



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 9 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 the various African insolvency law can be found in each of their respective former colonial powers. For example, Nigeria and Botswana have English Law heritage, South Africa has a mixture of civil and English law while Angola and Mozambique have civil law roots. Many of the current insolvency legislation is based on the states older, imported laws.

An objective of the Organisation for the Harmonization of Business Law in Africa (the "OHBLA") is to harmonise the domestic laws of its member states including their respective insolvency laws. In 2015 all 17 member states of the OHBLA adopted the UNCITRAL Mode Law on cross-border insolvency.

To achieve full marks, further details were required.

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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 economic crisis severely affected Eastern Asia and gave rise to some insolvency reforms in the region. Additionally, there has been some notable cross-border insolvencies which impacted on the Eastern Asian region.

In terms of law reform initiatives, the Asian Development Bank (“ADB”) has been promoting reform initiatives in Asian insolvency regimes. In 1999 the ADB produced a report which highlighted the lack of cross-border insolvency provisions.

Asian regional efforts to reform insolvency law in the Asian region have concentrated on the UNCITRAL Model Law on Cross-Border Insolvency. An increasing number of Eastern Asian states have adopted the Model Law including Singapore, Japan and Australia.

The Asian Business Law Institute together with the International Insolvency Institute published a report Corporate Restructuring and Insolvency in Asia. The project seeks to eliminate the inefficiencies in Asian cross-border insolvency regime. It involves two phases:

- 1. Phase one: A mapping exercise of the business reorganisation regimes (both in-court and out-of-court) in ASEAN, Australia, China, Hong Kong, India, Japan and South Korea. The mapping exercise will be published as a compendium of “Jurisdiction Reports” for each of the 16 jurisdictions considered.*
- 2. Phase two: An examination of the Jurisdictional Reports to determine the areas of similarity and make recommendations for ways in which the regimes in each jurisdiction could work more effectively with one another. The aim is to publish a set of Asian Principles of Business Restructuring (again, covering in-court and out-of-court regimes) directed at judges and practitioners, but also legislators and policy-makers in Asia.¹*

There was scope to elaborate regarding reforms in countries, such as in Thailand and Singapore

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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.

¹ <https://abli.asia/Projects/Asian-Principles-of-Business-Restructuring>; accessed 27 Oct 2022

The American Law Institute developed the ALINAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000). This instrument purpose is to resolve international insolvencies issues which involve North America and Canada. The Guidelines addresses corporate and other legal entities insolvency but excludes individual insolvency, non-profit organisation and financial institutions.

The ALINATA Guidelines have received some success as it has been used in many cross-border cases such as the Lehman Brothers case which involved about 70 insolvency proceedings in 17 countries.

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.

It is true that there are difficulties with designing a proper cross-border insolvency dispensation because of the differences in domestic insolvency laws and approaches.

Many state's insolvency systems are either based on English or civil law and within each domestic system, whether based on civil or English law, there are differences in policy approach, differences in substantive and procedural rules and differences in essential areas of general law.

As regards to voidable dispositions, the actio Pauliana which determines fraudulent transactions and reverses such transactions, forms the basis for dealing with fraudulent dispositions in civil law systems; e.g. Article 1167 Belgian Civil Code. In English law systems the Statute of Anne 1705 the Act of Elizabeth of 1570 forms the basis for dealing with fraudulent dispositions; e.g. Section 127(1) Insolvency Act 1986 which makes any transactions entered into after the presentation of a windup petition potentially voidable. This shows that different laws and policy considerations within each type of system will

dictate how voidable dispositions are treated within those systems, resulting in conflicting claims in a cross-border context.

These difficulties can be alleviated if the concerned states accede to or ratify treaties or conventions amongst themselves which would determine the relevant cross-border insolvency issues.

*Nevertheless, there are states which have legislative dispensation provisions for dealing with cross-border insolvency issues like differing treatment of voidable dispositions, i.e. their domestic law permit recognition and co-operation with foreign proceedings. However, some states do not have such provisions but could allow the local court to be approached on an *ad hoc* basis to allow insolvency representatives to deal with issues. In English/common law states, through the common law principle of comity, courts can be approached for a remedy whether or not there is a legislative dispensation provisions. Note however, that in civil law states there may be little to no inherent court jurisdiction to assist in like manner. It is therefore possible to find some ease in dealing with cross-border issues by application of private international law. Note however that the extent to which private international law will accomplish the particular objective is determined by the cumulative application of private international law rules by each state within whose jurisdiction the objective needs to be accomplished.*

In absence of treaty or convention or domestic provisions, two broad approaches exist when dealing with cross-border insolvency issues such as differences in treatment of voidable disposition;- universalism which suggests that one insolvency proceeding should govern the debtor's debts and assets worldwide; and territorialism which states that each state should exercise its own insolvency laws in relation to the debtor, its assets and creditors within its jurisdiction. It is noted that English law states tend to more closely align with universalism, while civil law states tend to adopt the territorialism approach, which consequently does not recognise any extraterritorial aspects of cross-border insolvency. In practice, states do not adopt either approach in their purest form and instead may apply any of the following "hybrid" approaches:

Modified universalism - the most relevant state to conduct the proceeding is identified and all other states facilitate and co-operate with the proceeding.

Modified territorialism - predicated on territorialism but supplemented by multi-lateral conventions.

Contractualism - the debtor elects which legal system will apply by stating such in their constitutional documents.

Cooperation - use of protocols to govern cooperation and coordination

Internationalist - *any of the foregoing approaches are available, depending on the circumstances of the case.*

Whatever the approach taken an important underlying principle is co-operation and coordination amongst courts to deal with the difficulties of cross-border insolvency. Various initiatives such as ALI-III Guidelines Applicable to Court-to-Court Communication in Cross-border cases, Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters and The UNCITRAL Model Law which mandates cooperation and coordination are trailblazing in this regards.

It is important to have these rules about co-operation and coordination so that there is an effective, clear and predictability uniform approach to international insolvency generally and in regard to voidable dispositions; they are important to prevent forum shopping, prevent fraud on creditors and to ensure equitable and fair treatment of all creditors.

You also needed to provide a context or framework for the treatment of voidable transaction rules in insolvency systems. This could have been done by briefly explaining the nature of voidable dispositions before discussing the importance of rules addressing them.

2

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 above definition proffered by Wessels is perceived as limited because the ‘body of rules’ which he is referring to are domestic rules; i.e. it is referring to insolvency proceedings which are pursuant to domestic laws. Even with consideration of the international aspects of a case and application of private international law rules such laws cannot truly be defined as “international” insolvency law because they cannot be applied or enforced transnationally. There is no unified body of insolvency rules/laws nor is there a single or an

international court that can adjudicate on cross-border insolvency cases. Each state applies their own rules which, in absence of treaties or conventions, has no extraterritorial effect. International insolvency is a situation that involves more than one states thus a truly international insolvency law would be one that applies globally like a supranational law wherein all states submit their right to make judicial decisions. Fletcher stated that:

“a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case”

The ability to apply domestic laws to an international situation and even being able to successfully have it recognised and enforced in another state does not make such domestic law “international” law. It is still domestic law.

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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 have been used as a source of cross-border insolvency law for centuries. It would be beneficial to discuss the nature of treaties / conventions.

One of the earliest treaties is the Latin American Montevideo Treaty of 1889. The treaty made provisions for liquidations, provided the notion of unity of proceedings and jurisdiction of the state in which the debtor is commercially domiciled. The 1940 revised treaty defined the term commercial domicile and made provision for compositions, analogous proceedings and suspension of payments. Another early instrument is the Bustamante Code [1928] which was adopted by 15 Latin American states provided the notion of universality and unity.

These instruments provided guidance on insolvency between the signatory states which had similar legal cultures and which were economically intergraded. They have broad application however but gave preference to local creditors.

The 1933 Nordic Convention, a multi-lateral treaty between Sweden, Denmark, Iceland, Norway and Finland provided for the amalgamation of debtor’s assets and distribution pursuant to the rules of the state in which the proceedings commenced (e.g. the debtor’s residence or its registered office). It also provided for judicial assistance, recognition of judicial decisions and recognition of proceedings in other states.

The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) is the current multilateral instrument on international insolvency within the European Union and provides uniform rules for settlement and also focuses on coordination of proceedings as they exist in member states.

Protocols, also described as mini-treaties, have been used to conduct insolvencies in a number of cases. The most famous example is the protocol used in the Maxwell case. The protocol in the Maxwell case was used to coordinate the US Chapter 11 proceeding and the UK administration proceeding.

Some of these treaties and conventions appear to work well but the essence of their success is that they are purely regional or, in the case of a bilateral instrument, work well between the two signatories. These instruments work well because the signatory states are closely linked and have similar legal and insolvency laws. Accordingly these treaties are unlikely to work outside their particular context. Additionally difficulty can arise in an international insolvency situation where some of the concerned states fall within the scope of a treaty and some do not.

There is scope to elaborate regarding the success or otherwise of treaties / conventions.

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Marks awarded 10 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 commenced under and governed by insolvency law. Generally they include liquidations, reorganisation and corporate rescue.

Informal insolvency proceedings are not always pursuant to or regulated by insolvency law. Such proceedings usually include negotiations between the debtor and its creditors and can include some form of debt restructuring.

A key advantage Lobo should consider about informal out-of-court arrangement is the cost efficiency of such arrangement because there is no court involvement. Privacy is also relevant.

However, disadvantages Lobo should consider about informal proceedings are that:

- 1. There is no way of binding dissenting creditors to the agreement; and*
- 2. it will still be open for other creditors to pursue insolvency proceedings against FPPL;- thus in the event that insolvency proceedings are subsequently commenced against them, any avoidance provisions in the law may cause any transfer of assets to Lobo or obligations undertaken to be cancelled.*

*In a formal insolvency proceeding a moratorium and stay of other proceedings are put in place which would prevent dissipation of FPPL's assets through individual creditor claims thereby preserving the availability of the assets for *pari passu* distribution to all creditors. Additionally in a formal insolvency it may be possible to bind dissenting creditors to whatever arrangements made. The key disadvantage that Lobo may consider with formal insolvency proceedings however, is the cost, as it is likely to involve the court.*

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.

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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 Asgardian insolvency representative may encounter the following difficulties

- *Recognition or standing of the foreign proceedings in Encanto*
- *Whether it can participate in the Encanto proceeding*
- *Whether a stay can be placed on the Encanto proceeding*
- *Whether a moratorium can be placed on other creditor proceedings against FPPL*
- *Coordinating the claims and procedures of the concurrent proceedings*
- *Dealing with the differences of each states' other commercial laws and policy considerations:- for example the differences in property rights, labour rights, security rights, priority rules and other socioeconomic issues; these differences will results in conflicting claims between states especially with regards to the debtor's assets.*

The international instruments which have been developed to assist with the above noted difficulties are:

- *The UNCITRAL Model Law which mandates cooperation and coordination*
- *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);*
- *Ali-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012), these are guidelines for court-to-court communication and are applicable worldwide; and*
- *Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).*

The importance of these instruments is that they are useful for aiding in the fair and efficient administration of the debtor's insolvent estate in a cross-border insolvency, with a view to maximising the benefit to the debtor's cross-border creditors.

Additionally, because these instruments are non-prescriptive they (allowing flexible venue for creating avenues of cooperation and coordination), parties are able to tailor provisions to meet the specific needs of their case and/or the particular requirements of applicable laws.

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.

The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the "EIR Recast") is the current multilateral instrument on international insolvency within the European Union, N.B. it applies to all European Union member states except Denmark and addresses, among other things, recognition and enforcement of insolvency proceedings, definition of "centre of the debtor's main interests" and co-operation and co-ordination.

The EIR Recast determines the proper jurisdiction for insolvency proceedings against EU Member states' debtors, the applicable law to govern those proceedings and it mandates automatic recognition of those proceedings between EU member states. However, as at 11 pm 31 Dec 2020 the EIR Recast no longer applies to UK insolvency proceedings and consequently it would not make sense for Lobo to commence proceedings against FPPL under the EIR Recast because such proceeding would not get any automatic, recognition, enforcement, co-operation or co-ordination from the courts. Note that the UK proceedings would have been pursuant to the Insolvency Act 1986 and not the EIR Recast, wherein again, there would be no automatic recognition or enforcement of those proceedings in any EU Member state. Recognition of the UK proceeding in any EU state would be determined by the laws of the relevant EU state and not the EIR recast.

Lobo could commence proceedings under the Cross Border Insolvency Regulations 2006 (CBIR), which adopted the UNCITRAL Model Law on cross-border insolvency. This would provide Lobo with recognition and assistance by UK courts for proceedings started in another country (in this case the EU state which Lobo is in). It is also possible for Lobo to pursue under UK common law principles but this would not assist with any reciprocal recognition of the UK proceedings in the EU member state.

5

Marks awarded 14 out of 15

* End of Assessment *

TOTAL MARKS 39/50

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