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 legal systems of former colonial powers are still followed substantially in many African nations. For example, countries like Nigeria, Kenya, Botswana, and Zambia, as well as those in Eastern Africa like Tanzania, have a civil law heritage based on Portuguese law, whereas Angola and Mozambique have a civil law legacy based on English law. The civil law, particularly French law, is deeply ingrained throughout West Africa's francophone nations. Some nations, including South Africa and Namibia, have mixed form of legal system as a result of the impact of both English law and Roman-Dutch civil law on their legal systems.
The insolvency law of a country is generally based on or borrows from various older laws serving as a guiding document during legislative drafting; however, it can be seen that a number of African countries have begun implementing a new contemporary legislation.]

3

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 financial crisis in East Asia in 1998 severely affected two countries, i.e., Indonesia and Thailand. This created an immediate requirement for an effective insolvency law to be in place in such countries when corporates failed as a large number of firms in the region became insolvent in the wake of financial crisis, but the insolvency proceedings that were in place were not effective.[1] The crisis hit countries exhibited fundamental weaknesses in their financial markets such as weak corporate governance, inadequate prudential supervision, inaccurate evaluation of credit risks, politically motivated lending decisions by state-owned banks etc. The reform initiatives that followed the financial crisis is as follows:

- ***(i) Singapore reacted by enacting an omnibus statute known as Insolvency, Restructuring and Dissolution Act to consolidate Singapore's corporate and personal insolvency and restructuring laws in October 2018. Post the financial crisis Singapore has emerged as a major restructuring hub for the Asian financial market.***
- ***(ii) In Thailand an additional section on Corporate Reorganization under Chapter 3/1 was added in the year 1998 to the 1940 Bankruptcy Act and Bankruptcy Court commenced operations in the year 1999.***
- ***(iii) In South Korea, the Corporate Reorganization Act was amended in 1999 to encourage rescue and "expedite and enhance the efficiency of the insolvency procedures."[2]]***

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.

[In North America there had been bilateral co-operation and co-ordination based on existing legislation and long-standing case law around comity between Canada and the United States. In the 1970s, Canada and the United States worked together towards a bilateral insolvency treaty which failed owing to its ambitious nature. Subsequent to the same, certain progress has been made by adoption of Model Law by both States and through other mechanisms such as Protocols. Thereafter, American Law Institute (ALI) prepared an International Statement by launching its Transnational Insolvency Project to "promote improved harmonization in the treatment of

[1] Insolvency Systems in Asia An Efficiency Perspective. OECD, 21-

[2] Asian Development Bank, *Country Report for Singapore Conference Cross-Border Insolvency—Indonesia, Korea, Philippines and Thailand* 3 (2004), *at* http://www.adb.org/documents/others/insolvency/insolvency-ctry-report-1.pdf

international insolvencies".[3] On the basis of the same, Principles of Cooperation among the NAFTA Countries was prepared and approved by members in the year 2000. It focused on insolvency of corporations and legal entities engaged in commercial activities while excluding natural persons.]

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

2
Marks awarded 8 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.

Any sophisticated system of bankruptcy law includes rules that allow antecedent transactions made by the debtor on the verge of insolvency to be annulled in favour of his creditors under certain conditions. These mechanisms, generally known as avoiding powers, voidable dispositions, or claw-back actions, which allows the retrospective avoidance of certain transactions.[4] The actio Pauliana, a component of which is still present in almost all contemporary civil legal systems, was such a feature in Roman law. Elizabeth I of England passed a law in 1571 that addressed transactions involving creditor fraud. It remained in effect for more than 400 years, but as time went on, its archaic language became a bigger concern. Section 423 of the Insolvency Act of 1986, written in more acceptable and modern English, eventually took its place.

There are several advantages to having rules for treatment of voidable dispositions. First and foremost advantage of having power of declaring certain transactions as avoidance being maximising the value of the firm. This power is limited to not just post commencement of insolvency period but also pre-insolvency period. This has in turn another advantage that it acts as a deterrent for the ex-management to enter into voidable transactions.]

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

[3] Jay Lawrence Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project,* 23 BROOK. J. INT'L L. 7, 8 (1997); Sean Dargan, *The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law,* 17 CONN. J. INT'L L. 107, 124 (2001).

[4] Jackson, T. H. (1984). Avoiding powers in bankruptcy. Stanford Law Review, 725-787

4

Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

> ***"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."***

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

[The author concedes that this definition is limited since it is connected to the existence of a national legal framework of insolvency law. In other words for such a concept to exist it is essential that there is a national or domestic law in place in the State. The author has also referred to other definitions of international insolvency law such as one provided by Fletcher which states 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 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."]

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

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.

['The most obvious way to effect international insolvency cooperation is though treaty or convention.' [5] The treaty is traditionally considered the ideal international agreement. In terms of Article 38(1)(a)[6] in the Statute of the International Court of Justice which states that 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states' recognizes it as a source of international law. The binding nature of a treaty is also recognized by the

[5] J Greene, 'Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross- Border Insolvencies' (2005) 30 Brook J Intl L 685, 726
[6] Statute of the International Court of Justice 1945, art 38(1)(a)

Vienna Convention on the Law of Treaties, 1969 which states that: 'a treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law'. Bilateral international insolvency conventions firstly appeared in Europe in the 13th and 14th Century which addressed the issue of absconded debtors.

Modern versions of bilateral treaties or agreements concerning jurisdiction, acknowledgment, and enforcement in relation to bankruptcies, winding up, arrangements, and compositions involving their State first emerged in the 19th century. The European Convention on Human Rights and other writings on the protection of individuals served as the foundation for the 1949 founding of the Council of Europe, which today has 47 member nations. It concluded the Istanbul Convention on Certain International Aspects of Bankruptcy in 1990, but not enough countries ratified it for it to become operative. However, it had a significant impact on how the European Union addressed the issues of international insolvencies among its member States.

There has been limited success in implementation of international insolvency law by treaties and conventions owing to various reasons associated with them. One of the primary reasons for such limited success is that a treaty is arrived at between two or more sovereign states after a long drawn negotiation process. The other issue is procedural complexities or lack thereof in its implementation. Further, any change in process has to be done by mutual agreement between the signatories of such sovereign states.]

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4.5

Marks awarded 13.5 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?

[Most legal systems include guidelines for different types of actions that can be taken to ease a debtor's financial issues. While approaching that resolution as a shared objective, these proceedings assume a variety of different shapes, for which consistent terminology is not always utilised, and may contain both what may be characterised as "formal" and "informal" parts. Formal insolvency proceedings are those that are started and governed by the insolvency law. Both liquidation and restructuring or rescue actions are typically included. Informal insolvency procedures typically entail voluntary agreements between the debtor and creditors and are not always governed by insolvency law. These negotiations, which originated in the banking and business sectors, often demand for the bankrupt debtor to be restructured in some way. Although unregulated, the efficiency of these voluntary negotiations depends on the existence of an insolvency legislation, which may offer covert incentives to pursue reorganisation.

The UNCITRAL Legislative Guide on Insolvency Law[7] states that there are two forms of corporate restructuring namely:

- ***(a) Formal insolvency proceedings are those commenced under the insolvency law and governed by that law. They generally include both liquidation and reorganization proceedings.***
- ***(b) Informal insolvency processes are not regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and some or all of its creditors.***

The key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement as compared to formal arrangement are as follows:
Advantages:

- ***I.*** Quicker reorganisation***: An informal mechanism is faster as compared to a formal mechanism owing to lack of need to follow procedural requirements which may be complex in nature as required in a formal mechanism which may include approval from courts or special tribunals.***
- ***II.*** Cost effectiveness***: As compared to a formal mechanism the cost of process linked to an informal arrangement of restructuring is lesser. Also as the process comparatively takes lesser time it avoids the cost of disruption in business and other costs related to stigma and loss of reputation that is otherwise attached to a formal process of restructuring.***
- ***III.*** Value maximisation***: A distressed asset has a life cycle, and the longer it is under stress, the more value it loses. The expenses related to a prolonged resolution process further reduce its worth. The formal insolvency process's public aspect, which damages the CD's brand, exacerbates value erosion. By removing certain***

[7] Legislative Guide on Insolvency Law by UNCITRAL accessed at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

parts of the formal process, the informal process keeps value. Early process start-up and completion, as opposed to the formal process, reduces the likelihood of business liquidation and the loss of economic value in otherwise viable companies. This is crucial to rescuing small enterprises that can't afford the costs of a protracted insolvency and so contributes to value maximisation. The quickness and reduction of formal procedures result in improvement in recoveries.

Disadvantages:

I. Lack of process finality: ***The potential of not achieving process finality is one of the main drawbacks of the informal out-of-court workout arrangement. If FPPL failed to come to an arrangement with Lobo in the present situation, it would cause an unnecessarily long delay in money recovery, and they would have to consider using a formal insolvency procedure.***

II. Absence of a statutory sanction: ***An informal process does not get the mandate or order from a court and as such may not be statutorily binding on the parties and the informal arrangement is only bound by a contractual arrangement. This has certain issues as there could be challenges by stakeholders. Further, there is a risk of parties not adhering to such contractual arrangements.***

III. Absence of a calm period: ***One of the goals of insolvency law is to guarantee a halt to debt collection efforts by creditors and give both debtors and creditors time to renegotiate their agreement. A good insolvency law has the feature of a collective feature that must in principle be binding on all the creditors. If a single creditor were allowed to continue with his or her individual debt enforcement mechanisms after commencement, that would render the collective proceeding ineffective. In order to stop fraud and safeguard the parties' legitimate interests, moratorium measures offer a quick "freeze." As a result, the Lobo will not be eligible for this benefit in the event of an informal agreement. As a result, FPPL might not be shielded from efforts by other creditors to recover their debts.]***

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 following roadblocks may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments:

(a) access – to foreign representatives and foreign creditors to domestic courts and domestic insolvency proceedings
(b) recognition - recognition of foreign insolvency proceedings by a domestic court, thereby, recognising the rights of the parties in overseas jurisdictions
(c) co-operation - between domestic and foreign courts, domestic and foreign insolvency professionals, and courts and domestic or foreign IPs
(d) coordination - coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts

The necessary parties in each nation may agree to help coordinate the full cross-border insolvency procedure in order to better coordinate the concurrent insolvency proceeding. This will assist in lowering process expenses and maximising the value of the debtor's assets. Protocols have shown to be extremely effective in reducing the expenses of litigation linked with cross-border bankruptcy processes by resolving the conflict of laws and other related issues. In cross-border insolvency proceedings, protocols have the capacity to address a variety of procedural issues and set up the best framework for a swift and efficient resolution of the debtor within the bounds of the respective States' domestic laws. However, the parties shall not use the Protocol as a method of evading any duties they may have under the applicable laws.

The UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), which offers a comprehensive procedural framework for access, recognition, cooperation, and coordination in cross-border insolvencies, can fill any gaps in domestic law and help foster the development of a cooperative ecosystem that is uniform across all adopting jurisdictions. The Model Law was approved by UNCITRAL in 1997, and 53 States in a total of 56 jurisdictions have since followed suit. The Model Law has generated enough legal precedent to support countries that are considering adopting it or have already done so. The UNCITRAL updated the Model Law enactment guidance based on its experiences in various countries. The Commission adopted the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation in 2009. The Model Law on the Recognition and Enforcement of Judgments Relating to Insolvency was developed by UNCITRAL in 2018. Chapter IV of the MLCBI authorises collaboration and direct communication between a local court and foreign courts or foreign agents and does not require reciprocity. There are other soft law approaches

It would be beneficial to also consider additional international instruments.

3.5

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in

Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

[The European Insolvency Regulation (EIR) no longer applied as of December 31, 2020, as a result of the UK's withdrawal from the European Union. As a result, in the present case, EIR shall not apply to the UK-instituted insolvency proceedings. Prior to that time, EIR, which had immediate effect and granted automatic recognition, governed the recognition and enforcement of insolvency procedures and judgements between the UK and EU Member States. Therefore, a Brexit means the following from the perspective of Insolvency Courts and Creditors in EU member states:

1. ***Insolvency cases filed in the UK wouldn't be recognised right away in other EU Member States.***
2. ***There are no requirements for court and insolvency representative cooperation or communication.***
3. ***Main insolvency proceedings in EU member states would not include non-main proceedings in the UK as an auxiliary measure.***

Due to Great Britain's adoption of the UNCITRAL Model Law on Cross-Border Insolvency, there is still an effective framework for the UK to recognise actions and judgments originating from EU Member States in the shape of the Cross-Border Insolvency Regulations 2006 in place. However, things won't be as simple as they were before Brexit. Therefore, recognising a proceeding from another European country may include more formal requirements and necessitate professional analysis of the relevant concerns.

According to Section 426 of the Insolvency Act of 1986, any court in the UK may assist courts with comparable insolvency jurisdiction in any area of the UK or any relevant country or territory and may apply analogous insolvency law to either court. However, foreign courts must make the request for assistance rather than a foreign insolvency representative. In addition to this, the Insolvency Service released a guide in March 2021 titled "Cross-border Insolvencies: Recognition and Enforcement in EU Member States" to give insolvency representatives a foundational understanding of the legal frameworks in the various EU member states as a place to start when requesting recognition for UK insolvency proceedings and handling assets in the EU.

Additional information: ***More information on the type of insolvency law being followed by country may be provided in which Lobo is to initiate restructuring/insolvency proceeding.]*** and MLCBI adoption info may be helpful.

4.5

Marks awarded 12.5 out of 15

* End of Assessment *

TOTAL MARKS 44/50
Excellent Paper