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 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.

[National or domestic legal systems across a variety of States will have been either founded in civil law or English (common) law,[1] which in turn will have impacted the respective insolvency laws of States. Both these influences are discussed in turn below:

A) The insolvency laws of many continental European legal systems are historically rooted in civil law (i.e., Roman and/or Germanic law). These European insolvency laws were influenced by, *inter alia*, the *Lex Mercatoria* (i.e., the trade customs of continental European merchants). For example, **It would be beneficial to stress the codification of law cf common law precedents**

1) French insolvency law: *The Ordonnance de Commerce* (1673) is a significant step in the history of French commercial and insolvency law insomuch that Chapter XI of that *Ordonnance* provided the groundwork of subsequent French insolvency law contained in the codes of 1807 and 1838, which consequently provided the foundation of Napoleonic insolvency codes in a number States other than France. The 1807 code was deemed to pro-creditor and unsympathetic towards debtors, due to the fact that it permitted the arrest and detention of debtors. In 1889, a French law introduced the idea of "judicial liquidation" and later in 1935 another law revised the harsh treatment of bankrupts and managers of failed businesses, ostensibly by way of introduction of ancillary bankruptcy proceedings against the proprietors of said insolvent business in tandem with penalties and disqualifications for directors. In 1955, a new dispensation ensued while a complete revision of insolvency legislation in 1967 introduced a reorganisation procedure which included a moratorium followed by a court-sanctioned plan. All these developments led to the 1985 Act which is largely still in force today and French bankruptcy law is broadly governed by the Commercial Code (Art L.610-1 to L.680-7 and Art R.600-1 to R.670-6)

2) Dutch insolvency law: numerous ordinances, such as the Amsterdam ordinance of 1772, once applied in parts of the Netherlands. The *Faillissementswet* (1897) provides for bankruptcy of both individuals and business, and introduced *failliet* or *surcheance van betaling* (i.e., a moratorium). However, the *Commissie van Onderzoek* (i.e., the Research Commission) developed the concept of *Schuldsaneringswet* which allows for a "fresh start" under Dutch bankruptcy law. Prior to the introduction of *schuldsanering,* Dutch insolvency law epitomised insolvency laws of many Western European countries in its being far more pro-creditor, and without the possibility of discharge being permitted unless the creditors agreed. New developments in consumer credit, however, forced Dutch lawmakers to introduce the notion of fresh start or rehabilitation to address over-indebtedness. The Netherlands was undergoing reform of its insolvency laws. A legislative proposal for the introduction of pre-packaged insolvencies had been on hold awaiting a decision of the European Court of Justice, which was handed down in April 2022. Allied to that proposal was a Bill amending certain provisions regarding transfers of undertakings and protection of employment. Additionally, implementation of the Restructuring and Insolvency Directive is pending. The Dutch Minister of Justice is considering the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. The *Wet Homologatie Onderhands Akkord* ("**WHOA**"), that is, the Dutch Scheme of Arrangement came into force on 1 January 2021.

Separately, Germany's insolvency law, that is, the *Insolvenzordnung*, which is the product of 1990s bankruptcy law reforms, is an example of unified insolvency

[1] P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007, p.55.

legislation, and is the current bankruptcy code in application in German since 1 January 1999.

3) The insolvency laws of many African countries follow the civil laws of their respective former colonial powers, e.g. Angola and Mozambique (Portuguese law), Francophone West African countries (French law), although some countries in the region such as Namibia and South Africa have hybrid legal systems made up of both Roman-Dutch and English law influences.

Similarly, the countries of South America predominantly follow civil law tradition and are said to have one of the most unified law systems globally. All South American States are signatories to the Union of South American Nations agreement, that is aimed at establishing a system of supra-national law akin to the European Union system. Several South American countries are in the process of revising their insolvency laws: Argentina, Colombia, Costa Rica, and Peru revised their insolvency laws at the end of the 1990s. The Argentine reforms were of special note because they were complemented by labor law reforms.[2] The two big economies of Brazil and Mexico – where the laws tended to be very old, formalistic, not enforced, out of touch with contemporary business practices, and heavily skewed to favour preserving the enterprise to protect employment at the expense of creditor protection have also been overhauled: the Brazilian Bankruptcy Law is fairly well-developed (by emerging markets standards), 'having been overhauled in 2005 to provide debtors with better prospects for restructuring instead of liquidation';[3] 'Mexico has a well-tested (by emerging markets standards) bankruptcy system, with multiple precedents dating back to 2003, shortly after the *Ley de Concursos Mercantiles* was approved'.[4]

B) The Anglo-American insolvency laws are historically rooted in common law (i.e., English law): **As per above, it would be beneficial to stress this common law as a difference**

1) The Insolvency Act 1986 (the "**1986 Act**") is the core legislation governing English insolvency law and is an example of unified legislation that deals with personal (consumer) and corporate bankruptcy under the auspices of the same 1986 Act (like the German *Insolvenzordnung*). However, the English 1986 Act essentially duplicates several provisions which apply to individuals and companies respectively. Aspects of the 1986 Act were amended by the Insolvency Act 2000 and the Enterprise Act 2002. In 2009, the Debt Relief Order for individuals was introduced and in 2016 further amendments were introduced that permitted applications for bankruptcy relief to be made online. Like other jurisdictions, the UK adopted several insolvency related reform measures in the wake of the Covid-19 pandemic. To this end, the Corporate Insolvency and Governance Act 2020 was enacted, setting out insolvency law reforms that, *inter alia*, introduced a new restructuring plan, new moratorium rules, the relaxation of wrongful trading liability as well as the suspension of winding up petitions and statutory demands.[5] Note also that England and Wales adopted the UNCITRAL Model Law on

[2] https://www.arabruleoflaw.org/bankruptcyreform/wp-content/uploads/2014/02/IR_1999_WB_Reforming-Insolvency-Systems-in-Latin-America.pdf , accessed 13 November 2023.
[3] https://www.clearygottlieb.com/-/media/files/emrj-materials/latin-america-insolvency-regime-scorecard-february-2020-update.pdf, accessed 13 November 2023.
[4] Ibid.
[5] https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/2-covid-map-17-may.pdf, accessed 13 November 2023.; for a discussion of the amendments introduced by the Corporate Insolvency and Governance Act 2020, see G McCormack, "Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid 19" (published by INSOL International as a Special Report, October 2020), https://unov.tind.io/record/70602?ln=en, accessed 13 November 2023.

Cross-Border Insolvency in 2006. Common law principles also still apply. Section 426 of the 1986 Act still applies to "relevant countries" (that is Channel Islands and Isle of Man) and countries or territories designated as such by the Secretary of State (and currently include: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, the Republic of Ireland, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu, the Virgin Islands, Malaysia, South Africa, and Brunei Darussalam.)

2) In the USA, the Bankruptcy Code is the federal legislation that applies to all US states. As the USA is a federation, conventionally, one must distinguish between federal and state law. American bankruptcy law was revised in the wake of the 1973 Review Commission, giving rise to the Bankruptcy Code of 1978 (the "**1978 Code**"). The 1978 Code codified the following well-known procedures: liquidation (Chapter 7); municipalities (Chapter 9); reorganisation / rescue (Chapter 11); family farmer (Chapter 12); and rescheduling of debt (repayment plan) (Chapter 13). The 1990s Review Commission produced the 2005 reforms that led to the Bankruptcy Abuse Prevention and Consumer Protection Act 2005. This introduced "means testing" as a principle by which to determine which individual debtor may file for Chapter 7 (that is, direct liquidation / bankruptcy) or Chapter 13 (that is, a repayment plan connected to a discharge). Chapter 15 contains the adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency replacing the former section 304 of the 1978 Code to deal with international insolvency. While the US insolvency system is seen as a quintessential example of a pro-debtor system thanks to its significantly liberal approach to rehabilitation, also termed as discharge, the 1978 Code was amended also in this regard by the 1990s Review Commission. The US insolvency system is deemed to be a trailblazer for of its very liberal rehabilitation approach (i.e., discharge of debt) and its Chapter 11 reorganisation mechanism.

3) While Australian insolvency law is also founded on English common law, it is not a unified legislation. The Corporations Act 2001 governs corporate insolvency, while insolvency of individuals or natural persons is governed by the Bankruptcy Act 1996. Note also that Australia has adopted the UNCITRAL Model Law on Cross-Border Insolvency. Furthermore, African countries formerly colonised by Great Britain, such as Botswana, Kenya, Nigeria, Tanzania and Zambia follow the English common law tradition, while Singapore, which is also common law based, is transforming itself into a significant regional player, passing a new Insolvency, Restructuring and Dissolution Act in October 2018 (that came into force 30 July 2020), consolidating its corporate and personal insolvency and restructuring legislative regimes into one unified act. Indian insolvency laws are founded on English law, and formerly emulated the older English model of differing legislations for company insolvency and personal bankruptcy.]

2.5

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 principle of *universality* or *universalism* entails that there should only be one insolvency proceeding dealing with all of a debtor's debts and assets globally. Therefore, once proceedings have been initiated in one jurisdiction, there should not be the possibility of opening any other insolvency proceedings nor any other forms of execution of a debtor's debt.

One forum should have jurisdiction, ideally.[6] *Universalism* is a cross-border insolvency concept that permits more than one insolvency proceeding pending or originating in different a State to be dealt with under the provisions of one insolvency law, e.g., in the State where the debtor has its centre of main interests (**COMI**). This entails that the law of the "main proceeding" takes to having global effect, even outside the territorial jurisdiction of the State where the "main proceeding" has been commenced. *Universalism* calls for "unity of proceedings" allowing the law of the State where the "main proceeding" is commenced (i.e., the *lex concursus*) to control the insolvency matter.[7] There could be other approaches, for instance using a global insolvency law without a single forum, however, that could include contractual elements such as companies electing which legal systems to apply by stating these in their Articles of Association.[8]

Note, however, that the hybrid notion of "*modified universalism*" has emerged as a consequence of a global consensus concerning universalism not having been (and probably never to be) reached and many States remaining closer to an approach based on territoriality. In circumstances where *modified universalism* is adopted, the "main proceeding", commenced in the State where the COMI has been determined, is supported by secondary or ancillary proceedings in another State. In those cases, the courts dealing with the respective proceedings are meant to engage in mutual co-operation.)

Territoriality or *territorialism*, on the other hand, is a concept in cross-border insolvency that stipulates that the consequences of insolvency proceedings will only apply to the State where insolvency proceedings have been commenced and can lead to a multiplicity of insolvency proceedings, that is, involving the insolvency laws of more than one State.[9] Furthermore, in *co-operative territorialism*, every State has jurisdiction over the assets in its jurisdiction; where assets are located in more than one State, courts should communicate with each other.[10] One of the main shortcomings of territorialism, is that it can give rise to the situation where a debtor could be declared insolvent in one State (e.g., where the debts are) but not in another State (e.g., where the assets are). This would entail that the debtor could be found to be solvent in one State but utterly insolvent in another State. While proponents of the principle of territoriality are cognisant of the problems with this approach, they prefer a co-operative type of territoriality over universalism.[11]

While the two theories or principles of universalism and territorialism are diametrically opposed to each other,[12] it is said that international observers and commentators appear to favour the former over the latter, despite the complications and limitations of the principle of universality.

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[6] For proponents of the universalist approach, see J L Westbook, "A Global Solution to Multinational Default", (2000) 98 *Michigan Law Review*, pp.2276 – 2328; A T Guzman, "International Bankruptcy: In Defence of Universalism", (2000) 98 *Michigan Law Review*, pp.2177 – 2215; P Perkins, "A Defence of Pure Universalism in Cross-Border Corporate Insolvencies", (2000) 32 *New York University Journal of International Law and Politics*, pp.787 – 828.

[7] See J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39 *St Louis University Law Journal*, pp.753-757; here 753; and J L Westbrook, "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court" (2018) 96 *Texas Law Review*, p 1473.

[8] See, e.g., R K Rasmussen, "A New Approach to Transnational Insolvencies", (1998) 19 *Michigan Journal of International Law*, pp.1-36.

[9] L M LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", (1999) 84 *Cornell Law Review*, p.2216.

[10] *Ibid*.

[11] See L M LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", (1999) 84 *Cornell Law Review*, pp. 696 – 762.

[12] See I F Fletcher, *Insolvency in Private International Law – National International Approaches* (Oxford University Press, 2nd Edn, 2005), pp.11-17, which provides a more elaborate explanation, adding the principles of "unity" and "plurality"; Cf. on the terminology, J L Westbrook, "The Lessons of Maxwell Communications", (1996) *Fordham Law Review* 64, pp.2531-2533; here 2531.

Limitations to universalism include, for example, that with universalism, recognition and effect requires that other States recognise that one set of insolvency proceedings (that all parties agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States. While the universalism fits well with globalisation and large multinationals corporations operating across international markets, this principle requires very high levels of trust in foreign legal systems and foreign insolvency proceedings, because a single insolvency proceeding would need to be able to have an extraterritorial effect; and a universalist approach would also have to address tricky legal issues, including choice-of-law and priority rules, in order to be truly effective.[13] Opponents of the principle of universality also highlight the difficulty in establish a single, "home" State for the debtor where insolvency proceedings will exclusively be opened. One of the main disadvantages of the principle of universality is that it creates ambiguity in the domestic markets and that "home" country standards may be indeterminate, in particular in circumstances where a debtor is a corporate group, and susceptible to strategic manipulation.[14]]

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.

[Latin American and Mesoamerican States have ratified some of the most long-standing multilateral conventions and treaties that address international insolvency issues. A number of general treaties were concluded among the Latin American States on private international law and commerce that included chapters or titles on bankruptcy or insolvency – these include the Montevideo Treaties of 1889 and 1940 as well as the Havana Convention on Private International Law of 1928 (known as the Bustamante Code).[15]

The Montevideo Treaty on International Commercial Law (1889)[16] has been ratified by a host of Latin American nations, including: Argentina, Bolivia, Columbia, Paraguay, Peru, and Uruguay. The 1889 Treaty deals with both corporate and personal insolvency, and allocates bankruptcy jurisdiction based on the debtor's commercial domicile in circumstances where the debtor:

1) has a commercial domicile in one treaty State, even if the debtor occasionally trades in more than one State or has agents or branches in another treat State; and it provides for one set of proceedings in the commercial domicile; and

2) has two or more economically autonomous businesses in different treaty States, then it provided for the possibility of concurrent proceedings. Where bankruptcy

[13] See J L Westbrook, "Choice of Avoidance Law in Global Insolvencies", (1991) 17 *Brooklyn Journal of International Law*, pp.499 – 538; J L Westbrook, and D T Trautman, "Conflict of Laws Issues in International Insolvencies", in J S Ziegel, and S I Candie (eds), *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford, 1994; online edn, Oxford Academic, 31 Oct. 2023), https://doi.org/10.1093/oso/9780198258964.003.0027, accessed 14 November 2023; J L Westbrook, "Universal Priorities", (1998) 33 *Texas International Law Journal*, pp.27 – 45.

[14] For a territorialist, more pessimistic view from one of the most prominent critics of universalism, see L M LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", (1999) 84 *Cornell Law Review*, pp. 696 – 762.

[15] For insolvency provisions contained in these agreements, see I F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd edn, 2005), App V.

[16] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ar/register_texts_vol2.pdf, accessed 13 November 2023.

proceedings are ongoing in one of the treaty States, then a local creditor in the other treaty State(s) containing an economically autonomous business may initiate insolvency proceedings in that treat State or commence other civil action against the debtor.

Moreover, there is the Montevideo Treaty on International Commercial Terrestrial Law (1940), which contains Title VIII on Bankruptcy;[17] and further the Montevideo Treaty on International Procedural Law (1940), which contains Title IV on Civil Meetings of Creditors. Since both these treaties have only been ratified by three of the original treaty states, i.e., Argentina, Paraguay, and Uruguay, it entails that an international insolvency between any two or more States signatory to the Montevideo Treaties necessitates careful analysis as to which treaty or treaties may apply.[18]

The Bustamante Code of 1928 was concluded between the most Latin American countries, including Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. While Bolivia and Peru are parties to both the Montevideo Treaty of 1889 and the Bustamante Code, Argentina, Colombia, Mexico, Paraguay, and Uruguay did not ratify the Bustamante Code and are not parties to it.

While all agreements promote unity of proceedings in the treaty States where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings. The Montevideo Treaties also differ from the Havana Convention in other ways than in terms of their contracting States: for instance, the Havana Convention is more sympathetic than the Montevideo Treaties towards an approach that permits a single proceeding with universal effect throughout Latin America. The Havana Convention's first chapter, 'Unity of Bankruptcy and Insolvency", under Article 414 stipulates that: "*If the insolvent or bankrupt debtor has only one civil or commercial domicile, there can be only one preventive proceeding in insolvency or bankruptcy, or one suspension of payments, or a composition (i.e., quita y espera) in respect of all his assets and his liabilities in the contracting State.*" Notwithstanding, concurrent proceedings can be instated in Havana Convention States that contain commercial establishments operating on entirely independent economic bases (under Article 415 of the Havana Convention). Thus, the Havana Convention adopts a similar mechanism to that found in the Montevideo Treaties of providing a single proceeding if the debtor only intermittently trades in more than one State, or only has agents or branches in another contracting State. However, unlike the Montevideo Treaties, the Havana Convention does not provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state.[19]

4

Marks awarded 9.5 out of 10

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

Question 3.1 [maximum 7 marks]

[17] https://www.jstor.org/stable/2213807?seq=1, accessed 13 November 2023.
[18] See I F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd edn, 2005), [5.06].
[19] See I F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd edn, 2005), [5.23].

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.

(i) While certain systems use the term "insolvency" and others the term "bankruptcy", many systems use these both terms interchangeably as synonyms.[20] Note also that in the period between the thirteenth and seventeenth century, domestic sovereign laws dealing with an individual's insolvency developed (in tandem with the development of the notion of the sovereign State) and these were often known as "bankruptcy laws". Even though "insolvency" and "bankruptcy" carry the same signification in many systems, the two can be differentiated in that "insolvency" on occasion signifies the state of debtor's financial affairs, whereas "bankruptcy" signifies the formal state being placed into formal bankruptcy proceedings. It would be a more a nuanced approach not to use the terms interchangeably. In Australia, for example, "insolvency" is frequently used to denote corporate insolvency, whilst "bankruptcy" if frequently used to denote the insolvency of an individual or natural person. "Insolvency" may be further subdivided into the situation where a debtor is generally unable to pay its debts as they mature or where a debtor's liabilities exceed its assets (i.e., balance sheet insolvency) or where a debtor is unable to service its debts when they fall due because of cash flow problems (i.e., cash flow or commercial insolvency).

(ii) Among the essential characteristics of “bankruptcy” and “insolvency” law, Wood enumerates the following principles deemed to be universal:[21]

1. "*Actions by individual creditors against the bankrupt are frozen. The piecemeal seizure of assets by disappointed creditors through 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, ie pro rata out of the assets according to their claims.*"

However, Wood goes on to clarify and discredit to some extent each of these three propositions in turn: "*The first proposition—that judicial actions by creditors are stayed—is universally true with only very few exceptions on the fringes. The second proposition—that all of the assets of the bankrupt are available for creditors—is so eroded by exceptions as to be doubtful. The third proposition—that creditors are paid pari passu—is a piece of wishful ideology which is nowhere honoured.*"[22]

Some of the principles applicable to both insolvencies of individuals and corporations include (1) the pari passu rules pertaining to distribution except where creditors' priorities and/or securities apply; (2) ensuring that secured creditors deal fairly towards the debtor and other, lower ranking, creditors; (3) the need to investigate the reasons for failure of the bankrupt/insolvent business; and (4) reclaiming voidable dispositions where an insolvent debtor has dealt improperly with assets.[23]

(iii) However, differences may arise when dealing with “bankruptcy” or “insolvency” of corporations vis-à-vis individuals. One of the main differences regarding the objectives of insolvency for individuals and corporations relates to the notion of exempt or excluded assets which will only apply to insolvent individuals. This entails that some systems allow for insolvent individuals to hold on to some of the assets (such as essential household goods) needed to

[20] I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed., 2017), Ch. 1.
[21] PR Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), p.3.
[22] *Ibid*.
[23] See M A Clarke et al, *Commercial Law* (OUP, 2017), chap. 28.

maintain them and their dependents.[24] Moreover, it should be self-evident that individual bankruptcy (involving a natural person)[25] is rather different from corporate insolvency (involving legal persona such companies or corporations, in that individuals are not "dissolved" following bankruptcy in the same way a company is dissolved once its affairs are wound up.

Furthermore, other key differences regarding the aims of insolvency for individuals and corporations (as distinguished by Sealy and Hooley[26]) are as follows:

The aims of insolvency for individuals include to:

- protect debtors from harassment by their creditors;
- enable debtors to make a new start, especially in less culpable cases, e.g., where insolvency has not been brought about the debtor's actions or conduct; and
- reduce overall indebtedness by ensuring contributions from present and future income are made to the estate while simultaneously taking into consideration the debtor's personal circumstances.

The aims of insolvency for corporations are to:

- preserve (where possible) the business or viable parts of the business as a going concern, if not necessarily the company; and
- impose personal liability on responsible persons (in cases where personal liability has been abused).]

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.

[Firstly, the notable lack of a worldwide system of insolvency law and of a global court with jurisdiction to hear insolvency matters gives rise to obvious difficulties. While all States that have a developed and/or mature legal systems also have some type of bankruptcy and/or insolvency systems, there is a variety of discrepancies in approaches, insolvency dispensations, and policy as well as procedural and substantive law or rules. Different States have different insolvency laws and policies toward insolvency and apply different cross-border insolvency rules. Furthermore, as there are a number of significant forms of real security in various States, this type of security remains one of the most complex facets to deal with in cross-border insolvency contexts. By way of example, the notion of a floating charge is commonplace in English law-based States, but in civil law-based States this form of security is generally unknown.

Secondly, the lack of common insolvency terminology presents a difficulty at the very outset in addressing cross-border insolvency cases. For example, we note the difficulties of defining the term "insolvency" at the international level (as noted by Friman)[27] with the consequence that international conventions and other instrument do not attempt to define properly that term and instead focus on defining "insolvency proceedings" (including or excluding exhaustive lists of potentially covered proceedings) which are to some extent easier to define even though some confusion as to the language persists.

[24] Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed., 2017), Ch. 1.
[25] Cf. World Bank, *Report on the Treatment of the Insolvency of Natural Persons*, 2012.
[26] See M A Clarke et al, *Commercial Law* (OUP, 2017), chap. 28.
[27] I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: OUP, 2nd ed, 2005), pp 3– 5.

Thirdly, Fletcher asks three extremely relevant questions in his attempt to consolidate the "cross-border" aspects and the "insolvency" aspects and they are as follows:

> (1) in which jurisdictions may insolvency proceedings be commenced (i.e., the choice of forum to exercise jurisdiction in the matter);
>
> (2) what State's law should be applied in respect of different aspects of the case (i.e., the choice of law to apply to the matter); and
>
> (3) what international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement) (i.e., the recognition and effect accorded to foreign proceedings in the matter)?

In answer to these questions asked by Fletcher, insolvency proceedings could potentially be commenced concurrently in more than one State, each of those states would apply its own domestic laws (including its own choice-of-law rules), and no or very limited extraterritorial effects would be granted to foreign proceedings; and thus, offering an insight into the difficulties that may be encountered when trying to encourage co-operation and co-ordination between different states.

Fourthly, Omar states that "[a]part from the general situation in the conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtors face creditors pressing their claims in more than one State, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title and other meanes of protecting tittle available to creditors in national laws".[28]

Finally, following nine key issues in cross-border insolvency cases have been identified by Westbrook (who is a dedicated proponent of *universalism*): (1) standing for (recognition of) foreign representatives; (2) moratoria on creditor actions; (3) creditor participation; (4) executionary contracts; (5) co-ordinated claims procedures; (6) priorities and preferences; (7) avoidance provision powers; (8) discharges; and (9) conflict of law issues.[29]]

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.

[In the context of international insolvency "hard law" may mean the kind of binding multilateral approaches seeking to regulate international insolvencies, whilst "soft law" means the non-binding frameworks intended to influence the regulation of international insolvency law. In the context of international insolvency, which may be classified as a sub-rubric of international trade law, several States have ratified or acceded to classic public law instruments such as treaties or conventions which seek to import into their domestic laws principles for the resolution of insolvency matters that have a nexus with another State, and thus may then be seen to constitute part of a State's "hard law" on insolvency. Where such treaties or conventions have not been incorporated into domestic laws, the State's own private international law doctrines will decide the three relevant questions of forum, recognition and

[28] PJ Omar, "The Landscape of International Insolvency", (2002), 11, *IIR* 173, p 175.
[29] JL Westbrook, "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court" (2018) 96 *Texas Law Review*, p 1473.

enforcement, and, crucially, the choice of insolvency (or other pertinent) law to achieve resolution for the debtor, creditors and other third parties. While it is said that there has been inconsistent success in resolving international insolvency law issues by way of "hard law" solutions, "soft law" approaches have garnered more success. A range of multilateral organisations, which must to be considered as distinct from States and/or their governments working on treaties or conventions, have concentrated their efforts on "soft law" methods over recent decades. That said, "the notion that treaties are hard and binding and non-treaty instruments are soft and non-binding" has come under scholarly scrutiny and been abandoned by some such as Mevorach.[30]

In the European context, bilateral international insolvency conventions appeared as early as from the thirteenth and fourteenth centuries. These early conventions addressed primarily the issues of absconding debtors and the subsequent gathering in assets. From the nineteenth century onwards, modern forms of bilateral treaties and/or conventions on jurisdiction, recognition and enforcement related to bankruptcy, winding up, arrangements and compositions involving their State began to appear.

Various regional groupings of States have ratified or acceded to treaties or conventions which import into their domestic insolvency laws principles to resolve insolvency issues that have a nexus with another State. A rare example of a successful multilateral step taken in the 21st century to promote harmonisation of domestic insolvency laws can be seen in the Scandinavian multilateral treaty of the Nordic Convention (1933).

After many years of unsuccessful European efforts to achieve multilateral international insolvency conventions, in 1990 the Council of Europe concluded a Convention on Certain International Aspects of Bankruptcy (known as the Istanbul Convention, Council of Europe Treaty Series Number 136); and although it was only signed by eight member States and was not ratified by a sufficient number of States for it to come into force, it nonetheless did have a significant influence on the development of a European Union response to issues of international insolvencies among EU members States.

The European Insolvency Regulation (**EIR**) (2000) achieved more success and influenced wider multilateral developments in international insolvency law (see in particular Articles 7 to 18). This was reviewed and amended resulting in the current multilateral "instrument" on international insolvencies, that is, the EU being Regulation (EU) 2015/848 of the European Parliament and Council of 20 May 2015 on Insolvency Proceedings (Recast) (**EIR Recast**). A further recent amendment to the EIR Recast by way of Regulation 2021/2260 of 15 December 2021 replaced Annexures A and B and came into effect for most EU member States in January 2022.

Further, inter-governmental bodies have also been promoting "soft law" options which have been perceived as being more successful than "hard law" solutions to international insolvency law issues. Similarly, multilateral commercial or professional bodies such as the International Bar Association (**IBA**) as well as bodies specialising in insolvency practice with diverse professional memberships (such as INSOL International) have been working on a range of proposed solutions.

For example, the adoption of the Model Treaty on Bankruptcy at the 1925 conference was an early initiative of the Hague Conference on Private International Law (the Hague Conference) (established in the 19th century to work towards the progressive unification of private international law). Even though the Model Treaty was never ratified, it contributed to international considerations regulating international insolvency, e.g., it gave jurisdiction in

[30] See I Mevorach in *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), p.150.

respect of a corporation to the court where the statutory registered seat was located "provided that it be neither fraudulent or fictitious".

An example of the Hague Conference's modern-day coordination with the United Nations Commission on International Trade Law (**UNCITRAL**) can be seen in the joint preparation of the UNCITRAL *Legislative Guide on Insolvency Law* (2004). This is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of laws and regulations".[31] It was expanded in later years, addressing insolvency of enterprise groups in Part Three and directors' obligations in the period approaching insolvency in Part Four, and specifically on international insolvency, Part One Recommendation 5 states "The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNICTRAL Model Law on Cross-Border Insolvency is recommended".

Arguably the most successful "soft law" approach to date can be seen in UNCITRAL's development in the mid-1990s of a Model Law on Cross-Border Insolvency (**MLCBI**), which is neither a treaty nor convention, but rather draft legislation that UNCITRAL recommended members States to adopt (with or without modification); and the MLCBI is gathering momentum as an influential response to international insolvency law, thanks to the number, economic dimension, and geographic reach of States now adopting it.

Some States have amended their domestic insolvency laws to address international insolvency issues via provisions for the recognition and enforcement or the effects of a foreign insolvency proceedings, while some State have also provided for co-operation and co-ordination where there are concurrent proceedings.

If the first draft of an EC Convention on Bankruptcy and Related Matters in 1970 had been adopted, it would have required contracting States to enact a "Uniform Law" into domestic law, while permitting States to make reservations on their incorporation (pursuant to Article 76). However, subsequent draft European insolvency conventions did not attempt to achieve uniform laws, other than in so far as they related to international issues such a jurisdiction, choice of law, and recognition and enforcement.

In 1997, the IBA started drafting a Model Bankruptcy Code which any State could consider when developing their domestic insolvency laws. Notwithstanding, this project did not get off the ground and the IBA instead contributed to the development of the project that would result in UNCITRAL's *Legislative Guide* (which the IBA subsequently endorsed).

In the early 2000s, the World Bank produced guidelines on the regulation of Insolvency: *Principles for Effective Insolvency and Creditor/Debtor Regimes*. These have been revised in 2005, 2011, 2015 and 2021. They gain significance in the context that International Monetary Fund (**IMF**) and the World Bank may occasionally require bankruptcy reforms in developing countries as a condition of loan support, referring countries to the 2004 *Legislative Guide* and the Principles, thus promoting convergence of insolvency law.

The European Union is also pushing for greater uniformity in the domestic insolvency laws of its member States with the European Parliament publishing a report in 2010 on the Harmonisation of Insolvency Law at EU Level. The report identified a number of areas of insolvency law where EU-level harmonisation is considered to be worthwhile and attainable, namely: (1) a possible common test of insolvency as a requirement of a formal insolvency process; (2) formal aspects of lodging and dealing with claims in a formal insolvency; (3) certain aspects of the manner in which reorganisation plans are adopted and their contents;

[31] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf, accessed 14 October 2023.

(4) rules relating to so-called detrimental acts; (5) interrelationship between contractual rights of termination and insolvency; and (6) directors responsibilities.

Moreover, the European Commission's Action Plan on Building a Capital Markets Union (CMU) (30 September 2015) stated "Convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress".

Such moves to harmonise domestic insolvency laws can reduce the significance of insolvencies crossing State borders and the need of regulates or courts to resolve international insolvency issues. While the proposition that harmonisation would offer a solution seems obvious, the extent to which such harmonisation is feasible and on the horizon is debatable.[32] Others have argued that given that fundamental difference between legal systems and the laws of countries are both the root problem of cross-border insolvencies and the major obstacle to their solution, the goal of harmonisation must continue to be pursued.[33]

By contrast, more successful strategies to address international insolvency issues appear to have come from uniform laws on recognition of insolvency proceedings and insolvency representatives. For example, in 1989 the IBA spearheaded an early multilateral attempt to achieve uniform recognition laws when it developed a Model International Insolvency Cooperation Act (1989) (**MIICA**) and recommended the enactment of this draft model statute as domestic legislation. However, no jurisdiction adopted MIICA as domestic legislation. In 1996, the IBA promoted a Cross-Border Insolvency Concordat (instead of recommending domestic legislation to be adopted by States) that was directed at assisting practitioners. However, it was of limited merit in achieving uniform recognition of laws because it did not prescribe a principal forum or seat for insolvency proceedings, only referring to the debtor's "centre of management control".

In the interim, UNCITRAL in 1997 completed the MLCBI, which proposed the uniform recognition of laws, using concepts derived from the EU Insolvency Regulation and promoted co-operation and co-ordination. Some other examples of international instruments promoting co-operation and co-ordination include:

(1) the European Guidelines on Communication and Cooperation (2007);

(2) ALI – III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012) – these 'play a prominent role in a cross-border airline restructuring. In the ongoing restructuring of the LATAM Airlines group, a cross-border insolvency protocol has been approved by the Grand Court of the Cayman Islands in July 2020';[34]

(3) EU JudgeCo Principle and EU Cross-Border Insolvency JudgeCo Guidelines (2015); and

(4) Judicial Insolvency Network (**JIN**), Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

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[32] Compare Westbrook, "Global Insolvency Proceedings for a Global Market", pp 2291 – 2298 (for a universalist, more positive outlook), and LM LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", (1999) 84 *Cornell Law Review* 696, pp 6696 – 762 (for a territorialist, more pessimistic view).

[33] D McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?", (1997) 26(3), *University of Baltimore Law Review* 15, pp 15 – 29.

[34] See https://www.ali.org/news/articles/alis-work-provide-guidance-drafting-cross-border-insolvency-protocols/ and https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/11/when-soft-law-instruments-matter-oblb-influences-cayman-islands, accessed 13 November 2023.

The Asian Business Law Institute's joint project with the International Insolvency Institute is another example of a recent regional soft law rather than a binding treaty approach initiative dealing with insolvency and restructuring that is aimed at developing Asian Principles of Business Restructuring. It published a report on Corporate Restructuring and Insolvency in 2020, which maps the both in-court and out-of-court business reorganisation regimes in ASEAN, Australia, China, Hong Kong, India, Japan, and South Korea.[35]

Of the multilateral steps to promote harmonisation of nation S tates' domestic insolvency laws noted above, we can highlight the following: (1) UNCITRAL Legislative Guide on Insolvency Law (2004); (2) World Bank Principles for Effective Insolvency and Creditor Rights Systems (2011); and (3) European Parliament report on Harmonisation of Insolvency Law at EU Level (2010). There are of course factors that may substantiate one's opinion on the likelihood of their impact and these include: (i) pressure from foreign investors seeking clarification for creditor protection;(ii) the political implications of a low ranking on the World Bank Doing Business Report; and (iii) the IMF and World Bank may sometimes require some insolvency law reform (in developing countries) as a condition of loan support agreement. The IMF or the World Bank may refer countries to the *UNCITRAL Legislative Guide* and the World Bank Principles, which in tandem constitute the international best practice benchmark for insolvency regimes (i.e., the Insolvency Standard), with the aim of promoting convergence of insolvency law.[36] For example, the World Bank's Principle C15 on International Considerations states:

> "*International Considerations Insolvency proceedings may have international aspects, and a country's legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries, and choice of law. Key factors to effective handling of cross-border matters typically include:*
>
> - *A clear and speedy process for obtaining recognition of foreign insolvency proceedings;*
> - *Relief to be granted upon recognition of foreign insolvency proceedings;*
> - *Foreign insolvency representatives to have access to courts and other relevant authorities;*
> - *Courts and insolvency representatives to cooperate in international insolvency proceedings; and*
> - *Non-discrimination between foreign and domestic creditors.*"[37]

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.

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[35] https://abli.asia/abli-projects/asian-principles-of-business-restructuring/, accessed 13 November 2023.
[36] See I Mevorach in *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), p.40.
[37] https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf, accessed 13 November 2023.

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.

[The American insolvent estate representative of Norton Cars Inc (**Norton**) may be advised that English Law permits recognition of and cooperation with foreign insolvency adjudications or proceedings. The *Cross-Border Insolvency Regulations 2006 (SI 2006/1030)* give effect to the 1997 UNCITRAL Model Law on Cross-Border Insolvency (**MLCBI**) in Great Britain. The MLCBI is designed to provide uniform legislative provisions to deal with the recognition of foreign insolvency proceedings and the coordination of concurrent proceedings.[38] (As noted above, UNCITRAL *Legislative Guide on Insolvency Law* (2004) is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of laws and regulations".[39])

Common law appears to be settled in this regard, too. In *McGrath v Riddell* [2008] UKHL 21, Lord Hoffman referred to the court's "jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any difference between the English and foreign systems of distribution" [30]. Lord Scott in *McGrath v Riddell* [2008] UKHL 21 [62] also allowed the appeal, but on the basis of the statutory provision of section 426 of the Insolvency Act 1986 (UK) on cooperation between courts exercising jurisdiction in relation to insolvency and not "from any inherent jurisdiction of the court".

The UK Supreme Court in *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liquidation) v Grant* [2012] UKSC 46, considered the question of recognition and enforcement of judgments concerning avoidance provisions, and declined to accept there was a *sui generis* category of insolvency orders or judgments subject to special rules, with Lord Collins stating that changes in the settled law of the recognition and enforcement of judgments were a matter for the legislature and that together with the law relating to international insolvency are "not areas which have in recent times been left to be developed by judge-made law" [128]. Lord Collins further held at paragraph 143 that "there is nothing to suggest that [Article 21 of the MLCBI] applies to the recognition and enforcement of foreign judgments against third parties."

Moreover, section 426(5) of the Insolvency Act 1986 (UK) authorises the local court to "apply, in relation to any matters specified in the request, the insolvency law which is applicable by

[38] See https://uk.practicallaw.thomsonreuters.com/8-107-3973.
[39] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf, accessed 14 October 2023.

either court in relation to comparable matters falling within its jurisdiction. Conversely, the English court may provide insolvency help to foreign courts under section 146 of the Insolvency Act 1986 (UK).] **S426 does not apply as the US is not designated**

3.5

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 to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, we would advise in the first instance that both Italy and Germany would be subject to EU law. The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000) (**EIR**), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. This was reviewed and amended resulting in the current multilateral "instrument" on international insolvencies, that is, the EU Regulation (EU) 2015/848 of the European Parliament and Council of 20 May 2015 on Insolvency Proceedings (Recast) (2015) (**EIR Recast**) adopted in 2015 and taking effect in June 2017. A further recent amendment to the EIR Recast by way of Regulation 2021/2260 of 15 December 2021 replaced Annexures A and B and came into effect for most EU member States in January 2022. Both Italy and Germany are EU Member States and as such both are subject to the EU Regulation / EIR Recast as amended.

The EIR Recast allocates jurisdictional competence to the courts of a member State within which is situated the "centre of the debtor's main interests" (**COMI**), which is defined in the Art.3(1) of EIR Recast as "…the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties". In light of this, as Norton Cars Inc shifted its COMI to Italy when England exited the EU and its management was directed from Italy, Italy may the country in which the main proceeding should be opened in terms of applicable law because the EIR allocates primary jurisdiction based on the debtor's (Norton) COMI. Under Article 7.1 of EIR Recast, which regulates the applicable law in proceedings subject to the Regulation and states that "[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of … the 'State of the opening of proceedings'", Italian insolvency law would be the applicable insolvency law in the main proceedings. Recently, the insolvency law reform (legislative decree no.14 of 12 January 2019, come into force on 15 July 2022, with further subsequent amendments) has replaced the old Italian Bankruptcy Law with a new Crisis and Insolvency Code (the "**Insolvency Code**"). Proceedings that are commenced in an EU Member State (except Denmark), in this case Italy, and listed in Annex A of the EIR, are recognised in Germany.[40] (Note further that Article 7 also addresses the law determine "the conditions for the opening of those proceedings, their conduct and their closure"; and Articles 8 to 18 provide the applicable law to apply in respect of specific matter such as rights *in rem*; set-off; immovable property; employment; and detrimental acts.).

However, note that the EIR allows for the possibility of subsidiary territorial proceedings in other member States. These are permissible in circumstances where the debtor has an "establishment", which is defined as "…any place of operations where a debtor carries out or

[40] https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/germany, accessed 13 November 2023.

has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets" (Art. 2(10) EIR Recast; noting also that the revised EIR Recast definition uses a reference to 'assets' rather than 'goods'). Such subsidiary proceedings may be either "independent proceedings", commenced prior to the main proceedings, or "secondary proceedings", commenced after the bankruptcy adjudication in the State with the COMI. Hence, we would advise that while Italy would be the more obvious primary jurisdiction based on Norton's COMI, as its main operations transpired in Germany and assuming that these fall within the definition of "establishment" under EIR Recast, then subsidiary territorial proceedings may be permitted to be opened in Germany under Germany's unified insolvency law, that is, the *Insolvenzordnung*. Under EIR Recast (i.e. Regulation No. 848/2015), in-court insolvency proceedings commenced in Germany (i.e. another European State) are automatically recognised in Italy.[41]

The subsidiary of Norton, Gladiator Manufacturing Ltd, which we are told manufactures and provides the engines for the sports cars in Germany, could fall within the definition of "group companies" (i.e., meaning "a parent undertaking and all its subsidiary undertakings"; Art.2(13) EIR Recast) as well as "parent undertaking" (Art.2(14) EIR Recast) meaning "*an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council […] shall be deemed to be a parent undertaking.*" Although EIR Recast does not include a definition of "subsidiary undertaking", an inference from the definition for "parent undertaking" suggests that a subsidiary undertaking is an "undertaking controlled, either directly or indirectly, by another undertaking" (i.e., the parent).[42]]

4

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?

[No because India, South Africa, and Australia are not EU Member States and therefore do not fall under the EU (Recast) Insolvency Regulation. Hence, the recognition of EU insolvency representatives in those countries would likely depend on domestic law factors such as the type of insolvency proceeding, the location of the debtor's assets, the existence of reciprocal arrangements, and the discretion of the local courts.

Australia and South Africa have adopted the UNCITRAL MLCBI;[43] India is in the process of adopting it. Australia's statutory provisions in ss.580-581 of the Corporations Act 2001 (Cth) permit the cooperation between foreign courts in "external administration" matter, such as liquidations"; even with the advent of the domestic adoption of the MLCBI in Australia through the Cross-border Insolvency Act 2008 (Cth), parties can use those recognition and enforcement provisions.]

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Question 4.4 [Maximum 6 marks]

[41] https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/italy, accessed 13 November 2023.

[42] https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1402#:~:text=Although%20the%20Recast%20EIR%20does,(i.e.%2C%20the%20parent). Accessed 13 November 2023.

[43] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

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.)

In the Netherlands, recognition of insolvency proceedings initiated in EU Member States (excluding Denmark) is done according to the EU Insolvency Regulation (EIR Recast). As noted above, under Article 7.1 of EIR Recast, Italian insolvency law (as the State of the opening proceedings) would be the applicable insolvency law in the insolvency proceedings in the Netherlands.

Furthermore, the real rights of security situated in the Netherlands would fall under Article 8 EIR which covers the third parties' rights *in rem*, and therefore the *lex situs* (i.e., Dutch law: the *Wet Homologatie Onderhands Akkord* ("**WHOA**") (as noted above) and/or the Dutch Civil Code) would apply to them rather than the *lex concursus* (i.e., the Italian law noted above). In broad terms, Article 8 states that the opening of insolvency proceedings, in this case in Italy, does not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets which are situated in another Member State (in this case in the Netherlands). It also describes specific assets and collections of indefinite assets that change from time to time, belong to the debtor, and are situated within the territory of another Member State at the time of the opening of proceedings. The recitals, specifically at (68), emphasise that Article 8 is the first exception to the general rule of application of the *lex concursus*: "*There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since such rights are of considerable importance for the granting of credit. The basis, validity and extent of rights in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. … Where assets are subject to rights in rem under the lex situs in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights in rem should be paid to the insolvency practitioner in the main insolvency proceedings.*" Art.8(2)(a)-(b) of EIR Recast highlights the essence of certain rights *in rem* that entitles the creditor to have control and recourse to the property covered by the security ahead of the claims of other unsecured or lower ranking creditors.[44] Hence, subsidiary territorial proceedings (governed by Dutch law) could be started in the Netherlands in relation to the real rights of security in NL pursuant to Art. 2(1) of the EIR Recast.]

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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 7 marks.)

[44] Bork, Reinhard, and Kristin van Zwieten (eds), 'Third parties' rights *in rem*', in Reinhard Bork, and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation*, 2nd edn (Oxford, 2022; online edn, Oxford Academic, 19 May 2022), https://doi.org/10.1093/oso/9780198852117.003.0009, accessed 13 November 2023.

[Australia has adopted the MLCBI.[45] Australia's statutory provisions in ss.580-581 of the Corporations Act 2001 (Cth) permit the cooperation between foreign courts in "external administration" matter, such as liquidations"; even with the domestic adoption of the MLCBI in Australia through the Cross-border Insolvency Act 2008 (Cth) (the "**2008 Act**"), parties can use of those recognition and enforcement provisions. Thus Australian Courts in this case would crucially recognise the jurisdiction of the relevant court where the "centre of main interest" is located, i.e., Italy (as well as act cooperatively with the Italian foreign court and insolvency practitioners).[46] Italy has not adopted the Model Law but there is no need for reciprocity. The MLCBI 'does not attempt to impose substantive laws or rules for the choice of substantive laws. It is essentially procedural in nature – laying out a practical framework for administering cross-border insolvencies'.[47] Note, however, that under Article 29 of the MLCBI on concurrent insolvency proceedings, the local proceedings in Australia maintain pre-eminence over the foreign proceedings in Italy. (Cf also the effects of recognition of a foreign main proceeding under Article 16 of 2008 Act).

In respect of the real rights of security situated in Australia, these would fall within the *Personal Properties and Securities Act 2009* (Cth) (**PPSA**) which provides a regime for certain unsecured creditors and the protection of a supplier's title to goods relevantly supplied. **It would be beneficial to broadly note that they would fall under Australian law (including laws outside the PPSA)**. A uniform concept of "security interest" exists under the PPSA to cover all existing forms of security interests under which an interest in personal property is granted pursuant to a consensual transaction that, in substance, secures the payment or performance of an obligation.[48] Personal property is defined broadly and essentially includes all property other than land, fixtures and buildings attached to land, water rights, and certain statutory licences.
To perfect title under the PPSA, suppliers are required to register the retention of title arrangements on the Personal Property and Securities Register (**PPSR**). If a security interest is not perfected, it will, on liquidation of the grantor, vest in the grantor; despite the agreement between the supplier and recipient that the supplier retains title to those goods until payment is received (see section 267, PPSA and section 588FL, Corporations Act 2001 (Cth)).[49] A PPSA security interest that is not perfected is therefore vulnerable. Note also that Article 32 of the Model Law states that "[w]ithout prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [PPSA] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received."

2.5
Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 48.5/50

[45] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status, accessed 13 November 2023.
[46] https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/australia, accessed 13 November 2023.
[47] https://treasury.gov.au/sites/default/files/2019-03/CLERP8.pdf, accessed 15 November 2023.
[48] https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/australia, accessed 13 November 2023.
[49] https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/australia, accessed 13 November 2023.

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