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 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.

Typically, the historical roots of the various insolvency law systems of African jurisdictions can be found in the laws of the colonial powers that once exerted control over those countries.

For instance, various African jurisdictions' insolvency law systems have their historical roots in:

- ***the English common law tradition's insolvency law system (including Nigeria, Kenya, Botswana, Zambia, Tanzania and other east-African countries);***
- ***civil law systems' insolvency laws, owing to European civil law jurisdictions with colonial influence in Africa, including France (being mostly west-African countries such as Senegal and Burkina Faso) and Portugal (such as Angola and Mozambique); and***

- *a hybrid of the English common law tradition's insolvency system and civil law systems' insolvency laws, where multiple former colonial powers have exerted influence: for instance, South Africa's insolvency law has been impacted by both Netherlands and England.*

Those African jurisdictions' insolvency laws' historical roots have tended to be reflected in iterative legislation that has built upon the old laws imported from European colonial powers as outlined above. That being said, some African States have begun to put into effect more modern insolvency laws.

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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 1997-8 financial crisis that affected eastern Asian (including notably South Korea, Thailand, Malaysia, Indonesia and Singapore) gave impetus to movements for insolvency law reforms, including Thailand's overhauling of its bankruptcy laws.

In the past few decades, Singapore has become a more significant jurisdiction to global financings and is a hub for money flows in east Asia, causing it to revisit its insolvency/bankruptcy legislative regime. In 2018, Singapore enacted its Insolvency, Restructuring and Dissolution Act, which unified into a single piece of legislation Singapore's regimes for corporate and personal insolvency and restructuring laws. That At came into force on 30 July 2020.

More recently, various jurisdictions have contributed to the Judicial Insolvency Network (the "JIN") conferences that have resulted in the drafting and promulgation of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the "JIN Guidelines"). Amongst east Asian jurisdictions, the JIN Guidelines have been adopted by the Supreme Court of Singapore and the Seoul Bankruptcy Court. The aim of the JIN Guidelines is to augment cooperation between courts of relevant States, in order that parallel proceedings in such States can be conducted more efficiently and effectively. The JIN has also developed its Modalities of Court-to-Court Communication, which seek to provide a framework for the courts of those relevant States to communicate with each other in relation to such parallel proceedings.

Various east Asia jurisdictions have incorporated the UNCITRAL Model Law on Cross-Border Insolvency into their domestic law - including the Philippines, South Korea, and Singapore.

Finally, as a regional soft law project, a broad selection of east Asia jurisdictions have together developed the Asian Principles of Business Restructuring, which in 2020 reported on corporate restructuring and insolvency in the region. The report covered in-court and out-of-court business reorganisation regimes in China, Hong Kong, India, Japan, South Korea, and the members of the Association of Southeast Asian Nations (the current members of which are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam).

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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.

In the 1970s, Canada and the United States attempted to negotiate a bilateral insolvency treaty. The attempt ultimately failed, but progress has been made between North American jurisdictions with regard to the resolution of international insolvency issues since then (as set out below).

*In the first instance, the Transnational Insolvency Project of the American Law Institute (the "*ALI*") - the ambition of which was to improve the coordination between the NAFTA countries of the United States of America, Canada, and Mexico in relation to international insolvency law issues - published, in 2000, the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "*ALI NAFTA Guidelines*"). The ALI NAFTA Guidelines apply to international insolvencies relating to the jurisdictions: the United States of America; Canada; and Mexico.*

*Also undertaken by the ALI, again by way of the Transnational Insolvency Project, were the ALI NAFTA Principles of Cooperation (the "*ALI NAFTA Principles*"), which were published in 2003. The ALI NAFTA Principles address corporate insolvencies in the relevant States (excluding individual insolvencies, and insolvencies of non-profit organisations and financial institutions). The ALI NAFTA Principles include general principles relating to cooperation between the States' courts, recognition of bankruptcies in a State by the courts of the other States, and various procedural rules and processes. The ALI NAFTA Principles also included a recommendation that each NAFTA country adopt the UNCITRAL Model Law on Cross-Border Insolvency (the "*Model Law*").*

*The ALI NAFTA Guidelines have been considered, in a project led by Fletcher and Wessels, in terms of their applicability globally. That project has led to the ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012) (the "*ALI - III Global Principles*").*

It is clear that the various ALI NAFTA work-streams and projects listed above have been a success within North America and Canada. Each of the ALI NAFTA Guidelines and the ALI NAFTA Principles have been adopted by each of the ALI NAFTA States. Furthermore, the NAFTA States have each adopted the Model Law (Mexico in 2000 and Canada and the United States of America in 2005). That adoption of the Model Law is particularly interesting because, as Fletcher noted (in *The Law of Insolvency (Sweet and Maxwell, 5th ed, 2017)*), the ALI NAFTA Principles were designed to be complementary to the Model Law and the NAFTA States hoped for the ALI NAFTA Principles to be considered, in the future, as groundwork for the development of supplementary provisions and guidelines to the Model Law.

Whether the ALI NAFTA work-streams and projected listed above will continue to be successful and influential will depend on whether cooperation and collaboration can continue outside of North America and Canada and whether the scope of the ALI NAFTA Principles can be extended beyond only corporate insolvency.

There is scope to elaborate. There is scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

3.5
Marks awarded 9.5 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.

Transactions or transfers that take place with a party after, or shortly prior to, the beginning of its insolvency may be subject to investigation and may be set aside if they meet certain conditions. Transactions subject to investigation and being set aside are known, together, as 'voidable transactions' or 'voidable

dispositions'. Voidable transactions exist both in relation to individual insolvency cases and corporate insolvency cases.

Voidable transactions are an important policy tool used to discourage creditors of an insolvent counterparty from taking individual debt enforcement action against that insolvent counterparty, which would run contrary to the purpose of modern insolvency law as a platform for collective debt enforcement action. Where undesirable (from a policy perspective) transactions occur, legislation relating to voidable transactions typically provides a selection of remedies to protect the other creditors of the insolvent counterparty. In summary, voidable transactions are a significant element of collective debt enforcement.

Transactions that are the subject of these provisions include those pertaining to fraud, those that treat some creditors in a more beneficial manner than others, and those that are value-destructive to the overall assets of the insolvent party. Accordingly, voidable transactions can broadly be put into one of two categories: either (1) they relate to a fraudulent transfer of property by an insolvent party (without that party receiving adequate consideration in return) or (2) they prefer a creditor, or a group of creditors, to the detriment of the insolvent party's other creditors.

In civil law jurisdictions, the concept of voidable transactions arose out of the actio Pauliana, a Roman law concept that has since evolved into voidable transactions in modern civil law jurisdictions. In English common law, the concept of voidable transactions arose out of the Act of Elizabeth (1570).

The Act of Elizabeth is widely regarded as the first true bankruptcy legislation (rather than legislation designed simply to prevent fraud). Among other things, the Act of Elizabeth moved English common law along the collective debt enforcement action path by giving jurisdiction for the supervision of insolvents' estates to the Lord Chancellor, whose role was to oversee the bankruptcy proceedings. The Lord Chancellor (or his delegate bankruptcy commissioners) could examine the transactions of the insolvent party, summon those persons for questioning, and (if appropriate) impose prison sentences on those persons. In civil law jurisdictions, the application of actio Pauliana was in contrast to the general theme of execution against the insolvent party (rather than their assets).

However, in both insolvency law systems, there has been a progression towards the collective debt enforcement action mentioned above, which is partly underpinned by the concept of voidable transactions.

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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.

Wessels's definition of international insolvency law above is limited because it relates, inherently, to national legal frameworks of insolvency law. One of the key issues in examining international insolvency law issues is that, in order to do so, national legal frameworks of insolvency law must be contrasted with each other and, in many cases, domestic legal systems do not provide for insolvencies that touch upon multiple jurisdictions.

Wessels identified a similar issue with Fletcher's definition of the international insolvency law, in The Law of Insolvency (Sweet and Maxwell, 5th ed, 2017), because Fletcher had similarly referred to circumstances that "transcend the confines of a single legal system, so that [...] domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

Where a State's jurisdiction to apply insolvency laws extends only to the limits of its national borders, and where insolvency cases transcend those borders, international insolvency law issues will arise. This is a particularly pertinent issue because recent history's technological advances mean that persons (both natural and legal), assets, and transactions are highly moveable, from jurisdiction to jurisdiction.

The limitations of Wessels's definition are most exposed in cross-border insolvency cases where: (i) there is a lack of coordination and cooperation between the courts of different States; (ii) there are multiple insolvency proceedings in relation to a single debtor, particularly if those proceedings are incompatible with each other as a matter of the relevant States' domestic insolvency legislation; (ii) unnecessary value destruction arises from conflicting attempts to provide solutions or rescue packages in relation to a debtor's financial distress; (iv) there is conflict as to priority rankings amongst creditors and security rankings amongst secured creditors, particularly leading to competing attempts amongst creditors to realise a debtor's assets (contrary to the general principle that creditors, or classes of creditors, should be treated equally in collective insolvency proceedings); and/or (v) there is a higher risk of fraudulent transactions.

In conclusion, Wessels's definition is limited by reference to States' domestic insolvency law regimes, meaning that there is an inherent risk of conflict wherever an international insolvency law issue (that is, an issue involving the domestic insolvency law regimes of multiple jurisdictions) arises. In the continued absence of global uniformity as to these issues, Wessels's definition will continue to be limited in that way and international insolvency law will be subject to a lack of clarity and predictability.

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Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

Treaties and conventions are instruments of public international law which States agree to be bound by and incorporate into their domestic legal framework accordingly. As part of domestic law, the relevant State's court will apply the incorporated substance of those treaties and conventions in relevant matters that are before it.

The history of European collaboration as to cross-border insolvencies demonstrates that treaties and conventions produce mixed success:

- *in the first instance, bilateral insolvency conventions were first introduced around the 1200s-1300s. These conventions provided an avenue for enforcement in relation to debtors who had sought refuge across borders from the jurisdictions in which they were insolvent.*
- *as time passed, more comprehensive and far-reaching bilateral conventions (relating to jurisdiction, recognition and enforcement, in relation to various insolvency proceedings) were promulgated.*
- *however, these rarely reached beyond bilateral agreements - the Nordic Convention of 1933 being an exception at the time, relating to Scandinavian States.*
- *attempts at agreeing multilateral treaties continued to falter; the Council of Europe was established in 1949, yet took until 1990 for its member states to agree a Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention, Council of Europe Treaty Series No 136). Even then, that convention was signed only by 8 of the Council of Europe's member states and did not enter into force because it was not ratified by enough of them.*
- *in fact, it has taken a move away from conventions and treaties - by way of European Union legislation - to achieve greater collaboration and uniformity amongst European States' insolvency frameworks.*

It is clear, then, that treaties and conventions have enjoyed mixed success, particularly when it comes to anything beyond bilateral agreements. This is

understandable, given disparities between States' domestic insolvency law frameworks, and in today's global environment it is important that alignment of cross-border insolvency laws is more uniform than a patchwork of agreements between two States. That widespread alignment is more likely to come from collective legislation rather than conventions and treaties.

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

4

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?

"Formal" insolvency proceedings are statutory proceedings commenced and continued under the applicable insolvency statutory regime. They are frequently court-supervised or in-court processes and their progress follows a defined path, as provided for in legislation.

By contrast, "informal" insolvency arrangements are processes that are frequently not subject to insolvency law regimes or court-supervision, but instead consist of voluntary negotiations between a debtor and some (or all) of its creditors with the ambition of consensual deals being reached between those parties in place of "formal" insolvency proceedings being, or becoming, necessary.

When considering whether to enter into any informal out-of-court workout arrangement it could enter into with FPPL, Lobo should consider that, unlike in "formal" insolvency proceedings:

- *there will be no moratorium to prevent other creditors from seeking the commencement of "formal" insolvency proceedings with regard to FPPL, meaning that those other creditors could cause FPPL to become insolvent and render ineffective the workout arrangement that Lobo has agreed with FPPL.*
- *similarly, any workout arrangement that is agreed will not bind other creditors.*

The risk in relation to the above points may vary depending on how many creditors FPPL has in Asgard (assuming it is financially comfortable in Encanto, which appears to be the case), how large their claims are in comparison to Lobo's, and whether the workout arrangement would give FPPL the breathing space to meet debts due to other creditors as they fall due. It would be helpful to know more about those points, as well as understanding whether FPPL's financial distress is a short-term issue that can be ameliorated or an indication of terminal decline/distress.

By contrast, an agreed workout arrangement would differ from "formal" insolvency proceedings by being significantly cheaper for Lobo to pursue (as opposed to involving the Asgard court), which is likely to prove expensive, and could remain private (rather than becoming publicly available information via court records). In both cases, an agreed workout arrangement is likely to help to protect FPPL's financial position from deteriorating further and, in turn, may prevent value-destruction.

Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

4.5

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

The insolvency representative appointed in respect of FPPL in Asgard may encounter difficulty wherever relevant laws of Asgard and Encanto diverge (for instance, where there are applicable property, intellectual property, or employment law elements at play). These issues may be exacerbated where the insolvency representative is not able to rely upon cooperation from the Encanto courts and where the Encanto courts and not willing to cooperate and coordinate with the Asgard courts during the concurrent insolvency proceedings.

Various cross-border insolvency agreements address such a lacuna. Assuming that neither Asgard nor Encanto are party to the UNCITRAL Model Law on Cross-Border Insolvency (but it would be helpful to know if that is indeed the case), the following international insolvency instruments may be of assistance:

- *the ALI - III report Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases (2012) (the "*ALI - III Report*"). The ALI - III report contains various global principles for cooperation and for court-to-court communications in international insolvency cases, along with various defined terms and rules on conflict of laws to assist with clarifying cross-border insolvency issues.*
- *the Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the "*JIN Guidelines*"). The JIN Guidelines seek to improve the efficiency and effectiveness of insolvency proceedings continuing in parallel in different jurisdictions by improving lines of coordination and cooperation between courts in cross-border cases. It would be helpful to know if either or both of Asgard and Encanto have adopted the JIN Guidelines.*

These cross-border insolvency agreements are important in cross-border insolvency matters because they provide for courts to coordinate and cooperate. Without these agreements, insolvency representatives and other stakeholders would be at the mercy of courts that were unwilling or unable to communicate and coordinate with other States' courts. In turn, that could lead to unsatisfactory outcomes for creditors (if, for example, the positions of creditors in one jurisdiction were prejudiced by the outcomes of concurrent insolvency proceedings in a different jurisdiction) and unnecessary expense and delay in progressing insolvency proceedings.

There is some scope to elaborate regarding relevant international instruments.

4

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.

*Following the UK's withdrawal from the European Union, the European Insolvency Regulation Recast (the "*EIR Recast*") ceased to apply in the UK from 11pm on*

31 December 2020 onwards and proceedings opened in the UK subsequently do not fall within the scope of the EIR Recast. What is the consequence of this?

It may be the case that FPPL's centre of main interests ("COMI***") is not in the UK - evidenced by the fact that the UK insolvency proceedings against FPPL were opened by a *minor* creditor of FPPL. The EIR Recast allocates jurisdictional primacy (known as main proceedings) based on a debtor's COMI, so it would be helpful to understand where FPPL's COMI is. This is a question of fact, starting from a rebuttable presumption that the jurisdiction of FPPL's incorporation would be its COMI. It is not clear where FPPL is incorporated (only that it is an incorporated company and that it has offices in the UK).***

If FPPL's COMI is in a European jurisdiction, the court of that State may be the appropriate one to open main insolvency proceedings pursuant to the EIR Recast. That could mean that any judgment given in respect of the UK insolvency proceedings could be unenforceable with regard to the European main insolvency proceedings (or, indeed, any other European jurisdiction in which subsidiary proceedings have been opened).

Non-enforceability of any judgment given or order made by the UK court may hinder the UK insolvency representative's ability to realise FPPL's assets or challenge voidable transactions, where the assets or transactions are outside of the UK. If that is the case, there could be damaging consequences for FPPL's UK creditors (and the petitioning creditor may not recover the debts that it was seeking to by opening insolvency proceedings in respect of FPPL.

It would be beneficial to also consider the MLCBI

3
Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 45/50
Excellent Paper