INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Many African jurisdictions were former colonies – their insolvency law systems are therefore still largely modelled on the laws of their respective former colonial rulers. For example, African countries such as Nigeria, Zambia, Botswana and Kenya, all of which were formerly under English rule, trace the roots of their insolvency law systems to English law. For countries such as Angolia or Mozambique who were under Portuguese rule, their insolvency law systems follow the civil law tradition given that they were influenced by Portuguese law.

There is scope to elaborate further regarding mixed law origins and French law origins.
1.5

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.

One important event which gave rise to insolvency law reform in Eastern Asia was the Asian Financial crisis of 1998 – this incentivised countries in the region to reform their insolvency regimes as an effective insolvency regime was seen as a bulwark against preventing another financial crisis. In exchange for IMF help, for example, Indonesia overhauled their insolvency legislation with the promulgation of Law No. 4/1998. Another example would be Thailand's new Bankruptcy Act in 1998.

One development which led to insolvency law reform is increased investment in the region. For example, Singapore overhauled its insolvency legislation with the introduction of the Insolvency, Restructuring and Debt Act in 2018 (which came into effect in July 2020) – this was an omnibus legislation which was modelled after the UK Insolvency Act. This was done to update Singapore's insolvency laws and to align it with the strategic interest of being the region's (and an international) debt-restructuring hub.

On a regional scale, the Asian Development Bank has also been driving insolvency law reform in East Asia by funding law reform initiatives as well as supporting conferences to discuss insolvency ideas. Countries in East Asia have also been undertaking bilateral reform initiatives – an example of which can be found in the Closer Economic Relations Trade Agreement (1983) and Memorandum of Understanding on the Harmonisation of Business Law (1988) between Australia and New Zealand (see generally: R Tomasic, Insolvency in East Asia (Ashgate, 2006)).

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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.

In the late 1970s, the US and Canada made an effort to negotiate a bilateral treaty providing single administration of bankruptcy cases involving Canada – but this effort failed (see Harold S. Burman, "Harmonisation of International Bankruptcy Law: A United States Perspective" (1996) Fordham Law Review at p 2544).

Separately, the American Law Institute ("ALI") (a professional body in the United States) has spearheaded a few initiatives towards resolving international insolvency issues between North American Free Trade Agreement countries (ie, the United States, Canada and Mexico). One such initiative was the ALI Transnational Insolvency Project – this was an initiative to improve co-operation in international insolvencies across the NAFTA states. The goal of this project was to provide a non-statutory basis for cooperation in international insolvency cases involving two or more NAFTA states: (see Fletcher & Wessels, "A First Step in Shaping Rules for Cooperation in International

Insolvency Cases" (2010) International Corporate Rescue). The end product of this project was the Principles of Cooperation among the NAFTA countries which was approved by all NAFTA members in 2000.
The success of this initiative, however, is limited by the fact that it only provides a set of guiding principles in dealing with international insolvency situations amongst NAFTA states – however, it does not address substantive differences in the insolvency laws across NAFTA countries. It also does not give clear guidance to companies in NAFTA states who want to perform cross-border transactions. These principles are also not binding on the NAFTA states.

Notwithstanding these shortcomings, the NAFTA principles laid the foundation for the ALI – International Insolvency Institute Report – Fletcher and Wessels were appointed to consider the application of these principles worldwide. And so what started out as a project for NAFTA member states eventually developed a global footprint. The NAFTA principles were also successful in the sense that it also recommended that each NAFTA country adopt the Model Law on Cross-Border Insolvency – which Canada, the US and Mexico all eventually did.

Included together with the NAFTA Principles was an appendix – "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases" – these guidelines were based on examples from actual cross-border cases involving cross-border insolvency protocols. They were not meant to alter domestic laws in any country or to curtail the substantive rights of parties in court proceedings. These set of guidelines achieved some measure of success in that they formed the basis for the ALI-III Global Guidelines for Court-to-Court Communications in International Insolvency Cases – and evidence of its success may be found in the fact that ALI had noted that these Global Guidelines played a prominent role in cross-border airline restructuring.

There is scope to elaborate. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

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Marks awarded 7.5 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.

Voidable dispositions generally refer to: a) fraudulent conveyances and b) preferences. The former refers to a situation where the insolvent has transferred his property in either the form of a donation or undervalue transaction so as to put it out of reach of his creditors. The latter refers to a situation where the insolvent settles a pre-existing debt with a creditor or affords the creditor a security for the pre-existing debt, thereby improving the creditor's position upon bankruptcy.

In Civil Law countries, the actio Pauliana forms the basis of fraudulent conveyance law – it provided for the avoidance of property transfers made to defeat or delay creditor's claims. In English law, the Act of Elizabeth 1570 was the genesis of this remedy. While these formed the basis of the law dealing with voidable dispositions in both Civil law and common law jurisdictions, the subsequent development of these rules were influenced by each country's history and culture. This resulted in the divergence in the form of the rules in the present day. For example, the period in which a transaction can be challenged differs – under Polish law, the claw back period can range from a year to only two or six months whereas under English law, this can range up to 2 years. Further, the laws across states differ as to who can bring an action for a voidable disposition – in France, either the administrator, liquidator, plan performance supervisor or Public Prosecutor can do so. In England, it is the administrator or the liquidator who can do so.

These rules are important in insolvency for two reasons. First, it prevents the dissipation of the debtor's assets when insolvency is imminent – doing so can not only protect creditors by ensuring that assets disposed of by the debtor can be recovered and used to meet creditor's claims, but in the case of a company, increase the chances of a successful restructuring. Second, it may ensure fairness amongst creditors by ensuring that some creditors do not get an unfair advantage (ie, through preferential transactions where they are able to obtain a security for a pre-existing debt).

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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 concedes that this definition has limitations because it is tied to the existence of a national legal framework of insolvency law. This excludes transnational legal insolvency frameworks such as the EIR Recast, or public international law instruments such as treaties which parties may be signatories to (eg, The Montevideo Treaties in 1889 and 1940). It also excludes soft law approaches such as UNCITRAL's Model Law on Cross-Border Insolvency or the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines). For example, the JIN Guidelines may not be a body of enforceable rules per se but they do allow for coordination amongst courts who are dealing with cross-border insolvencies.

Wessel also refers to Fletcher's definition to illustrate the limitations of the above definition. Fletcher defines it as a situation where an insolvency occurs which "transcends the confines of a single legal system" such that one set of domestic law provisions cannot be immediately and exclusively applied without considering the issues raised by the foreign elements of the case. Fletcher's definition implies that there is a body of rules (specifically, private international law) which govern the coordination between different national systems in cross-border insolvency situations. Indeed, as Fletcher points out, there are 3 pertinent issues to be considered in cross-border insolvency: a) the forum which can exercise jurisdiction, b) the recognition and effect of foreign proceedings and c) the applicable choice of law. None of these 3 issues (which are conflict of laws issues) are captured by Wessel's definition above.

Another limitation with this definition is that, as pointed out by Friman, there is no common insolvency language. While "insolvency" is defined quite clearly in the domestic context, at the international level – there is no clear definition. For example, an inability to service debts in the short term (ie, a cash-flow crisis) can, in some jurisdictions, be sufficient to trigger the commencement of insolvency proceedings. And insofar as Wessel's above definition describes international insolvency law as a body of rules governing "insolvency proceedings or measures" – that too is problematic given that what an "insolvency proceeding" is may vary across jurisdictions.

In short, the limitation of Wessel's definition above is that it is too general and does not sufficiently capture the broad scope covered by international insolvency law as well as the pertinent issues.

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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.

The first way in which a treaty/convention can be a source for cross-border insolvency law is where States become signatories – obligations under the treaty or convention

may then, for example, form part of the State's domestic law on insolvency. Alternatively, a State may have to modify domestic legislation to give effect to its treaty obligations.

Such treaties or conventions can be a successful way of establishing cross-border insolvency rules. One example is the Nordic Convention on Bankruptcy – Norway, Denmark, Iceland, Sweden and Finland agreed to the Convention – effectively, a bankruptcy declared in one Nordic country is recognized in other the other Nordic countries as automatically applying to the bankrupt's property in those countries. Another example is the EIR Recast, specifically Art 7 which states that the applicable law to insolvency proceedings and its effects shall be that of the Member State of the territory of which such proceedings are commenced. There is scope to discuss further examples of treaties/conventions.

That being said, such treaties/conventions are not as successful as compared to "soft law" solutions to international law problems. For example, it is not always the case that the treaty will be ratified by all member States – the Convention on Certain International Aspects of Bankruptcy (The Istanbul convention) was only signed by 8 member states, an insufficient number for it to enter into force.

That the "soft law" approach is preferred as opposed to signing treaties or conventions is also evident from the effort which has been channelled into this approach over the decades – as well as the fruit it has borne, the most significant of which is the Model Law on Cross-Border Insolvency which is increasingly being adopted by countries.

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Marks awarded 14 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 refer to insolvency proceedings commenced under insolvency law – which in this case could either be the laws of Asgard or Ecanto, depending on where insolvency proceedings are brought as against FPPL. In contrast, informal insolvency arrangements refer to voluntary negotiations between the debtor and some (or all) of its creditors. Some of these informal insolvency arrangements may be regulated by insolvency law.

One advantage of an informal out-of-court workout arrangement is that the cost involved is significantly lower given that court mechanisms are not invoked. Second, there would be no publicity on the fact that FPPL is facing financial difficulties – this might be important for Lobo given that publicity around FPPL's financial difficulties may make it even harder for them to keep their business going and increase the likelihood that they will be unable to make full repayment of their debt to Lobo. To give an example, if I were Lobo's CEO and I believed in FFPL's long-term business and was willing to convert the existing debt into an equity stake in FPPL, I would not want it to be known that FPPL is facing insolvency issues because that would affect the value of any equity stake in FPPL.

One other consideration Lobo should bear in mind is the priority of their debt – for example if they are unsecured creditors, their debt ranks behind FPPL's secured creditors. In such a case, Lobo would lose out if formal debt recovery options were invoked (assuming of course, that Escanto and Asgard laws provide for pari-passu distribution). Further, given that there is no statutory moratorium in place, it does not prevent other creditors from commencing an insolvency proceeding against FFPL. Finally, there would be no way of binding dissenting creditors to any agreement reached.

The key advantages of a formal debt recovery mechanism, however, is that Lobo can take advantage of the statutory moratorium which prevents individual creditor proceedings from being brought against FPPL. Second, if the workout arrangement with FPPL involves other creditors, it is possible to bind dissenting creditors to the whatever workout arrangement that is agreed upon by FPPL and the majority of the creditors.

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.

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.

One difficulty concerns the nature of the insolvency proceedings in the Asgardian and Encanto courts – for example if winding up proceedings are taken out in Encanto and the court order is for restructuring in Asgard, it may lead to unnecessary capital losses for creditors as attempts at restructuring may be frustrated. In the same vein, another difficulty is the risk of multiple proceedings being brought against the same debtor. Other difficulties include: a) an increased risk of fraud, b) forum shopping and c) difficulty in predicting which law applies to questions concerning security rights and priority payments.

The second difficulty relates to the recognition and enforcement of foreign insolvency proceedings. In the present case, one question is whether the formal court order obtained by Lobo is recognised and enforceable in Encanto. Separately, one other difficulty is whether the Asgardian insolvency representative has the standing to intervene in the Encanto insolvency proceedings.

Absent co-ordination and co-operation between states in cross-border insolvency situation, it may lead to creditors scrambling to grab a debtor's assets – here, only creditors with the deepest resources would be able to pursue this chase for a debtor's assets. This runs counter to the fundamental principle of equality amongst creditors.

One international insolvency instrument which has been developed to assist with these difficulties is the UNCITRAL Model Law on Cross-Border Insolvency. A key feature of the Model Law is that it does not require reciprocity (though some states such as South Africa may stipulate this in their enactment of the Model Law). Another example would be the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines).

These international insolvency instruments are important because they (such as the Model Law) provide a set of rules to navigating the various issues raised in a cross-border insolvency situation – and it is important to have such a set of rules to provide a measure of certainty and predictability to parties as to what can and should be done. Such certainty and predictability is important for cross-border trade as it helps commercial parties plan ahead for a worst-case scenario (*ie*, the recovery of a debt in a cross-border insolvency situation – parties will be able to forecast, for example, what law will be applicable to the winding up proceedings, or where such proceedings should even be brought in the first place). Instruments such as the JIN Guidelines are also important because it enables and facilitates coordination and cooperation amongst courts under whose supervision such insolvency matters are conducted.
There are additional international insolvency instruments that merit consideration.

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.

Following the exit of the UK from the EU, the EIR Recast ceased to apply in the UK from 11pm on 31 December 2020. In this case, the EIR Recast (and the transitional provisions which lasted till 31 December 2021) would not apply with respect to the UK commenced insolvency proceedings. Therefore, the applicable set of rules would be the UK Cross-Border Insolvency Regulations 2006 (which is the UK's enactment of the UNCITRAL Model Law on Cross-Border Insolvency) and/or English private international law rules.

Under English law, the liquidator has a duty to take into custody all the property (whether tangible or intangible) that the debtor company is the owner of, or is entitled to. Assuming that there are not enough debts to satisfy the minor creditor in the UK, the insolvency representative might have to ensure that the winding up proceedings in the UK, and their appointment as liquidators, are recognised in the European State where FPPL has the majority of its assets. In this case, it would be important to find out which European State FPPL has its center of main interests and where majority of its assets are located. It is also important to find out the insolvency laws of that state to determine whether the UK liquidator has standing, and whether the winding up proceedings in the UK can and will be recognised. This is important because the EIR Recast regulations no longer apply and therefore recognition of insolvency proceedings in the UK in other EU states is no longer automatic.

In contrast, if Lobo takes out insolvency proceedings as against FPPL, then its insolvency representatives will have to make an application for those set of foreign proceedings to be recognised under the UK Cross-Border Insolvency Regulations 2006. Assuming that FPPL's registered office is in the state where Lobo has taken out insolvency proceedings, then there is a rebuttable presumption that that is its center of main interests. If this presumption is not rebutted, and the state where Lobo has brought insolvency proceedings is recognised as the foreign main proceeding, then a stay of the UK proceedings will be available as of right. Checks should also be done to ensure that FPPL has not shifted its registered office recently because that will affect the analysis of where its COMI is.

Because the Model Law has no principle of reciprocity, it does not matter whether the state in which Lobo has taken out insolvency proceedings would provide equivalent relief to a UK insolvency representative (or whether that state has adopted the Model Law) – what is relevant is that the UK has adopted the Model Law, and so long as the Lobo's insolvency representative can satisfy the requirements for relief under the Model Law as enacted in the Cross-Border Insolvency Regulations 2006, it will be granted by the English courts.

It would be useful to still know if the MLCBI has been adopted by relevant countries.

4.5

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 44.5/50
Excellent.