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.

Woods states that “there are a number of ways to classify the legal systems or families of the world but in general legal families across the globe will in many States either have an English law, or what can broadly be termed, a Civil law orientated foundation”.

Examples of countries whose insolvency law systems have historical roots in civil law include: the Netherlands and Spain. On the contrary, examples of countries whose insolvency law systems have historical roots in English law include: India and Australia.

India and Australia share a similar legislative approach to insolvency law, in that, both of those countries are based on English law and have legislation for dealing with companies and personal bankruptcy respectively.

For example, in Australia, the Corporations Act 2001 regulates corporate insolvency whereas the Bankruptcy Act 1966 regulates the insolvency of individuals or natural persons. As the result of number of recent reforms in Australia, there has been the introduction of a new restructuring and liquidator process for small businesses in the Corporations Act 2001.

In the case of India, following various attempts at law reform over the years, India adopted the Insolvency and Bankruptcy Code 2016 which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy.

On the converse, the Dutch insolvency law is a civil law system. In the Netherlands, the *Faillissementswet* of 1897 provides for *failliet* or *surcheance van betaling*, however, the work of the Research Commission gave rise to *Schuldsaneringswet* which allows for a fresh start. Further, the *Faillissementswet* provides for bankruptcy of individuals and businesses.

The Netherlands is currently reviewing and reforming its insolvency laws, being the Dutch Scheme of Arrangement entered into force on 1 January 2021. In Dutch, those laws are referred as the "*Wet Homologatie Onderhands Akkoord*", or, "WHOA", for short.

Turning to another State of which its laws are based on the civil system, the Spanish insolvency laws are regulated by a single procedure that can be utilised by either individuals or corporations pursuant to the Spanish Insolvency Act 2003, noting that legislation has been amended on numerous occasion within the past 15 years.

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

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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.

Fletcher states that “in seeking solutions to the problems associated with cross-border insolvency, there are two main approaches or theories, both of which have their supporters and detractors. The two principles, or theories, are universalism on the one hand and territorialism on the other. However, the problem is that the two theories are diametrically opposed to each other”.

Whilst it appears that both universalism and territorialism are based on legitimate and reasonable arguments, international observers are in favour of universality, notwithstanding the shortcomings associated with that approach.

Further, Omar states that “it is sometimes said that civil law countries are more inclined to take a territorial approach to jurisdiction and that common law countries are more closely aligned with universalism”.

Universalism is based on the premise that there should only be one insolvency proceeding covering all of the debtor’s assets and debts worldwide. Moreover, in the event that proceedings against a debtor, there should be no other insolvency proceedings ought to be possible nor any other forms of execution of the debtor’s assets. **A discussion of COMI is warranted**

Modified universalism seeks to provide a cost effective and pragmatic “alternative” to universalism. The notion of modified universalism provides that there is a “main proceeding”, opened in the State where the centre of main interests has been determined, and that proceeding may be supported by secondary or ancillary proceedings in another State. In such circumstances, it is expected that the courts dealing with respective proceedings are supposed to co-operate with each other.

Whereas, territorialism, refers to the notion that "proceedings may be commenced in every State/jurisdiction where the debtor holds assets, but that they should be *territorially* limited and restricted to property within the State where the proceedings are opened". Those proceedings would then in turn have an impact on creditors, in that, there would be restriction in terms of which creditors may file their claims, noting that those creditor claims are confined to the borders of the State in which the insolvency proceedings are taking place.

LoPucki states that "one major drawback when applying the principle of territorialism, is that the debtor may be declared insolvent in one State (where the debts are) but not in another (where the assets are). This would mean that the debtor could be solvent in one State but hopelessly insolvent in another. The proponents of territoriality do appreciate the problems associated with this approach; however, they do not believe that the answer lies in universalism. Rather, they see the solution in a co-operative form of territoriality".

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.

Fletcher states that “Latin American States have achieved some of the most long-lasting multilateral agreements on managing international insolvency issues. A series of general treaties were concluded on private international law and commerce that included a chapter or title on bankruptcy or insolvency. These treaties, among different groups of Latin America States, are:

- The Montevideo Treaties (1889) and (1940); and
- Havana Convention on Private International Law (1928) (Bustamante Code).”

The Montevideo Treaty 1889 (**1889 Treaty**) provides for personal and corporate insolvency. Further, the 1889 Treaty allocates the appropriate bankruptcy jurisdiction based on the debtor’s commercial domicile.

Pursuant to the 1889 Treaty, in circumstances where a debtor has a commercial domicile in one treaty State, even if the debtor occasionally trades in more than one State or has branches or agents in another State, it provides for one set of proceedings in the commercial domicile.

Further, under the 1889 Treaty, where a debtor has two or more economically autonomous business in different treaty States, it provides for the possibility of concurrent proceedings. To this end, when an insolvency proceeding opens in one of the States, a local creditor in the other State/s containing economically autonomous business may open bankruptcy proceedings in that State or take other civil action against the debtor.

On the contrary, the Havana Convention on Private International Law (**Havana Convention**), has a more supportive approach to allow for a single proceeding with universal effect throughout its region, in comparison to the 1889 Treaty.

The first Chapter of the Havana Convention which is entitled "Unity of Bankruptcy or Insolvency" provides:

"Article 414: If the insolvent or bankrupt debtor has only one civil or commercial domicile, there can be only one preventive proceeding in insolvency or bankruptcy, or one suspension of payments, or a composition (*quita y espera) in respect of all his assets and his liabilities in the contracting States*".

That being said, Article 415 of the Havana Treaty contains a provision to the effect that "there may be concurrent proceedings in Havana Convention States that contain commercial establishments operating entirely separately economically."

Fletcher states that "(the Havana Convention) there adopts a similar approach to the Montevideo Treaties of providing for a single proceeding if the debtor is only occasionally trading in more than one State, or only has branches or agents in another contracting State. However, where there are concurrent proceedings, the Havana Convention does not provide procedures for co-operation or co-ordination of any concurrent proceeding".

There is scope to elaborate for example with respect to the different members of the different agreements

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Marks awarded 7.5 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.

Whilst it may be said that the terms "bankruptcy" and "insolvency" may be used interchangeably, that is, for those terms to be used without making any difference, I do not agree with that position on the basis that the terms "bankruptcy" and "insolvency" mean different things in some systems as opposed to others, noting that some systems use the term "insolvency" and others "bankruptcy". Further, I do not agree with the above statement for further reasons set out below.

By definition, "insolvency occurs when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets".

Whereas, the term "bankruptcy is also sometimes used, however it usually refers to the formal state of being in bankruptcy".

As an example, in Australia, “insolvency” is often used to refer to a corporation, whereas “bankruptcy” is often used to refer to the insolvency of an individual natural person. **Phrasing/connectors might benefit from rephrasing for clarity.**

In the context of insolvency, Fletcher states that “the roots of bankruptcy law (as a collective debt collecting procedure) are to be found in the following procedures of Roman law, namely: *cession bonorum* (assignment of property); *distraction bonorum* (forced liquidation of assets); *remission and dilation* (compositions with creditors). These procedures developed from individual debt collecting procedures, which in turn gave rise to the development of collective debt collective mechanisms (insolvency law) when the debt was found to be insolvent”.

Wood states that "the word 'bankruptcy' is said to stem from the Italian *banca rotta*, which means to 'break the bench'. This referred to the situation where a merchant who operated his business in the medieval market place could not pay his debt and his creditors closed his business by breaking his bench or counter".

Fletcher states that “although these terms (insolvency and bankruptcy respectively) carry the same meaning in different systems, one explanation is that ‘insolvency’ sometimes means the state of financial affairs of a debtor, whilst ‘bankruptcy’ refers to the formal state of being put into a formal bankruptcy proceeding. However, these terms are used as synonyms in many systems”.

In terms of the essential characteristics of “bankruptcy” and “insolvency”, Wood states the “universal principles” of those terms, “but then goes on to discredit them as well as follows:

- actions by individual creditors against the bankrupt are frozen – thus individual pursuit is stayed. This is also referred to as the automatic stay, signifying a moratorium against individual debt enforcement. This is the only true universal feature according to Wood;

- the assets are pooled which become available to pay creditors – replacing the piecemeal seizure of assets by individual creditors. This feature has been eroded as a universal principle in that different States provide for different exceptions to this rule;

- creditors are paid *pari passu*, that is, on a proportionate basis out of the available assets based on their claims. Wood terms this as a piece of ideology “which is nowhere honoured” since priority creditors and secured creditors form exceptions to this rule in most, if not all, States.”

Further, Sean and Hooley state that “the objectives of insolvency for individuals and corporations” are as follows:

- individuals: to protect the debtor from harassment by his creditors; to enable the debtor make a fresh start – especially in a less blameworthy cases (where insolvency has not been brought about by the actions or conduct of the debtor); to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration;

- corporations: where possible to preserve the business, or viable parts thereof – not necessarily the company; where personal liability has been abused, to impose personal liability on responsible persons;

- principles that apply to both situations are: to ensure *pari passu* distribution as far as possible, except in so far as creditors have priority; ensure that secured creditors deal fairly towards the debtor and other creditors; to investigate reasons of failure; to reclaim voidable dispositions where the insolvent debtor dealt improperly with assets".

It is worth noting that, according to Fletcher, "some topics overlap in individual bankruptcy and corporate insolvency, there are also pertinent differences between the two. For example, it is only in relation to individuals that the notion of exempt or excluded assets will apply (this means that some systems allow the insolvency individual to keep some of the assets required to maintain him or herself and his or her dependents)".

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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.

It may be said that cross-border insolvency dispensations form part of the framework of the "essential features of an insolvency system".

A cross-border insolvency dispensation may be described as a "method for dealing with assets of insolvent estates that are situated in foreign States, that is, States where an insolvency proceeding has not yet been commenced."

Whilst some States have statutory provisions for dealing with those types of situations, there are other States that have no statutory dispensation, however, their local courts can be approached on an *ad hoc* basis for an order to allow for a foreign insolvency representative to deal with assets of a local jurisdiction.

To this end, in many common law States, the relevant courts have provided a remedy in the absence of any statutory rules covering such support. Or, alternatively, where legislation exists but a *lacuna* arises due to a gap in the legislative provisions.

In these circumstances, private international law may also find application, or, there may a treaty or convention regulating how to deal with those types of situations.

The starting point is that "there is not a single set of insolvency rules that applies globally". That being said, all States with a developed legal system have provided for some sort of bankruptcy/insolvency system, which may also be referred to as a collective debt collecting procedure. However, there are differences in approaches, polices and rules in those respective legal systems.

With that in mind, scholars, legislatures, international organisations (for example, UNCITRAL and the World Bank) and courts are always striving to devise statutory dispensation and solutions to remedy insolvency issues on a transnational basis.

However, the flow on impact of globalisation, trade and movements of assets across borders, has resulted in creditors being compelled to deal with the estate of their respective debtor in numerous States in order to reclaim their debts.

In these circumstances, consideration of cross-border legal and transnational legal insolvency issues becomes necessary.

Wessels states that "(international insolvency law) is commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case".

Further, insofar as the recognition of insolvency proceedings are concerned, Woods states that "there cannot be sole dependence on the goodwill of the first state. The European Union – where a common market between nation States exists – has also realised this. Irrespective of the existence of a formalised common market, today's communications and interaction between individuals, businesses and States have given rise to transactional or cross-border cases of insolvency… it has even been claimed that in modern times the majority of significant corporate collapses involve more than one State and that international insolvencies are therefore the norm and not the exception."

Notwithstanding the efforts of scholars, legislatures, international organisations and courts, "most domestic legal systems are ill-equipped when it comes to dealing with insolvencies with implications across national borders". Moreover, the enforcement legal mechanisms within a State ends with its national borders.

In particular, some of the challenges that arise which need to be considered and overcome in this regard include: the present-day mobility of people, the significant speed at which assets are being transferred from one State to another and the complexity of many business transactions.

In the absence of co-ordination and co-operation between courts of different States in a cross-border scenario, the probability of multiple insolvency proceedings against the same debtor is always a risk.

Further, some of the challenges which arise in cross-border insolvency include (but are not limited to):

- if proceedings compete with each other, or are incompatible in nature (for example, liquidation versus corporate restructuring), that may lead to additional capital losses for creditors as the opportunity resolve financial distress under a restructuring scheme may be prevented;

- the appropriate law required to determine proceedings may be impossible to predict which in turn may give rise to questions as security rights and priority payments in an insolvency;

- creditors could find themselves in a race for assets of the respective debtor in which "only the fittest" would survive, that is, creditors who are unable to join that "race", would be at a loss, noting that outcome undermines one of the basic global principles of insolvency, being the principle of equality between creditors; and

- fraud and detrimental forum shopping could also become the catalyst for risk in cross-border insolvency proceedings.

Notwithstanding the above-mentioned issues that need to be addressed in cross-border insolvency proceedings, there have been various attempts by stakeholders and representative bodies in order to address these matters.

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

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Question 3.3 [maximum 3 marks]

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

In the context of international insolvency, public international instruments such as treaties and conventions to which States become signatories (and therefore bind themselves accordingly), become part of domestic law enforcement in the courts, and those treaties and conventions may then form part of a State’s “hard law” on insolvency.

On the contrary, the "soft law" does not take the form of a treaty or convention, for example, the Model Law on Cross-Border Insolvency (**Model Law**). The Model Law is a draft legislation recommended by UNCITRAL for member States to adopt, with or without modification.

A notable example of "hard law" can be sought in the bilateral international insolvency conventions which appeared from the 13th and 14th centuries regarding absconding debtors and later in gather assets. From the 19th century onwards, Europe has taken on more modern forms of bilateral treaties and conventions for the purposes of recognising enforcement related to bankruptcy, winding up arrangements and compositions involving their State appeared.

That being said, Europe has been unsuccessful in achieving multilateral international insolvency conventions for many years.

A rare example of successful multilateral treaty can be found in the form of the Nordic Convention (1933) which hails from the Scandinavian region.

Further, in the case of Europe, further success has been achieved by the European Union, in the form of the European Insolvency Regulation (**EIR**). The EIR has influenced broader multilateral developments in international insolvency law.

Whilst there has been varying success of "hard" law and "soft" law in providing solutions to the challenges of international insolvency, more success has been gained through the use of "soft law" options.

Mevorach states that “the most successful ‘soft law’ approach to date has been undertaken by UNCITRAL. In the mid-1990s, it developed a Model Law on Cross-Border Insolvency (MLCBI). This initiative did not take the form of a treaty or convention, but rather that of a Model Law, draft legislation that UNCITRAL recommended States to adopt, with or without modification. Given the number, economic size and geographic spread of States that are now adopting the MLCBI, it is gathering momentum as an influential response to international law.”

At times it would be beneficial to elaborate on matters in your own words

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Marks awarded 12 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.

I advise that some States, including England, have amended their domestic insolvency laws to address international insolvency issues through provisions for the recognition and enforcement of a foreign insolvency proceeding.

In this scenario Norton Cars Inc (**Norton**) has filed for liquidation in terms of American law, however the headquarters of Norton were still in England. Further, some of the assets of Norton that need to be dealt with as part of the liquidation are situated in England.

The main piece of legislation regulating English insolvency law is the Insolvency Act 1986 (UK) (**Insolvency Act**).

As part of its cross-border rules, England and Wales has adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006. Section 426 of the Insolvency applies to "relevant" countries as listed and common law principles are also applicable.

In the first instance, the American insolvent estate representative may apply to the English court to request recognition in terms of English Law in order to deal with the assets of Norton situated in England pursuant to section 426(5) of the Insolvency Act which authorises the local court to "apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction." **S426 does not assist as the US is not designated**

At paragraph 30 of *McGrath v Riddell* [2008] UKHL, Lord Scott stated that "… [t]he primary rule of private international law… applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English court should, so far as is consistent with justice and UK

public policy, co-operate with the courts in the country of the principle liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution".

Thus, an American insolvent estate representative could apply to the English Court pursuant to the relevant section of the Insolvency Act for assistance in applying English law in respect of the liquidation of Norton.

There is scope for greater elaboration

3

Question 4.2 [Maximum 4 marks]

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

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

The European Union passed a Council Regulation on Insolvency Proceeding (European Insolvency Regulation (EIR)) in 2000 which was made effective from 2002, noting the EIR is based on essentially the same terms as the EU Convention which lapsed in 1996.

However, as required by the EIR after a decade of operation, some amendments were made resulting the EIR (Recast) which was adopted in 2015 and took effect from mid-2017.

Article 3(1) of the EIR allocates jurisdictional competence to the courts of a member State within which is situated the "centre of the debtor's main interests" (COMI). In this scenario, Norton's COMI has shifted to Italy, therefore jurisdictional competence (and the applicable law) is allocated to the court and insolvency laws of Italy.

That being said, while the EIR "allocates primary jurisdiction based on the centre of the debtor's main interests (main proceedings), it does allow for the possibility of a subsidiary territorial proceedings in other member States. These are permitted where the debtor has an "establishment". An establishment is defined as "any place of operations…where the debtor carries out a non-transitory economic activity with human means and assets". In this scenario, Norton's main operations transpired in Germany, therefore there is the possibility that a subsidiary territorial proceeding may be required in Germany.

Further, the EIR provides that "such subsidiary proceedings may be either "independent proceedings", opened prior to the main proceedings, or "secondary proceedings", opened subsequent to the bankruptcy adjudication in the State with the COMI.

For completeness, the EIR Recast has been amended to extend its scope to include:

- pre-insolvency/hybrid proceedings;
- expanding the provisions on the "centre of the debtor's main interests";
- recognition of the existence of insolvency proceedings outside the EU for the purposes of co-ordinating proceedings both inside and outside of the EU;
- extending secondary proceedings to include rescues;
- providing for an electronic register and standard forms; and

- acknowledging corporate groups through enhanced co-operation and co-ordination provisions.

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?

No, an Indian, South African or Australian court will not be eligible to apply the EU (Recast) Insolvency Regulation, as the EIR "allocates jurisdictional competence to the courts of a member State within which is situated the centre of the debtor's main interests".

1

Question 4.4 [Maximum 6 marks]

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

(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.)

Wood states that “certain aspects of insolvency law will be affected by local legal culture, basic rights and the way in which a system deals with related matters such as the security rights provided for…”.

Further, “since there are a number of differences between types of real security found in various States, this remains one of the most difficult aspects to deal with in a cross-border context”.

In terms of which law will apply to the insolvency proceeding with regard to the real rights of security situated in Netherlands, the Dutch insolvency law is governed by:

- the *Faillisementswet* of 1897 which provides for *failliet* or *surceance van betaling* (moratorium), however, the work of the Dutch Research Commission gave rise to *Schuldsaneringswet* which allows for a fresh start in Dutch bankruptcy law; and

- the *Wet Homologatie Onderhands Akkoord*, otherwise known as 'WHOA'.

For completeness, the Netherlands has not adopted the UNCITRAL Model Law on Secured Transactions 2016.

It would be beneficial to explain why Dutch law is applicable

1.5

(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.)

Murray and Harris states that “Australia does not have a single unified Bankruptcy or Insolvency Act. Further, Australia has also adopted the UNCITRAL Model Law on Cross-Border Insolvency.”

Australian legislation is based on or influenced by the UNCITRAL Model Law on Secured Transactions 2016.

In Australia, the Corporations Act 2001 (which regulates corporates insolvency) and the Bankruptcy Act 1966 (which regulates the insolvency) of individuals or natural persons deals with the real rights of security situation in Australia. In addition, Australia has developed Personal Property Security Act (PPSA).

Further, Australia has adopted the UNCITRAL Model Law on Secured Transactions 2016.

There is scope to elaborate

2.5

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40.5/50

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