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.

There are different classifications for a country's legal system. However, they can (broadly) be said to be based on either civil law or English law. Notwithstanding this distinction in classification, the history of most legal systems' insolvency law began with simple individual debt collecting mechanisms (and likely imprisonment for the debtor) and developed into a modern-day collective debt collecting procedure.[1]

An example of a country whose insolvency system has historical roots in civil law would be the Netherlands. Dutch insolvency law historically had (similar to many of its European contemporaries) been pro-creditor where a more conservative approach was adopted towards granting a discharge of debt to a debtor. Historically, no such discharge was allowed unless with the consent of creditors. However, as time progressed, the position changed. It was not until the Research Commission's findings which gave rise to "Schuldsaneringswet" which enabled discharge of debtors.[2] Despite a more liberal approach to discharge (than historically), the modern Dutch system is still considered creditor friendly.

Modern Dutch insolvency proceedings can be divided into three main categories: personal insolvency and corporate insolvency (which itself can be divided into insolvencies aimed at liquidation or rescue/continuation).[3] The Dutch Bankruptcy Act ("Faillissementswet") (which deals with both individual and corporate insolvency) and the European insolvency regime are the primary legal frameworks which govern Dutch insolvency law. A recent development to the Dutch insolvency regime is the Act on Court Confirmation of Extrajudicial Restructuring Plans ("**Dutch Scheme**"). The Dutch Scheme entered into force on 1 January 2021. In short, the Dutch Scheme enables a business to restructure debt via a plan whilst continuing trade.[4] This is a slight shift towards making the Dutch system more debtor-friendly.

Unlike the civil law countries on continental Europe which were influenced by Roman law, English law influenced common law jurisdictions. The United States of America ("**America**") is a country whose legal system is based on English law. America is a federal republic (unlike the Netherlands, which is a unitary monarchy). The Bankruptcy Code 1978 is federal legislation meaning it applies to all 50 American states. The Bankruptcy Code provides for liquidations (Chapter 7) and rescue (Chapter 11), as well as rescheduling of debt (Chapter 13). The current American system is generally considered the standard bearer of a pro-debtor insolvency system due to its a more liberal approach to discharge of debt.[5] This is in contrast with the Dutch system outlined in the preceding paragraph. However, it should be noted that the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 reformed the Bankruptcy Code and introduced "means testing" to determine whether an individual debtor could file for bankruptcy or relief[6]. This is a slight shift away from a pro-creditor position.

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[1] Professor André Boraine and Professor Rosalind Mason, "INSOL International, Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024", p 81

[2] Ibid., p 9

[3] Baker McKenize, "Global Restructuring & Insolvency Guide", https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-The-Netherlands.pdf, accessed 15 November 2023

[4] International Comparative Legal Guides and the International Business Reports, "Netherlands", https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/netherlands, accessed 15 November 2023

[5] Professor André Boraine and Professor Rosalind Mason, "INSOL International, Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024", p 8

[6] Ibid., p 8

Another country whose legal system is based on the English common law is Australia. Australia's insolvency regime is more decentralised than that of other countries- there is not a single unified piece of legislation for insolvency. This is highlighted by the fact that the Corporations Act 2001 deals with corporate insolvencies whilst the Bankruptcy Act 1966 deals with individuals. In contrast to America, Australia is considered a creditor friendly jurisdiction. There is an emphasis on protecting the rights and interests of creditors (over that of the debtors). An example of this would be Australia's voluntary administration regime- this is controlled by creditors whose aim is to maximise creditor return.[7]

Another approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries cf codification in civil jurisdictions.
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.

No single set of insolvency law or regime (or any area of law in fact) can be applied to every jurisdiction in the world. Each jurisdiction is the product of its own history and culture. The lack of global uniformity in insolvency law means that problems can arise in cross-border insolvency cases. An example of a potential problem in cross-border insolvency is how to reconcile the differing approach each jurisdiction involved may have towards insolvency law. In an attempt to seek a solution to this issue, the differing principles of universalism and territorialism have emerged.[8]

A difference between the principle of universalism and principle of territorialism is the number of jurisdictions involved. The principle of universalism is premised on the idea that in any cross-border insolvency case, there should only be one (i.e. "main") insolvency proceeding which would cover all of the debtor's assets and debts. In contrast, the principle of territorialism states that insolvency proceedings may be commenced in every jurisdiction in which the debtor in question holds assets, but that such proceedings should be limited to assets within that jurisdiction.[9] Territorialism means there could be multiple proceedings against the same debtor in several jurisdictions (if the debtor holds assets in multiple jurisdictions) and not just one jurisdiction having carriage of the insolvency proceedings.

Another difference between the principle of universalism and the principle of territorialism relates to costs. Universalism would, in theory, be more a cost-effective approach as there would be a "unity of proceedings"[10] whereas territorialism would be more costly due to the possibility of multiple concurrent proceedings.

A further difference between the principles of universalism and territorial is the domestic market. Universalism, because of its nature, can cause uncertainty in the domestic market and to domestic creditors as proceedings[11] are confined to one jurisdiction- this would especially be the case if the jurisdiction with carriage of the main proceedings may have

[7] International Comparative Legal Guides and the International Business Reports, "Australia", https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/australia, accessed 15 November 2023
[8] Professor André Boraine and Professor Rosalind Mason, "INSOL International, Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024", pp 35-37
[9] Ibid., p 38
[10] Ibid., p 83
[11] Ibid., p 38

different insolvency standards from a domestic creditor's jurisdiction. Territorialism on the other hand would cater to local creditors and the domestic market due to proceedings being limited to the jurisdiction where the assets are based.[12] It is likely however that territorialism would be more costly financially (as mentioned in the previous paragraph) due to multiple proceedings and can present practical challenges to creditors who may have to participate in insolvency proceedings in jurisdictions they are not familiar with (or perhaps forego participating due to costs or impracticality).

The principle of modified universalism differs from the principle of universalism because the former (when adopted) would mean multiple proceedings: the commencement of main proceedings in a jurisdiction where the centre of main interests is which is then supported by secondary proceedings in another jurisdiction (unlike universalism, which, when adopted, would mean unity of proceedings).

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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 countries have several adopted several initiatives to assist in resolving international insolvency issues. These are:

1) the Montevideo Treaty on International Commercial Law (1889) ("**1889 Montevideo Treaty**");
2) the Montevideo Treaty on International Commercial Terrestrial Law (1940) ("**1940 Montevideo Treaty**"); and
3) the Havana Convention on Private International Law (1928) ("**Bustamante Code**") (collectively, "**the Initiatives**").

The signatories to the 1889 Montevideo Treaty are Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. The 1889 Montevideo Treaty covers both individual and corporate insolvency. A debtor's commercial domicile is the test that will determine bankruptcy jurisdiction. In the situation where debtor is commercially domiciled in one State which has ratified the 1889 Montevideo Treaty, one set of proceedings will be commenced in the State of commercial domicile (even if the debtor in question occasionally trades in another treaty State). It is also possible for concurrent proceedings to occur if the debtor has two (or more) businesses which are economically autonomous in different treaty States. In such a situation, if proceedings have been commenced in one State, another creditor in the second State which contains the economically autonomous business may initiate bankruptcy proceedings in that second State.[13]

The signatories to the 1940 Montevideo Treaty are Argentia, Paraguay and Uruguay. Similar to the 1889 Montevideo Treaty, the 1940 Montevideo Treaty deals with bankruptcy (contained in Title VIII on Bankruptcy). However, a difference between the two Montevideo treaties are the signatories to them- only Argentina, Paraguay and Uruguay have ratified both treaties. As result of this, the applicable treaty will need to be identified and applied where there is cross-border insolvency between any two or more members of both treaties.[14]

The signatories to the Bustamante Code include several Central American, South American and Caribbean counties. It should be noted that no country is a member of all the Initiatives.

[12] Ibid., p 38
[13] Ibid., p 60
[14] Ibid.

Again, a prudent analysis on the relevant Initiative is needed to determine which one would apply if the States involved are signatories to more than one of the Initiatives.

Aside from the signatories, the Initiatives are also different in their approach to the conduct of insolvency proceedings. The Bustamante Code's approach is more akin to universalism/single proceedings across the treaty States, as demonstrated by Article 414 of Chapter 1 which states "*there can be only one preventive proceeding…in respect of all his assets and his liabilities in the contracting States*"[15].

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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.

I do not agree that the terms "bankruptcy" and "insolvency" should be used interchangeably (even if they often are). I think one of the reasons why these terms are often used interchangeably is because no single set of bankruptcy or insolvency laws or rules apply to every jurisdiction in world- this means that the legal language used in a jurisdiction can vary from another jurisdiction (even if the jurisdictions share a common official language). Further, "bankruptcy" is occasionally used in everyday media to describe an insolvent company which, in my view, has also blurred the distinction between the two terms. In my view, the terms are similar but they are distinct from each other.

The reason I do not agree that the terms "bankruptcy" and "insolvency" should be used interchangeably is because of the type of debtor involved. Even though both describe the financial status of a debtor, "bankruptcy" only applies to that of a natural person, whereas "insolvency" is used in relation to that of a company or other non-natural entity. Further, in my view, "bankruptcy" has a narrower meaning than "insolvency"- "bankruptcy" is a legal process and is a type of insolvency where an individual can be declared bankrupt if they owe the statutory minimum amount to any creditor and are unable to pay (i.e. if they are insolvent). On the other hand, "insolvency" has a wider meaning as it is often used as an umbrella term to describe various legal procedures dealing with financial distress of debtors and in the context of cross-border cases. I think my view of the distinction between the two terms is akin to Australia's distinction of the two terms.

Notwithstanding the preceding paragraph, both "bankruptcy" and "insolvency" share common essential characteristics:

1) they both describe the financial state of a debtor (natural person or company respectively) who is unable to pay off their debts to creditors. "Bankruptcy" is a type of insolvency applicable to a natural person. There are other types of "insolvency" including administration and liquidation which both apply to companies only;
2) once proceedings are commenced in either, there will be an insolvency practitioner appointed (such as a trustee in bankruptcy or liquidator) whose statutory function

[15] Havana Convention on Private International Law, Chapter 1 Article 414

would be to obtain and realise the debtor's assets (estate) and distribute the pooled assets to all creditors in accordance with the law; and

3) once the proceedings have commenced in either, a moratorium is granted, i.e. actions by individual creditors against the debtor are stayed. This is because the process is a collective procedure that binds all creditors- if there was no moratorium, it would render insolvency law meaningless.[16]

It would be beneficial to also consider Wood's comments

Differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual are:

1) during the "insolvency" process of a company (such as liquidation), the liquidator may have claims (such as for breach of fiduciary duty) against the former directors of the company. This commencement of proceedings to impose (personal) liability by the officeholder on those who managed the financially distressed company does not apply to a trustee in bankruptcy against the bankrupt;
2) the issue of "rehabilitation" at the end of the proceedings. In an individual bankruptcy, the insolvent debtor will be discharged and will be able to continue life without the debt that resulted in the bankruptcy in the first place (albeit possibly with conditions attached[17]- the degree of this is jurisdiction-specific). Corporations on the other hand cannot be "rehabilitated" as an individual can at the end of the "insolvency" process. The company in liquidation will usually be dissolved after the assets have been realised and distributed and the affairs of the company are wound up;
3) officeholders of companies where possible, as part of their statutory function, will try and preserve the business or any part of. This does not, per se, happen in a bankruptcy; and
4) Subject to the jurisdiction, some assets of the bankrupt will fall outside the bankruptcy regime (such as tools of trade of the debtor) whereas all the assets of a company will fall under the control of the officeholder.

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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.

Challenges can arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

Cross-border insolvency cases involves different legal systems. A challenge is how to effectively to deal with cross-border insolvency cases. Sovereignty means that States legislate for within their own borders, including in the insolvency arena. Invariably legislating for insolvency law can mean differing standards of insolvency law in some countries. Some insolvency law in some jurisdictions are relics of their colonial history whereas other jurisdictions are outdated and not suited to the modern world economy.[18] Improvements in standards to insolvency law will take time to achieve during the current unprecedented pace of change in the world economy.

A related challenge to differing legal systems is that of differing insolvency language. Not having a unified global insolvency law means that there will be differing insolvency language. Domestic and international definitions of "insolvency" can vary widely- such discrepancies in

[16] Professor André Boraine and Professor Rosalind Mason, "INSOL International, Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024", pp 20-21
[17] Ibid., p 25
[18] Ibid., p 36

definitions can make it difficult to even define "insolvency"[19]. The lack of a globally agreed term for "insolvency" is demonstrated in international instruments- even when States have attempted to streamline cross-border insolvency through agreement, they have, on occasion, not provided a definition for the word "insolvency". Instead such instruments have focused on the definition of "insolvency proceedings"[20]. If the term "insolvency" (which is the crux of insolvency proceedings) cannot be defined, it is difficult to see how a single global cross-border insolvency dispensation can be achieved.

Another challenge that can arise in cross-border insolvency is that co-operation with other States is required where there are concurrent insolvency proceedings. Co-operation requires trust in foreign legal systems[21]. Due to various reasons (for example, political or historic), such trust may not be forthcoming. The situation is not eased by the lack of international insolvency legal system or a global insolvency judiciary that will deal with cross-border insolvency matters. Even if an international insolvency legal system or a global insolvency judiciary was proposed, it may encounter resistance on the grounds of national sovereignty. It is fair to say that most States would be more inclined to influence foreign insolvency law, rather than adopting them into their national law.

A further challenge to developing a single global cross-border insolvency dispensation is policy considerations of every jurisdiction differ. Different jurisdictions place different emphasis on different stakeholders in the insolvency process. For example, some jurisdictions tend to be more creditor friendly (such as Singapore) and others are more pro-debtor (such as the United States of America). Further, jurisdictions such as France also place great emphasis on employment rights. The development of a single global cross-border insolvency dispensation can also be complicated by a State's desire to protect local creditors. As a result of the various policy considerations, States may be competing, as opposed to co-operating, regarding a debtor's assets[22] (which is diametrically opposite to trying to develop a unified global cross-border insolvency system). Even before a single global cross-border insolvency dispensation can be developed properly, the interests of different States (as highlighted by this paragraph) need to be reconciled first.

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

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Question 3.3 [maximum 3 marks]

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

"Hard law" and "soft law" in the context of international insolvency relates to the approaches to regulating insolvencies involving two or more States, i.e. international insolvency. In this context, "hard law" means binding laws that provide states with rights as well as responsibilities. On the other hand, "soft law" is not legally binding and seeks to influence the regulation of international insolvency. Therefore the distinguishing feature between the two laws is the enforceability of them.

Treaties and conventions which a State becomes a signatory to is "hard law". This would bind the signatory State and would affect their domestic laws (which would be enforceable in the domestic courts). "Hard law" has had a varying degree of success in providing solutions to the challenges of international law. An example of an unsuccessful attempt to achieve multilateral

[19] Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2005, second edition), pp 3-5
[20] Professor André Boraine and Professor Rosalind Mason, "INSOL International, Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024", p 41
[21] Ibid., p 38
[22] Ibid., pp 36-37

international insolvency regulation is that of the Council of Europe- in 1990, the Council had concluded a Convention on Certain International Aspects of Bankruptcy which despite being signed by several Members States never came into force as it was not ratified by enough Member States. By contrast, an example of multilateral success on international insolvency in Europe would be the European Union's ("**EU**") European Insolvency Regulation (2000) ("**EIR**"). The EIR was in recent years amended which means that the current "hard law" on international insolvency within the EU is the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast).[23]

"Soft law" has been more successful than "hard law" in providing solutions to the challenges of international insolvency.[24] Perhaps the biggest reason for this is the proponent of "soft law". Proponents of "soft law" tend to be multilateral organisations (rather than sovereign States which formalise "hard law"/treaties). The Hague Conference on Private International Law ("**Hague Conference**") is an intergovernmental organisation that was established with the aim of unifying private international law and is a key driver of "soft law" in international insolvency. The Hague Conference administers international conventions and soft law instruments. An example of the Hague Conference's coordination is with the United Nations Commission on International Trade Law ("**UNCITRAL**"). UNCITRAL aims to "*further the progressive harmonization and modernization of the law of international trade*"[25]. As a result of this cooperation, the UNCITRAL Legislative Guide on Insolvency Law (2004) was prepared.

To date, the most successful "soft law" initiative in providing solutions to the challenges of international insolvency has been UNCITRAL's Model Law on Cross-Border Insolvency ("**MLCBI**")[26]. MLCBI is designed to provide States with a modern legal framework to deal effectively with cross-border insolvency proceedings. MLCBI takes the form of a Model Law (draft legislation) and not a treaty or convention[27]. It is therefore focused on encouraging cooperation between the different jurisdictions involved (rather than attempting to unify insolvency law of different States). Member States of UNCITRAL are recommended to adopt the Model Law (whether or not with modification). As of today's date, legislation which is based on or influenced by the Model Law has been adopted in 59 States in a total of 62 jurisdictions[28]. States that have adopted the Model Law range from the United Kingdom to Gabon and Panama. The geographical spread of the adopting States and jurisdictions (and the number of them) suggests that the MLCBI has become a well-supported solution to the challenges of international insolvency law.[29]

3

Marks awarded 11 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.

[23] Ibid., pp 46-47

[24] Ibid., p 47

[25] United Nations Commission on International Trade Law, https://uncitral.un.org/, accessed 14 November 2023

[26] Professor André Boraine and Professor Rosalind Mason, "INSOL International, Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024", p 47

[27] Ibid., p 47

[28] United Nations Commission on International Trade Law, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status, accessed 14 November 2023

[29] Professor André Boraine and Professor Rosalind Mason, "INSOL International, Foundation Certificate in International Insolvency Law, Module 1 Guidance Text, Introduction to International Insolvency Law 2023/2024", p 47

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 applicable English cross-border source that the American insolvent estate representative ("**American Representative**") may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc ("**Norton Cars**") situated in England is the Cross-Border Insolvency Regulations 2006 ("**CBIR**"). CBIR implements the UNCITRAL Model Law on Cross-Border Insolvency ("**MLCBI**").

CBIR (by adopting MLCBI) envisages a foreign representative seeking assistance from the courts in England and Wales in connection with foreign insolvency proceedings. A foreign representative is usually a foreign insolvency officeholder, such as a liquidator[30] (in this case, the American Representative). Foreign insolvency proceedings include liquidation[31] (this case, the American liquidation of Norton Cars). The CBIR (and MLCBI) are intended to put the American Representative in the same position, as far as possible, as an officeholder who was appointed under English and Welsh law.

In circumstances where the English and Welsh courts are asked to recognise foreign insolvency proceedings, the CBIR differentiates between two types of such proceedings which in turn affects the scope of relief available. The two types of proceedings are "foreign main proceedings" and "foreign non-main proceedings". From the fact pattern, the situation of Norton Cars would be considered "foreign main proceedings" because these are foreign insolvency proceedings (i.e. commenced in America) which are taking place in the jurisdiction in which the debtor has its centre of main interest (i.e. in England where Norton Cars is headquartered).

In terms of the application itself, the American Representative can apply directly to the English and Welsh courts. The documents that would need to be included in the application are an application notice and supporting evidence covering, inter alia, reasons for seeking recognition and the relief sought (such as to protect the assets of Norton Cars located in England). The application for recognition would also need to be accompanied by either a certificate copy of the decision commencing the American liquidation and appointing the American

[30] Article 2(j), Schedule 1 of CBIR
[31] Article 2(i), Schedule 1 of CBIR

Representative (or a certificate from the American court which affirms the existence of the American proceedings and the appointment of the American Representative)[32].

The effect a successful application for recognition would be that the American Representative would enjoy the same powers as if they had been appointed to the same office in England and Wales[33]. Recognition in English and Welsh courts means that the domestic courts can (and most likely will) exercise discretionary relief under CBIR which is in line with longstanding common law that courts will actively assist foreign insolvency proceedings. For example, if recognition of the "foreign main proceedings" of Norton Cars is successful, there will be an automatic stay which will prevent the continuation of creditor action[34]. Such a stay will prevent the commencement of proceedings concerning Norton Cars' assets in England and is a significant reason why recognition under CBIR should be sought by the American Representative.

Section 426 of the UK Insolvency Act 1986 enables officeholders in certain countries to request assistance from English and Welsh courts which includes declarations recognising the rights of a foreign insolvency representative. However, section 426 does not apply to the American Representative's situation given the fact that America is not a "*relevant country or territory*" for the purposes of the section.

Greater elaboration regarding common law is warranted

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.

Both Italy and Germany are members of the European Union. The appropriate legal source to be used in cross-border insolvency matters between the two countries is the 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 amended the previous European Insolvency Regulation 2000. The EIR Recast is directly applicable to European Union Member States (with the exception of Denmark) and prevails over a Member State's domestic law.

The starting point is to ascertain the jurisdiction of the centre of main interest of Norton Cars. Jurisdiction to commence main insolvency proceedings will be conferred to the courts of the European Union Member State within which the debtor's centre of main interest is. As defined in Article 3(1) of EIR Recast, a debtor's 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*."[35] From the fact pattern, Norton Cars has its centre of main interest in Italy but its main operations are conducted in Germany. In light of the European insolvency regime set out above, main proceedings should be opened in Italy. The reason for this because jurisdictional competence is conferred to the debtor's centre of main interest, which is Italy in the fact pattern.

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[32] Article 15, Schedule 1 of CBIR
[33] Norton Rose Fulbright, "The Model Law in Great Britain: Cross-Boder Insolvency Regulations 2006", https://www.nortonrosefulbright.com/en/knowledge/publications/1d8e1fb5/the-model-law-in-great-britain-cross-border-insolvency-regulations-2006, accessed on 15 November 2023
[34] Article 20, Schedule 1 of CBIR
[35] Article 3(1), EIR Recast

Notwithstanding the preceding paragraph, EIR Recast permits the commencement of secondary insolvency proceedings in a second Member State (in this case Germany). This is to "*protect the diversity of interests*"[36]. Under the EIR Recast, proceedings are permitted if the debtor has an "establishment". For the purposes of EIR Recast, "establishment" is defined as "*any place of operations where a debtor carries out or has carried out…a non-transitory economic activity with human means and assets*".[37] From the fact pattern, Norton Cars has carried out non-transitory economic activity in Germany via its operations with the sports car engines. It should be noted that the effect of these secondary insolvency proceedings, which may be commenced in parallel to the main proceedings in Italy, are limited to only the assets located in Germany.

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?

An Indian, South African or Australian court will not 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. The co-ordination mechanisms which are set out in the EU (Recast) Insolvency Regulation does not apply to States which are not members of the European Union.

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 relevant regulation to the fact pattern is 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 does not harmonise the substantive insolvency laws of the Member States of the European Union. It is instead directly applicable and prevails over the domestic legislation of the Member States (except Denmark). The EIR Recast deals with the rules concerning conflicts of law in European insolvency cases where a debtor has a centre of main interest in one European Union Member State (which in this case in Italy) and assets in another (which in this case is the Netherlands).[38]

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[36] Recital 23, EIR Recast
[37] Article 2(10), EIR Recast
[38] Practical Law, "Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation)", https://uk.practicallaw.thomsonreuters.com/w-007-6397?transitionType=Default&contextData=(sc.Default), accessed on 15 November 2023

The relevant Article of the EIR Recast is Article 7.1. Article 7.1 states that "*the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened*".[39] This would mean that the law applicable to the insolvency proceedings in the fact pattern is that of Italy as insolvency proceedings were commenced there. The laws of Italy will determine the conditions for the conduct of proceedings and the assets which will form part of the insolvency estate[40].

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.

1.5

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

In the situation where insolvency proceedings are commenced under Italian law and an Italian insolvent estate representative ("**Italian Representative**") has been appointed where there are assets which are subject to real rights of security established in terms of Australian law, the relevant laws are the Corporations Act 2001 (Cth) ("**the Act**") and the Cross-Border Insolvency Act 2008 (Cth) ("**CBIA**").

Sections 580-581 of the Act sets out the cooperation between an Australian court and its foreign counterpart in external administration matters. The situation of Norton Cars, which has been liquidated, is an "external administration matter"[41] as defined by the Act. It is prescribed under section 581 of the Act that the Australian courts will, in all external administration matters, aid the courts of other countries that have jurisdiction in the external administration matters in question[42]. An example of this is *Re Chow Cho Poon (Private) Ltd*[43]. The Singaporean liquidator applied to the New South Wales Supreme Court for orders that they could open, redesignate and operate the bank accounts of the company in Australia. The court granted the application. The rationale for this was that the bank in Australia would not make the accounts in question operative without the court recognising the appointment of the Singaporean liquidator under section 581 of the Act.

Applying *Re Chow Cho Poon (Private) Ltd* to Norton Cars' assets in Australia, the assets will be dealt with under sections 580-581 of the Act.

The Italian Representative, as a foreign representative, will need to apply for recognition under the CBIA. The CBIA is Australia's domestic implementation of the UNCTIRAL Model Law on Cross-Border Insolvency. The CBIA will enable the Italian Representative to gain recognition under Australian Law and *locus standi* to commence or defend any proceedings as well as deal with any assets based in Australia.

There is some scope to elaborate

2.5

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40.5/50

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

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[39] Article 7.1, EIR Recast
[40] Article 7.2(b), EIR Recast
[41] Section 580, the Act
[42] Section 581(2), the Act
[43] [2011] NSWSC 300