INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1**

**(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)**

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **11 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the **best response** to this statement.

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

**Question 1.2**

Which of the following **best describes** an "executory contract" and its enforceability?

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

**Question 1.3**

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

**Question 1.4**

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

**Question 1.5**

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the correct statement:

(a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

**Question 1.6**

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

**Question 1.7**

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

**Question 1.8**

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

**Question 1.9**

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

**Question 1.10**

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

(a) This statement is untrue because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

**Marks awarded 9 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.

Examples of countries whose insolvency law systems have historical roots in civil law are those influenced by Roman or Germanic law, including Germany, France, Italy, the Netherlands and Portugal. South America is also generally civil law-based. Examples of countries whose insolvency law systems have historical roots in English law include Australia, New Zealand, India and the USA. African countries' insolvency law systems tend to follow former colonial influence, e.g. Eastern African countries such as Tanzania and Kenya, and Nigeria, Botswana and Zambia follow England, whereas Western African countries and Angola and Mozambique follow civil law countries. The UAE is an interesting country, as the 'onshore UAE' operates a civil law system, whereas the financial free zones with their own insolvency laws (DIFC and ADGM) operate a common law system.

It is difficult to compare civil law and English (or common) law jurisdictions using a broad-brush approach as one may opine that civil law systems were historically pro-creditor with English law-based jurisdictions such as the USA being heavily pro-debtor, however England was initially heavily pro-creditor before changes came about, including by way of statute (e.g. the Statute of Ann 1705). Some general differences between systems include how security rights are classified and how employee and government claims are dealt with.

In terms of comparisons between civil and common law countries, as set out above, the USA (common law roots) is heavily pro-debtor and takes a very liberal approach to the concept of a 'fresh start', with Chapter 11 of the US Bankruptcy Code being world-renown as the gold standard in reorganisation and rescue. Reorganisation and rescue has been one of the main areas of reform over recent years so it is difficult to specify jurisdictions which remain heavily pro-debtor, although I understand that South Africa (which has a mixed common and civil law-based system) remains as such: "*South African insolvency law has traditionally been, and is still regarded as, a pro-creditor system*."[1]

Other differences include whether jurisdictions have single, unified insolvency laws for corporates and individuals. For example, Spain (civil law roots) has unified insolvency laws, whereas Australia (common law roots) has a law for corporates and a law for individuals.

**This answer also required a discussion of the common law aspect of English law cf civil codification.**

**2**

**Question 2.2 [maximum 3 marks]**

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

Universalism considers an approach that envisages insolvency processes originating in different jurisdictions being channelled through a single jurisdiction, to the exclusion of others. Accordingly, one set of courts (in the relevant jurisdiction) would be seised of the matter of the debtor's insolvency or bankruptcy proceedings and theoretically, it would not be possible to commence proceedings or

[1] The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution André BORAINE, Roger EVANS, Melanie ROESTOFF and Lienne STEYN (2015) 3 NIBLeJ 5 Roestoff "The Pro-Creditor Approach in South African Insolvency Law and the Possible - (2015) 3 - Studocu Accessed 15 November 2023

execute judgments in other jurisdictions. Similarly, there would be one appointment to taken by an officeholder (noting that some appointments may be joint / panel) in the relevant jurisdiction, and the officeholder would consider and deal with the interests of all creditors, worldwide. In terms of recognition and effect, it is envisaged that other states / jurisdictions recognise and give effect to that one set of insolvency proceedings and recognise that it has extraterritorial effect in their states / jurisdictions in respect of a debtor's worldwide assets.

Modified universalism is a paired back version of universalism and envisages 'main [insolvency] proceedings' in the Centre of Main Interests (**COMI**) with 'secondary [insolvency] proceedings' taking place in other jurisdictions in which the debtor has assets. Subject to the relevant court's rules / applicable laws in the main and secondary jurisdictions, the idea is that the courts co-operate with one another as regards the insolvency proceedings so as to recognise and give effect to, as far as possible, proceedings in other jurisdictions.

Territorialism takes the opposite view to universalism, i.e. that insolvency proceedings may be brought by creditors in accordance with various domestic laws, i.e. in each jurisdiction in which the debtor has assets, and that those proceedings are territorially limited in terms of dealing with the assets in a liquidation. Territorialism envisages an officeholder being appointed in each jurisdiction to consider and deal only with assets / rights / liabilities, etc. in that jurisdiction. Accordingly, foreign creditors (with qualifying interests / rights) would potentially need to seek recourse in various jurisdictions, depending on where the relevant asset / insolvency proceeding was taking place, and could end up in a situation where they are pursuing a claim against a debtor (with entities in different jurisdictions) considered insolvent in one jurisdiction but not in another – which may create issues with recognition and effect (of foreign proceedings).

**3**

**Question 2.3 [maximum 4 marks]**

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

Latin American initiatives taken to address international insolvency issues include the following:

1. Montevideo Treaty on International Commercial Law (1889) (**MV ICL**)
2. Montevideo Treaty on International Commercial Terrestrial Law (1940) (**MV CTL**)
3. Montevideo Treaty on International Procedural Law (1940) (**MV IPL**)
   (together, the **MV Treaties**)
4. Havana Convention on Private International Law (1928) (the **Bustamante Code**)

The MV ICL deals with personal and corporate "*insolvency*".[2] The MV CTL contains a section on "*bankruptcy*".[3] The MV IPL contains a section on creditors' meetings.[4] One of the primary differences between those initiatives is that not all Latin American countries have ratified the various treaties, and so it is necessary to consider the application of such treaties on a case by case basis.

The MV Treaties deal with matters such as the allocation of bankruptcy jurisdiction based on a commercial debtor's domicile or, where the debtor has "*economically autonomous businesses*"[5] in different states, it envisages parallel proceedings. Although there may also be parallel proceedings in Bustamante Code countries that contain "*commercial establishments operating entirely separately*

[2] Guidance Text, paragraph 6.4.2.1, p60
[3] Guidance Text, paragraph 6.4.2.1, p60
[4] Guidance Text, paragraph 6.4.2.1, p60
[5] Guidance Text, paragraph 6.4.2.1, p60

*economically*" [6] (Article 415) the Bustamante Code provides stronger support for a universalist approach (Article 414) and therefore universal recognition / effect amongst Bustamante Code countries is bolstered. However, there are no co-operation provisions in the Bustamante Code where parallel proceedings are on foot.

[Student note: Guidance Text footnote 131 reference at p59 (https://www.uncitral.org/pdf/english/texts/general/Register Texts Vol2.pdf.) does not exist (with or without the full-stop at the end): "*The requested URL was not found on this server*" and the Fletcher text at footnote reference 130 at p59 is not available for free.]

**It would be beneficial to note the different ratifying States.**
**Thank you for your note that the link did not work for you.**

**3**
**Marks awarded 8 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.

**(i) What meaning may be ascribed to "bankruptcy" and "insolvency"?**

In certain circumstances, I agree that the terms may be used interchangeably. Indeed. Fletcher states that 'the terms are used a synonyms in may systems'[7] but in my view, the terms should only be used interchangeably at a very high level because once you drill down into the meaning of each term, the grammatical composition, and depending on the relevant jurisdiction and context, the terms may mean different things, as explained below.

For example, 'bankruptcy' is often used to describe an individual's formal financial status, i.e. 'Joe has been declared bankrupt'. Such description indicates that an action has been taken by, for example, a court, in order to record the crystallisation of Joe's financial status as 'bankrupt'. A company could also be said to have been declared bankrupt or to be bankrupt, again, by a court order, but more specific terms are often used to describe the formal procedure that the company is part of, such as 'in liquidation', 'in administration' etc. Accordingly, my view is that 'bankruptcy' describes a formal financial status following the order of a court (or other relevant authority).

'Insolvency' is most commonly used in a corporate context and also describes a financial status, however the fact that a company is insolvent does not necessarily mean that it has been or will be put into a formal insolvency or bankruptcy process. For example, in many jurisdictions, a company can be 'balance sheet' or 'cash flow' insolvent for a period of time and in some markets, it is common for that status to be encountered on a cyclical basis as part of the company's operations.

**(ii) The essential characteristics of "bankruptcy" and "insolvency"**

[6] Guidance Text, paragraph 6.4.2.2, p61
[7] I F Fletcher, The Law of Insolvency, London (Sweet and Maxwell, 5th ed, 2017), Ch 1

Wood[8] lists some potential essential features of insolvency or bankruptcy '*law*' (with exceptions). In my view, these features could apply similarly to the concepts of bankruptcy and insolvency: (i) moratorium; (ii) collation of assets to distribute amongst creditors; (iii) creditors paid pari passu (subject to priority rights and preferences).

Sealy and Hooley[9] agree with the common features of insolvency or bankruptcy being pari passu distribution (with exceptions) and add: fair dealing amongst creditors, investigation of reasons for financial failure, and to reclaim voidable dispositions.

I would add the following essential characteristic of bankruptcy and insolvency: the imposition of liability or sanctions where an individual (in a personal or corporate context) has abused his/her position, to, for example, obtain credit improperly or create voidable dispositions / inappropriate preferences or otherwise seek to defraud creditors / avoid their rights being effective.

Whilst I accept that bankruptcy and insolvency do have common essential characteristics, my view remains that the terms should only be used interchangeably at a very high level, given the inherent differences between the two, as summarised above and below.

**(iii) Differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual**

Differences arising between bankruptcy / insolvency of an individual and a company include (i) corporate rescue or preservation of a company (or part thereof) versus protection from harassment for an individual / the concept of a 'fresh start'; (ii) the fact of excluded / exempt assets from the creditor 'pot' for individuals whereas exclusions are not generally found in corporate insolvency regimes (although can be agreed in consensual, informal proceedings); (iii) the fact that whilst ultimately you can liquidate and dissolve a company, you cannot (historical practices aside) dissolve an individual.

**7**

**Question 3.2 [maximum 5 marks]**

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

Westbrook, an advocate for universalism, has identified nine key issues in cross-border cases: (1) standing for (recognition of) the foreign representative; (2) moratorium on creditor actions; (3) creditor participation; (4) executory contracts; (5) co-ordinated claims procedures; (6) priorities and preferences; (7) avoidance provision powers; (8) discharges; and (9) conflict-of-law issues.[10]

Further, different jurisdictions have adopted different language and meanings of the term 'insolvency' and adopt different views on when, for example, a company (or individual) is deemed to be insolvent and the dates on which a debtor is put into a formal insolvency process. There is also a plethora of the types of insolvency proceedings that may be utilised in different jurisdictions. As discussed in the Guidance Text, 'at an international level it may be quite difficult to define the term "insolvency"'.[11]

[8] P R Wood, Principles of International Insolvency (Sweet and Maxwell Ltd, 2007)
[9] In M A Clarke et al, Commercial Law (Oxford University Press, 2017), chap 28
[10] See J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, St Louis University Law Journal 753, pp 753 - 757
[11] Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024, paragraph 5.3, p41, citing "On insolvency or collective proceedings, see further H Eidenmuller, "What is an insolvency proceedings?" (2018) 92 American Bankruptcy Law Journal, p53

This creates a fundamental difficultly in terms of classifying the financial status of a debtor across jurisdictions, in that one jurisdiction may consider a debtor to be insolvent, whereas another may not. For example, a global enterprise debtor may be considered insolvent in one jurisdiction, but not in another. The different classifications of relevant financial status also create challenges including identifying when an insolvency practitioner may be appointed and any 'trigger' dates from which certain periods begin to run in different jurisdictions in cross-border situations, e.g. a look-back period, and issues around recognition and enforcement of insolvency proceedings / insolvency practitioner appointments. These difficulties are recognised by Westbrook's nine key issues.

The different classifications of insolvency also create a divergence of approach (across different jurisdictions) in terms of how a creditor may pursue an unpaid debt, meaning that a creditor may have various different debt recovery options (supported or not by insolvency-related procedures) in different jurisdictions.

Other relevant terminology (often defined by reference to a particular jurisdiction's domestic laws) can have different meanings and impacts in different jurisdictions, e.g. 'secured creditor', 'security interest', 'security rights', and one of the major difficulties encountered when dealing with insolvency law in a cross-border context is how to deal with security (referred to in the Guidance Text as 'real security') and priority rights. The difficulty stems from the fact that the different forms of security available to a creditor are invariably founded in domestic law. The primary issue is that not all jurisdictions recognise all the different types of security or the priorities afforded by such in foreign jurisdictions. An example is floating charges, which afford priority on distribution in an English insolvency (or other common law-based insolvency processes) but are generally not recognised as a concept in the USA (or other civil law-based insolvency processes). Omar states that:

> *"Apart from the general situation of conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one jurisdiction, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws."*[12]

Again, these difficulties are recognised by Westbrook's nine key issues.

The UNCITRAL Legislative Guide on Insolvency Law provides a comprehensive statement of the key objectives and principles that should be reflected in a state's insolvency laws[13] and is divided into five parts, thus providing support for the proposition that common essential features are relevant to, and aid, international trade and finance.

**5**

**Question 3.3 [maximum 3 marks]**

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

Hard law is legislation enacted in a particular jurisdiction by way of statute, which includes domestic laws and international treaties (when so adopted as binding so as to affect domestic law). Hard law is

[12] P J Omar, "The Landscape of International Insolvency", (2002), 11, p175

[13] UNCITRAL website: https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law, accessed 12 November 2023

prescriptive and (subject to the wording thereof) often mandates compliance. Examples of hard law are domestic insolvency laws, such as the UAE Federal Bankruptcy Law 2016 or the English Insolvency Act 1986, or domestic laws ratifying and incorporating treaties / conventions / regulations into domestic law such as the European Union Withdrawal Act 2018 which incorporates Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) into English law, post Brexit.

Soft law is instruments such as non-binding memoranda of guidance / co-operation (such as the JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters) which states may recommend compliance with or model laws (such as the UNCITRAL Model Law on Cross-Border Insolvency (**MLCBI**)) which states may adopt (in full or as amended). Soft law generally contains best practice to be considered when countries revise their own insolvency legislation. Soft law becomes hard law once formally incorporated into domestic law, e.g. by Article 117(3) and Schedule 4 of the DIFC Insolvency Law 2019, the MLCBI has been incorporated into the DIFC's domestic insolvency law (with certain modifications for application in the DIFC).

As set out in the Guidance Text,[14] there has been varying success achieved by 'hard law' solutions in the context of addressing international insolvency law issues. For example, European efforts at achieving multilateral insolvency conventions (i.e. by way of 'hard law') were unsuccessful for many years. More success has been achieved by the European Insolvency Regulation (EIR) 2000, however in terms of 'soft law', the MLCBI is considered the most successful [soft law] approach to dealing with international insolvency law issues to date.

**3**

**Marks awarded 15 out of 15**

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

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

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

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

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

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

**Question 4.1 [Maximum 4 marks]**

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

[14] Module 1 Guidance Text, paragraph 6.1.3.3, p47

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.

Both England and the USA have adopted the UNCITRAL Model Law on Cross-Border Insolvency (**MLCBI**).

Article 15(1) of the MLCBI provides: *"[a] foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed."* Article 4 of the MLCBI provides: *"The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [the English Court]."* Article 5 provides: "*A [US estate representative] is authorized to act in a foreign State on behalf of a proceeding under [English law], as permitted by the applicable foreign law*." Article 9 provides: **"***A foreign representative is entitled to apply directly to a court in this State."*

Accordingly, the US estate representative is able to use the provisions of the MLCBI to seek recognition of her status and of the foreign (US) proceedings in order to deal with the assets of Norton Cars Inc situated in England. Relief available to the US estate representative is predominantly set out at Articles 19-21 of the MLCBI.

Further, pursuant to Section 426 of the English Insolvency Act 1986, the English Court should recognise the status of the US estate representative and permit her authority to gain control over and deal with Norton Cars' assets in England. The English Court may apply English law or the relevant US law (s426(5)). **S426 cannot assist as the US is not designated**

**Common law is also relevant**

**2.5**

**Question 4.2 [Maximum 4 marks]**

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

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

The EIR (Recast) 2015 (**EIR**) applies in both Germany and Italy. **It would be beneficial to state why this is the case.** As set out in the Guidance Text,[15] the EIR allocates jurisdictional competence to the courts of the member state within which the COMI is situated. However, subsidiary proceedings (secondary to the main insolvency proceeding) are also permitted. Accordingly, in order to determine where the main insolvency proceeding should be commenced, it is necessary to consider which jurisdiction the COMI is in: Italy or Germany.

The question states that the COMI is Italy, however pursuant to Recital 30 of the EIR, the presumptions of a COMI are rebuttable. There is no specific definition of COMI in the EIR, however Article 3.1 provides: *"The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."* Accordingly, it is advisable to consider the registered office

[15] Module 1 Guidance Text, paragraph 6.4.3.3, p65

and the principal place of business of a corporate debtor when determining the COMI. Further, the centre of management and supervision will be influential factors, and as the management of Norton Cars is directed from Italy, it is strongly arguable that Italy is the COMI. On that basis, the country in which the main insolvency proceeding should be commenced is Italy.

Recital 23 of the EIR permits secondary / subsidiary proceedings which "*may be opened in the Member State where the debtor has an establishment*". Article 3.2 supports that proposition. Chapter III deals in detail with secondary insolvency proceedings. Germany is the location of Norton Cars' main operations and therefore, the insolvency practitioner may request that secondary insolvency proceedings are opened in Germany vis-a-vis Norton Cars' assets in Germany (and indeed, Recital 23 of the EIR limits secondary proceedings in assets in the secondary state).

Pursuant to Article 7.1 of the EIR, "*the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened*". Accordingly, the domestic insolvency laws of Italy (for the main proceeding) and Germany (for the secondary proceeding) must also be considered.

**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.

**Elaboration is warranted**
**.5**

**Question 4.4 [Maximum 6 marks]**

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

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 7 marks.)

Article 7.1 of the EIR provides: *"Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceedings')."*

Article 7.2 provides: *"(b) The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;… (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;"*

Accordingly, on the basis that: (a) insolvency proceedings were commenced in Italy; and (b) Italy and the Netherlands are Member States to the EIR, it is arguable that Italian law will apply to the

real rights of security of assets situated in the Netherlands. I note that as a general rule, a branch of a company does not have a distinct legal personality, which may support the preceding proposition.

**In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.**

**1**

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 7 marks.)

Articles 7.1 and 7.2 refer to Member States. Australia is not a Member State to the EIR. Australia has adopted the MLCBI and the UNCITRAL Model Law on Secured Transactions, however Italy has not. On the basis that an insolvency proceeding has been commenced in Australia, my view is that Australian law applies to the real rights of security vis-a-vis assets situated in Australia.

**There is some scope to elaborate**

**2.5**

**Marks awarded 10 out of 15**

*** End of Assessment ***

**TOTAL MARKS AWARDED 42/50**

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