INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

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

Question 1.3

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

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10 ,

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

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

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

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

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

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Countries such as the United States, England, Australia, Canada and India all have insolvency law systems rooted in English (common) law.

Most European and African countries, as well as China, Japan and all South American nations not including Guyana, have their insolvency systems based on civil law.

The origins of civil law in an insolvency context, can be derived from Roman law and Tablet 3 of the Twelve Tables which dealt with the exaction of judgements. In this regard, debt executions developed from the debtor pledging his own body for the repayment of the risking imprisonment, a death sentence or slavery in order to secure repayment of the debt. In more modern times, it can be said that civil law insolvency systems can be seen as creditor-friendly as the approach is focused on the protection of the creditors' rights and adopting a more conservative approach towards the granting of a discharge of debt to debtors. Examples of legislation which favour civil law orientated foundations include:

- The Dutch insolvency law, specifically the ordinance of Amsterdam of 1772.
- The *Ordonnance de commerce* of 1673, this provided the foundation of the French insolvency law and the commercial codes in 1807 and 1838. The code of 1807 allowed for the arrest and detention of debtors and was seen to be harsh penalty.
- The German *insolvenzordnung* in 1999 is noted as the current bankruptcy code in Germany.

In contrast, the countries mentioned above where English (common) law is evident have a pro-debtor policy to insolvency law and can be characterised through a more liberal approach towards a discharge of debt, this has been referred to as "rehabilitation" or "Fresh start". Examples of English (common) law rooted legislations can be seen in:

- The Insolvency Act of 1986, implemented in England and Wales
- The Bankruptcy Code of 1978 which is implemented in the USA and is seen as a prime example of a pro-debtor system.
- Australia, the Corporations Act 2001 regulates corporate insolvency and the Bankruptcy Act 1966 regulates the insolvency of individuals.

In conclusion, civil law and English (common) law policies show up in a variety of insolvency laws within a country and will dictate how creditor and debtors are treated, however the local culture and basic rights within that county will also have a significant impact in the way in which a system deals with matters on insolvency both individual and corporate.

There is scope to elaborate regarding common law vs codified law.

2.5

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.

The approach of Universalism / Universality is the concept that there should be only one insolvency proceeding covering all of the debtor's assets and debts worldwide. It allows for more than one insolvency proceeding in different jurisdictions to be dealt with under the provision of one insolvency law. Primary insolvency proceedings may be administered where

the debtor has its centre of main interest ("COMI"). Essentially, the insolvency law selected will control the worldwide effect and regulate the secondary insolvency proceedings in different jurisdictions. It calls for so-called "unity of proceedings", allowing the law of the state where the "main proceeding" is opened (the *Lex concursus*) to regulate the matter. To elaborate, in in the case of universalism, recognition and effect requires that other states recognise that one set of insolvency proceedings and recognise it as having extraterritorial effect in their state.

On the other hand, territorialism is based on the notion that insolvency proceedings may be commenced in every states / jurisdiction where the debtor holds assets leading to a plurality of insolvency proceedings. However, the assets should be territorially limited and restricted to the property within the states where the proceedings are opened. This is unlike universalism where one forum should have jurisdiction over the debtor's assets.

A key difference between universalism and territorialism is in relation to creditors' rights. With universalism, all creditors worldwide should have the opportunity of participating in the proceedings with all claims being treated on an equal basis whereas with territorialism, creditors' claims are restricted and confined to the national borders of the state where the insolvency proceedings are taking place.

The concept of modified universalism has emerged as a result of the global consensus that universalism in its purest form is likely never to be achieved and that many states are closer to an approach of territorialism. Modified universalism differs from the two concepts mentioned above in that the main / primary proceedings opened in one state where the COMI has been determined is actually supported by secondary or ancillary proceedings. This approach requires effective communication and cooperation amongst the courts in different jurisdictions.

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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.

Latin American states have achieved some of the most long-lasting, multilateral agreements to assist with the management of international insolvency issues. These agreements include:

- The Montevideo Treaties (1889), adopted by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. These eight treaties were seen as the first successful code on private international law and demonstrated a respect of national sovereignty between the nations. These were the first treaties on conflict law to be adopted at that time. The treaties covered personal and corporate insolvency and assigns bankruptcy jurisdiction based on the commercial domicile where; a debtor has a commercial domicile in one state and; where the debtor has two or more economically autonomous business in different treaty states and provide for the provision of the possibility of concurrent proceedings. One of the most notable treaties was the Montevideo Treaty on International Commercial Law (1889).

- Havana Convention on Private International Law (The Bustamante Code of 20 February 1928), ratified by Latin and middle American states including; Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. Bolivia and Peru are the only parties to both the Montevideo Treaty (1889) and the Bustamante Code (1928).

- The Montevideo Treaties (1940), adopted by Argentina, Paraguay and Uruguay. These treaties were designed to update current legislation, adapt specific provisions and reaffirm existing treaties. It is important to note that the Montevideo Treaty on international Terrestrial Law (1940) contained Title VIII on bankruptcy.

The main differences between these treaties are outlined below:

- The individual states that have ratified the Montevideo Treaties (1889) and (1940) and the Bustamante Code (1928) are not all the same. Therefore when dealing with matters of international insolvency one must pay close attention to which treaty or treaties apply.

- Article 414 of the Bustamante Code (1928) states "if the insolvent or bankrupt debtor has only one civil or commercial domicile, there can be only one preventive proceeding in insolvency or bankruptcy" therefore one would say that this code is more supportive than the Montevideo treaties as it allows for a single proceeding with universal effect through its region.

- Lastly, according to the Montevideo Treaties regarding concurrent proceedings, if a debtor is only occasionally trading in more than one state or has branches or agents in another contracting state, the approach provides for a single proceeding. This is unlike the Havana Convention which does not provide procedures for co-operation of any concurrent proceedings.

4

Marks awarded 9.5 out of 10

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

Question 3.1 [maximum 7 marks]

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

While bankruptcy and insolvency both relate to debt, I do not believe these terms should be used interchangeably as the two terms have different meanings and implications.

Insolvency can mean a financial state while bankruptcy is a legal process. To explain further, insolvency is the situation when the liabilities of a debtor exceed the assets of a debtor (balance sheet insolvency) or where the debtor cannot meet their financial obligations to debts as they fall due by reason of cash flow problems (cash flow or commercial insolvency). Bankruptcy, on the other hand, can refer to the formal state of being put into formal bankruptcy proceedings.

Additionally, the terms have different applications. Some sources of insolvency law use the term 'bankruptcy' while other sources use the term 'insolvency'. An example of this can be seen in Australia where the term 'insolvency' is often associated with the insolvency of a corporation and supported by legislation such as the Corporations Act of 2001, which regulates corporate insolvency. While the term 'bankruptcy' usually refers to the insolvency of an individual and is supported by the Bankruptcy Act of 1966 which regulates the insolvency of an individual or natural person.

It may also be said that corporate insolvency can have a greater impact on people's lives and a country's economy as opposed to individual bankruptcies. With that said, there are three essential features of bankruptcy for individuals and corporations as explored by Philip R Wood and include: (i) Actions by individual creditors against the bankrupt are frozen. The piecemeal seizure of assets by disappointed creditors through attachment or executions are stayed and replaced by a right for a dividend against the pool. (ii) All assets of the bankrupt belong to the pool which is available to pay creditors. (iii) Creditors are paid pari passu, ie pro rata out of the assets according to their claims.

However, although there are similarities with the two, there are key differences between the objectives of insolvency / bankruptcy for individuals and corporations which are outlined in Sealy and Hooley Commercial law. For individuals the objectives are as follows:

- to protect the insolvent from harassment by his creditors
- to enable him to make a fresh start, especially in a less blameworthy cases;
- to have him reduce his indebtedness by making such contributions from his present resources and future earnings as is just, taking into account his personal circumstances and the claims and needs of his family.

In corporate insolvency:

- where possible, to preserve the business, or the viable parts of it (but not necessarily the *company*)

In addition to the differences in objectives, there are also pertinent differences between the two when it comes to assets and the end of an insolvency or bankruptcy. For example, the notion of exempt or excluded assets will only apply to an individual and individuals are also not dissolved after bankruptcy however, a company is dissolved once the affairs have been wound up.

In conclusion, while various systems use the terms "bankruptcy" and "insolvency" interchangeably, generally speaking the term bankruptcy refers to the insolvency of an individual and is also considered a formal legal process while the term insolvency usually refers to the insolvency of a corporation and is seen more as a financial state. Depending on the state in which a debtor is located the sources of insolvency may be the same with provisions included to be more applicable to individuals (natural persons) or corporations such as the Insolvency Act 1986 and the Bankruptcy Code of 1978 or differ entirely where separate legislation is used in one state, such as Australia for corporations and individuals. It is also worth noting that local laws and cultures will play a key role in the legal proceedings for each.

7

Question 3.2 [maximum 5 marks]

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

To analyse the challenges associated with cross board insolvency which hinder the implementation of a successful single global cross-border insolvency dispensation, we must first define the term. Cross border insolvency in its simplest form is a transnational insolvency which involves an insolvency proceeding in one country, with creditors and/or assets located in at least one other county.

As discussed by Hakan Friman at the University of Pretoria, issues with cross-border insolvency begin with finding a common insolvency language. This gives rise to a variety of interpretations leading to conflicting understandings in an international context.

Due to the nature of globalisation, trade and movement of assets across borders, cross-border legal issues and transnational insolvency law issues arise. Different states have different laws

and as such problems are created due to the difference in approaches and policies as well as variances in substantive and procedural rulings. As there is not a single set of insolvency rules that apply globally, this absence of a single insolvency law system combined with the lack of a global parliament to enforce judgements when deal with cross-border insolvency issues leads states to rely on their own insolvency legislation. Many of which are ill-equipped when dealing with international insolvency matters.

Policy considerations contribute to the hindrance of the development of a single international insolvency system as pro-creditor orientated systems typically found in West-European countries follow a more conservative approach towards the granting of a discharge or debt to debtors, while pro-debtor orientated systems such as the USA, adopt a more liberal approach towards discharge of debt, also known as 'rehabilitation' or 'fresh start'. However, we are seeing reforms in pro-creditor systems, for example the Dutch system which has introduced the concept of a 'fresh start' in view of over-indebtedness in recent years.

Furthermore, Westbrook has identified nine key issues in cross-border cases: standing for (recognition of) the foreign representative; moratorium on creditor actions; creditor participation; executory contracts; co-ordinated claims procedures; priorities and preferences; avoidance provision powers; discharges and conflict-of-law issues.

Additionally, the various sources of insolvency law adopted by a country are influenced by either an English common law or civil law orientated foundation, this results in different approaches being implemented to deal with cross-border insolvency issues and presents further challenges when attempting to establish a uniformed international insolvency dispensation. For example, common law countries usually adopt the approach of universalism which promotes one insolvency proceeding covering all of the debtor's assets and debts worldwide based on the COMITY of the insolvency. However, this principle can create insecurity in domestic markets and that the states standards where the insolvency proceedings will exclusively be opened may be indeterminate and open to strategic influence.

Alternatively, civil law countries that generally adopt a territorialism approach, meaning insolvency proceedings, may be opened in every jurisdiction where the debtor holds assets. However, they should be territorially limited to property within the state where the proceedings were commenced. This presents issues as the debtor in this situation may be declared insolvency in a state where the debts are but solvent in a state were the assets are.

While attempts have been made to harmonise the cross-border insolvency such are the adoption of modern universalism, where main / primary proceedings opened in one state where the COMI has been determined is actually supported by secondary or ancillary proceedings. There is still a short coming when applying a uniformed international insolvency dispensation.

5

Question 3.3 [maximum 3 marks]

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

Hard law refers public international instruments, including binding treaties and conventions that have been developed, to which states become signatories on and in turn effect their domestic laws accordingly. An example of successful hard laws are the Montevideo Treaties of 1889 and 1940 in Latin America and the Nordic Convention of 1933 from the Scandinavian region. By strengthening ties between contracting nations, hard law options have helped to

address the challenges of international insolvency though attempting to codify private international law.

On the other hand, soft law can be seen as non-binding principles and a form of guidelines to promote best practice and encourage communication and cooperation among international states. An example of soft law which has been successful can be seen as the Model Law on Cross-border Insolvency ("MLCBI"). Unlike hard law options, this initiative did not take the form of a treaty or a convention. It was a draft legislation seen as a Model Law which was presented to UNCITRAL member states to be adopted with or without modification. Due to various socio-economic factors and the fact more and more states are adopting the MLCBI, it is seen as an influential response to international insolvency law. Soft laws are key in influencing domestic laws so that they may be improved in order to be more adequate when dealing with international insolvency issues.

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.

My advice to the American insolvent estate representative would be to look to the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) implemented in England and Wales in 2006 as the USA is not a relevant country for the purpose of section 426 of the Insolvency Act (1986) to be applied.

Furthermore the UK has adopted the UNCITRAL Model law on Recognition and Enforcement of Insolvency-Related Judgements which can assist in providing guidance on recognition. As the US and England have adopted the UNCITRAL Model Law on Cross-Border Insolvency, reviewing this soft law approach will be useful for the American insolvent estate representative.

Lastly, as England is a common law country, the American insolvency representative could refer to relevant judge made law on cross-border matters where English courts have recognized foreign insolvency orders or judgments to assist with the insolvency proceedings.

4

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.

As Italy and Germany are both members of the European Union, the appropriate legal source to follow is the European Insolvency Regulations (Recast) 2015 ("EIR Recast") which determines the proper jurisdiction for a debtor's insolvency proceedings, what applicable law is to be used in said proceedings and ensures mandatory recognition of those proceedings in European Union member states.

As the EIR Recast allocates primary jurisdiction based on the COMI, Italy is the country where the main proceedings will be opened. Additionally, Article 7.1 states that "The applicable law to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened ("The State of the opening proceedings")". As the main proceedings are opened in Italy, the applicable law will also be that of Italy (the Italian Bankruptcy Act) and pursuant to EIR Recast Article 20, judgements opening an insolvency proceeding in Italy will have the same effect in Germany without further formalities.

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 India, South Africa and Australia are not in the European Union and therefore these regulations do not apply.

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 Dutch Bankruptcy Act (Faillisementswet) will also need to be studied and applied in this situation. In addition, the UNCITRAL Model Law on Secured Transactions (2016) would need to be reviewed as it attempts to harmonise the rule relating to security interest around the world. UNCITRAL Model Law on Secured Transactions applies to all types of assets, secured obligation, borrow and lender.

There is scope to elaborate

2

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

As Australia is a common law system we are likely to encounter a floating charge, and as such the general law will prescribe how these rights are established. With that said, the Australian Corporations Act of 2001 would be the relevant law to study in this context as it deals with corporate insolvencies, in relation to the real rights of security situated in the state, UNCITRAL Model Law on Secured Transactions (2016) provides guidance on how to deal with these matters.

There is scope to elaborate

2

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 46.5/50

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