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 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 insolvency law systems historically stem from those of former colonial powers present in their countries. This means that several countries including Nigeria, Kenya & Botswana use English law tradition. Other countries such as Angola and Mozambique use civil law tradition originating from Portuguese law and many West African countries have a civil law base sourced from French law. There are also influences from Roman-Dutch civil law in some African countries, which is mixed with English law.

Though the routes of African insolvency law are based on former colonial powers, there is now a trend to move towards more modern legislation. This is using examples from other legislation (e.g. UNCITRAL) to modernise the systems and make them fit for purpose. They are therefore becoming a hybrid of systems.

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Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

Eastern Asia experienced a severe financial crisis in 1998, which hit certain countries harder than others (e.g. Indonesia and Thailand). This triggered a reform of many insolvency laws and Thailand used this crisis to entirely change its insolvency laws.

Singapore is a key financial centre for the world and its growth has triggered a revision of their insolvency laws. This occurred in October 2018 and consolidated its corporate insolvency, personal insolvency & restricting laws into a unified act. This simplified the insolvency laws and enhanced Singapore's attractiveness for foreign investment.

There has also been the implementation in 2016 of the Guidelines for Communication and Cooperation between Courts in Cross-border Insolvency Matters (JIN Guidelines). Rather than overhauling the domestic insolvency laws such as the Singapore example above, this looked to bring cooperation between countries insolvency laws. This has been adopted by some Asian countries, as well the Americas and UK.

Finally, there has been a movement by several East Asian countries including Japan, Philippines, Republic of Korea, and Singapore to adopt model law on cross-border insolvency. This should simplify international insolvency in the region. This has been supported by the 2020 Asian Principles of Business Restructuring, which outlined business reorganisation regimes in several East Asian countries.

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Question 2.3 [maximum 4 marks]

Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.

A key initiative undertaken to assist with the resolution of international insolvency issues between North America and Canada is the ALI NAFTA Guidelines created by the American Law Institute (ALI). This addresses Court-to-Court communications in Cross-Border Cases and was based on Model Law. The implementation was successful and helped to bring the laws closer.

The NAFTA guidelines proved so successful; the ALI worked with International Insolvency Institute to consider the implication of the guidelines worldwide. This exercise resulted in the ALI – III Global Principles for Cooperation in

International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases.

Secondly, Canada and the US were agreeing a bilateral insolvency treaty in the 1970s. However, this was never finalised due to being too stretching in the areas it aimed to agree on and no final treaty was made. In its place, cooperation has been achieved through the common adoption of the Model Law alongside practical mechanisms including Protocols.

There was also good success with the common adoption of Model Law. This was enhanced by the fact that North America and Canada had shared a history of cooperation without a formal system. This worked through a combination of case law and their own individual legislation.

The final key area of resolution was the ALI Transnational Insolvency Project initiated by the United States professional bodies to improve cooperation for the NAFTA states. This worked with advisory groups from the three countries and resulted in the Principles of Cooperation (POC) were agreed in 2000 and have proved successful ever since. The key topics of the POC is cooperation and recognition, to aid the insolvency process.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

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Marks awarded 9 out of 10

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

Question 3.1 [maximum 5 marks]

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

Voidable dispositions rules were put in place to prevent fraud from transactions made to benefit the debtor or owners by hiding assets, and to aim to ensure the equitable treatment of creditors by preventing preference transactions. A voidable transaction itself can therefore be categorised as fraudulent conveyances or preferences. Fraudulent conveyances occurs when the debtor disposes of an asset for no consideration, or significantly lower than the market value. Preference transactions are those transactions with pre-existing creditors

which benefits certain creditors over others improving their position once insolvency has commenced.

The historical source of voidable dispositions in the English system is the Act of Elizabeth of 1570. The English system initially introduced the English Bankruptcy Act 1542 which included two fundamental principles of collective participation by creditors and a pari passu distribution of assets available. The 1570 act was then the first bankruptcy specific set of laws. This brought in a bankruptcy commissioner, who would supervise the process and could examine the debtor's transactions. They also had powers to question relevant people and send bankrupts to prison. This began the concept of voidable transactions.

At the end of the 19th century Joseph Chamberlain was appointed the president of the Board of Trade. This appointment brought with it three key principles, including that the assets of the debtor belonged to the creditors and so they should have the fullest control. Alongside this principle there was also one which held that there should be an independent examination of the debtor's conduct and circumstance leading to the insolvency.

Meanwhile, civil law systems are based on the actio Pauliana and are typically traceable back to Roman law. These are based on pre-determined laws and therefore are usually easier to align with other jurisdictions. This applies to insolvency law and explains why civil law systems will often have more unified laws.

The key difference between the two systems is that English law systems is based on historical case law. This means that the voidable transaction law developed naturally as insolvency practitioners looked to overturn transactions in court and if successful, their case became a precedent for future cases. This creates difficulties in aligning international law, as the case law already exists and creates the basis for the law. It is therefore not as easy as civil law to amend laws to make the rules around voidable dispositions aligned.

Civil law on the other hand is based on defined statute and this becomes the basis for law. This means that rules are written into statute and must be followed by reference. This is particularly important, as civil law rules will only change if amended through new statutory law. Therefore, the governing body of a country must decide to amend insolvency laws, whilst case law will be decided based on precedents. It also means that it is easier to align countries with developing insolvency laws if they are under ruled under civil law.

The key overall impact is that there are likely to be similar laws to prove a voidable disposition, but the remedies are likely to differ. These remedies are important in insolvency as they protect the rights of creditors. Should there be differences

in these roles in a cross-border insolvency, there is a high likelihood that creditors will be unable to effectively overturn voidable transactions under the rules of one country. There is some scope to elaborate regarding importance.

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.

The key reason that the above definition has limitations is that it requires relevant countries to have an established insolvency law framework. Where this doesn't exist, there is no applicable laws to become executable and therefore the definition fails to accurately describe the concept. The definition needs to be broadened to include provisions for countries with little or no insolvency laws, but that still may have an impact on an insolvency (e.g. asset held domestically).

The definition also lacks narrative around international law providing rules instead of relying on goodwill to deal with cross-border insolvency matters. This is particularly important due to the trend in the world as it moves towards less important international borders in respect of trade and exchange laws.

The trend towards globalisation and reduced importance of borders provides the opportunity to move assets around the world quickly, to avoid specific insolvency laws. It is there less of a need to consider international aspects of a case, but rather a need to have international cooperation to avoid these issues occurring and to ensure the insolvency systems remain robust. This international aspect to insolvency cases is becoming the norm and so international insolvency law will become key.

It would be beneficial to also consider comments re Fletcher.

4.5

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In

your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

Treaties and conventions are hard laws which bind countries and insolvency practitioners. These have been a useful part of law in Europe for centuries but have not always been long standing or successful. An example of this is the 1990 Istanbul convention, which was successfully drafted and signed, but was not ratified effectively. This therefore did not directly dictate future cross-border insolvency but did help to develop soft laws. However, some conventions have been successful – such as the Nordic convention of 1933. This appears to have been successful due to limited number of countries included and close existing ties.

The EU has taken the previous failure of treaties and Instead found success In a soft law approach such as the European Insolvency Regulation (EIR). This has been effective at bringing those countries in the EU together and offers advice for those outside of the EU (such as the UK).

Treaties and conventions have been key to encouraging an efficient and successful international insolvency system outside of the EU. Many treaties have been drafted to specifically bring certain regions in line, such as The Montevideo Treaties of 1889 and 1940 and Havana Convention on Private International Law of 1928, which brough together Latin American states. This includes countries such as Argentina, Paraguay and Uruguay and has been effective at allocating bankruptcy jurisdiction based on the debtor's commercial operations. This provides a treaty for bringing one insolvency proceeding but dealing with cross-border issues across Latin America. Alternatively, it also provides for two concurrent insolvency proceedings and ensuring these are dealt with in the most equitable and efficient manner.

Whilst the Montevideo Treaties is more widely accepted, the Havana Convention on Private International Law is more effective at bringing countries insolvency systems together to create one efficient proceeding. This likely relinquishes more individual control of a country but provides a single system in most cases for an insolvency. However, it does have the downside on the Montevideo Treaties of not providing procedures for the success of concurrent proceedings.

Therefore, the Latin American treaties show that they are useful at bringing countries insolvency laws together but have the drawbacks that they are not universally adopted and can have individual gaps which need addressing.

Whilst Latin America has benefited from treaties, North America was working towards one but could not finalise an agreement. Instead, North America has relied on Model Law and protocols in place of treaties and conventions. The failure of the treaty is put down to the scope of the treaty, which is often an issue with countries that have complex and varied insolvency laws. However, where there

is cooperation between countries, there is often co-ordination of insolvency laws without the need for explicit treaties.

Some areas do not have any sort of treaties. This includes Asia, which has shown a need for cooperation through cross-border insolvency challenges. Whilst it would likely benefit these countries to create treaties, the adoption by many countries to adopt Model Law provides the required framework for cooperation. An example of this soft law approach is the Asian Business Law Institute joint project with the International Insolvency Institute, to create the Asian Principles of Business Restructuring. This is proving successful and shows a situation where a stringent treaty is not required.

Finally, whilst treaties are great at creating a set of rules to follow, in their absence an effective case-by-case system has been set up by insolvency practitioners to deal with conflicts. Due to being case-by-case, this is often tailored to the situation and is likely to result in the most effective solution. This case law then may set a precedent in a more effective manner than a treaty. This is particularly effective when paired with the UNCITRAL model law.

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Marks awarded 14 out of 15

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

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

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

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

Question 4.1 [Maximum 5 marks]

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

The main difference between formal and informal insolvency arrangements is that formal arrangements are those commenced under the relevant insolvency law of that country (in this case, Asgard). This includes formal processes such as

liquidations, administrations, and other rescue procedures. They follow statute and will typically require the appointment of a regulated individual to complete the process. It is typically difficult to reverse the decision to enter a formal insolvency procedure without a final solution.

Formal insolvency procedures will have the benefit of statutory provisions, such as moratoriums (allowing the debtor time to prepare to repay the debt, without creditors actively chasing them). There is a clear statutory path to follow in formal insolvency procedures and Lobo will have comfort that all creditors will be bound by the procedure, rather than bringing proceedings after an informal agreement is in place with another creditor.

However, formal insolvency procedures are likely to be much more expensive and may mean that the underlying company is dissolved. In Lobo's case, this may branch into Encanto depending on the international insolvency cooperation between the countries, meaning the costs will likely be much higher. They will also not be in control of the formal insolvency procedure, and it will be up to the appointment holder to decide the steps taken to repay the debt. This is unlikely to be attractive if the debt is below a certain size.

There is also the disadvantage of a formal procedure in that it publicly outlines the issues experienced by Lobo, which may put off future customers and may the cost of future borrowing higher. This may then become a self-fulfilling prophecy for future insolvency issues.

On the other hand, informal insolvency arrangements are not typically regulated by the relevant insolvency laws of a country. They will usually be in the form of negotiations between the creditor and debtor to provide a solution without the need to proceed through a full formal insolvency system. This usually has the benefit of being cheaper and therefore resulting in a better outcome for both parties. However, it can be difficult to reach an agreement. Some sectors are likely to have better chances for success, including those such as the banking sector, where insolvency issues occur regularly and therefore previous precedents are in place. However, there remains the need for the threat of formal insolvency procedures to make the negotiations effective.

Informal insolvency options are likely to be a better solution for Lobo providing they have limited creditors and can engage them all productively in informal negotiations. However, they should be aware that there may be 'rogue' creditors that could still enforce after an informal procedure is put in place.

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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.

This is a situation where cross-border insolvency rules will need to work together to effectively complete the insolvency processes. However, the first and overarching difficulty that may arise is that there may be a lack of domestic laws or treaties addressing international insolvency. This will mean there is no clear legal protocol for dealing with assets in one jurisdiction, but insolvency proceedings in another. There is also likely to be cause issues where there is an insolvency procedure in both countries and assets are limited. It will be up for the relevant local courts to decide how much cooperation there is and in what form it takes.

There is also likely to be issues with having the insolvency proceedings in one jurisdiction (Asgard) recognised to be able to implement any local laws in Encanto. Where there are no provisions to rule on recognition of a foreign insolvency procedure, this will render an IP's power in another jurisdiction very limited.

There is likely to be issues around distributions in either insolvency procedure, should there be assets to provide dividends. The local insolvency proceedings may, or may not, accept creditor claims from international creditors. This is likely to impact distributions and, in this case, may mean that Lobo is not entitled to received assets from the Encanto proceedings. It may also have the further impact that creditors do not feel bound by insolvency proceedings and therefore may either seek to recover assets during a process or continue after the proceedings are complete using local law.

There is also an increased cost issue around a lack of unified international insolvency proceedings. This is due to the enhanced level of work required for the relevant insolvency practitioners causing additional costs of the insolvency procedure, which is likely to lead to a reduced distribution to creditors.

The key insolvency instrument developed recently to aid these issues is the UNCITRAL Model law. This is a set of guideline insolvency laws, which is seen as 'best practice'. The model law invites countries to adopt the guidelines in their whole, or in part. Where large portions of Model Law is adopted, it makes cross-border insolvency much easier as key protocols are aligned. This has largely been adopted by the UN countries but is not universally adopted across the globe.

The development of these instruments is very important as the world becomes more globalised. As other systems, particularly finance systems, become more sophisticated, it renders outdated international insolvency laws more powerless to appropriately address insolvent entities. Sophisticated parties will utilise countries with little or no protocols for cooperation to elude creditors and insolvency laws.

The development of strong insolvency procedures will also mean that concurrent insolvency proceedings are not necessary required. When foreign creditors have faith in a local insolvency procedure due to the surround protocols, this makes the IPs job more effective and efficient. This benefits creditors and debtors alike.

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

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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.

It should first be outlined that since 31 December 2020, the EIR Recast no longer applied to the UK following it's exit from the EU. Therefore, though the major creditor is incorporated in Europe, it cannot be dealt with simply with the EIR Recast.

In this case, FPPL is incorporated in the UK and so the original minority creditor petition is effective. The liquidators of the company still have a duty to collect assets belonging to the company and protect the value held in these assets. There may be difficulties in this respect where the assets are in foreign jurisdictions and therefore the English liquidators may struggle to be recognised in locations where the assets reside. It is this challenge that will initially require additional information around the location and nature of foreign assets, as well as a review of the relevant foreign law.

There may also be a question as to whether the UK is the correct jurisdiction for the liquidation. This will be judged based on factors including there being

sufficient connection to England Wales (which may include asset location). This appears to be dealt with effectively through the incorporation of the company in the UK, but it would be useful to understand whether this is the main location of management and whether the company's operations are based in the UK.

On the basis that the UK liquidator is in the appropriate jurisdiction and the assets are within reach, there is protocol to recognise foreign creditor claims. This will mean that Lobo can lodge a proof of debt in the UK liquidation and be reassured that their claim will be assessed equitably. This it not always the case and is often a fear of creditors lodging claims in foreign insolvency proceedings. We would need further information that Lobo's claim is recognisable under UK law.

Whilst the UK does not fall under the EIR Recast, there may be some foreign laws used in certain matters relating to the liquidation. Whilst under the Insolvency Act 1986, the procedure and substance are dictated by UK insolvency law, elements of foreign law may be drawn upon for some matters. This may include validation of a foreign claim and dealing with relevant security over assets. Such matters will need to be dealt with on a case-by-case basis and will often rely on case law.

Finally, there may be situation where there are concurrent insolvency proceedings in both countries. Where this is the case, a review of the law will need to be conducted to understand how the insolvency provisions interact internationally.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 43.5/50
Excellent paper