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.

Systems that have historical roots in English Law tend to be those with English colonial roots, such as the United States, Australia, India and some African countries for example Nigeria and Botswana. These countries all follow a common law system. A common theme to the early insolvency laws was the punishment of those unable to pay their debt, for example by means of imprisonment in what was called 'debtor's prisons'[1]. This was only abolished in 1869 by the Debtors Act.

Respective common law jurisdictions tend to use the English law as a basis for their current legislation, with some modernisation in the form of new and reformed insolvency laws. There are however differences in the sources of insolvency law between these countries, for example both the USA and England have a single, unified set of insolvency laws, whilst Australia has two separate sets of legislation covering corporate insolvency and personal insolvency.

Conversely, many European countries such as the Netherlands and France adopted a civil law system, along with some other African countries which have historical roots in civil law states, such as Angola and Mozambique. The majority of Latin America also follows a civil law system and is known to be one of the most unified regions in terms of insolvency law. In these countries, Roman Law formed the foundations of insolvency law and stem from Table 3 of the Twelve Tables which related to the execution of judgements.[2] Many countries across Europe adopted insolvency legislation between the 13th and 17th century, which involved some sort of debt collection procedure.

Generally, common law insolvency systems appear to be more debtor friendly, such as American insolvency law which is said to give the debtor a fresh start following discharge from the insolvency proceedings. Conversely, civil law systems such as the Netherland were pro-creditor and gave more power to creditors in the course of insolvency proceedings. This, however, is changing and in the Netherlands, new consumer credit regulations mean that debtors are becoming more favoured.

Another notable difference is that civil law countries tend to favour a territorial approach to cross-border insolvency proceedings whereas common law countries have adopted approaches closer to universalism, meaning that more efforts are made to unify insolvency laws across these States. [3]

A greater emphasis regarding common law vs codified law would be beneficial.

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.

Salafia suggests that territorialism is a system based off the belief that a court's power is limited to its own country's jurisdiction and insolvency law. [4] This means that should an entity have

[1] Barty-King, Hugh, The Worst Poverty, Alan Sutton Publishing, 1977

[2] J C Calitz, "Historical overview of state regulation of South African Insolvency Law" (2010) 16(2) Fundamina

[3] P J Omar, "A Panorama of International Insolvency Law: Part 1", (2002) International Company and Commercial Law Review 366

[4] Salafia, Cross-Border Insolvency Law in the United States & Its Application to Multinational Corporate Groups, (Connecticut Journal of Int'l Law, 2006)

operations or assets in multiple jurisdictions, it may be necessary to open multiple concurrent insolvency proceedings in different jurisdictions. The assets of the entity would be dealt with in their respective States where the proceedings have been opened, and the creditors would be limited as to which jurisdiction they are able to claim against the debtor in. This can cause issues in situations whereby a debtor's assets are located in a jurisdiction where proceedings have not commenced.

On the other hand, universalism takes the opposite approach, that the debtor's estate is administered through the cooperation among all countries affected[5]. This means that an entity facing insolvency with operations or assets in multiple jurisdictions can be dealt with under the provisions of one insolvency law. This may be the territory in which the entity has its 'centre of main interests'. This concept requires that there is just one single insolvency proceeding which has effect across all other jurisdictions, and therefore all other States must recognise this insolvency proceeding, which in practice would be extremely difficult to impose.

As absolute universalism is an unrealistic concept, modified universalism as a hybrid approach has been created and is adopted by a number of States. In this approach, a 'main proceeding' is commenced in the entity's 'centre of main interests', at the same time as proceedings in other relevant States, and there is a level of co-operation between the States. This is the concept used today by many states as co-operation between courts in different jurisdictions is encouraged.

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.

Private international law was initially codified in South America via the Montevideo Treaties of 1889 and 1940.[6] These treaties included sections on bankruptcy or insolvency law which assisted the ratifying states in managing insolvency issues.

The Montevideo treaty of 1889 was ratified by six Latin American countries and sought to allocate the jurisdiction of the debtor. For example, if an entity operates in more than one State, whereby the entity's business in both states is operated autonomously, then concurrent proceedings may occur. It follows that whereby assets are spread across multiple jurisdictions, creditors in the local jurisdiction may request a local adjudication, and in each local jurisdiction, local creditors are first to receive payment.[7]

A second Montevideo treaty was created in 1940 and was ratified by three Latin American countries, and it is therefore important to distinguish which countries have ratified these two separate treaties. There are in fact two separate 1940 treaties which involves bankruptcy law: The Treaty of International Civil Procedure and the Treaty on International Commercial Terrestrial Law. A new provision was added to the 1889 treaties whereby the creditors are given a right of priority of payment

[5] EH Biery, A Look at Transnational Insolvencies & Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Prot. Act of 2005, (Boston College Law Review, 2005)

[6] Ana Delic, Oxford Public International Law, https://opil.ouplaw.com/page/530

[7] Kurt H. Nadelmann, A Report of the Montevideo Conference and Creditor Discrimination, University of Pennsylvania Law Review, 1951

from the assets situated in the jurisdiction of the place of payment even in situations where only one bankruptcy is declared.[8]

The Montevideo treaties were widely criticised for having only a partial solution to international insolvency issues and the rules are thought to work best only in their regional settings rather in the international stage.[9]

The Havana Convention of Private International Law was introduced in 1928 and was adopted by 15 South and Central American countries. It seeks to provide more of a singular approach to insolvency proceedings, whereby if the debtor is only domiciled in one country, then there can be only one preventative proceeding brought against them. Separate rules apply to entities which have autonomous establishments in multiple jurisdictions and in such cases, concurrent proceedings may exist. The Havannah Convention however does not provide any guidance for the co-operation of concurrent proceedings between jurisdictions unlike the two Montevideo Treaties.[10]

It would be beneficial for you to clearly stipulate the differences, rather than describing each and leaving it for the reader to discern.

2.5

Marks awarded 8.5 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.

When using the terms 'insolvency' and 'bankruptcy', it is important firstly to determine which insolvency regime these terms are being used in reference to as the definitions will differ between States.

The term 'insolvency' can broadly be described as a situation where a debtor either cannot pay its debts as and when they fall due (cash flow insolvency), or whereby its liabilities exceed its assets (balance sheet insolvency). It is in essence, a state of economic distress, and in many States, it doesn't necessarily denote a company or individual that has entered a formal insolvency process. Many companies may enter a period of insolvency and then recover through restructuring or additional capital investment without the need to enter a formal insolvency process. However, in certain States such as Australia, it is used only in reference to the insolvency of a corporation rather than an individual.

The word bankruptcy originates from the Italian term 'banca rotta', which means to 'break the bench', whereby in the medieval times the bench of an insolvent debtor would be broken in the marketplace

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[8] Kurt H Nadelmann, Concurrent Bankruptcies and Creditor Equality in the Americas, University of Pennsylvania Law Review, 1947

[9] Ian F. Fletcher, International Insolvency: A Case for Study and Treatment, The International Lawyer, 1993 (https://scholar.smu.edu/til/vol27/iss2/7)

[10] Ian F. Fletcher, Insolvency in Private International Law – National and International Approaches, Oxford University Press, 2005

by the creditors[11]. It is generally used to denote insolvency of a debtor, however it is more commonly used in the sense of a formal state of being in bankruptcy, i.e. the insolvent company or individual has entered into a formal insolvency process. In the US, the term is used to describe both personal and corporate formal insolvency proceedings, whereas in the UK, it is only individuals who are able to be declared bankrupt.

Wood[12] provides three universal characteristics of insolvency or bankruptcy law:

1. The staying of proceedings brought against the bankrupt by creditors;
2. The pooling of assets in order to repay creditors; and
3. The proportionate payment of creditors from the pooled assets based on claim amount, i.e. the creditors are paid 'pari passu'.

Wood goes on to criticise these features, as modern insolvency laws have involved the addition of exceptions to 2 and 3, for example creditors may have security over specific assets and therefore these assets wouldn't be pooled or paid proportionately to creditors. Wood therefore argues that the only truly universal feature of bankruptcy law is 1.

When comparing corporate vs personal insolvency (or bankruptcy), there are differing objectives as distinguished by Sealy and Hooley[13]. In personal insolvency, the objectives include enabling the bankrupt to start anew whilst providing protection for the bankruptcy from its creditors and allowing the bankrupt to make repayments of debt from their current and future income whilst considering the bankrupts personal circumstances. For example, in some States, in personal bankruptcy, certain assets may be excluded from the proceedings to enable the bankrupt to care for themselves or their dependents.

Personal circumstances are not taken into consideration in corporate insolvency, and the objectives given by Sealey and Hooley are instead to protect the value of the company and take any legal action in situations of abuse of personal liability, to make recoveries for the liquidation estate.

I therefore do not agree with the statement that the terms 'bankruptcy' and 'insolvency' may be used interchangeably, as there are differences in their definitions in different States as well as differing characteristics and objectives as outlined above.

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.

The complete coherence of a cross-border insolvency system would require the existence of a single set of global insolvency laws as well as a global insolvency court to deal with insolvency matters between States, for example through a system of absolute universalism. As previously described, this is an unrealistic concept and global insolvency laws and courts do not exist. There are certain aspects of local insolvency law which are influenced by respective local legal culture, the basic rights of individuals and corporations and differing labour and security rights laws.

Omar[14] expands on the above and explains that differing domestic norms impact local creditor priority systems in insolvency cases. For example, in cases whereby a creditor has made a claim against a

[11] P R Wood, Principles of International Insolvency (Sweet and Maxwell Ltd, 2007)
[12] Ibid note 9
[13] M A Clarke et al, Commercial Law (Oxford University Press, 2017)
[14] P J Omar, "The Landscape of International Insolvency", (2002)

debtor in multiple states, their claim priority may differ in each State, giving rise to conflicting laws. Other factors impacting the priority of claims between states include differing laws relating to netting, security and set-off, as well as retention of title clauses.

Friman[15] explains that one of the difficulties of the creation of a global insolvency system is the differing use of language between States. In particular, the term 'insolvency' is defined differently in each insolvency law system and for some States it can mean cash flow insolvency and in others it can mean balance sheet insolvency as discussed in 3.1.

Westbrook[16] gives a list of nine key issues, some of which echo the remarks of Omar above. These are:

1. Recognition of the foreign representative
2. Moratorium on creditor actions
3. Creditor participation
4. Executory contracts
5. Co-ordinated claims procedures
6. Priorities and preferences
7. Avoidance provision powers
8. Discharges
9. Conflict-of-law issues.

These 9 factors are aspects of insolvency systems which tend to differ from State to State, leading to difficulties in cross-border insolvency cases. It is noted that Westbrook is an advocate for universalism, and so would favour the harmonisation between States of the above nine issues.

5

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.

The term "hard law" concerns laws written in a form that suggests the existence of a legal obligation. In an international insolvency context, international treaties or conventions are considered a primary source of international hard law as well as international or regional insolvency regulations.[17] This type of law is enforceable, giving parties the ability to make applications to court to invoke the laws.

An example of an international insolvency hard law is the Nordic Convention which was drafted and agreed upon by representatives from Denmark, Finland, Iceland, Norway and Sweden in 1933.[18] The success of this type of multilateral treaty is relatively rare, and for a time, the only operational multi-lateral treaties were the Nordic Convention, joined by the aforementioned Montevideo Treaties and Havana Convention of 1928.[19]

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[15] H Friman. The discussion on cross-border insolvency rules are largely based on the master class notes initially drafted by H Friman for the LLM international insolvency law module at the University of Pretoria
[16] J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, St Louis University Law Journal 753
[17] I Mevorach, A Fresh View of the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups, (Michigan Journal of International Law, 2019)
[18] H Holm-Nielsen, The Scandinavian Convention on Bankruptcy and Arrangements outside Bankruptcy, (Journal of Comparative Legislation and International Law, 1936)
[19] D McKenzie, International Solutions to International Insolvency: An Insoluble Problem? (University of Baltimore Law Review, 1996)

A more recent successful example of hard insolvency law is the European Insolvency Regulation of 2000. Although not a treaty/convention, this regulation was adopted by the European Union and is binding for EU members.

Conversely, "soft laws" are those that aren't legally binding. These laws are seen as "a weakened version of hard law, with diminished levels of bindingness, obligation, and precision."[20] This includes Model Laws and Model Treaties, however in some cases, Model Laws are adopted by States into their local legislation, at which point they become enforceable, hard law.

An early example of soft law is the Model Treaty on Bankruptcy drafted by The Hague Conference on Private International Law in 1925. This Treaty was never ratified by any country and therefore never became hard law of any jurisdiction however it did contribute to early foundations of the regulation of international insolvency law.

The most successful soft law in the context of insolvency is the UNCITRAL Model Law on Cross-border Insolvency which was drafted in the mid-1990s. Member States were encouraged to adopt these Model Laws which promote harmonisation of insolvency law and co-operation and co-ordination of insolvency courts across jurisdictions. To date, legislation based on this Model Law has been adopted in 59 States.[21]

3

Marks awarded 15 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.

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[20] Ibid

[21] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status Accessed 11 November 2023

In UK insolvency legislation, Section 426 of the Insolvency Act 1986 dictates that 'The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.' However, in reference to this section, America is not listed as a 'relevant country' or territory, and therefore recognition must be sought through other means.

Both the UK and the United States of America have adopted forms of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). The UK has adopted the Model Laws into its national law, however in the US, the Model Law doesn't form a part of federal law and is only adopted in a number of states[22].

The Model Laws do not require reciprocity and therefore in this situation, the Model Laws can be applied for the purposes of recognition of the American insolvent estate representative. The Model Laws establish simplified recognition procedures for qualifying foreign proceedings. The proceedings would be recognised as either the main proceeding or a non-main proceeding, depending on where the centre of main interests ("COMI") is at the date of commencement of the foreign proceedings.[23]
As the headquarters of Norton Cars Inc ("Norton") is still in England, the UK would be considered as the COMI. Norton also maintains establishments in the US, therefore the US proceedings are classed as the non-main proceedings in accordance with the Model Laws if recognition was sought in the UK.[24]

Following the recognition of the non-main foreign proceeding, the American insolvent estate administrator may request that the distribution of all or part of the assets located in the UK be entrusted to the American insolvency estate administrator. As this relates to a non-main proceeding, if this is requested, the court "must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding".[25]

Common law is also relevant

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.

As Norton shifted its COMI to Italy, an EU Member State, upon Brexit, European Insolvency Regulation ("EIR") would apply. In accordance with EIR, the country where Norton's COMI is located is given exclusive jurisdiction to the commencement of main insolvency proceedings.[26]

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[22] G A. Bermann, The UNCITRAL Model Law at the US State Level (Columbia Law School, 2023)
[23] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency Accessed 11 November 2023
[24] Article 2(c) UNCITRAL Model Law on Cross-Border Insolvency
[25] Article 21.2 and 21.3 UNCITRAL Model Law on Cross-Border Insolvency
[26] https://www.ilauk.com/docs/paper_comi_in_ec_reg_and_cbir.pdf

It is worth noting that COMI is defined in the EIR as the "place where the debtor conducts the *administration* of its interests on a regular basis and which is ascertainable by third parties".[27] Therefore, careful consideration should be given as to where the COMI is considered by third parties. In this example, the main operations transpired in Germany, however the management was directed from Italy, therefore, this is the designated COMI.

As discussed, the main proceedings should therefore be opened in Italy based on the COMI, however it is possible for concurrent proceedings to be opened in other Member States, and therefore, if necessary, secondary proceedings may be opened in Germany[28]. If these proceedings are opened, the effects would be limited to dealing with the assets located in Germany.[29]

In accordance with Article 7 of the EIR, the law applicable to the insolvency proceedings would be that of the country where the proceedings are opened. Therefore, Italian and German law would be applied in the proceedings opened in these countries respectively, and aspects of law such as set-off and current contracts would be determined by each country.

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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?

The EIR Recast regulation is only applicable to Member States, being countries located within the European Union, and unlike the UNCITRAL Model Law, the EIR Recast regulation does require reciprocation between States. The courts of India, South Africa and Australia are not Member States and so this regulation would not be applied in these countries and their own international insolvency legislation in respect of recognition would apply instead.

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 6 marks.)

The Netherlands have not adopted the UNCITRAL Model Law on cross-border insolvency. However, as both the Netherlands and Italy are both EU member states, EIR Recast regulations can be applied in this scenario.

Article 8 of the EIR Recast covers third parties' rights in rem. This Article states that the rights of creditors in rem are not impacted by the opening of insolvency proceedings in relation to assets located in Member States. In accordance with 2(a) of this Article, this includes "a right guaranteed by

[27] Article 3, REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast)
[28] Ibid, Article 19.2
[29] Ibid, Article 3.2

a lien in respect of the claim or by assignment of the claim by way of a guarantee". This Article applies to both tangible and intangible assets, and both moveable and immovable assets.

Therefore, the security afforded to the creditors which have established security over the assets in the Netherlands would not be impacted by the commencement of insolvency proceedings. These assets would be dealt with in Netherlands by its local laws on security over assets.

In respect of any immovable property which is subject to registrations in public registers, Article 14 of the EIR Recast will apply which requires that the Member state in which the register is kept will govern the law applied.

3

(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.)

Australia is not part of the EU and therefore does not follow the EIR Recast, however it has adopted the UNCITRAL Model Law on Cross Border Insolvency, which as discussed does not require reciprocity.

In accordance with the Model Law, the State in which the entity's COMI is located is considered the "foreign main proceedings." The insolvency representative in Italy may apply for recognition of the Italian proceedings in Australia, which would then be recognised as the foreign main proceedings. Relief would be granted upon recognition of the foreign main proceeding, including a stay of enforcement proceedings over assets of Norton.

However, there are exceptions to the above in the case of secured assets and in this circumstance, the law governing secured assets in Australia would apply. The Italian insolvent estate representative should firstly check the Australian Personal Property Securities Register to confirm that the security is valid. If it is invalid, the Italian insolvent state representative may be able to obtain authority to deal with this asset following recognition. If the charge is valid, then the secured creditor in Australia would retain their security rights over these assets.

3

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 47.5/50

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