



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1**

**(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)**

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **11 pages**.

## ANSWER ALL THE QUESTIONS

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

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

#### Question 1.1

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

- (a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.
- (b) This statement is untrue since the word “bankruptcy” is believed to derive from non-English origins and has a historical root from destroying a vendor’s place of business.**
- (c) This statement is true, although the word “bankruptcy” is not an English phrase.
- (d) The statement is true and the phrase “bankruptcy” is believed to have been first adopted in England in the 12<sup>th</sup> century.

#### Question 1.2

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

- (a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.**
- (b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.
- (c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.
- (d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

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

### Question 1.3

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

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

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).
- (b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

### Question 1.4

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

- (a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.
- (b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.
- (c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.
- (d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

### Question 1.5

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

- (a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.
- (b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

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

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

#### Question 1.6

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

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

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

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

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

#### Question 1.7

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

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

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

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

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

#### Question 1.8

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

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

- (b) This statement is untrue because African nations all have a civil law tradition.
- (c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.
- (d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

#### Question 1.9

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

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.
- (b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.
- (c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.
- (d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

#### Question 1.10

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

- (a) This statement is untrue because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.
- (b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.
- (c) This statement is true because globalisation makes the principle of universalism redundant.
- (d) This statement is true because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 10 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.

The insolvency and bankruptcy legal systems of various countries can broadly be classified into two categories or 'families', depending on whether they are founded upon civil law or English law.

Civil law has its roots in ancient principles of Roman law and is the predominant legal system in Continental European countries, as follows –

- a) **Netherlands** – The key legislations governing Dutch insolvencies is the Dutch Bankruptcy Act (*Faillissementswet*) and the European Insolvency Regulation. The *Faillissementswet* governs both individual and corporate bankruptcy. The strict pro-creditor outlook which characterized the Dutch insolvency system has witnessed gradual relaxation leading to the introduction of a 'fresh start' regime. A new legislative framework i.e., The Act on Court Confirmation of Extrajudicial Restructuring Plans (known in Dutch as *Wet Homologatie Onderhands Akkoord* or 'WHOA') was introduced in 2021, which allows out of court restructuring of debts. Netherlands has not adopted the UNCITRAL Model Law on Cross Border Insolvency.
- b) **France** – Corporate insolvencies in France is governed by provisions of the French Commercial Code, as amended from time to time (including the recently introduced Ordinance No. 2021-1193 of 15 September 2021). Apart from this, European Insolvency Regulation also govern insolvency proceedings in France. The French insolvency system has witnessed a shift from a debtor friendly regime to a more pro-creditor framework. France has not adopted the UNCITRAL Model Law on Cross Border Insolvency.
- c) **Germany** – The Insolvency Code (*Insolvenzordnung* or InsO), enforced on 1 January 1999 (and as amended from time to time) is a comprehensive legal framework governing insolvency processes in Germany. It applies to both companies and individuals. Germany has not adopted the UNCITRAL Model Law on Cross Border Insolvency.
- d) **Spain** – Insolvency and restructuring proceedings in Spain were governed by the Spanish Insolvency Act 2003. Spanish insolvency law has recently undergone significant structural changes with the introduction of Consolidated Text of the Insolvency Law in September 2022.

English law on the other hand is rooted in common law principles and predominantly extends in the common law States. The insolvency and bankruptcy legal systems of the following countries have historical roots in English (common) law:

- a) **United Kingdom** – The Insolvency Act 1986 is the primary statute, which contains provisions covering both individual and corporate insolvencies. The insolvency legal regime in the UK has witnessed various changes/ reforms by way of the Insolvency Act 2000 and the Enterprise Act 2000, Debt Relief Order introduced in 2009 (for individuals) and the Corporate Insolvency and Governance Act 2020 (which was enacted in the wake of the Covid 19 pandemic). The UK insolvency system is generally considered to be creditor friendly. As regards cross-border insolvencies, it is relevant to note that the UK has adopted the UNCITRAL Model Law on Cross Border Insolvency in the year 2006. The other key provisions/ principles applicable in case of international insolvencies are Section 426 of the Insolvency Act 1986 (in respect of "relevant countries"), European Insolvency Regulation (applicable to insolvencies where main proceedings started prior to 11 pm on 31 December 2020, being the timing of expiry of the transition period following exit of the UK from European Union).

- b) **United States of America** – The American bankruptcy law is codified in the form of the Bankruptcy Code of 1978. The 1978 Code has been reformed by way of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005. The American system is considered liberal and pro-debtor as it allows for statutory discharge of debt or what is also known as ‘rehabilitation’ or ‘fresh start’. It is also known for the reorganization/ rescue mechanism contained in Chapter 11 of the 1978 Code. USA has adopted the UNCITRAL Model Law on Cross Border Insolvency by enactment and enforcement of Chapter 15 in the 1978 Code in the year 2005.
- c) **Australia** – There is no single Australian statute dealing with various aspects of insolvency and bankruptcy. Specifically, the insolvency of corporates is governed by the Corporations Act 2001, while individual insolvency is governed by the Bankruptcy Act 1966. The Australian insolvency law is considered pro-creditor given the primacy accorded to creditors’ rights. In 2008, Australia adopted the UNCITRAL Model Law on Cross Border Insolvency through the enactment of the Cross Border Insolvency Act 2008.

Apart from the above, it is noted that the legal systems of countries in Africa are variously based on civil law or English law depending on which colonial powers ruled them in the past. The countries in South America predominantly follow civil law. The Indian insolvency law draws primarily from English law.

**Elaboration is warranted with respect to common law precedent of codification**

2

**Question 2.2 [maximum 3 marks]**

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

The three major regimes/ principles/ theories which apply in the context of cross border insolvency are universalism, modified universalism and territorialism.

The crux of universalism is that a cross border insolvency must be centred in one particular jurisdiction, both in terms of the forum as well as the applicable law, irrespective of where the parties, debts and assets are situated. This principle implies that all aspects pertaining to the insolvency of a debtor, including assets and claims, should form part of a single/ central insolvency proceeding which is conducted in one forum and under one law, for instance where the centre of main interests (COMI) of the debtor is situated. Advocates of universalism argue in favour of efficiency (for instance, through better coordination) and economy (for instance, by saving costs of multiple proceedings) and also highlight its relevance in the era of globalisation and multi-national corporations having operations spread across various countries. The other key advantage of universalism is the equal treatment of all creditors. However, application of this principle also entails various disadvantages/ hindrances such as political and administrative challenges of arriving at cross border agreements based on universalist principles, conflict with domestic laws and policies and identification of the forum for conducting the universal insolvency process.

Opposite to the principle of universalism is the principle of territorialism which is premised on territory where the assets of the debtor are located. As the name suggests, the scope and consequences of such proceedings is limited to the territorial borders of the relevant State where the proceedings are conducted. This means that separate insolvency proceedings can be simultaneously initiated in all those States where the debtor holds assets. The benefits of territorialism include protection of national/ local interests, avoiding conflict with substantive laws (such as those pertaining to priority) and obviating the need of any universal legislation. Some key disadvantages are the inefficiencies and



increased costs associated with the multiplicity of proceedings and the possibility of conflicting decisions across jurisdictions (including on the solvency/ insolvency of the debtor).

Modified universalism has emerged as a kind of a bridge between universalism and territorialism. This principle/ theory envisages a central or main insolvency proceeding in the territory where the centre of main interests (COMI) of the debtor is situated. This central/ main proceeding is supplemented by ancillary proceedings in other territories. A vital aspect of this principle is the cooperation between the courts which are conducting the respective proceedings. Modified universalism combines the benefits of universalism with the benefits of territorialism and is hailed for the flexibility that it allows. Modified universalism has gained widespread popularity which is reflected in the increasingly large number of countries which are adopting this regime.

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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.

The Latin American countries, which have integrated economies and legal systems, are known for some of the earliest and most enduring multi-lateral initiatives to address issues relating to cross border insolvency. These initiatives culminated in the following treaties/ conventions –

- i) The Montevideo Treaty of 1889 (subsequently revised in 1940); and
- ii) Havana Convention on Private International Law (*Bustamante Code*) of 1928

The differences between the two sets of initiatives are as follows –

- (a) *Member States*: The Montevideo Treaties and the Havana Convention differ in terms of their Member States. The Montevideo Treaty of 1889 has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay, while the 1940 treaties have been ratified by Argentina, Paraguay and Uruguay. 15 Latin American countries, namely Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela, are parties to the Havana Convention. Notably, Bolivia and Peru are also parties to the Havana Convention.
- (b) *Single or concurrent proceedings*: The Montevideo Treaties and the Havana Convention also differ with respect to the extent of application of the principles of unity and universality in respect of bankruptcy proceedings. The Montevideo Treaties use the test of ‘commercial domicile’ for determination of the jurisdiction of bankruptcy proceedings. Whether a single or concurrent bankruptcy proceedings can be conducted will depend on the nature of the business/ trade carried out by the debtor. If the principal business/ economic enterprise of the debtor is situated in one State, while the debtor also occasionally engages in business related activities in other States, either directly or through branches/ agents, then a single proceeding will be conducted in one treaty State where the debtor is commercially domiciled. However, if the debtor has independent businesses/ commercial enterprises, and is, thus, commercially domiciled, in more than one treaty State, then bankruptcy proceedings can be conducted simultaneously in such States. The Havana Convention promotes the principles of unity and universalism in a greater measure as compared to the Montevideo Treaties. However, much like the Montevideo Treaties, the Havana Convention allows single or concurrent bankruptcy proceedings to be held depending on whether the debtor has a single commercial enterprise in one State with occasional trading/ business activities in other States or has various economically separate business undertakings/ establishments in more than one

State which have signed up to the Havana Convention. However, the Havana Convention does not contain provisions for co-operation or co-ordination in case of concurrent proceedings. Further, the Havana Convention recognizes the extra-territorial effects of insolvency proceedings, in as much as Court decrees passed in insolvency proceedings conducted in one member State are enforceable in other member States, provided the applicable local rules governing registration/ publicity of court decrees are complied with.

4

Marks awarded 9 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.

Broadly speaking, “insolvency” refers to the situation or state of financial distress of a debtor where either its liabilities exceed its assets (balance sheet insolvency) and/ or where a debtor cannot repay its debts when they fall due (commercial or cash flow insolvency). On the other hand, “bankruptcy” refers to a formal legal process, which can result from a state of “insolvency”. Viewed from this perspective, while “bankruptcy” of a debtor presupposes that the debtor is in a state of “insolvency”, the reverse is not always true as the “insolvency” of a debtor may or may not culminate in “bankruptcy” of the debtor.

However, in many countries, these two terms are used synonymously. In some countries, such as the United States, the term “bankruptcy” is used in case of both corporations and individuals, while in some other countries, such as Australia and India, the term “insolvency” is used in the context of corporations, while the term “bankruptcy” is used in the context of individuals.

As per Wood<sup>1</sup>, below are some essential characteristics of “insolvency” and “bankruptcy” law –

- 1) Moratorium, which prohibits individual actions for enforcement of debt/ claim against the estate of the bankrupt;
- 2) Pooling of assets of the bankrupt to enable collective payment to the creditors, as opposed to *ad hoc*/ piecemeal seizure of assets by individual creditors;
- 3) Payments of creditors from the pool of assets on *pari passu* or proportionate basis as per their claims.

It may be added that the second and third feature have undergone significant dilution in view of exceptions to these rules being carved out by the legal systems of various States.

Sealy and Hooley<sup>2</sup> have identified certain differences between the objectives of insolvency law in its application to individuals and corporations, as summarised below –

- 1) *Key objectives in insolvency of individuals*: protection of debtor from harassment by creditors, enabling fresh start (especially where insolvency has not resulted from default or conduct of

<sup>1</sup> P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), p 3

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

the debtor), reduction of indebtedness using present and future income of the debtor to make contribution to the estate, while considering the personal circumstances of the debtor.

- 2) *Key objectives in insolvency of corporations*: preservation of business or its parts as going concern, wherever possible; fixing personal liability on individuals responsible for the insolvency.

Apart from the above, principles relating to *pari passu* distribution (subject to creditor priority and security interest), fairness in treatment, investigation into causes of insolvency, voidable/ fraudulent transactions, are relevant for insolvency of individuals as well as that of corporations.

However, there are also some key differences between individual and corporate insolvency. One such important distinction is that in some legal systems, certain assets of the insolvency individual are kept out of the process to enable maintenance of the individual and his/ her dependants. In contrast, during insolvency of a corporate debtor, all assets of debtor of whatever nature and whether in the debtor's possession or not, are pooled together for the purpose of collective realisation and distribution. The other key difference is that insolvency of individuals does not culminate in a dissolution order, while an order for dissolution typically follows once the affairs of a corporation have been completely wound up.

In view of the above, the meaning and use of the terms "bankruptcy" and "insolvency" appears to be contextual in nature and would typically depend on the legal system under consideration.

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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.

Below are some key challenges in development of a single global cross-border insolvency system:

- 1) Fundamental differences between national laws and legal systems, including varied approaches to insolvency – There is conflict of laws and differences in values, principles and policies which underpin domestic laws, including insolvency laws. For instance, certain insolvency systems are pro-creditor, while others are pro-debtor. Some domestic legal systems may give super priority to employee dues while others may not. There are also key differences between laws relating to priority of creditors, treatment of security, set off and netting arrangements, scope of moratorium, treatment of executory contracts, participation and role of creditors and so on.
- 2) Different approaches to resolution of cross border insolvency issues – for instance, universalism, modified universalism, territorialism, cooperative territorialism, contractualism and others.
- 3) Lack of a common/ global language for insolvency – this is best exemplified from the different meanings and use of the term "insolvency" and "bankruptcy" itself.
- 4) Low/ outdated standard of insolvency laws in various countries – for instance, insolvency laws of many countries are not considered suitable to meet present day economic values, needs and goals and makes harmonisation and integration of insolvency laws across borders more difficult.

- 5) There is no global court which can deal with cross border insolvency cases – as a result judicial proceedings in insolvency matters are territorial in nature giving rise to possibility of conflicting decisions and the need for cooperation, recognition and enforcement.

**It would be beneficial for you to also consider all the matters raised by Friman, Omar and Westbrook (some of which are addressed above)**

**3**

**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” essentially refer to the multilateral instruments which are used for regulating international insolvencies.

States often sign treaties and conventions, which can be bilateral or multilateral in nature. Once signed, such treaties and conventions bind the signatory States and become part of their domestic laws. These bilateral/ multilateral treaties and conventions constitute hard laws. Some examples include the Nordic Convention (1933) and the Istanbul Convention (1990).

In Europe, various efforts to arrive at effective multilateral treaties/ conventions governing international insolvency did not produce the desired results. The Istanbul Convention, which was signed by eight member States could not be enforced in the absence of ratification by required number of member States. However, it vitally influenced measures developed by the European Union to address issues relating to international insolvencies between member States. These efforts led to the enactment of the European Insolvency Regulation (EIR) in the year 2000, which is generally considered to be more successful and significant than the earlier multilateral efforts in the realm of cross-border insolvency. EIR 2000 underwent certain amendments in the year 2015 and became known as EIR Recast (which has been recently amended in 2021/ 2022).

As compared to “hard law” options, “soft law” solutions have witnessed more success in attempting to resolve issues around international insolvencies. While States have primarily focused on working out treaties and conventions, “soft law” has been the focus of multilateral organizations, such as The World Organization for Cross-border Co-operation in Civil and Commercial Matters (earlier known as the Hague Conference on Private International Law), The International Institute for the Unification of Private Law (UNIDROIT) and The United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model Law on Cross-border Insolvency (MLCBI) is the best example of a “soft law” solution to cross border insolvency issues. The significance of MLCBI is that it is not prescriptive or binding like a treaty or convention but is a ‘Model Law’ i.e., a draft legislation which UNCITRAL member States are recommended to adopt. There is flexibility in adopting the Model Law with or without modifications depending on domestic conditions and needs. The MLCBI is being adopted by an increasingly large number of countries and has significantly growing influence on finding solutions to cross border insolvency related issues.

**3**

**Marks awarded 13 out of 15**

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

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company’s main place of business

as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

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

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

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

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

**Question 4.1 [Maximum 4 marks]**

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

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The following English cross border sources may be used by the American insolvent estate representative to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England:

- 1) The UNCITRAL Model Law on Cross-border Insolvency, as England has adopted the Model Law.
- 2) Case laws from English Courts under common law jurisdiction, on recognition of foreign insolvency proceedings and related assistance.

It may be added that under Section 426 of the UK Insolvency Act 1986, the UK insolvency courts are required to assist the corresponding insolvency courts of “any relevant country or territory” that request for assistance. However, since America is not designated as a “relevant country”, Section 426 of the UK Insolvency Act 1986 will not apply in the present case. The other cross border source (at the time when the headquarters of Norton Cars Inc were still in England) would be the European Insolvency Regulation which is not relevant in the present case since these Regulations only apply to EU Member States.

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**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.

Since the cross-border insolvency matter involves Italy and Germany, which are both EU Member States, the European Insolvency Regulation (EIR Recast 2015, as amended) will be the appropriate applicable legal source in this case.

Further, since COMI is in Italy, the courts in Italy will have the jurisdiction to open the main proceeding as per the applicable European Insolvency Regulation. Under the European Insolvency Regulation, COMI is the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties.<sup>3</sup>

Since, in the facts of this case, COMI is situated in Italy from where the management is directed, the main proceedings will be opened in Italy. The fact that the main operations transpired in Germany would assume relevance for determination of subsidiary proceedings.

4

#### Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

No, because the EU (Recast) Insolvency Regulation applies only to EU Member States (which does not include India, South Africa or Australia).

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.)

Netherlands, like Italy, is governed by the European Insolvency Regulation. Thus, the laws of Italy (where COMI is situated, and insolvency proceeding has been opened) will apply to the insolvency proceeding in the Netherlands. This is, however, subject to security rights over assets situated in the Netherlands.

**Greater clarity and explanation is needed. Take care to specifically state what law will apply to the security rights over assets in the Netherlands. 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.)

Ordinarily, Australian law will apply, both to an insolvency proceeding in Australia and the real rights of security situated in there. However, since Australia has adopted the Model Law, the Italian insolvent estate representative can apply to the Australian court for recognition of Italian

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<sup>3</sup> Article 3(1) of EIR Recast

insolvency proceedings. Such recognition will, however, be subject to security rights situated in Australia.

**Greater clarity and explanation is needed. Take care to specifically state what law will apply to the security rights over assets in Australia**

**1.5**

**Marks awarded 12 out of 15**

**\* End of Assessment \***

**TOTAL MARKS AWARDED 44/50**

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