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 10 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.

The module notes indicate that this difference, between insolvency laws with historical roots in civil law vs English law is a main point of departure, since many countries' systems are based on one or the other. (Module notes p 4)

The roots of civil law began with Roman law, which was quite brutal beginning with the debtor literally pledging his body for the debt, and he could be imprisoned, killed or enslaved as security for the debt. This did expand as Roman law developed into collective debt collecting, based on the 3 principles of assignment of property, forced liquidation and compositions with creditors, where the debtor was determined insolvent. This began as very "pro-creditor", though eventually the concepts of discharge, and abolishing imprisonment came much later. (idem p 4)

English law did not initially include imprisonment, but this was introduced in 1267, and only abolished in 1869. The first English Bankruptcy Act (1542) was generally for "dishonest and absconding" debtors, so basically "fraudulent debtors". The 1570 Act was considered "a true bankruptcy statute" (versus fraud prevention), introducing structure for collective debt collection after insolvency was determined, and with a supervised process. The Statute of Ann in 1705 introduced "a statutory discharge", making it more "debtor friendly". (idem p 4-6)

While countries with either a Civil or English/ Common law based system differ, local laws can also have an effect, examples being security or labour rights, and terminology. (idem p 7) **It would be beneficial to elaborate upon the significant difference pertaining to common law in English countries and codification in civil based countries.**

It is noted that currently "the main piece of legislation regulating English Insolvency law, is the Insolvency Act 1986", which has been updated with certain amendments, including the adoption in 2006 of the UNCITRAL MLCBI. However, "English/ Common law countries have since independently updated their insolvency laws, like Australia for example. (idem p 8)

The US began with the Bankruptcy Coe of 1978, has been since updated including adoption of the UNCITRAL MLCBI. The US is "viewed as trendsetting regarding its rather liberal fresh start approach (discharge of debt) and Chapter 11 reorganization mechanism". (idem p 8)

Australia is also based on English Common law, has also adopted the UNCITRAL MLCBI, though unlike England and the US, it does not have unified insolvency laws (i.e., corporate vs individual). (idem p 8)

The countries with Civil Law systems (referred to as "Continental European", including French, Dutch, German and Spanish for example, vs some Emerging Markets which are a mix of the two depending on their colonial heritage), have similarly independently updated their insolvency laws, more or less, and as with Common law countries, based in part due to the numerous multi-lateral initiatives, the details of which are beyond the scope of this question. (idem p 9-11)

Dutch insolvency law is a unified system, and until it adopted "fresh start" legislation, it was similar to the other Civil Law countries being "pro-creditor". The Dutch recently introduced scheme of arrangement legislation. (idem p 9)

The French's 1807 code was very tough on debtors, including imprisonment, though this was revised in 1935. 1967 laws provide for reorganizations. (idem p 9)

Germany updated its insolvency laws in 1999, and has a unified system. (idem p 10)

Spain as recently updated its insolvency laws, which is also a unified system. (idem p 10)

In general, English common law began more pro-debtor relative to pro-creditor civil law, though have become more similar in this respect over time with insolvency law reforms. It seems more English/ Common law countries have adopted the UNCITRAL MLCBI, and in any case, by the nature of Common Law, the common law countries seem to be more similar than the civil law systems which seem to vary. Finally, it appears that the variety of multi-lateral "soft-law" initiatives have positively influenced the modernizing of insolvency laws, including related to cross border issues.

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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.

The basic principle of Universalism is that "there should only be one insolvency proceeding covering all of the debtor's assets worldwide", so once opened, no others will be opened. This should ideally be the centre of the debtor's main interests, and a guiding principle is that all creditors should be treated equally (of a similar class). It is accepted there could be variations, which leads into modified universalism. The challenges are that this requires a very high level of trust to address difficult issues. (idem p 37-38)

Territorialism is basically the opposite, believing insolvency proceedings can be started in every country where the debtor has assets, and being limited to the assets in each country. This addresses the issues local creditors face. (idem p 38)

Modified Universalism relates to the consideration that pure universalism will never be accepted, and considering many countries' acceptance of territoriality, this has emerged where there is a "main proceeding" where the COMI is, and secondary proceedings are opened in another country, which suggests/ requires cooperation among the countries. (idem p 40)

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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.

Relevant to the region of Latin America, Fletcher notes "multi-lateral arrangements are more likely to be successfully put in place among states which are regionally grouped…" (idem p 59)

The Latin American states have "achieved some of the most long-lasting multilateral agreements re international insolvency law". They were based on general treaties on "private international law and commerce", and included a section on insolvency. The general treaties established were Montevideo in 1889 & 1940, and the Havana Convention on Private International Law in 1928 (Bustamante Code). The initial Montevideo treaty was ratified by 6 countries, the latter, by 3. The latter included a treaty on "International Procedural Law" and included a section on "Civil Meetings of Creditors". Given the limited number of countries signed up, it therefore "requires careful analysis as to which treaty may apply". The 1889 Treaty includes both corporate and individual insolvency, and provides for jurisdiction based on the commercial domicile of the debtor, requiring a single set of proceedings if

there is one main commercial domicile, even if there is occasional trading in other countries, including branches/ agents. However, it may allow concurrent proceedings (or other civil action) if there are independent businesses in different treaty countries. (idem p 59/60)

The Havana Convention "on Private International Law" (1928) was signed by 15 Latin and Central American countries. (idem p 61)

While Bolivia and Peru are parties to the 1889 Treaty and Havana Convention, certain other countries (Argentina, Columbia, Mexico, Paraguay and Uruguay) didn't ratify and so are not parties to the treaty. (idem p 61)

While the Havana Convention is more supportive of a single proceeding with universal effect, it does consider the need for concurrent proceedings where there are independent businesses operating in different treaty countries, so this is similar to the Montevideo for a single proceeding in certain circumstances where there is limited business in other countries. The Havana Convention adopts a "universality approach", enforcing court orders, subject to local rules. Unfortunately the Havana Convention does not provide for coordination/ co-operation when there are concurrent proceedings.

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Marks awarded 10 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.

Regarding the Terms Bankruptcy vs Insolvency being used inter-changeably? Discuss whether Agree, and Why or Why not

It is noted some systems use one term or the other, or both to have somewhat different meanings (e.g, corporate vs individual). (idem p 18)

Elaboration is warranted.

1) meaning that may be ascribed to bankruptcy and insolvency

The UNCITRAL Legislative Guide definitions in the Module notes do not specifically define bankruptcy, but is referred to in the definition of Insolvency, as follows: "when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets (added note: this definition denotes commercial insolvency or cash flow insolvency and balance sheet insolvency respectively. The term bankruptcy is also sometimes used but it usually refers to the formal state of being in bankruptcy)." (idem p 30)

While the Legislative Guide is "soft law" and meant to assist countries with updating their insolvency laws to conform to best practices, as the Guide's definition points out, the two terms are sometimes used interchangeably.

Generally, it has been said that insolvency refers to a state of financial affairs (cash flow or balance sheet insolvency, etc.), while bankruptcy is a formal legal state an individual or entity is put into. (idem 18)

2) essential characteristics of bankruptcy and insolvency

"Wood lists essential features of both, as universal features:

- stay of proceedings, and
- Pooling of assets
- Paying all creditors (of the same or similar class) parri passu (though which has various exceptions by country) (idem p 18)

3) Any differences that may arise when they involve a corporation vs individual:

Sealy and Hooley note the different objectives as:

- Individuals – to protect the debtors from being harassed by creditors, to make a fresh start if appropriate.
- Corporations – to try to preserve the value of the viable aspects of the business.
- Owners/ Directors, etc. – to hold them responsible if they abused their positions.
- Relating back to section 2) above, Principles that apply to both are: Equal distribution (parri passu) to creditors where of the same class, secured creditors dealing fairly, investigations into reason for insolvency, and recovery of fraudulent preferences. (idem 4, 8, 18-19)

There are some other relevant matters to consider, such as excluded assets

Why or Why not agree:

In theory, I generally don't agree the terms should be used interchangeably as it seems to cause confusion, however, as it is a fact that certain systems use one or the other to mean essentially the same thing, or both with different meanings, and which meanings vary among countries, then I do accept that in practice they appear to be used inter-changeably between countries at times.

My personal view is that insolvency is a financial position of a debtor, whether on a cash flow or balance sheet basis, they cannot pay all of their debts (generally, whereas I see bankruptcy as more of a legal state an insolvent debtor is placed in to deal with the situation, so consistent with the Legislative Guide definition above. However, I believe my personal view is based mainly on the fact that the countries where I have insolvency experience (mainly English/ Common Law), this is how the 2 terms are generally interpreted, which supports the fact that the terms are used somewhat interchangeably. Hopefully over time, as multi-lateral initiatives promote best practices, like the Legislative Guide referred to above, there may become more uniformity. In the meantime, one has to accept they can have the same, similar, or different meanings in different countries.

4.5

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.

Apologies for the long response, I found this question somewhat broad/ open-ended, with many aspects of Module notes seeming to be relevant. I note it did not require answering "briefly", as with many other questions…

In general, a particular challenge is that there are such a variety of methods used by different countries to deal with cross-border insolvency issues. A major general issue is that countries may either have

their insolvency laws based on the English Common Law system, or Civil Law, and then individual countries systems developed further over time. Where there are assets in foreign countries where insolvency proceedings haven't begun, some countries do have laws to deal with this, however others do not and so there is a need to apply to the foreign courts for a court order to allow the assets to be dealt with. The courts of Common law countries can apply common law in the absence of specific laws, or gaps in the law, to deal with this situation. If there are concurrent proceedings, then there are the issues of recognition and enforcement in the other countries. There are treaties and conventions between some countries that provide for how these matters are dealt with. It is sometimes necessary to rely on private international law. (idem p 27)

It is noted that often domestic insolvency laws focus on debtors that operate within the country and may not address cross-border issues, in which case private international law becomes an issue. (idem p 44)

The module notes state "the fundamental legal issues that arise", which are the same as the questions Fletcher raises in relation to cross border insolvency, are as follows: "the choice of forum to exercise jurisdiction in the matter, the recognition and effect accorded foreign proceedings in the same matter, and the choice of law to apply to the matter." (idem p 44)

Friman highlights that an initial problem is "finding a common insolvency language". (idem p 41)

Omar notes that besides the main issue of conflict in laws, domestic laws/ norm differences effect creditors and the priorities of their claims. The conflict of laws issues can be complicated by "the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws." (idem p 41)

Westbrook, who supports universalism, notes 9 "key issues" in cross-border insolvency: "standing for (recognition of) the foreign representative, moratorium on creditors actions, creditor participation, executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance provision powers, discharges and conflict-of-law issues." While harmonization "sounds like an obvious solution", though debatable, because of the "fundamental differences" between laws of countries/ legal systems is the major problem, attempts at harmonization must continue.

There are also various specific issues that can add further difficulties to developing a single global cross-border insolvency dispensation.

It is noted that in some countries it's not possible to apply a "collective" insolvency proceeding to individuals, while in others it may only apply if they are an entrepreneur/ trader. (idem p 27)

Many countries treat group companies as single entities, whereas insolvency laws generally recognize separate company legal status. Some countries have laws that will make exceptions in order to effectively consolidate international insolvency proceedings where there is overlap in the creditors, ownership and/ or intermingling of assets). (idem p 27)

Insolvency issues related to banks or other deposit taking financial institutions, and insurance companies, create major challenges as they can create systemic risk to specific countries or the global financial system. (idem p 27)

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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.

In the context of international insolvency, the module notes clarify this when they “consider multilateral approaches that seem to regulate international insolvencies by way of binding ‘hard law’ or to influence its regulation by way of ‘soft law’.” (idem p 45)

In other words, hard law are the actual laws of a country that must be followed, whereas soft law is created to influence or persuade countries to follow them, say as best practices.

Hard laws would include treaties and conventions between countries.

An example of a successful “hard law” would be the Nordic Convention, and to a lesser extent, the treaties and conventions established in Latin America, some with more success than others based on the number of countries adopting them, the details of which has been referred to in a previous question. Once signed, these treaties or conventions bind the countries and become hard law.

A difficulty with “hard law” is that it up to a country to adopt it into law, it cannot generally be forced, though there can be “persuasion” factors, such as certain laws being conditional for IMF funding or certain World Bank ratings.

It appears that treaties and conventions have not been overly successful generally, as the module notes refer to “a rare successful multilateral treaty, the Nordic Convention (1933)”. (idem p 47)

It is noted that “while there has been variable success in achieving ‘hard law’ solutions to international insolvency issues, more success has been gained through the use of ‘soft law’ options.” Numerous multilateral organizations have been focusing on ‘soft law’, particularly since the 1990’s, when UNCITRAL introduced the Model Law on Cross Border Insolvency (MLCBI) which has been the most successful soft law. The MLCBI, as opposed to a treaty or convention, provided draft legislation for countries to adopt, as is or modified. A large number of countries have adopted it, and adoption has been gradually increasing, making it very successful. The Hague Conference on Private International Law (1925), focused on standardization, was never ratified, but was said to have made a positive contribution to international insolvency laws, therefore, it is my opinion that any “soft law” approaches can generally only be beneficial, even if they only contribute to subsequent efforts. (idem p 47)

It would be beneficial to use your own words: at times there is a heavy reliance on quoting the guide

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Marks awarded 12.5 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.

I would advise as follows:

Firstly, England (and Wales) have adopted the UNCITRAL MLCBI, plus the US is generally considered English/ Common Law (vs Civil law countries), which also enables the US legal representative/ court to approach the English court for recognition and enforcement in order to deal with assets in England, on the basis of common law principles/ precedent. The fact that the US has also adopted the UNCITRAL MLCBI should make this most applicable as England has adopted it also. S 426 of England's Insolvency Act also applies to "relevant" countries listed. (idem p 7)
It would be beneficial to note that S 426 is not applicable as the US is not designated
It may be relevant that "the English court has jurisdiction to wind up a foreign company, including unregistered companies in certain circumstances (effectively when insolvent), which seems established. A further relevant issue is to consider the effect of an English winding-up order, as relates to foreign assets/ creditors. I would add that local choice of law issues apply to winding up by an English court with international aspects, and would refer to the English Insolvency Act 1986, where English law would apply, noting foreign law may apply, for example, regarding proofs of claim. (idem p 49) While the US Representative should be aware of these additional items which could be relevant, I would advise that they attempt to use the UNCITRAL MLCBI, and possibly S 426 of the England Insolvency Act, and common law, in order to have the English court recognize the US Insolvency proceeding as the main proceeding, including so that England does not open concurrent proceedings in England, if Norton's English headquarters and main place of business may also be insolvent, or if so, that they may be secondary , but cooperating and coordinating with the main proceeding in the US.

I would also refer her to the Maxwell case where England and US cooperated via court orders for a protocol between the respective IP's, in the event concurrent proceedings are opened in England. (idem p 40)

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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.

Appropriate legal source(s) to be used in X-border matters b/w Italy & Germany:

The EU updated their bankruptcy convention in 2017 [EIR (Recast) 2015], which is most relevant as both Italy and Germany are in the EU. The EIR provides for jurisdiction to be based on the COMI, and does permit additional proceedings where the debtor has an "establishment", and these "subsidiary proceedings can be either independent, if opened prior, or secondary if opened after, the main proceedings based on COMI. As the COMI is in Italy, it appears that is where the main proceedings should be, with possibly subsidiary proceedings in Germany being "where it's main operations transpired", if that is deemed appropriate and in the best interest of the creditors involved, including for cost savings. (idem p 64)

Regarding the possibility of the subsidiary proceedings in another member state (Germany), the Recast states these can occur if the debtor has an "establishment" in that state, being defined as "any place of operations… where the debtor carries out a non-transitory economic activity with human means and assets", which clearly seems to be the case in Germany given the main operations are located there. The Recast notes the "subsidiary proceedings" can be either "independent proceedings" if they were initiated before the main proceeding (where COMI would be based), or "secondary proceedings" if they were initiated subsequent to the main proceedings having the COMI. (idem p 64)

Regarding UK leaving the EU, the Recast Regulations only apply to main insolvency proceedings opened prior to 11pm Dec 31/20 (though UK exited Jan 31/20), so the dates must be considered to consider if England is bound by the Recast should there be cross border insolvency issues related to England given it. As the the COMI transferred to Italy when the UK exited, because of the delay in the Recast not applying to UK, the main proceedings could have been opened in the UK while the COMI was still there, so if UK main proceedings were opened by Dec 31-20. However there is no indication insolvency proceedings were opened in England before the COMI move to Italy, so as noted above, it appears the main proceedings should be in Italy where the COMI is. I would also refer the IP's to the amendments to the EIR Recast, which recognize insolvency proceedings outside the EU (i.e., and so possibly the UK depending on timing), for secondary proceedings to include rescues, and enhanced cooperation/ coordination for corporate groups. (idem p 64-65)

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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?

It appears possible, given amendments to the EIR Recast recognize insolvency proceedings outside the EU, for secondary proceedings to include rescues, and for enhanced cooperation/ coordination for corporate groups. (idem p 65)

The answer is no as it is not applicable to non-members outside the EU.

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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 6 marks.)

As Netherlands are part of the EU, the EU Recast should apply, and make Italy the main proceedings and relevant law for the insolvency proceedings, however, the local laws/ real security rights in Netherlands are relevant, and so it will be a matter for the relevant courts to decide. The EU recast allows for secondary proceedings in another member state where debtors have an establishment or place of operations, which the facts refer to. This would be affected by whether insolvency proceedings are opened in Netherlands. Being a Civil Law system, their laws may be more similar to Continental Europe (Italy in this case). (idem 65)

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(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 6 marks.)

An insolvency proceeding in Australia would firstly seem to be governed by Australia law, as they are obviously outside the EU Recast, and their domestic private international law would apply in relation to real rights of security.

So it would seem to depend if the Australian courts will accept Italy as the country of the main proceedings, and if so, if secondary proceedings being opened in Australia.

I would also refer to the amendments to the EIR Recast, which recognize insolvency proceedings outside the EU, for secondary proceedings to include rescues, and enhanced cooperation/ coordination for corporate groups. (idem p 64-65)

Australia's laws are based on common law (unlike mainland Europe/ Italy), so it seems Italy would not rely on common law principles. It is relevant that Australia have adopted the UNCITRAL MLCBI, which favours Universality, which favors recognition and enforcement. I would expect the UNCITRAL MLCBI to prevail. The issue would be subject to Australia's Corporations Act 2001 which regulates corporate insolvency, and recent relevant reforms. (idem p 9)

There is some scope to elaborate

3

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS 45.5/50

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