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 1986 unified 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 historical roots of insolvency law systems in African jurisdictions primarily depend on the laws of their respective former colonies. For instance, the insolvency law in Tanzania, Kenya, Zambia, Nigeria and Botswana originates from English law. In contrast, the insolvency law in jurisdictions such as Mozambique, Angola and the Francophone countries of West Africa have its roots in civil law (such as Portuguese law and French law). Lastly, given the historical influence of both the civil law and English law, mixed legal systems can be found in jurisdictions including South Africa and Namibia. For the sake of completeness, it should also be noted that many African jurisdictions have introduced more modern insolvency legislation in recent years notwithstanding the historical roots of their insolvency law as identified above.]

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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.

[Firstly, the financial crisis in East Asia in 1998 had considerable economic impacts on many economies in East Asia, which in turn led to insolvency law reforms in several jurisdictions in Eastern Asia, with Thailand being the most notable example since it has overhauled its bankruptcy laws.

Secondly, Singapore has also undergone a significant insolvency law reform in recent years, introducing a unified Insolvency, Restructuring and Dissolution Act to consolidate its existing corporate insolvency and personal bankruptcy laws. The said Act has come into effect on 30 July 2020 and has strengthened the role of Singapore as a major role-player in respect of international insolvency law in Eastern Asia. Also, Singapore also played an important role in reaching the JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.]

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.

*[While Canada and the US attempted to reach a bilateral insolvency treaty as early as in the 1970s, they failed to reach an agreement apparently because of its over-ambitious scope. Since then, Canada and the US tried to deal with international insolvency issues through the adoption of the Model Law on Cross-border Insolvency ("*MLCBI*") and other protocols. These initiatives have not been particularly successful.*

*Later on, the American Law Institute ("*ALI*") has assisted in resolving international insolvency issues between North American Free Trade Agreement ("*NAFTA*") countries including Canada, the US and Mexico. Specifically, ALI has commenced the ALI Transnational Insolvency Project with a view to improving cross-border cooperation in insolvency contexts, under which the well-known Professor Westbrook has been appointed as designated Reporter and advisory groups have been formed by experts from the said countries.*

Further, ALI also issued Principles of Cooperation among the NAFTA Countries in around 2000 for cooperation and recognition issues arising in international insolvency contexts. These principles focus on general corporate insolvency cases but not cases concerning (a) individual bankruptcy and (b) insolvency of non-profit organisations and financial institutions. These Principles also include Recommendations for Legislation or International Agreement, proposing that NAFTA countries shall adopt the MLCBI and many other legislative proposals. Given the hard work of ALI as well as

the extensive scope of the Principles, the ALI's efforts have been rather successful and well recognized in North America.]

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

3

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.

[Rules on the treatment of voidable dispositions have different historical roots. In civil law jurisdictions, the "actio Pauliana" (i.e. actions that may be taken by creditors, etc. to avoid fraudulent legal transactions) constitutes the historical origin of voidable disposition rules. Meanwhile, the voidable disposition rules originate from the Act of Elizabeth 1570. When the avoidance provisions were first developed, "actio Pauliana" in civil law appears to aim more at fraud prevention, while the English rules seem to aim more at protecting the bankruptcy or insolvency estate and ensuring the equal treatment of all creditors.

We may review the treatment of these rules in different insolvency systems through the following factors:-

First, in terms of policy considerations, avoidance provisions (in both civil law and common law jurisdictions) tend to be "pro-creditor" in nature. That said, in some "pro-debtor" jurisdictions, there may be out-of-court settlements between creditors and bankrupts on the treatment of the bankrupts' assets without intervention from the Court, which may cater the rehabilitative need of bankrupts. In contrast, in "pro-creditor" state (and specifically those with a civil law origin), the voidable disposition rules can be relatively strict to protect the interests of the general creditors of the bankrupt. As such, policy considerations play an important role in the design of avoidance provisions in different jurisdictions.

Second, in terms of source of law, avoidance provisions are generally statutory in nature (especially in civil law jurisdictions). Nevertheless, in common law countries, voidable disposition rules have been further developed by the Court by way of development of case law, which is reflected by, for instance, the large volume of case law on the scope and application of the avoidance provisions in the UK (which are often referred to by courts in other Commonwealth jurisdictions). As such, source of law may have a bearing on the application of voidable disposition rules in different jurisdictions.

Third, the (legal) effect of voidable disposition rules may play a vital role too. In some jurisdictions (such as civil law jurisdictions with stringent rules on fraudulent conveyances), there may be a broader scope of "voidable disposition" or "fraudulent conveyances", as a result of which any disposal of a property of a bankrupt may invariably be void with few exceptions. In contrast, in some other jurisdictions, the voidable disposition rules may provide that post-winding-up dispositions shall be generally void unless with the Court's sanction. In such case, it is possible for the bankrupt or other interested parties to apply for sanction from the Court to validate the disposal. The difference in legal effects should therefore be considered when reviewing the voidable disposition rules in different jurisdictions.]

It would be beneficial for you to elaborate upon the importance of the rules.

4

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 Dutch commentator here is Professor Bob Wessels (who offered this definition in his commentary titled "International Insolvency Law"). Professor Wessels considers that the key limitation of the said definition is that such definition is connected to the (pre-)existence of national legal frameworks of insolvency law.

As can be seen from the definition above, its essence is that the "applicable law" cannot be executed without also taking into account the international aspect of a given case. While the definition did not specify what the "applicable law" means, such term

seems to imply that there would be a set of legal rules should have been applicable but for the international elements of the case. In presupposing that a set of legal rules should be "applicable", it is clear that the aforesaid definition is offered from the perspective of an individual jurisdiction such that a (local) Court cannot apply its "applicable law" immediately without also having considered the cross-border elements of the case (over which the Court may not have jurisdiction).

Such issue is an important limitation to Professor Wessels' definition above because many cross-border insolvency cases nowadays involve multiple jurisdictions (e.g. because the assets of a bankrupt or an insolvent company situate around the world) and thus it is difficult to resolve issues arising from those cases only from the viewpoint of one of the local courts. Insolvency practitioners should not, and cannot, only consider the interest of their "home" jurisdiction. Instead, they should be prepared to take the insolvency case to different courts and consider the "applicable laws" in different situations and under different legal systems.

Taking this definition further, it also seems to imply that there exists a single set of "applicable law" that should have applied to resolve an insolvency case. Such assumption is clearly subject to dispute because it is often impossible and impractical to resolve insolvency issues in multiple jurisdictions only by applying one set of legal rules (which is also a principal limitation of the traditional "universalism" approach in international insolvency contexts, which prescribes that there should only be one set of insolvency proceeding covering all assets of a bankrupt around the world). Given the difference in the legal rules across jurisdictions and the difficulty in recognition / enforcement of local orders in foreign jurisdictions, there is plainly no single set of "applicable law" that may be applied to resolve international insolvency laws. Instead, courts and insolvency practitioners should refer to and apply laws from different jurisdictions to resolve the said issues.]

This is well written. It would be beneficial to also consider Fletcher's comments.

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Question 3.3 [maximum 5 marks]

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

[Treaties and conventions are sometimes viewed as part of the "hard law" resolutions put forward by governments and States to resolve international insolvency issues, which, in my opinion, and when considered on its own, may not be viewed as a successful way in resolving cross-insolvency issues.

First, a common feature of treaties and conventions is that they should become binding only if States sign these treaties and conventions and incorporate the same into their domestic law. As such, one of the key conditions for treaties and conventions to operate is that the States should be able to reach a consensus on these treaties and

conventions, otherwise those treaties and conventions simply cannot take effect at all. For instance, in 1990, the Council of Europe issued a Convention on Certain International Aspects of Bankruptcy (also known as Istanbul Convention, Council of Europe Treaty Series No. 136. Such convention was only signed by 8 member States. Since it has not been ratified by enough member States, the convention did not come into effect at last. As such, the difficulties encountered by States in the execution and ratification process of treaties and conventions may significantly limit its effectiveness.

Secondly, since treaties and conventions may only be ratified by limited States, they are unlikely to be universally applicable which again heavily limited their effectiveness. For instance, in 1889, the Montevideo Treaty on International Commercial Law has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. Subsequently. In 1940, only Argentina, Paraguay and Uruguay ratified the Montevideo Treaty on International Commercial Terrestrial Law and the Montevideo Treaty on International Procedural Law. Since the 1940 treaties have only been ratified by three countries (but not all signatories to the 1889 treaty), insolvency practitioners would need to careful consider which treaties should apply in case of international insolvency cases among the aforesaid countries.]

This was well considered. I would love to see some more examples incorporated into your analysis.

4

Marks awarded 12 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?

[While "formal" insolvency proceedings mean proceedings commenced in accordance with (and governed by) the insolvency law of a certain jurisdiction, "informal" insolvency proceedings are those proceedings that generally involve voluntary out-of-court cooperation and/or negotiations that may not necessarily be regulated by insolvency law of a certain jurisdiction.

In the present case, Lobo may consider (i) commencing winding-up proceedings (as a "formal" proceeding) or (ii) conducting out-of-court compromise and/or arrangements with FPPL (as an "informal" proceeding).

First, the key advantage of "informal" proceeding is that it is generally cheaper since court procedures are not involved. If Lobo takes steps to wind up FPPL (being a "foreign" company incorporated in Encanto but not Asgard), Lobo may expect that it would need to first incur a considerable amount of legal fees to deal with the winding-up proceedings. While FPPL is struggling financially in Asgard, FPPL is financially stronger in Encanto, which implies that it only has short-term cashflow problems. As such, it is likely to defend any "formal" winding-up proceedings commenced by Lobo, which would result in even higher legal fees to be incurred by Lobo. In contrast, the fees to be incurred in "informal" arrangements may be conceivably lower.

Second, there is also no publicity issue in "informal" proceeding, meaning that the financial difficulties of FPPL may not be made known to the pubic in Asgard by virtue of its winding-up proceedings. If Lobo reaches settlement with FPPL after commencing winding-up proceedings against it, it may be possible for other creditors to substitute its role as petitioner or take any other steps as permitted by the laws of Argard to continue with the proceedings. In such case, the collective nature of winding-up proceedings may mean that it would be difficult for Lobo to reach bilateral settlement with FPPL. Further, once FPPL is wound up, its assets may be shared among general creditors of FPPL including Lobo on ***pari passu*** *basis.*

On the other hand, the key disadvantage of "informal" proceeding is that there would not be any statutory moratorium preventing FPPL from being subject to any other proceedings during the "informal" negotiation. As such, it is open to other creditors to take a head start in suing FPPL and enforcing its judgments against the assets of FPPL, which is clearly detrimental to the interests of Lobo.

Lastly, another disadvantage of "informal" arrangements is that they may not be able to bind other (dissenting) creditors (if any). Even if Lobo and FPPL are able to reach a binding settlement agreement, it would not prevent other dissenting creditors from taking steps to wind up FPPL, in which case the efforts and costs incurred by Lobo in securing the informal settlement with FPPL would be nothing but waste of resources. In this regard, in considering whether this disadvantage should apply in the present case, Lobo should ascertain whether FPPL owes money to any other substantial creditor(s).]

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.

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.

[In terms of difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination, they include:- (i) difficulty and/or uncertainty in securing recognition of the formal court order against FPPL for a court-supervised insolvency proceeding in Asgard; (ii) difficulty and/or uncertainty in obtaining recognition of their appointment as the insolvency representative; and (iii) whether the insolvency representatives in Asgard may seek a local stay of the concurrent insolvency proceeding commenced against FPPL in Encanto.

In response to these difficulties, the insolvency representatives in Asgard may first consider whether Encanto has adopted the UNCITRAL Model Law on Cross-border Insolvency ("MLCBI") as part of its domestic laws. If yes, Articles 25 to 26 of MLCBI requires the Encanto Court (or any insolvency representatives appointed by it) to co-operate with foreign court (including the Asgard Court) and the insolvency representatives appointed by the Asgard Court. For instance, Article 27 of MLCBI offers examples of appropriate means of cooperation such as the approval or implementation by courts of agreement concerning coordination of proceeding. Pursuant to this Article 27, the two Courts may enter into protocols or cross-border insolvency agreements to resolve cross-border issues relating to insolvency of FPPL (including the aforesaid issues). As can be seen above, MLCBI is very helpful and thus the development of MLCBI is clearly crucial to the development of international insolvency law.

Alternatively, the insolvency representatives in Asgard may also ascertain whether the Encanto Court would follow any "soft law" guidelines such as:- (a) the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) issued by the American Law Institute; (b) the EU Cross-Border Insolvency Court-to-Court Cooperation Principles; or (c) the JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. These guidelines often provide for protocols and procedural guidance that serve to facilitate the cross-border cooperation and communication by Courts in respect of international insolvency issues which may include the aforesaid three issues in the present case.

Depending on the exact drafting of the guidelines in question, the insolvency representatives in Asgard and/or the Asgard Court may seek assistance from the Encanto Court in recognizing the order made by Asgard Court and granting corresponding relief in Encanto such as a stay of the local concurrent proceedings.]

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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 first issue is whether the European Insolvency Regulation Recast ("EIR Recast") applies to the UK commenced insolvency proceedings. In this regard, UK ceased to be a member of the EU at 11pm on 31 January 2020. As such, under UK law, the EIR Recast, being part of EU law, should no longer apply to any proceedings commenced in the UK after 11pm on 31 December 2020 (being the expiry of the Brexit transition period).

In the present case, the insolvency proceeding against FFPL was commenced by a minor creditor in the UK on 30 June 2022, i.e. after 31 December 2020. As a result, EIR Recast (as well as its latest amendment by way of Regulation 2021/2260 of 15 December 2021) should not apply to the said UK winding-up proceedings. That said, EIR Recast appears to apply to the proceedings to be commenced by Lobo in another country in Europe (assuming that it is a member of the EU).

The next issue is the consequences of the non-applicability of EIR Recast to the English proceedings. If EIR Recast applies to the English proceedings, the UK law should generally apply to UK proceedings save as to specific matters that have been otherwise provided for in Articles 8 to 18 of EIR Recast, including set-off issues, rights in rem issues employment issues, detrimental acts and immovable property issues. Since EIR Recast does not apply to the English proceedings, the English proceedings should be governed exclusively by the UK law (save that foreign law may be possibly relevant to limited aspects of administration of winding-up (such as where a debt is governed by foreign law)).

Further, before Brexit, recognition of insolvency proceedings commenced in the UK and the EU (and judgments issued by the respective Court) should be subject to EIR Recast which has direct effect in the UK and the EU. Since EIR Recast no longer applies to the UK, one would need to rely on Cross-Border Insolvency Regulations 2006

(adopting the Model Law on Cross-border Insolvency) in respect of the recognition of EU proceedings. This issue also applies to recognition of appointment of insolvency representatives as well as court orders among UK Courts and European Courts. As such, Lobo may expect that the procedures involved in mutual recognition of proceedings in the UK and EU may become more complicated than before.]

There is scope to elaborate upon the MLCBI.

4

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS 45/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.