INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

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

Question 1.3

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

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Insolvency law systems in countries, broadly, can be categorised into those that have historical roots in civil law and those that have historical roots in English law. This is often the jumping off point for comparisons of legal systems generally and insolvency systems in particular.

In simple terms, continental Europe follows a civil law insolvency system and so do the former colonies of continental European states. Countries that would be considered to follow the civil law tradition would include the Netherlands, France, Germany, Portugal on the continent, much of Latin America as well as those countries colonised by France, Portugal or Germany notably countries in Africa. Civil law being law that is traceable to Roman law and Roman procedures and is a codified system of law. Historically, civil law was influenced by the customs and usages of merchants (Lex Mercatoria) in continental Europe in the Middle Ages.

Whereas for the UK and its former colonies (e.g. Australia, India, Singapore) the basis of laws generally and insolvency law in particular follow the English law tradition which is based on case law as opposed to statute.[1] English law developed independently of continental Europe.

The premise for both insolvency law systems today is that the systems assume collective debt collecting procedure. However, the origin in the development of insolvency law in both systems was in relation to individuals and debt-collecting procedures against an individual only later developing into collective debt collective procedures. This was in part due to changes in legislation over centuries but also as a result of the development of the principle of legal persons as opposed to natural persons. With respect to individuals both systems introduced the notion of rehabilitation of debtors (albeit at different times in history).

The foundational principle in both systems is that insolvency law is intended to deal with a debtor's financial difficulties and historically was biased towards the creditors although this principle has not held and through the centuries countries have deviated from this principle within both traditions. The United States of America although of the Anglo tradition is considered to be pro-debtor and has been since its foundation. The Netherlands, for example, while historically pro-creditor is modifying its law to being more pro-debtor.

Wood[2] argues that all modern insolvency systems for individuals and corporations have essential features (or universal features) and given their universality this applies equally to countries with historically civil law traditions and those countries with historical English law traditions (although it is acknowledged by commentators including Wood himself there many exceptions or deviations from these essential features). These are:

- payment of creditors *parri passu*,
- stay of proceedings i.e. proceedings against as debtor are frozen,
- pooling of assets.

[1] South Africa being a notable exception having a hybrid system of Roman-Dutch (civil) law and English law.
[2] PR Wood, Principles of International Insolvency (Sweet & Maxwell, 2007), note 2 pg. 3.

Insolvency law frameworks for both civil law and English law countries have main of the same features[3] even if the translation into the legislation may differ amongst countries including:

- Commencement proceedings
- Effects
- Automatic stay
- Personal consequences and liability
- Executory contracts
- Set-ff and netting (pre and post commencement)
- Avoidable dispositions
- Administration of Estate
- Distribution
- Costs of administration
- Rehabilitation
- Alternative provisions
- Cross-border dispensations
- Special Rules.

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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.

Universalism and territorialism in cross-border insolvency are two approaches put forward to deal with the issues that arise in international insolvency matters. Modified universalism is one alternative theory to these two that aims to deal with the issues arising with universalism and territorialism. (It is not the only "third way", other approaches include *inter alia* co-operative territorialism and contractualism).

Universalism:

- Recognise extraterritorial dimension of insolvency proceedings and assumes trust in foreign insolvency law and legal systems in general.
- Favours concept of unity. i.e. one proceeding dealing with the debtor's assets and creditors in whatever State. Assets are for the benefit of all creditors as they participate in the one proceeding equally (regardless of the State the creditor maybe from). One law applies being the law of the country where the insolvency originates (and applies universally i.e. worldwide). **A discussion of COMI would be beneficial**
- Has to deal with choice of law and priority issues.
- Single insolvency representative and one process for submission of claims.
- Assumes reciprocity (which critics consider to be unrealistic)
- No other proceeding possible and no forms of execution can be initiated in another jurisdiction following the initial insolvency proceeding.
- Benefit is considered to be that having one proceeding and a single insolvency representative may reduce the administrative expenses than if there are multiple insolvency representatives.
- Idealistic
- Critics consider it impractical and not politically favoured.

Modified Universalism:

[3] Foundation Certificate in International Insolvency Law, Module 1 Guidance Text" Introduction to International Insolvency Law 2023/2024, (INSOL) pg. 12

- This (as the name implies) is a modification of the principle of universalism that takes into account that universalism remains an ideal and historically States have followed the territorialism approach.
- The key factor is that a main proceeding opened in a State where it is determined the centre of main interest ("COMI") is.
- It allows for secondary or ancillary proceedings in other States.
- Emphasises co-operation of various proceedings. In different states
- Considered to the pragmatic approach.

Territorialism:

- No recognition of the extraterritorial dimension to insolvency administration.
- Possible for the debtor to not be in an insolvency proceeding in one country while not be in another (the debtor being at the same time insolvent and solvent in different jurisdictions)
- Assets are dealt with in the State in which they are located and for the benefit of the creditors in that State.
- If foreign recognition is sought in other State where assets are located the law of that State will apply (not where the insolvency proceeding commenced) and creditors in that State will be settled prior to the creditors in the State where the proceeding commenced.
- Resultant effect of territorialism is there may be a plurality of proceedings.
- Insolvency representative in local jurisdiction will need to bring local actions in different jurisdictions dealing with local assets and creditors only.
- No necessity to deal with choice of law or priority issues.
- Consider to be more practical given the reality of the differences in legal systems in different countries but considered to be a costly approach given the need there is no recognition of extraterritorial dimension of insolvency proceedings.
- Having multiple insolvency representatives and proceedings may increase the expenses of the overall insolvency proceedings.
- There is a tendency by States to protect local interests in an insolvency proceeding above those outside its borders which may support the argument territorialism is more reflective of reality.

2.5

Question 2.3 [maximum 4 marks]

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

There have been a number of initiatives in Latin America to resolve the international insolvency law issues. Arguably, Latin America may be the most successful region in this regard. Latin American countries are largely civil law countries which may be a contributing factor. Efforts have been made to deal with international law issues broadly as well as those specific to insolvency law for example, the Union of South American Nations Agreement (the aim of which is to establish a system of supra-national law in the region)[4].

Historically, initiatives include the following treaties and conventions.

i) Montevideo Treaty on International Commercial Law (1889) ("MTICL") – This was signed by six Latin American Countries and deals with personal and corporate law. It deals with issue of jurisdiction of the proceeding (which is determined by the debtor's commercial domicile).

[4] It came into force in 2011.

ii) Montevideo Treaty on International Commercial Terrestrial Law (1940) ("MTICTL"). Title VIII on Bankruptcy – This was signed by three Latin American Countries.

iii) Montevideo Treaty on International procedural Law (1940) ("MTIPL") - Title IV on Civil Meetings of Creditors – Signed by three Latin American Countries

iv) Havana Convention of Private International Law (1928) (Bustamante Code) – This convention covers both Latin and Middle American States. This convention was universalist in approach aiming for unity of insolvency proceedings. It allows for a single proceeding with universal effect through the region but permits concurrent proceedings where there are entities operating economically independently.

The Bustamante Code, therefore having a different effect to the Montevideo Treaties in terms of the universality and singularity of proceedings.

These initiatives, given they were ratified by different countries, have different effects depending on which country the insolvency proceeding is and in which other country the cross-border issue arises.

Below is a table of the various countries in Latin America that have signed which treaty/convention. The intention of the treaties and conventions may have been to address issues of cross-border insolvency but the fact that different countries have ratified different treaties and conventions adds a layer of complexity.

Country	MTICL	MTICTL	MTIPL	Bustamante Code
Argentina	Ratified	Ratified	Ratified	
Bolivia	Ratified			Ratified
Columbia	Ratified			
Paraguay	Ratified	Ratified	Ratified	
Peru	Ratified			Ratified
Uruguay	Ratified	Ratified	Ratified	
Mexico				
Middle American Countries	N/A	N/A	N/A	Applies

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Marks awarded 9.5 out of 10

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

Question 3.1 [maximum 7 marks]

It is said that the terms "bankruptcy" and "insolvency" may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to "bankruptcy" and "insolvency", (ii) the essential characteristics of "bankruptcy" and "insolvency" and (iii) any differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

To the general public bankruptcy and insolvency are likely considered to be synonyms. Even by those that work in the field of insolvency these terms are often used interchangeably. This is in part because there is no universal language of "bankruptcy" or "insolvency" terminology that applies across countries and, therefore, the use of one or other term can be a useful shorthand when discussing

matters generally it is a loose use of the language as the terms do have different meanings in different jurisdictions.

i) Meaning of “Bankruptcy” and meaning of “Insolvency”

The two may considered inter-changeable when used to describe the state in which a debtor is unable to pay its debts when they fall due or when its liabilities exceed the value of its assets. So, it is possible to state a company is bankrupt and a company is insolvent and mean that the company is unable to pays its debts when they fall due or that its liabilities exceed its assets i.e. the meaning in each use of the term is intended to be synonymous However, even this can be problematic as different jurisdictions may define insolvency (or bankruptcy) in one of these ways or both. Therefore, the meaning of insolvency (or bankruptcy) can vary according to state.

Generally, though the meaning of insolvency is the state in which a debtor is unable to pay its debts when they fall due or when its liabilities exceed the value of its assets (i.e. the state of the financial affairs of the entity). Whereas the meaning often ascribed to “bankruptcy” is that it is a formal state of being in “bankruptcy”, being an insolvency proceeding.

Bankruptcy is used, when used to describe a formal state, depending on jurisdiction, to apply only to the insolvency proceeding relating to individuals (England or Australia for example). In other States the comparable term would be sequestration. Insolvency being used to refer to corporations and in terms of the relevant proceeding a different term is used e.g. liquidation (there is a further complication as some states allow companies to be in liquidation that are not insolvent).

However, in some states the meaning of bankruptcy covers both individuals and corporations, such as the United States of America.

It is, should be noted it is possible to be insolvent but not in any insolvency proceeding.

Given the above “bankruptcy” and “insolvency” are not inter-changeable and lawyers, practitioners and interested third parties need to be clear in their use of language as to the meaning of the term and the context.

i) Essential characteristics of “Bankruptcy” and “Insolvency”

Given that there is no universal definition of “Bankruptcy” and “Insolvency” the essential characteristics depend on the definition being ascribed. One essential characteristic is that both words are used in contexts that describe the negative financial status of an entity.

If one uses bankruptcy and insolvency inter-changeably then the essential characteristics would be the definition and this, as discussed above relates to the definition relevant in a jurisdiction as to whether it is one or both of inability to pay debts when they fall due or when liabilities exceed the value of assets and which one is sufficient to trigger an insolvency proceeding.

However, where bankruptcy is a proceeding then the essential characteristic would be depending on the State whether this is a term referencing an insolvency proceeding governing individuals or whether it is a term referencing an insolvency proceeding governing individuals and corporations and this would be as defined the insolvency law of the State.

Insolvency is not used with reference to a proceeding. It is used for a reason for a proceeding to be initiated. Although as mentioned above an entity can be classed as being insolvent (either because its

liabilities exceed its assets or because it is unable to pay its debts upon maturity) and not be in an insolvent proceeding. However, it is considered to be an essential characteristic to initiate an insolvency proceeding.

It would be beneficial to consider the essential characteristics raised by Wood. You raise some of the relevant points below.

i) Differences arising when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

"Bankruptcy" / "insolvency" for individuals and corporations have a number of similarities (broadly, both assume payment of creditors *parri passu*, stay of proceedings, assets are pooled) there are a number of differences due to the differences in procedure, legal status (one being a real person and one being a legal person) as well as policy objectives. In all States different legislation governs the bankruptcy" / "insolvency" of individuals and corporations to account for this.

The fundamental difference that arises is that the purpose of an insolvency proceeding against a corporation is that the intention is to remove the legal and physical existence of the company and dissolve it. This, obviously, does not apply to individuals as their existence continues after an insolvency proceeding has commenced and therefore there has to be a recognition of this (generally in modern terms the insolvent is rehabilitated or afforded a "fresh start").

The issues that are specific to individuals which result in a difference between insolvency law and procedures for individuals and corporations are:

- Ensuring debtor is not harassed by creditors.
- Possible entitlement to retain certain types of property/assets i.e. certain assets may be excluded from the insolvency proceeding.
- Be allowed to have a "fresh start" (recognition of the fact the individuals cannot be dissolved in the same manner as corporations that face insolvency
- Individual accountability (rights, duties and obligations as an individual)
- Allowance for reduction of debt by allowance for repayment of debts over a period of time
- Certain States do not allow individual insolvency or limit it to traders.
- Certain States restrict individuals from acting in certain roles during the period under insolvency.

For corporations the "bankruptcy" / "insolvency" has different consequences. In the event of a formal proceeding these include:

- All assets are for the benefit of the creditors (none are retained by the corporation)
- Allowance for partial of full restructuring
- Limited liability of the company. Directors may be held accountable and have certain rights, duties and obligations but as a result of being a director or officeholder. Members do not have liability.
- Dissolution of the corporation as the terminal effect of the insolvency (i.e. removal of the physical and legal existence of the corporation)
- Certain States have special rules applicable to certain types of corporations e.g. banks or regulated entities.
- Corporations have a separate legal identity from the directors/management however in the event of "bankruptcy" / "insolvency" (even if not a formal proceeding) the fiduciary duty of the directors changes from being to the shareholders to protecting the interest of the creditors.

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Question 3.2 [maximum 5 marks]

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

- **No Common Language**

A fundamental challenge in dealing with cross-border insolvency matters is that there is no common language and the same term can be used in different States to mean different things. One such example is "bankruptcy" another is the definition of "insolvency" and what that means in different States.

Different States often having different meanings (for example, it may mean the liabilities exceed the assets or it may mean the inability to pay a debt when it falls due). A further difference between systems is what constitutes "insolvency proceedings" and their equivalence between different States.

- **No set of common insolvency laws or court**

The fundamental challenge with dealing with insolvency law in a cross-border context is that there is no set of insolvency rules that governs insolvency across the world. There is no form of global court to deal with cross-border insolvency matters.

Further, historically, domestic insolvency regimes and laws have not developed to deal with insolvency matters that are cross-border. The law only deals with insolvency within their borders.

- **Different Legal Histories in the development of insolvency law**

Different states have different origins of insolvency law. In simple terms the difference between civil law or common law traditions.

Insolvency regimes in different states have evolved at different paces and have different historical origins. Many developing countries inherited their regime from their former colonial power and those, particularly low-income countries, have not necessarily reformed the legislation whereas countries which may be more affected by global business and the resulting inter-connectedness of states may have introduced more recent (and often more complex) legislation. Insolvency law and practice is often a specialised area of law and the standards and practice in many States may not be of as higher standard as in other States.

A further complication is that there are legal matters that overlap with insolvency law which have consequences in an insolvency proceeding but which are not explicitly included in insolvency legislation such as security rights, employment.

- **Different Principles that underpin a State's insolvency law**

Different jurisdictions have a different basis and principles that underpin their insolvency system. Such differences affect insolvency law in a cross-border context as well as in more specifically.

The broad differences include, for example, whether the system is pro-debtor or pro-creditor. There is also a divide between systems of those that are more pro-business rescue or restructure, a more modern approach to insolvency, and those do not have such provisions in their legislation.

States may also have allowed public policy to influence the local insolvency system (such as the introduction of protection of labour rights or the environment) which other States do not similarly adhere.

This is on top of dealing with the differences in the core issues which would be, as identified by Westbrook[5]:

i. standing for (recognition of) the foreign representative
ii. moratorium on creditor actions
iii. creditor participation (co-ordinated or not)
iv. executory contracts
v. claims procedure
vi. priorities and preferences
vii. avoidance provision powers
viii. discharges, and
ix. conflict of law provisions.

These vary across States because of the differences in legal systems to align two countries on these matters would be a challenge to align multiple is almost impossible.

- **Protectionism**

A fundamental challenge is that there is a tendency by States to protect local interests in an insolvency proceeding above those outside its borders which complicates efforts to overcome these differences.

- **Political Will**

While there has been efforts in recent years to deal with cross-border insolvency years this has been a late development in terms of international law issues. Insolvency is not necessarily a topic that governments historically had wanted or thought necessary to focus on.

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Question 3.3 [maximum 3 marks]

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

"Hard Law" in the context of insolvency means insolvency related law that is binding upon States and it affects domestic law and it becomes binding on the courts. Hard law are treaties or conventions ratified by countries. States and governments are involved in the creation of "hard law".

Example of hard law include:

In Europe:

- Nordic Convention on Bankruptcy (1933) – This is a successful example of hard law.
- Convention of Certain International Aspects of Bankruptcy (Istanbul Convention, Council of Europe Treaty Series Number 1360) – This was unsuccessful in and of itself as not ratified by a sufficient number of states but had subsequent influence.
- EC Convention on Bankruptcy and Related Matters (1970) – This was not successful as was not adopted.
- EC Regulation on Insolvency Proceedings - European Insolvency Regulation (EIR), developed in 2000 and the review and amendment in the form of the Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast) and the further amendment of Regulation 2021/2260 of 15 December 2021. This is a successful example of hard law.

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

In Latin America"

- Montevideo Treaty on International Commercial Law (1889)
- Montevideo Treaty on International Commercial Terrestrial Law (1940)
- Montevideo Treaty on International procedural Law (1940)
- Havana Convention of Private International Law (1928) (Bustamante Code) – Latin and Middle American States.

In Africa:

- *Organisation pour l'Harmonisation en Afrique Droit des Affaires* (OHADA) Treaty

"Soft Law" in the context of insolvency means the efforts made by multilateral organisations to promote the harmonisation of domestic insolvency law. "Soft law" is not legally binding on states.

Multilateral examples of soft law:
A significant portion of this work has been done by international organisations and institutions notably the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank.

UNCITRAL has developed various guides that may promote the harmonisation on international insolvency law:

- In 1997 *UNCITRAL Model Law on Cross-Border Insolvency* developed
- In 2004 *UNCITRAL Legislative Guide on Insolvency Law.*
- In 2009 the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*
- In 2018 *UNICTRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgement with a guide to Enactment.*
- In 2019 *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment*

There are other guides which also deal with issues that may impact insolvency matters for example guides that deal with Secured Transactions.

The World Bank has also prepared a number of guidelines on the regulation on insolvency such as *Principles for Effective Insolvency and Creditors/Debtor Regimes*, first drafted in 2005 and revised three times since (in 2011, 2015 and most recently in 2021).

Other work includes the Judicial Insolvency Network of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines) (covering the Americas, Asia and the United Kingdom).

Work in particular geographic regions includes:

In Europe:
Work done by the European Union and the European Commission includes:

- Report on the Harmonisation of Insolvency Law at EU Level, done in 2010.
- Action Plan on Building Capital Markets Union, done in 2015, recognised the need for greater certainty around cross-border insolvency and restructuring proceedings.
- European Guidelines on Communication and Co-operation, done in 2007.
- EU JudgeCo Guidelines, done in 2015.

In North America:

- American Law Institute NAFTA[6] Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, applicable to insolvencies in the NAFTA member states.
- ALI – III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases.

In Africa:

- Adoption, in 2015, by the member states of *Organisation pour l'Harmonisation en Afrique Droit des Affaires* (OHADA) of the UNCITRAL Model Law on Cross-Border Insolvency

Given that the majority of the work done in respect of "hard law" is regional or within geographical blocs that have pre-existing legal and trade agreements (such as NAFTA, Latin America and the EU) these are likely to have an impact given that the "hard law" introduced covers issues beyond just insolvency law. Further, given that these blocs have entered into trade agreements there is considerable trade between the countries who are part of these blocs so there is likely to be resulting insolvencies that are cross border. The extent to which the "hard law" that is in place has an impact beyond these geographical blocs may be marginal especially considering some of the world's major economies are not party to them, including notably China and Russia.

The "soft law" work done is a "work in progress" with much of the work being done in the last 30-40 years. The involvement of the multilateral institutions, notably the World Bank and United Nations, evidence the importance of international insolvency law and reflects the fact that it is a global issue and practical ways forward need to be found given the realities of the differences in legal systems across the countries of the world.

The work done by UNCITRAL in developing the *UNCITRAL Legislative Guide on Insolvency Law* as well as the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* are important examples of soft law. The former is dealing with issues at the most fundamental namely it is trying to ensure consistency of definitions so that there is a development of a common language in insolvency law. (The purpose of this document was a reference guide for national authorities and legislative bodies to use when drafting new legislation and regulations or assessing the existing laws and regulations). The latter is aiming to provide practical information on cooperation and communication in cross-border matters.

However, other work done, arguably, may be less successful in real the *UNCITRAL Model Law on Cross-Border Insolvency* was published over a quarter of a century ago and there has not been close to universal adoption of it, some large and economically strong jurisdictions have not adopted it all and even those that have made modifications to it which undermine the impact.

However, the *UNCITRAL Model Law on Cross-Border Insolvency aim, which is* to promote co-operation and co-ordination between states as opposed to unifying cross-border insolvency law is likely to contribute to the better practice of insolvency law[7]. This work together with the other UNICTRAL work recognise the issues faced in international insolvency law and are important in ensuring there is discussion, awareness and attempts at improvements.

Aside from the work done by multilateral organisations, other "soft law" work may suffer from the same criticism as that for the work done on "hard law" in that it has a focus on regional or geographical blocs. However, the same counterargument would apply given that these blocs and trading

[6] North American Free Trade Agreement, being an agreement between the United States of America, Canada and Mexico.

[7] A Kaey and P Walton, Insolvency Law Corporate and Personal (Lexi Nexis, 4th Edition, 2017), pg. 400

agreements have been formed because the countries involved trade regularly it makes the most sense that "soft law" would be between these trading partners.

3

Marks awarded 14 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.

In terms of English corporate insolvency law the English court has jurisdiction to wind up an incorporated in a foreign jurisdiction. Given that the headquarters of Norton Cars Inc were based on England the company has a registered presence and a nominated resident person which gives the court jurisdiction.

There are two main sources of English law that the American insolvent estate representative need consider in terms of recognition and dealing with the assets based in England.

The first being the position in common law, which both permits the recognition of foreign liquidators and co-operation between courts on insolvency matters (subject to public policy considerations) but also permits that the company's assets are distributed to creditors under a single system of distribution[8]" (in terms of the principal liquidation). It is a recognised in comment law in England that that the courts have jurisdiction "under… established practice of giving direction to ancillary liquidator to direct the remittal of the English assets, notwithstanding and different between English and foreign systems of distribution"[9].

[8] McGrath b Riddel [2008] UKHL 21 at [30]
[9] *Ibid* at [62]

The other are the statutory insolvency laws of England namely, the Insolvency Act 1986 (UK). England has modified its insolvency law provisions to incorporate cross border insolvencies. (England has adopted the UNCITRAL Model Law on Cross Border Insolvency). While the procedure and substance of the Insolvency Act 1986 applies to a foreign company wound up under English law there may be some consideration of American insolvency law depending on the issue.

Section 426 of the Insolvency Act (1986) in particular deals with co-operation between courts in different states in relation to insolvency proceedings and providing that the United States of America is considered to be a "relevant country or territory" in terms of that section of the Insolvency Act 1986 (UK) then the American insolvent estate representative can request that the assets in England form part of the estate in the United States and be distributed in accordance with the legal provisions of that country (assuming the assets are not secured). **The US is not designated under s426. The MLCBI needs to be considered**

2

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 main legal sources would be the insolvency laws of Italy and Germany as well as the European Insolvency Regulations (Recast) given both countries are in the European Union. Reference may also be made to European Guidelines on Communication and Co-operation.

The main proceeding would be where the *debtor's* centre of main interest ("COMI") is The EIR determines that the court of jurisdiction competence is where the COMI is situated and allocates the main proceeding following the COMI.

Per EIR Recast, Art 3(1) "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".

It is stated that the COMI is in Italy but this was shifted from England when the UK exited the European Union (i.e. 31st December 2020). Assuming the insolvency proceeding is taking place in 2023 then the administration of interest will have been moved to Italy

However, given that operations were conducted in Germany and there is a subsidiary in Germany the main proceeding may be in Germany and that in fact the debtor's centre of main interest is in Germany. The

Alternatively, this may be considered to be an "establishment". An "establishment" is defined as having the meaning "any place of operations… where the debtor carries out a non-transitory economic activity with human means and assets"[10]. The operations are likely to meet this definition. Depending on the order of the insolvency proceedings this may be an independent proceeding if action is taken in Germany first or secondary proceedings if taken after proceedings have commenced in Italy.

[10] https://eur-lex.europa.eu/eli/reg/2015/848/oj

Consideration needs to be given the subsidiary, Gladiator Manufacturing Limited and whether it in turn is insolvent given the parent is insolvent and the substratum has collapsed as result (which may be the case if Gladiator Manufacturing Limited sole customer is Norton Cars Inc) or whether there are options for rescue of this entity. (EIR (Recast) has been expanded to cover rescues for secondary proceedings) as well as corporate groups (Gladiator Manufacturing Ltd and Norton Cars Inc may be considered a corporate group).

4

Question 4.3 [Maximum 1 mark]

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

An Indian, South African or Australian court would be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative appointed in terms of the EU Regulation. The EU Regulation applies to member states of the European Union. One of the amendments to European Insolvency Regulations affected by EIR Recast was to recognise the existence of proceedings outside the European Union and to co-ordinate proceedings outside and inside the European Union. The courts in India, South Africa and Australia would be entitled to consider this regulation in any recognition proceeding.

It would be necessary to apply for recognition in terms of the laws that apply in those countries. Australia and South Africa have adopted the Model Law on Cross Border Insolvency. India has not but its insolvency regime is rooted in English law so would likely have recognition procedures.

0.5

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 6 marks.)

The European Insolvency Regulations (Recast) ("EIR (Recast)") Articles 7-18 determine that Italian law would be the applicable law given that is where the opening proceedings commenced. The Netherlands has signed the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines).

However real rights of security will (likely) be governed by legislation outside of the EIR (Recast)as such consideration will need to be given to the Dutch legislation governing real security rights. Further, depending on if the asset is immoveable property EIR (Recast) Article 8 would apply.

The assets in the Netherlands may be an exception and would not be dealt with under Italian law in terms of the insolvency matters given that there are assets in the Netherlands that are subject to the real rights of security established in terms of Dutch law.

Given that Norton Cars Inc has a branch in the Netherlands this would likely meet the criteria of an "establishment" in terms of the European Insolvency Regulations (Recast) ("EIR (Recast")). The

Netherlands is a European Union state and as such the European Union Regulations and the EIR (Recast) would apply.

An "establishment" is defined as having the meaning "any place of operations… where the debtor carries out a non-transitory economic activity with human means and assets"[11]. A branch would likely meet this definition.

As such it would be possible for secondary proceedings to be opened in the Netherlands (the main proceedings being in Italy, where the centre of main interest is) and deal with the assets that are subject to real security rights in accordance with the provisions of Dutch law.

Given that legal proceedings have commenced in Italy the proceedings in the Netherlands would secondary as opposed to independent.

Elaboration is warranted. 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.

2

(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.)

Australia is not a European Member state. Australia has adopted the *Model Law on Cross Border Insolvency* - Cross-Border Insolvency Act 2008 (Cth)) - and it also has statutory provisions (section 580-581 of the Corporations Act 2001 (Cth) that permit co-operation with foreign courts in respect of an insolvency procedure. If these provisions are not applicable there is still an option for recognition and enforcement though the Australian courts. It would need to be determined if Australia has adopted the *UNCITRAL Model Law on Secured Transactions.*

Australia has signed the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines).

It would need to be determined what are the insolvency provisions relating to secured assets under Australian law. Real rights of security will (likely) be governed by legislation outside of the insolvency legislation as such consideration will need to be given to that legislation.

Consideration will also need to be given as to when the real rights of security were registered (and if this was done properly) as they may be subject to challenge as a voidable transaction as it may be considered to be a preference. However, if the rights were properly registered and would need to be recognised in the proceedings outside of Australia.

Further information is needed as to the nature of the assets and the security. Australia's insolvency law is based on English law regime and as such may recognise a floating charge as a real security. Such a charge would not be recognised in Italy given it is a civil law country.

3

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 45/50

[11] https://eur-lex.europa.eu/eli/reg/2015/848/oj

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