



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 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 roots of many African Insolvency law systems lie with the legal systems of those European powers involved in the modern colonisation of Africa (namely; Britain, France, Germany, Netherlands, Portugal, Spain and Italy). It'd be great to give examples for specific countries.**
- **In more recent times, the Organisation for the Harmonization of Business Law in Africa ("OHADA", or "OHBLA") was established (in 1993) to seek to regulate, revise and integrate the domestic laws of its member states (of which there are currently 17).**
- **In 2015, all member states of OHADA adopted the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI").**

- *Other African Nations, which are not members of OHADA, (for example; Ghana, Kenya, South Africa, Malawi and Uganda) have adopted the MLCBI, however, in certain cases (such as in South Africa) no designation of the countries to which the Cross Border Insolvency Act would be applicable has yet been made, rendering the MLCBI (practically) inoperative. South African insolvency law is thus regulated by principles of common law and private international law.*

1.5

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.

- *Following the Asian Financial Crisis in 1997 there has been a growing recognition of the need for better financial integration and reorganisation laws within the East Asian region.*
- *There are currently no treaties and/ or conventions that specifically address insolvency and restructuring issues within the East Asian region.*
- *Important reform initiatives in the region include:*
- *a joint project undertaken by the Asian Business Law Institute ("ABLI") and the International Insolvency Institute ("IIL"), which aims to publish a set of Asian Principles of Business Restructuring in an attempt to eliminate inefficiencies in insolvency and restructuring matters across the region; and*
- *an increasing number of states in the region have adopted the UNCITRAL MLCBI.*

It'd be beneficial to discuss reforms that took place in countries such as Thailand and Singapore.

1.5

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.

- *The United States and Canada sought to harmonize a cross-border insolvency system in the 1970's, aimed at promoting the efficient and equitable resolution of international insolvency issues, however, these early initiatives did not result in a binding treaty.*
- *The American Law Institute ("ALI"), an independent professional organisation aimed at clarifying, modernising and improving the law, began an initiative to*

improve co-operation and co-ordination which resulted in the preparation and approval of its Principles of Cooperation among the NAFTA Countries (being USA, Canada and Mexico) in 2000 (the "NAFTA Principles"), which were subsequently published in 2003.

- *Thereafter, ALI, together with the International Insolvency Institute ("IIL"), prepared the Guidelines Applicable to Court-to-Court Communications in Cross-Border cases which have been endorsed by several judicial bodies in North America.*
- *The NAFTA Principles and are aimed to improving cooperation between the NAFTA states in an effort to maximise the value of a corporate debtor's assets and recognition of the debtor's bankruptcy status with those states.*
- *Additional General Principles address issues including moratoriums against individual debt enforcement, information sharing, access to judicial proceedings and distribution of assets. The Additional General Principles also provide further recommendations for international agreement on insolvency issues.*
- *Each of Mexico (in 2000), Canada (in 2005) and USA (2005) have subsequently become signatories to the UNCITRAL MLCBI.*

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 6 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 law on voidable transactions in the common law system of England has its roots in the Act of Elizabeth (1570), as developed by the Statute of Ann (1705) and the Act of 1883 and as further developed under the English Courts of Equity, leading ultimately to the Insolvency Act, 1986.*

- *Certain civil law systems (such as those of the Netherlands) have, as the root of their systems on those voidable, the Roman Law principle of the Actio Pauliana (being an action in Roman law aimed at the protection of creditors from fraudulent transactions).*
- *Civil law, having developed from early Roman Law principles, and English Insolvency law, having developed from legislation, have thus developed different approaches in respect of voidable transactions and the setting aside of voidable dispositions.*
- *A voidable transaction is one that may be set aside by a creditor or liquidator in certain circumstances, with the ultimate aim of returning the benefit of the transaction received by the receiving party to the insolvent estate. The rules on voidable transactions are important tools in an insolvency regime and deal with situations in which a creditor has been adversely affected by the actions of the debtor.*
- *The starting point in relation to voidable transactions is the basic principle that third parties must respect the rights and obligations relating to contracts to which they are not a party (even if prejudiced by those contracts). However, in certain situations, creditors are entitled to object to contracts entered into by the debtor and seek to unwind the consequences of those acts. Typically, such transactions can be set aside in circumstances in which the debtor knew (or ought to have known) that prejudice to the creditor would result from the act.*
- *The rules relating to voidable transactions are important for the purposes of:*
 - (a) *preventing fraud, for example, where the debtor has attempted to dissipate assets for his own benefit, or for the benefit of the shareholders or directors of a company;*
 - (b) *preventing favouritism, for example, where the debtor seeks to prefer some creditors at the expense of others;*
 - (c) *Preventing loss of value of the business when a company is bordering on insolvency; and*
 - (d) *creating an environment for the orderly gathering of assets and/ or encouraging settlements given the knowledge that assets seized by creditors may be "clawed back" for the benefit of the insolvent estate as a whole.*

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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.

- *The definition of "international insolvency law" as a "body of rules" is limited by the fact that such rules are necessarily the domestic laws of a particular State.*
- *The fact that such rules are limited to the domestic laws of a State is necessarily the case given that a State's enforcement of its laws applies only within the confines of its geographical borders.*
- *The laws of any given State have developed from rules that have governed the conduct of persons and the dealing of assets within those geographical borders. However, the modern market economy has developed in recent times such that the interaction between individuals (and transactions relating to assets) frequently have a cross-border element.*
- *The multi-national element to the modern economy presents significant challenges when it comes to an orderly winding up (or reorganisation) of a company (or an individual's) financial affairs and/ or the collection and distribution of assets for the benefit of the general body of creditors and stakeholders (who themselves may be situated in different States).*
- *Whilst certain treaties and conventions may govern the manner by which certain States (particularly those that are geographically aligned) deal with international elements of insolvency law there is not (yet) a single set of rules dealing with international insolvency which might properly be termed as an (or the) "international insolvency law."*

There is some small scope to elaborate. But this is answered well.

4.5

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 establishment of treaties and conventions have, in certain instances, been successful at establishing (more) uniform insolvency rules as between nation States. As noted by the author, Fletcher, such multilateral arrangements are*

more likely to be successfully put in place "among states that are regionally grouped in such a way that functional interaction takes place constantly, and at many levels." Treaties and conventions have thus been more prevalent, and mores successfully implemented, at a regional level. Examples include:

- *In Latin America, the Montevideo Treaties (1889 and 1940), and the Havana Treaty on International Commercial Law (1928) have been (partially) successful in establishing a set of rules allowing for a single insolvency proceeding in one of the member states, with universal effect throughout the region.*
- *The Nordic Convention was concluded in 1933 as between certain Scandinavian countries. The Nordic Convention has been very effective at establishing and promoting the principle of comity between the member States. As a result of the Nordic Convention, member States accord special recognition and enforcement of insolvency adjudications in other member States, for example, the recognition of a "domiciliary" bankruptcy order being applicable to property situated throughout the member States.*
- *The EU Regulation on Insolvency Law 1346/2000 (EIR) was considered a milestone in the cross-border coordination of national insolvency proceedings between European States. The EIR Recast (2015) (effective from 26 June 2017) provides for wide-ranging clarifications as well as extensive new coordination rules to aid the recognition and enforcement of cross border insolvency proceedings between EU member states.*
- *The UNCITRAL MLCBI is designed to assist States in developing a modern and uniform insolvency framework to address instances of cross-border proceedings, however, it is neither a treaty nor a convention. It has, however, been adopted by numerous States as domestic legislation.*

There is some scope to elaborate and discuss the nature of treaties / conventions.

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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?

- *Formal insolvency proceedings involve legal proceedings commenced under, and governed by, the relevant insolvency laws of a particular State. Formal insolvency proceedings have the advantage of obtaining protection (for the debtor) from creditors and debt collection and (usually) instituting a stay on any new legal proceedings being brought against the debtor. Formal insolvency proceedings usually require oversight by a licensed insolvency professional and/ or the supervision of the Court. These procedures include liquidation and formal reorganisation and/ or restructuring. Formal insolvency proceedings can be disadvantageous due to the cost of engaging professionals, delays arising out of the Court supervisory functions and due to the relative inflexibility of the procedure.*
- *An informal insolvency arrangement usually involves the debtor (or its agents/ advisors) negotiating directly with creditors in order to come to some form of arrangement to repay debt. Informal insolvency arrangements are not necessarily governed by any particular insolvency laws. For informal restructuring/ arrangements to be successful it is important that there be a viable underlying business and some form of liquidity to keep the business afloat while the informal arrangements are being negotiated and implemented. Informal restructuring/ arrangements requires support from the main stakeholders. Informal arrangements can be advantageous due to the flexibility of the arrangements and costs savings in engaging legal and insolvency professionals.*
- *In considering whether to engage with FPPL in relation to an informal arrangement, Lobo should consider the reasons for FPPL's current financial distress and carefully consider whether these are likely to result in short-term cash flow difficulties for FPPL, or longer-term difficulties that are likely to threaten the underlying business, for example (in addition to the staffing issues and market turndown): loss of a major supplier or customer and/ or increase in overhead costs and/ or growth by acquisition leading to cash flow difficulties and/ or evidence of fraud or improper practices.*
- *Lobo must also consider whether FPPL is likely to have any other creditors who may institute formal insolvency proceedings and whether FPPL has assets that are likely to be sufficient to meet its debts (or whether it is more viable as a*

going concern) and, in particular, the ability of FPPL to receive cash flow and/or make payments from its Encanto office.

It would be beneficial to also consider matters such as the absence of moratorium and the inability to bind dissenting creditors in an informal workout. 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.

3.5

Question 4.2 [Maximum 5 marks]

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

- *Under the principles of modified universalism, the most appropriate State in which to wind up a company is likely to be the jurisdiction in which it is incorporated - in this case, Encanto. The interests of FPPLs creditors are likely to be best served where the Courts of Asgard and Encanto co-operate with one another to ensure that all the company's assets are distributed under a single system of distribution.*
- *The key difficulties facing the Asgardian insolvency representative will be the recognition of his/ her appointment in Encanto. Similarly, the appointment of the Encanto insolvency representative may not be automatically recognised in Asgard. The fact of the concurrent proceedings may raise numerous practical consequences and complications, including:*
 - (a) The gathering in of assets from different jurisdictions;*
 - (b) The costs arising out of running two concurrent proceedings, the payment of the fees of the insolvency representatives and professional advisors and avoiding duplication of work;*
 - (c) The powers of the respective insolvency representatives to investigate the affairs of the company, including investigations into the conduct of the officers of the company and the sharing of information as between the two insolvency representatives;*
 - (d) The sharing of resources (including funding) as between the two insolvency representatives;*
 - (e) The establishment of procedures by which creditors (in either jurisdiction) are to file a claim and ensuring fairness for creditors (everywhere);*

- (f) *Determining which set of laws (Encanto or Asgard) applies to the distribution waterfall, subordination of claims, preferred creditors, and (possibly) the treatment of employees;*
- (g) *The treatment of contracts entered into by the Company and the choice of law provisions governing such contracts; and*
- (h) *The application of foreign law (either Encanto or Asgard law) governing contracts and/ or security arrangements entered into by FPPL.*

- *It is unclear from the brief factual background whether there exist any treaties or conventions governing the application of insolvency laws between Encanto and Asgard, and (if such treaties or conventions exist) these are likely to have a significant impact as to the manner by which the Courts of Asgard and Encanto (and their respective appointees) cooperate together and co-ordinate the liquidation of the company.*
- *The adoption of the UNCITRAL Model Laws, rules of private international law, treaties and/or conventions may govern (and will likely have a significant impact on) the issues set out above. The existence and development of such international insolvency instruments is therefore extremely important to avoid conflict, uncertainty and duplication and ensure that the insolvency procedures are conducted for the best interests of the creditors and other stakeholders.*

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

3

Question 4.3 [Maximum 5 marks]

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

- *Prior to the UK's departure from the EU Prior to 1 January 2021, recognition and enforcement of insolvency procedures between the UK and EU Member States was subject to the European Insolvency Regulation (Recast), 2015 (the "EIR (Recast)"). The EIR (Recast) determined the proper jurisdiction for a debtor's insolvency proceedings, the applicable law to be used in those proceedings and provided for the recognition of those proceedings in EU member states.*

- *The EIR (Recast) no longer applies to UK insolvencies where the main proceedings were opened after 11pm on 31 December 2020 (and thus does not apply to the UK proceedings commenced against FPPL on 30 June 2022).*
- *Although the EIR (Recast) is no longer in place, there remains an effective legal framework for recognition of proceedings and judgments from EU member states to the UK, including the Cross-Border Insolvency Regulations 2006 (UK's enactment of the UNCITRAL MLCBI).*
- *Recognition of UK proceedings and judgments in the EU will be subject to the local laws of the individual member states and the recognition of FPPL's (Encanto) insolvency proceedings is likely to require court applications (and encounter possible procedural hurdles) that may not have been encountered under the EIR (Recast).*
- *In the event that Lobo seeks to institute legal proceedings against FPPL in a European country (other than the UK), it will be necessary to determine whether that European country has the necessary jurisdiction to wind up a foreign (UK) company. Further information necessary to answer this question may include whether:*
 - (a) there is a sufficient connection between FPPL and the European country;*
 - (b) FPPL has assets within the European country;*
 - (c) there is likely to be a benefit to those applying for the insolvency proceedings in the European country; and*
 - (d) there are creditors (or other stakeholders) within the jurisdiction of the European court.*
- *In the event that an insolvency representative is appointed in a European country, any requests (to the UK Court) for assistance must come from the relevant European Court rather than from the European insolvency representative. This will require the European insolvency representative to apply (to its home Court) to request that a letter of request be sent to the relevant court in the UK.*

It would also be beneficial to know if MLCBI adopted.

4

Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS 40/50

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