INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

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

Question 1.3

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

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 6 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.

Insolvency law systems are primarily influenced by two major legal traditions: civil law and common law.

Civil Law Systems:

1. Civil law systems have their roots in Roman law and are codified, meaning the primary source of law is legal codes and statutes.
2. In civil law jurisdictions, insolvency proceedings are often court-driven. The court plays a central role in the proceedings, including the appointment of an insolvency administrator.
3. These systems traditionally emphasized the rights of individual creditors, with a focus on liquidation rather than reorganization of the debtor.
4. Many civil law countries have reformed their insolvency laws to incorporate features of reorganization and rescue culture, inspired partly by Chapter 11 of the US Bankruptcy Code.

Common Law Systems:

1. Common law is based on court judgments and legal precedents. Countries like the United Kingdom, the United States, and former British colonies like India and Australia follow this tradition.
2. In common law jurisdictions, insolvency proceedings can be more flexible, with a significant role played by insolvency practitioners appointed by the creditors, rather than by the court.
3. These systems traditionally have a stronger focus on balancing the interests of the debtor and the creditors, with a significant emphasis on reorganization and rehabilitation of the debtor.
4. The US Chapter 11 proceedings have been highly influential globally, inspiring reforms in many civil law countries to facilitate corporate rescue.

Comparison:

- Civil law systems tend to be more formalistic and court-centric, while common law systems often allow more flexibility and creditor control.
- Historically, civil law countries leaned more towards liquidation, but this has been changing. Common law systems, particularly with the influence of US bankruptcy law, have a more pronounced culture of reorganization.
- The source of insolvency law in civil law countries is primarily statutory, while in common law countries, it is a combination of statute and case law.
-

In summary, while the historical roots of insolvency law in civil and common law jurisdictions have led to different approaches and emphases, there is a growing convergence, particularly with the increasing adoption of reorganization and rescue mechanisms in civil law countries. This convergence reflects the globalized nature of business and the need for insolvency systems that can effectively deal with cross-border insolvency situations.

It would also be beneficial to list relevant examples of civil law countries

2.5

Question 2.2 [maximum 3 marks]

Ihe principle of universalism holds that a bankruptcy proceeding should extend globally to all of the debtor's assets and creditors, wherever located. This allows for a unified proceeding to administer the debtor's estate in the most equitable and efficient manner, avoiding the need for multiple parallel proceedings across jurisdictions. However, courts have recognized limits to exercising jurisdiction extraterritorially and may decline to apply domestic law abroad based on international comity and choice of law considerations. **There is scope to elaborate upon forum**

The principle of modified universalism represents a compromise between pure universalism and territorialism. It recognizes the benefits of a unified global proceeding, but defers to local laws and proceedings to govern assets within their jurisdiction. For example, a main proceeding may be opened where the debtor has its center of interests, with ancillary proceedings opened locally to administer local assets under local law as needed. This allows for some coordination while still respecting jurisdictional limits.

Finally, the principle of territorialism holds that assets should be administered separately in each jurisdiction where they are located, under local bankruptcy law. **There is scope to elaborate upon territorial limits** This avoids jurisdictional overreach but can result in complex, conflicting parallel proceedings across multiple countries. It also prevents globally coordinated administration of the debtor's estate.

In summary, universalism promotes global consolidation but can exceed jurisdictional limits, territorialism avoids overreach but sacrifices consolidation, while modified universalism attempts to balance comity concerns against the benefits of a unified proceeding. The choice depends on the circumstances of each case.

Source: In re Maxwell Communication corp. plc
170 BR 800 - Bankr. Court, SD New York, 1994 -

2.5

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, several initiatives have been undertaken to address international insolvency issues, reflecting the region's growing integration into the global economy. These initiatives vary in their approach and scope, and they include both regional efforts and the adoption of international standards. Here are some key initiatives:

1. **Adoption of the UNCITRAL Model Law on Cross-Border Insolvency:** Some Latin American countries have adopted or are considering adopting the UNCITRAL Model Law on Cross-Border Insolvency. This Model Law provides a framework for dealing with insolvency cases involving debtors with assets and liabilities in more than one country. It promotes cooperation between courts and insolvency practitioners in different jurisdictions. Countries like Chile and Mexico have incorporated this model into their legal systems, enhancing their ability to handle cross-border insolvency cases.
2. **Regional Conferences and Organizations:** There have been various conferences and meetings among Latin American countries to discuss insolvency law reforms and cross-border insolvency issues. These forums provide opportunities for countries to share experiences, best practices, and to consider harmonization of insolvency laws. The Latin American Insolvency Professionals Association (ALPI) and other regional organizations play a role in these discussions.
3. **Bilateral Agreements:** Some Latin American countries have entered into bilateral agreements with other nations to address specific aspects of cross-border insolvency. These agreements can facilitate cooperation in cross-border cases and may include provisions for mutual recognition of insolvency proceedings.

4. **Local Law Reforms:** Many countries in Latin America have reformed their insolvency laws to better align with international practices and to handle cross-border insolvency more effectively. These reforms often include provisions for recognizing foreign insolvency proceedings and for cooperation with foreign courts.

Differences Between These Initiatives:

- **Scope and Application:** The UNCITRAL Model Law has a broad international scope and is designed to be adopted by countries around the world, while regional conferences and organizations focus specifically on the needs and challenges of Latin American countries.
- **Legally Binding vs. Advisory:** The adoption of the UNCITRAL Model Law involves incorporating it into a country's legal system, making it legally binding. In contrast, outcomes from regional conferences are usually more advisory and aim at encouraging best practices and cooperation.
- Bilateral vs. Multilateral: Bilateral agreements are limited to the parties involved and are tailored to specific bilateral needs, whereas the UNCITRAL Model Law and regional initiatives aim for broader, multilateral solutions.

Overall, these initiatives reflect a growing recognition in Latin America of the importance of effective legal frameworks for managing cross-border insolvency, in line with global economic integration and the increasing complexity of international business structures.

Source: sIII Prize in Insolvency History | International Insolvency Institute

This answer required consideration of the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code)

2

Marks awarded 7 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.

The terms "bankruptcy" and "insolvency" are often used interchangeably in casual conversation, but they have distinct meanings in legal and financial contexts. Understanding these differences is important, especially when considering their application to individuals versus corporations.

1. **Meaning of Bankruptcy and Insolvency:**
    - **Insolvency:** This is a financial state where an individual or entity is unable to pay their debts as they come due. Insolvency is about the balance of assets and liabilities; if liabilities exceed assets, or if one cannot meet obligations when they are due, insolvency is the term used to describe this state.
    - **Bankruptcy:** This is a legal process that is initiated when an insolvent individual or entity seeks relief from their debts. Bankruptcy proceedings are formal and involve the courts. They can result in the discharge of debts (subject to certain conditions) and can involve the liquidation of assets to pay creditors or the restructuring of debts. **There is some scope to elaborate regarding different use in different jurisdictions, and examples in that respect**
2. **Essential Characteristics:**

- **Insolvency:** The key characteristic of insolvency is the inability to pay debts. It's a financial condition and not necessarily a legal status. Insolvency can be temporary or permanent, depending on various factors, including the ability to raise funds or negotiate with creditors.
- **Bankruptcy:** Bankruptcy is a legal process, and its essential characteristic is the involvement of the court. It provides a structured way to deal with insolvency, including the protection of the debtor from further legal action by creditors during the process. **It would be beneficial to also consider the matters raised by Wood in some detail**

3. **Differences in Application to Corporations vs. Individuals:**
    - **For Individuals:** Bankruptcy for individuals often involves proceedings like liquidation (selling off assets to pay debts) or reorganization (restructuring debts to make them more manageable). The end goal can be a discharge of debts, giving the individual a "fresh start." **Exempt property is relevant**
    - **For Corporations:** When a corporation is insolvent, bankruptcy can involve liquidation (winding up the company and selling assets to pay creditors) or reorganization (restructuring the company's debts and operations to continue business). Corporate bankruptcy does not result in a discharge of debts in the same way as for individuals; instead, it focuses on satisfying creditor claims to the extent possible.

In summary, while insolvency and bankruptcy are related concepts, they are not identical. Insolvency is a financial state, whereas bankruptcy is a legal process designed to address insolvency. The application of these concepts differs between individuals and corporations, particularly in terms of the outcomes and implications of bankruptcy proceedings. For individuals, bankruptcy can lead to a discharge of debts, while for corporations, it focuses on either restructuring for business continuity or orderly liquidation.

4.5

Question 3.2 [maximum 5 marks]

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

There are several challenges that arise in cross-border insolvency cases that make it difficult to develop a unified global framework .

One major challenge is the difference between territorialism and universalism approaches. Territorialism means each country handles insolvency proceedings within its own jurisdiction, while universalism involves a single main proceeding to coordinate all countries involved. There is disagreement over which approach is better. Universalism faces difficulties implementing unified proceedings across borders due to variances in national laws and procedures. Another key challenge is the reluctance of countries to cede control over local assets and creditors. Countries want to protect the interests of local creditors and maintain sovereignty over assets within their jurisdiction. This makes cooperation and coordination difficult.

There are also differences between common law and civil law systems that impact cross-border insolvency, such as different priorities for creditors . Judges in civil law systems tend to have more discretion compared to common law systems . Additionally, multinational companies create complexities with operations spanning numerous countries. This leads to issues regarding which country has jurisdiction and which law applies.

Finally, the lack of widely adopted international agreements on cross-border insolvency also poses challenges. Instruments like the UNCITRAL Model Law have helped but have not been universally adopted [3][5][8]. Overall, conflicting national laws and interests make consensus difficult'

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

1.5

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.

In the context of international insolvency, the distinction between "hard law" and "soft law" is significant, as it reflects different approaches to legal regulation and governance on an international scale.

Hard Law:

1. **Definition:** Hard law refers to legally binding rules or agreements. In the context of international law, this typically means treaties or conventions that states have agreed to and ratified, making them part of their domestic legal system.
2. **Characteristics:** Hard law is enforceable, with clear legal obligations and consequences for non-compliance. It provides a definitive legal framework within which parties must operate.
3. **Example:** An example in international insolvency is the European Union Insolvency Regulation (EUIR), which is binding on EU member states (except Denmark). It provides clear rules on jurisdiction, recognition, and coordination of insolvency proceedings across member states.
4. **Success:** The success of hard law in international insolvency is mixed. While it provides clear and enforceable rules, its reach is limited to the jurisdictions that have ratified the agreement. For instance, the EUIR is effective within the EU but does not apply globally.

Soft Law:

1. **Definition:** Soft law consists of guidelines, principles, declarations, or other non-binding agreements. These are not legally enforceable but can influence behavior and inform the development of hard law.
2. **Characteristics:** Soft law is more flexible and easier to negotiate than hard law. It often serves as a tool for cooperation and coordination, providing a framework that can be adapted to different legal systems.
3. **Example:** The UNCITRAL Model Law on Cross-Border Insolvency is an example. While the Model Law itself is not binding, it provides a template that countries can adopt or adapt into their domestic legal systems.
4. **Success:** Soft law can be highly successful in areas like international insolvency due to its flexibility and adaptability. The Model Law, for instance, has been adopted in various forms by many countries around the world, including the United States, the United Kingdom, Japan, and South Africa. This widespread adoption enhances cooperation and coordination in cross-border insolvency cases, even among countries with different legal traditions.

In summary, hard law provides a strong, enforceable legal framework but can be limited by the need for ratification and the challenge of achieving international consensus. Soft law, while not legally binding, offers flexibility and the ability to influence and shape practices across different jurisdictions. In the field of international insolvency, both hard and soft laws play crucial roles, with soft law often acting as a stepping stone towards the development of more formalized hard law agreements.

3

Marks awarded 9 out of 15

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

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

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

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

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

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

The scenario you've described with Norton Cars Inc presents a complex situation in terms of potential insolvency proceedings, given the company's international presence and the various jurisdictions involved. Here are some key considerations:

1. **Center of Main Interests (COMI):** The determination of the company's COMI is crucial in deciding where the primary insolvency proceedings should be initiated. In this case, the COMI has moved from the UK to Italy following Brexit. This suggests that the main insolvency proceedings might be initiated in Italy, assuming that the company's primary business activities and administrative management are now centered there.
2. **Secondary Proceedings:** Given Norton Cars Inc's presence in various countries, secondary insolvency proceedings could be initiated in these jurisdictions. These are typically opened in countries where the debtor has an establishment, such as branches or subsidiaries, and are meant to deal with the assets located in those countries. For example, proceedings could potentially be opened in the USA, Germany (where Gladiator Manufacturing Ltd is located), and possibly in India, South Africa, and Australia, depending on the nature and extent of its operations in these countries.
3. **Cross-Border Insolvency Laws:** The handling of this case would involve cross-border insolvency laws. If countries involved have adopted the UNCITRAL Model Law on Cross-Border Insolvency (like the USA and South Africa), this could facilitate cooperation and coordination among the different jurisdictions. However, the specific laws and procedures of each country will play a significant role.
4. **EU Insolvency Regulation:** For EU member states, the EU Insolvency Regulation would apply, which aims to coordinate insolvency proceedings across EU countries. Since the COMI is in Italy, an EU member state, this regulation would be particularly relevant.
5. **Impact on Subsidiaries:** The situation of Gladiator Manufacturing Ltd in Germany would need to be considered separately, as subsidiaries generally have their own legal identity. However, its financial situation and operations could be significantly impacted by the insolvency of the parent company.
6. **Jurisdictional Challenges:** The company will face challenges due to the different insolvency laws and procedures in each jurisdiction. This includes differences in how insolvency is declared, the role of the debtor in the proceedings, the treatment of creditors, and the potential for restructuring versus liquidation.

In summary, the insolvency proceedings for Norton Cars Inc would likely be complex, involving multiple jurisdictions with different legal frameworks. The primary proceedings might be in Italy due to the COMI being there, but additional proceedings in other countries where the company has significant assets or operations would also be a key part of the overall insolvency resolution. Coordination among these jurisdictions would be essential for an orderly process.
Source: Principles of Cross-Border Insolvency Law

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.

For this cross-border insolvency matter between Italy and Germany, the main applicable legal sources would be the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency .

The EU Insolvency Regulation provides common rules on cross-border insolvency proceedings within the EU, including determining which country has jurisdiction to open main insolvency proceedings. Since Norton Cars shifted its COMI to Italy, the main insolvency proceeding should be opened in Italy under the EU Insolvency Regulation. The COMI is the center of the debtor's main interests and is key for determining jurisdiction. Even though Norton Cars' operations are in Germany, its COMI is in Italy where its management is directed from.

The UNCITRAL Model Law also uses the COMI concept and aims to facilitate cooperation between jurisdictions in cross-border insolvency cases . It has been adopted by many countries, including within the EU. So it could provide a framework for cooperation between Italy and Germany in this case.

Overall, the main insolvency proceeding should be opened in Italy given Norton Cars' COMI is there. The EU Regulation and UNCITRAL Model Law help determine applicable law and enable cooperation between Italy and Germany in this cross-border scenario.

Source: Cross-border Insolvencies: Recognition and Enforcement in EU Member

It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.

2

Follow up questions

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.

In the scenario where Norton Cars Inc has shifted its Center of Main Interests (COMI) to Italy, while its main operations are in Germany, and considering both countries are members of the European Union, the primary legal source for cross-border insolvency matters would be the European Union's Insolvency Regulation (EUIR).

European Union Insolvency Regulation (EUIR):

1. **Applicability:** The EUIR applies to all EU member states (except Denmark) and governs cross-border insolvency proceedings within the EU. It aims to provide a coordinated and efficient approach to insolvency proceedings that involve debtors with assets or creditors in more than one EU member state.
2. **Determining COMI:** The EUIR places significant emphasis on the debtor's COMI to determine jurisdiction. The COMI is presumed to be the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. In this case, since Norton Cars Inc's COMI is in Italy, as its management is directed from there, the main insolvency proceedings should, according to the EUIR, be opened in Italy.
3. **Secondary Proceedings:** While the main proceedings are opened in the country where the COMI is located, secondary proceedings can be opened in other countries where the debtor has an establishment. In this case, secondary proceedings could be opened in Germany, given that Norton Cars Inc has significant operations there. These secondary proceedings are usually limited to the assets located in that country.
4. **Coordination Between Proceedings:** The EUIR facilitates coordination between main and secondary proceedings. This coordination is essential to ensure the efficient administration of the insolvency, protect the rights of local creditors, and maximize the value of the debtor's estate.

In summary, under the European Union Insolvency Regulation, the main insolvency proceedings for Norton Cars Inc should be opened in Italy, where its COMI is located. Secondary proceedings can be opened in Germany, where the company has significant operations. The EUIR will guide the coordination and administration of these proceedings across Italy and 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?

According to the references, an Indian, South African or Australian court would not be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative .

The EU (Recast) Insolvency Regulation only applies within the EU and determines which member state has jurisdiction to open insolvency proceedings. It also provides for the automatic recognition of insolvency proceedings opened in one EU member state by the other member states .

However, after Brexit, the UK is no longer part of the EU regulatory framework on cross-border insolvency. Recognition of English insolvency proceedings in EU member states now depends on each country's domestic law rather than being automatic under the EU regulation.

Similarly, the courts of non-EU countries like India, South Africa and Australia are not bound by the EU regulation and would rely on domestic law and rules on private international law to decide whether to recognize an EU insolvency representative. The EU regulation does not apply directly to non-EU countries.

In summary, courts outside the EU, including in India, South Africa and Australia, are not eligible to apply the EU Insolvency Regulation and would use domestic law to assess recognition of an EU insolvency representative .

Source: Cross border insolvency – an overview of the current EU legal

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.)

[Type answer here]

Take care to answer each sub-question in the correct location

(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.)

A) In the case of Norton Cars Inc's assets in the Netherlands, the primary insolvency proceeding is governed by Italian law, as the proceeding was opened in Italy. However, when it comes to assets located in another country, such as the Netherlands, the local law of that country typically applies to certain aspects, particularly real rights of security.

Insolvency Proceeding: The general insolvency proceeding, including the administration and distribution of assets, will be governed by Italian law, as Italy is where the primary insolvency proceeding was opened.

Real Rights of Security: For the assets in the Netherlands that are subject to real rights of security (like mortgages or pledges), Dutch law will apply. This is because real rights of security are generally governed by the law of the place where the asset is located (lex situs). Therefore, the handling of these secured assets in the Netherlands will need to comply with Dutch security and property laws.

Elaboration and reference to appropriate sources is warranted

2

(b) Law Applicable to Insolvency Proceedings and Real Rights of Security in Australia:

For the assets of Norton Cars Inc located in Australia, the situation is somewhat different, as Australia is not a member of the European Union and may have different rules regarding cross-border insolvency.

Insolvency Proceeding: The recognition and effect of the Italian insolvency proceeding in Australia will depend on Australian law. Australia has adopted the UNCITRAL Model Law on Cross-Border

Insolvency, which allows for the recognition of foreign insolvency proceedings. The Italian insolvency representative would need to apply to an Australian court for recognition of the Italian proceeding.

Real Rights of Security: Similar to the Netherlands, the real rights of security over assets located in Australia will be governed by Australian law. The handling and potential enforcement of these security interests must adhere to the local property and security laws in Australia.

In both cases, the Italian insolvency representative will need to navigate the interplay between the laws of the country where the insolvency proceeding was initiated (Italy) and the local laws of the countries where the assets are located (the Netherlands and Australia). This often requires a coordinated approach involving local legal counsel in each jurisdiction to ensure compliance with the respective legal systems.

3
Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 37/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.