**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 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.

In general, States either have an English law, or Civil law orientated foundation. Such foundations also appear in insolvency laws, but some aspects of insolvency law are affected by local legal culture as well.
USA and Australian laws are based on English common law. However, while the American system is governed by the Bankruptcy Code of 1978, reformed in the form of the BABCPA in 2005, and is seen as trendsetting regarding its liberal fresh start approach and chapter 11 reorganization mechanism, Australia does not have a single unified Bankruptcy or Insolvency Act. England, Wales, USA, and Australia adopted the UNCITRAL Model Law on Cross-Border Insolvency. **There is some scope to elaborate regarding common law across various countries with historical roots in English law.**
Among civil law systems, it worth mentioning the Dutch, French, German and Spanish insolvency laws.
The insolvency regulations in emerging markets and developing nations draw heavily from established insolvency legal frameworks, such as those observed in England or in civil law jurisdictions, especially because many of these countries were once colonies and adopted their former colonial rulers' legal structures.
In Africa, nations like Nigeria, Kenya, Botswana, and Zambia, along with Eastern African countries like Tanzania, adhere to the English law tradition. On the other hand, Angola and Mozambique follow a civil law tradition rooted in Portuguese law. Countries in West Africa that predominantly speak French have a strong foundation in civil law, specifically influenced by French legal practices. In contrast, countries like South Africa and Namibia have mixed legal systems due to the influence of both Roman-Dutch law (civil law) and English law within their legal frameworks.
The imported laws form the basis of current legislation in these countries, but many African States are now introducing more modern legislation.
India's insolvency laws are based in English law and used to reflect the older English model with different legislation for companies and personal bankruptcy. In 2016, an Insolvency and Bankruptcy Code was adopted.
On the other hand, South American countries are mostly rooted in civil law and have one of the most unified systems in the world. All South American countries recently signed the Union of South American Nations agreement, which aims to stablish a supra-national law, such as in the EU.

**2.5**

**Question 2.2 [maximum 3 marks]**

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

Universality and territoriality are two concepts/approaches to dealing with the problems associated to insolvency cases that involve multiple jurisdictions.

The **universalism** (generally favoured by international observers and commentators) is an approach that seeks to consolidate the insolvency proceedings of a debtor in a single, primary jurisdiction, which should encompass all the debtor's assets and liabilities, regardless of where they are located globally. In this scenario, the officeholder should possess the means to manage and secure all assets, while simultaneously ensuring that all creditors worldwide are afforded an equal opportunity to engage in the proceedings. This approach demands a significant degree of trust in foreign legal systems and their insolvency proceedings, particularly considering the necessity for extraterritorial effects (some difficulties such as choice-of-law and priority rules must be addressed to the universality approach to be effective). **There is scope to elaborate, for example with respect to COMI**

On the other hand, **territorialism** emphasizes separate proceedings in each jurisdiction where the debtor has assets or creditors, prioritizing local interests. Under territorialism, each jurisdiction that holds a substantial link to the debtor's financial circumstances can initiate and supervise insolvency proceedings within its own boundaries. These proceedings may function autonomously, without the existence of a centralized, global insolvency procedure. The assets involved in each specific proceeding should be confined to the jurisdiction where that proceeding is being conducted, and the creditors' capacity to submit their claims should also be limited to that same jurisdiction.

Due to the absence of a global consensus on universalism and the prevalence of a territoriality-based approach in many states, the concept of "**modified universalism**" has emerged. Under this approach, a "main proceeding" initiated in the state identified as the center of main interests is complemented by secondary or ancillary proceedings in another state. In such cases, the courts overseeing these separate proceedings are expected to collaborate and work in conjunction with one another.

**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.

Latin American nations have successfully established enduring multilateral agreements concerning the resolution of international insolvency matters. A sequence of comprehensive treaties was crafted on private international law and commerce, encompassing a specific chapter or section dedicated to bankruptcy or insolvency. These treaties, formed among various groups of Latin American countries, are **(i)** The Montevideo Treaties (1889) and (1940); and **(ii)** The Havana Convention on Private International Law (1928), known as the Bustamante Code.

The Montevideo Treaty on International Commercial Terrestrial Law (1940) contains a title on Bankruptcy (Title VIII). There is also a 1940 Montevideo Treaty on International Procedural Law that contains a title on civil meeting of creditors (Title IV). These treaties were ratified only by Argentina, Paraguay, and Uruguay (the other 3 original treaty countries did not ratify the treaties).

The 1889 Treaty addresses personal and corporate insolvency, establishing bankruptcy jurisdiction based on the debtor's commercial domicile. If a debtor has a commercial domicile in one treaty State, proceedings take place in that location, even if the debtor engages in occasional trade or has branches in another State. In the case of a debtor with economically autonomous businesses in different treaty States, concurrent proceedings are possible. When insolvency proceedings are initiated in one State, local creditors in other States with economically autonomous businesses of the debtor can open bankruptcy proceedings or pursue civil action against the debtor.

The Havana Convention, which was ratified by Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela, emphasizes a unified approach to bankruptcy or insolvency proceedings, allowing for a single proceeding with universal effect throughout its region.

In its first chapter, titled "Unity of Bankruptcy or Insolvency," the convention states that if a debtor has only one civil or commercial domicile, there should be only one proceeding in insolvency or bankruptcy across all contracting States. However, concurrent proceedings are allowed in Havana Convention States if the debtor has economically separate commercial establishments.

While the convention shares similarities with the Montevideo Treaties in providing for a single proceeding in certain circumstances, it does not include provisions for cooperation or coordination in cases of concurrent proceedings. The second chapter, titled "Universality of Bankruptcy or Insolvency, and Their Effects," acknowledges that insolvency proceedings initiated in one member State will have extraterritorial effect in another member State. The convention enforces court decrees from the time of pronouncement, with compliance to local rules for registration or publicity.

**There is some scope to greater explain / emphasise differences.**

**3.5**

**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.

The use of the terms "insolvency" and "bankruptcy" varies among legal systems.

In some cases, "insolvency" is employed to describe the financial state of a corporation, while "bankruptcy" is used for an individual's insolvency in countries like Australia. Although these terms often carry the same meaning, distinctions may exist, such as "insolvency" referring to the financial state of a debtor and "bankruptcy" denoting the formal entry into bankruptcy proceedings.

However, many systems treat these terms as synonymous. Insolvency itself may signify a situation where a debtor's liabilities exceed assets (balance sheet insolvency) or when the debtor cannot repay debts promptly due to a cash flow problem (cash flow or commercial insolvency).

From the Brazilian perspective, "insolvency" usually refers to the financial state of the debtor (a company's inability to meet its financial obligations timely), but "bankruptcy" actually means "liquidation". Formal "insolvency" proceedings under Brazilian law are referred as "judicial reorganization proceedings".

In this sense, especially considering that different terms may be used in different jurisdictions to address the concepts involving insolvency proceedings, I do not agree that the terms "insolvency" and "bankruptcy" can be used interchangeably.

On the other hand, Wood identifies several potential essential features of insolvency or bankruptcy law that are considered universal principles but then casts doubt on their universality:

(i) **Automatic Stay:** Wood acknowledges the automatic stay, which freezes individual creditors' actions against the bankrupt, as the only truly universal feature. It imposes a moratorium on individual debt enforcement.

(ii) **Pooling of Assets:** The idea that assets are pooled and made available to pay creditors, replacing piecemeal seizures by individual creditors, was once considered universal. However, Wood notes that this principle has eroded, with different states providing various exceptions to this rule (in Brazil, for example, assets that are essential for the debtor's activities cannot be seized).

(iii) **Equal Payment to Creditors (Pari Passu):** The notion that creditors should be paid on a proportionate basis out of available assets is termed by Wood as an ideological concept "which is nowhere honored." Priority creditors and secured creditors often deviate from this rule in most, if not all, states.

Sealy and Hooley distinguish between the objectives of insolvency for individuals and corporations as follows:
**Objectives for Individuals:** (i) Protect the debtor from harassment by creditors; (ii) Enable the debtor to make a fresh start, particularly in cases where insolvency is not due to the debtor's actions; and (iii) Reduce indebtedness by making contributions from present and future income to the estate, considering personal circumstances.

**Objectives for Corporations:** (i) Preserve the business or viable parts thereof, not necessarily the entire company; and (ii) Impose personal liability on responsible persons if personal liability has been abused.

**Common Principles for Both Individuals and Corporations:** (i) Ensure *pari passu* distribution as far as possible, with exceptions for creditors with priority; (ii) Ensure that secured creditors deal fairly with the debtor and other creditors; (iii) Investigate reasons for failure; and (iv) Reclaim voidable dispositions when the insolvent debtor improperly dealt with assets.

Despite some overlapping topics, there are pertinent differences between individual and corporate insolvency. For instance, the notion of exempt or excluded assets, allowing insolvent individuals to retain certain assets for personal maintenance, applies, in the author's opinion, only to individuals (although, as mentioned above, at least under Brazilian law, assets essential to the debtor's activities may be exempted).

**7**

**Question 3.2 [maximum 5 marks]**

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

The notion of international insolvency law is subject to various perspectives. While there is no universally applicable set of insolvency rules globally, it is acknowledged that all states with developed legal systems have some form of bankruptcy or insolvency system, also known as a collective debt collecting procedure. Differences exist in approaches, policies, and both substantive and procedural rules among these systems. Scholars, legislatures, international organizations like UNCITRAL and the World Bank, and courts are consistently working to develop statutory dispensations and solutions to address insolvency issues on a transnational level amid these variations.

Various methods are available for handling the assets of insolvent estates located in foreign states where insolvency proceedings have not yet begun. Some jurisdictions have statutory provisions addressing these situations, while others don't have statutory dispensation and rely on ad hoc approaches where local courts may grant orders allowing foreign insolvency representatives to manage assets. In common law states, courts can be approached for assistance even in the absence of specific statutory rules, addressing gaps or lacunae in legislative provisions. Private international law rules, treaties, or conventions may also come into play to regulate the treatment of such situations.

**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.

There are multilateral approaches to regulating international insolvencies through binding "hard law" or influencing regulations via "soft law." “International law” is usually categorized as public international law, which governs states (if adopted domestically), and private international law (domestic law), which governs parties. In the realm of international insolvency, a subset of international trade law, states may adopt treaties or conventions into domestic laws to address cross-border insolvency issues. In the absence of such agreements, a state's private international law principles may determine forum, recognition, enforcement, and the choice of insolvency law.

Public international instruments like treaties and conventions, once ratified by states, become part of their domestic "**hard law**" on insolvency, enforceable in courts. In Europe, bilateral international insolvency conventions emerged in the 13th and 14th centuries, initially addressing absconding debtors and later expanding to asset gathering. From the 19th century onwards, more modern forms of bilateral treaties focused on jurisdiction, recognition, and enforcement related to bankruptcy, winding up, and arrangements. The Nordic Convention (1933) from the Scandinavian region is a notable multilateral treaty. However, broader European efforts at achieving multilateral international insolvency conventions faced years of unsuccessful attempts.
In 1990, the Council of Europe, with 47 member countries, concluded the Istanbul Convention on Certain International Aspects of Bankruptcy. While signed by eight member states, it did not enter into force but influenced the European Union's response to international insolvency issues among its member states. The European Union found success through the European Insolvency Regulation (EIR) in 2000, influencing broader multilateral developments. The current multilateral instrument within the EU is Regulation (EU) 2015/848 of the European Parliament and Council, known as the EIR Recast. The EIR Recast ceased to apply in the UK after its exit from the EU on December 31, 2020, and recent amendments were made in December 2021, which became effective for most member States in January 2022.

The pursuit of "hard law" solutions to international insolvency law issues has shown variable success, but more effective outcomes have been achieved through the use of "**soft law**" options. Multilateral organizations, distinct from states or governments working on treaties, have been instrumental in adopting this approach in recent decades.
The Hague Conference on Private International Law, established in the 19th century for the progressive unification of private international law, adopted a Model Treaty on Bankruptcy in 1925, influencing international discussions on regulating international insolvency. While not ratified, this Model Treaty contributed to deliberations on jurisdiction allocation for corporations. The Hague Conference now collaborates with UNIDROIT and UNCITRAL, such as in the preparation of the UNCITRAL Legislative Guide on Insolvency Law (2004).
UNCITRAL, in the mid-1990s, successfully employed a "soft law" approach by developing the Model Law on Cross-border Insolvency (MLCBI). Rather than a treaty or convention, this initiative took the form of a Model Law—draft legislation recommended for adoption by member states, with or without modification. The MLCBI has gained significant momentum as an influential response to international insolvency law, with many states adopting it due to its widespread applicability.

**3**

**Marks awarded 11.5 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.

As part of its cross-border rules, England and Wales adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006 (UK Statutory Instrument 2006 No. 1030). In order to request recognition of the proceeding in the UK, the American insolvent estate representative must comply with the provisions under Schedule 1 (Uncitral Model Law on Cross-Border Insolvency) and Part 2 (Applications to Court for Recognition of Foreign Proceedings) of Schedule 2 (Procedural Matters in England and Wales) of the Cross-Border Insolvency Regulations 2006 (2006 No. 1030). Below you will find some relevant rules under Schedule 1 for this particular case:

> *Article 15. Application for recognition of a foreign proceeding*
> *2. The foreign proceeding shall be recognised—*
>
> *(a)as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or*
>
> *(b)as a **foreign non-main proceeding** if the debtor has an establishment within the meaning of sub-paragraph (e) of article 2 in the foreign State. (article 2 (e)"establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services)*
>
> *Article 21. Relief that may be granted upon recognition of a foreign proceeding*
> *2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, **provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected**.*

*3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.*

It is worth mentioning that Section 426 of the Insolvency Act establishes a statutory framework requiring U.K. courts to assist insolvency courts of "relevant countries" upon request. This assistance may involve granting orders enabling overseas office holders to utilize U.K. insolvency laws or, less frequently, applying the local insolvency laws of the requesting court within the U.K. However, the provision is limited in scope as it only applies to requests from insolvency courts of "relevant countries," primarily comprising Commonwealth countries or remaining U.K. colonies, so it couldn't be applied to this case.

JIN Guidelines for communication and cooperation between courts in cross-border insolvency matters could also be used since both the USA and the UK adopted it.

After the Brexit, EIR Recast no longer applies in the UK (post11pm 31 December 2020 proceedings).
**It would be beneficial to also reference the common law**

**3.5**

**Question 4.2 [Maximum 4 marks]**

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

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

The European Insolvency Regulation (EIR) **designates jurisdictional competence to the courts of a member state where the "centre of the debtor's main interests" (COMI) is located**, as follows:

*Article 3*
***International jurisdiction***
*1.*
*The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The 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****. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.* ***That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings****.*

The EIR primarily assigns jurisdiction based on the COMI for main insolvency proceedings but allows for the **possibility of a secondary proceeding in other member states**. These subsidiary proceedings are permissible when the debtor has an "establishment," defined as any place of operations where non-transitory economic activity occurs with human means and assets. Subsidiary proceedings can be either "independent proceedings," initiated before the main proceedings, or "secondary proceedings," initiated after the bankruptcy adjudication in the state with the COMI.

*2.*

*Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.*

*3.*

*Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings.*

*4.*

*The territorial insolvency proceedings referred to in paragraph 2 may only be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 where*

*(a)*

*insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or*

*(b)*

*the opening of territorial insolvency proceedings is requested by:*

*(i)*

*a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or*

*(ii)*

*a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings.*

*When main insolvency proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings.*

The EIR Recast (as the EIR beforehand) governs the applicable law in proceedings falling under the Regulation. Article 7.1 specifies that, unless stated otherwise, **the law applicable to insolvency proceedings and their effects is that of the "State of the opening of proceedings**." Article 7 further elaborates on the determination of the law concerning the conditions for opening, conducting, and closing these proceedings. Subsequent Articles 8 to 18 provide provisions on the applicable law for specific matters such as rights in rem, setoff, immovable property, employment, and detrimental acts.

Therefore, considering that the COMI is in Italy, the main proceeding should be opened in Italy and, therefore, Italian law should applicable (article 7.1 of EIR). A subsidiary proceeding could also be opened in German if, besides operations, the company had an actual “establishment” there.

**For completeness of this answer, it would be beneficial to note that both States are EU member States.**

**3.5**

**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?

The EU Recast Insolvency Regulation applies only to EU members. Australia and South African adopted the UNCITRAL Model Law on Cross-Border Insolvency, so they could pursue recognition under the

terms of this instrument. However, India is yet to adopt the Model Law (although some initiatives are in course.

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**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.)

Italian law will apply, pursuant to article 7 of Chapter I of the EU (Recast) Insolvency Regulation, which 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. Since the Netherlands are also a Member State, despite the powers assigned to the insolvency practitioner under article 21 of Chapter I, any intended actions towards the security assets situated in the Netherland will have to comply with the rules of the Netherlands (article 21, paragraph 3) and observe article 8 of Chapter I of EU Recast, as follows:

*Article 21*
***Powers of the insolvency practitioner***
*1.The insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on it, by the law of the State of the opening of proceedings, in another Member State, as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State.* ***Subject to Articles 8 and 10, the insolvency practitioner may, in particular, remove the debtor's assets from the territory of the Member State in which they are situated.***
*2.The insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. The insolvency practitioner may also bring any action to set aside which is in the interests of the creditors.*
*3.In exercising its powers,* ***the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures, unless ordered by a court of that Member State, or the right to rule on legal proceedings or disputes****.*

*Article 8*
***Third parties' rights in rem***
*1.****The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings****.*

*2.The rights referred to in paragraph 1 shall, in particular, mean:*
*(a)the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;*
*(b)the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;*
*(c)the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;*
*(d)a right in rem to the beneficial use of assets.*
*3.The right, recorded in a public register and enforceable against third parties, based on which a right in rem within the meaning of paragraph 1 may be obtained shall be considered to be a right in rem.*
*4.Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).*

**3**

(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.)

UNCITRAL Model Law on Cross-Border Insolvency was adopted in Australia by the means of **Cross-Border Insolvency Act 2008**, which shall apply in this case, alongside with the Corporations Act 2001, especially its Schedule 2 (Insolvency Practice Schedule for Corporations) and its sections 580-581 (cooperation between Australia and foreign courts in external administration).

**3**
**Marks awarded 14 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.**