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.

Many insolvency law systems remain based in civil law and/or English law tradition in either form or procedural substance. To assist in analysing the various countries, it is helpful to classify the legal systems into "*insolvency law "families"*" of either English law or broadly civil law.[1]

[1] A Boraine and R Mason, "Module 1 Guidance Text, Introduction to International Insolvency Law" p 4.

A helpful example to illustrate the breadth and historical impact of civil and English law systems is on the continent of Africa, which typically follow the laws of their respective former colonial masters. Following independence from Portugal, the legal systems of Mozambique and Angola continue to follow civil law principles. In contrast, countries of former English colonial rule such as Kenya, Zambia, and Nigeria remain influenced by English legal tradition. **What English legal tradition?** Separately, countries such as Namibia and South Africa have inherited mixed legal systems from former Dutch (Roman-Dutch civil law) and British (English law and common law) rule.[2]

Countries with historical roots in English law, otherwise known as Anglo-American (common law) systems, include the United States of America (USA), Australia, India and of course England. While certain continental European countries can be categorised through their civil law systems such as the Netherlands, France, Germany and Spain.

In the beginning, the common law did not concern itself with the bankruptcy of individual debtors (not until statute in 16th century) as this was simultaneously being development as a result of the *Lex Mercatoria* ("Law Merchant" body of law in the mediaeval courts of Europe). The *Lex Mercatoria* developed among customs and practices of merchants, but based on mercantile law of Italy (derived from Roman Law).[3]

Furthermore, the historical roots of civil law can be traced to Roman law and Table III of the Twelve Tables (execution of judgments) in the 1st century.[4] Debt execution under Roman law was notoriously severe and if unpaid could lead to imprisonment, death or enslavement of the debtor to secure repayment of the debt. By contrast, the Statute of Marlbridge introduced into English law imprisonment for debt in 1267 (later abolished in 1869). The reduction in modern use of debtor's prisons can be attributed to legal developments and political culture. Reform in the 1860s -70s throughout Europe for their abolishment was commonplace.[5]

The transition from execution against the person to execution of the debt against the assets of the estate in debt collection procedures has evolved over centuries. The roots of both civil and English law insolvency systems remain at the core of each system, though are now evolved to answer modern practices and socially acceptable standards.

You raise interesting and relevant points but further was needed with respect to common law vs codification

2

Question 2.2 [maximum 3 marks]

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

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[2] Ibid, pp. 10. See also LEXAfrica "Guide to Insolvency and Business Restructuring in Africa" <<https://lexafrica.com/wp-content/uploads/2023/07/LEX-Africa-Insolvency-Guide-2023.pdf>> accessed 3 November 2023.

[3] I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1, p 7.

[4] The Avalon Project, "The Twelve Tables" Yale Law School, Lillian Goldman Law Library, Source: Ancient Roman statutes: translation, with introduction, commentary, glossary, and index by A Johnson et al., Austin: University of Texas Press, 1961 <<https://avalon.law.yale.edu/ancient/twelve_tables.asp>> accessed 1 November 2023. See also Boraine and Mason, *supra* note 1, p 4.

[5] K Gratzer, *Defafult and Imprisonment for Debt in Sweden: From the Lost Changes of a Ruined Life to the Lost Capital of a Bankrupt Company* Published in "History of Insolvency and Bankruptcy from an International Perspective" Edited by Karl Gratzer and Dieter Stiefel (Södertörns högskola 2008) <<https://www.diva-portal.org/smash/get/diva2:15847/FULLTEXT01.pdf>> accessed 4 November 2023.

Difficulties may arise in cross-border insolvency proceedings due to the fact that independent and sovereign states may govern their own legislation, or may not subscribe to the available treaties or conventions. Insolvency proceedings commenced in one State may not be easily recognised in another and vice versa, depending on the framework available in those States.

As such, there are competing views on how to proceed in cross-border insolvencies, being (i) **universality** (or **universalism**) where there should only be one insolvency proceeding covering all of the debtor's assets worldwide; or (ii) **territorialism** which is based on the premise that insolvency proceedings may be commenced in every state or jurisdiction where the debtor holds assets, but that they should be territorially restricted to property within the state where proceedings are commenced.[6]

While these concepts may seem diametrically opposed, "modified universalism" is a more accepted middle ground, which is more often than not the reality in practice. Modified universalism accepts that most states are closer to territorialism, and therefore where there is a "main proceeding" in one state where there is a centre of main interests (COMI), it is supported by secondary or ancillary proceedings through co-operation of the courts.[7] Other concepts and schools of thought include co-operative territorialism (courts should communicate), contractualism (as stated in articles of association), co-operation following a protocol (i.e. Maxwell case), or internationalist principle (modified universalism with a pragmatic approach).[8]

Territorialism is much more focused on the local creditor and local interests within its domestic market. With universalism, there is a real risk (and concern) that the strongest creditors would receive payment and any distributions diluted. Smaller creditors may also encounter difficulty participating in foreign proceedings and it may be impractical, or expensive, effectively shutting them out. **Territorial limits require elaboration**

The principle of universalism is more widely accepted in common law based states whereas civil law countries are more inclined to take a territorial approach. The difficulty is that territorialism tends to become too costly and universalism can often become political.[9]

A greater explanation of universalism it warranted, as distinct from modified universalism

2

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 are a number of initiatives underway in the Latin American region with the aim of resolving international insolvency issues. As a starting point, it must be highlighted that the Latin American and South American regions are progressing towards a more unified bloc, in particular with the adoption of the *Unión de Naciones Suramericanas* “Union of South American Nations” (UNASUR) agreement consisting of two existing free trade blocs, *Mercado Común del Sur* (MERCOSUR) and *Comunidad Andina* (CAN). UNASUR has an express

[6] Boraine and Mason, *supra* note 1, pp 37 – 38.
[7] Ibid, p 40.
[8] Ibid, pp 40 – 41.
[9] Ibid, p 39.

objective to minimise bureaucracy implementing key features inspired by the European Union such as adopting a common currency and passports.[10]

Incentives specific to managing international insolvency issues have been achieved throughout Latin America by way of general treaties and private international law, being: (i) The Montevideo Treaties on International Commercial Law ("**1889 Treaty**") and International Commercial Terrestrial Law ("**1940 Treaty**") (together the "**Montevideo Treaties**"); and (ii) Havana Convention on Private International Law (1928) (the "**Bustamante Code**").

The 1889 Treaty was originally ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay and deals with personal and corporate insolvency. Subsequently, the 1940 Treaty was ratified only by Argentina, Paraguay and Uruguay, which may result in one or both treaties applying in an international insolvency where two or more States are involved.[11] Depending on the number of treaty States and economic activity, the 1889 Treaty provides for concurrent proceedings or one set of proceedings in the commercial domicile. Delić surmises that the Montevideo Treaties favour an approach to private international law known as the principle of domicile and the 'real seat' doctrine, credited to German jurist and legal thinker, Friedrich Carl von Savigny (1779–1861).[12]

The Bustamante Code is similar to the Montevideo Treaties providing for a single proceeding if the debtor is occasionally trading in more than one State, but does not provide for procedures of co-operation of concurrent proceedings.[13] To ensure maximum agreement between participating States, the authors of the Bustamante Code specifically refrained from clarifying whether the principle of domicile or nationality applied.[14] The Latin and Middle American member States include: Bolivia, Brazil*, Chile, Costa Rica, Cuba, Dominican Republic*, Ecuador, El Salvador, Guatemala, Haiti*, Honduras, Nicaragua, Panama, Peru and Venezuela*.[15]

The most obvious differences in relation to the above initiatives is the variance of membership between treaties. While membership to the Montevideo Treaties remain fragmented to a certain extent, the only common signatories to the Bustamante Code are Bolivia and Peru (1889 Treaty and Bustamante Code).

4

Marks awarded 8 out of 10

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

Question 3.1 [maximum 7 marks]

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

[10] Latin American Jurisdictions: UNASUR, University of Oxford, Bodleian Libraries, last updated on 1 November 2023 <<https://libguides.bodleian.ox.ac.uk/law-latinamerica>> accessed on 1 November 2023.
[11] Boraine and Mason, *supra* note 1, p 60.
[12] Delić, Ana, "The Birth of Modern Private International Law: The Treaties of Montevideo (1889, amended 1940)" at <<https://opil.ouplaw.com/page/530>> accessed 1 November 2023.
[13] Boraine and Mason, *supra* note 1, p 62.
[14] Delić, *supra* note 7.
[15] A number of States ratified the Bustamante Code with specific reservations (noted by *).

It can be said that the terms "bankruptcy" and "insolvency" may be used interchangeably as a general reference point, however, there are limits to this statement and their use should be considered carefully in context. Consideration must be given to the meaning of each term, their characteristics and differences in practice when discussing consumer indebtedness and business indebtedness.

What meaning may be ascribed to "bankruptcy" and "insolvency"?

To address the above, Fletcher has attempted to draw a distinction between "insolvency" and bankruptcy" which is a result of *"unco-ordinated"* and *"illogical"* condition of insolvency laws:

> *"… the distinction arose historically between insolvency, as a factual condition, and bankruptcy as a legal condition or status … When used as legal terms, however, and particularly when used as substantives, it is technically incorrect to refer to a person as "a bankrupt" unless that status has actually been imposed in consequence of a formal, legal process to which the debtor has been a party. Conversely, the expression "an insolvent" has no formal or technical significance in English law, although the terms "insolvent" (used adjectivally) and "insolvency" are employed frequently throughout the Insolvency Act 1986 and related legislation."*[16]

The word "bankruptcy" has origins in the Italian translation of *banca rotta* which means to "break the bench", in which the benches or counters of merchants were broken when they could not pay their debts.[17] "Bankruptcy" as a formal status, i.e. "bankrupt", can only be initiated through legal proceedings and as such the distinction must be made.

On the other hand, the meaning of "insolvency" may also vary from jurisdiction to jurisdiction, but is generally understood to be "*when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets*".[18]
It would be beneficial to consider different use in different jurisdictions further. Elaboration is warranted, for example although these terms carry the same meaning in many systems, one explanation is that "insolvency" sometimes means the state of financial affairs of a debtor, whilst "bankruptcy" refers to the formal state of being put into a formal bankruptcy proceeding. Also in some jurisdictions bankruptcy refers to individual processes and insolvency refers to corporate processes.

The essential characteristics of "bankruptcy" and "insolvency" and differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

The principles distinguishing between individual and corporate insolvency may apply equally, however, a key difference is that a natural person cannot be "dissolved" at the conclusion of insolvency proceedings. A company may be "dissolved" after it is "wound up", whereas a person may ultimately be "discharged" (depending on the relevant terminology and legislation).

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[16] I F Fletcher, *supra* note 3, p 5 - 6.
[17] Boraine and Mason, *supra* note 1, p 4.
[18] UNCITRAL *Legislative Guide on Insolvency Law* 2004 Parts 1 and 2, p 5 <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>>.

Wood assists us in providing a starting point for discussion of the essential features or characteristics of insolvency or bankruptcy law.[19] According to Wood, the following are said to be universal principles, generally:

- **Moratorium/stay of enforcement**: In both personal and corporate insolvencies, once formal action is commenced against the bankrupt, individual creditor actions are frozen or subject to a "stay" of individual debt enforcement. In general, if a single creditor continued with enforcement, this could leave the formal action ineffective.

- **Pooling of assets**: An insolvency administrator may be appointed with the obligation of pooling available assets to pay creditors. However, this process and legal foundation is highly dependent on the relevant insolvency laws of the State which may contain certain exceptions.

- ***Pari passu***: This is the principle where similarly situated creditors' claims are satisfied "*proportionately to their claim out of the assets of the estate available for distribution to creditors of their rank*."[20] The principle of *pari passu* is severely limited in States where priority or secured creditors obtain a higher rank above others, which according to Woods is an ideology, "*which is nowhere honoured*."[21]

Sealy and Hooley take the distinction between objectives of insolvency for individuals and corporations even further, in particular in relation to the application of *pari passu*. While they recognise the difficulties imposed by State insolvency laws insofar as to rules of creditor priority, Sealy and Hooley impose an obligation to investigate the underlying reasons for failure and to ventilate and/or reclaim voidable dispositions in relation to assets. A similar requirement is proposed to investigate corporations where personal liability has been abused. A further key feature is the "salvaging" of corporations/businesses as a going concern (insofar as possible). Sealy and Hooley continue to take their theme of rehabilitation in relation to individuals in that bankruptcy should protect the debtor from creditors and enable a fresh start.[22]

Understanding the key elements involved in the commencement of proceedings of a formal bankruptcy or insolvency process are also crucial to differentiating between an individual or corporate debtor. In terms of standing (*locus standi*), the shareholders of a company may resolve to initiate insolvency procedures if they deem it appropriate to do so. How, when and where the proceedings are initiated is a further important consideration for creditors which can vary greatly between States at national and/or local level, including the requirement to utilise personal bankruptcy courts or commercial courts.[23]

There is scope to elaborate with respect to differences such as exempt property

Conclusion

When discussing the essential characteristics or points of departure between "bankruptcy" / "insolvency" in the context of a corporation or an individual, the macro differences remain relevant: moratorium; *pari passu*; commencement; *locus standi*; voidable dispositions/transactions; distribution of assets etc, It is inevitable that special rules will vary

[19] Boraine and Mason, *supra* note 1 p 18. See also P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), pp 1-30 (p 3).
[20] Boraine and Mason, *supra* note 1, p 31.
[21] Ibid, p 18.
[22] Ibid, pp 18 – 19.
[23] Ibid, p 20.

between jurisdictions i.e. provisions for discharge (or lack thereof); excluded assets for his/herself for the benefit of dependents[24]; and applications against a group enterprise[25].

In consideration of the above analysis, the distinction between "bankruptcy" and that of "insolvency" will continue to be a point of deliberation as insolvency systems and organisations evolve, and careful consideration must be given to their use.

5.5

Question 3.2 [maximum 5 marks]

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

The varying approaches to cross-border insolvency make it difficult to develop a single global cross-border insolvency dispensation for a number of reasons. The ultimate root of the issue is the fact that legal systems vary across countries including differences between civil law and common law approaches which make harmonization difficult, if not impossible. In addition to the difficulties posed by sources of law, the differences in terminology can have quite significance impacts. i.e. the distinction and definition of "bankruptcy" and "insolvency". Attempts to harmonise terminology can be found in the UNCITRAL Legislative Guide on Insolvency Law (2004) ("**UNCITRAL Guidelines**") and other UNCITRAL insolvency-related texts.

In the absence of a regulating body on insolvency law, which is recognised and acceptance of jurisdiction is ratified globally, there will continue to be challenges in this regard. The UNCITRAL Model Law on Cross-Border Insolvency (1997) ("**MLCBI**") and UNICTRAL Guidelines are a commendable launching point for signatory and non-signatory countries in terms of guidance to a single global cross-border insolvency dispensation. However, it is arguable that either initiative has not materialized as hoped for. This is evident through the limited list of countries who have legislation based on or influenced by the MLCBI.[26]

The lack of a universal system or single procedure for recognition and enforcement creates uncertainty among creditors. In the absence of a single global mechanism for insolvency dispensations, recognition of foreign insolvency proceedings is not automatic. States will also likely have separate legislation or statute governing the enforcement of foreign judgments.

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

1

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.

"International law" can be categorised as either public international law or private international law. Generally, public international law will govern states if adopted domestically (for example the United Nations International Bill of Human Rights which consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural

[24] Insolvency Act 1986, section 283(1).
[25] UNCITRAL *Legislative Guide on Insolvency Law* "Part three: Treatment of enterprise groups in insolvency" <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf>>.
[26] <<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>>.

Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols). Private international law (otherwise known as domestic law) governs parties.[27]

In circumstances where a State becomes a signatory to an international treaty or convention and it is ratified as part of domestic laws enforceable in its relevant courts, it may then form part of State's "hard law". For example, the Scandinavian multilateral treaty known as the 'Nordic Bankruptcy Convention' (1933), provides legal framework for cross-border recognition and enforcement between Denmark, Sweden, Norway, Iceland and Finland. The treaty is limited to "*bankruptcies and compulsory arrangements with creditors, the latter of which no longer exist in all the participating countries*."[28] **Elaboration is warranted regarding success**

On the other end of the spectrum, "soft law" refers to agreements and guidance that are not legally binding on a State. The most successful example of "soft law" are the UNCITRAL initiatives. The Model Law on Cross-Border Insolvency was developed in the 1990's in the form of draft legislation which member States are recommended to adopt, with or without modification. [29]

2.5
Marks awarded 9 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.

It is our understanding that Norton Cars Inc has filed for liquidation in the United States courts while the headquarters are located in England.

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[27] Boraine and Mason, *supra* note 1, p 45.
[28] INSOL International "The Complex landscape of Nordic Forum Shopping" Winter 2017/2018 <<https://www.insol-europe.org/download/documents/1317>> accessed 14 November 2023.
[29] Boraine and Mason, *supra* note 1, p 47.

We note that England and Wales has adopted the UNCITRAL Model Law on Cross-Border Insolvency ("**MLCBI**") in 2006 (Cross-Border Insolvency Regulations 2006 (*SI 2006/1030*) ("**CBIR 2006**")). The MLCBI provides a framework for the request of recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England. While the USA has also adopted the MLCBI, it does not require reciprocity from the perspective of English Law.

We would advise that the US insolvency estate representative to apply under the CBIR 2006 to the British courts for recognition of the insolvency proceedings in England. We are satisfied that the present circumstances also cover the requirement that foreign proceedings for which recognition is sought are subject to the supervision and control of a foreign court (i.e. USA bankruptcy courts).[30]

For your understanding, the CBIR 2006 provides for recognition of two types of insolvency proceedings: (i) foreign main proceedings; and (ii) foreign non-main proceedings. It is arguable that in relation to the present proceedings, the later would apply as the liquidation is taking place in a state other than the debtor's centre of main interests (Italy/Europe) but has an "establishment" in the USA.[31]

We also remind the US insolvency estate representative, in relation to foreign non-main proceedings, that no automatic stay applies and relief may be granted on application for appropriate discretionary relief.[32] They must also be minded that common law rules of conflict of laws will also apply.

It would be beneficial to elaborate and discuss why s426 is not applicable

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.

It is our understanding that Norton Cars Inc has shifted its centre of main interest ("**COMI**") to Italy during the Brexit, at the same time its main operations transpired in Germany but management was directed from Italy. We note that a cross-border insolvency matter has arisen between Germany and Italy.

In order to understand and be guided through cross-border insolvency matters within the European Union, we must look to the European Insolvency Regulation (EIR) (2000) as reviewed and amended in 2015 on Insolvency Proceedings (Recast) ("**EIR Recast**"). We note that the EIR Recast ceased to apply in the UK following Brexit.[33]

For the avoidance of doubt, Article 7.1 of the EIR Recast states "*[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of … the 'State of the opening of proceedings'*."

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[30] "Cross border insolvencies" Practical Law Restructuring and Insolvencies <<https://uk.practicallaw.thomsonreuters.com/2-107-3985>> accessed 11 November 2023.
[31] Article 2, Schedule 1, CBIR 2006.
[32] Article 21, Schedule 1, CBIR 2006.
[33] The Insolvency (Amendment) (EU Exit) Regulations 2019.

With the above said, it would be appropriate for the main proceeding to be opened in Italy (being the COMI) in accordance with the EIR Recast.

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. As was the case with the EIR, the Recast EIR only applies to insolvency proceedings involving debtors whose COMI is located in a Member State.[34]

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.)

The issue of conflict of laws in cross-border insolvency disputes will generally arise where a debtor faces creditors pursuing their claims in more than one State, as is the case above. Omar recognises that "*[a]part from the general situation in conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency…. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws*."[35]

On 1 January 2021, the *Wet Homologatie Onderhands Akkoord* (Act Homologation Private Agreement) ("**WHOA**") came into force. WHOA partly implements Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt ('restructurings') (the 'Directive'), amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). This implementation has the effect of ensuring the EIR Recast is unaffected and to be regarded as "*compatible and complementary*".[36]

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[34] See Recital 14, Original EIR; Recital 25, Recast EIR; See also section 3.2.2 of S Pepels, "Defining groups of companies under the European Insolvency Regulation (recast): On the scope of EU group insolvency law" first published in International Insolvency Revie, volume 30 issue 1, p. 96 – 123, 5 December 2020 <<https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1402#:~:text=Like%20the%20Original%20EIR%2C%20the,located%20in%20a%20Member%20State.&text=Group%20companies%20with%20a%20COMI,proceedings%20under%20the%20Recast%20EIR>> accessed 13 November 2023.

[35] P J Omar, "The Landscape of International Insolvency", (2002) 11, *IIR* 173, pp 173 - 174 (p 175). See also Boraine and Mason, *supra* note 1, p 41.

[36] Ten Holter Noordam "Netherlands: Implementation of the Restructuring Directive – will secured creditors' rights be affected?" published on 18 March 2021 <<https://tenholternoordam.nl/en/news/netherlands-implementation-of-the-restructuring-directive>> accessed 14 November 2023.

Depending on the applicable WHOA restructuring track, whether the proceedings involve 'public' or 'non-public' restructuring will determine whether it is caught within the provisions of the EIR. Only 'public' restructuring may be subject to the EIR Recast: (i) the debtor has COMI in an EU state (except Denmark) and (ii) cross border elements are involved. In accordance with the EIR Recast, rights in rem of creditors or third parties are unaffected.[37] As such, the law of real rights of security as applicable in the Netherlands would apply.

3

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

Australian law is based in common law and has adopted the MLCBI. However, Australia is also considered a 'third country' with respect to the EU for the purposes of legislative and regulatory scope of the EIR Recast.[38] There are only 4 EU member states who have implemented MLCBI – Greece, Poland, Romania and Slovenia. Accordingly, Australia is not a party to any Italian or relevant international treaties or EU regulation.

Australia enacted the Cross-Border Insolvency Act 2008 (Cth) subsequent to becoming a MLCBI signatory. As MLCBI does not require reciprocity, its application is fairly straightforward in that the Italian insolvent estate representative may be permitted to apply for recognition in the Australian courts. This allows the Australian courts to establish COMI and the relevant insolvency laws and procedures which should be recognised.[39]

Elaboration is warranted as to what the relevant laws are with resect to real rights of security situated in Australia.

1.5

Marks awarded 12.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 38.5/50

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

[37] Article 8 EIR Recast.
[38] Article 2(5) of the Regulation (EU) 2016/399.
[39] S Taylor et al., Taylor David Lawyers "Restructuring and insolvency in Australia: overview" Practical Law, updated as at 1 June 2021 << https://uk.practicallaw.thomsonreuters.com/2-502-1459>> accessed 14 November 2023.