SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment1summative]. ***An example would be something along the following lines: 202223-363.assessment1summative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked.

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

African states' insolvency laws tend to follow the historical origins of their former colonisers' legal regimes. Former French colonies which countries? ***therefore tend to have an insolvency regime with French civil law features; former Portuguese colonies*** which countries? ***a Portuguese civil law tradition; and former English colonies*** which countries? ***an English common law tradition. Countries with a mixed colonial heritage may combine features of the respective colonists' laws, notable examples being South Africa and Namibia with mixed Roman-Dutch civil law and English common law features.***

Although these "imported laws" may constitute the historic foundation of local legislation, the demise of colonialism and local jurisdictional initiatives has led to the implementation of more modern insolvency features in some African jurisdictions. A number of African countries have also joined the Organisation for the Harmonisation

of Business Law in Africa (OHADA), whose remit includes harmonisation of domestic laws on topics including insolvency proceedings, and in 2015 the 17 OHADA member states adopted the UNCITRAL Model Law on Cross-Border Insolvency – perhaps marking the early stages of a move away from territorialism in African insolvency.

2

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.

As with African states, the demise of colonialism in Eastern Asian jurisdictions brought departures from "mother country" legal traditions. Thereafter, the financial pressures caused by the 1998 Asian Financial Crisis prompted reforms to insolvency laws in many jurisdictions, including South Korea, Indonesia, Malaysia, Thailand and elsewhere. Elaboration is warranted.

More recently, the financial pressures caused by the COVID-19 pandemic caused several East Asian jurisdictions to implement either structural reforms or short-term relief measures to domestic insolvency law. In China and Japan, for example, short-term regulations encouraged banks to refrain from treating certain breaches of commercial loan agreements as events of default; in Australia, amendments to the Corporations Act introduced a temporary "safe harbour" relieving directors of personal liability for debts incurred while the company is insolvent, and extended the period for compliance with a statutory demand from 21 days to 6 months.

Supra-national organisations have also helped Asian jurisdictions to explore appropriate reforms. The Forum for Asian Insolvency Reform was founded by inter alios the World Bank and OECD shortly after the Asian Financial Crisis to help improve Asian insolvency regimes, and more recently the Asian Business Law Institute has sought to develop Asian Principles of Business Restructuring, recently (2020) publishing a report on Asian in-court and ex-court corporate restructuring and insolvency developments in ASEAN and other jurisdictions.

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.

Early efforts to establish a bilateral Canada / USA insolvency treaty ended with the abandonment of the draft America-Canada Bankruptcy Treaty in 1979 (though the existence of these negotiations arguably paved the way for the eventual agreement of the 1988 Canada–United States Free Trade Agreement ("CUSFTA")).

Following the 1994 signing of the North American Free Trade Agreement ("NAFTA"), the successor to CUSFTA, in 2000 the American Law Institute's ("ALI") Transnational Insolvency Project produced its NAFTA Principles of Cooperation aimed at improving co-operation in international corporate insolvencies (though not personal bankruptcies or financial institution insolvencies) across the three NAFTA states.

The NAFTA Principles focused on improving insolvency arrangements for corporations and other commercial legal entities, a key recommendation being the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, since adopted by the USA (2005), Canada (2005) and Mexico (2000). The NAFTA Principles encouraged co-operation in transnational bankruptcy and sought to facilitate recognition of foreign NAFTA insolvency judgments.

The NAFTA Principles were well received. Reflective of a broader recognition that this type of "soft law" arrangement could be in some respects as effective, and were certainly easier to finalise and promote, than formal "hard law" treaties and conventions, some authorities hoped that as national adoption of the Model Law increased, "a compelling case would emerge for the development of supplementary provisions and guidelines based on the NAFTA Principles" (quoting Ian Fletcher's The Law of Insolvency). This ambition resulted in the ALI and International Insolvency Institute's 2012 Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases.

More recently, the replacement of NAFTA by the 2020 USA-Mexico-Canada Agreement, intended to modernise NAFTA though in reality making relatively modest changes to the latter's provisions, is not expected to materially change the state of cross-border insolvency in North America.

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

Marks awarded 7 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 concept of a voidable disposition ("VD") is important in insolvency for a variety of reasons. Firstly, collective action tends to be more effective in maximising the pool of assets available to (in particular, unsecured) creditors than a regime that permits individual creditors to pursue individual remedies. VD provisions are intended to support a collective regime and preserve the pari passu principle, maintaining the estate and discouraging individual creditors from unilateral action in the period before an insolvency: why try to cut an advantageous deal for yourself when it could be clawed back? This rhetorical question would benefit from reconsideration. I'd love to see you explain the importance in greater detail, rather than ask the reader rhetorically. It would also be beneficial for you to explain voidable transactions in greater detail.

In addition, VDs allow for fraudulent concealment of assets or transactions intended to benefit the debtor's personnel or associates to be unwound, again improving the assets available to creditors. These benefits and the associated incentives have long been recognised: where jurisdictions differ is in the regime by which they seek to bring them about.

The historic foundation of VDs in English common law is the practice in pre-Elizabethan England whereby a debtor would sell his assets to the Church for some nominal amount, with the Church agreeing in return to pay the debtor a pension if he lived in seclusion on their property (or overseas), effectively putting his assets beyond his creditors' reach. The 1571 Fraudulent Conveyances Act sought to remedy this by allowing for dishonest contracts to be unwound: debtors (and purchasers) who engaged in contracts designed to frustrate creditors could find those contracts set aside.

In the early Roman/civil law tradition, the manus injectio principle of execution against the person (rather than against the debtor's property) was supplemented by elaborate procedures for nullifying fraudulent transfers: any act by which a debtor reduced the property available for division amongst his creditors was held to be a fraud on the creditors permitting a range of remedies, including in rem against the property itself. The actio Pauliana was aimed at returning property transferred to third parties, and would involve a consideration of good faith (or not) in the transaction: knowingly fraudulent third parties would gain no protection from losses as a consequence of the action, and ex gratis transfers to third parties were not protected even if made in good faith. Later, early French and Italian developments also included the obligation to disclose all possessions and transactions for review, in order that such transactions could be identified.

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.

Bob Wessels' definition quoted above reflects a key challenge in international insolvency law, i.e. that in the absence of a unifying internationally-applicable insolvency regime, any national insolvency system will face challenges when some aspect of the insolvency (e.g. the debtor's assets, creditors, contractual arrangements or other obligations) is located in a jurisdiction other than the one where the debtor's insolvency is taking place.

Wessels admits that his definition is limited because it relates to the existence of a national insolvency law regime, and views the associated challenges from the point of view of a national regime, whereas international insolvency by definition involves transnational issues: as Ian Fletcher puts it, "circumstances which in some way transcend the confines of a single legal system", and which may be more usefully analysed from a global perspective. Wessels' position reflects the fact that enforcement of a state's jurisdiction generally stops at its borders, and the historical development of domestic laws, understandably focused on local issues, has meant that domestic insolvency laws may fare poorly when faced with transnational insolvency issues.

A more "top down" perspective is instructive. For example, as Hakan Friman noted, supranational organisations from the United States' earliest federal government to the European Union have recognised the challenges of cross-border insolvency: that if a chaotic, expensive, and potentially-contradictory multiplicity of proceedings is to be avoided, and certainty and predictability for parties increased, the recognition of insolvency proceedings in one state by the authorities in another cannot solely be at the whim of the latter. This is doubly so in an era of intense globalisation where cross-border insolvencies are arguably the norm rather than the exception.

These issues can be relatively easily addressed where a formal common market exists (the EU, as mentioned), or where a federal or similar system allows for a supervening standardised body of insolvency law (e.g. the USA). Such issues are substantially more challenging where the two (or more) states are not bound by some enforceable arrangement, and recognition of foreign proceedings is (for example) left in the hands

of the local judiciary. Recent developments in Hong Kong recognition law, for example (see Global Brands Group Holding Limited (in liquidation) [2022] HKCFI 1789), where something of a lacuna exists in this area, have moved the emphasis from a corporate debtor's country of incorporation to its centre of main interests, and severely limited the assistance available to overseas liquidators – highlighting these challenges and the limits of any national insolvency law when viewed in isolation.

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.

A particular problem in international insolvency, in the absence of a unifying internationally-applicable insolvency regime, is the risk of competing insolvency proceedings in different jurisdictions, with the different priorities of different national regimes (e.g. pro-creditor, pro-debtor, or other domestic priorities) and the often poor standard of domestic insolvency laws, which may be outdated or otherwise fail to reflect the reality of modern globalised business. The result is to raise the risk of multiple concurrent insolvency proceedings and/or a "race to the prize" amongst creditors, offending the principle of equality or par conditio creditorum and, moreover, increasing uncertainty, time and expense for parties.

In the absence of true single-forum universalism, one remedy is co-operation and co-ordination between insolvency proceedings and recognition and enforcement of foreign insolvency decisions, ideally within a regime that binds interested parties and preserves the collective aspect of modern insolvency, whether that be on an internationalist, modified universalist, co-operative territorialist, or other basis.

One source for such a regime is international treaties or conventions (noting that some pro-territorialism authorities consider that true harmonisation and universalism is simply not a practical prospect given the fundamental differences between some national legal systems).

Notable successes in this regard include the 1933 Nordic Convention, the Montevideo Treaties and in particular the Havana Convention with its aim of a single insolvency proceeding effective throughout its region. Though limited to their particular region, the longevity of these multilateral arrangements is testimony to their utility in mitigating the challenges of cross-border insolvency and the difficulties of territorialism in particular, and perhaps highlights that even domestic legislative amendments specifically aimed at addressing the problems of international insolvencies (to permit and streamline, for example, recognition and co-operation with foreign insolvency proceedings) are not a substitute for true cross-state arrangements in the era of globalisation.

An international treaty is, of course, binding only on its signatories, and will additionally require ratification before its terms are incorporated into domestic law and can be relied upon by parties in the local courts. Bilateral treaties will be useful only in insolvencies involving the two signatory states, whereas multilateral treaties (while of broader potential application) can be difficult to negotiate and finalise, and to meaningfully keep updated as business practices develop over time.

European efforts, for example, were largely unsuccessful (see the abandonment of attempts to produce a fully uniform regime following the draft 1970 EC Convention on Bankruptcy, or the long genesis and limited uptake of the Istanbul Convention, for example), though more recent initiatives (e.g. the European Insolvency Regulation 2000 and the European Commission's 2015 Capital Markets Plan) have been positively received. It is perhaps because of the diplomatic and other difficulties in finalising formal "hard law" responses to the challenges of international insolvency that "soft law" initiatives put forward by non-state multilateral organisations, like the UNCITRAL Model Law and the Legislative Guide, and the World Bank's frequently-updated Principles, have arguably met with a more favourable reception.

This is well answered. There is some scope to elaborate with further examples

4.5

Marks awarded 13 out of 15

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

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

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

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

Question 4.1 [Maximum 5 marks]

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

A formal insolvency proceeding is one commenced under and governed by local insolvency law, and may include restructuring / reorganisation / rescue and discharge proceedings, as well as liquidation and eventual deregistration.

An informal insolvency arrangement tends not to be regulated by local insolvency law, and will usually involve bilateral or multilateral negotiations between a debtor and its creditor(s).

Informal arrangements give the involved parties significant flexibility in their approach to restructuring a debtor's liabilities, though some features may, depending on local legislation, require the court's approval to be truly effective – and ultimately, it will be the threat of formal proceedings that persuades the debtor to perform its side of any bargain.

A key advantage for Lobo of an informal out-of-court arrangement is likely to be an associated absence of publicity: formal insolvency proceedings must generally be advertised and may therefore attract other creditors of FPPL, who may take a different view of FPPL's commercial prospects or even seek to liquidate the company without regard for Lobo's preferences.

An informal arrangement, being contractual in nature, can provide for a very wide variety of rights and remedies, including delays to repayment, haircuts on or partial discharge of the debt, debt for equity swaps and so forth. However, Lobo will need to satisfy itself that any rescue plan it agrees with FPPL is commercially realistic, and there is a risk that these arrangements could nevertheless be disrupted by another creditor seeking to open formal insolvency proceedings (which could, given potential rules on voidable dispositions, retrospectively nullify elements of the informal deal if they are found to have preferred Lobo as a creditor).

Related to the above, a key benefit of formalised insolvency proceedings is that they will tend to bind all interested parties (for example, a statutory moratorium on creditors' claims against FPPL may come into effect), reducing any threat to Lobo's interests of unilateral action by another FPPL creditor.

Other advantages of an informal arrangement with FPPL include that it may be cheaper than taking formal debt recovery action, and potentially allow FPPL to resume normal operations (and making money to pay down its debts) quicker than formal proceedings, if Lobo considers that FPPL is likely to survive as a going concern.
Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

4.5

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.

The Asgardian insolvency representative ("AIR") has encountered a common problem in international insolvency: the risk of competing insolvency proceedings in different jurisdictions.

Multiplicity of insolvency proceedings raises a complex range of issues, including amongst others standing and recognition of the foreign representative, creditors' moratoria, creditors' proving their claims, gathering in of assets local and overseas, how to deal with executory contracts (especially with an overseas element), priority of distributions, voidable dispositions, discharge and liquidation. These issues may be exacerbated by the different priorities of different national regimes (whether pro-creditor, pro-debtor, or reflective of some other domestic priority), forum-shopping, concealment, and other problematic outcomes.

Ideally, there may exist one or more international insolvency instruments on which the AIR may rely in the Courts of Asgard or Encanto, or at least have reference before those Courts, to try to resolve these and other difficulties. These could include (in rough order of preference, from the AIR's position):

(1) A formal treaty (whether bilateral or multilateral), incorporated into both domestic legal systems, governing Asgard/Encanto cross-border insolvencies and providing for a single unified insolvency proceeding whose decisions are automatically recognised and enforceable in both countries;

(2) Some less comprehensive but still legally enforceable variation of the above, providing for a general unity of proceedings and permitting concurrent proceedings in certain well-defined circumstances;

(3) Modern and effective local legislation (for the AIR, preferably in Encanto law, such that the AIR can act as the driver of the process in both jurisdictions) providing for the recognition and enforcement of, and co-operation with, decisions of a foreign insolvency body;

(4) In the absence of local legislation to that effect, a recognised body of judge-made law (again, for the AIR, preferably in the Encanto courts) providing for the same; and/or

(5) A body of "soft law" guidelines, perhaps developed by local legal professional or multilateral trade associations and generally accepted by the judiciary and authorities of both countries, providing guidelines for the reasonable resolution of Encanto / Asgard cross-border insolvency disputes.

The development of international insolvency instruments (i.e. ideally some species of (1) and (2) above) has been recognised as an important area for centuries: bilateral insolvency agreements allowing for the pursuit of debtors and their assets emerged in Europe from the 13th century and blossomed into more comprehensive arrangements in the late 19th and early 20th. The 1933 Nordic Convention, the Montevideo Treaties, the Havana Convention and in the modern era the European Insolvency Regulation reflect the recognised importance of regulating cross-border insolvencies.

Although true universalism is derided by some commentators as an unachievable pipe-dream at odds with the reality of national priorities, the modern environment of formal instruments, supplemented by the gradual national adoption of "soft law" like the UNCITRAL Model Law on Cross-Border Insolvency and initiatives like UNICTRAL's Legislative Guide, mean that modified universalism and more coherent management of cross-border insolvencies are gathering momentum in this important area.

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

3.5

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against 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 Insolvency Regulation Recast ("EIRR") ceased to have effect in the UK on 31 December 2020 following the UK's exit from the European Union. The European (Withdrawal Agreement) Act 2020 contained transitional provisions whereby the EIRR would apply to insolvency proceedings so long as they were opened before 31 December 2020 – but given the UK proceedings opened on 30 June 2022 these are not applicable. Likewise, the English insolvency proceedings will no longer automatically be recognised in Lobo's home state (assuming that is a European Union member state), and recognition there will be a matter for local law.

Accordingly, the English insolvency practitioner is likely to need to seek recognition and assistance from the courts in European countries in which FPPL has assets under the relevant state's national laws. If and to the extent Lobo has commenced proceedings in a European member state by that time, the English practitioner may struggle to obtain assistance because Lobo's proceedings may be deemed to be the

"main" proceedings under the EIRR (and if so will automatically be recognised as such in every other Member State).

The analysis above will be dependent on whether FPPL is found to have its centre of main interests in Lobo's home jurisdiction, since within the European Union only the courts of the COMI member state have jurisdiction to open "main" proceedings.

It would therefore be useful to know:

(1) Where FPPL is incorporated;

(2) Where FPPL is likely to be deemed to have its centre of main interests; and

(3) The relative values of creditors' claims (we are told the UK claim was brought by a minor creditor and that Lobo is the major creditor, but not in what proportions).
It would be beneficial to consider the MLCBI

3.5
Marks awarded 11.5 out of 15

* End of Assessment *

TOTAL MARKS 41.5/50
A very good paper that generally addresses the questions asked and substantiates its answers.