INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the summative (or formal) assessment for Module 1 ***of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

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6. ***The final submission date for this assessment is*** 15 November 2022***. The assessment submission portal will close at*** 23:00 (11 pm) GMT on 15 November 2022***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages***.***

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct***. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

Civil Law and English (Common) Law countries have the same historical roots. Select from the following the best response ***to this statement.***

(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.

(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.

(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.

(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.

Question 1.2

Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response ***to this statement.***

(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.

(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.

(c) This statement is untrue since discharge of debt never became part of any of these systems.

(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.

Question 1.3

England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.

(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.

Question 1.4

There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.

(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.

(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved' after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.

(c) The statement is untrue since insolvency law rules are not collective in nature.

(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.

Question 1.5

All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.

(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.

(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.

(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.

Question 1.6

The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign

insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is true?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.8

Which of the following best describes international insolvency law?

(a) It is public international law governing insolvency law between States.

(b) It is private international law governing insolvency law between States.

(c) It may involve aspects of both public international law and private international law.

(d) It involves a simple classification within either public international law or private international law.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

Question 1.10

Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response to this statement.

(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.

(b) This statement is untrue because North America was not a party to these agreements.

(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.

(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

The laws governing much of Africa gained their roots from former colonial states. South Africa and Namibia have legal systems informed by both roman-Dutch (civil) law and English law. The West African Francophone countries have their origins in civil (particularly French) law. Certain other African countries (including Botswana, Zambia, Kenya and Nigeria) are based on English law; whereas others (Mozambique and Angola, for example) are based on civil (Portuguese) law. Much of the insolvency regimes across Africa have been adapted from the older origins of their legislative regimes. However, quite a few African states have implemented more recent insolvency legislation. E.g. OHADA members in sub-Saharan Africa (since the treaty took effect from 1995), adopted the UNCITRAL Model Law on Cross-Border Insolvency and passed insolvency legislation in this respect, and gaining an arguably more modern and universally applicable regime.

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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 across East Asia significantly impacted countries such as Thailand and Indonesia. The aftermath of this crisis and its ongoing impact led to insolvency law reforms in places such as Thailand, which reformed all of its bankruptcy laws.

Separately, and more recently, Singapore (an increasingly important financial hub in the region) passed new insolvency laws in October 2018. This legislation consolidated the country's corporate and personal insolvency and restructuring laws into a single unified piece of legislations with effect from 30 July 2020.

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.

During the 1970s, the US and Canada attempted to formulate a bilateral insolvency treaty. That treaty was unsuccessful as it was not targeted enough and possibly too broad in scope - the countries simply could not reach agreement.

Better progress has been made via each state adopting the Model Law and through adopting international insolvency Protocols. The broad adoption of the Model Law possibly lent itself to a successful development insofar as North America and Canada are concerned.

Another example of a successful initiative has been the work undertaken by the American Law Institute, in its assistance to resolve international insolvency issues between the NAFTA countries. This culminated in Principles of Cooperation amongst the NAFTA countries being approved in 2000, focusing on the insolvency of corporations and other legal entities (not personal insolvency). This was a very significant and important development in helping to resolve international insolvency issues in North America and Canada.

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.

There is no single set of insolvency rules that apply globally. Whilst many countries do have similar domestic insolvency laws; many differ markedly. This makes it incredibly difficult, if not impossible, to create a successful cross-border insolvency dispensation. For example, the treatment of voidable dispositions amongst nation states differs greatly, particularly when comparing those that stem from English law as against civil law jurisdictions.

The Act of Elizabeth of 1570 is said to be the basis for the fraudulent conveyance law under English legal systems, whereas, the actiio Pauliana is the basis for the civil law systems.

The Actiio Paulian is a legal action in Roman law that seeks to protect creditors from fraudulent legal transactions, in particular, those intended to reduce a debtor's estate by bad faith transfers to third parties. The Roman law rules developed from individual debt collection, into a collective debt collection process. The context or framework at play here shifted from a process aimed at enforcement against a person towards a dispensation of execution against debtor's assets.

The Act of Elizabeth of 1570 is the first law designed as a true bankruptcy statute, as opposed to simply a fraud-prevention law. It sought to introduce a collective (bankrupt) procedure, as opposed to individual debt-collecting procedures as existed before this Act. This, like the Roman law equivalent, moved to a collective process that aimed to ensure fairness amongst creditors.

Despite the differences in these rules across English and civil law jurisdictions, the goals that such rules seek to achieve can be seen to be very similar. At their core, these rules (also called avoidance rules) provide for certain transactions that take place prior to commencement of insolvency proceedings to become subject to investigation. Provided specific requirements are satisfied, such transactions can be set aside and see debtor benefits needing to be repaid. These rules are vitally important to ensure fairness and equality during insolvencies. In particular, these rules aim to prevent transactions involving fraudulent dispositions, provide for equitable treatment amongst all creditors by avoiding favouritism where a debtor makes preferential dispositions, and seek to ensure that no sudden loss of business value is incurred immediately prior to insolvency, amongst other goals. Voidable dispositions or

avoidance laws are important to insolvency law from a policy perspective, but also because they aim to ensure recovery of assets or their value for the benefits of all creditors and such laws implement a framework for fair commercial conduct.

Whilst historically, the dispensation rules stemming from civil and common law origins arose from different sources and in different contexts, and some of those differences may still exist in modern insolvency regimes, as they have developed into more modern legislative regimes, the goals of each regime have started to align.

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 has perceived limitations for several reasons.

First, as the author himself identifies, the above definition is predicated on the existence of a national legal framework for insolvency law, which is obviously inappropriate when seeking to define a concept that is international. A definition that is based on or originates from a supra-national body may lend itself to a more internationally applicable definition.

Second, any definition of international insolvency law ought really to be based on a factual matrix involving an insolvency that arises in such a way that it extends beyond the borders of any single legal system, such that one nation's domestic insolvency laws are not able to immediately and exclusively be applied without necessary regard to the international issues arising in the insolvency. Such definition must be rooted in the international context in which it is attempting to be applicable in respect of.

Third, in an international insolvency, a fundamental issue could be what is the "applicable law", as this definition mentions. International insolvencies will involve a company in one nation state, and creditors in other states, or assets and/or subsidiaries arising in other states. There will be aspects of competing or parallel insolvencies in respect of the foreign assets and companies. The applicable law may or will be

different for each aspect of an international insolvency. The use of "applicable law" here is therefore apt to mislead and or is inappropriate. Further, is it referring to the procedural or substantive (proving debts) aspects of the insolvency? These points are fundamental to adequately defining international insolvency law and ought to be addressed.

It would be beneficial to also consider Fletcher's comments

4

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.

Various instruments like international treaties or conventions are a ripe source of international insolvency rules that can be accessed in cross-border insolvency cases. These instruments bind those countries that are signatories to them, become domestic laws in that state and form part of the hard laws enforceable by their local Courts. If signed up to (and ratified and implemented domestically), they are very effective instruments to establish rules governing international insolvencies. For example, the Nordic Convention on Bankruptcy was successful in recognising the law of the place of insolvency adjudication for its member states.

Many countries around the globe have ratified and or acceded to treaties and conventions on insolvency, thereby importing into domestic law, principles concerning the resolution of insolvency issues that involve another country. Such instruments aid countries in determining the important international insolvency questions such as the proper forum for the insolvency, recognition and enforcement and questions as to choice of law.

On occasion, a convention that may not have been successful itself in establishing international insolvency rules or laws, has otherwise laid the foundation for future more successful future endeavours. For example, the Council of Europe developed a convention on Certain International Aspects of Bankruptcy (the Istanbul Convention) in 1990. Whilst it was only signed up to by 8 members and was not ratified by a sufficient number to come into force, it was still a very important development for the European Union's reaction to international insolvency issues amongst its member countries – it started the dialogue amongst its member states that arguably laid the foundation for what become the European Insolvency Regulation (2000), which itself, has had (and continues to have) significant impact on broader multilateral developments in international insolvency laws across Europe.

This is well written. I'd love to see you discuss some more examples in your analysis.

4

Marks awarded 13 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 proceedings instituted pursuant to insolvency law and are governed by those laws. Whilst dependent on the state, they will typically include liquidations, reorganisation or rescue proceedings. The conduct of formal insolvency proceedings are defined by the laws and rules pursuant to which they will be conducted. Whereas, informal insolvency arrangements are not always governed by the insolvency laws, and typically, will include voluntary negotiations amongst a debtor and some or all creditors. These arrangements will typically involve some form of negotiated restructuring of the insolvent debtor, such negotiations having been developed through commercial and banking sectors and operations. Informal insolvency arrangements are not typically defined by any strict and formal laws or rules.

Advantages to Lobo in relation to formally commencing insolvency proceedings, include protection of its rights as creditor pursuant to the insolvency laws of Asgard, a moratorium of claims arising in relation to FPPL, and having the Court supervising any formal proceedings. Potential disadvantages to Lobo for formal commencement might include limiting FPPL's ability to survive as a going concern. For example, its ability to obtain further financing could be hindered, severely undermining its ability to turn around financially, and limit its prospect to recover the debt it is owed. There is an element of potentially losing of control, as its rights are then subject to a formal Court supervised proceeding with any number of other potential creditors. Formal proceedings may also have other inadvertent implications such as triggering clauses in other financing or contractual arrangements that FPPL has entered into, such as force majeure or change of control clauses. Formal proceedings may also be perceived

as negative by market participants, which could financially harm FPPL and in turn, Lobo's ability to recover its debt.

Advantages to Lobo in seeking an informal arrangement is that it could potentially maintain some level of control of the enforcement of its debt. It could enter into very flexible repayment arrangements with FPPL, it could negotiate with other creditors (strength in numbers) to obtain better terms in the long-run, should it be able to assist FPPL to financially survive in the short term. Costs and publicity avoidance are relevant***. Potential disadvantages include not having any form of independent third party overseeing the refinancing arrangements, and no moratorium on claims arising whereby other creditors could seek to recover debts against FPPL. FPPL may also continue to seek other forms of financing which could be financially more detrimental to the business (which it may not be able to do once any formal proceeding had been commenced).*** There is also no way to bind dissenting creditors.

Questions that ought to be asked include what are the formal powers available to Lobo in Asgard under formal insolvency, including whether recourse can be had to the assets and finances of FPPL in Encanto (where its operations are financially sound), what assets does it have in Asgard against which its debt could be enforced, what other creditors of FPPL are there, how much are they owed, what is the nature of their debts (priority, secured, unsecured etc.). It would also be important to check whether the insolvency law would regard Lobo's debt as a vulnerable or voidable transaction. What distribution rules apply in Asgard insofar as it might draw any distinction between secured and unsecured creditors, and what type of creditor is Lobo regarded to be. Lobo would also want to know about what forms of out of court options have been developed through the commercial and banking sector in Asgard that are available to it. Lobo should also determine what agreements or contracts it has entered into will be impacted by formal insolvency proceedings being commenced.

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.

Many difficulties may arise for the insolvency representative in respect of co-operation and co-ordination of the two insolvency proceedings. First of all, are the two proceedings both regarded as insolvency proceedings, for the purposes of the others' insolvency laws (for recognition and/or enforcement purposes)? Second, do the laws

of Encanto permit the recognition of the foreign proceeding in Asgard, and vice versa. Further, do each countries' insolvency laws permit co-operation and co-ordination? In order for any useful co-operation and co-ordination, the laws ought properly to permit this. There may be issues in terms of defining which proceeding is the main insolvency proceeding, and which proceeding is in aid of the foreign main proceeding. Depending on the views of the Court's in each jurisdiction, there may be difficulties encountered in getting the Court's to communicate and coordinate the insolvency proceedings, including which laws apply to which parts of the insolvencies. Other difficulties include each state applying its own laws, including choice of applicable laws for the procedural and substantive aspects of the insolvency, whereby no or extremely limited extraterritorial effects would be grants to the others' foreign proceeding.

Without a single set of insolvency rules or laws, coordination is ripe for encountering difficulty. However, various international insolvency instruments have been developed in an attempt to overcome such difficulties, and foster a collaborative and coordinated approach to dealing with international insolvencies involving a debtor with creditors or assets in multiple countries. These include:

1. *The IBA Cross-Border Insolvency Concordat (1996) – this instrument accepts that concurrent foreign insolvency proceedings may arise. It therefore proposes their coordination, including for the agreement to protocols prescribing the responsibilities and jurisdictional reach of each proceeding the subject of the protocol. This approach, having been developed by practitioners, has been successful in forming Court-approved protocols being implemented.*

2. *UNCITRAL's Model Law on Cross-Border Insolvency – the Model law is designed with co-operation and co-ordination in mind. The Model law requires a local Court or insolvency practitioner to co-operate with foreign courts or foreign insolvency representatives. It facilities the entry into coordination agreements and protocols. Such agreements are entered into with a view to ensuring that a single debtor's insolvent estate is administered fairly and efficiently, to maximise the returns to creditors.*

3. *Other coordination instruments developed include the American Law Institute's NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) and the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (Singapore, 2016), each having their own successes in developing coordination in international insolvencies.*

The development of the above international insolvency instruments has been instrumental in promoting the recognition and enforcement of insolvencies in other jurisdictions. In what has to date been an increasingly global economy, it is imperative that structures be in place to foster the coordination of insolvency efforts, for the benefit of both debtors and creditors. The very development of a number of important

instruments (detailed above) emphasises the importance that such instruments hold in today's international insolvency context. It would be important to the factual matrix to which this question relates to identify what international insolvency instrument each nation had signed up to and ratified domestically.

There are some other relevant international instruments.

4.5

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

The European Insolvency Regulation allocates jurisdiction to Courts of its member states by virtue of the member state which is the "centre of the debtor's main interests". Whilst jurisdictional primacy is afforded in the EU to the state with the centre of the debtor's main interest (and which on the facts of this question, might be the UK given it is incorporated and has offices there), the European Insolvency Regulation does permit subsidiary territorial proceedings in other states, based on where the debtor has an establishment. The European Insolvency Regulation Recast (the "EIR Recast"), however, would not apply with respect to the UK commenced insolvency proceedings. This is because the UK insolvency was commenced on 30 June 2022, and from 11pm on 31 December 2020, the EIR Recast ceased to apply to the UK following its exit from the European Union. Domestic UK legislation therefore governs the UK proceeding.

The EIR Recast would only have applied to the UK insolvency where the main proceeding (which we assume here would be in another country in the Europe) was opened prior to the expiration of the transitional period, which was 11pm on 31 December 2020.

The consequences of this are many. First, a moratorium on claims against the FPPL may have arisen on the filing of the insolvency proceeding against FPPL in the UK. This, depending on the extent and effect of that moratorium, may prevent Lobo from commencing the insolvency proceeding in another country in Europe. This might mean, therefore, that Lobo may need to participate in the insolvency in the UK as a creditor. As a creditor, Lobo would want to know what assets are available in the UK to satisfy its debt.

If, however, the moratorium did not have extraterritorial effect beyond the UK's border, and Lobo were in fact able to commence an insolvency proceeding in Europe, this raises the international insolvency issues of needing to potentially coordinate and cooperate with the UK insolvency. Lobo would want to know of each jurisdiction's laws as regards to coordination, and recognition of foreign proceedings (and importantly, enforcement) – could a protocol be put in place to govern the proceedings? There would then be a need to seek to potentially enter into some form of coordination or cooperation agreement in respect of the two insolvencies, defining the jurisdiction and operation of each insolvency.

In order to decide whether to commence a European insolvency proceeding (if Lobo could do so), it would want to know the assets available in the jurisdiction that it was considering commencing proceedings. Equally, it would want to know the ability for FPPL's foreign assets to be made available to satisfy the debts in that European state (if available).

It would be beneficial to consider the MLCBI

3.5
Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 43.5 /50
An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.