formal or an informal process which will depend upon the specific facts of the case.***

***A formal process will require that the relevant test to put FPPL into a process is met. The process will be formal and will proceed in a familiar fashion - eg, there will be stages/steps which must be taken in every set of insolvency proceedings commenced in Asgard. There may be a moratorium on any further proceedings being commenced against the debtor preventing it from having to defend multiple actions in that jurisdiction. The priority of payments to creditors will be defined by the governing law of the insolvency proceedings such that creditors will have some certainty on where their claim will rank in the liquidation. There will also be specific rules for how security interests are recognised. Licensed insolvency practitioners would be appointed who will be skilled and experienced in winding down a company, getting in its assets and making distributions to its creditors. Formal proceedings can however be expensive and may not be appropriate, for example, where the company can be saved. The creditors' ultimate distribution may also take some time to be paid as it will typically happen at the end of the proceedings once the liquidators have got in all of the assets and worked out what distributions can be made to creditors which, depending on the complexity of the insolvent's estate may take some time.***

***Where a formal process is initiated to present a rehabilitation plan, the debtor may also get the benefit of a moratorium and it may be able to bind dissenting creditors (provided the relevant requirements are met). However, such processes can be expensive particularly where court involvement is required. Such rehabilitations are also typically in the public domain which may affect the debtor's business if it is seen as being in financial distress and in need of rescue***

***An informal process will not have the formality of proceedings commenced for example under the supervision of a court process. This can be advantageous as it means that the parties can proceed flexibly, with a view to getting a good compromise for all stakeholders. There may be no moratorium on claims however and a creditor may still seek to place FPPL into a formal process which could disrupt the informal negotiations. An informal process may not bind all of FPPL's creditors and so if certain creditors aren't dealt with in the compromise, they may still seek to attack FPPL by issuing formal proceedings against it. There is no guarantee that the parties will be able to reach agreement therefore much time and effort may be spent in seeking to***

*reach a negotiated settlement which ultimately falls over and a formal process is needed in any event. Informal processes are typically less expensive than formal rehabilitation processes and are unlikely to have the same publicity as a formal process.*

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.*

*Where insolvency proceedings have been issued concurrently against FPPL in Asgard and Encanto, Asgard will apply its insolvency laws to the proceedings and Encanto will apply its insolvency laws to the proceedings. The insolvency representative appointed in Asgard may not have the power to act in connection with the insolvency proceedings commenced in Encanto as, generally speaking, domestic insolvency laws do not have extra territorial effect. It would also be necessary for the Asgard insolvency representative to consider how the Encanto proceedings will affect the proceedings in Asgard and whether the two sets of domestic laws are compatible with one another. If Asgard is pro-creditor and Encanto is pro-debtor, there may be a conflict in how those liquidations will proceed. Similarly different jurisdictions may place different emphasis on different interests (eg labour rights or an unwillingness to recognise foreign fiscal claims) which may result in different jurisdictions vying for the debtors' assets for the benefit of its local creditors.*

*The Asgard insolvency representative would therefore be well advised to understand whether he/she is able to cooperate and coordinate with the insolvency representative in Encanto to give the concurrent liquidations the best chance of achieving an equitable outcome for all of FPPL's creditors.*

*To the extent there is disagreement as to the choice of law for the insolvency, the insolvency representatives may look to the UNCITRAL Legislative Guide on Insolvency Law as to guidance on applicable law in insolvency proceedings.*

*In 1989, the International Bar Association developed a Model International Insolvency Cooperation Act which accepted that concurrent proceedings may be issued but encouraged a system where there would be proceedings a primary jurisdiction with supplementary proceedings elsewhere. It also provided mechanisms whereby a domestic court could act in support of foreign proceedings. While it was a useful initial step, it has not been adopted as domestic legislation in any jurisdiction. Later, in 1996,*



***the IBA promoted an approach which was directed at guiding practitioners - the Cross-Border Insolvency Concordat. However, it was of limited value because it did not insist upon a principal forum but rather referred only to the company's "centre of main management". It did however assist the evolving thinking around cooperation and coordination of concurrent proceedings.***

***The Model Law on Cross Border Insolvency places cooperation and coordination front and centre in that it places obligations on courts and insolvency representatives to communicate and cooperate as much as possible, with a view to the insolvent's estate being managed as fairly and as efficiently as possible to ensure that returns to creditors are maximised. It mandates that a local court or insolvency representative must cooperate with a foreign court or representative and this is increasingly done by cross-border protocols which will agree how certain matters within an insolvency will proceed and those protocols are approved by the relevant court. There are also a number of guidelines available which the courts may refer the parties to when seeking to encourage cooperation and coordination between jurisdictions.***

***Where the Model Law has been implemented in both jurisdictions, this will assist the streamlined recognition and enforcement of concurrent insolvency proceedings.***

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.***

***As of 31 January 2021, the UK ceased to be a member of the EU, meaning that the European Insolvency Regulation Recast (the EIR Recast) would not apply any insolvencies commenced after 11PM on 31 December 2020 and so it would not apply to the FPPL insolvency proceeding noted above. This means, amongst other things, that the EIR Recast will not apply to the English proceedings to determine the choice of law of the insolvency. There will also be no automatic recognition of the foreign insolvency proceedings in the UK pursuant to the EIR Recast and recognition would have to be sought pursuant to the Insolvency Act.***

***The EIR Recast concept of COMI (centre of main interest) will also not apply directly in the United Kingdom meaning that it may be uncertain where the principal jurisdiction for the insolvency is based. The EIR Recast provides that the courts of the jurisdiction where the company's centre of main interest is based will have supervision over the***



***main proceedings whereas where the company has an "establishment" in other countries, there would be subsidiary territorial proceedings in those jurisdictions. Now that the UK is no longer a member of the EU, it is not clear if and to what extent the "centre of main interest" test will be applied which will result in uncertainty as to which court will seise jurisdiction as the being the court of the main proceedings.***

It would be beneficial to know if the MLCBI applies.

3.5

Marks awarded 13.5 out of 15

\* End of Assessment \*

**TOTAL MARKS: 43/50**

**Excellent**