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).***

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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.

The historical roots of the various insolvency law systems found in African jurisdiction are largely derived from their former colonial powers (as applicable), including:

- ***English law (e.g. Zambia);***
- ***Portuguese law (e.g. Angola);***
- ***Civil law, and particularly French law (e.g. Francophone countries of West Africa, such as Senegal); and***
- ***Roman-Dutch / English (e.g. South Africa).***

However, a number of African countries have now started to introduce new, more modern legislation, likely due to the shift in insolvency law as a result of increased globalisation and the various international frameworks that have been developed.

3

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.

One of the important events that led to some insolvency law reform in Eastern Asia was the 1997/1998 financial crisis (also known as the Asian Financial Crisis). The crisis had its origins in Thailand with the collapse of the Thai baht, which in turn led to further financial contagion. As a result, Thailand in particular (as well as other countries such as Indonesia) overhauled their bankruptcy laws (as well as foreclosure procedures and foreign investment restrictions) in order to strengthen their institutional frameworks.

Another, more recent, development was in Singapore as a result of its growing role as a major player in the East Asian region. Starting from 2010 and culminating in reform in 2018 (with the Insolvency, Restructuring and Dissolution Act (the "IRDA") coming into force on 30 July 2020), Singapore transitioned from its English insolvency roots to a consolidated insolvency act adopting (inter alia) the UNCITRAL Model Law on Cross-Border Insolvency. Along with providing Singapore with a consolidated insolvency act, the IRDA also introduced a number of reforms designed to simplify and modernise Singapore's insolvency laws in order to promote Singapore as an international financial centre for insolvency and debt restructuring.

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.

In the 1970s, Canada and the United States attempted to negotiate a bilateral insolvency treaty. However, the countries were unable to reach an agreement, potentially because the scope of the treaty may have been too ambitious in scope.

Despite the failure to agree on a broad insolvency treaty, the countries nonetheless continued to take steps, and develop new ways, to cooperate and coordinate bilaterally on insolvency matters. This started informally via existing legislation and case law on comity. The countries then made more practical progress by adopting the Model Law, as well as mechanisms such as cross-border, court-to-court protocols, which established procedures for the coordination of cross-border proceedings in Canada and the United States.

Furthermore, both Canada and the United States as well as Mexico (together, the "NAFTA States") are parties to the North American Free Trade Agreement ("NAFTA"), a tri-lateral trading bloc in North America. In respect to cross-border insolvency issues, a United States professional body (the American Law Institute, or the "ALI") took steps

to assist the NAFTA States with the resolution of international insolvency issues arising out of NAFTA. In particular, the ALI spearheaded initiatives such as the ALI Insolvency Project to improve the cooperation between the NAFTA States on cross-border international insolvencies. ALI prepared and issued a "Transnational Insolvency: Cooperation Among the NAFTA Countries: International Statement" for each NAFTA State, which set out each of the relevant country's insolvency law that were applicable to international insolvencies. These works then culminated into a treatise entitled "Principles of Co-operation among the NAFTA Countries", which was approved by the ALI Council and Members at its annual meeting in May 2000.

As a result, even though the initial attempts between Canada and the United States to formalise a bilateral treaty were successful, since then, significant progress has been made by soft law methods to achieve a growing level of cooperation and coordination. 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

3.5
Marks awarded 9.5 out of 10

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

Question 3.1 [maximum 5 marks]

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

There are a number of possible historical reasons for the difference in approaches that the English law and civil law jurisdictions have taken regarding the treatment of voidable dispositions.

It is an essential element that, since insolvency law establishes a collective debt-collecting mechanism, that individual creditors should be discouraged from bringing/continuing individual debt claims. An exception to this general rule (on public policy grounds) is the investigation of certain transactions that may have taken place prior to commencement of the insolvency proceeding that might be set aside for either fraudulent conveyancing or fraudulent preference (together, referred to as voidable dispositions). The historical context behind voidable dispositions from both a common law and civil law jurisdiction is briefly described below, along with an explanation as to the differences in approaches.

Civil law systems

Civil law systems are derived from Roman law. The laws of the Twelve Tables were the legislation that stood at the foundation of Roman law. Table Three of the Twelve Tables dealt with the execution of judgments, which developed from the pledger pledging his own body for the repayment of outstanding loans – in order to secure the repayment of the pledgor's debt, the pledger could face a number of personal consequences such as imprisonment, death or slavery.

Table Three then developed further into the Actio Pauliana, an action in Roman law intended to protect creditors from fraudulent conveyances within a year of the impugned transaction taking place. Actio Pauliana has been subsequently modernised and has found its way in various civil law jurisdictions (such as Poland, Switzerland and France).

Accordingly, much of the initial development of civil law systems in respect of debt was based on individual debt collecting procedures. This then gradually gave rise to the development of collective debt collection mechanisms (i.e. insolvency).

Common law systems

Similarly, common law systems first started as individual debt collecting procedures. It was only by way of the Act of Elizabeth 1570 (the "1570 Act***"), did common law systems move towards a collective debt collection mechanism, with the 1570 Act being considered the first specifically-designed bankruptcy statute (as opposed to being merely a fraud-prevention law). It was the 1570 Act that formed the foundation in common law systems of the remedy for voidable dispositions. More particularly, it was Joseph Chamberlain in 1881 who identified that "good bankruptcy law" should include an independent examination of the debtor's conduct and circumstances leading to his insolvency, as formalised in the law of 1883.***

Accordingly, common law systems introduced the remedy of voidable dispositions significantly later than civil law systems, and did so in a context of an over-arching bankruptcy statute (rather than merely focussing on fraud, which is the mischief that voidable dispositions seek to resolve). The relatively lesser importance, or at least the ancillary nature, placed on voidable dispositions in common law systems may explain the difference in approaches regarding their treatment. In any event, as globalisation continues, both civil and common law systems alike begin to converge and align in the process and treatment of voidable disposition claims.

This is answered well. There is some scope to elaborate in parts.

4.5

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.

Whilst the author makes an attempt to define international insolvency law, the definition proffered has limitations. Significantly, the definition is referable to the existence and application (or non-application) of a domestic / national legal framework. In that sense, the definition is circular, as it simply defines international insolvency law as being 'not domestic insolvency law'.

Similarly, in this modern age of globalisation, it is rare (and indeed unusual) for insolvency situations to involve just one jurisdiction or state, such that there is not a single (or clearly demarcated) applicable law. National and state borders are becoming increasingly irrelevant as companies expand their branches and subsidiaries across the world. In these circumstances, even what would historically be viewed as a domestic insolvency would nonetheless have international insolvency aspects. There is therefore a continuous blurring of lines between domestic and international insolvency law, which necessitates a clearer definition of what constitutes international insolvency.

Absent a clearer definition, domestic insolvency systems may be content to limiting guidance and regulations purely to 'domestic' matters. Doing so (as has been the case in many jurisdictions to date) may expose those domestic insolvency systems to being ill-equipped to deal with modern insolvencies that transcend borders – particularly issues of mobility of individuals and assets and the complexity of business transactions. Again, this highlights the importance of having a clearer definition for international insolvency law that is not connected to the existence of a domestic, national legal framework of insolvency law.

A better definition of international insolvency law (which is missing from the author's definition) is to take a holistic approach to insolvency, acknowledging the globalisation and complexity of modern day business transactions. By starting with an overarching definition would allow a clearer, or at least more relevant, definition of international insolvency law.

Again, this is well written. There is scope to consider the author's comments and Fletcher's comments in more detail.

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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 can be forms of 'hard' law (as opposed to 'soft' law) and are the classic public international instruments. Signatory States to treaties and conventions bind themselves to the terms of the treaties and conventions by way of ratifying the same into their domestic law. To the extent that the States import the treaties and conventions into domestic law, they form part of that State's 'hard' law and can be enforceable in the usual way (e.g. via the Judicial system).

Treaties and conventions have had variable degree of success historically. The diversity of member states and competing interests make it difficult for a large number of States to accede to their terms, let alone to then ratify into domestic law.

For example the European nations were unsuccessful for many years in negotiating and achieving multilateral insolvency conventions. A prime case study for this was the Council of Europe, which was founded in 1949 in France and currently has 47 member countries. The Council of Europe concluded a Convention on Certain International Aspects of Bankruptcy (also known as the Istanbul Convention, Council of Europe Treaty Series No 136). This Convention was only signed by 8 member states, and did not have sufficient member states ratifying the Convention for it to enter into force. Whilst a disappointment in its own right, its failure nonetheless paved the way for the eventual development of a European Union response to international insolvency issues faced by members of the European Union. Perhaps recognising that binding Conventions are not always the most practical method, the European Union subsequently concluded the European Insolvency Regulation (EIR) (2000), which has continued to be slightly amended and 'recast' to adapt to the ever-changing environment that its member states face regarding international insolvencies.

*A more successful example of treaties would be within Latin American States, who have achieved long-lasting multilateral treaties on how to manage international insolvency issues. This includes the Montevideo Treaty on International Commercial Law (1889) (the "*1889 Montevideo Treaty*"), which has been ratified by key Latin American countries such as Argentina, Peru and Uruguay. The 1889 Montevideo Treaty deals with both personal and corporate insolvency, and deems the relevant bankruptcy jurisdiction to be based on the debtor's commercial domicile.*

In conclusion, treaties and conventions are one of the many ways to create and develop international insolvency law. Despite some practical issues and variable success in the past, they should not be ignored as a clear and decisive way for member State to agree on fundamental aspects of international insolvency.

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Marks awarded 13.5 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?

Insolvency arrangements can generally be classed as either "formal" insolvency proceedings or "informal" insolvency arrangements:

- ***Formal insolvency proceedings are commenced under the relevant jurisdiction's insolvency laws and are therefore governed and enforced by that law. All insolvency systems provide for a procedure for debtors to enter into formal insolvency proceedings, which then trigger a number of consequences, such as automatic stays/moratoriums etc.***

- ***In contrast, informal insolvency arrangements are generally (but not always) arrangements outside of formal laws of the jurisdiction and instead involve voluntary/informal negotiations between the debtor and all or some of its creditors. Usually, the parties come to a commercial agreement (usually a form of restructuring of the debtor). Whilst not strictly regulated by formal insolvency laws, often times the effectiveness of informal insolvency arrangements require the existence of formal insolvency law in order to provide comfort to all parties that the required restructuring can be duly effected.***

The key advantages and disadvantages that Lobo should consider between an informal out-of-court workout arrangement with FPPL and a formal debt recovery options are as follows:

- ***Advantages of informal out-of-court workout arrangement (an "***Informal Workout***"):***

- ***One of the key advantages to an Informal Workout is that of cost and compliance. Given it is simply an agreement between parties, there is no need to formalise documentation to the degree required under a formal debt recovery. There would also be lower legal fees and no Court fees for recovery, as well as the saving of the time it usually takes to see a Court process to completion.***

- ***An Informal Workout is also relatively private as compared to formal recovery, or at least does not have rigid requirements as to advertisement to put other creditors on notice. Unwanted publicity could further jeopardise FPPL's financial situation, which may have an adverse effect on Lobo's total recovery.***

- ***Finally, an Informal Workout can be on commercial terms that specifically work for the parties. There is therefore a degree of flexibility to find a restructuring plan that is beneficial and viable for all parties.***

- ***Disadvantages of an Informal Workout:***

  - ***It is unknown whether FPPL has other creditors (present or future) in Asgard. If so, an Informal Workout would not give FPPL an automatic moratorium on claims, which means that the Informal Workout could be overtaken if another creditor puts forward formal debt recovery proceedings against FPPL.***

  - ***Additionally, an Informal Workout only binds those parties who agree to it. Dissenting creditors are not, and cannot, be bound and, again, there remains a risk that these dissenting creditors may take steps contrary to the Informal Workout.***

- ***Advantages to formal recovery:***

  - ***The advantages to formal recovery are generally the opposite to the disadvantages of an Informal Workout. In addition, formal recovery would also provide Lobo with a degree of comfort that assets might not be dissipated in the event of a Court (and/or liquidator) supervised insolvency process.***

- ***Disadvantages to formal recovery:***

  - ***The disadvantages to formal recovery are generally the opposite to the advantages of an Informal Workout. In addition, formal recovery may result in FPPL breaching certain financing covenants and other contracts, having a cascading effect on worsening the financial position of FPPL and therefore the likelihood for Lobo to fully recover its debts.***

Lobo may wish to enquire further to ascertain FPPL's true financial position, its other creditors and whether there are other Informal Workouts being negotiated before determining which path it should take.

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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.

In the event that there are concurrent insolvency proceedings on foot against FPPL in both Asgard and Encanto, there are a number of difficulties that may arise for the insolvency representative in relation to co-operation and co-ordination. These are set out below.

1. *There is a preliminary question on whether the insolvency proceedings in Encanto can be maintained, given that FPPL appears to be managing to meet its debts as they fall due in Encanto. This is not a direct matter for the insolvency representative in Asgard, but it would nonetheless be worthwhile to keep track on the status of the insolvency proceedings in Encanto.*

2. *The insolvency representative would need to consider which of the Asgard or Encanto insolvency proceeding should be recognised as the primary (universal) proceeding (usually where FPPL has its centre of main interest, which is likely to be Encanto given its head office is there) and which should be the secondary (territorial) proceeding (usually where FPPL has assets or a fixed interest, i.e. Asgard). This, of course, assumes that Encanto has insolvency laws that provide for extra-territorial and cross-border aspects as required to take on role as being the primary proceeding. Clear difficulties will arise if both Asgard and Encanto take a strict territorial approach and do not otherwise co-operate and co-ordinate between the two jurisdictions to deal with cross-border issues.*

3. *Another issue that might arise is to the extent the insolvency laws of Asgard and Encanto conflict. It is unclear which aspects of insolvency either of the jurisdiction emphasise or whether they are even substantively the same. Asgard might be pro-creditor and Encanto might be pro-debtor (or vice versa). There will need to be provision to surmount the difficulty arising from conflicting procedure.*

In order to ameliorate the difficulties highlighted above, international insolvency instruments have been developed in an attempt to assist with issues of co-operation and co-ordination. These include:

1. ***Initiatives to set best practice standards to ensure insolvency laws can be modernised to suit the globalised trade environment, such as:***

    a. ***the World Bank's *Principles for Effective Insolvency and Creditor / Debtor regimes; and***

    b. ***the *UNICITRAL Legislative Guide on Insolvency*.***

2. ***The IBA Cross-Border Insolvency Concordat (1996): The Concordat accepts the reality that there may be concurrent insolvency proceedings and, instead of eliminating this, it proposes that the concurrent insolvency proceedings need to be coordinated. The Concordat consists of 10 principles that, whilst does not have binding effect, provide guidance to practitioners and courts on how to harmonise cross-border insolvency proceedings.***

3. ***The UNCITRAL Model Law on Cross-Border Insolvency (1997) (the "MLCBI"): The MLCBI is designed to assist States on how to develop a modern, harmonised and fair insolvency framework by providing draft legislation for States to adopt (with or without modification). The intention behind the MLCBI is that, if member States have substantially similar laws, then there will be no material conflict. The MLCBI also includes uniform recognition laws and promotes cooperation and coordination between States with respect to concurrent proceedings to the maximum extent possible. The purpose behind this is to ensure that a debtor's (i.e. FPPL's) insolvent estate would be administered fairly and efficiently to maximise the recovery for creditors (i.e. Lobo).***

4. ***The Judicial Insolvency Network's contribution to the *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* in 2016: These guidelines sought to improve the efficiency and effectiveness of concurrent proceedings by enhancing the same amongst the courts who supervise the proceedings.***

5. ***Region-specific instruments, such as:***

    a. ***the American Law Institute's and International Insolvency Institute's *Global Principles for Cooperation in International Insolvency Cases* and *Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*; and***

    b. ***the European Guidelines on Communication and Cooperation 2007.***

The above international insolvency instruments have been significant in assisting with the difficulties arising from concurrent proceedings. As a means of soft-law, these instruments have been able to allow countries progressively to cooperate and coordinate in a way that is reflective and reactive to the globalising and modernising economy. These instruments have had just as much, if not more, tangible success than conventional treaties and conventions in establishing best-practice guidelines to harmonise the international insolvency framework.

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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.

The European Union adopted the European Insolvency Regulation (Recast) (the "EIR Recast***") in 2015, which took effect in mid-2017. The EIR Recast provides that the court within which the debtor has its centre of main interest ("***COMI***") should be the primary jurisdiction in respect of the insolvency (i.e. the main proceeding). The EIR Recast also has flexibility in allowing the possibility of non-primary (i.e. subsidiary) territorial proceedings in other States where the debtor has an "establishment" (defined as "any place of operations… where the debtor carries out a non-transitory economic activity with human means and assets"). These subsidiary proceedings can be either "independent proceedings" (if commenced prior to the main proceedings) or "secondary proceedings" (if commenced after the main proceedings).***

The EIR Recast ceased to apply to the United Kingdom as of 11pm on 31 December 2020 as a result of the UK's exit from the European Union.

On this basis, the insolvency proceeding brought against FPPL by a minor creditor on 30 June 2022 (the "UK Proceedings***"), 1.5 years later, would not be captured by the EIR Recast.***

The consequence of this is that the UK Proceedings are not governed by the EIR Recast or any of the international instruments. It will purely be a matter of United Kingdom law. Lobo will therefore have to seek United Kingdom legal advice on the implications of this.

The key consideration is whether Lobo is able to commence separate proceedings in another country in Europe, or whether the UK Proceedings acts as a bar to further creditor action. The determination of this issue will depend on the jurisdiction scope of the moratorium / automatic stay in the United Kingdom (and whether it has a global reach):

- ***If the moratorium has a global reach, then Lobo would not be able to commence further creditor action in another jurisdiction without the risk of facing an anti-suit injunction (or similar), meaning that it would have to join as a party to the UK Proceedings in order to obtain the relief it seeks. There are obvious problems to this, particularly if the English Court does not have sufficient jurisdiction to grant the necessary relief (e.g. winding up a non-United Kingdom company or dealing of the assets of the same) or if FPPL has sufficient assets in the jurisdiction to satisfy Lobo's claim in full (bearing in mind that there are other creditors in the United Kingdom).***

- ***If the moratorium only applies to proceedings in the United Kingdom, then Lobo would be able to commence further proceedings in the desired European country. Lobo would need to determine where FPPL's COMI is and bring the action there to have that proceeding be deemed the main proceeding relating to the EU. Lobo can also bring subsidiary territorial proceedings in FPPL's other European jurisdictions in order to have a holistic approach to the liquidation proceedings by taking advantage of the EIR Recast.***

It would be beneficial to consider the MLCBI.

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Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS 46/50
Excellent paper.