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.

Take care to answer each sub-question

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.

Legal systems globally are categorised as having their foundation either in English law or Civil Law. This applies to the various insolvency laws although culture, basic rights and security rights influence these laws. Despite different terms of refence used it relates to the same principle.

The roots of **civil law** traces back to Roman law and Table 3 of the Twelve Tables. According to Fletcher "the roots of bankruptcy law are established from procedures of the Roman law, being *cession bonorum* (assignment of property); *distraction bonorum* (forced liquidation of assets); *remission and dilation* (compromise with creditors."

Insolvency law in Europe was premised on the *Lex Mercatoria* ("law merchant of the Middle Ages"), which was established customs and usages between merchants on the continent which accordingly impacted the countries which had more of a Roman or Germanic law, referred to as "civil law". As such Roman law principles fundamentally formed the backbone of many civil law countries.

Countries with civil law roots
Dutch insolvency law is a civil law system, 1772 ordinance of Amsterdam was the law in part of the Netherlands. It governs the law of bankruptcy for individuals and businesses.

Angola and Mozambique have a civil law based on Portuguese law.

The **Francophone countries of West Africa** is based on French civil law.
French insolvency law

Latin American and South American countries are largely civil law countries and governed by the Union of South American Nations agreement following law of the European Union.

English Law is found on statutory developments with the first English Bankruptcy Act of 1542 allowing for compulsory sequestration which laid the foundation for (i) appointment of a commissioner (trustee) on application by creditors' (ii) with a compulsory administration of the insolvent's affairs and equal distribution of assets. This paved the way to modern insolvency principles of (i) collective participation and (ii) *pari passu* distribution amongst creditors.

The concept of statutory discharge was introduced with the Statue of Ann in 1705 which and only afforded once the commissioner had found the insolvent was rehabilitated.

Further law reforms in 1883 included the office of the Official Receiver and brought about the regime of "friendly sequestration" with the co-operation of creditors. The 1883 Act formed the basis of English insolvency law for the 20th century. Following the Cork Report published in 1977 the English insolvency law was scrutinized and announced the promulgation of the 1986 Insolvency Act.

Countries with English law roots
Australian insolvency law is premised on English common law. They have adopted the UNCITRAL Model Law on Cross-Border Insolvency as they don't have a unified Bankruptcy or Insolvency Act.

African countries like **Nigeria, Kenya, Botswana, Zambia and Eastern Africa** have English law tradition dating back to colonial rule.

India's insolvency laws are premised on English law with different legislation for individuals and businesses. They adopted a new Insolvency and Bankruptcy Code in 2016

Interestingly **South Africa and Namibia** have a combination of legal systems as they were influenced by civil law (Roman-Dutch law) and English law.

This answer also required a discussion of the common law aspect of English law cf the codified nature of civil law

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Question 2.2 [maximum 3 marks]

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

Supporters of universalism promote a single insolvency process which entails all the debts and all the assets of the debtor, regardless of where it is located. Once insolvency proceedings have commenced in a chosen state, it will be impossible for a creditor to commence any other insolvency proceedings. In terms of recognition and enforcement this principle requires all states to agree on the place for the single insolvency process to be successfully instituted. Furthermore, the other states will have to recognise the signal insolvency process and the effect on their own jurisdiction. It is very idealistic to believe all creditors can participate in one, all-encompassing insolvency proceeding with all claims dealt similarly. This concept is premised on trust in foreign legal systems and foreign insolvency proceedings. The challenges it poses relates to a decision of the governing law and rules of ranking and priority treatment and could potentially be a situation which the debtor abuse.

In stark contrast the advocates of territorialism call for multiple insolvency processes to run in parallel in more than one jurisdiction where assets of the debtor are located. The only limitation being that each insolvency proceedings can only deal with property in its specific jurisdiction. This will prevent creditors from submitting claims in these other jurisdictions despite multiple insolvency proceedings instituted at the same time. Such a stance will secure the interest of local creditors, ensuring their claims are satisfied before assets are shared beyond the local boarder.

The biggest downside to this principle is a situation where the debtor is declared insolvent in state A, where the debt sits but is considered solvent in state B where the debtors' assets are leaving the creditor with no access to the recover from the assets.

Whereas a majority of states support the principle of territoriality, there have been a revised stream of modified universalism which proposes as a middle ground, that there is a "main insolvency process or proceeding" which is opened in the state where the debtor has its centre of main interest (COMI). This "main proceeding" will have universal effect, even outside the territorial jurisdiction of the state where the "main proceeding" was initiated. It allows for ancillary proceedings in other states with the understanding that the respective courts will co-operate in common matters by recognising the main proceeding and the enforcement of same in their jurisdiction.

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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.

Latin American states successfully negotiated a series of treaties on private international law and commerce which specifically include a section on bankruptcy (insolvency) being (i) the Montevideo Treaties of 1889 and 1940 and (ii) the Bustamante Code of 1928.

The Montevideo Treaty of 1889 deals with International Commercial Law and was approved by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. It also deals with personal and corporate insolvency where the jurisdiction for bankruptcy is based on the debtor's commercial domicile –

(i) If the debtor is commercially domiciled in one treaty state, it provides for a single legal process in that commercial domicile even if he trades in ore that one state; and

(ii) If the debtor has multiple business in different treaty states, concurrent legal processes are allowed.

The 1940 Montevideo Treaty deals with International Commercial Terrestrial Law and includes Title VIII on Bankruptcy. There is further 1940 Montevideo Treaty on International Procedural Law and includes Title IV on civil meetings of creditors. The 1940 treaties have been approved by Argentina, Paraguay and Uruguay.

The fact that only some members of the state approved the 1940 treaties makes it rather difficult to understand which of the international insolvency treaties will find application between the states.
A further distinction between the 1889 and 1940 treaties is the enforcement of a single proceeding across the member states.

The Havana Convention of Private International Law (the Bustamante Code) was agreed in 1928 and approved by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.
Only Bolivia and Peru are parties to the Montevideo Treaties and the Bustamante Code of 1928.

In contrast to the Montevideo Treaties the Havana Convention promotes the principle of a single legal process to be acknowledged across the jurisdictions, hence Chapter I being "Unity of Bankruptcy or Insolvency". For debtor with business that operate independently, there may be parallel proceedings in the Havana Convention states. This aligns with the Montevideo Treaties in respect of a situation where the debtor is commercially domiciled in one treaty state, it provides for a single legal process in that commercial domicile even if he trades in ore that one state. For parallel proceedings the Havana Convention doesn't allow co-operation or co-ordination.

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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.

Some legal systems use "insolvency" and other use "bankruptcy" and some use these terms as having the same meaning. "Bankruptcy" referring to the insolvency of an individual or a natural person and "insolvency" referring to the insolvency of a corporation as is done in Australia. There is also an

explanation that insolvency refers to (i) the actual financial situation of the debtor where his liabilities is more than his assets (factual or balance sheet insolvency) or (ii) a situation where the debtor cannot repay his debts as he has no cash on hand (commercial of cash flow insolvency).

According to the UNCITRAL Legislative Guide and other UNCITRAL texts and insolvency-related terminology, "Insolvency" is when a debtor is unable to pay its debts as it matures. Whereas Sometime "Bankruptcy" is used to confirm or express the status of the debtor as "being in bankruptcy."

In my view there are very definite differences between the grounds for commending insolvency or bankruptcy proceedings against an individual versus the legal basis for an application to wound-up (liquidate) a company (legal person). The way in which the majority of states have in modern insolvency law established separate legislation and processes for the insolvency proceedings of an individual and/or a company supports the argument that bankruptcy and insolvency are not synonyms. Different states have different rules and interpretations and to understand the approach we must observe two fundamental areas of insolvency law (i) individual and (ii) corporate insolvency as discussed below.

Even from its origins, according to Fletcher the roots of bankruptcy law (as a collective debt collecting procedure) are found in Roman law, in particular the: *cession bonorum* (assignment of property), *distractio bonorum* (forced liquidation of assets), *remission and dilatio* (compositions with creditors). Whereas these procedures were initially for collection of debt from individuals, it was the foundation for collective debt collecting mechanisms if the debtor was insolvent (insolvency law).

Stemming from the Italian word "*banca rotta*", bankruptcy means to "break the bench". This relates to a practice amongst merchants to actual damages to the debtor's counter (bench) should he have failed to pay his creditors. Over time the process of collecting of debt (which were creditor friendly) and insolvency law transformed from an execution process against the debtor to an exemption of execution against the debtor's assets. Harsh penalties and imprisonment for debt were replaced with more civilized sanctions repositioning insolvency law.

"Bankruptcy" first reference in English law is in the English Bankruptcy Act of 1542 as a type of compulsory sequestration for debtors defrauding its creditors. It paved the way for modern insolvency laws premised on (i) participation by a body of creditors and (ii) *pari passu* distribution of assets amongst the creditors.

Like bankruptcy, the early insolvency laws under English law also dealt with debt collection in relation to individuals. The Act of Elizabeth in 1570 introduced the first law proposed as a true bankruptcy statute and not a law preventing fraud by delinquent debtors. It outlined (i) acts of bankruptcy which formed the basis for a creditor to launch proceedings against a debtor (ii) jurisdiction and powers of managing the estate was moved from the commissioner to the Lord Chancellor who in turn could appoint commissioners and call bankruptcy meetings (iii) functions of the commissioner entailed investigating the transactions of the debtor (iv) the debtor had to transfer his property to the commissioner and (v) third parties could be questioned about the debtors' actions and transactions.

Further to the differences discussed above, there are distinctive objectives protecting the interest of an individual versus the manner in which insolvency proceedings for a company / corporation is administratively managed.

Insolvency or bankruptcy proceedings for individuals aim to achieve the following objectives which protect the interest of the creditors and the individual as an insolvent:

- secured creditors treating the debtor and other classes of creditors fairly;

- *pari passu* (equal) distribution of dividends amongst creditors and recognising the ranking of priority that secured creditors enjoy versus concurrent creditors;
- allowing a process / investigation by a presiding officer to understand the underlying causes of the demise of the individual's affairs;
- as part of the investigation to consider any transactions potentially classified as "voidable dispositions" where the insolvent preferred certain creditors or prejudiced other creditor in relation to the sale / transfer of assets;
- to shield the individual from disgruntled creditors;
- to assist the insolvent to maintain himself and his family (dependants) there are certain specific assets declared as "exempt" or "excluded" from the individual's bankruptcy proceedings and these can include personal belongings, bed, linen and clothes;
- to reduce the indebtedness by allowing the insolvent to contribute new income to the insolvent estate; and
- this could pave the way for the insolvent's rehabilitation.

For corporations there are similar objective as outlined in bullets 1 – 4 below.
In addition, thereto the following objectives apply to corporations only:

- secured creditors treating the debtor and other classes of creditors fairly;
- *pari passu* (proportionate to debt / equal) distribution of dividends amongst creditors and recognising the ranking of priority that secured creditors enjoy versus concurrent creditors;
- allowing a process / investigation by a presiding officer to understand the underlying causes of the demise of the individual's affairs;
- as part of the investigation to consider any transaction potentially classified as "voidable dispositions" where the insolvent preferred certain creditors or prejudiced other creditor in relation to the sale / transfer of assets;
- ensuring the business or parts thereof, is rescued for socio-economic reasons, not only job preservation;
- to investigate the abuse or neglect of powers of directors with a view to hold individuals (directors) accountable for any misconduct;
- once the company's affairs have been wound-up in a liquidation the legal entity will be dissolved;
- a corporation unlike an individual consumer cannot be rehabilitated.

It would be beneficial if you elaborate and specifically discuss the differences between individual bankruptcy/insolvency and corporate insolvency. There was also scope for greater specificity with respect to essential characteristics.

4.5

Question 3.2 [maximum 5 marks]

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

Whereas there is no "one size fits all" solution for legislation on insolvency that can be applied across all states and countries, it is necessary for the states to agree, based on their respective legal rules and specific laws, a uniform and unified approach to deal with debtors (insolvents) in multiple jurisdictions.

The mere definition of "insolvency" is problematic as there are different interpretations in the various jurisdictions. Friman also states that "finding a common insolvency language" is problematic o solutioning the issues of cross-border insolvency. There is a distinction between factual (balance sheet) insolvency and commercial (inability to pay debts as they fall due). Whereas "insolvency

proceedings" seem to refer to actual proceedings or the commencement of legal process there is a better understand of the terminology.

Omar expresses a view that save for the obvious conflict in laws, the different domestic norms furthermore impact and complicates the position (rights and ranking) of creditors.

Fletcher defines "international insolvency" or "cross-border insolvency" as a situation "...in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

As a supporter of universality, Westbrook [1] acknowledges the challenges facing cross-border insolvencies with reference to the legal systems of multiple jurisdictions:
- recognition / acknowledging the foreign representative;
- stay on actions by creditors (moratorium);
- level of involvement / participation by creditors;
- uncompleted contracts that the insolvency representative (practitioner) needs to consider for purposes of giving effect thereto;
- procedures in relation to submitting claims;
- ranking preferences and priority of creditors (different classes)
- avoidance provision powers;
- possibility of rehabilitation (discharge); and
- conflict of law issues

Fletcher deals with 3 important considerations to correspond the fundamental differences between the various legal systems and the various laws:

(1) the jurisdiction where insolvency proceedings can commence?
(2) the law of the country that will apply?
(3) if international effects will be permitted to these insolvency proceedings (like enforcement)?

The responses to these questions highlight the principle that insolvency proceedings should run in parallel in the various states, with each state's law finding application in that particular state.

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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 law" in providing solutions to the challenges of international insolvency.

The regulation of international insolvencies is often approached and solutioned by "hard law" which is binding treaties versus "soft law" [2] which aims to have application via influence and recommendation.

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[1] See J L Westbrook, "Global Insolvency Proceedings for a Global Market: The Universalist system and the Choice of a Central Court" (2018) 96 Texas Law Review, p 1473.

[2] I Mevorach in The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press, 2018) draws upon behavioural and economic analyses to examine the merits or otherwise of hard or soft instruments, of treaties and model laws, and (at 150) abandons "the notion that treaties are hard and binding and non-treaty instrument are soft and non-binding".

Over time the "hard law" solutions to international law issues have been unpredictable and "soft law" solutions have proven to be more successful.

The only real successful hard law solution is the Model Treaty on Bankruptcy Act presented at The Hague Conference on Private International Law in 1925 where the said treaty was never ratified, but nonetheless played a role to the international consideration on regulating international insolvency law. **The Nordic Treaty is a rare success**. Accordingly, the Hague Conference considered itself "The World Organisation for Cross-border Co-operation in Civil and Commercial Matters". In 2004 its co-operation with UNCITRAL resulted in the drafting of the UNCITRAL Legislative Guide on Insolvency Law.

The UNCITRAL Model Law on Cross-border Insolvency (MLCBI) has been the most successful example of "soft law". The draft legislation was not a treaty or convention but in the form of a Model Law being suggested by UNCITRAL for adoption to the member states. The Model Law can be adopted with modifications or without. Based on the number of states adopting the MLCB it is positively considered an influential solution to internal insolvency law.

Another example is the Asian Business Law Institute on a joint project with the International Insolvency Institute, developing Asian Principles of Business Restructuring as a regional initiative on a soft law approach absent any binding treaties.

3

Marks awarded 12.5 out of 15

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

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries, which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

At the time Norton Cars Inc had its offices in England, the UK was still part of the European Union. Therefore, the American insolvent estate representative (insolvency practitioner) will have access to international insolvency laws of the European Union and in particular –

- The European Insolvency Regulation (EIR) which was passed in 2000 and amended in 2017 and 2021. The EIR primarily awards jurisdictional expertise to courts situated at the "centre of the debtor's main interest" (COMI). In an instance where the debtor has a fleeting business the EIR will allow secondary proceedings in the other member state. What will be of particular important to the US insolvency practitioner is the amendments in the EIR Recast of 2017 which expanded its provision on the "centre of the debtor's main interest" to recognise insolvency proceedings outside the EU with a view to co-ordinate proceedings both inside and outside the EU.
- There is also the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements (MLIJ) of 2018 which was a project necessitated after the United Kingdom Supreme Court in 2013 declined recognition of a foreign judgement from an insolvency scenario in *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant*.[3]

Since the liquidator must take control of all the assets and property of the company, it will depend upon the recognition of (i) the winding up order and (ii) the appointment of the liquidator in the foreign state with a view to allow the insolvency practitioner to deal with the assets located in England.

- England has adopted the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) which allows for co-operation and co-ordination in concurrent and parallel foreign insolvency proceedings. Accordingly, courts and liquidators must engage and co-operate to ensure the debtor / company's estate is administered efficiently in order to maximise returns to creditors. This mandate to engage is progressively applied via the Protocols or Cross-Border Insolvency Agreements, which is then approved by the relevant courts where the assets are located.[4]

In a recent case in the House of Lords, *McGrath v Riddell*[5] the Lord Hoffmann at paragraph 30 stated"

> "[t] 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."

The liquidator in a local (domestic) liquidation, related to the foreign insolvency proceedings, had to surrender assets in the local liquidation to the foreign liquidator for distribution under foreign laws. This will support the request from the US insolvency practitioner for recognition of the US insolvency proceedings, the insolvency practitioner's appointment and the release of the English assets to the US insolvency process.

- The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021) outlining international best practice and standards for insolvency regimes (the Insolvency

[3] [2012] UKSC 46.
[4] UNCITRAL itself developed a Practice Guide on Cross-Border Insolvency Agreements (2009) to provide a potential framework for co-operation under the MLCBI.
[5] [2008] UKHL 21.

Standard) and specifically Principle C15 which deals with insolvency proceedings having international aspects, including recognition of foreign judgements and cop-operation between states.

This Insolvency Standard has identified factors that will contribute to successfully managing cross-border matters –

(i) expediated and transparent processes to recognise foreign insolvency proceedings;
(ii) appropriate relief once a foreign proceeding has been recognised;
(iii) foreign insolvency practitioners having access to courts and other authorities with a view to execute on their appointment;
(iv) courts and insolvency representatives to work together;
(v) no discrimination between foreign and domestic creditors.

It would also be beneficial to elaborate with respect to s426.

3

Question 4.2 [Maximum 4 marks]

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

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

Whereas the "centre of main interest" is defined "as the place where the debtor conducts the administration of its interest on a regular basis" the main proceedings should be launched in Italy. The insolvency practitioner can rely on the European Insolvency Regulation (EIR) which is a Council Regulation on Insolvency Proceedings passed by the European Union in 2000.

The insolvency practitioner can refer to the *Institut International pour l'Unification de Droit Privé* (International Institute for the Unification of Private Law) (UNIDROIT)[6] which is an independent intergovernmental organisation based in Rome and "studying the needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between states and groups of states and to formulate uniform law instruments, principles and rules to achieve those objectives." Some of the UNIDROIT texts on Mobile Equipment (2001) and the Principles of Transnational Civil Procedure have specific importance for international insolvencies. The Hague Conference on Private International Law – also referred to as the World Organisation for Cross-Border Co-operation in Civil and Commercial Matter integrates its activities with the UNIDROIT and the United Nations Commission on International Trade Law (UNCITRAL).

The EIR Recast (EIR) governs the applicable law proceedings subject to the Regulation and specifically Article 7.1 which determines that the law applicable to the insolvency proceedings shall be that of the states instating (starting) the proceedings. In this instance the primary proceedings will commence in Italy.

The decision of what law rules or system apply to international insolvencies depends on the relevant convention and regulation. Recommendations on applicable law in insolvency proceedings[7] are also

[6] http://unidroit.org/.
[7] These were drafted by UNCITRAL in close co-operation with the Hague Conference on International Law and in

outlined in the *UNCITRAL Legislative Guide on Insolvency Law (2004)*[8]. Fletcher and Wessels endorsed the recommendations on Global Rules on Conflict-of-Law Matter in International Insolvency Cases by adding it to their ALI – III Report on Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases (2012).

What would be critical for the Italian insolvency practitioner is co-operation from the other state, Germany. Reliance is placed on the UNCITRAL Model of Cross-Border Insolvency (MLCBI)[9] which impress on member states to ensure their respective laws is in line with concepts of modern and efficient insolvency systems with ultimate goal to harmonise internal legislation on cross-border insolvency. Whereas co-operation and co-ordination is critical principles of the UNCITRAL MLCBI, it obliges the courts and the insolvency practitioners (representatives) in the different states to engage in effective and constructive communication to ensure a fair and efficient administered estate which will have utmost benefit to all creditors.

Furthermore, within the context of the EIR, the European Guidelines on Communication and Cooperation (2007) (developed by INSOL Europe's academics, Wessels and Virgós) there are non-binding rule and a Draft Protocol for all international insolvencies subject to the EIR. INSOL Europe and the Conference of European Restructuring and Insolvency Law (CERIL) established a Joint Working Group to review and emphasise the duty of courts and insolvency practitioners to co-operate and communicate under the EIR.

To demonstrate the importance of effective communication the European Union endorsed a project in 2015 which rolled out the EU JudgeCo Guidelines of 26 EU JudgeCo Principles and 18 EU Cross-Border Insolvency Court-to-Court Communications Guidelines, "strengthening efficient and effective communication between courts in EU Member States in cross-border insolvency cases".[10]

Germany and Italy's membership of the EU should be stated as the reason for the EIR Recast's application for completeness

3.5

Question 4.3 [Maximum 1 mark]

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

No - as the EIR applies to the courts of member states and whereas India, South Africa and Australia are not members of the EU and EIR won't be applicable.

1

Question 4.4 [Maximum 6 marks]

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

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consultation with the UNCITRAL Working Group on secured transactions. Jenny Clift, "Choice of Law and the UNCITRAL Harmonisation Process" (2014) 9 *Brooklyn Journal of Corporate Financial & Commercial Law* 29, 47

[8] UNCITRAL Legislative Guide on Insolvency Law (2004) Pt 2 at 68. (Legislative Guide) Recommendations 30-34 address the law applicable to the validity and effectiveness of rights and claims, the law applicable in insolvency proceedings and exceptions thereto.

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

[10] http://www.ejtn.eu/PageFiles/16467/EU_Cross-Border_Insolvency_Court-to-ourt_Cooperation_Principles.pdf.

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

As the main insolvency proceedings have been instituted in Italy in Italian court, the insolvency proceedings will be governed by Italian law. Omar's view is that conflict of laws is even more complex when there are security and other means of protecting title, available to creditors.[11]

In any cross-border insolvency there are often proceedings that are unsuited as in one court liquidation proceedings are launched and in another an application to perfect security and restructure the company. Creditors competing for security rights and priority ranking will undermine any successful rescue or liquidation. One of the most basic global principles of insolvency is the principle of equality (*par conditio creditorium*). Based on this important principles clear and uniform rules on cross-border insolvency issues were developed for the purpose of international trade and investment.

A variety of legal principles constitutes "general law", including non-bankruptcy law which also influences insolvency law, like the vesting of real rights of ownership or rights of real security. One of the most challenging aspects to deal in a cross-border insolvency scenario is the differences between types of real security in member states. A guiding principle is to acknowledge in a bankruptcy or insolvency scenario any pre-acquired rights under the general law of a particular states, for example the law relating to security. UNCITRAL Model Law on Secured Transactions (2016) regulates rules on security interest around the world.[12]

The insolvency practitioner will have to acknowledge the security interest and the rights of the creditors under Dutch law which is a civil law system. The Netherlands' insolvency laws were reformed in 2021 as the Dutch Scheme of Arrangement. Being a civil law state the English law notion of a floating charge in unknown to Dutch law.

- UNCITRAL Model Law on Secured Transactions (2016);181 Guide to Enactment (2017) and Practice Guide (2019) "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 fulfils 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 assets, secured obligation, borrower and lender...The Model Law includes a set of Model Registry Provisions (the "Model Provisions") that can be implemented in a statute or other type of legal instrument, or in both."[13]

3

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

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[11] P J Omar, "A Panorama of International Insolvency Law: Part 1", (2002) *International Company and Commercial Law Review* 366, p 366 - 376. In this article, as well as in its second part, 2002 *ICCLR*, pp 416 to 422, the author compares the procedures for dealing with cross-border insolvencies in Australia, Belgium, France, New Zealand and Switzerland. See also P Torremans, *Cross Border Insolvencies in EU, English and Belgian Law,* The Hague / London / New York: Kluwer Law International, 2002.

[12] See www.uncitral.org/uncitral/en/commission/working_groups.

[13] See https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions.

As the main proceedings are launched in an Australian court, Australian law will apply.

The pre-acquired rights of secured creditors under Australian security law will be acknowledged and verified by the insolvency practitioner when dealing the matter under Australian insolvency laws. Specific aspects of a state's insolvency regimes are influenced by local legal culture, basic rights and the way in which a system deals with security rights and related issues.

A variety of legal principles constitutes "general law", including non-bankruptcy law which also influences insolvency law, like the vesting of real rights of ownership or rights of real security. One of the most challenging aspects to deal in a cross-border insolvency scenario is the differences between types of real security in member states. A guiding principle is to acknowledge in a bankruptcy or insolvency scenario any pre-acquired rights under the general law of a particular states, for example the law relating to security. UNCITRAL Model Law on Secured Transactions (2016) regulates rules on security interest around the world.[14]

Australia has separate legislation in relation to corporate insolvency, the Corporation Act 2001 and the Bankruptcy Act 1966 for the insolvency of individuals. Recent law reforms in Australia introduced a new restructuring and liquidation processes. In this scenario the Corporation Act 2001 will apply to the corporate insolvency proceedings of Norton Cars. Australian law is premised on English law but has no single codified Bankruptcy or Insolvency Act, dealing a number of separate Acts on insolvency. In addition, Australia also adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) by way of the Cross-border Insolvency Act 2008 and implement the regulations on co-operation and co-ordination of concurrent proceedings. In particular Chapter IV of the MLCBI mandates co-operation and direct communication between local courts and foreign courts as well as foreign insolvency representatives. Agreements on the co-ordination of cross-border proceedings are known as Protocols or Cross-border Insolvency Agreements. These Protocols are acknowledged globally and are recommended as guidance to parties in Court Practice Notes -

- ALI-III in the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases;
- UNCITRAL in their Practice Guide on Cross-border Insolvency Agreements; and
- The Judicial Insolvency Network in their Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.[15]

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Marks awarded 13.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 43/50

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

[14] See www.uncitral.org/uncitral/en/commission/working_groups.

[15] https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-xbdr.