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.

> ***African countries still largely follow the laws of their respective former colonial masters. Therefore, the various insolvency law systems found in African jurisdictions would depend on the identity of each country's former colonial master.***
>
> ***Countries which were colonised by the UK such as Nigeria, Zambia and Tanzania have an English law tradition. On the other hand, countries such as Angola and Mozambique have a civil law tradition based on Portuguese law. The Francophone countries of West Africa are steeped in French civil law. There are also countries which have mixed legal systems such as Namibia and South Africa, since both the Roman-Dutch (civil law) and English law have influenced their legal systems.***

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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 1998 financial crisis in East Asia gave rise to some insolvency law reforms in countries affected by the crisis.***
>
> ***For instance, Thailand overhauled in bankruptcy laws in the wake of the 1998 financial crisis. In 1998, Thailand revamped its bankruptcy laws to allow for corporate restructuring similar to the United States' Chapter 11, through an additional section on Corporate Reorganisation under Chapter 3/1 which took effect in 1998. Thailand also assigned a bankruptcy court dedicated to bankruptcy and reorganisation cases.***
>
> ***In Japan, similarly, a new rescue process modelled after the United States' Chapter 11 was introduced. The civil rehabilitation proceedings (*minji saisei*) pursuant to the Civil Rehabilitation Act (Act No 225 of December 22, 1999), and the corporate reorganisation proceedings (*kaisha kosei*) pursuant to the Corporate Reorganization Act (Act No 154 of December 13, 2002), have the aim of rehabilitating and rescuing insolvent debtors, thereby preserving their businesses as ongoing concerns.***

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, the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border cases (2000) was developed by the America Law Institute ("ALI") Transnational Insolvency Project. These guidelines were intended to be complementary to the Model Law on cross border insolvency, and were developed for international insolvencies involving parties from United States of America and Canada. Professor Westbrook was appointed as reporter and advisory groups were formed with experts from the USA, Canada and Mexico. Together, an International Statement on the relevant country's insolvency law as applicable to international cases was prepared, and the Principles of Cooperation among NAFTA Countries was subsequently prepared and approved by the ALI Council and Members in 2000. This speaks to the success of the ALI NAFTA Guidelines as an initiative. However, the NAFTA Principles are limited in that they focus on the insolvency of legal entities engaged in commercial operations, but do not extend to (1) the insolvency of***

individuals, ie, natural persons and (2) the insolvency of non-profit organisations and financial institutions.

Another initiative would the drafting of Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines). The overarching objective of the guidelines is to improve the efficiency and effectiveness of parallel proceedings in international insolvencies through the enhancement of coordination and cooperation amongst courts which supervise the conduct of such international proceedings. These guidelines have since been adopted by the courts in, inter alia, the Americas and Canada. The JIN Guidelines appears to have been successful, having received the "Most Important Overall Development" award presented by the Global Restructuring Review.

In North America, Canada and the USA have made practical progress through both States' adoption of the Model Law and mechanisms such as Protocols. There had also been bilateral cooperation and coordination based on existing legislation and long-standing case law on comity.

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

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Marks awarded 9 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

The differences in the approaches regarding the treatment of voidable dispositions may be attributed to the different manners in which such rules developed in the context of English law and civil law. In relation to civil law systems, the Actio Pauliana forms the basis of avoiding fraudulent conveyances. The Actio Pauliana is an action in Roman law intended to protect creditors from fraudulent legal transactions, specifically transactions intended to reduce a debtor's estate by transfers to third party in bad faith. Thus, there appears to be an emphasis on bad faith or fraud as a requirement where dispositions are sought to be set aside under civil law.

Conversely in English law, the Act of Elizabeth of 1570 is the genesis of the remedy of avoiding dispositions. The Act of Elizabeth was designed specifically as a true bankruptcy statute, rather than as a law to prevent fraud. Thus, this explains why under the common law, there are multiple means of setting aside dispositions, not all of which involve fraud. For instance, dispositions may be set aside on the basis of being unfair preferences or undervalue transactions.

A framework for the treatment of voidable dispositions in insolvency systems may be devised based on the type of the dispositions. For instance, the requirements for setting aside a transaction may differ based on whether the transaction was a fraudulent conveyance (disposition of property in the form of a donation or undervalue transaction without receiving adequate value in return) or whether it was an unfair preference (disposition of property that causes or increases the debtor's insolvency, characterised by the settlement of a pre-existing debt to a creditor, or by affording a creditor real security for a pre-existing unsecured debt, thereby improving the creditor's position in insolvency). However, a common requirement across both could be that the transaction must have occurred at a time when the insolvency of the debtor was imminent, or the insolvency of the debtor was caused by the transaction.

These rules are important because an important premise of international insolvency law is to establish a collective debt-collecting mechanism, whereby the interests of each creditor are equally and fairly protected. Some debtors may choose to abuse the concept of a moratorium by entering into transactions in anticipation of insolvency, to the prejudice of creditors by depriving such creditors of the debtor's assets in insolvency proceedings. As such, rules pertaining to voidable transactions are essential to prevent: (1) fraud (where debtors or directors or debtor companies use such transactions to siphon assets); (2) preferential treatment of creditors by the debtors (where debtors use transactions to funnel assets to a certain creditor); (3) a sudden loss of value for the business entity just before the commencement of insolvency proceedings, to the prejudice of creditors. In some states where the law permits, the existence of voidable disposition rules allows for the creation of a framework to encourage the out-of-court settlement of debts because creditors are aware that last-minute transactions and seizures of assets are susceptible to being set aside and will be more incentivised to work with debtors to arrive at commercially workable settlements which exclude court intervention.

5

Question 3.2 [maximum 5 marks]

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

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

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

> ***This definition of international insolvency law is limited as it is connected to the existence of a national legal framework of insolvency law. In other words, this definition presupposes that international insolvency law only exists alongside a particular nation's domestic insolvency law, and likely has no independent existence. On this view, the operation of international insolvency law must depend, in each case, on the domestic insolvency law of a particular country. This would arguably limit the development of international insolvency law as the starting point is that of domestic insolvency law, which varies across countries.***
>
> ***The definition proposed by Fletcher exposes this limitation, whereby Fletcher espouses that international insolvency should be considered as a situation in which an insolvency occurs in circumstances which in some way transcends the confines of a single legal system. On this view, the essence of international insolvency law lies in the fact that it is meant to operate across boundaries, and the focus is no longer how international laws must be adapted to a particular country's domestic legal system. In other words, the starting point would be an immutable set of rules and principles which all countries should adhere to, before suitable adjustments are made for the particular circumstances of each country. Such a definition would arguably be more conducive for the development of international insolvency law.***
>
> ***The author's definition is also limited because it is focused on the idea of immediate and exclusive enforcement. However, that appears to be a view that focuses unduly on a single creditor and how that creditor's rights may be achieved. Such a definition is incapable of capturing the hallmarks of cooperation and coordination across different jurisdictions that international insolvency law requires. Hence, to overcome this limitation, the definition should not be hinged on whether the applicable law may be immediately and exclusively enforced, but on whether the applicable law provides for an equitable and collective distribution of the debtor's assets across creditors from multiple jurisdictions.***

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.

> ***Treaties and conventions are useful as a source for cross-border insolvency law, only to the extent that member states are willing to ratify them. Treaties and conventions can be bilateral (ie, between two countries) or multilateral (ie, between multiple countries). When ratified, treaties and conventions are incorporated into a domestic country's own laws, and thus constitute "hard law" instruments.***
>
> ***In Europe, for instance, bilateral insolvency conventions arose in the 13th and 14th centuries. These conventions addressed absconding debtors and gathering in assets. It appears that treaties can also focus on more specific areas of international insolvency law such as jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions.***
>
> ***A notable convention for cross-border insolvency law would be the Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe Treaty Series No 136. However, the success of this convention was limited. Only 8 members signed convention, and it was not ratified by sufficient members for it to enter into force. However, it was arguably successful in influencing the development of a European Union response to the problems of international insolvencies among its member states, which eventually led to the European Insolvency Regulation (EIR) (2000), and now the EIR Recase.***
>
> ***Another notable source of cross-border insolvency law as a multi-lateral treaty would be the Nordic Convention (1933), which was relatively more successful as it was ratified by Denmark, Finland, Iceland and Sweden, and was passed successfully.***
>
> ***On the whole, it is argued that treaties and conventions are not relatively a successful way of establishing cross-border insolvency law rules. A possible reason could be that countries might be reluctant to be bound to hard-law instruments such as treaties and conventions and would rather not ratify it. A more successful means of establishing international insolvency law rules would be soft law instruments, such as the UNCITRAL Model Law on Cross-Border Insolvency. Countries might be more open to adopting such soft law instruments which do not carry with them, for instance, the risk of sanctions should they breach any treaty or conventions. Such soft-law instruments would gradually bring international insolvency rules in various countries closer together.***

This is answered well. There is some scope to consider additional examples of treaties/conventions.

4.5

Marks awarded 14.5 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?

> ***Formal insolvency proceedings refer to proceedings which are commenced under the insolvency law and governed by such law. They include both liquidation and reorganisation or rescue proceedings.***
>
> ***Conversely, informal insolvency arrangements generally entail voluntary negotiations between debtor and creditor(s). These types of negotiations are commonly developed through the banking and commercial sectors and typically provide for some form of restructuring of the insolvent debtor. While not regulated by insolvency law, voluntary negotiations nevertheless depend on the existence of an insolvency law to facilitate such negotiations, by providing incentives or persuasive force to achieve reorganisation (*eg*, the fear of winding up under insolvency law would compel debtor companies to enter into restructuring arrangements contractually).***
>
> ***There are several key advantages that Lobo should consider in pursuing out-of-court workout arrangements with FPPL, compared to formal debt recovery options:***
>
> ***(1) Firstly, as FPPL is struggling financially in Asgard, Lobo might not recover much even if it pursues formal debt recovery options in Asgard. In addition, FPPL operates as a foreign company in Asgard and it is unclear what debt recovery options are available to FPPL as a creditor of a foreign company under Asgard insolvency law. Conversely, an out-of-court workout***

arrangement would give Lobo more flexibility to come to a commercially sensible and amicable solution with FPPL.

(2) Should Lobo commence formal debt recovery proceedings against FPPL, and FPPL becomes insolvent, it would go into liquidation. The distribution of FPPL's assets would then follow the order prescribed by law. This would disadvantage Lobo if Lobo is an unsecured creditor. Assuming that FPPL may make arrangements without falling afoul of any unfair preference or undervalue transaction laws, an informal workout arrangement may allow Lobo to recover more money by allowing FPPL to restructure and recover.

Costs and privacy require elaboration.

However, the key disadvantages of an out-of-court workout arrangement is the lack of security. In an informal out of court arrangement, there may be no accountability on the part of FPPL. Conversely, in a court-ordered judicial management, FPPL (or its judicial managers) would need to account to the court for its progress in the restructuring. This would prevent FPPL from dissipating assets or fraudulently using its assets in the interim. Moreover, if Lobo and FPPL enter into a contractual, out-of-court settlement arrangement, but it is unsuccessful and FPPL still becomes insolvent, Lobo would join the general pool of creditors if it has no security. By that time, the pool of Lobo's assets might have diminished significantly in the absence of monitoring by the court.

Moratorium and binding of dissenting creditors is relevant.

4

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.

Difficulties that may arise for the insolvency representative pertaining to cooperation and coordination include: (1) seeking recognition of the Asgardian insolvency proceedings from the Encanto court; (2) ensuring the equitable distribution of FPPL's assets amongst creditors from both jurisdictions, in light of potentially conflicting rules of priority; and (3) obtaining a moratorium of the insolvency proceedings in Encanto to facilitate the court-supervised insolvency proceeding in Asgard, assuming the Asgard proceeding pertains to the restructuring or reorganisation of FPPL.

(1) In relation to the first difficulty, it would be crucial to first get the Encanto court to recognise the insolvency proceedings in Asgard in order to protect the interests of the creditors of FPPL in Asgard (ie, Lobo). Otherwise, the

assets of FPPL might be completely depleted by the creditors in Encanto, to the prejudice of the creditors in Asgard. Furthermore, if the proceeding in Asgard relates to a court-supervised proceeding to restructure or reorganise FPPL, it is all the more important to keep the assets of FPPL in healthy shape to ensure it has sufficient funds to recover and reorganise.

(2) As to the second difficulty, different countries might have different rules in relation to priority of creditors. For instance, Lobo might be considered a secured creditor in Asgard but may be considered an unsecured creditor ranking low in priority in Encanto. In this regard, more information is required about the exact type of security Lobo has (if any) and the relevant laws on priority in Encanto and Asgard. However, the fundamental point is that it would fall to private international law, in the absence of any treaty between the countries, to determine the ranking of priority of the creditors.

The international insolvency instruments that have ben developed to assist with respect to those difficulties are chiefly the UNCITRAL Model Law and Cross-Border Insolvency ("UMLCBI"). Assuming that Encanto has adopted the UNCITRAL Model Law and Cross-Border Insolvency ("UMLCBI"), any proceeding in Asgard from Encanto's point of view would be a foreign non-main proceeding because FPPL's centre of main interests would likely be in Encanto (that being where its head office and significant operations are located) (see Art 17(2)(b)).

The UMLCBI is extremely important in promoting coordination and cooperation. In particular, Art 19 of the UMLCBI provides for relief that may be granted upon application for recognition of a foreign proceeding. The court may stay execution against the debtor's assets, and may entrust the administration or realisation of the debtor's assets to the foreign representative. This would solve difficulty (1) above as it would remove FPPL's assets in Encanto from being in danger of being dissipated.

Further, under Art 21(1) of the UMLCBI, the court may stay the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities. The court may also suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor, which prevents FPPL from disposing of its assets. Also, under Art 2(2) of the UMLCBI, the court may upon recognition of a fireng proceeding, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Encanto to the foreign representative, provided that the court is satisfied that the interests of the creditors in Encanto are adequately protected. This would solve difficulty (2), as it gives the foreign representative from Lobo the discretion as to the order in which FPPL's assets should be distributed. However, this is subject to cooperation and coordination, as the representative must satisfy the Encanto court that the Encanto creditors' interests are adequately protected.

Finally, Art 29 provides for the coordination of a proceeding under one jurisdiction and a foreign proceeding. Specifically, Art 29 provides that where a foreign proceeding and a proceeding under Encanto are taking place concurrently regarding the same debtor (FPPL), the court shall seek cooperation and coordination under Arts 25, 26 and 27. Art 25 pertains to cooperation and direct communication between a court of the Encanto and court/representative of Asgard, Art 26 pertains to cooperation and direct communication between the person administering the liquidation or reorganisation of FPPL and the foreign representative, while Art 27 pertains to the forms of cooperation. This would go some way in addressing the difficulties listed above as well. In light of the benefits mentioned, instruments such as the UMLCBI should be continuously developed and improved so that more countries adopt them, thereby leading to greater harmonisation.

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

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.

Whether the European Insolvency Regulation Recast ("EIC Recast") applies with respect to the UK commenced insolvency proceeding would depend on when the UK action is commenced. Following UK's exit from the European Union, the EIR Recast ceased to apply in the UK from 11pm on 31 December 2020. In the present case, given that the minor creditor's action in the UK was opened on 30 June 2022, the EIR Recast would not apply with respect to the UK commenced insolvency proceedings.

Notably, Article 7.1 of the EIR Recast states that unless otherwise provided, the law applicable to insolvency proceedings and their effects will be that of the state of opening of proceedings. Given that the EIR Recast is no longer applicable to the UK, Article 7.1 of the EIR Recast would arguably not operate to render UK Law the law applicable to the insolvency proceedings.

The EIR Recast essentially allocates jurisdictional competence to the courts of a member state within which is situated the debtor's centre of main interests ("COMI"). If the EIR Recast does not apply to the UK-commenced insolvency proceeding, and FPPL's COMI is determined to be some country other than the UK, it might lead to a situation of parallel proceedings with no coordination or cooperation between the courts/insolvency representatives in UK and the COMI. In this regard, FPPL is an incorporated company with offices in both the UK and throughout Europe, as well as other non-European countries. Thus, more information is required to determine FPPL's COMI.

Nevertheless, it bears noting that the EIR Recase has recently been amended to recognise the existence of insolvency proceedings outside of the EU for the purposes of coordinating proceedings both inside and outside the EU. Therefore, if the requirements are met for the recognition of non-EU insolvency proceedings, and the proceedings in the UK are recognised, there may be cooperation and coordination notwithstanding that the UK is no longer part of the EU.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 45/50

Excellent Paper