INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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.

The Organisation pour l'Harmonisation en Afrique du Droit des Affaires ("OHADA"), or Organisation for the Harmonisation of Business Law in Africa ("OHBLA") is operative in Sub-Saharan Africa and acts as the basis for insolvency law across the continent. A Treaty was signed in 1993 and took effect from 1995 and includes 17 member nations.

The aim of OHADA is to renew or harmonise the domestic laws of its 17 member states on a range of topics, including insolvency proceedings. In a significant development for the continent's insolvency framework, all 17 member states of OHADA adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2015 upon the Council of Ministers passing the Uniform Act on Insolvency (Acte uniforme portant organisation des procedures collectives d'apurement du passif).

Take care to answer the question put to you.

0

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.

In the wake of the Asian financial and economic crisis in the late 1990s, insolvency reform rose to the top of the policy agenda of many Asian economies in the years thereafter. A large debt overhang rendered a sizeable part of the Asian corporate sector insolvent and destabilised the financial system. The absence of effective, predictable, and orderly ways to deal with insolvency was for the first time keenly felt by government, corporations, and creditors.

Whilst there are currently no treaties or conventions addressing international insolvency issues within the Asian region, there are an increasing number of countries within the Asia-Pacific region that have adopted the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law"), including the substantial economies of Australia, Japan, New Zealand, Philippines, Republic of Korea, and Singapore. In 2018, India released a draft chapter as part of its consultation on the adoption of the Model Law, signalling yet another potential adoption of the Model Law in the region.

A further "soft law" regional initiative which has gathered increasing momentum is the Asian Business Law Institute's joint project with the International Insolvency Institute, which aims to develop Asian Principles of Business Restructuring ("Principles"). The joint involvement of both these institutions speaks to its importance and significance, particularly for Asia, and it is intended that the Principles will inform all stakeholders in Asia on an appropriate approach to Asian restructurings and thereby advance convergence in Asian insolvency laws.

In 2020, it published its report on Corporate Restructuring and Insolvency in Asia, which mapped business reorganisation regimes (both in-court and out-f-court) in ASEAN, Australia, China, Hong Kong, India, Japan, and South Korea.

It would be beneficial to also discuss reforms in countries, such as Thailand and Singapore, in response to the crisis.

1.5

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.

Chapter IV of the Model Law on Cross Border Insolvency ("Model Law") permits (and, where drafted by UNCITRAL, mandates) co-operation and direct communication between a local court and foreign courts or foreign representatives. A prime example of this is the co-operation permitted under Articles 25 and 26 whereby "approval or

***implementation by courts of agreements concerning the coordination of proceedings*" is provided for. Such coordination agreements are often referred to as "Protocols" or "Cross Border Insolvency Agreements".**

The UNCITRAL Practice Guide on Cross Border Insolvency Cooperation provides information for insolvency practitioners and judges on practical aspects of co-operation and communication in cross border insolvency cases – focusing on the use of Protocols and Cross Border Insolvency Agreements.
Such Protocols have had particular success in relations between the USA and Canada. For example, in the *Norte/ Networks* case. The co-ordination and co-operation shown in the conduct of Nortel's concurrent insolvency proceedings in North America extended to a joint electronic trial, using video link, in the Ontario Court of Justice (Commercial List) and the US Bankruptcy Court for the District of Delaware on an allocation dispute. The joint trial arose out of arrangements between the parties relating to the sale of assets as well as from the Protocol that was approved by the relevant US and Canadian courts.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope, for example to discuss ALI and NAFTA in detail.

2
Marks awarded 3.5 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.

Numerous problems arise in cases of cross-border insolvency. Independent and sovereign states govern their own regulation and must, therefore, be involved in amending their legislation to meet the challenge of resolving such international difficulties that can be encountered. There is, however, often room for both primary (universal) proceedings in the state where the centre of main interest is, and secondary (territorial) proceedings in states where the same debtor has assets or a fixed interest.

Insolvency laws in many countries are outdated and, therefore, a number of initiatives have been developed to seek to provide international best practice standards, including The World Bank's *Principles for Effective Insolvency and Creditor / Debtor

Regimes, the *UNCITRAL Legislative Guide on Insolvency* and the EU Commission's *Bankruptcy and fresh start: stigma on failure and legal consequences of bankruptcy*.

A common distinction is made between pro-creditor and pro-debtor systems when attempting to reconcile the various national approaches to insolvency; that is, looking at the interests of the creditors in recovering their claims, or looking at the interests of the debtor in continuing to do business. In seeking to resolve the problems associated with cross-border insolvency, there are two diametrically opposed ideals – universalism and territorialism.

Universalism is based on the premise that all the debtor's assets should be included in a single set of insolvency proceedings operating worldwide and to allow all creditors to participate in the proceedings with all claims being treated equally. Whilst the concept lends itself well to globalisation, opponents point out that the main drawback is that it will create uncertainty in the domestic markets and that "home" country standards may be indeterminate and vulnerable to strategic manipulation.

Territorialism is based on the premise that insolvency proceedings may be commenced in every state where the debtor holds assets and that they should be territorially limited and restricted to property within the state where the proceedings are opened. Opponents of the concept argue that a debtor may be declared insolvent in one jurisdiction but not in another, which would potentially cause huge practical and economic challenges for creditors.

It is often the case that civil law countries will adopt a territorial approach to jurisdiction and common law countries will be more inclined to align with universalism. Whilst national states tend to adopt a more diluted version of these concepts in practice – "modified universalism" and "modified territorialism", the diametrically opposed concepts are representative of the challenges that remain arising out of the historical, and often diverging, development of insolvency law in different jurisdictions.

Take care to address the focus of the question. This sub-question required you to consider the historical roots of voidable transactions: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law. You also needed to consider the context/framework for those rules and their importance.

1.5

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.

Wessels' definition of international insolvency law is limited since it is connected to the existence of a mere national framework of insolvency law. Fletcher exposes this limitation by highlighting that "international insolvency" or "cross border insolvency" should be considered as a situation:

"...in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

Friman points out that despite the USA comprising 50 individual states, insolvency law is a federal question under the Constitution in recognition of the need for an overarching, standardised regulation of insolvency matters to facilitate and support the effective operation of a common market with a free flow of goods, services, capital, and people.

Further, given the ever-increasing standardisation of laws and customs throughout the European Union, communications and interaction between individuals, businesses and member states have given rise to transnational cases of insolvency in light of the investments and establishments of branches and subsidiaries between member states. This prompted the European Parliament to publish a report on the Harmonisation of Insolvency Law at EU Level in 2010, which outlined differences between domestic insolvency laws within the EU and identified areas where increased harmonisation of insolvency laws among member states would be worthwhile and achievable.

As such, national borders are becoming increasingly irrelevant and capital markets and foreign exchange controls have been heavily relaxed or scrapped altogether, resulting in the majority of significant corporate collapses involving several member states and international insolvencies fast becoming the norm rather than the exception.

Such developments give rise to obvious problems with Wessels' definition in that, nowadays, most domestic legal systems are not appropriately equipped to dealing with insolvencies with international implications in light of the increasing mobility of people across national borders and the speed at which assets can be transferred internationally at relative ease.
As such, the main reason for establishing clear and uniform rules relating to international insolvency issues is to provide a degree of clarity and predictability which are vitally important to the facilitation of international trade and investment.

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.

The UNCITRAL Model Law on Cross Border Insolvency provides for significant co-operation and co-ordination of concurrent international insolvency proceedings. It does not require reciprocity.

Subsequent developments facilitating this collaborative approach of using Protocols or Cross Border Insolvency Agreements include:

- ***The ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross Border Cases published by The American Law Institute (ALI) and The International Insolvency Institute (III) in 2000. These were largely based on examples from actual cross-border cases involving cross-border insolvency protocols but were not intended to alter the domestic rules or procedures in any nation, nor to affect or curtail any substantive rights of any parties in court proceedings.***

- ***The ALI-III Global Guidelines Applicable to Court-to-Court Communication in Cross Border Cases ("ALI-III Global Guidelines") published in 2012. The overriding objective was to enhance co-ordination and harmonisation of insolvency proceedings that involved more that one state through communications and impose an obligation on the courts to be satisfied that is communication is consistent with the applicable rules of procedure. In early 2021, ALI reported that the ALI-III Global Guidelines played a prominent role in cross-border airline restructuring, including the ongoing restructuring of the LATHAM Airlines Group with a cross-border insolvency protocol having been approved by the Grand Court of the Cayman Islands in 2020.***

- ***The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross Border Matters in 2016. The overriding objective is to improve the efficiency and effectiveness of parallel proceedings in an international insolvency by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted. The JIN Guidelines have since been adopted by courts in nations in the Americas, Asia and the United Kingdom.***

This sub-question required you to discuss the nature of treaties/conventions, consider a number of different examples of treaties/conventions and discuss the success of same.

0.5

Marks awarded 7 out of 15

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

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

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

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

Question 4.1 [Maximum 5 marks]

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

Formal insolvency proceedings are those commenced under and governed by prescribed insolvency law provisions and generally include both liquidation and reorganisation or rescue proceedings. On the other hand, informal insolvency processes are not regulated by the insolvency law and will usually involve voluntary negotiations between the debtor – here, FPPL – and its creditors, of which one is Lobo here.

These types of negotiations typically provide for some form of restructuring of the insolvent debtor and, whilst not formally regulated by an insolvency law, the effectiveness of such voluntary negotiations will nevertheless depend on the existence of the insolvency law itself, which can provide indirect incentives or persuasive force to achieve an agreed outcome between the debtor and creditor(s).

The disadvantages of an out-of-court, informal insolvency arrangement are that:

- ***(i) There is no moratorium in place preventing other creditors of FPPL from approaching the courts and commencing formal insolvency proceedings; and***
- ***(ii) There is no way of binding any dissenting creditors of FPPL to any agreement reached in respect of the debt owed to Lobo by FPPL.***

However, the advantages of an out-of-court informal workout are that:

- ***(i) The costs are significantly lower since the courts are not involved; and***

(ii) There is no adverse publicity regarding FPPL's financial difficulty in Asgard.

If Lobo commenced formal insolvency proceedings instead in respect of the debt owed by FPPL, the advantages of this course of action are that:

(i) There is the benefit of a statutory moratorium preventing any legal proceedings being taken against FPPL; and

(ii) It may be possible to bind dissenting creditors to whatever workout is proposed by the officeholder or FPPL itself.

The two disadvantages usually associated with formal insolvency proceedings are that:

(i) There is adverse publicity regarding the financial distress of FPPL in Asgard which can negatively impact the goodwill of the company; and

(ii) Formal insolvency proceedings can be very expensive, especially if there is court involvement, which is usually the case.

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 insolvency representative may encounter difficulties in respect of the nine key issues identified by Westbrook in respect of cross border insolvency cases, namely:

(i) Standing for (recognition of) the insolvency representative in Encanto;
(ii) Moratorium on creditor actions;
(iii) Creditor participation;
(iv) Executory contracts;
(v) Co-ordinated claims procedures;
(vi) Priorities and preferences;

(vii) Avoidance provision powers;
(viii) Discharges; and
(ix) Conflict of law issues.

The insolvency representative in Asgard may encounter difficulties with the definition of insolvency of FPPL in an international setting. Whilst the traditional understanding of "insolvency" refers to a situation where the combined total of the outstanding liabilities exceeds the measurable value of all the debtor's assets, this may not be accurately or adequately correlative between the insolvency regimes of Encanto and Asgard. As Friman points out, cross border insolvency cases must be sufficiently defined or ascertained and systems all over the world apply a variety of procedures to deal with non-payment of debt.

Further, potential differences in domestic norms in Encanto and Asgard may impact on the position of creditors and the priorities they assert in insolvency. If FPPL faces creditors in claims in Encanto and Asgard, this will inevitably raise issues of conflict of laws. The conflict itself may be made more complex by the presence of qualifications, retention of title clauses and other means of protecting title available to creditors in national laws.

To assist with such potential difficulties, there are a range of guidelines now available to parties to promote co-operation and co-ordination in the context of recognition and enforcement of concurrent foreign insolvency proceedings.

In North America, the American Law Institute ("ALI") Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) for international insolvencies involving the USA, Canada and Mexico.

Subsequently, the ALI and the International Insolvency Institute ("III") developed the ALI – III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2012).

In Europe, the European Guidelines on Communication and Cooperation (2007) contain non-binding rules and a Draft protocol for International Insolvencies subject to the EIR. In 2017, the Conference of European Restructuring and Insolvency Law ("CERIL"), in collaboration with INSOL Europe, established a Joint Working Group to review the Guidelines in light of recent practice, which focused on the duty of cooperation and coordination under the European Insolvency Regulation Recast ("EIR Recast"). Subsequently, 18 EU Cross Border Insolvency Court-to-Court Communications Guidelines were published in 2015, with the aim being to strengthen efficient and effective communication between courts in EU member states in insolvency cases with cross-border elements.

More recently, the inaugural Judicial Insolvency Network (JIN) conference in Singapore in 2016 culminated in the drafting of Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters ("JIN Guidelines"), with their overarching aim being to harness the efficiency and effectiveness of parallel proceedings in international insolvency cases.

The development of these international instruments, in conjunction with an increasing number of nations adopting the UNICTRAL Model Law on Cross-Border Insolvency, will be of crucial importance to the insolvency representative, FPPL, Lobo and the respective national courts in Encanto and Asgard in effectively co-operating and co-ordinating the international elements to the insolvency proceedings concerning FPPL.

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 UK ceased to be a member of the European Union at 11pm on 31 January 2020 following the end of the "Brexit" transition period. Under UK law, the European Insolvency Regulation Recast ("EIR Recast") no longer applies to post-11pm 31 December 2020 insolvency proceedings in the UK. The EIR Recast applies to insolvencies where the main proceedings were opened prior to the expiry of the transition period (being 11pm on 31 December 2020). As a consequence, the EIR Recast would not apply to the insolvency proceedings initiated on 30 June 2022.

Further information would be helpful, particularly confirmation of the registered office address of FPPL, whether Lobo is incorporated in a European country which is part of the European Union.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 13 out of 15

* End of Assessment *

TOTAL MARKS 33.5/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.