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**.

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 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. 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 **11 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

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the **best response** to this statement.

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an "executory contract" and its enforceability?

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

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 a 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 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the correct statement:

(a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies 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, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these 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 untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

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 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.

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

(d) 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.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

(a) This statement is untrue because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

Civil Law Countries

The history of insolvency law dates back to Roman law, which provided for debtor pledging their own bodies to repay loans. If no one was willing to help the debtor, the debtor could be punished corporeally. According to Fletcher, the roots of bankruptcy in civil law are found in *Cessio Bonorum* (assignment of property); *Distractio Bonorum* (forced liquidation of assets); and *Remission and Dilatio* (composition with creditors). At root, insolvency was a collective debt collection procedure. The lex mercatoria (customs & usages developed between merchants & traders) further facilitated the growth of insolvency laws. This came to be popularly called civil law. The origin of the term 'bankruptcy' is from Italian - *banca rotta*, which means 'breaking the bench'. If a merchant was unable to pay debts, the creditors would close his business by breaking his bench or counter. Thus, at the outset, bankruptcy started off as pro-creditor.

The Netherlands - The Dutch system originated with the ordinance of Amsterdam, in 1772, which was later amended to include business insolvencies and fresh start – *Faillissementswet* & *Schuldsanering,* respectively. In the Dutch system, no discharge was allowed before *schuldsanering* (pro-creditor). However, owing to the developments in consumer credit, the law was brought in. Recently, the Dutch insolvency system was reformed to introduce – Wet Homologatie Onderhands Akkoord (WHOA), which introduces a pre-insolvency procedure in the Netherlands, which one might refer to as the "Dutch scheme".[1] Necessary amendments were made to make it compliant with the EU restructuring directive.

France - The *Ordonnance de Commerce* of 1673 served as a foundation for future insolvency legislation. The French Code 1807 was particularly harsh on debtors as it provided for the arrest and detention of debtors. However, in 1967, the French system was reorganised to include a reorganisation procedure and moratorium.

Germany – The German Insolvency Law is called Insolvenzordnung (InsO), 1999, which is a unified insolvency legislation.

Spain – The Spanish Legal Code on Insolvency (2003) provides for a single procedure that individuals and corporations can utilise.

In contrast to the civil law system, countries with common law systems emerged differently.

Common Law Countries

England – In English law, the Statute of Marlbridge 1267 provided for the imprisonment of debtors on non-payment of debts. However, it was not until the 16th century that the word bankruptcy was introduced. The first English bankruptcy Act was introduced in 1542, which provided for complete sequestration for dishonest and absconding creditors. The underlying principle was that in the case of fraudulent debtor, there should be compulsory administration and pari-passu distribution. In 1570, the Act of Elizabeth was introduced. However, so far, no discharge provisions had been provided. The Statute of Ann in 1705 introduced the notion of statutory discharge., which was not an entitlement automatically available, rather depended on the confirmation that the debtor had cooperated during the process. Further, the courts of equity developed the insolvency system. In 1881, Chamberlain laid down the three cardinal rules essential for any bankruptcy law, namely a) Property Principle, b) supervision and audit of trustee in insolvency, and c) independent examination of debtors conduct. This fair procedure served as a foundation of modern insolvency law of England. In 1977, Cork committee was created, which resulted in the promulgation of Insolvency Act, 1986. This is a unified legislation and provides for both corporate & personal insolvency.

[1] https://resor.nl/dutch-scheme/

America – The Bankruptcy Code 1978 of USA is a federal legislation. The American system also provides for the discharge provisions and therefore is termed pro-debtor. It was more liberal than the English system as it tried to balance the desire of creditor groups and debtor groups and commerce. Thus, despite having historical roots in Common law, the American system diverged from England, Australia & Canada.

Australia – The Australian system is based on English common law but does not contain one unified law on insolvency & bankruptcy. For international context, Australia has adopted the UNCITRAL MLCBI. The Corporations Act 2001 regulates the corporate insolvency and the Bankruptcy Act 1966 regulates insolvency of individuals.

3

Question 2.2 [maximum 3 marks]

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

Universalism states that once a proceeding is opened against a debtor, no other insolvency proceedings must be opened anywhere against the debtor or its assets. Thus, advocating for one forum to have all jurisdiction. It allows all creditors worldwide to participate in the proceedings, where all claims are treated equally. Such a single forum can be where the debtor's main interests are situated. While this principle operates well in globalisation, it does not provide certainty in domestic markets. Under this principle, courts of the State (where proceedings are opened) apply their national laws in order to decide between reorganisation or liquidation or priority of payments. All assets are collected and distributed equally among all creditors, local & foreign. Courts in foreign countries must assist the main forum. This is also a multilateral approach to the choice of applicable law, whose main aim is the unity of the debtor's estate, unity of the body of creditors and the universal effect of the debtor's incapacity. LoPucki remarks that in Universality, one court plays the tune, and everyone else dances. This principle is appreciated because it is simple, cost-effective (saves from the multiplicity of proceedings) and also time efficient (speedy). It also provides a solution for forum shopping, albeit only theoretically. However, common points of criticism for this principle are: (a) varying national law approaches to bankruptcy; (b) how to choose which country to start the proceeding in; (c) manipulation of the choice of home country standard: moving to more debtor-friendly States or forum shopping. It also requires high level of international cooperation.

Territorialism states that insolvency proceedings may be commenced in every State where the debtor holds assets, advocating for concurrent proceedings in different jurisdictions against the same debtor (which may be several at any point in time). This principle is based on the principle of plurality. These proceedings must be limited territorially and restricted to property within the State wherever proceedings are opened. The restrictions under this principle apply regarding the filing of claims by creditors and the mandate of the Insolvency Professional/representative. This principle largely focuses on the national interest as a priority before moving any assets abroad.[2] It addresses the 'choice of forum' question by permitting a court to exercise jurisdiction over any debtor who satisfies the conditions of the local insolvency law. Once the choice of forum is established, choice of law is decided. This theory has no extra-territorial reach. This principle is more domestic-oriented as it prioritises national interest before remitting any assets abroad. However, territoriality also poses some fundamental challenges, like there is multiplicity of proceedings, which means there is constant re-litigation. The number of proceedings would be directly proportional to the number of States. This increases costs for the creditors as well as time. This principle is criticised for contravention of the equality principle of creditors as local creditors can prove locally, while others cannot. This is why it is also called 'grab rule'. Other challenge that presents itself under this theory is situations where a

[2] Paul J Omar, International Insolvency Law, Themes & Perspectives (Routledge, 1st edn, 2008)

debtor is solvent in one and insolvent in another? Thus, the theories keep oscillating between local protection versus international cooperation.

Due to a lack of agreement over any of the above-mentioned principles, **modified universalism** has emerged as a possible solution. It provides for the opening of a 'main proceeding' in a State with a Centre of main interest, and then 'secondary proceedings' in other states. LoPucki states that owing to the problem of universalism, it is impossible to adopt it in its true form. Westbrook states that 'Modified Universalism accepts the central premise of universalism that assets should be collected and distributed on a worldwide basis but reserves to local courts discretion to evaluate the fairness of the home country procedures & protect interests of local creditors.'[3] They further state that modified universalism is 'universalism adapted to political realities of differing laws in a world in which law is administered by nation-states. The objective is to provide results as close as possible to that which would emerge from a single global proceeding.'[4] The UNCITRAL Model Law is based on the principle of modified universalism. The main task of modified universalism is to identify which nation should host the main proceeding. 'It envisions the commencement of a main procedure in a single jurisdiction even if non-main proceedings can also be opened, and the laws of other jurisdictions can still be relevant for certain aspects of the procedure. Once the procedures are opened, the MLCBI establishes a set of rules to facilitate cooperation and assistance for the successful management of the procedures. In our view, the adoption of modified universalism as a regulatory model to deal with cross-border insolvency is a sensible one. Indeed, against those favoring the adoption of a more fragmented (or "territorialist") approach, we believe that the existence of a centralized procedure is a superior option.'[5]

3

Question 2.3 [maximum 4 marks]

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

With the use of multi-lateral agreements, Latin American states have attempted to address international insolvency law issues. These treaties are –

1. **The Montevideo Treaties (1889) (amended in 1940**) – Within the Montevideo treaties, the Montevideo Treaty on International Commercial Law (1889) has been ratified by Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay. This treaty covers personal & corporate insolvency. This treaty favours the principle of domicile and the 'real seat' doctrine.[6] It provides one set of proceedings where the debtor has a commercial domicile in one treaty state. It provides for concurrent proceedings where the creditor has two or more autonomous businesses in different treaty states. The 1940 Montevideo treaties have only been ratified by

[3] Jay Lawrence Westbrook, Choice of Avoidance Law in Global Insolvencies, 17 BROOK. J. INT'L L. 499, 517 (1991)
[4] Jay Lawrence Westbrook, Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court, (March 28, 2018). U of Texas Law, Public Law Research Paper No. 691, Available at SSRN: https://ssrn.com/abstract=3151805 or http://dx.doi.org/10.2139/ssrn.3151805
[5] Anthony J. Casey, Aurelio Gurrea-Martínez & Robert K. Rasmussen, United Nations Commission on International Trade Law (UNCITRAL), (This policy note was submitted to the United Nations Commission on International Trade Law Working Group V (Insolvency) on 14th September 2023), available at < https://insolvencylawacademy.com/united-nations-commission-on-international-trade-law-uncitral/#:~:text=The%20MLCBI%20is%20built%20on,certain%20aspects%20of%20the%20procedure.>
[6] Ana Delic, The Birth of Modern Private International Law: The Treaties of Montevideo (1889, amended 1940), University of Tilburg, Oxford Public International Law, available at < https://opil.ouplaw.com/page/530>

Argentina, Paraguay & Uruguay, which means that a careful examination of the applicability of treaties is required before opening of international insolvency.

2. **Havana Convention on Private International Law (1928**) - Also called **Bustamante Code**, this Convention has been ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. The principle of Universalism is enshrined under this Convention as it allows for a single proceeding with universal effect among the countries (article 414) However, if a commercial establishment operates entirely separately economically, the Convention allows for concurrent proceedings (art. 145). It does not provide for cooperation & coordination of insolvency proceedings. Chapter II of the Convention contains universality principles of bankruptcy, which recognise that the commencement of insolvency proceedings in one State will have extra-territorial effects in another Member State.

There is scope for greater explanation / emphasis on the similarities and differences which apply

3.5

Marks awarded 9.5 out of 10

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

Question 3.1 [maximum 7 marks]

It is said that the terms "bankruptcy" and "insolvency" may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to "bankruptcy" and "insolvency", (ii) the essential characteristics of "bankruptcy" and "insolvency" and (iii) any differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

Answer: There is no consensus over the meaning of the terms – insolvency & bankruptcy. The prevalent understanding is that 'insolvency; refers to the state of financial affairs of a debtor. This could be balance sheet insolvency or cash flow insolvency. Bankruptcy, on the other hand, refers to the formal state of being put into the insolvency proceedings or court recognition of the debtor's insolvency. This is the generally ascribed meaning of the terms. However, certain jurisdictions like Australia give different meanings to terms. In Australia, insolvency refers to the insolvency of corporations, while bankruptcy refers to the insolvency of individuals/natural persons. Further, there are certain jurisdictions that use the terms synonymously.

Philip Woods defines certain universal features of insolvency & bankruptcy law.

1. "Actions by individual creditors against the bankrupt are frozen. The piecemeal seizure of assets by disappointed creditors through the levying of distress, or attachment or execution are stayed and replaced by a right to claim for a dividend against the pool.
2. All assets of the bankrupt belong to the pool, which is available to pay creditor claims.
3. Creditors are paid Pari passu, i.e. pro rata out of the assets according to their claims."[7]

However, Wood is critical of these principles. He regards the first postulate as the truly universal feature of insolvency. The second postulate has been subjected to so many exceptions in different countries that it has been eroded. The third postulate, as Wood remarks, 'is a piece of ideology nowhere honoured'.[8]

The objectives of insolvency of individuals and corporations are different.

[7] P R Wood, Principles of International Insolvency (Part 1), International Insolvency Review (1995) Allen & Overy
[8] Ibid

Individual Insolvency: The key design policy under this is discharge, which releases the debtor from past financial obligations and also protects them from adverse effects that may come with it.[9] Sealy & Hooley[10] consider the following objectives relevant:

(a) **To protect debtors from harassment by creditors** – Creditors or third parties acting on behalf of creditors may attempt to harass the debtor by threatening them, publicly shaming them, excessive communication, and constant legal threats, to name a few. In such situations, the individual insolvency law regulates creditor behaviour. For instance, the Fair Debt Collection Practices Act (FDCPA) in USA, through the Consumer Financial Protection Bureau, provides rules for regulating creditor behaviour in case of insolvency of debtor.

(b) **Discharge/Fresh Start** – Unless the debtor has violated some norm of behaviour under insolvency law, they can obtain a discharge from most of his existing debts, providing them with an opportunity to start afresh, especially in cases where the insolvency is brought about by factors beyond the debtor's control.

(c) **To reduce the indebtedness by making contributions from present & future income to the estate while considering their personal circumstances.** USA Bankruptcy law, based on whether the debtor uses Chapter 7 or Chapter 13, allows for discharge in exchange of surrendering his existing non-exempt assets or, a portion of his future earnings.[11] This also contributes to their overall economic stability.

Corporate Insolvency: The key design policy under this is the preservation of business and liquidation if the company is viable.

(a) **Allocation of risk among participants** - the overarching objective of insolvency is to foster economic growth for all participants, including creditors. It also allocates risk among different creditors in a predictable, equitable and transparent manner. This reduces the risk of lending & increases the availability of credit.

(b) **To preserve business or viable parts of the business, not just the company** – the aim of corporate insolvency is to rescue the business or parts thereof through restructuring of debt, operations, or ownership to facilitate business & lower the loss of employment.

(c) **Maximizing value for creditors** – The corporate insolvency law is designed to protect and maximize value for the benefit of all interested parties and the economy in general.[12] This includes equitable treatment of creditors & satisfaction of their claims to the fullest extent possible.

(d) **Imposition of personal liability** – Insolvency can be a consequence of irresponsible business practices. One of the key objectives of this law is to identify the people (directors, officers) responsible for the distress in the company and impose personal liability upon them for causing such distress.

Despite the considerable overlaps, the two systems differ in regard to the notion of exempt or excluded assets. Only in individual insolvencies some systems permit the insolvent person to retain some assets required for their maintenance or their dependents. This could be insurance contracts, trusts, etc.

7

Question 3.2 [maximum 5 marks]

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

[9] Thomas H Jackson, *The Logic & Limits of Bankruptcy Law*, Harvard University Press, 1986
[10] In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017)
[11] Jackson, n 11, chap 10
[12] https://www.elibrary.imf.org/display/book/9781557758200/ch02.xml

Answer: When dealing with cross-border insolvency, several issues arise since national insolvency systems are different in their approach towards the subject.

1. The fundamental difficulty in cross-border insolvencies is the absence of global insolvency law systems and courts to resolve insolvency matters where more than two countries are involved.
2. Secondly, every country takes a different approach to insolvency issues. Some countries believe in unity, thereby taking a universalist approach to cross-border insolvency (single proceeding in one State having extra-territorial effects), while other countries might take a more conservative approach of territoriality, focused on national interest. Such countries encourage a plurality of proceedings in every country where the assets of the debtor are situated. Furthermore, countries may be debtor-friendly (inclines towards alleviation of debtor's predicament) or creditor-friendly (amelioration of creditors exposure to losses).[13]
3. According to Friman, finding a common insolvency language is also a difficulty. Insolvency can be a balance sheet insolvency (based on assessed valuations of the totality of assets & liabilities) or a cash flow insolvency (predicated on debtors' inability to pay the debts as they fall due). This is also termed a liquidity crisis. Since every country has its own definition of insolvency, there is no generally agreed-upon definition globally. Even conventions and treaties find it much easier to define 'insolvency proceedings' but not 'insolvency'.
4. Further, all cross-border insolvencies give rise to conflict of law issues. In order to resolve this, the conceptual matrix of private international law is transposed on insolvency.
5. Cooperation and coordination among courts and foreign representatives.

It would be beneficial for you to also consider the matters raised by Omar and Westbrook

2

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of "hard" and "soft" laws in providing solutions to the challenges of international insolvency.

Answer: In international insolvency, 'hard law' refers to binding international laws such as treaties and conventions. It denotes a legal framework that is legally binding on the parties involved and which can be legally enforced before the courts. Treaties and conventions (classic public law instruments) to which states are signatory and bound are considered 'hard law.'

Some examples of the hard laws would be the Bilateral International Insolvency Conventions of the 13th & 14th centuries and, the Nordic Convention (1933) of the Scandinavian countries. In 1990, the advent of the Istanbul Convention provided regulations on Certain International Aspects of Bankruptcy (Council of Europe Treaty Series No. 136). This Convention served as a foundation for the development of the European Insolvency Regulation (EIR) 2000, which was later amended in 2015 – EIR (Recast) 2015/848. Other examples may include the Montevideo Treaties of Latin America (1889 & 1940), Bustamante Code 1928, etc. They have met with varying success since different national insolvency laws pose a challenge to a hard law instrument.

'Soft law': The success of hard laws has been irregular. However, soft laws have been very successful in approaching the complexities of international insolvency cases. Soft laws are non-binding international instruments. They can be in the form of agreements, principles or declarations. They are more effective in responding to complex issues as they are flexible and can complement hard laws. They often originate in standard-setting organisations such as UNCITRAL, World Bank, UNIDROIT,

[13] Fletcher, n 3

INSOL International, etc.[14] The general criticism surrounding soft laws is that they are non-binding, lack of certainty, & lack of predictability.

The most successful soft law instrument in international law is the UNCITRAL Model Law on cross-border Insolvency (MLCBI). Its increasing adaptation by countries, with or without modification, has been helpful in the unification of the international insolvency law approach. Other examples include the Hague Convention on Private International Law (19th century), which was aimed at unifying private international law. This led to the adoption of the Model Treaty on Bankruptcy 1925, which is now known as 'The World Organization for Cross-border Cooperation in Civil & Commercial Matters. They coordinate their work with UNIDROIT & MLCBI. Other examples: Insolvency protocols dealing with matters of cross-border cooperation and communication, such as the American Law Institute (ALI) Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2001), CoCo Guidelines (2007), and the American Law Institute International Insolvency Institute (ALI-III) Global Guidelines for Court-to-Court Communications in International Insolvency Cases (2012).

3

Marks awarded 12 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

[14] Gert Jan Boon & Bob Wessels, 'Soft Law Instruments on Restructuring and Insolvency Law: Why They Matter (or Not)', Oxford Business Law Blog 2019, available at < https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/07/soft-law-instruments-restructuring-and-insolvency-law-why-they-matter>

Answer: Since Norton Cars Inc. is headquartered in Nottingham (England), the American insolvency estate representative must seek recognition of the proceedings in England to deal with the assets of Norton Cars Inc. situated there. For these purposes, she may refer to the following laws –

1. **Section 426, Insolvency Law, 1986** – This section serves as a basis for cooperation & allows for recognition & enforcement of insolvency-related orders between USA & UK. Sub-section (4), in particular, provides for assistance to foreign courts in insolvency-related matters. Under sub-section (5), the local court is authorised to apply the insolvency law of either court in comparable matters falling within its jurisdiction. **S 426 is not applicable – US not designated**
2. **Article 26, UK Cross Border Insolvency Regulations, 2006 (CBIR)** – This law provides a framework for facilitating cooperation and coordination between jurisdictions in cross-border insolvency cases. Article 1 of the regulation provides for the scope of the regulation by laying down situations in which assistance can be provided. This law is premised upon the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI). As the MLCBI does not require reciprocity, the CBIR also does not require reciprocity.

The insolvency representative of USA must petition the English courts seeking recognition of foreign main proceedings. Part 2 of CBIR 2006 provides for the procedural requirements for application to courts for recognition of foreign insolvency proceedings.

Case: **McGrath v Riddell [2008] UKHL 21** recognises the principle of *modified universalism* embedded deeply in the English cross-border insolvency regime, which encourages cooperation between UK & foreign courts, so far as it is consistent with justice and public policy considerations.

3

Question 4.2 [Maximum 4 marks]

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

Answer: The appropriate legal source in this case would be EIR (Recast) Regulations, 2015/848. The EIR Recast provides a framework for the coordination of insolvency proceedings involving companies with assets in multiple EU States. It is important to remember that EIR Recast regulations apply to insolvency proceedings only in the EU member States.

It employs COMI (Centre of Main Interest) as a key factor in determining in which State should the main proceedings be opened. Under Regulation 3, COMI is defined as 'a place where the debtor conducts administration of its interests on a regular basis, and which is ascertainable by third parties.' Determining COMI is a fact-specific inquiry and will depend upon the evidence of the location of the registered office, place of administration, location of principal assets, main operations, etc. The EIR Recast Regulations will apply so long as the COMI is located in European Union member states, even if the registered office is in a third country.

If the management is in Italy, but the main operations are in Germany, then the proceedings should be opened in Germany, as the COMI would be in Germany. There is a rebuttable presumption that COMI is where the registered office of the debtor is located. However, this is only applicable in cases where the registered office has not been moved to another Member State within the three-month

period prior to the insolvency filing.[15] Germany follows the EIR (Recast) 2015, and thus, main proceedings should begin in Germany. Any other proceeding, which starts in any other member State, can be termed as a 'secondary proceeding.'
COMI is in principle in Italy.

3

Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

Answer: The EIR (Recast) Insolvency Regulation 2015/848 applies to the Member States of the European Union. Since India, South Africa or Australia are not EU Member states, they cannot apply the EU (recast) Insolvency Regulation. The domestic laws of these countries will apply.

1

Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 7 marks.)

Answer: If the COMI is in Italy, and the main proceedings have begun in Italy, secondary proceedings can be started in the Netherlands (article 3, paragraph 2, EIR Recast 2015). The law applicable to the proceedings is EIR Recast 2015/848, as both States are member states of EU.

The domestic laws of the Netherlands would apply to the real rights of security situated in England. The EIR Recast is largely focused on recognition & coordination. Therefore, it does not harmonise the laws pertaining to the treatment of property (real rights of security). In this case, the Dutch Bankruptcy Act will be the applicable law to determine the real rights of security situated in the Netherlands.

In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.

2

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 7 marks.)

Answer: Since the COMI is in Italy, the Italian insolvency estate representative will have to seek recognition of EU insolvency against the debtor in Australia as per the domestic laws of Australia. Since both States have ratified the UNCITRAL MLCBI, it mandates cooperation & direct communication

[15] Mayer Brown, German Insolvency Law – An Overview, available at < https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2023/05/1354frank-german-insolvency-law_english.pdf?rev=32ac12a051f64294bb11482c614a16d6#:~:text=German%20insolvency%20law%20is%20governed,to%20both%20individuals%20and%20companies.>

between local courts & foreign courts or their representatives. Once the proceedings are recognised, the EU insolvency estate representative can move the Australian courts to collect the assets.

They can enter into court of agreement concerning coordinated insolvency proceedings. (Re: Maxwell Communications case 1991).

It would also be beneficial to note that the real rights of security will be dealt with by Australian law.

2.5

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 42/50

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