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.***

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

The different insolvency law systems to be found in Africa are largely based on former colonial powers, however a number of African states are starting to introduce other more modern legislation. There is a wide variety of insolvency law, with some states adopting and continuing to adopt English law tradition, some states have adopted civil law tradition or for some states there is a mix of legal systems adopted because of previous colonial influence. One such state, South Africa, is neither pure Roman Dutch law nor pure English Law as it is more of a hybrid between the two however both legal proceedings are prevalent with in their legal system[1].

Further details on specific countries would be beneficial

1.5

[1] Burdette, David: A framework form corporate insolvency law reform in South Africa. June 2002

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.

1. *1998 Financial Crisis*
    a. *The financial crisis in 1998 gave rise to a number of insolvency law reforms in East Asia as the absence of effective ways and orderly ways to deal with insolvency impacted the government, creditors and corporations. Restructuring processing on a large scale were slow to emerge without insolvency procedures and new investment was not as forthcoming due to the absence of creditor protection.*[2]
    b. *As such the Forum for Asian Insolvency Reform (FAIR) was created by the Organisation of Economic Co-operation and Development (OECD)*
    c. *Individual countries also looked to changes is their reorganisations and administration procedures. Thailand reformed its Bankruptcy Act in 1998 to create a new rescue process. Japan has established a new rescue process which is modelled after Chapter 11 regime of the United States by enacting the Civil rescue law in 1999, which replaced the Composition law in 1922.*
    d. *Singapore also sought to consolidates is corporate and personal insolvency and restructuring laws into a unified act which came into force on 30 July 2020.*

3

Question 2.3 [maximum 4 marks]

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

1. *American Law Institute (ALI) Transnational Insolvency Project developed the ALI NAFTA Guidelines application to court-to-court communications in Cross-Border Cases (2000)*
2. *This initiative was designed to improve co-operation and resolution across NAFTA states, with a recommendation that each NAFTA state adopts the Model law on cross-border insolvency which Canada and USA have both done*
3. *The Judicial Insolvency Network has also sought to facilitate communication and cooperation amongst national courts in cross border insolvency and restructuring matters, of which judges from Canada and US, amongst other nations, became part of in October 2016.*
4. *In 1970s, the US and Canada worked towards a bilateral insolvency treaty however this approach failed as they failed to reach an agreement.*

[2] Forums for Asian Insolvency Reform: *Insolvency Reforms in Asia: An Assessment of the implementation Process* ***Bali, Indonesia 7-8 February 2001.***

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

3

Marks awarded 7.5 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.

We understand that voidable transactions are those that can be classified as transactions which have a preference to individual creditor or a disposition which does not achieve an adequate value of return, there by selling at an undervalue usually in a rushed of preferred sale.

Generally, around the globe, states will either be governed through English Law or Civil law, however with respect to insolvency law and whilst foundations of these laws maybe found within insolvency laws of different states, the local legal culture may also impact the basis for a state's insolvency system. The other issues is whether the insolvency law is based on a pro-creditor approach or a pro debtor approach; a pro creditor jurisdictions allows the creditor to protect himself against insolvency through security or set off while a pro-debtor jurisdiction aims to maximise the debtors estate to increase the assets available to creditors.[3] This therefore gives a rise to the implications of issues found within insolvency systems

With respect to voidable transaction there are two acts which refer specifically to these transactions based on whether the state is governed through civil law or English law. With respect to civil law, the actio pauliana is an action designed by Roman law intended to protect creditors from Fraudulent transactions especially those used to reduce the debtor's estate. One thing to note is that the actio pauliana was not necessarily governed through insolvency first , however was part of civil law, however transitioned across to insolvency given the action of fraudulent transaction would generally be occur as a result of bankruptcy[4]. Taking Dutch law for example, the actio pauliana allows any creditor who has

[3] Wood, Phill: Principles of International Insolvency (Part1).

[4] Bork, Reinhard: Sequana I: Struggling with section 423 of the Insolvency Act 1986.

been adversely affected by a debtor's actions to seek to annul that act irrespective of whether the claim of the creditor arose before or after act in question.[5]

With respect to English law, the Act of Elizabeth 1570 forms the basis for remedies against fraudulent transactions however many states now have adopted the Uniform Voidable Transactions Act (UVTA) which amends the Uniform Fraudulent Transfer Act (UFTA). Where this is important is that any creditor is permitted to void a debtor's transaction in two situations: when a debtor engages in a transaction with the intent to hinder, delay or defraud any creditor or when a debtor makes a transfer without receiving reasonably equivalent value under certain conditions[6].

When looking at how a creditor can void a transaction of a debtor with respect to the governing law, the history of each law will have certain significance. It is argued that the Act of Elizabeth was designed as a true bankruptcy statute rather than a fraud prevention law, and proceedings could only be opened following an act of bankruptcy and transaction would be investigated by commissioners - something that is done in insolvency proceedings today especially with suspicions of transaction which may hinder the creditors. On the basis of good insolvency law there were three principals which came out, but most notably Chamberlain suggested that there needs to be an independent examination of the debtors conduct and circumstances leading to insolvency.

The rules governed through both civil law and English law are important with respect to voidable dispositions are important whether the jurisdiction is pro creditor or pro debtor. Civil law would suggest that creditors are favoured ahead of the debtor and therefore the actio pauliana was introduced for the protection of debtors, while in a pro debtor English law jurisdiction the idea is to maximise the estate of the debtor and therefore by examining the transactions occurring as result of bankruptcy can determine whether the transactions have been entered into to hinder the creditors position.

There is scope to elaborate regarding the importance of the rules.

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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:

[5] Willem De Groot, Jan: How are creditors protected under the laws of the Netherlands" at https://dutch-law.com/actio-pauliana-dutch-law.html >> accessed November 2022.
[6] Taken from: Slen, D & Hildreth, Mark: The Uniform Voidable Transactions Act in a Nutshell at https://www.shumaker.com/Templates/media/files/pdf/news/publications/-voidable-transactions-act.pdf

> ***"[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.

As we are aware, there is not one set of single insolvency rules that apply on a global basis, and therefore the definition, in its entirety would be considered true. Where a debtor has a book of multiple assets in more than one location, or a company has subsidiaries around the world with share charges granted over the assets from creditors in other jurisdictions then there has to be some international aspect given to the case. However, there are a number of theories and strategies which have been used to suggest harmonisation across jurisdictions and enabling the law to be fully enforced for the benefit of the creditor to enable to debtor a successful discharge, given the model law.

Firstly, where the definition has limitations is whether you are adopting either territorialism or universalism, which are two theories within international insolvency.

Territorialism centres upon the belief that a courts powers is limited to the country's jurisdiction and insolvency law, i.e. a US court presiding over multinational debtors re-organisation would deal only with the US assets, creditors and ultimately law. Under territorialism, one would suggest that the applicable law cannot be executed immediately given the multinational facets that could be within the insolvency case. In this case, the insolvency proceedings might not be able to be fully enforced and will mean duplicative proceedings in other jurisdictions and therefore the commentator would suggest that

Universalism, on the other hand, hinges on the co-operation of all jurisdictions where the debtor has assets on the basis that all jurisdictions where the debtor has assets or creditors apply the procedural and substantive law of the host jurisdiction which helps to reduce time and resources, and transnational cooperation avoid dissipation of insolvency law. Whilst both territorialism and universalism address the international aspect of the case, the theories suggest that matters can be dealt with primarily in the host jurisdiction, i.e., where the country where the applicable law concerns over the debtor, or individual facets of the debtor's estate are dealt with in each jurisdiction they are part of. Whilst this does disadvantage creditors in other jurisdictions, it would suggest that it takes the international element away from the proceedings by working directly within that home jurisdiction.

Secondly, there are now multilateral bodies which are working to provide solutions to the efficiency of international insolvency law with a range of strategies such as harmonisation of domestic insolvency laws, or a uniform choice of law rules and co-operation and co-ordination to promote recognition and enforcement. Such strategies or instruments have been devised to address international insolvency matters but indicate the role that co-operation needs to have to make sure that international insolvency matters can be addressed smoothly.

Whilst generally domestic courts have had to seek the appropriate international jurisdiction to wind up a company, some domestic courts are modifying their framework and law to adopt international insolvency issues, which takes out the requirement that rules cannot be fully enforced without considering the international aspect of the case. By providing for co-operation where there are multiple concurrent proceedings. For example, Australia has a similar provision to section 426 in the insolvency act 1986 (UK), as does New Zealand, whereby they permit co-operation between foreign courts in external administrations. This, therefore, whilst considering of the international aspect of the case, ensures that rules can be fully enforced.

Finally, and despite the efforts, there are a handful of treaties which have been developed such as the Nordic Convention 1933, as a way of solving international insolvency problems. However, you could concede that the author is right in many respects give the limited number treaties. The issue comes into play that every legal system differs greatly across the globe and therefore there has to be some consideration of the international aspect of the insolvency which needs to be taken into consideration.

It would also be beneficial to consider limitations discussed by the author and reference to Fletcher.

3.5

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.

As we understand 'international law' is either characterised through public law, which governs the state, and private international law, which governs parties.

Multilateral approaches have been used to address and regulate international insolvencies through binding hard law or through soft law as a way of regulation. Given that there is little simplicity between whether issues within insolvency law fall between public international law or the private international law then there have been a number of international instruments which have been developed to resolve insolvency issues that have a connection with another state: one such being treaties or conventions.

Treaties and conventions essentially bind the state to the domestic law and are in essence form the States hard law on insolvency. Greenwood in Source of International Law: an Introduction[7] suggests that treaties are not source of law but are in fact an obligation under the law i.e. they only bind the states that are party to them and the choice to be party is completely up to that state. However, there are only a handful of treaties which are in existence today which apply to cross border insolvency law. These are the Nordic Convention of 1933 between Sweden, Denmark, Norway and Finland; the Montevideo treaties of 1889 and 1940 between Argentina and Peru, Columbia, Bolivia, Uruguay and Paraguay; and the Havana Convention of 1928 [8]. The Nordic Convention enforces a domiciliary adjudication in the other member states, very similar to how the theory of universalism works when considering international insolvency and negates the need for registration with the insolvency administrator able to all on the assistance of all other member states

Given the nature of cross border insolvency, there is an existing problem that at least there is an elusiveness of a universal solution, given the fact that legal systems are very different which is the main issue for international insolvency and hence why harmonisation of insolvency laws seems to be the solution, however attenable this might be. Treaties work well where local laws are similar. One would argue that the Nordic convention has been successful in this regard, however, to expand this on a larger global scale with countries that operate differently, especially the vast number legal systems would mean applying treaties in this regard would probably be less successful. This was seen with the E.U. convention which, despite the cross-border trade within the EU finding cross border insolvency laws which took a long time and ultimately collapse in 1996. Given the lack of success with "hard law" treaties, more success has been found with soft law initiatives.

There do however, absent of the sources of cross border insolvency law, a number of legal principals applicable to international insolvency cases but there is a lack of international legal and institutional framework. It is argued there is no international treaty in sense that the rules they apply do not address cross border dimensions and are not legally binding between the countries. Whilst the UNICTRAL model law provides a good example for a central law however this is still be to be interpreted by the local courts and will vary from country to country.

Given the relative lack of success with adopting treaties as a source of international insolvency law it would be considered that countries will only be prepared to adopt or apply measures to facilitate cooperation in international insolvencies with other countries whose legal systems are similar to their own. Therefore, and given the lack of treaties in international insolvency it would be considered

[7] Greenwood, Christopher: Sources of International Law: An introduction.

[8] Mckenzie, Donna, International Solutions to International Insolvency: an Insoluble Problem? *University of Baltimore Law Review: Vol.26 Iss.3 Article 4.*

that whilst a source of international law, it cannot be applied globally given the nature of international legal systems.

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Marks awarded 12.5 out of 15

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

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

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

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

Question 4.1 [Maximum 5 marks]

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

Firstly we need to consider what formal and informal insolvency proceeds are.

Formal insolvency proceedings are those which are commenced under the insolvency law and governed by that law where as informal insolvency proceedings are not necessarily regulated by the insolvency law and will allow for negotiations between the debtors and its creditors, however their effectiveness is still governed by the existence of an insolvency law, as ultimately a company might have to enter an formal insolvency procedure should the arrangement between its creditors fails.

Considering the definitions of both formal arrangements are necessarily safer and more effective as the communications between the debtor and its creditors are run through insolvency law which means that they are generally put in place through the appointment of an insolvency practitioner. Considering the likes of an informal arrangement, the debtor will explain its financial situation to its creditors and generally organise a payment plan between its creditors however this can likely go wrong due to cashflow issues and poor management of the company's assets. In a formal insolvency proceeding, Wood lists the possible features that are applied to insolvency law whereby the assets are frozen and

individual pursuit can be stayed, the assets are pooled to become available to pay creditors and creditors are paid on a pari passu basis. This is not something that can be negotiated in an out of court agreement between the debtor and its creditors. Creditors, in an informal arrangement, could change their mind and still pursue the debt through legal means should they not be satisfied that the conditions are being met – this then could lead to the creditor petitioning to the court to liquidate the company.

FFFL is ensuring that it is paying its debts, and is able to, as they fall due in Encanto which suggests that the operations in this State are quite strong, despite its operations in Asgard, where it owes money to Lobo. Lobo could consider firstly that a repayment plan from FFFL in the Encanto could mean that its debt is being satisfied however there are a number of considerations especially with respect to international insolvency law that could mean a formal insolvency procedure might be best option to guarantee its debt being paid. What are these? Advantages/disadvantages need to be discussed in detail. *Lobo would have to consider also whether there are any other insolvency proceeding launched in FFFLs primary state which is Encanto. By agreeing an informal out of court arrangement, Lobo could be guaranteed payment from Encanto without their being a freeze of assets in the home jurisdiction which will be governed through insolvency proceedings in Encanto's state. The implications of multiple insolvency proceedings in more than one state will give rise to cross board matters and this gives rise to the issue of resolution and co-ordination of multiple insolvency proceedings against the same debtor. By taking away the cross-boarder matter, Lobo could be in a better position to recover its debt* How so?

Lobo can also back out of the arrangement if FFFL is not meeting its contractual obligations to satisfy the debt and therefore Lobo as the creditor has significant control and can exercise this control however Lobo would have to consider the length of time that repayment of the debt would take and whether this will impact their own cashflow. Should the terms not be suitable for Lobos operations then an informal arrangement might not be suitable and work.

One other consideration for Lobo that with an informal creditors agreement, there is no moratorium in place which does not stop other creditors who FFFL owes money to in Asgard launching insolvency proceedings and therefore this could impact the payment plan agreement between FFFL and Lobo and considering the insolvency proceeding could lead to less returning back to Lobo as a result.

It would be beneficial to also consider matters such as costs, privacy and the inability to bind dissenting creditors in an informal workout.

3

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.

Given that there is another insolvency proceeding initiated in Encanto then this now gives rise to a cross border insolvency given that FPPL has assets in another jurisdiction and Lobo is a creditor is Asgard. Therefore, this gives rise to a number of difficulties which may arise for the insolvency representative pertaining to co-operation and co-ordination.

Firstly, we understand that individual states govern their own legal framework and therefore how an insolvency procedure is initiated in Asgard will be different to that of Encanto, and each state will apply its own laws. For example, there could be room for universal aspects and territorial aspects however should a strict territorial approach be applied by the insolvency representative in Encanto, then it could mean that there will be difficulties. This will be particularly prevalent if there is little co-operation and/or co-ordination between the countries. Here the insolvency representative could only consider the assets and creditors in Asgard and will not be able to apply any laws universally. One such instrument could be uniform/harmonization of choice of laws, even if the domestic laws differ. For example, where this has been applied is the Nordic Convention 1933, where a treaty has been formed across Norway, Sweden, Denmark, Iceland and Finland where the countries are bound by those law.

Another potential difficulty will be how each estate priorities their creditors, especially with respect to local and foreign creditors. Ring-fencing is permitted in some jurisdictions which disadvantages the foreign creditors, as local creditors have some form of protection and entitlement to the assets in that jurisdiction. Therefore, Lobo could be disadvantages should the jurisdiction of Encanto permit ring-fencing, given that it has launched an insolvency proceeding in another jurisdiction. The UNCITRAL Model law of Cross border insolvency does not permit ring-fencing and applied that foreign creditor have the same rights regarding the opening of, and participation in, a proceeding under the state as creditors in that state" (Article 13(1) of the Model Law). This is important as to not prejudice creditors in a foreign state.

As per the routes of insolvency law, we have seen that some states are governed through English law and others are governed through civil law which brings on the issue regarding whether a state is pro-creditor or pro-debtor. This will give

rise because one insolvency system could focus on the discharge of the debtor as efficiently as possible and ignore the rights of other creditors during the proceeding, and therefore Lobo could be disadvantaged as a result of the proceeding in another jurisdiction. Again, harmonisation of laws will enable both states to recover monies for the creditors.

With respect to the difficulties of the debtors estate not being administered fairly across the creditors in different states especially with respect to the case above where the debtors estate is focused in both Encanto and Asgard, then the courts can promote co-operation and co-ordination whereby the insolvency practitioners operating in different estate look to achieve the same goal – this could be through the Model law whereby insolvency practitioners must look to achieve some co-operation with foreign courts, which could assist Lobo through out the insolvency proceeding.

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

3

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

The European Insolvency Regulations Recast is important as there are some notable changes to the European Insolvency Regulation set up in 2002. Pursuant to the recast insolvency regulation, where a centre of main interest (COMI) of a debtor is located in an EU member state, insolvency proceedings opened in that member state are recognised as the main proceedings which are automatically recognised throughout the EU thereafter. The laws of the member state opening such proceedings will govern the nature and effect of insolvency proceedings throughout the EU.

Given that the UK ceased to be a member of the EU on 31 January 2020, and therefore the UK entered into a withdrawal agreement whereby, in respect to cross border insolvencies, there was a period of EU legislation which is applicable to the UK as between EU and the UK in the same way prior to Brexit Day.

The withdrawal agreement states that the at the end of the transition period, the Recast Insolvency Regulations shall apply to insolvency proceedings provided that the main proceedings were opened before the end of the transition period.

The end of the transition period was 30 December 2020, and therefore in this example a minor creditor opened an insolvency proceeding in the UK on 30 June 2022. This therefore negates the use of the European Insolvency Regulations Recast and it would not apply to this insolvency proceeding.

Therefore, given that an insolvency procedure has been opened in UK there is now no longer a single uniform regime which co-ordinates the restructurings between the UK and EU member states. Therefore, insolvency proceedings commenced in EU member states are no longer automatically recognised in the UK. There does however remain a legal framework for the recognition on inbound legal proceedings from EU member states into the UK, including the Cross-Border Insolvency Regulations 2006.

However, for Lobo there is no automatic recognition under a source such as the CBIR and there-fore the company would have to seek an order from the court applying for recognition in that jurisdiction. One thing we might need to consider would be the where the centre of main interest is and whether Lobo has enforced any security over its debt which might influence whether the proceedings occur in

It would be beneficial to consider the MLCBI.

3.5
Marks awarded 9.5 out of 15

*** End of Assessment ***

TOTAL MARKS 39.5/50

A very good paper that generally addresses the questions asked and substantiates its answers.