INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

African countries that formed part of a colonial empire, in many instances still follow the laws of the respective empires of which they were a colony. The following law traditions is followed:

1. ***An English law tradition is still followed by countries such as Nigeria, Kenya, Botswana, Zambia Tanzania, Malawi.***
2. ***A civil law tradition based on Portuguese law is followed by Angola and Mozambique.***
3. ***A civil law tradition based on French law is followed by the Francophone countries of West Africa, including Burkina Faso, Côte D'ivoire (Ivory Coars), Republic of Guinea Conakry, Mali and Senegal***

4. *A mixed system of Roman-Dutch law (civil law) and English law is followed by South Africa and Namibia.*
5. *A legal system based on Belgian law is followed by the Democratic Republic of Congo*

The insolvency law is based on older imported laws, however newer, more modern legislation are being introduced by various African States.

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Question 2.2 [maximum 3 marks]

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

The outbreak of the financial crisis in 1997 – 1998 led many Asian economies to try and improve their insolvency procedures.

In November 1999, a meeting was held in Sydney, Australia on Insolvency Systems in Asia: An Efficiency Perspective. The result of the abovementioned meeting, was the creation of the Forum for Asian Insolvency Reforms ("FAIR"), a policy dialogue platform for the discussion and promotion of insolvency reform strategies and the formulation and implementation thereof.

Thailand reformed its Bankruptcy Act B.E. 2483 (AD 1940) in 1998. The amendment was approved and adopted on 4 March 1998 and became effective on 10 April 1998 as the Bankruptcy Act Amendments No. 4. A new chapter was introduced in this Act to create a new rescue process in terms whereof a business can be rehabilitated and to render a distressed company viable while protecting the interests of creditors. The Act was last amended in 2018 when, on 27 February, the Bankruptcy Act (No. 10), B.E. 2561 (2018) was published.

Projects have been undertaken to introduce and / or reform reorganisation procedures by the People's Republic of China, Hong Hong, China, Indonesia, the Philippines and Vietnam. Japan enacted the Civil Rescue Law 1999 wherein a new rescue process was established.

Singapore passed a new Insolvency, Restructuring and Dissolution Act, No. 40 of 2018 on 1 October 2018 and as such created a single unified piece of insolvency legislation consolidating their personal and corporate insolvency and restructuring laws. Various Sections of the Act came into effect on various dates. Sections 2 – 466, 468 to 478, 480 to 494, 495(a), (c) to (j), 496 to 498, 500 to 527 and the Schedules came into effect on 30 July 2020; Sections 467(a) – (g) on 15 September 2020 and Section 479 on 30 June 2022.

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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.

During the 1970's, Canada and the United States tried to reach an agreement in the form of a bilateral insolvency treaty, however they failed to reach same.

In 2000, the American Law Institute ("ALI") established the ALI Transnational Insolvency Project, which sought common ground and shared principles and guidelines for cooperation in of cross-border insolvencies between the North American Free Trade Agreement ("NAFTA") countries, being the USA, Canada and Mexico and to provide guidance to courts and lawyers in respect thereof. Each countries, together with the assistance of experts and advisors from non-NAFTA countries, prepared an International Statement of that country's insolvency laws which were applicable to cross-border insolvencies. The ALI then, based on the information contained in the International Statements, prepared a combined exposition titled the Principles of Cooperation among the NAFTA Countries ("the Principles"). It was approved by the Council and Members of the ALI on 16 May 2000 and finally published in 2003, together with the tree volumes containing the three International Statements of the laws of the three NAFTA countries. As a result of the comparative studies and involvement of advisers from non-NAFTA countries, the Principles can potentially be adapted to non-NAFTA bankruptcy proceedings.

A code of practice was included as Appendix B to the Principles, the purpose of which is to facilitate the practical application of the Principles by Courts. It is set out in the form of Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ("Guidelines").

The Principles contains Recommendations for Legislation or International Agreement. The first Recommendation is that each NAFTA country should adopt the UNCITRAL Model Law on Cross-Border Insolvency. Each country proceeded with the said adoption, with Mexico adopting the Model Law in 2000 and the US and Canada each adopting same in 2005.

The Principles had a major influence on the bankruptcy cooperation among the US, Canada and Mexico and the Principles, together with the Guidelines, have been endorsed by inter alia the National Conference of Bankruptcy Judges, the National Bankruptcy Conference and the Canadian Judicial Council.

In 2006, the ALI, together with the International Insolvency Institute ('III") announced a Global Principles Project, which is a project to extend the 2003-Principles. The objective of the ALI and III was to establish the acceptance, with any modifications deemed necessary, of the 2003-Principles of Cooperation in jurisdictions across the world. The report was titled Global Principles for Cooperation in International Insolvency Cases ("Global Principles") and built on the 2003-Principles.

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 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.

There are differences in approaches regarding the treatment of voidable dispositions as many domestic legal systems are based on either civil law or English law.

The roots of civil law is Roman law. Roman law established the main principles of an action in terms whereof creditors can be protected from fraudulent legal transactions, being a disposition of property, entered into by a debtor with the intention to defraud his creditors and which has the effect of reducing the value of his estate. The action referred to above is the actio pauliana and it forms the basis of the law applicable in the setting aside of voidable dispositions in civil law systems. Therefore in States with a civil law system, the actio pauliana is the only right of recourse for a creditor who intends on reversing a fraudulent transaction undertaken with the purpose of defrauding creditors.

The application of the actio pauliana leads to the setting aside of any such fraudulent transaction.

The basis for this remedy in English law can be found in the Act of Elizabeth of 1570. In States where their legal systems are based on English law, there are remedies similar to the actio pauliana included in their insolvency law. The principles laid down in the respective laws will be followed in order to set aside voidable dispositions and other forms of fraudulent transactions, for example dispositions without value.

Where either the actio pauliana, in a civil law system, or the principles of the insolvency laws of a English law system is applied to set aside these fraudulent transactions, any benefits received by the receiver of the property will need to be repaid to the insolvent

estate. These remedies are therefore very important in an insolvency scenario, as these remedies are aimed at:

1. *preventing fraud;*
2. *ensuring the equitable treatment of all creditors by preventing the situation where one creditor is preferred above another due to a fraudulent disposition;*
3. *preventing a sudden loss of value of an insolvent estate; and*
4. *in some States, creating a framework for encouraging out-of-court settlements, as the knowledge that dispositions can be set aside will lead to better cooperation from debtors in voluntary settlement negotiations.*

There was scope to elaborate and also discuss the nature of voidable transactions in greater detail. But this is answered well.

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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.

B Wessels defines international insolvency law as per the above definition. His concession that the definition is limited is since it relies on the existence of a national legal framework of insolvency law.

He refers to various other definitions of international insolvency law, which exposes the limitations of his own definition, including a definition by Fletcher, being:

""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 a 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."

Due to the economic interactions and investments between various states the establishment of branches of entities across borders, etc. cross-border insolvency cases have increased.

Therefore, the definition is perceived to have limitations due to the following reasons:

1. *International insolvency transcends national borders;*
2. *As such, the insolvency procedures cannot rely exclusively on the domestic law provisions of one single legal system;*
3. *Regard has to be had to the foreign elements and implications of the application of the insolvency laws of another jurisdiction;*
4. *A state's jurisdiction generally ends with its national borders and therefore more than one legal system will be applicable.*
5. *Without cooperation between Courts of different States, there will always be a risk of multiple insolvency proceedings against the same debtor, which will prejudice creditors where these proceedings compete with or are incompatible with each other, as it might lead to financial losses or attempts to rescue a distressed entity might be prevented.*

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.

In insolvency law matters, many States have ratified or acceded to treaties or conventions, which expand their domestic laws to include principles to resolve issues in cross-border insolvencies.

Treaties and conventions are classic public international instruments in terms of which States bind themselves upon signature of the treaties and conventions and which affect their domestic laws. These treaties and conventions might the form part of the "hard law" on insolvency, which are enforceable in the courts.

European attempts to develop multilateral international insolvency conventions were unsuccessful for many years. A Convention on Certain International Aspects of Bankruptcy was concluded by the Council of Europe in 1990. It was signed by 8 member states, but it was not ratified by enough members for it to come into force.

Another convention that was unsuccessful as it was not adopted, is the first draft of an EC Convention on Bankruptcy and Related Matters which was drafted in 1970. Various further draft conventions were drafted from 1970 until 1996. However the final draft lapsed and were not adopted.

More success was achieved by way of regulations, than by way of treaties and conventions. The abovementioned final draft convention was revised and adopted in the form of the European Insolvency Regulation (2000) and it has influenced multilateral developments in international insolvency law. It was amended and the current applicable regulation in the European Union is Regulation (EU) 2915/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency

Proceedings (Recast) (EIR Recast). Annexures A and B of the EIR Recast has been replaced by way of Regulation 2021/2260 of 15 December 2021.

One successful convention is the Nordic Convention which was concluded between Denmark, Finland, Iceland, Norway and Sweden in 1933. This Conventions remains in effect.

If the variable success of the EIR Recast (as amended) – although it is a regulation and not a convention - and the Nordic Convention is considered, multilateral approaches to regulate international insolvencies by way of binding "hard law" in the form of treaties and conventions can be viewed as a successful way in establishing rules for cross-border insolvency law, however more success has been gained through the use of "soft law", for example the UNITRAL Model Law on Cross-Border Insolvency.

5
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?

Information required: Confirmation as to whether Lobo holds any security for the payment of his debt.

Formal insolvency proceedings are proceedings that are commenced in terms of the insolvency law of a particular State and which proceedings are governed by that insolvency law. Formal insolvency proceedings include liquidations and business rescue proceedings.

Informal insolvency proceedings are in most instances not regulated by the insolvency laws of a particular State. It mostly involves voluntary negotiations between the debtor and some, or all of its creditors. Although the voluntary negotiations are not subject to regulation under the insolvency laws, it is still dependent upon the existence of an insolvency law, as the principles of the insolvency laws can be used to motivate the acceptance of a proposal made during the voluntary negotiations by providing incentives or persuasive force.

If Lobo enters into an informal out-of-court workout arrangement, the arrangement may entail that FPPL will settle the entire debt that is owed to Lobo in terms of a payment arrangement. Costs and publicity should be considered. Advantages and disadvantages should be discussed in detail.

If Lobo elects to follow formal insolvency proceedings, at the commencement of the insolvency proceeding, various consequences will follow, including, but not limited to the following:

1. ***All actions by creditors against FPPL will be stayed, as insolvency or bankruptcy commences a collective procedure, which is binding on all creditors and no single creditor may be preferred above another by being allowed to proceed with the instituted action;***
2. ***Existing rights and obligations in terms of uncompleted contracts are generally recognised, but in most States the insolvency representative may elect to abide by the contract or not and they will normally only abide if there is a benefit for the general body of creditors. If they do not abide, the solvent party to the agreement will have certain remedies against the insolvent estate, however he might still be prejudiced to a certain extent.***
3. ***Once the insolvency proceedings commence *concursus creditorum* is established, which means that all creditors are pooled together, and the estate is administered to the benefit and advantage of the concursus. No creditor may be preferred above another (except where a creditor is a secured creditor or a preferent creditor to due the application of a specific law) and therefore all creditors will receive a dividend, being a proportionate amount (the same percentage) of their claims. Therefore, if Lobo holds no security for his debt, he will receive the same percentage of his claim as all the other creditors and he will definitely not receive payment in full.***
4. ***Before any dividends can be calculated and paid to all the creditors who prove claims if FPPL is formally liquidated, the costs of administration of the estate and fees of the appointed insolvency representatives must be paid. In some estates, the proceeds of the assets collected and sold by the insolvency representative are insufficient to cover the costs of administration and therefore a very small amount or no funds are available for distribution to creditors. Depending on the asset value of FPPL, Lobo will therefore also run the risk of receiving no dividend at all.***

The binding of dissenting creditors should be discussed in detail.

3.5

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.

In a cross-border context there is a risk of multiple insolvency proceedings against one debtor, which is exactly the position that Lobo finds himself in. Multiple insolvency proceedings can compete or can be incompatible due to differences in the insolvency laws, policies and cross-border insolvency rules that are applicable.

It is difficult in a cross-border context to reconcile how various jurisdictions approach insolvency difficulties arise due to a conflict of laws across jurisdictions and differences in domestic norms, as different jurisdictions view the interests and priorities of creditors in recovering their claims differently. Some systems are pro-creditor, where other systems are pro-debtor. Therefore, where there are creditors across jurisdictions, a conflict of laws will arise, as each jurisdiction has other means of protecting their creditors' interest. The question will therefore be what country's law should be applied in respect of different aspects of the case.

Cross-border insolvencies are further complicated because not only procedural law, but also substantive law, in private and public law, influences these procedures.

Westbrook identified nine key issues in cross-border cases, which the insolvency representative might also encounter:

1. ***Recognition of the foreign representative in Encanto;***
2. ***moratorium on creditor actions;***
3. ***creditor participation;***
4. ***executory contracts;***
5. ***co-ordinated claims procedures;***
6. ***priorities and preferences;***
7. ***avoidance provision powers;***
8. ***discharges; and***
9. ***conflict-of-law issues***

International instruments developed include:

1. ***European Guidelines on Communication and Cooperation (2007)***
2. ***ALI - III Global Principles for Cooperation in International Insolvency Cases and***
3. ***ALI - III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012)***
4. ***European Insolvency Regulation (Recast)***

5. *UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI").*

If the MLCBI was adopted as drafted by Encanto and Asgard, this will assist the insolvency representative, as it mandates co-operation and communication between courts and representatives in different jurisdictions. In terms of Articles 25 and 26 of MLCBI Courts can approve or implement agreements concerning the coordination of cross-border insolvency proceedings.

The development of these international instruments are very important as it assists in the co-operation and co-ordination in addressing international insolvency issues.

There is some scope to elaborate but this is answered well

4.5

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.

Information required: In which country is FPPL incorporated? Where are the assets of FPPL situated?

Under normal circumstances a court has jurisdiction to liquidate a company based on the location of its registered head office or main place of business, however an English Court also has jurisdiction to wind up a foreign country if that company complies with a requirement to register its presence and nominates a resident person to accept service of process and other formal notices on its behalf.

If FPPL's registered head office or main place of business is situated in the UK, or if it complied with the requirements referred to above, the UK courts will have jurisdiction and can liquidate the company.

With the UK's departure from the European Union on 31 January 2020, in terms of the UK Law, the EIR Recast no longer applied to proceedings in the UK commenced after 11 pm on 31 December 2020. As the proceedings were opened in the UK on 30 June 2020, the EIR Recast will not be applicable to these proceedings.

The English domestic laws will therefore be applicable on the insolvency of FPPL with respect tot the UK commenced insolvency proceedings. As part of its cross-border

rules, England adopted the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"). In this regard, the Insolvency Act 1986 and MLCBI will be applicable.

If Lobo applies for the liquidation of FPPL in a European country, the European Insolvency Regulation Recast would apply to that insolvency proceeding. In terms of Article 7.1 of the EIR Recast ""[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of … the 'State of the opening of proceedings'."

Therefore, as the State of the opening of proceedings is the UK, the laws applicable to insolvency proceedings of FPPL, will be the laws of the UK. The insolvency proceedings in the European country, will therefore have to be recognized in the UK so that concurrent insolvency proceedings can be commenced in both the UK and the European Country.

The laws of the UK will however also be applicable to the insolvency proceedings in the European Country.

There is some scope to elaborate.

4
Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS 44/50
Excellent Paper