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).***

4. ***You must save this document using the following format:*** [studentID.assessment1summative]***. An example would be something along the following lines: 202223-363.assessment1summative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked***.***

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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 historical roots of the insolvency laws of various African countries can be found in the laws of their former colonial powers. Nigeria, Kenya, Botswana, Zambia and other East African countries including Tanzania have an English law tradition, having been colonised by the British. Angola and Mozambique have a civil law tradition based on Portuguese law, having been colonised by Portugal. West African countries have a civil law tradition, based in particular on French law, having been French colonial territories. Namibia and South Africa have mixed systems based on influences of both civil and English law, having been German, Dutch and British territories at various times.

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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 financial crisis in 1998 had a significant economic impact on countries in East Asia, in particular Indonesia and Thailand. The crisis led to widespread insolvency law reforms.

Two examples of the reform initiatives are (1) An overhaul of Thailand's bankruptcy laws, as the pre-existing system was ill-equipped to manage the economic impact of the crisis (2) In 2010, Singapore convened the Insolvency Law Review Committee to review Singapore's bankruptcy and corporate insolvency regimes. The recommendations included adoption of the UNCITRAL Model Law. Singapore passed a new law in 2018, the Insolvency, Restructuring and Dissolution Act, which makes substantive changes to Singapore's insolvency laws as well as consolidating its insolvency and restructuring laws into a single statute. (https://www.herbertsmithfreehills.com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill).

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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.

Attempts were made by Canada and the United States in the 1970s to agree a bilateral insolvency treaty, however this was unsuccessful and agreement was not reached, possibly because the scope of the proposed agreement was too wide.

A much greater harmonisation of the insolvency issues in North America was achieved by the US American Law Institute (ALI) instigation of the Transnational Insolvency Project ("the Project") as an initiative to improve co-operation between NAFTA (North American Free Trade Agreement) States. The Project appointed experts from each State, including Professor Westbrook, who produced an International Statement on each country's insolvency laws as applicable to international cases. This resulted in the Principles of Cooperation Among the NAFTA Countries, which was prepared and approved in 2000, and which set out General Principles, Procedural Principles and Recommendations for Legislation, focusing on corporate insolvency.

The Principles recommended that the NAFTA countries adopt the UNICTRAL Model Law, which Mexico did in 2000. The United States and Canada followed suit in 2005.

An example of the Courts of the United States and Canada working co-operatively pursuant to the provisions of the Model Law can be seen in Re Nortel Networks Corporation [2016] ONCA 332. The Canadian and United States Courts reached independent but co-ordinated decisions, albeit the litigation was vastly expensive and time-consuming. Westbrook considers that the case could have been dealt with far more effectively had either Court been able to manage the case centrally (see Westbrook, "Global Insolvency Proceedings for a Global Market" (2018) 96 Texas Law Review 1473 at p.134). It could be said that Re Nortel demonstrates effective co-operation between the Courts, which nevertheless demonstrates room for improvement. This would have been achieved if only one of the States' Courts had been seised of the case.

4
Marks awarded 10 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

It is a key objective of the insolvency law of most legal systems to provide for a legal mechanism which addresses the collective satisfaction of outstanding claims from the assets of the debtor. (UNCITRAL Legislative Guide on Insolvency Law, cl.1.) It is in the context of collective action that it is essential to discourage individual creditors from pursuing their debts following the commencement of insolvency proceedings.

However, the law may also provide that transactions which take place prior to the commencement of insolvency proceedings should also be subject to investigation and, potentially, be set aside, thereby furthering the objective of ensuring that creditors receive a fair allocation of the debtor's assets. (UNCITRAL Legislative Guide on Insolvency Law, cl.151)

These rules are crucial in insolvency and have as their aims preventing fraud, ensuring the equitable treatment of creditors, preventing a sudden loss of value shortly before the commencement of insolvency proceedings to the detriment of the body of creditors and, in some jurisdictions, encouraging out of court settlements.

Actio Pauliana forms the basis of the law relating to fraudulent conveyances in civil law systems and the Act of Elizabeth of 1570 is the basis of the equivalent remedy in English law systems. As a result of the laws of those different systems having developed from different sources, the laws of voidable dispositions still differ vastly in civil and English law systems, in particular in relation to the detail for the requirements for the remedies to be applied.

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Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

> ***"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."***

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

Wessels acknowledges that the definition is limited because it presupposes a national legal framework of insolvency law. The same limitation can be seen in Fletcher's definition of international insolvency law, which expressly refers to a "single set of domestic insolvency provisions".

This is problematic as it assumes that there is a single national law, even in multi-state jurisdictions, which is not universally the case.

It also discriminates between domestic law and the international aspect of a case, whereas the reality is that national borders are becoming increasingly irrelevant in the current world economy, in which financial investments in foreign countries are common, capital markets have been deregulated and foreign exchange controls have been relaxed or abolished.

The effect of the way businesses, individuals and States are interacting in modern times is that most significant corporate insolvencies affect more than one State (and the same is likely true of high-net-worth individuals) and a case will, more often than not, have international aspects.

Even 200 years ago, the founding fathers recognized that there had to be one single set of national insolvency proceedings to be applied as a matter of federal, and not

state, law. This acknowledges the principle that a common market with a free flow of goods and services, capital and labor requires an overarching and and standardized insolvency law. The same is true of a wider common market; the EU standardized the insolvency laws of member States for the same reason.

This highlights the inadequacy of most domestic legal systems to deal with cross-border insolvencies, which is becoming increasingly important in the current world economy in which "the international aspect of a given case", as described by Wessels, will more often be present than not.

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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.

A treaty or convention becomes part of a participating States' domestic law, forming part of its "hard law" and therefore enforceable in the Courts of that jurisdiction as a legally binding instrument. In contrast, a State may agree to certain instruments, or adopt certain principles, guidelines, recommendations, standards and declarations etc., that are not legally binding but could be described as forming part of that State's "soft law".

The most obvious benefit of treaties and conventions as a source of cross-border insolvency law is that it is legally binding and carries legitimacy and force as a result of being directly applicable.

It is worth noting that the definition of non-treaty instruments as "soft and non-binding" was abandoned by Mevorach in The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps. Mevorach considers that "soft law" instruments can in fact be 'harder' in terms of implementation into domestic law than a treaty, specifically that a model law approach "can possess the characteristics of hard law, while retaining flexible features that induce participation" (https://blogs.law.ox.ac.uk/business-law-blog/blog/2018/04/future-cross-border-insolvency-overcoming-biases-and-closing-gaps).

As a further example, Europe has had varying degrees of success in the adoption of international conventions and treaties. Successful bilateral conventions appeared as far back as the 13th and 14th centuries, however Europe's attempts to achieve multilateral international insolvency conventions were unsuccessful for many years.

Whilst the council of Europe was formed in 1949, it was not until the early 1960s that

committees of experts were formed to work on a bankruptcy convention. There followed only draft conventions between 1970 and 1996, which did not enter into force. Significant progress was eventually made with the Istanbul convention in the 1990s. The Istanbul convention was not ratified as it had insufficient signatories for it to enter into force, but it had an important influence on the EU approach to international insolvency. It was this document which formed the basis of the European Insolvency Regulation (EIR) (2000), which became the current EIR (Recast) 2015. It can be seen that, even though the Istanbul convention did not form part of the 'hard law' of the EU signatories to it, it nevertheless had an important impact on the development of an answer to the difficulties encountered by member States in relation to cases involving an international element.

The Nordic Convention of 1933 is an example of a successful multilateral treaty between its five Scandinavian member States. This convention has been termed "remarkable" for the comity it displays, suggesting that conventions of this degree of success are the exception rather than the rule.

Across the world, problems have been encountered with encouraging States to agree to treaties and conventions. This can also lead to problems of determining which treaties apply, for example in relation to the Montevideo treaties (1889) and (1940) which are not ratified by the same Montevideo Treaty States.

It is fair to say that the success of treaties and conventions as solutions to issues of international insolvency has been variable and that soft law solutions, in particular the UNCITRAL Model Law on Cross-Border Insolvency, have also been enormously effective in encouraging member States to adopt its draft legislation, whether with or without modifications, even though the instrument itself is not legally binding. For example, in North America, attempts to work towards a bilateral insolvency treaty in the 1970s were unsuccessful, which has been attributed to the fact that the proposed treaty was too wide in its scope. Instead, far greater success was achieved by the adoption of Canada and the United States in 2005 of the Model Law.

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Marks awarded 15 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 commenced under and governed by insolvency law. Formal insolvency proceedings are bankruptcies and liquidations, and generally include reorganisation or rescue proceedings.

Informal insolvency arrangements are usually, but not always, unregulated by the insolvency law and generally involve voluntary, out-of-court negotiations between the debtor and its creditors, typically providing for some form of restructuring of the debtor.

Advantages of an informal creditor workout for Lobo are that the costs will be significantly lower for an out-of-court resolution. There will also be no publicity of FPPL's financial difficulties which may result in an indirect benefit for Lobo if it increases the chance of FPPL's successful restructuring and maintains the value of FPPL's goodwill. Lobo may also be able to enter into an agreement with FPPL which extends beyond the terms which a Court could impose, including debt for equity swaps, if Lobo is interested in converting FPPL's debt to equity in the company. Lobo may consider that it is likely to see a greater return of its debt under an informal workout than in formal liquidation proceedings, even if the workout includes discharging some of the debt or delaying repayment.

Disadvantages of an out-of-court workout are that there will be no moratorium in place, which means that other creditors could approach the Courts to commence an insolvency proceeding. If other creditors dissent, there is no way to bind those dissenting creditors to the agreement, as there may be in a formal process.

Lobo may not consider that an informal creditor workout is in its best interests compared to proceedings to liquidate FPPL, for example if it is clear that attempts to rescue or preserve FPPL's business or parts of it are unlikely to be successful.

Lobo would need to know that FPPL, as a foreign registered company carrying on business in Asgard, would be subject to insolvency proceedings under Asgard's domestic laws. It would be helpful to know whether any contractual

arrangement between FPPL and Lobo is governed by the laws of Asgard, which may help to found jurisdiction for insolvency proceedings in Asgard. Lobo may not have a remedy in formal proceedings in Encanto, where FPPL is not otherwise struggling to meet its debts unless Lobo's debt was able to form the subject matter of insolvency proceedings in Encanto. This may be less attractive for Lobo due to the additional expense and effort involved in participating in foreign proceedings.

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Question 4.2 [Maximum 5 marks]

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

Where there are concurrent insolvency proceedings in different jurisdictions, each State will apply its own laws, including its own choice-of-law provisions. The Asgardian insolvency representative will want to ascertain whether the laws of Encanto provide for extraterritorial effect to be given in Encanto to the Asgardian proceedings and whether there will be recognition of the Asgardian insolvency proceedings.

The difficulties the insolvency representative may encounter in respect of co-operation and co-ordination in respect of the concurrent insolvency proceedings include

(1) Where the insolvency proceedings compete with each other; for example, the insolvency representative may be considering corporate rescue/restructuring options whereas the Encantonian proceedings may contemplate liquidation
(2) The Encantonian law (and indeed the Asgardian law) may be ill-equipped to deal with the implications of the foreign insolvency proceedings, for example, it may refuse to entertain the jurisdiction of the Asgardian insolvency representative to appear or enforce his or her rights as insolvency representative in its domestic Courts
(3) Whether the Encantonian Courts will recognise the Asgardian proceedings and stay its domestic insolvency proceedings
(4) Whether the position of creditors will lack certainty, as creditors' rights may be viewed differently in each jurisdiction, for example as they relate to issues of priority payments and security rights as well as voidable transactions

Various multilateral instruments have been developed to assist countries in reviewing and reforming domestic insolvency laws. For example, the UNCITRAL Legislative Guide on Insolvency Law (2004) and the World Bank Principles for Effective Insolvency and Creditor/ Debtor Regimes (2021) were designed to promote international best practice standards and create debate around the difficulties of cross-border insolvency law.

The development of international instruments which promote clear and uniform rules in relation to cross-border issues is to further the goals of clarity and predictability, which foster successful international trade and investment. Even where those instruments do not form part of a State's "hard law", they encourage debate which helps to identify the weaknesses in approaches to international insolvency. By identifying best practice standards, they clearly set a marker as to minimum standards, which many States are not currently meeting.

It would be beneficial to elaborate on international instruments.

4

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 question does not state where FPPL was incorporated, although it states that it has offices in the UK, Europe and non-European countries. An English Court will nevertheless have jurisdiction to wind up a company formed in another State that has carried on business in England, even if it has not complied with UK registration requirements, if it has a "sufficient connection" to the jurisdiction.

The question does not state where FPPL's assets are situated. If its assets are situated in another jurisdiction, the liquidator's ability to take those assets into their control will depend upon the recognition of their appointment in other jurisdictions.

The question does not state whether the laws of England and Wales govern Lobo's claim to the debt it is owed by FPPL. Whilst the UK insolvency practitioner may accept a proof from Lobo in respect of a debt governed by foreign law, it may have to refer to foreign law to establish the validity of the claim. Depending on

the laws of the country governing that debt, the UK Court may or may not be able to apply the foreign laws.

The question does not state which European country in which Lobo is considering opening additional proceedings and whether that country is in the EU. This is relevant as to whether the other State has adopted the UNCITRAL Model Law and would be willing to co-operate and co-ordinate with the Courts of England and Wales and recognise the UK insolvency proceedings.

The European Insolvency Regulation Recast does not apply in the UK following its exit from the European Union. The effect of this is that the recognition of the English insolvency proceedings in the EU will now depend on the local laws of each member State, whereas prior to the UK's exit from the EU, recognition was automatic.

As a result of the EIR Recast not applying in the UK, there will not be automatic effect given to a moratorium under English law in the EU, which may result in a race to enforce foreign assets or bring foreign insolvency proceedings.

Further, if there are foreign judgments in respect of the company's assets, it is not certain that the English courts will recognise those judgments, potentially depriving the company's foreign creditors.

In short, the effect of the EIR Recast not applying is greater uncertainty for creditors, the debtor, insolvency practitioners and lawyers. The result of that uncertainty is likely to lead to greater cost incurred in resolving complicated questions of conflicts of law.

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Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS 49/50
Excellent paper.