



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 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

The source of civil law jurisdictions is statutes or legislative Codes. Courts in civil law jurisdictions, such as the Netherlands, France, Germany and Spain determine legal issues by reference to the interpretation and application of statutes, without regard to stare decisis (i.e. earlier decisions of superior and/or equal Courts). Therefore, civil law jurisdictions may be perceived as more 'rigid', inflexible and predictable in their application of domestic law.

Civil law jurisdictions' insolvency law is rooted in Roman law, and is pro-creditor in its stance. This means that domestic laws do not allow for debt(s) to be discharged with ease. Historically, civil law insolvency regimes were harsh on defaulting or insolvent debtors - for example, the French Commercial Code 1807 sanctioned debtors being arrested and/or detained, and in 1935, shareholders and directors of insolvent companies could be subject to penalties and disqualification from their directorship.¹ In addition, civil law jurisdictions typically favour a territorialism approach, whereby separate concurrent insolvency proceedings are afoot in a cross-border insolvency.

By contrast, legal systems based on English common law have two sources of law: (i) statutory law; and (ii) case law (i.e. a legal system whereby prior decisions of superior (or the same) Court are binding on the lower (or same) Court in determining a legal issue(s)). As a result, common law systems may be seen to be more flexible, adaptable and less predictable in its application of domestic law over time.

For example, key English insolvency law statutes include:

1. Insolvency Act 1986, effective as of 25 July 1986² and amended pursuant to the Insolvency Act 2000 and Enterprise Act 2002.
2. Corporate Insolvency and Governance Act 2020, which introduced during the Covid-19 pandemic a new restructuring plan, moratorium rules and the pausing of winding up petitions and statutory demands.

Generally speaking, English common law systems are debtor friendly (i.e. pro-debtor, as opposed to being pro-creditor). A hallmark of a pro-debtor system the ability of a debtor to discharge debt with relative ease and to achieve a clean start (for example, the US Chapter 11 reorganisation mechanism and moratoriums that can arise under the English Insolvency Act 1986 in certain circumstances). In England and Wales, only licensed insolvency practitioners will be appointed to act in insolvency proceedings regarding personal or corporate insolvency. Insolvency Practitioners ("IPs") are subject to various statutory duties, practical and ethical rules with which they must adhere to, and IPs are regulated by the Recognised Professional Body ("RPB").³ RPBs are overseen by the Insolvency Service.⁴

Moreover, common law jurisdictions typically favour a universalism or modified universalism approach, which strives for one forum (i.e. the Centre of Main Interests) to determine cross border insolvencies.

Further examples of common law countries would be beneficial

2.5

Question 2.2 [maximum 3 marks]

¹ INSOL Module 1 Guidance Text, *Introduction to International Insolvency*, 2023/2024 Ed., paragraph 4.1.2.2.

² [Insolvency Act 1986 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1986/45)

³ [Regulation of Insolvency Practitioners \(IPs\) - House of Commons Library \(parliament.uk\)](https://www.parliament.uk/library/research-and-briefing/papers/2016/01/regulation-of-insolvency-practitioners-ips)

⁴ [Guidanceforpublication.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/guidance/guidance-for-publication.pdf)

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 different theories on how to approach cross border insolvencies. A cross border insolvency could arise in a variety of ways, for example, because a debtor has property in more than one country or State or because a debtor's creditors are based in more than one country or State. In cases such as these, more than one insolvency proceeding may be initiated. The following theories provide a guide as to how to approach such a scenario:

Universalism: one forum (i.e. State / Court) has jurisdiction to determine all insolvency proceedings and therefore has the power to affect the debtor's assets and debts worldwide. The law of the 'lex concursus' (i.e. where the main insolvency proceeding has been opened) regulates the matter (otherwise referred to as 'unity of proceedings'⁵), irrespective of the physical location of the debtor's relevant assets / property.

Territorialism: the opposite of Universalism, which provides for concurrent insolvency proceedings in different States. Territorialism involves separate insolvency proceedings being commenced in each country / State that the debtor has an establishment or interest (i.e. assets / property). Each country / State's laws will apply.

Modified Universalism: hybrid situation, whereby neither universalism nor territorialism is achieved, due to cost, practical or political factors. Instead, an insolvency proceeding is commenced in the centre of main interests which is supported by a secondary or ancillary insolvency proceeding in another jurisdiction. **Elaboration is warranted, for example with respect to COMI**

2.5

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.

Various multilateral Treaties have been passed and ratified by Latin American States, which govern international insolvencies. By way of example:

1. Montevideo Treaty on International Commercial Law (1889) governs personal and corporate insolvency in the State signatories. This Treaty has been ratified by 6 States;⁶
2. Montevideo Treaty on International Commercial Terrestrial Law (1940), which includes Title VIII on Bankruptcy;
3. Montevideo Treaty on International Procedural Law (1940), which includes Title IV on Civil Meetings of Creditors;⁷
4. Havana Convention on Private International Law (1928), which has been ratified by 15 States.⁸

⁵ INSOL Module 1 Guidance Text, *Introduction to International Insolvency*, 2023/2024 Ed., paragraph 5.2.4.1.

⁶ Namely, Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay – Ibid, paragraph 6.4.2.

⁷ The 1940 Montevideo Treaties have been ratified by Argentina, Paraguay and Uruguay only – Ibid, whereas the 1889 Montevideo Treaty has been ratified by the 6 States listed at footnote 6.

⁸ Ibid.

The Havana Convention, Chapter 1, favours a 'Unity of Bankruptcy or Insolvency' in respect of "all his [debtors'] assets and his liabilities in the contracting States" and therefore it has extra-territorial effect.⁹ The Havana Convention does not contain a mechanism for co-operation or coordination with other, foreign insolvency proceedings / Courts.

By contrast, the 1889 Montevideo Treaty provides for concurrent insolvency proceedings, where a debtor has two or more businesses in different contracting States.

In conclusion, the key differences in the Latin American insolvency regimes are:

1. the contracting States that are signatories to the Treaties;
2. whether concurrent insolvency proceedings are recognised; and
3. the degree of co-operation and collaboration proffered to foreign States differs.

4

Marks awarded 9 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.

In my view, the terms bankruptcy and insolvency are not interchangeable because:

1. The origin of each term is different: as discussed further below bankruptcy law can be traced to Roman law, whereas insolvency law and related principles began to emerge later on, in continental Europe;
2. Each process is different: historically, bankruptcy laws provided for piecemeal debt collection, whereas early insolvency law deals with debt collection on a collective basis;
3. The rationale underpinning bankruptcy and insolvency is different: bankruptcy law is traditionally pre-creditor, whereas insolvency law is pro-debtor;
4. Differences are also present regarding the availability of debt forgiveness or discharge;
5. Taking England as an example, following the Cork Report, a clearer distinction between bankruptcy law and insolvency law was devised (with separate Acts governing each today); and
6. Although some jurisdictions use the terms 'bankruptcy' and 'insolvency' interchangeably, different definitions have been given to each term in various countries, and so it would be remiss to ignore these nuances entirely.¹⁰

There is scope to elaborate regarding the different meanings for bankruptcy/insolvency in different jurisdictions. By way of example, in Australia bankruptcy refers to the individual and insolvency to the corporation. Although these terms carry the same meaning in many systems, one explanation is that "insolvency" sometimes means the state of financial affairs of a debtor, whilst "bankruptcy" refers to the formal state of being put into a formal bankruptcy proceeding.

According to Fletcher, the law of bankruptcy can be traced to the Roman law debt collection procedures:

1. Cessio bonorum;
2. Distraction bonorum; and

⁹ Ibid.

¹⁰ INSOL Module 1 Guidance Text, *Introduction to International Insolvency*, 2023/2024 Ed., paragraph 4.2.2.1.

3. Remission and dilation.¹¹

Early bankruptcy laws and procedures were overwhelmingly pro-creditor and punitive in nature. Defaulting debtors were punished by way of severing their body (i.e. in Roman times) or imposing a sentence of imprisonment for those that committed an offence under the English Bankruptcy Act 1542 (in 16th century England).

Over time, legislative reform shifted from taking action against the individual defaulting debtor to pursuing the debtor's assets. In England, from the late 16th century, the Lord Chancellor had the ability to convene a bankruptcy meeting on petition of a debtor's creditors, and principles such as (i) the collective participation of creditors and (ii) *pari passu* distribution of a debtor's estate, emerged – these principles can be found in modern Insolvency laws, and so some characteristics of bankruptcy and insolvency laws are common to each. In 1705, England introduced a statutory discharge of debt and following the Cork Report, the Insolvency Act 1986 was enacted, providing a new statutory framework dealing with insolvency related issues. Overall, insolvency laws tend to be pro-debtor with mechanisms for debt discharge or other form of rescue.

Bankruptcy denotes a state of being in bankruptcy, whereas insolvency is defined as (i) cash flow insolvency (i.e. a situation where a debtor is not able to pay its debts as they fall due); or (ii) balance sheet insolvent (i.e. whereby the debtor's liabilities exceed their assets).

Insolvency proceedings are legal proceedings subject to Court supervision, which either results in a reorganisation or liquidation of the insolvency estate (i.e. the assets of a debtor that are caught by the insolvency proceeding). An insolvency practitioner will be appointed to oversee and administer the insolvency proceedings and are typically part of a regulated industry, and are subject to statutory or other duties.

Insolvency proceedings may concern an individual debtor (i.e. personal bankruptcy or insolvency) or a corporation (i.e. corporate insolvency). Differences between the two types of insolvency proceedings include:

1. Effect:
 - a. corporate insolvencies may result in a corporation(s) being dissolved as part of a reorganisation or restructure has been affected as corporate insolvencies cannot be 'rehabilitated. Conversely, an individual bankrupt may be able to treat their unpaid debts as entirely forgiven;
 - b. individuals who have been adjudicated to be bankrupt may be disqualified from certain roles;
 - c. individual directors or officers of a corporation subject to insolvency may be personally liable for the debts of the corporation.
2. Commencement: individual insolvencies / bankruptcies may be commenced in an informal manner, not involving the local Courts, whereas corporate insolvencies may require a resolution of the members / shareholders of the company in question.
3. Court: in some jurisdictions, specialist bankruptcy courts will deal with individual bankruptcies.

There was scope to more systematically work through each of the topics raised by it: (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. In relation to the differences you raise, it would be beneficial to also consider objectives and exempt property.

¹¹ INSOL Module 1 Guidance Text, *Introduction to International Insolvency*, 2023/2024 Ed., paragraph 4.1.1; I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017) Ch 1, p6.

Question 3.2 [maximum 5 marks]

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

The following factors make it increasingly difficult for a single cross-border insolvency law to be developed and administered:

1. Divergent laws: not only as between different jurisdictions, but also as between different areas of law that have implications on the resolution of insolvency or bankruptcy issues, such as:
 - a. Insolvency law
 - b. Bankruptcy law
 - c. Property law
 - d. Securitisation law, noting, in particular, that not every jurisdiction has a concept of a 'floating charge', such as that recognised in the UK;
 - e. Employment and labour laws;
 - f. Executory contracts;
 - g. Avoidance laws, etc.
2. Technical terms and definitions: differ across jurisdictions and areas of law, meaning it is difficult to reconcile different regimes and/or areas of law. Local rules of statutory interpretation may also differ.
3. Legal framework: common law and civil law jurisdictions have different sources of law; the latter, generally speaking, does not recognise stare decisis / 'judge made' law. While these sources of law may overlap, these might be incapable of being fully reconciled.
4. Standing of Foreign Insolvency Practitioners: different rules apply to the appointment of insolvency practitioners or officers, their duties and scope of their powers.
5. Discharge: different regimes apply, with some focussing on liquidating the estate assets, while others focus on rescuing an insolvent individual or company. In circumstances of over-indebtedness, some regimes recognise collective proceedings whereas others do not.
6. Treatment of creditors: the categories of creditors recognised may differ from country to country. In addition, certain creditors may be afforded different priority or preferential claim(s).
7. Avoidance laws: rules regarding which transactions (if at all) may be void or voidable can also differ. For example, in the Cayman Islands, sections 145 and 146 Companies Act govern voidable preferences and dispositions made at an undervalue – in turn, these provisions prescribe which conveyance, transfer or dispositions are invalid or potentially voidable, and it is likely that these provisions differ to similar legislative provisions in other countries.
8. Policy considerations: each government's political agenda changes over time, meaning different approaches to insolvency or bankruptcy law and reform arise. In addition, a jurisdiction may be pro-creditor or pro-debtor, which makes for harmonising the laws of various States increasingly difficult, if not impossible.

9. Court or other Administrative Assistance: jurisdictions have different regimes regarding the appointment of insolvency practitioners or officers, and the scope of their powers and duties also vary from State to State.

10. Conflict of Laws: certain jurisdictions provide for greater recognition and enforcement of foreign insolvency proceedings and/or assistance in proceedings abroad.

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

3

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.

Hard law: binding law, which may be primary or secondary law. Examples include domestic law (i.e. Insolvency Act 1986¹²), bi-lateral or multi-lateral Treaties, such as the European Insolvency Regulation (Recast) and the Nordic Convention on Bankruptcy (1993).

Soft law: not binding law, but it is of persuasive effect. Examples include the Hague Conference on Private International Law's publications and guidance¹³; the UNCITRAL Legislative Guide on Insolvency Law (2004)¹⁴; the UNCITRAL Model Law on Cross-Border Insolvency (1997), which member States were encouraged to adopt as domestic law¹⁵; guidance issued by the International Bar Association, INSOL International, the Asian Business Law Institute joint project with the International Insolvency Institute, including its report on Corporate Restructuring and Insolvency in Asia (2020)¹⁶; European Commission's guidance and publications on cross-border insolvency cases¹⁷ and the World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes (2021 revision).

Due to the various challenges in achieving harmonisation of laws across different jurisdictions (outlined in the answer to question 3.2 above), soft law has proven to be an effective means of achieving solutions to international insolvency issues.¹⁸ Moreover, the sheer breadth of soft law sources (i.e. regulatory, academic and professional bodies) may have contributed to the successful development and implementation of soft law resolutions. **There is scope to elaborate regarding success or otherwise.**

2.5

Marks awarded 10 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.

¹² [Insolvency Act 1986 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1986/45)

¹³ See for example, the minutes of the HCCH March 2022 meeting accessible here: [Private International Law and Insolvency: Update \(hcch.net\)](https://www.hcch.net/en/working-groups/private-international-law-and-insolvency/update)

¹⁴ [UNCITRAL Legislative Guide on Insolvency Law | United Nations Commission On International Trade Law](https://www.uncitral.org/uncitral/uncitral/legislation/legislative_guide/legislative_guide.html)

¹⁵ [UNCITRAL Model Law on Cross-Border Insolvency \(1997\) | United Nations Commission On International Trade Law](https://www.uncitral.org/uncitral/uncitral/legislation/model_law_on_cross-border_insolvency/1997_model_law.html)

¹⁶ <https://abli.asia/abli-projects/asian-principles-of-business-restructuring/>

¹⁷ [Insolvency proceedings \(europa.eu\)](https://ec.europa.eu/economic_finance_affairs/insolvency_proceedings_en)

¹⁸ INSOL Module 1 Guidance Text, *Introduction to International Insolvency*, 2023/2024 Ed., paragraph 6.1.3.3.

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.

The issue is what cross-border initiative(s) (i.e. both hard and soft law) will assist an insolvent estate representative that has been duly appointed in accordance with American law (noting that the application American State law is not specified) in having their appointment recognised in England and Wales, for the purpose of dealing with the insolvent's estate's (i.e. Norton Cars Inc's) assets that are situated in England (i.e. where it has an 'Establishment' for the purposes of Article 2(f) UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law")).

As neither the USA nor England is part of the European Union, the EU (Recast) Insolvency Regulation 2015 does not apply, and so this will not assist the insolvent estate representative.

However, the Model Law has been implemented in the UK via the Cross-Border Insolvency Regulations 2006 (the "CBIR") and the US via the Bankruptcy Code dated 1978 and is of assistance. Specifically, the Guidance notes to the Model Law, Part II, section B, paragraph 29 states: "One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize."¹⁹ Provided the foreign proceeding is a collective proceeding and the insolvent estate representative is a qualifying representative (as defined in the Model Law), Article 15(1) of UNCITRAL Model Law will be of assistance, as it states: "A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed"²⁰. So long as the evidence stated in Article 15 of the Model Law is provided to the relevant Court, "...the court should recognise the foreign proceeding without further requirement."²¹

Furthermore, soft law initiatives that support parallel / cross-border insolvency proceedings (including the use of Protocols or Cross-Border Insolvency Agreements), which would be of assistance to the insolvent estate representative are:

¹⁹ [UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation](#)

²⁰ Ibid.

²¹ Ibid.

1. JIN Guidelines, which have been adopted by American and English Courts;²²
2. ALI NAFTA Guidelines applicable to Court-to-Court Communication in Cross-Border Cases dated 2000; and
3. ALI-III Global Guidelines applicable to Court-to-Court Communication in Cross-Border Cases dated 2012.

In addition, the American case of Maxwell Communications Corporation Plc dated 1991 and the Canadian case of Nortel Networks dated 2015 (which pre-date the Model Law) would be of persuasive authority before the relevant court, in support of facilitating cross-border insolvencies and the recognition of the estate representatives' appointment in England (or failing that, the use of a Protocol to govern the insolvent estate representatives' ability to administer the estate in England).

It would also be relevant to raise s426 and why it is not applicable.

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Question 4.2 [Maximum 4 marks]

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

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

As both Italy and Germany are Members States of the European Union, the EU Recast Insolvency Regulation (2015) will apply.

Article 3(1), (2) of the Recast Regulation provides that a Court has jurisdiction to open an insolvency case in relation to a debtor when either:

- (a) The debtor's centre of main interests ("COMI") is situated within the State's territory; or
- (b) The debtor has an Establishment within that States territory.

COMI is defined as: "...the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties" (Article 3(1)).

An Establishment is defined as: "...any place of operations where a debtor carries out or 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 (Article 2(10)).

Preamble, paragraph 23 states: "This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union." (emphasis added)²³

²² INSOL Module 1 Guidance Text, *Introduction to International Insolvency*, 2023/2024 Ed., paragraph 7.2.

²³ [REGULATION \(EU\) 2015/ 848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL - of 20 May 2015 - on insolvency proceedings \(europa.eu\)](#); see also Articles 3(1), (2) of the Recast Regulation.

Under Article 3(1) of the Recast Regulation, the "main insolvency proceeding" should be opened in Italy, because that is Norton Cars Inc's COMI and the country in which Norton Cars Inc's management decisions are taken.

If a parallel insolvency proceeding were to be opened in Germany, that proceeding would be a "secondary insolvency proceeding" under the Recast Regulation.

Articles 7 to 18 provide that the law of the "State of the opening proceedings" (i.e. Italy) determines "...the conditions for the opening of those proceedings, their conduct and their closure." Therefore, the laws of Italy would determine the insolvency proceedings from start to finish and would have a bearing on any attempt to realise assets of Norton Cars Inc that are based overseas (i.e. via its Establishments in the US, India, South Africa and Australia).

A soft law source that is also of assistance is Fletcher and Wessels recommendations on Global Rules on Conflict of Laws Matters in International Insolvency Cases to the ALI – III *Report on Transitional Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012).²⁴ Specifically, Principle 7(1) regarding recognition states: "An insolvency case opened in a state which, with respect to the debtor concerned, has jurisdiction under the rules of international jurisdiction established by these Global Principles, in conformity with Global Principle 13, should be recognized and given appropriate effect under the circumstances in every other state" (i.e. Germany, as well as any other EU Member State in which Norton Cars Inc has an Establishment).²⁵

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Question 4.3 [Maximum 1 mark]

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

Yes, typically the law of the forum (i.e. the EU (Recast) Insolvency Regulation) will apply, unless a party invokes a choice of law issue. Also, the EU (Recast) Insolvency Regulation 2015 determines the proper jurisdiction for a debtor's insolvency proceedings, including the applicable law to be used in those proceedings.

Moreover, it is noteworthy that:

1. Australia has enacted ss. 580-581 of the Corporations Act 2001 and the Cross-border Insolvency Act 2008, which are substantially similar to s. 426 of the English Insolvency Act 1986 which states: "An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part" (assuming that an English court appointed the insolvency representative in question)²⁶; and
2. India has recently considered adopting the Model Law.²⁷

The fact that these countries are not members of the EU requires consideration

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Question 4.4 [Maximum 6 marks]

²⁴ https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf

²⁵ https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf at page 7.

²⁶ [Insolvency Act 1986 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1986/126)

²⁷ INSOL Module 1 Guidance Text, *Introduction to International Insolvency*, 2023/2024 Ed., paragraph 6.4.5.

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.)

Italy (i.e. the main insolvency proceeding regarding Norton Cars Inc, since its COMI is in Italy) and the Netherlands (i.e. a country in which Norton Cars Inc has an Establishment) are bound by the EU Recast Regulation.

Articles 7 to 18 of the Recast Regulation provide that the law of the "State of the opening proceedings" (i.e. Italy) determines "...the conditions for the opening of those proceedings, their conduct and their closure." Therefore, the laws of Italy would determine the insolvency proceeding.

However, the EU Recast Regulation, preamble paragraph 22 states: "This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different. This Regulation should take account of such differing national laws in two different ways. On the one hand, provision should be made for special rules on the applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of the opening of proceedings should also be allowed alongside main insolvency proceedings with universal scope."²⁸

Therefore, Dutch law would govern the real rights of security (i.e. rights in rem) situated in the Netherlands.

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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.)

As stated above, Italy (i.e. the main insolvency proceeding regarding Norton Cars Inc, since its COMI is in Italy) is bound by the EU Recast Regulation and therefore Italian law will govern the main insolvency proceedings pursuant to Articles 7 to 18 of the Recast Regulation.

However, Australia is not bound by the EU Recast Regulation as it is not a Member State of the European Union. The Recast Regulation, preamble paragraph 62 is clear that: "The rules on cooperation, communication and coordination in the framework of the insolvency of members of a group of companies provided for in this Regulation should only apply to the extent that proceedings relating to different members of the same group of companies have been opened in

²⁸ [REGULATION \(EU\) 2015/ 848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL - of 20 May 2015 - on insolvency proceedings \(europa.eu\)](#)

more than one Member State." (Emphasis added) Therefore, the Recast Regulation does not have extra-territorial effect in Australia.

As a result, Australian law will govern an insolvency proceeding opened in Australia, as well as the real rights of security situated in Australia.

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Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40/50

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