



**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 12<sup>th</sup> 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.

Examples of countries whose insolvency systems have historical roots in English law (i.e. common law systems) include:

- (1) England. England has adopted the Insolvency Act 1986 which is an example of unified insolvency legislation as it deals with both the insolvency of corporations and the bankruptcy of individual natural persons in the same Act.
- (2) The United States of America (USA). The USA has adopted the Bankruptcy Code which is federal legislation and therefore applies to all US states. The Bankruptcy Code is another example of unified insolvency legislation. The American system is a good example of a pro-debtor system due to its liberal 'fresh start' approach.
- (3) Australia. Whilst Australian law is also based on English common law, it does not have unified insolvency legislation like England and the USA. Instead, the Corporations Act 2001 regulates corporate insolvency and the Bankruptcy Act 1966 regulates personal insolvency.

Examples of countries whose insolvency systems have historical roots in civil law systems include:

- (1) France. The insolvency legislation in France was traditionally harsh towards debtors (the 1807 commercial code allowed for the arrest and detention of debtors). However, the severe treatment of bankrupts and failed businesses has since been updated and the insolvency legislation was revised in the 1985 Act.
- (2) Germany. Germany reformed its insolvency legislation during the 1990s and the Insolvenzordnung came into force on 1 January 1999. This is another example of unified insolvency legislation.
- (3) The Netherlands. Dutch insolvency legislation was typical of many West-European countries as it was very much pro-creditor (i.e. no discharge was allowed unless creditors agreed). However, the concept of a 'fresh start' (like in the USA) has been introduced and the Netherlands is in the process of reforming its insolvency laws. The Dutch scheme of arrangement (WHOA) entered into force on 1 January 2021.

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

**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.

The concept of universalism provides that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide. This means that only one set of insolvency proceedings should be opened, for example in the State where the debtor has its centre of main interests (COMI).

This concept is based on the approach that all of the debtor's assets should be included in the single set of insolvency proceedings and all creditors around the world should have the opportunity to participate in the single set of proceedings on an equal basis.

This approach benefits from lower costs due to a single set of proceedings, however this requires other States to recognise the proceedings and the extraterritorial effect of those proceedings in the relevant States. As a result, universalism requires a high level of trust in foreign legal systems and foreign insolvency proceedings.

On the other hand, the concept of territoriality provides that insolvency proceedings can be opened in every State and jurisdiction where the debtor holds assets. This can therefore lead to multiple insolvency proceedings running concurrently with each other which is known as plurality of proceedings.

This approach benefits local creditors in the relevant State, however smaller creditors will face difficulties in participating in the other ongoing insolvency proceedings in other States (i.e. without local insolvency proceedings, only the strongest creditors who can participate in multiple proceedings may receive payment). Territorialism can result in the debtor being declared insolvent in one State (i.e. where the debts are located) but not in another State (where the debtor's assets are located).

**There is scope to consider territorial limits here**

In practice, States do not adopt universalism or territorialism in their purest form. As a result, the notion of modified universalism can be adopted where the main proceeding is opened in the State where the centre of main interest has been established. This main proceeding can then be supported by secondary or ancillary proceedings in another State. Where modified universalism is adopted, the courts dealing with the main and secondary or ancillary proceedings should co-operate with each other and assist each other. **There is scope to consider COMI here**

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.

In Latin America, a number of general treaties have been concluded on private international law which deal with bankruptcy and insolvency. These treaties are: (i) the Montevideo Treaties (1889 and 1940); and (ii) the Havana Convention on Private International Law (1928) (Bustamante Code).

The Montevideo Treaty of 1889 has been ratified by a number of Latin American States, however the Treaty of 1940 has only been ratified by three of the original treaty States (Argentina, Paraguay and Uruguay). As a result, an international insolvency between the Montevideo Treaty States needs to be carefully considered in order to determine which treaty or treaties apply.

The 1889 Treaty regulates personal and corporate insolvency and allocates jurisdiction dependent on the debtor's domicile. Where the debtor has commercial domicile in one treaty State, the 1889 Treaty provides for one set of proceedings in that State (even where the debtor occasionally trades in more than one State or has branches or agents in another State). Where the debtor has two or more businesses in different treaty States, the 1889 Treaty provides for the option of concurrent proceedings. In the event that insolvency proceedings are opened in one State, then a local creditor in the other State where the debtor conducts an economically autonomous business may also open proceedings in that State or take other civil action against the debtor.



The Havana Convention on Private International Law was also concluded in 1928 (the Bustamante Code) between a number of Latin American and Middle American States. Bolivia and Peru are party to both the Montevideo Treaty (1889) and the Bustamante Code (1928) whereas Argentina, Colombia, Mexico, Paraguay and Uruguay did not ratify the Havana Convention and are not party.

The Havana Convention promotes a single proceeding with universal effect throughout its region (and is more supportive than the Montevideo Treaties in this respect). Article 414 of the Havana Convention states that where the debtor has only one civil or commercial domicile, there can be only one set of insolvency proceedings in respect of all the debtor's assets and liabilities in the contracting States.

However, there can be concurrent proceedings in the Havana Convention States where commercial establishments are operating entirely separately economically. Whilst the Havana Convention accepts that insolvency proceedings commenced in one member State will have extraterritorial effect in another member State it does set out procedures for co-operation or co-ordination of any concurrent proceedings.

**It would be more beneficial to explicitly compare and state differences between the agreements**

**3.5**

**Marks awarded 7.5 out of 10**

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

#### **Question 3.1 [maximum 7 marks]**

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

It is true that the terms ‘bankruptcy’ and ‘insolvency’ are used interchangeably by different States in relation to insolvency matters. Indeed, Fletcher<sup>1</sup> notes that these terms are used as synonyms by States in many systems.

However, these terms do refer to separate things and in this answer the author does not agree with the question statement. ‘Insolvency’ can be considered as the state of financial affairs of a debtor whereas ‘bankruptcy’ refers to the formal state of being put into a formal bankruptcy proceeding.

Another distinction is the use of these terms when referring to companies or individual natural persons. For example, in England, ‘insolvency’ is used to refer to the insolvency of a corporation whereas ‘bankruptcy’ is used to refer to the insolvency of an individual natural person. This approach is also adopted in Australia.

There are also different objectives for the insolvency of corporations (i.e. ‘insolvency’) and the insolvency of individual natural persons (i.e. ‘bankruptcy’) as noted by Sealy and Hooley<sup>2</sup>. The objectives of insolvency for individuals include: (i) protecting the individual from harassment by their creditors; (ii) allowing the individual to make a fresh start – particularly in cases where the insolvency

---

<sup>1</sup> I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell 5th ed, 2017)

<sup>2</sup> M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), chap 28.

has not been brought about by the conduct or actions of the individual; and (iii) reducing the indebtedness of the individual by making contributions to the estate (from both present and future income).

In relation to corporations, Sealy and Hooley consider that the objectives include: (i) preserving the business (or at least the viable parts of the business); and (ii) imposing personal liability on responsible persons (i.e. directors) where the concept of personal liability has been abused.

Another example of a difference between corporate insolvency ('insolvency') and individual insolvency ('bankruptcy') is the concept of exempt or excluded assets. It is only in individual insolvency where some insolvency systems allow the insolvent individual to retain some of their assets that are required by the individual or their dependents. The concept of dissolution also only applies in corporate insolvency.

However, the following principles can apply to both individual insolvency and corporate insolvency: (i) ensuring pari passu distribution to creditors as far as possible, save where creditors have priority (i.e. secured creditors); (ii) ensuring secured creditors deal with the debtor (individual or company) and other creditors fairly; (iii) investigating the reasons for failure and the insolvency; and (iv) to reclaim assets where the debtor dealt with those assets improperly in the period prior to insolvency.

There are also common features of 'insolvency' and 'bankruptcy' that can be considered universal principles. Wood<sup>3</sup> contends that the only truly universal feature of 'insolvency' and 'bankruptcy' is the moratorium or the automatic stay (i.e. actions by individual creditors against the bankrupt (both corporations and individual natural persons) are frozen).

Wood also argues that the pooling of assets of the debtor to pay its creditors or the fact that creditors rank pari passu (i.e. creditors' claims of the same class rank on a proportionate basis in relation to the available assets of the debtor) are common features of both 'insolvency' and 'bankruptcy'. However, the extent to which these features are applied in practice can differ greatly due to the opposing approaches of States when dealing with cross-border insolvency.

In conclusion, whilst the terms 'insolvency' and 'bankruptcy' are often used interchangeably by States, the distinction between these two terms should be noted in order to develop a common insolvency language to be adopted by multiple States. Whilst there are some common key principles between insolvency and bankruptcy, it should be clarified that the terms themselves relate to different matters, namely the insolvency of a company and the bankruptcy of an individual natural person.

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.

As noted by Wood<sup>4</sup> there is no single set of insolvency rules that apply on a global basis. This lack of a global insolvency system means that many challenges arise for all stakeholders (i.e. debtors, creditors and practitioners) when dealing with cross-border insolvency matters. Cross-border insolvency can often lead to the opening of insolvency proceedings in more than one State. A key issue is how to co-ordinate multiple and concurrent insolvency proceedings in multiple States against the same debtor.

---

<sup>3</sup> P R Wood, Principles of International Insolvency (Sweet and Maxwell Ltd, 2007)

<sup>4</sup> P R Wood, Principles of International Insolvency (Sweet and Maxwell Ltd, 2007)

Friman<sup>5</sup> notes that one of the first issues that arises when dealing with insolvency law in a cross-border context is finding a common language for insolvency. For example, a short-term inability to service debts can be considered sufficient for the commencement of insolvency proceedings in some States but not others. This means it can be difficult to define the term insolvency at an international level, as evidenced by the fact that some international conventions and instruments do not even attempt to include a definition of insolvency.

Omar<sup>6</sup> also notes that differences in insolvency systems can have a specific impact on the position of creditors and their priorities in insolvency processes. There are also qualifications in different jurisdictions (i.e. security, retention of title clauses and other title protection measures available to creditors).

Westbrook<sup>7</sup> has summarised key issues in cross-border cases, being: (i) standing and recognition of the foreign representative, (ii) moratorium on creditor actions, (iii) creditor participation, (iv) executory contracts (v) co-ordinated claims procedures, (vi) priorities and preferences, (vii) avoidance provision powers, (viii) discharges and (ix) conflict of law issues.

Indeed, when considering the three questions raised by Fletcher<sup>8</sup> (i) in which jurisdictions may insolvency proceedings be opened? (ii) what country's laws should be applied in respect of different aspects of the case? (iii) what international effects will be accorded to proceedings conducted at a particular forum?), there is the potential for insolvency proceedings to be opened concurrently in more than one State where each State would apply its own laws (including its choice of law rules) and where no or limited extraterritorial effects would be granted to foreign proceedings in other States. This is a clear example of the difficulties faced in attempting to achieve co-operation and co-ordination between different States in cross-border insolvency matters.

One of the biggest differences between in attempting to harmonise the approach of multiple States to develop a global system is that some systems are pro-creditor (i.e. follow a more conservative approach in relation to granting a discharge of debt to debtors) and some systems are pro-debtor (i.e. follow a more liberal approach towards the discharge of debt).

Commentators argue that the fundamental differences between legal systems are both the root problem of cross border insolvencies and the major obstacle to their solution. As such, commentators argue that the goal of harmonisation must continue to be pursued.

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.

Public international instruments are treaties and conventions to which States become signatories. The signatory States bind themselves to these treaties and conventions which are incorporated into the domestic laws enforceable in the courts of the relevant State. The treaties and conventions therefore become “hard law”.

---

<sup>5</sup> H. Friman

<sup>6</sup> P J Omar “The Landscape of International Insolvency” (2002) 11, IIR 173

<sup>7</sup> J L Westbrook, “Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court” (2018) 96 Texas Law Review

<sup>8</sup> I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005)

Examples of bilateral international insolvency conventions in Europe can be traced back to the 13th and 14th centuries. In 1990, the Council of Europe (formed in 1949) concluded the Istanbul Convention. Ultimately, this convention was not ratified and did not enter into force but it did have an important influence on the development of a response by the EU to the issues of international insolvencies amongst the EU member states.

The European Insolvency Regulation (EIR) 2000 has also influenced multilateral developments in international insolvency law. The EIR was reviewed and amended and the current multilateral instrument on international insolvencies within the EU is the EIR Recast (2015).

In contrast to “hard law”, “soft law” is not binding on the relevant States. However, a range of multilateral organisations have achieved a large amount of success through the “soft law” approach in recent years.

In the 19th century, the Hague Conference was established to work towards the unification of private international law. Like the Istanbul Convention, the Model Treaty on Bankruptcy adopted by the Hague Conference in 1925 was never ratified but has contributed to the development of a combined approach to international insolvency. The Hague Conference is now known as the World Organisation for Cross-border Co-operation in Civil and Commercial Matters and coordinates with the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL).

It is agreed by commentators that the most successful “soft law” approach is the Model Law on cross-border insolvency developed by UNCITRAL. The Model Law is not a treaty or convention but is instead draft legislation that UNCITRAL recommends member States to adopt (on a modified or unmodified basis). Mevorach<sup>9</sup> considers that the Model Law is gaining momentum as an influential response to international insolvency law.

**There are times when you are heavily reliant on the wording in the guide. It would be beneficial to further elaborate in your own words**

**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.

---

<sup>9</sup> I Mevorach – The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press, 2018)

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 UNCITRAL Model Law on Cross-Border Insolvency has been adopted in England and Wales and incorporated into English law pursuant to The Cross-Border Insolvency Regulations 2006 (the “Regulations”).

The American insolvent estate representative (the “**Representative**”) would be deemed a foreign representative for the purposes of the Regulations.

Regulation 15 of the Regulations would allow the Representative to apply to the court in England for recognition of the foreign proceedings in America against Norton Cars Inc (“**Norton**”) pursuant to which the Representative was appointed. This application for recognition would need to be accompanied by evidence of the proceedings in America and evidence of the appointment of the Representative in the American proceedings (Regulation 15(2)) and a statement by the Representative identifying all foreign proceedings, proceedings under British insolvency law and section 426 Insolvency Act 1986 requests in respect of Norton that are known to the Representative (Regulation 15(3)).

A request under s.426 of the Insolvency Act 1986 relates to a request by courts that have jurisdiction in one part of the United Kingdom for assistance and co-operation from a court that has jurisdiction in another part of the United Kingdom. As the foreign proceedings in relation to Norton have been commenced in America, the Representative would not be able to require the court in England to co-operate under s.426 as this section only deals with jurisdiction in different parts of the United Kingdom, i.e. England and the Channel Islands or a country or territory designated by the Secretary of State.

The courts in England can then decide whether to recognise the foreign proceedings in England in accordance with Regulation 17 of the Regulations.

From the point at which the Representative files an application for recognition, until the application is decided upon, the court in England may grant relief of a provisional nature under Article 19 of the Regulations, including staying execution against Norton’s assets or suspending the right of Norton to transfer, encumber or otherwise dispose of its assets (Regulation 19(1)(c)).

Where the court in England approves the recognition of the American proceedings, the Representative can apply for the court to grant relief under Regulation 21 of the Regulations including staying the commencement of individual actions against Norton’s assets, staying execution against Norton’s assets and suspending the right of Norton to transfer, encumber or otherwise dispose of any of its assets.

The court can also entrust the administration or realisation of all or part of Norton's assets located in Great Britain to the Representative (Regulation 21(1)(e)).

Under Regulation 18 of the Regulations, the Regulator is required to inform the court in England of any substantial change in the status of the recognised foreign proceedings in America and any other foreign proceedings in relation to Norton that become known to the liquidator.

#### **Common law warrants further elaboration**

**3**

#### **Question 4.2 [Maximum 4 marks]**

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

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

The appropriate source to be used in a cross-border matter between Italy and Germany is Regulation (EU) 2015/2018 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) ("**EIR Recast**").

Pursuant to Article 7.1 of the EIR Recast, the law applicable to the insolvency proceedings and their effects should be the law of the Member State within the territory of which such proceedings are opened.

The EIR Recast allocates jurisdictional competence to the courts of the member State where the debtor's centre of main interests is situated. As the COMI of Norton has shifted to Italy, jurisdictional competence should therefore be allocated to the courts in Italy.

However, whilst the main proceedings should be opened in Italy due to Norton's COMI, the EIR Recast also allows for the possibility of subsidiary territorial proceedings in other member States where the debtor has an establishment, being any place of operations where the debtor carries out a non-transitory economic activity with human means and assets (Article 2(10) of the EIR Recast).

On these facts, Norton has an establishment in Germany. Proceedings could therefore be opened in Germany, either as 'independent proceedings' (proceedings opened prior to the main proceedings in Italy) or 'secondary proceedings' (proceedings opened subsequent to the bankruptcy adjudication in Italy, being the COMI of Norton).

**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 EU Member States they are not eligible to apply the EU (Recast) Insolvency Regulation and the recognition of the EU insolvency representative will depend on the relevant cross-border insolvency legislation adopted by those States.

**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.)

As Italy and the Netherlands are both member states of the European Union, the EIR Recast would apply in this scenario. The branch operated by Norton in the Netherlands would be deemed an establishment under the EIR Recast.

Pursuant to Article 19 of the EIR Recast, the opening of insolvency proceedings in Italy would be automatically recognised in all other Member States including the Netherlands.

Pursuant to Article 21 of the EIR Recast, the insolvency practitioner appointed in Italy may exercise all the powers conferred on them in Italy in another Member State (i.e. the Netherlands) provided that no other insolvency proceedings have been opened there. The insolvency practitioner may remove the assets of Norton that are situated in the Netherlands (subject to Articles 8 (Third parties' rights in rem) and 10 (Reservation of title) of the EIR Recast).

**In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.**

**1**

- (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 the COMI of Norton is in Italy, the EIR Recast would still apply in Italy however the principle of automatic recognition under Article 19 of the EIR Recast would not apply in Australia as Australia is not a Member State of the European Union.

As Australia has adopted the UNCITRAL Model Law on Cross-border insolvency, through the Cross-border Insolvency Act 2008 (the "Act"), the insolvency practitioner appointed in Italy would be deemed a foreign representative and could apply for recognition of the Italian proceedings in Australia under Article 15 of the Act.

The insolvency practitioner appointed in Italy could also request co-operation between the Australian and Italian courts under sections 580-581 of the Corporations Act in relation to the liquidation of Norton in Italy.

**Take care to answer the specific sub-question**

**0.5**

**Marks awarded 9.5 out of 15**

**\* End of Assessment \***

**TOTAL MARKS AWARDED 41/50**

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