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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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, i.e. 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.

Answer: When colonising Africa, the European powers introduced their legal systems to their African colonies. Post-independence, most, if not all, African countries largely continued to follow the laws of their former colonial overlords.

As a result, African countries colonised by the British, such as Kenya, Nigeria, Botswana, Zambia and Tanzania follow the English law tradition. Countries colonised by Portugal, such as Angola and Mozambique, follow the civil law tradition based on Portuguese law. French former colonies, situated largely in Francophone West Africa, follow the civil law tradition based on French law.

South Africa – colonised by the Dutch and later the British – has a mixed legal system influenced by Roman-Dutch law and English law. Namibia, although colonised by Germany, had close ties with South Africa post WW1 (as a Protectorate), and followed the same pattern, by adopting Roman-Dutch and English law, as in the case of South Africa.

3

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.

Answer: The financial crisis that swept thorough East Asia in 1998 had a devastating effect on the markets leading inter alia to many insolvencies of corporations and individuals. To avoid a repeat of the suffering caused, East Asia countries embarked on programmes to reform insolvency law which had proved to be inadequate.

Thus, for example, Thailand embarked on wholesale reform of its bankruptcy laws, while Singapore repealed its existing insolvency laws and replaced them with the new Insolvency, Restructuring and Dissolution Act in October 2018. This Act, which came into force on 30 July 2020, bundled Singapore's corporate and personal insolvency law, as well as restructuring laws, into a single Act.

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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.

Answer: The first attempt to establish a cross-border insolvency regime between Canada and the USA occurred in the 1970's but failed to achieve the goal of a bilateral insolvency treaty. The parties were compelled to fall back on their respective, existing, insolvency legislation coupled with bilateral cooperation and coordination. The parties recognised and respected each other's laws, and judicial decisions made in their respective jurisdictions, albeit not compelled by law to do so.

Later, the USA-based American Law Institute ("the ALI") stepped forward to assist in resolving cross-border insolvency issues between signatory States of NAFTA (USA, Mexico and Canada). Its appointee as Reporter, Professor Westbrook, and its various advisory expert groups, drafted an International Statement which summarized and commented on the respective countries' insolvency laws which were being applied in international insolvency cases. As a result, in 2000, the ALI published a set of Principles for Cooperation applicable to the NAFTA countries.

The Principles' scope of application is limited to insolvency matters concerning corporations and similar legal entities involved in commercial trade, and not to the insolvency of individuals.

Two important Principles are these:

- one dealing with "co-operation" between countries by recognizing the need for world-wide cooperation by courts in securing and locating the debtor's assets, and ensuring that proceedings are conducted in a just and procedurally sound manner; and
- another dealing with speedy and effective "recognition" of the bankruptcy of a debtor by courts and countries across various jurisdictions.

There are 27 Principles grouped under specific sections.

Ultimately, the Principles recommend the adoption of the UNCITRAL Model Law on Cross-border Insolvency, as well as ensuring that procedural devices, necessary to ensure that the Model Law is procedurally sound and effective, are established.

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

2.5
Marks awarded 8.5 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.

Answer: The after-effects of several centuries of divergent insolvency law development under two systems the common law versus civil law continues to bedevil the achievement of a unified cross-border insolvency dispensation. While both systems are based on a collective debt-collecting procedure post insolvency, policy differences have led to divergent views and emphases on the manner of debt-collection and the pursuit of creditors who may have transacted – often to the detriment of the remaining creditors – with the debtor shortly before the insolvency.

The policy difference is reflected in the approach – illustrated in substance and procedurally – towards dispositions by the debtor, commonly termed *voidable dispositions*. The policy difference which developed is illustrated by reference to a single example, being the difference in approach between the UK (with a legislation and common law – via case law - system) and the USA (with a legislation based or civil law system of federal bankruptcy laws). While both systems developed a system which replaced individual debt collection with collective debt collection at the point of insolvency, the relief and procedures followed in the UK were primary pro-creditor as opposed to pro-debtor tendencies being predominant in the civil law systems.

Put simply, the common law systems were designed to ensure that the debtor's assets, (wherever they were to be found), were collected, sold (or realised), and then sold before the proceeds were distributed to the creditor. The civil law systems, while also designed to replace individual collection with collective collection, nevertheless contained forms of relief, and procedural mechanisms, which were pro-debtor. As such, civil law systems seek to aid the debtor to recover from its debt burden before re-entering commerce to try once more to become a successful company.

As a result of these policy differences, common law based systems pursue the debtor's assets with much more vigour, including by recovering assets which were disposed by the debtor in the form of voidable dispositions.

Voidable dispositions fall in two categories, fraudulent conveyances and preferences –

- a fraudulent conveyance concerns payments and/or disposals of assets without the insolvent receiving adequate value in return e.g. not receiving payment of a purchase

price which broadly equates in value to the value of the goods disposed of`) the effect of which is to increase the level of insolvency of the insolvent's estate.

- A preference is the settlement of a pre-existing debt owed by the insolvent, or by providing the creditor with real security, thereby having the effect of improving the creditor's position viz-a-viz other creditors of the insolvent once insolvency commences.

The civil law systems, which seeks to provide the debtor with opportunities to be relieved of its debt burden before re-entering the commercial world, is far less concerned with the task of vigorously seeking out debts – including voidable dispositions - for eventual sale and distribution of the assets to and for the benefit of the general body of creditors.

It is the task of supporters of a unified system of international insolvency law to bridge the policy divide between countries using common law and those countries using civil law.

You needed to discuss the different historical basis of civil and common law voidable transactions: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law. You also needed to discuss the importance of voidable transactions in more detail.
3

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.

Answer: Wessels, the author of International Insolvency Law, when providing the aforegoing definition, pointed out the logical shortcoming in the definition as being that it was dependent on the existence of a national legal framework of insolvency law which could reach beyond its domestic borders. Yet, in reality, this was difficult to achieve.

Put differently, Wessels argues that the definition is based on the shortcomings of any particular domestic insolvency law regime which cannot reach beyond the domestic jurisdiction of that court albeit, for example, that the debtor's assets are located in foreign countries and therefore beyond the reach of the national court that granted the insolvency order against a debtor.

The international context of trade has vexed legislative authorities for centuries. In the USA, the legislators sought to overcome the difficulty by enacting federal bankruptcy legislation which was enforceable across all the States in the Union. Of course, this did not solve the problem of insolvencies with a truly international character involving States outside the United States of America. The same question arose when the EU – a common market consisting of many (but not all) European States – considered corporate collapses which had international ramifications (.g. location of assets and / or branches of a multi-national corporation) across the EU. However, limiting the effectiveness of the insolvency law to EU members only,

remained a shortcoming. These attempts failed to bring about a truly international insolvency regime.

In the meantime, the growth of multi-national corporations, situated and /or holding assets in various jurisdictions around the world, demonstrated the shortcomings of national borders, and the limitations of orders made by domestic courts. Put differently the reach of insolvency law was inadequate to regulate multi-located international corporate entities.

The central issue (there are other issues – discussed elsewhere) is that of the "effectiveness" of court orders. Courts are, and for good reason should be, wary about issuing orders which cannot be executed. In the insolvency context, an order placing an estate into liquidation and providing the liquidator powers to find, sell or realise, and distribute the proceeds amongst creditors is hamstrung if the order cannot be enforced in respect to the debtor's assets located in foreign countries. Consequently, because of the speed of international travel, international banking and money transfers, and the speed with which assets can be transferred from State to State, a high degree of coordination and cooperation between the courts of various States is needed to make insolvency laws effective.

For example, if a court order issued in Country A is not recognised by the courts in Country B, or if the regulations to wind up the affairs of a debtor differ from State to State, it provides gaps or opportunities for debtors to evade court orders, and evade attachme***nt*** and execution against debtors' assets situated in various jurisdictions. The cost and inconvenience of instituting multijurisdictional insolvency proceedings can also lead to creditor-fatigue in pursuing debtors thereby leaving a trail of bad debtors across a. multitude of countries.

If anything, the shortcomings pointed out by Wessels, and many other commentators, demonstrate the urgent need for cooperation in establishing a single set of treaty-based international insolvency laws.

It would be beneficial to elaborate on some of those commentators, and other definitions, such as by Fletcher.

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.

Answer: As a starting point, there is general consensus in academia, governments, and amongst practitioners, that treaties and conventions are the best way to overcome the gaps caused by conflicts between the State-based insolvency law of different countries, and to resolve the issues discussed below.

To recap, the difficulties in applying domestic insolvency law to international insolvencies across various jurisdictions gives rise to issues involving -

- choice of forum to exercise jurisdiction over persons and / or actions in insolvency law. In this instances, a court must enjoy jurisdiction to grant a provisional winding up order (commencement proceedings) but questions may arise as to whether the law of other jurisdictions e.g. where assets are located must be applied instead.

- recognition and effectiveness of judgments and orders of domestic courts. In this instance, countries may not recognise the judgments of courts situated in other countries, thus rendering the proceedings in the court that made the order meaningless

or ineffective. This is a major issue which the UNCITRAL Model Law On Recognition and Enforcement of Insolvency Related Judgements seeks to rectify.

- the choice of law to be applied to the proceedings. In common law jurisdictions, the law of the forum or the country where the court is situated shall apply unless the parties specifically request that the law of a foreign jurisdiction should be applied. In civil law jurisdiction, the rules are different.

Given the above difficulties, States turn to treaties and conventions in an effort to overcome some or all of these issues. The definitive feature of treaties and conventions is that the Signatory States agree to bind themselves to laws and practices on a cross-border scale e.g. such as an agreement to recognise and enforce orders granted by domestic courts in other jurisdictions.

As to the degree of success that has been achieved using treaties and conventions, there is a mixed bag of results:

- The Nordic Convention of 1993 is a somewhat rare multilateral treaty in which a number of countries reached agreement on matters such as jurisdiction; enforcement, winding up and arrangements.
- The EU did not succeed in obtaining sufficient signatories to pass the Istanbul Convention in 1990. Nonetheless, the principles in the convention are regarded as highly influential.

I would love to see you discuss more examples and their success or otherwise.
An alternative method of achieving a level of international agreement in insolvency law by the EU States has been to use regulations. The initial attempt via the European Insolvency Regulation or EIR on 2000, was later replaced by Regulation 2015/848 read with the EIR Recast in 2015 and onwards.

Ultimately, at best, the results are a mixed bag of partial success. That success is largely limited to Regulations binding a limited number of States within a Union.

Only when the UNCITRAL Model Law is ratified by many States around the world, can it be said that treaties and conventions constitute a successful method of achieving uniformity in international insolvency law.

4

Marks awarded 11 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?

Answer: Formal insolvency proceedings are those proceedings regulated by the insolvency laws. These proceedings include liquidation, corporate reorganisation, and rescue proceedings.

Whereas Informal insolvency proceedings typically take place outside the insolvency law, for instance in the form of informal mediation. Mediation is a voluntary process of informal negotiations between the debtor and willing participating creditors.

The main reason why Lobo might opt for a corporate rescue plan instead of liquidating or winding up FPPL are that Lobo might be persuaded that: a better price can be obtained for FPPL if sold as a going concern as opposed to, upon liquidation, selling FPPL's piecemeal and /or at distressed prices. Of course, from a "good citizen" perspective, keeping FPPL in business will ensure that jobs are retained.

The disadvantages of informal mediated arrangements are:

1. That other creditors of FPPL will not be barred from approaching the courts to obtain a liquidation order, and
2. none of FPPL's remaining creditors are obliged to accept the term of an agreement reached informally.

The advantages of an informal creditor mediation are that:

1. The cost is significantly lower in that the courts and legal representatives are not involved, and
2. Such mediations are reached in private and therefore the fact that FPPL had been in financial difficulties can be hidden from public view.

Statutory corporate rescue regimes are of value in that:

1. Creditors can no longer bring legal proceedings against FPPL, thus giving FPPL time and space to rescue the company; and
2. All creditors, including those who oppose the rescue, will be bound by a court ordering the rescue.

There are two disadvantages associated with formal rescue mechanisms:

1. The market may suffer a loss of confidence in FPPL when the news of the proceedings becomes known to the public; and
2. Costs of the court and legal representatives can be prohibitively high.
3. **Publicity.**

Addition questions that might be asked of client is –

- have any creditors taken legal steps to enforce their claims against FPPL? If so, these creditors should be requested to either cease or suspend those proceedings in order to allow for an informal negotiation.

- Whether the company traded while insolvent so it can be established to which extent, if any, the directors incurred personal liability.

4.5

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.

Answer: It is inevitable that in the absence of co-ordination and co-operation between Courts of the two countries, risks of multiple insolvency proceedings against FPPL abound.. When these proceedings are incompatible in nature, and get bogged down, delayed or even halted, the creditors might find that the insolvency practitioner cannot act with due expediency to rescue FPPL. Consequently, the creditors may end up in a worse financial position due to liquidation than had the rescue been successful.

A number of initiatives are underway to encourage States to adopt universal international best practice standards. Such initiatives include The World Bank's Principles for Effective Insolvency and Creditor / Debtor Regimes, the UNCITRAL Legislative Guide on Insolvency and a project by the European Commission called 'Bankruptcy and Fresh Start: Stigma on failure and legal consequences of bankruptcy'.

Elaboration is warranted.

3.5

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.

Answer: The UK ceased to be a member of the EU at 11pm on 31 January 2020. The UK legislated that the EIR Recast – referred to in these answers above – would no longer apply to insolvency proceedings post 11 pm 31 December 2020 in the UK. The UK legislated however that the EIR Recast would still apply to insolvencies where the main proceedings commenced prior to the expiry of the transitional period i.e. before 31 December 2020.

On the facts, the proceedings in the UK were not regulated by the EIR Recast as those proceedings commenced after the transitional period when the UK was by then no longer a member of the EU. Thus, EIR Recast was therefore not applicable to UK proceedings at that time. Lobo, it appears, might be entitled to commence proceedings in an EU country without breaching the EIR. This advice is subject to Lobo establishing that the UK proceedings are not an obstacle due to the amendments to the EIR which provide inter alia for the "recognition of insolvency proceedings outside the EU for the purposes of coordinating proceedings inside and outside the EU". The existing UK proceedings may therefore, for this reason, present a

bar to Lobo concerning proceedings in an EU country. That will also be the case if the centre of the debtor's main interests lie outside the EU. These are questions which Lobo needs to address before deciding to commence proceeding in the EU.
It would be beneficial to consider the MLCBI.

3
Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 40.5/50

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