



**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 12<sup>th</sup> 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.

[Please note that defined terms carry the same meanings throughout my paper, I have not redefined terms in each question.]

The modern insolvency systems of the world typically have their roots in either civil law or the English common law. Civil law insolvency systems are founded on Roman law principles, whereas common law systems are rooted in English law.<sup>1</sup> The early years of both systems required a debtor to essentially 'pay' for their debt with life or limb, representing a pro-creditor regime. Both systems developed from individual to collective debt collecting systems and with the passage of time there has been an increasing recognition of the values of rehabilitation, restructuring and avenues which might allow creditors to recoup their assets if the business is allowed to continue in some form or another. A recent legislative example of a pro-debtor initiative is in the United Kingdom (the **UK**) where following the hardships caused by the Covid-19 pandemic, the UK passed the Corporate Insolvency and Governance Act which provided for certain reforms to the English insolvency law in respect of restructuring plans, moratoriums, and the suspension of winding up petitions and statutory demands.<sup>2</sup>

The Netherlands has a civil insolvency law system and the Dutch 1987 *Faillissementswet* (bankruptcy law) deals with bankruptcy of both individuals and companies. Prior to the introduction of the *Schuldsaneringwet* (The Debt Restructuring Act) the Dutch insolvency law system was a very pro-creditor system with no discharge of debt available unless the creditor agreed. The *Schuldsaneringwet* has introduced a more liberal system with the concept of "a fresh start" available to debtors.<sup>3</sup>

Australia's insolvency law is based on the English common law system. Australia has two primary pieces of legislation which deal with the insolvency of individuals and companies, being the Bankruptcy Act 1966 and the Corporations Act 2001 (Cth) (the **Corporations Act**), respectively.<sup>4</sup> Australia has also adopted the UNCITRAL Model Law on Cross-border Insolvency (the **Model Law**) through the Cross-border Insolvency Act 2008 (Cth). The application of these acts is supported and supplemented by the common law through the development of case law in Australia which draws on English case law and the case law of other common law jurisdictions.

The African continent is also an interesting example to consider because the insolvency laws of its various countries typically have their roots in the laws of their former colonial powers. For example, Kenya's system is based on English law, whereas the West African countries are based on the French civil law system.<sup>5</sup>

**A better approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries cf codification in civil jurisdictions.**

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<sup>1</sup> See section 4.1.1 of the Module 1 Guidance Text.

<sup>2</sup> See section 4.1.2.21 of the Module 1 Guidance Text.

<sup>3</sup> See section 4.1.2.2 of the Module 1 Guidance Text.

<sup>4</sup> See section 4.1.2.1 of the Module 1 Guidance Text.

<sup>5</sup> Module 1 Guidance Text, page 10.

**Question 2.2 [maximum 3 marks]**

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

Universalism, modified universalism, and territorialism are approaches or theories as to cross-border insolvency.

The essence of 'universalism' is that there could be one 'main proceeding' which would apply universally in all jurisdictions / States where the debtor has operations, creditors, assets etc. This theory supports the notion that the laws of the jurisdiction of the 'main proceeding' will apply universally and outside the territory of the 'main proceeding'. In other words, there would only be one legal forum dealing with the insolvency and any other jurisdictions where insolvency proceedings could be commenced would be precluded in favour of adopting the findings of the 'main proceeding'.

**There is scope to elaborate**

'Modified universalism' accepts that a 'universal' approach in cross-border insolvency proceedings is unlikely to ever transpire fully due to the persisting territorial nature of the world's differing legal systems and in some cases a particular jurisdiction's desire to protect for example, creditors in their own jurisdiction. However, modified universalism accepts the importance of the insolvency practitioners having the tools to trace and obtain worldwide assets and to treat creditors on an equal basis as far as possible. The crux of 'modified universalism' is that there would still be one 'main proceeding' in the jurisdiction of the debtor's centre of main interest (**COMI**), but that proceeding can be supported by ancillary proceedings in the other relevant jurisdiction(s) and the courts in those jurisdictions are expected to cooperate with each other.

The principle of 'territorialism' is fundamentally different to the principle of universalism because it supports the commencement of insolvency proceedings in all the jurisdictions where the debtor has assets with the effect that there could be multiple concurrent proceedings in respect of the same debtor. Territorialism supports the notion that the consequences of an insolvency proceeding will only apply in the jurisdiction (territory) where it has been commenced. This approach can benefit local creditors, but a major drawback is the fact that a debtor may be deemed insolvent in one jurisdiction where its debts are, but not in another jurisdiction where its assets are.

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**Question 2.3 [maximum 4 marks]**

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

Some Latin American States have entered treaties which deal with private international law and commerce and include sections on bankruptcy / insolvency. These include:

- 1) the Montevideo Treaty on International Commercial Law (1889) which has been ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay;
- 2) the Montevideo Treaty on International Commercial Terrestrial Law (1940) which has been ratified by Argentina, Paraguay and Uruguay,

(Together the **Montevideo Treaties**); and



- 3) the Havana Convention on Private International Law (1928) (the Bustamante Code) which was concluded between Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.

Broadly speaking the Montevideo Treaties and the Bustamante Code deal with the extent to which a single proceeding will have a universal effect among the member States (among other things). For example, pursuant to the Bustamante Code, if a debtor only has one civil or commercial domicile, then there can only be one proceeding in insolvency or bankruptcy in respect of its assets and liabilities in the contracting States.<sup>6</sup> However, if the debtor has commercial establishments that operate entirely separately, then concurrent proceedings are allowed under the Bustamante Code.<sup>7</sup> Article 414 of the Bustamante Code represents a similar approach to the Montevideo Treaties which allow for a single proceeding if the debtor is only occasionally trading in more than one member State. The Bustamante Code accepts that insolvency proceedings in one member State will apply to other member States.

Although these multilateral agreements represent some of the most universal approaches to insolvency law, it is important to note that the members to each of the Montevideo Treaties and also parties to the Bustamante Code are different which will impact their applicability and effect in practice.

**3.5**

**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.

The terms "bankruptcy" and "insolvency" are sometimes used interchangeably, however, coming from a background of first practising law in Australia, from a personal perspective those terms originally carried quite different meanings for me with the result that it took some time to get used to the fact that other jurisdictions such as the one that I currently work in (the Cayman Islands) and many other international jurisdictions do use those terms more interchangeably and in a manner which is sometimes inconsistent with how Australia uses them. For example, in Australia, “bankruptcy” and bankruptcy proceedings are used to refer to the insolvency of an individual natural person, whereas “insolvency” is used to refer to the insolvency of a corporation. In the context of international cross-border insolvency work, I now deal with the American jurisdiction quite frequently, and it uses the term "bankruptcy" in respect of corporations. In view of the above, I would agree with the statement that the two terms may be used interchangeably (as they are in practice), and this is a view that Fletcher shares,<sup>8</sup> however, it is important to understand that not all jurisdictions will use the terms interchangeably.

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<sup>6</sup> Article 414 of the Bustamante Code.

<sup>7</sup> Article 414 of the Bustamante Code.

<sup>8</sup> I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1, p 6; and see generally L E Levinthal, “The Early History of Bankruptcy Law”, (1918) 66 *Uni of Pennsylvania Law Review and American Law Register*, p 223.

Further guidance as to the meanings of the terms may be garnered from section 4.2.2.1 if the Module 1 Guidance Text which provides an example of two differing meanings for "bankruptcy" and "insolvency". It explains that bankruptcy can refer to the formal state of being put into a formal bankruptcy proceeding, whereas insolvency sometimes means the state of financial affairs of a debtor and can mean a situation where the liabilities of a debtor exceed the assets of a debtor (balance sheet insolvency) or where the debtor cannot repay debts as they fall due by reason of a cash flow problem (cash flow insolvency).<sup>9</sup>

Turning to the essential features of "insolvency" and "bankruptcy", Wood<sup>10</sup> offers the following guidance as to their universal principles (with some caveats):

1. A stay or moratorium against individual debt enforcement against the debtor.
2. Pooling of the debtor's assets to pay its creditors. This feature can be diluted due to different States taking different approaches and having different exceptions to this rule.
3. The payment of creditors on a *pari passu* basis, meaning on a proportionate basis out of the available assets and based on each creditor's claim. Wood recognises that this feature is somewhat idealistic because many States prioritise certain creditors and secured creditors are generally exempt.<sup>11</sup>

As to the differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual, Sealy and Hooley<sup>12</sup> offer some helpful guidance on the different objectives or aims of a corporate insolvency and that of an individual.

As to individuals, the aims usually include:

1. Protecting the debtor from harassment by his creditors.
2. Enabling the debtor to make fresh start – especially where their insolvency/bankruptcy hasn't been brought about by the debtor's own actions.
3. Reducing indebtedness by making contributions from present and future income and giving consideration to personal circumstances.<sup>13</sup>

Fletcher also offers that the notion of exempt or excluded assets only applies to individuals and this is based on the idea that an individual debtor will need some minimal assets to maintain themselves and their dependents during the resolution of their bankruptcy.<sup>14</sup>

The above aspects are representative of a pro-debtor system.

As to corporations, the aims typically include:

1. Preserving the business, or viable parts thereof to the extent possible, but not necessarily preserving the company itself.

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<sup>9</sup> See section 4.2.2.1 if the Module 1 Guidance Text on page 18.

<sup>10</sup> P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), p 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> In M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), chap 28.

<sup>13</sup> *Ibid.*

<sup>14</sup> I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1.

2. Imposing personal liability on responsible persons where personal conduct is at fault.<sup>15</sup>

Wood goes on to provide examples of that apply to both individual and corporate insolvency, such as:

1. The *pari passu* distribution of payment to creditors as far as possible (excluding priority and secured creditors).
2. Maintaining fair dealings as to secured creditors, the debtor and the other creditors.
3. Investigating the reasons for the debtor's failure.
4. Reclaiming voidable dispositions where the insolvent debtor dealt improperly with assets.<sup>16</sup>

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### 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.

There are a myriad of challenges that may be encountered when dealing with insolvency proceedings in a cross-border context and many of these challenges stem from the fact that there is no universal system for dealing with insolvencies and rather separate jurisdictions have their own unique systems which don't always align, recognise each other or foster cooperation. Many academics have offered insights into this topic, and it is useful to draw from their writings to demonstrate some of the potential difficulties.

A preliminary issue is a basic one in relation to the use of terminology and definitions. For example, Friman explains how even the most fundamental terms, such as 'insolvency' can have different meanings in different jurisdictions.<sup>17</sup> For example, some jurisdictions consider a company to be insolvent when its liabilities exceed its assets (balance sheet insolvency), whereas others define insolvency as being when a company cannot meet its financial obligations as they fall due (cash flow insolvency). Due to these different definitions of insolvency, Friman explains that some international instruments and conventions do not even attempt to define this term and instead focus on defining insolvency proceedings.<sup>18</sup> Of course, insolvency proceedings and the various tools that are available within such a process can differ markedly, even as between systems that are both based in say common law.

Further challenges can include differences in approach to the priority of creditors when it comes to the time for distribution of assets in an insolvency proceeding. When dealing with a cross-border insolvency, this issue is typically interconnected with the question of which law should apply. Omar provides a helpful explanation of this issue and states that "*[a]part from the general situation in 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 debtor faces creditors pressing their claims in more than one jurisdiction, 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 clauses and other means of protecting title available to creditors in*

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> I F Fletcher, *Insolvency in Private International Law – National and International approaches* (Oxford University Press, 2<sup>nd</sup> ed, 2005), pp 3 – 5.

<sup>18</sup> Ibid.

*national laws.*"<sup>19</sup> This issue may be even further exacerbated by the fact that the question of priorities is not considered settled law in all States and in some common law jurisdictions, the question of creditor priority is continuing to develop in recent case law.

Other potential areas of difficulty when dealing with cross-border insolvencies have been identified by Westbrook, who is a strong proponent of universalism (the theory that there should be a universal approach to cross-border insolvencies, with one main proceeding having extraterritorial effect on all other relevant jurisdictions). Westbrook identifies the following challenges:

- 1) Standing (*locus standi*) for (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.<sup>20</sup>

Westbrook's challenges 3, 6 and 9 have been briefly touched upon above, however, it is worth noting challenge 1 regarding the issue of recognition as another key challenge. A common issue in cross-border insolvency is whether a foreign court will recognise another court's judgment. For example, when a court in one State appoints an insolvency practitioner and grants them certain powers in respect of the debtor, the question becomes whether a foreign court will recognise that order to allow the insolvency practitioner to act on or enforce that order in another jurisdiction. The development of UNCITRAL's Model Law on Recognition and Enforcement of Insolvency Related Judgments (2018) is an example of a helpful tool that has been designed to address this issue for States who have chosen to adopt that particular model law.

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### **Question 3.3 [maximum 3 marks]**

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

In the context of international or cross-border insolvency matters, the concepts of 'hard' and 'soft' law refer to different legal instruments which either form part of a State's binding laws or are simply guidance, often developed by multinational organisations as opposed to States/ governments,<sup>21</sup> which may be drawn upon and used in determining / resolving a particular legal scenario.

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<sup>19</sup> P J Omar, 'The Landscape of International Insolvency', (2002) 11, *IIR* 173, p 175.

<sup>20</sup> J L Westbrook, 'Developments in Transnational Bankruptcy', (1995) 39, *St Louis University Law Journal* 753, pp 753 – 757.

<sup>21</sup> See section 6.1.3.3 of the Module 1 Guidance Text.

A typical example of a 'hard' law in the international context is a treaty or convention to which foreign States have ratified and become members to with the effect that that the treaty or convention becomes binding on the member States and essentially becomes part of or affects the State's domestic law.

A particular example of a largely successful international treaty in relation to insolvency law is the Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden (the **Nordic Convention**). The Nordic Convention promotes uniform choice of law principles because it operates by recognising the law of the place of the insolvency proceeding as being determinative and universally applicable. In addition to avoiding conflict of laws issues when it comes to dealing with insolvency proceedings that are subject to the Nordic Convention it also means that recognition and enforcement matters are smoother because they do not require additional formal legal processes. For example, there is an immediate stay of creditor action across all member States and the insolvency practitioners are recognised immediately and may seek the assistance of the other States courts in relation to any property that may be situated there.<sup>22</sup>

Another example is the European Union (EU) Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the **EIR Recast** and the **EIR**) which applies as between members of the EU and determines the jurisdiction and applicable law of insolvency proceedings with a cross-border element based on a debtor's COMI.

Although treaties and conventions are very powerful instruments when agreed and entered, the reality is that reaching agreement is uncommon and as such there are few examples of successful international treaties or conventions in the international insolvency space.

More success has been had with "soft laws" in the context of international insolvency law. One of the most successful 'soft law' approaches to date is the Model Law. Unlike a treaty or convention, the Model Law is essentially a draft or example piece legislation that UNCITRAL recommends members states adopt and modify as they see fit.<sup>23</sup> One of the guiding principles of the Model Law is co-operation and co-ordination and it obliges courts and insolvency representatives in different States to communicate and co-operate to the maximum extent possible with a view to ensuring that a debtor's insolvent estate is administered fairly and efficiently, with a view to maximising benefits to creditors.<sup>24</sup> The Model Law has been adopted by many states and is working as an effective body of soft laws and regulations between foreign States engaged in cross-border insolvency proceedings.

A final example of a model, or in this instance "guiding principle" that States can use to enhance their cross-border insolvency laws is the "JIN Guidelines". The JIN Guidelines were developed in 2016 during the Judicial Insolvency Conference in Singapore and aim to promote communication and cooperation between Courts of member States in a cross-border insolvency matters and, particularly where there are parallel insolvency proceedings ongoing in two or more jurisdictions. These guidelines have since been adopted in courts in several States such as the Americas, Asia, and the UK.<sup>25</sup>

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Marks awarded 15 out of 15

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

<sup>22</sup> Article 3 of the Nordic Convention and Section 6.4.3.2 of the Module 1 Guidance Text).

<sup>23</sup> See section 6.1.3.3 of the Module 1 Guidance Text.

<sup>24</sup> UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2001).

[https://uncitral.un.org/en/texts/insolvency/explanatorytexts/cross-border\\_insolvency/judicial\\_perspective](https://uncitral.un.org/en/texts/insolvency/explanatorytexts/cross-border_insolvency/judicial_perspective).

<sup>25</sup> <http://www.jin-global.org/jin-guidelines.html>.

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.

In seeking to seek recognition of the American insolvency proceedings and / or orders in the England, the following sources will be applicable in order to deal with Norton Cars Inc's (NCI) assets in England.

1. The English common law.

- a. In particular, in the House of Lords decision in *McGrath v Riddell* [2008] UKHL 21, Lord Hoffmann referred to the English 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 differences between the English and foreign systems of distribution*".<sup>26</sup> At paragraph 30, he stated: "[t]he primary rule of private international law ... applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."<sup>27</sup> The American insolvent estate representative may rely on these statements in support of her application for the English Court to recognise her role so that NCI's English assets may be dealt with.
- b. It is also noteworthy that the Insolvency Act 1986 (UK) (the **Insolvency Act**) and particularly section 426 which deals with co-operation between courts exercising jurisdiction in relation to insolvency and requires the English Court's to consider remitting assets collected in England to the foreign liquidators in respect of 'relevant countries' as

<sup>26</sup> *McGrath v Riddell* [2008] UKHL 21.

<sup>27</sup> *McGrath v Riddell* [2008] UKHL 21 at [62].

defined by the Insolvency Act will not be off assistance because the United States is not a relevant country for the purpose of the Insolvency Act.

2. The Model Law.

- a. The Model Law has been incorporated into English law by the Cross Border Insolvency Regulations 2006 (the **CBIR**). Article 21 of the CBIR allows an English Court to grant any appropriate relief where necessary to protect the assets of the debtor (or the interests of the creditors) where the foreign insolvency proceeding has been recognised by the English Court.
- b. It is worth noting that the United States has also adopted the Model Law.<sup>28</sup>

4

**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.

In circumstances where NCI has its COMI in Italy and operations in Germany, the appropriate legal sources as between those two States which are members of the European Union is the EIR Recast.

Pursuant to the EIR, the primary jurisdiction of the insolvency proceedings will be that of NCI's COMI<sup>29</sup> which is presently in Italy. As a result, the main proceedings in respect of NCI will be in Italy and Italian law will apply.

However, because NCI also has its main operations in Germany, potentially also including those of its subsidiary, Gladiator Manufacturing Ltd (if that is where it is registered and it is unclear on the facts), the EIR would also allow for ancillary proceedings in Germany as long as NCI has an "establishment" there which is defined in the EIR as "any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets"<sup>30</sup> If Gladiator Manufacturing Ltd is a German registered entity, it would likely meet the definition of an establishment. Even if Gladiator Manufacturing Ltd isn't an establishment, the fact that NCI has its 'main operations' in Germany would typically indicate that it does have an establishment in Germany which would allow for subsidiary or ancillary proceedings under the EIR. Those proceedings may be either independent (if commenced first) or secondary, if opened after the main proceedings in Italy.

The insolvent estate representative may also consider whether there are any other treaties or conventions as between Italy and Germany which may provide guidance.

4

**Question 4.3 [Maximum 1 mark]**

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<sup>28</sup> [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status).

<sup>29</sup> EIR Recast, Art 3(1).

<sup>30</sup> EIR Recast, definitions.

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, the courts in India, South Africa and Australia are not eligible to apply the EU (Recast) Insolvency Regulation because they are not member States. The EU (Recast) Insolvency Regulation only applies to the States in the EU and although not specifically relevant in this scenario it is worth noting that it no longer applies to the UK after it left the EU in 2020.<sup>31</sup>

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**Question 4.4 [Maximum 6 marks]**

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

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

The law that will apply to the insolvency proceedings as a whole will be Italian law. Italian law applies for the following reasons:

1. Italy and the Netherlands are both States which are part of the EU.
2. The EIR Recast applies to cross-border insolvency matters as between EU states.
3. Pursuant to the EIR Recast the jurisdiction of the main insolvency proceedings will be determined based on where NCI's COMI is, and we know that that is Italy.
4. As such, the main proceedings will be in Italy and Italian law will apply.

Despite the existence of the EIR and the fact that both Italy and the Netherlands are member States, the real rights of security situated in the Netherlands would still likely be determined pursuant to Dutch law. The reason for this is because real rights of security / secured creditors are nearly always dealt with separately or outside of an insolvency proceeding. The fact of the security usually entitles the holder to seek recourse in relation to the debt they are owed by calling upon that security towards payment. It would depend on the specific terms of the contract in relation to the security interest.

If the security interest was dealt with in the context of the international insolvency proceedings for whatever reason, then it might help that both Italy and the Netherlands are member States to the EIR. If the EIR applied, it is noteworthy that the security interest would not constitute an establishment so as to constitute separate proceedings, with the result that the real rights of security could be dealt with in the main proceedings. However, this is all subject to the primary position that usually a secured creditor would retain its separate right to enforce its own debt.<sup>32</sup>

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(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

<sup>31</sup> <https://www.legislation.gov.uk/uksi/2019/146/contents>.

<sup>32</sup> Module 1 Guidance Text, page 18.



In circumstances where Australia obviously is not part of the EU and is not a member to the EIR Recast, the EIR does not apply with the result that insolvency proceedings in Australia in relation to NCI would be subject to Australian insolvency law pursuant to the Corporations Act which applies to the insolvency of corporations. Australia has also adopted the Model Law on Cross-border Insolvency through the Cross-border Insolvency Act 2008 (Cth).

Australian law would also apply to the real rights of security in Australia, subject to the same qualification in answer 4.4(a) above which clarifies that a secured creditor would have recourse to enforce its debt outside of the insolvency process by virtue of their status as a secured creditor.

As to the Italian insolvent estate representative of NCI seeking to realise and protect any assets in Australia (possibly including the real rights of security but only if that debt wasn't dealt with outside of the insolvency proceedings), they may benefit from sections 580 – 581 in the Australian Corporations Act which permits cooperation between Australian and foreign courts, in this case Italy, in external administration matters, such as insolvency.<sup>33</sup> In *Re Chow Cho Poon (Pte) Ltd* [2011] NSWSC 300, the New South Wales Supreme Court granted assistance to a foreign liquidator upon a request under section 581, thus enabling control of assets in a bank account. The Court specifically discussed Cross-border Insolvency Act 2008 (Cth), section 22 on the interaction of the Model Law with section 581 of the Corporations Act as invoked in that case.<sup>34</sup>

The Italian insolvent estate representative of NCI should seek to rely on sections 580 – 581 of the Corporation Act, particularly as the Model Law has not been adopted in Italy. Parties have made use of these sections when the Model Law does not apply and there are examples in the Australia Federal Court context.<sup>35</sup>

Even though Italy hasn't adopted the Model Law, the Italian estate representative may seek to rely on some of the useful elements which relate to secured transactions if the real rights of security are being dealt with in the context of the insolvency proceedings. It would be worth checking the extent to which the following model laws and guides have been adopted, apply or can provide useful guidance:

1. UNCITRAL Model Law on Secured Transactions (2016)<sup>36</sup> and the Guide to Enactment (2017) and Practice Guide (2019) which is an attempt at harmonise the rules relating to security interests around the world<sup>37</sup> and *“deals with security interests in all types of tangible and intangible movable property, such as goods, receivables, bank accounts, negotiable instruments, negotiable documents, non-intermediated securities and intellectual property with a few exceptions, such as intermediated securities... [It] follows a unitary approach using one concept for all types of security interest, a functional approach under which the Model Law applies to all types of transaction that fulfil security purposes, such as a secured loan, retention of title sale or financial lease, and a comprehensive approach under which this Model Law applies to all types of asset, secured obligation, borrower and lender...The Model Law includes a set of Model Registry*

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<sup>33</sup> Module 1 Guidance Text, page 101.

<sup>34</sup> *Re Chow Cho Poon (Pte) Ltd* [2011] NSWSC 300 and footnote 100 to the Module 1 Guidance Text, page 51.

<sup>35</sup> See *Tannenbaum v Tannenbaum* [2012] FCA 904 (24 August 2012); and *Cooksley v Cooksley* [2017] FCA 1193 (6 October 2017).

<sup>36</sup> [https://uncitral.un.org/en/texts/securityinterests/modellaw/secured\\_transactions](https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions).

<sup>37</sup> Module 1 Guidance Text, page 24.

*Provisions (the “Model Provisions”) that can be implemented in a statute or other type of legal instrument, or in both.”<sup>38</sup>*

2. UNCITRAL Legislative Guide on Secured Transactions (2007)<sup>39</sup> which focused on the coordination of the treatment of security interests in insolvency.<sup>40</sup>

**3**

**Marks awarded 15 out of 15**

**\* End of Assessment \***

**TOTAL MARKS AWARDED 48.5/50**

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

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<sup>38</sup> [https://uncitral.un.org/en/texts/securityinterests/modellaw/secured\\_transactions](https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions).

<sup>39</sup> [https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured\\_transactions](https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured_transactions).

<sup>40</sup> Module 1 Guidance Text, page 75.