



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.

In general, States across the globe can either be classified as having an English law (otherwise termed common law) or civil law-based foundation of insolvency.

1. English law-based

One example of an English law-based system of insolvency is the United States of America (the "US"). Given that the US is a federation, laws may be enacted at the federal or state level. The US laws relating to insolvency and bankruptcy are enacted under the former. That being, the Bankruptcy Code of the US is a piece of federal legislation and applies to all US states.

While the first US Bankruptcy Code came into effect in the 1800s, it has been revised numerous times.¹ In 1978 and following the work of the Review Commission of 1973, the current Bankruptcy Code was enacted. The Bankruptcy Code of 1978 is comprised of the following mechanisms:

- Liquidations;
- Municipalities;
- Reorganisation (corporate rescue);
- Family farmer; and
- Rescheduling of debt (repayment plan).

The most recent amendment to the Bankruptcy Code of 1798 has been the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"), which was born out of the Review Commission of the 1990s.

By and large, the US bankruptcy system is viewed as pro-debtor and trendsetting given its liberal approach to a debtor's ability to achieve a fresh start, rehabilitation or discharge. This is particularly evident by the Bankruptcy Code's Chapter 11 procedure (i.e. company reorganisation). However, due to the BAPCPA, a "means testing" system has now been put into place in order to determine who may file under Chapter 7 (straight bankruptcy / liquidation) or Chapter 13 (repayment plan).

In terms of international law, the US has adopted the 1997 UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"), which has replaced former section 304 of the Bankruptcy Code.

2. Civil law-based

In contrast, a civil law-based system of insolvency can be found in France. Tracing its origins back to the thirteenth century,² one of the earliest legislative enactments of significance is the *Ordonnance de Commerce* of 1673 (the "OdC 1673"). The Napoleonic insolvency codes (which were the inspiration for commercial codes of many other States) can be directly drawn from the French commercial codes of 1807 and 1838, which themselves were based on Chapter XI of the OdC 1673.

The French commercial code of 1807 could be viewed as anti-debtor as it permitted for the arrestment and detention of debtors. However, by 1889, the concept of judicial liquidation had been introduced and in 1935, the role of creditors was reduced even further while the judiciary's role increased.³ In

¹ CFI Team, "US Bankruptcy Code", <<<https://corporatefinanceinstitute.com/resources/commercial-lending/us-bankruptcy-code/>>>, accessed 11 November 2023.

² John D Honsberger, Bankruptcy in France, 1979 52-1 *Canadian Bar Review* 59, 1974 CanLII Docs 84, <<<https://canlii.ca/t/t321>>>, accessed 11 November 2023.

³ Ibid

limited circumstances, the corporate veil could be lifted in order to sanction directors of bankrupt entities who had committed offences.⁴

In 1967 and in furthering France's move towards a more debtor-friendly jurisdiction, the ability to implement a reorganisation procedure with the simultaneous benefit of a moratorium (following court approval) was introduced. These developments culminated in the insolvency law of 1985, many aspects of which are still in force to this day.

Unlike the US, France has not adopted the MLCBI.

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

1.5

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, modified universalism and territorialism are some of the theoretical solutions to problems arising with cross-border insolvency.

Universalism or, universality, can be most easily defined as the concept of one insolvency proceeding capable of dealing with all of a debtor's global assets and debts. Where one insolvency proceeding is commenced, no other insolvency proceedings should be issued in any other location against a debtor. Under the universality method, only one forum should have jurisdiction over the insolvency proceedings. Alternatively, if a single forum of jurisdiction is not used, a global framework of international insolvency law should be utilised. Whichever method of universality is proceeded with, it is clear that all of a debtor's assets should be considered under one insolvency proceeding that allows for an insolvency practitioner to control and collect in all of the debtor's assets. Further, creditors – regardless of their location globally – should be able to participate in the amalgamated proceeding on an equal basis to other creditors. In terms of recognition and effect, universalism requires other States to recognise that one set of insolvency proceedings (which are agreed as to appropriate jurisdiction) as having extraterritorial effect against the world.

In view of the fact that universalism in its purest form is not likely to be achieved, the concept of modified universalism has materialised. Unlike pure universalism, which emphasises the need for one insolvency proceeding, modified universalism subscribes to the idea that a main proceeding should be opened in the jurisdiction where an entity's centre of main interests is located and, this main proceeding can be further supported by ancillary or secondary proceedings in a different location. Regardless, the courts dealing with both the main and ancillary proceedings are expected to support and co-operate with one another.

In direct contrast to universalism is the concept of territorialism or territoriality. The territorialism school of thought promotes the idea that insolvency proceedings against the same debtor may be commenced in multiple jurisdictions. However, the proceedings should be limited to assets of the debtor within the relevant jurisdiction in which the proceedings are commenced. Therefore, under territorialism, creditors may only participate in, or file their claims in, proceedings commenced in their respective jurisdictions (i.e. a creditor concerned with a debtor's Hong Kong assets may only participate in Hong Kong proceedings, despite the fact that insolvency proceedings against the same debtor may be underfoot in England). Similarly, an insolvency practitioner's powers over proceedings and a debtor's assets would be limited to the jurisdictional borders in which the proceedings are

⁴ Ibid

commenced (i.e. using the same example directly above, an insolvency practitioner appointed over Hong Kong proceedings would only be capable of controlling and obtaining the debtor's Hong Kong assets, not the debtor's assets in England). In this way, it can be said that territorialism is concerned with the protection of local creditors and a State's national interests.

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Question 2.3 [maximum 4 marks]

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

In order to combat issues arising from international insolvency, the Latin American States have implemented multiple general treaties on private international law and commerce, which include sections on bankruptcy or insolvency. Due to their years of enactment and the number of signatories, these treaties are generally viewed as some of the most well established and multinational insolvency treaties worldwide. These treaties, ratified by differing sets of Latin American countries, are:

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

1. Montevideo Treaties

The Montevideo Treaty on International Commercial Law (1889) has been ratified by:

- Argentina;
- Bolivia;
- Columbia;
- Paraguay;
- Peru; and
- Uruguay.

Further, the Montevideo Treaty on International Commercial Terrestrial Law (1940) and the Montevideo Treaty on International Procedural Law (1940), which contain Titles on Bankruptcy and Civil Meeting of Creditors respectively, have been ratified by:

- Argentina;
- Paraguay; and
- Uruguay.

Due to the fact that the 1940 Treaties have only been ratified by three of the original six States to the 1889 Treaty, an analysis as to which treaty or treaties that apply between any two or more of the Montevideo signatory States must be carefully conducted.

The 1889 Montevideo Treaty encapsulates both corporate and personal insolvency. Further, the 1889 Treaty dictates which bankruptcy jurisdiction will apply based on a debtor's commercial domicile. In circumstances where:

- a debtor is considered to be commercially domiciled in one treaty State, one set of bankruptcy proceedings will occur in that jurisdiction. This is even in circumstances where the debtor may, from time to time, trade in other States (or has multiple offices or agents in other States); and

- where the debtor can be said to have two or more economically independent businesses in different treaty States, multiple and concurrent bankruptcy proceedings may be opened in those jurisdictions by local creditors.

2. Havana Convention on Private International Law (the Bustamante Code)

The Havana Convention on Private International Law has been adopted by the following States:

- Bolivia;
- Brazil;
- Chile;
- Costa Rica;
- Cuba;
- Dominican Republic;
- Ecuador;
- El Salvador;
- Guatemala;
- Haiti;
- Honduras;
- Nicaragua;
- Panama;
- Peru; and
- Venezuela.

As noted above, Bolivia and Peru are signatories to each of the Montevideo Treaty (1889) and the Bustamante Code (1948).

In contrast to the Montevideo Treaties, the Bustamante Code is more amenable to a single bankruptcy or insolvency proceeding with unilateral effect. This is particularly evident by the Code's first Chapter, which is entitled "Unity of Bankruptcy or Insolvency":

"If the insolvency 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...in respect of all his assets and his liabilities in the contracting States."

Despite the above, the Bustamante Code (in similar fashion to the Montevideo Treaties) does allow for concurrent proceedings in circumstances where commercial establishments are operating in multiple member States on an entirely separate economical basis. However, the Bustamante Code is silent on procedures of co-operation and co-ordination where concurrent proceedings are opened.

In true universalism fashion, the Bustamante Code recognises that insolvency proceedings issued in one member State will have unilateral effect in other member States.

4

Marks awarded 8.5 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.

While the terms "bankruptcy" and "insolvency" are often used interchangeably and without further thought, it is not necessarily true that such terms are synonymous. Each term may have a discrete definition depending on the jurisdiction in which they are used. In Australia, the term "insolvency" is reserved for describing an insolvent corporate entity, whereas the term "bankruptcy" is utilised to describe an individual or natural person being in an insolvent state.

On a separate and more technical level, "insolvency" may refer to the actual financial state of a debtor. This can be even further broken down into a balance sheet insolvency test (i.e. the liabilities of the debtor outweigh the assets of the debtor) versus a cash flow insolvency test (i.e. where the debtor cannot repay debts as and when they fall due).

On the other hand, "bankruptcy" may refer to the debtor being formally placed into bankruptcy proceedings.

In circumstances where "insolvency" and "bankruptcy" are used without differentiation, Wood⁵ identifies the following key features for their definitions:

- the ability for creditors to individually pursue actions against the debtor is halted (often referred to as a moratorium). Wood claims that the imposition of a moratorium is the only true universal feature of all insolvencies or bankruptcies;
- the assets of the debtor are collected and pooled, which in turn become available for payment to creditors. Although this feature is included by Wood, different mechanisms and exceptions to this "rule" may occur depending on the jurisdiction. As such, the pooling of assets in order to pay creditors is not a truly universal feature of insolvencies and bankruptcies; and
- payment to creditors occurs on a *pari passu* basis. In other words, creditors are paid proportionally out of the available assets and such payment is based on the creditors' claims. Given that many jurisdictions adhere to a "waterfall" basis for payment to creditors (i.e. preference is given to secured creditors over unsecured creditors etc.), Wood states that this feature is in no way "honoured" as a whole and therefore cannot be viewed as a universal feature of insolvencies and bankruptcies.

Notwithstanding the terminology being used, the objectives of an "insolvency" or "bankruptcy" for a corporate entity versus an individual or natural person can be further distinguished as set out below.

The objective for individual insolvency is to achieve:

- protection of the debtor from harassment by its creditors;
- the ability for the debtor to make a fresh start, particularly in instances where the insolvency has not occurred due to the actions or conduct of the debtor; and
- a reduction of indebtedness by way of contributions from present and future income to the estate while simultaneously taking into account the debtor's circumstances.

The objective for corporate insolvency is to achieve:

- where possible, the preservation of the business or variable parts of the business and not necessarily the company (e.g. corporate reorganisation or rescue); and
- imposition of personal liability on corporate officeholders where such persons have abused their powers and duties.

⁵ P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), p. 3.

Regardless of whether individual or corporate insolvency is being pursued, *pari passu* distribution of assets to creditors should be achieved (except, as noted above, in circumstances of creditors having priority e.g. secured creditors over unsecured creditors) and the debtor should be dealt with fairly by creditors alike. Further, investigations should also occur in order to deduce the reasons for the individual or corporate failure. Finally, where the insolvent debtor improperly dealt with assets, reclaiming of voidable dispositions should be accomplished.

The main difference in objectives for corporate versus individual insolvency is that individual insolvency recognises the need for a debtor to continue onwards following the conclusion of insolvency proceedings. This results in individual insolvency allowing for a debtor to exempt or exclude assets from the insolvency estate; these assets are limited to those that are required to maintain the debtor or their dependents.⁶ Conversely, corporate insolvency seeks to dissolve the corporate entity once insolvency proceedings are completed.

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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.

There are numerous issues which can occur in cross-border insolvencies that, in turn, hamper the ability for States to agree a universal insolvency procedure.

First and foremost, the terminology and language used by each State is not necessarily transferable. As discussed previously above, some states may use the terms "insolvency" and "bankruptcy" interchangeably, while other States attribute vastly different meanings to each word. The term "insolvency" itself usually has a concrete definition within a particular State's domestic legislation. However, each State may define "insolvency" in a slightly different way. In many States and traditionally, the term "insolvency" is used to describe a situation in which the total assets of a debtor are outweighed by the debtor's total liabilities. Further, some degree of the debtor sustaining this state of over-indebtedness is usually required. Conversely, some States may attach the term "insolvency" to a situation in which the debtor is merely experiencing short-term liquidity issues; although the debtor may be able to repay the debt on a long term basis, this short-term position can nevertheless be enough to trigger insolvency proceedings. In light of the fact that each State's use of the word "insolvency" can vary infinitesimally, many international conventions or instruments will avoid attempting to define "insolvency" altogether.

While the term "insolvency proceedings" can be easier to define, many States use a variety of different procedures within insolvency proceedings. Sometimes, two States may use the same procedure and yet refer to the name of that procedure in a completely different way. On the other hand, one State may allow for a specific procedure within insolvency proceedings, which another State would not legally recognise.

Secondly, countless differences in each State's domestic legislation on a variety of topics (otherwise known as 'conflicts of law' issues) often drastically change a creditor's priority of payment. For example, some States recognise the existence of trusts while other States do not. Further, some States place emphasis on a person's place of domicile in relation to moveable property while other States do not. As noted above, difficulties continue to arise where some States may allow for the use of a specific procedure within insolvency proceedings whereas other States do not (e.g. the cross-class cram down mechanism within a Scheme of Arrangement).

⁶ I Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1, pp 1 – 30.

Westbrook has identified the following nine essential issues when dealing with cross-border insolvencies:

- standing and/or recognition of a foreign representative;
- moratoriums on creditor actions;
- creditor participation;
- executory contracts;
- co-ordinated claims procedures;
- priorities and preferences;
- avoidance provision powers;
- discharges; and
- conflict of law issues.⁷

While it may be obvious that the solution to these issues is to agree a global set of insolvency rules, the possibility of every State setting aside decades (if not, centuries) worth of domestic legal precedence for the sake of conformity is very slim. Despite this, many argue that the only solution to the problem of these differing rules is to continue any and all attempts towards global insolvency homogenisation.⁸

When viewing "insolvency" from the lens of a "cross-border" perspective, Professor Fletcher asks three material questions⁹:

1. In which jurisdiction may insolvency proceedings be opened?
2. What country's law should be applied in respect of different aspects of the case?
3. What international effects will be accorded to proceedings conducted at a particular forum (including as to issues of enforcement)?

In answer to the above questions and as a pinnacle point for highlighting the difficulties in cross-border insolvencies, it is possible for insolvency proceedings to be commenced in multiple States, all of which will apply different laws to different aspects of the case and will result in little to no enforceability of the proceedings in other States.

5

Question 3.3 [maximum 3 marks]

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

"Soft" law often refers to suggested practices and standards, non-binding resolutions, guidelines and codes of conduct. "Hard" law, on the other hand, refers to legally binding instruments, often by way of treaties or conventions in an international law context.

In terms of international insolvency, there have been various attempts, both successfully and unsuccessfully, to implement hard and soft law.

⁷ See J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, *St Louis University Law Journal* 753, pp 753 – 757.

⁸ See D McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?", (1997) 26(3), *University of Baltimore Law Review* 15, pp 15 – 29.

⁹ See I Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005), pp 3 – 5.

1. Hard Law

As noted above, traditional examples of hard law are international instruments such as treaties and conventions. When States become a signatory to a treaty or convention, they are entering into a binding agreement in which the terms of the treaty or convention will be domestically incorporated into the State's legal system. This, in turn, may result in the State's hard laws on insolvency.

As far back as the 13th and 14th centuries, Europe has enacted bilateral treaties in order to address the issue of absconding debtors and the collective gathering of a debtor's assets. By the 19th century, numerous bilateral treaties were introduced in order to specifically address issues of jurisdiction, recognition and enforcement in an insolvency context. One example of a successful treaty in this regard is the Nordic Convention (1933) from the Scandinavian region.

For many years throughout the early 20th century, wider European attempts to achieve multilateral insolvency treaties were not successful. Then, in 1947, the Council of Europe (currently comprised of 47 member States) was founded. The Council of Europe was established in order to achieve conformity of democratic principles in-line with the European Convention of Human Rights and other various works relating to individual rights and their protection.

In 1990, the Convention on Certain International Aspects of Bankruptcy known as the Istanbul Convention, Council of Europe Treaty Series Number 136 concluded. Although the Istanbul Convention was signed by eight States, it was ultimately unsuccessful; the requisite number of States needed to ratify the Istanbul Convention in order to bring the Convention into force was not achieved. Despite the foregoing, the Istanbul Convention eventually helped to shape the European Union's protocols when dealing with international insolvency issues.

While not a convention, the European Insolvency Regulation (the "EIR") (2000), which acted as the European Union's response to international insolvency, has seen significant success. The EIR itself has been used as the basis for multinational achievements in international insolvency law. The EIR was subsequently amended to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) ("**EIR Recast**"). The EIR Recast acts as the European Union's current instrument on international insolvency within the member States. Most recently however, and due to the United Kingdom's (the "**UK**") exit from the European Union, the EIR Recast ceased to apply to the UK on 31 December 2020 at 11pm. The EIR Recast continues to be updated, with the most recent amendment occurring in 2021 and coming into effect in January of 2022.

2. Soft Law

While the success of "hard law" relating to international insolvency is up for debate, "soft" laws have gained much more traction in modern day times. A multitude of organisations (i.e. groups that are not affiliated with any State or government) have dedicated time and resources to the expansion of "soft" laws on international insolvency.

During the 19th century, the Hague Conference on Private International Law (the "**Hague Conference**") was established for the purposes of achieving unification of private law. An early initiative of the Hague Conference was the adoption of a Model Treaty on Bankruptcy in 1925. Although the Model Treaty was never ratified, it played a significant role in the shaping of further international insolvency deliberations. The Model Treaty suggested that jurisdiction of a corporation should proceed to the court in which said corporation's statutory registered seat was located "*provided that it be neither fraudulent nor fictitious*". The Hague Conference itself has labelled their organisation as "The World Organisation for Cross-border Co-operation in Civil and Commercial Matters".¹⁰ The Hague

¹⁰ HCCH, "Hague Conference on Private International Law", <<<https://www.hcch.net/index.cfm?oldlang=en>>>, accessed 15 November 2023.

Conference works together with the International Institute for the Unification of Private Law ("UNIDROIT") and the United Nations Commission on International Trade Law ("UNCITRAL"). The Hague Conference's cooperation with UNCITRAL resulted in the UNCITRAL Legislative Guide on Insolvency Law (2004).

By far and away, UNCITRAL has been the most successful proponent of "soft law" in relation to international insolvency. UNCITRAL developed MLCBI (as defined in question 2.1 above) in the mid 1990s. The MLCBI is not a treaty or a convention but rather, draft legislation. This legislation may be adopted by States with or without modification. Given the amount of States, the size of those States, and the global distance covered by the States adopting the MLCBI, it is clearly seen as the most influential response to international insolvency law issues.¹¹

3

Marks awarded 15 out of 15

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

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

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

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

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

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

Question 4.1 [Maximum 4 marks]

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

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.

The American insolvent estate representative of Norton Cars Inc has numerous resources she may use in order to gain recognition of her appointment in the UK. An American insolvency representative may apply for recognition under the UK's domestic laws (whether by way of the implementation of the MLCBI or under the Insolvency Act 1986) or under common law.

¹¹ I Mevorach in *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford Press, 2018).

The UK has amended its domestic insolvency laws to address the issue of recognition and enforcement by its adoption of the MLCBI in its Cross-Border Insolvency Regulations.¹² Cross-border insolvency cooperation by the UK with other MLCBI adopting States (such as the US) is therefore based on those mutually understood rules and processes.

Under Chapter II of the UK's Cross-Border Insolvency Regulations 2006, a foreign representative is entitled to apply directly to a court in Great Britain.¹³ The foreign representative may also apply to commence a proceeding under British insolvency law (if certain conditions for commencing such a proceeding are otherwise met).¹⁴ Further and upon recognition of a foreign proceeding, a foreign representative is entitled to participate in a proceeding regarding a debtor under British insolvency law.¹⁵

Alternatively, the US insolvency representative may utilise s.426(4) of the Insolvency Act 1986:

"The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any other relevant country or territory." (emphasis added)

Section 426(5) of the Insolvency Act 1986 then goes onto state that:

"For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in...a relevant country...is authority for the court to which the request is made 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."

The US is not designated in relation to s426

In other words, the English courts are under a duty to assist requesting foreign courts in insolvency proceedings. When faced with such a request, the UK courts may apply English or the requesting jurisdiction's rules in relation to the specific circumstances of the request.

If all else fails, the US insolvency representative may apply for recognition under the UK's common law. The representative may rely on cases such as *McGrath v Riddell*¹⁶ and *Singularis Holdings Ltd v PricewaterhouseCoopers*¹⁷ in which the English courts have recognised the need for foreign insolvency representatives to be able to collect information from a UK debtor and control the debtor's UK assets.

3.5

Question 4.2 [Maximum 4 marks]

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

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

¹² The Cross-Border Insolvency Regulations 2006 (SI 2006/1030); the Cross-Border Insolvency Regulations (Northern Ireland) 2007 (SR 2007/115).

¹³ Article 9, Chapter II of the Cross-Border Insolvency Regulations 2006.

¹⁴ Article 11, Chapter II of the Cross-Border Insolvency Regulations 2006.

¹⁵ Article 12, Chapter II of the Cross-Border Insolvency Regulations 2006.

¹⁶ [2008] UKHL 21.

¹⁷ [2014] UKPC 36 [2015] AC 1675

The EIR (Recast) will be the applicable legal resource to be used in a cross-border insolvency matter between Italy and Germany given that both States are EU member States.

Under the EIR (Recast), allocation of jurisdictional competence is awarded to the courts of an EU member State which is deemed the centre of the debtor's main interests (the "COMI").¹⁸ Although the EIR (Recast) allocates main insolvency proceedings based on the debtor's COMI, secondary proceedings may be initiated in other member States. Such secondary proceedings are permitted in circumstances where the debtor has an establishment. The term "establishment" within the EIR (Recast) is specifically defined to mean "*any place of operations...where the debtor carries out a non-transitory economic activity with human means and assets*". The secondary proceedings may be independently initiated (i.e. before the commencement of the main proceedings) or truly secondary (i.e. opened after the commencement of the main proceedings in the debtors COMI).

Applying the above to Norton Cars Inc, it is likely that the main insolvency proceedings would be opened in Italy as Italy is the company's COMI. However, given that the company's main operations transpired in Germany, secondary insolvency proceedings could very well be initiated in Germany as it is likely that the main operations of a company would fall into the EIR (Recast) definition of an "establishment".

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 of 9 January 2022, the EIR (Recast) only applies to EU member States. However, the EIR (Recast) does recognise the existence of insolvency proceedings outside of the EU for the purposes of co-operation between courts.

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.)

Both the Netherlands and Italy are member States of the EU. As such, the EIR (Recast) would apply to the insolvency proceedings. While the usual norm under the EIR (Recast) would be to apply the laws of the main proceedings (i.e. the debtor's COMI), Article 8 of the EIR (Recast) covers third parties' rights *in rem* (i.e. security). Article 8 states that the initiation of insolvency proceedings does not affect the rights in *rem* of creditors or third parties in respect of tangible, intangible, movable or immovable assets which are situated in another EU Member State. As such, the laws of the Netherlands would apply to the real rights of security situated in the Netherlands despite the fact that main insolvency proceedings may be initiated in Italy.

¹⁸ "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" (EIR Recast, Art 3(1)).

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.)

Australia is not a signatory any relevant international treaties or EU legislation. Although Australia has adopted the MLCBI, it does not recognise international insolvency matters unless they are issued from a State that has also adopted the MLCBI, which Italy has not.

As such, Australian domestic laws on insolvency would apply to an insolvency proceeding in Australia and concerned with real rights of security situated in Australia. Australian law is based on English common law. However, and unlike the UK, Australia's insolvency laws are not unified. In general, insolvencies pertaining to corporate entities, such as Norton Cars Inc, are governed by the Corporations Act 2001.

3

Marks awarded 14.5 out of 15

*** End of Assessment ***

TOTAL MARKS 47/50

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