



**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.

Most States insolvency law systems will have either a foundation in English Law (common law) or civil law.

Common law is a system of law that is based on court decisions and precedents. It is based on the principle of stare decisis – “to stand by things decided” – which means courts and judges need to follow earlier decisions and rulings when dealing with a case that presents with

similar circumstances. Some examples of jurisdictions with a common law system include England and Wales, America, Australia, and India. Although each of these have their own domestic legislation in place for insolvency law, when interpreting this legislation, prior court decisions are precedent and binding.

Civil law systems centre around comprehensive statutes, which outline procedures to follow. Courts and Judges will have to follow these statutes when making decisions, however unlike in common law systems, these decisions are not binding on future cases with similar facts. Examples of jurisdictions which have civil law systems are France, Germany and Spain.

Common law systems can provide a degree of consistency, as it will be based on interpretation in previous case law, whereas civil law systems could lack this consistency, as they are based on the judge's interpretation of the law on a case-by-case basis. This could vary from decisions previously made, so although a previous case in a civil law system might be very similar, the Judge is not bound by that decision and is open to interpret the law from their viewpoint. Civil law systems could however be argued to allow a degree of certainty, in that the law is defined in the statute and not based on previous interpretations.

Common law systems also help to be able to adapt to different situations, as legislation will not be able to consider and incorporate every scenario that could occur. In a common law system, this can be accounted for, as courts can address these unpredictable scenarios. It can also respond to changes in society, making it more flexible. Higher courts can overrule past precedent and case law as bad law, which means the law is able to adapt and change with societal changes. Unless legislation is updated and amended, there is no scope for if it doesn't fit a certain situation, or for if there are societal changes over time. It will remain in force until the law is amended, which could take some time.

3

### **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.

Universalism is the theory that there should only be one set of insolvency proceedings to deal with the debtor's assets and creditors in all jurisdictions, preventing further proceedings being brought elsewhere. This main proceeding will have a worldwide effect even outside the jurisdiction of the State where they are opened, and the law of that State will regulate the matter. This differs from territorialism, which is the theory that multiple insolvency proceedings can be commenced in each state where the debtor holds assets. This would mean each state would deal only with the assets within their state.

Modified universalism seems to be a cross over between the two. This approach involves one main proceeding being brought in the State which has been established as the centre of main interests, however it is supported by secondary or ancillary proceedings in other States. The Courts involved are expected to co-operate with each other in whilst dealing with these proceedings.

Whilst universalism relates well to globalisation, territorialism focuses on domestic interests. Territorialism can benefit local creditors who may face practical and economic difficulties in participating in cross-border insolvency, whereas a universalist approach may be favourable to large multinational corporations.

There can be difficulties with establishing where insolvency proceedings should be brought under a universalist approach, as it would likely be based on the debtor's centre of main interests. For most multi-nationals, more than one State could claim to be the

centre of main interest, for example if the debtor's main business is primarily conducted in one State, but the location of their assets and creditors is in another. This could also be a problem with an approach of modified universalism; however, proceedings can be brought in other States to support the main proceeding, so although a State may not be considered the centre of main interests, the Court in the State of the main proceedings is supposed to co-operate with the other States. With territorialism, establishing where proceedings should be brought is not a problem, as each State only deals with the assets and creditors within their jurisdiction, so there is no need to establish a debtor's centre of main interests.

There could be a lack of predictability in a universalist approach, which it could be argued isn't a concern when taking approach of territorialism. With territorialism, there is no uncertainty on the laws that will be applied in insolvency proceedings brought within that State, whereas with universalism it depends on the centre of main interests, therefore the systems and laws in place could be vastly different from one State to another. With modified universalism, although there will be a main proceeding in one State supported by ancillary proceedings in other States, each with different legal systems in place, the courts are expected to co-operate.

3

### **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 initiatives to assist with the resolution of international insolvency issues in Latin America are by way of Treaties, namely the Montevideo Treaties and the Havana Convention on Private International Law (1928) (Bustamante Code).

The Montevideo Treaty on International Commercial Law (1889) (MTICL) covers both personal and corporate insolvency. When considering the jurisdiction for bankruptcy proceedings, it will allocate this based on the debtor's commercial domicile in certain circumstances. Where the debtor has a commercial presence in one treaty State, it provides that there be one set of proceedings in that State, regardless of whether business is conducted in another State. It also allows for concurrent proceedings to take place in each treaty State where the debtor has economically autonomous businesses. This means creditors can bring proceedings or take civil action against a debtor even where proceedings and underway in another treaty State, so long as the debtor has separate, autonomous businesses in each. There are two further Montevideo Treaties. The Montevideo Treaty on International Commercial Terrestrial Law (1940) (MTICTL) contains Title VIII on Bankruptcy, and Montevideo Treaty on International Procedural Law (1940) (MTIPL) contains Title IV on Civil Meetings of Creditors.

Title IX of the Bustamante Code covers 'Bankruptcy or Insolvency'. Chapter I, Article 414 states that where the debtor has only one domestic or commercial domicile, only one set of proceedings can be brought in that Treaty State, meaning it will take effect throughout that region, however, similarly to MTICL, if a debtor has commercial establishments which are 'entirely separate economically'<sup>1</sup>, concurrent proceedings can be brought in those treaty States. Chapter II covers the 'Universality or Bankruptcy or Insolvency, and Their Effects'. It states that a decree of bankruptcy or insolvency in one Treaty State will have extraterritorial effect in another (Article 417<sup>2</sup>) and that powers given to trustees appointed in one Treaty State

---

<sup>1</sup>League of Nations, Treaty Series 1929 - Title IX. Bankruptcy of Insolvency, Page 362

<<<https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2086/v86.pdf>>>, accessed 21 October 2023

<sup>2</sup> *idem* Article 417



will have extraterritorial effect in the others (Article 418<sup>3</sup>). Chapter III covers 'Agreement and Rehabilitation', and states that any agreement reached between the debtor and creditors shall have extraterritorial effect in the other Treaty States (saving real action by creditors who may not have accepted) (Article 421<sup>4</sup>) and any steps taken to rehabilitate the debtor shall also have extraterritorial effect in other Treaty States once ordered by the Judge (Article 422<sup>5</sup>).

The obvious difference between the Montevideo Treaties and the Bustamante Code is the States that are member to them. The 1889 MTICL has been ratified by 6 Latin American States, whereas the 1940 MTICTL and MTIPL have only been adopted by 3 Latin American States. The Bustamante Code would appear to have had more success, being ratified by 15 Latin and Middle American States. Of these, only Bolivia and Peru have ratified the MTICL.

Another difference is that the Bustamante Code is more supportive of a single proceeding, which will have effect throughout the region, whereas the Montevideo Treaties focus on the commercial domicile, demonstrating a respect for national sovereignty.

Also, the Bustamante Code does not have procedures in place for co-operation or co-ordination, so although there may be concurrent proceedings underway, nothing in the Code places an obligation on the States to co-operate with each other.

It should also be noted that some Latin American countries have adopted the UNCITRAL Model Law on Cross Border Insolvency (Model Law). These include Brazil, Chile, Colombia, Mexico and Panama<sup>6</sup>. Brazil and Mexico are the two countries with the largest economies in Latin America<sup>7</sup>, and are therefore more likely to be involved in cross border trade and potentially cross border insolvency proceedings.

4

Marks awarded 10 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.

Bankruptcy is the situation where it has been established that a debtor cannot pay their debts and has been declared bankrupt by a court. The word bankruptcy is said to have come from the Italian term *banca rotta*, meaning "to break the bench", the situation where if a debtor operating his business in the medieval market could not pay his debt, his creditors would close the debtor's business by breaking their bench. This term is more often applied to a situation where the debtor is an individual.

---

<sup>3</sup> *idem* Article 418

<sup>4</sup> *idem* Article 421

<sup>5</sup> *idem* Article 422

<sup>6</sup> Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)

<<[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)>>, accessed 21 October 2023

<sup>7</sup>International Monetary Fund, "GDP per capita, current prices",

<<<https://www.imf.org/external/datamapper/NGDPDPC@WEQ/WE/SMQ>>>, accessed 21 October 2023

Bankruptcy is a legal process, and once complete, the debts are normally cleared allowing the debtor a fresh start (although they may be asked to make contributions if they are able to). In the case of individuals, they are not able to be 'dissolved' as companies can be.

By contrast, Insolvency refers to the situation where a debtor is in financial distress, for example if their liabilities exceed their assets, or if they cannot pay their debts due to a cash flow problem. It is used more often when the debtor is a company. Although this can be a legal process (if an insolvency representative is appointed by a court), it can also be an informal process, for example if the insolvent debtor is able to reach an informal agreement with their creditors.

Bankruptcy normally is one legal process, whereas insolvency is a financial state which can lead to various different processes. As mentioned above, it can lead to the debtor reaching an informal agreement with their creditors. It can also lead to an insolvency representative being appointed to manage the estate, however during this process the directors and management can stay in place to continue running the business whilst recovery procedures are attempted. If these options fail, the debtor can ultimately be struck off and, if a company, liquidated/dissolved. **There is scope to elaborate regarding essential characteristics**

There are several differences when dealing with the bankruptcy / insolvency of an individual and a corporation. Firstly, once an individual has been declared bankrupt/insolvent, some systems allow for a notion of discharge, or a 'fresh start', for financially distressed individuals. This approach allows the debtor a discharge of their unpaid debt at the end of the proceedings, and they are then able to continue without this burden of debt, therefore making a fresh start. Although corporations can receive a discharge of debt, the difference lies in that once insolvency proceedings are completed and the corporation has been liquidated, they will be dissolved and unable to continue business.

Also for individuals, there is the notion of exempt or excluded assets for individuals, which is the notion that when establishing what comprises the estate for the purpose of proceedings, some assets are excluded or exempt for individuals, allowing the insolvent debtor to keep some assets to allow them to maintain themselves. This is not an option available for corporations, and all assets established as part of the estate are traced and collected so they can be distributed amongst the creditors.

There are some avenues for relief that are available to corporations, but not individuals, known as corporate rescue. Corporate rescue is sometimes considered preferable to formal insolvency proceedings where possible, as an attempt to preserve the business (or the viable parts) of the financially distressed debtor. These can be informal, where an out of court agreement is reached, and can include provisions such as extension of payments, discharge of some of the debt and debt for equity swaps. There are also formal statutory corporate rescue options available, which can involve actions such as an automatic stay/moratorium, appointment of an independent officeholder to take over from existing management, and the development of a rescue plan. The objective for corporate rescue is a focus on recovery of the company, as opposed to a realisation of its assets, allowing jobs to be preserved which can be better for the economy.

I do not think the two terms can be used interchangeably. Firstly, Bankruptcy refers to a debtor's legal state, whereas insolvency refers to a debtor's financial state, and these are two very different things. Also, bankruptcy is more often used when referring to an individual. Corporations are more likely to enter into insolvency proceedings as there are more options and avenues for restructuring for them before they are ultimately dissolved.

6

**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 numerous challenges in cross-border insolvency which mean that developing a single global cross-border insolvency difficult to develop.

Firstly, States may disagree on the approaches to insolvency that should be taken in proceedings. Some States may prefer a universalist approach, believing multiple insolvency proceedings should be dealt with under the provisions of one state's insolvency laws, usually where is established as the debtor's centre of main interests. This approach would be possible in a single global dispensation, as would an approach of modified universalism, where there is a main proceeding in one State, supported by secondary or ancillary proceedings in other States. The problem would be if a State strongly believes that the approach that should be taken in cross-border insolvency is one of territorialism, working on the premise that proceedings should be limited to just dealing with the assets within the state where proceedings are started. This approach would not work in a single global dispensation, as territorialism involves multiple proceedings in multiple States, with no requirement for co-ordination or co-operation.

Different states may also have different views as to whether they should prioritise the interests of the debtor or the creditor. In a pro-debtor system, you may see methods designed to promote the debtor's ability to continue business, such as discharges of debt, re-payment plans and allowing exempt assets. Other States may favour pro-creditor system, whereby they prioritise the interests of the creditor in recovering their assets. This can cause problems in attempting to develop a single global cross-border insolvency dispensation, as States may not agree on what avenues should be available to debtors and creditors. You would also need to consider that some States, for example France, may emphasise other interests they consider to be important such as labour rights.

There is also a risk that jurisdictions may have different viewpoints on procedural approaches that should be taken, for example in establishing where a debtor's centre of main interests is, different processes for distribution of assets between creditors, different rankings and rights of creditors and rules regarding prioritisation and treatment of claims. States may find it difficult follow a single global system if they don't agree with the approaches to be adopted in that system.

If a single global system was to be developed, it would require States to surrender their judicial sovereignty. A single system would require all States to conform to the international insolvency proceedings and enforce the outcome and orders of those proceedings, however some States might not be willing to conform in this way. Also, given that insolvency proceedings, especially cross border insolvency, can be very complicated, it would involve a review of both procedural and substantive law for each State, which would be difficult to achieve, and might receive some reluctance from law makers not wanting to sacrifice their judicial sovereignty.

In developing a single global cross-border insolvency system, it would involve consultation and input from multiple States, and given all the differences discussed above, finding a system that all States can agree to would be very difficult. It would require States conforming to procedures they may not agree to and surrendering some level of the sovereignty in the process.

**It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook** **2.5**

**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.

Hard law refers to any rules or legal instruments incorporated by a State which become legally binding on that State. States, as well as corporations and individuals within that State, are expected to follow these laws, and if not, will be subject to consequences. Soft law refers to instruments, such as protocols and guidelines, which although not legally binding, are originated from and recommended by a range of organisations such as the World Bank and the United Nations Commission on International Law (UNCITRAL).

In an international context, treaties and conventions are public international instruments that, once ratified by a State, become binding on that State and are incorporated into domestic legislation, therefore becoming hard law. A successful example of this is the Nordic Convention on Bankruptcy, which is a convention between Denmark, Finland, Iceland, Norway and Sweden (1933). According to this convention, if a debtor is declared bankrupt in one of these Nordic States, this is recognised in the other member States, and it is applied to assets and creditors in those member States.

Other examples of successful hard law can be seen in the conventions ratified in Latin America. The Montevideo Treaty on International Commercial Law (1889) covers both personal and corporate insolvency, the Montevideo Treaty on International Commercial Terrestrial Law (1940) contains Title VIII on Bankruptcy, and Montevideo Treaty on International Procedural Law (1940) contains Title IV on Civil Meetings of Creditors. Furthermore, the Havana Convention on Private International Law covers 'Bankruptcy or Insolvency' in title IX. This includes a Chapter on 'Universality or Bankruptcy or Insolvency, and Their Effects' which states that a decree of bankruptcy or insolvency in one Treaty State will have extraterritorial effect in another (Article 417<sup>8</sup>) and that powers given to trustees appointed in one Treaty State will have extraterritorial effect in the others (Article 418<sup>9</sup>). The Chapter on 'Agreement and Rehabilitation' states that any agreement reached between the debtor and creditors shall have extraterritorial effect in the other Treaty States (Article 421<sup>10</sup>) and any steps taken to rehabilitate the debtor shall also have extraterritorial effect in other Treaty States once ordered by the Judge (Article 422<sup>11</sup>).

Although hard law has been proven to be successful regionally, soft law has been seen to be more successful in finding solutions to common challenges found in international insolvency. The UNCITRAL Model Law on Cross-Border Insolvency 1997 (Model Law) is the most successful example of soft law. This initiative was in the form of a model law, or draft legislation, which States can choose to adopt with or without modification. To date, it been adopted into the domestic legislation of 59 States<sup>12</sup>, the latest being Saudi Arabia as recently as December 2022. Some of the states that have adopted the UNCITRAL Model Law include the United States, United Kingdom, Japan and Canada, which have some of the largest economies in the world<sup>13</sup> and produce a large volume of cross border trade. This is quite an

---

<sup>8</sup> League of Nations, Treaty Series 1929 - Title IX. Bankruptcy of Insolvency, Page 362, Article 417  
<<<https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2086/v86.pdf>>>, accessed 21 October 2023

<sup>9</sup> *idem* Article 418

<sup>10</sup> *idem* Article 421

<sup>11</sup> *idem* Article 422

<sup>12</sup> Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)

<<[https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)>>, accessed 5 November 2023

<sup>13</sup> International Monetary Fund, "GDP current prices",

<<<https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD>>>, accessed 5 November 2023

impact, allowing for co-ordination and co-operation between different jurisdictions that might not have been achieved without it.

UNCITRAL also developed the UNCITRAL Legislative Guide on Insolvency Law<sup>14</sup> (UNCITRAL Guide) which was introduced in 2004. This guide provides key objectives and principles that should be taken into consideration not only for States when reviewing and reforming their existing laws and regulations, but also when formulating new laws and regulations. As stated on the UNCITRAL's website, the "advice provided aims at achieving a balance between the need to address a debtor's financial difficulty as quickly and efficiently as possible; the interests of the various parties directly concerned with that financial difficulty, principally creditors and other stakeholders in the debtor's business; and public policy concerns, such as employment and taxation".

Another example of soft law is the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (the Principles), which were most recently revised in 2021<sup>15</sup>. The original Principles were developed in 2001 in response to a need for internationally recognised standards to evaluate the effectiveness of insolvency systems. The World Bank has worked with UNCITRAL to ensure there is consistency between the World Bank's Principles and UNCITRAL's Guide, to ensure they are consistent in their approach and to further harmonise the guidance being given State's for evaluating and reforming their domestic insolvency law systems. The Principles are designed to be flexible. States are therefore given flexibility on policy decisions, whilst being encouraged to adopt practices that have been widely recognised as good practices internationally. One of the main focuses of the Principles is to develop more effective restructuring procedures, but there is also a focus on alternatives for restructuring of small and medium sized enterprises.

**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]**

<sup>14</sup> Legislative Guide on Insolvency Law <<[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf)>>, accessed 15 November 2023

<sup>15</sup> The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes <<<https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>>>, accessed 15 November 2023

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.

We know that the United States adopted the UNCITRAL Model Law on Cross Border Insolvency 1997 (Model Law)<sup>16</sup> by enactment of Chapter 15 of the Bankruptcy Code<sup>17</sup>. This means that the Court in the US must co-operate with foreign courts or representatives, and is also "entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative"<sup>18</sup>.

As Norton Cars Inc (Norton) has filed for liquidation whilst the headquarters were still in England, we know that the United Kingdom (UK) was still part of the European Union (EU) at this point. We would therefore need to look to the EU Regulation 2015/848 on insolvency proceedings (EU Recast)<sup>19</sup> to establish where Norton's centre of main interests (COMI) is. Chapter I Article 3 states that "[t]he 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"<sup>20</sup>. Furthermore, Article 3 states that "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". Bearing this in mind, as Norton has moved its headquarters to England, this is where we would presume the COMI for Norton is.

Similarly to the US, the UK has also the Model Law by way of the Cross-Border Insolvency Regulations 2006 (the Regulations)<sup>21</sup>. Under Article 15 paragraph 1, "[a] foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed"<sup>22</sup>.

Under Article 17 paragraph 1 of the Regulations, "a foreign proceeding shall be recognised if—

- (a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2;
- (b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2;
- (c) the application meets the requirements of paragraphs 2 and 3 of article 15; and
- (d) the application has been submitted to the court referred to in article 4."

---

<sup>16</sup>UNCITRAL Model Law on Cross-Border Insolvency (1997) <<chrome-extension://efaidnbmnnnibpcjpcglclefindmkaj/https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>>, access 29 October 2023

<sup>17</sup>United States Bankruptcy Code (title 11, United States Code) – at <<<https://uscode.house.gov/view.xhtml;jsessionid=6490450B75B5207DA7E15BEF2BF6399D?req=granuleid%3AUSC-prelim-title11&saved=%7C73JhbnVsZWlkOIVTQy1wcmVsaW0tdGl0bGUxMS1jaGFwdGVyNy1mcm9udA%3D%3D%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim>>>, Chapter 15, Ancillary And Other Cross-Border Cases, accessed 29 October 2023

<sup>18</sup> *idem* Section 1525 (b)

<sup>19</sup> Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation) <<[https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=(sc.Default))>>, accessed 29 October 2023

<sup>20</sup> *idem* Chapter I Article 3

<sup>21</sup> Cross-Border Insolvency Regulations 2006 << <https://www.legislation.gov.uk/uksi/2006/1030/made>>>, accessed 29 October 2023

<sup>22</sup> *idem* Chapter III, Article 15



We know that the US proceedings would fall within the definition of a foreign proceeding ("foreign proceeding" means a collective judicial or administrative proceeding in a foreign State... pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation"<sup>23</sup>), and you have been "authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs"<sup>24</sup>. We will assume you have evidence of your appointment and the US proceedings and can provide a statement of all foreign proceedings as required by Article 15 Chapter 2 and 3<sup>25</sup>. The Application would be submitted to a competent court as defined in Article 4<sup>26</sup> which we know has jurisdiction as the debtor has a place of business and assets in Great Britain (GB). Therefore all 4 criteria for recognition of foreign proceedings under Article 17 have been met.

The proceeding would likely be recognised as a foreign non-main proceeding as the debtor has an establishment as defined in Article 2<sup>27</sup>. It would be unlikely to be considered a foreign main proceeding as although it maintains a presence and conducts business in the US, the headquarters were moved to England, and we have already established that Norton's COMI would be in England following the EU Recast guidance on COMI.

If the US proceedings are recognised, relief could be granted in the form of staying commencement or continuation of individual actions or proceedings against the debtors assets (Article 21 paragraph 1(a)), staying execution against the debtor's assets (Article 21 paragraph 1(b)), suspending the right to transfer or dispose of the debtor's assets (Article 21 paragraph 1(c)) and entrusting administration of the assets located in GB to the foreign representative (Article 21 paragraph 1(e))<sup>28</sup>. The Court may also entrust the distribution of the assets in GB to the foreign Representative (Article 21 paragraph 2<sup>29</sup>).

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

2.5

#### **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.

Firstly, we would need to establish where Norton Cars Inc's (Norton) centre of main interests (COMI). To do this, as both Italy and Germany are EU Member States, we would need to look to EU Regulation 2015/848 on insolvency proceedings (EU Recast)<sup>30</sup> which they are both

<sup>23</sup> *idem* Chapter I, Article 2 subparagraph (i)

<sup>24</sup> *idem* Chapter I, Article 2 subparagraph (j)

<sup>25</sup> *idem* Chapter III, Article 15 paragraph 2 and 3

<sup>26</sup> *idem* Chapter I, Article 4

<sup>27</sup> *idem* Chapter I, Article 2 subparagraph (e) "any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services"

<sup>28</sup> *idem* Chapter III, Article 21 paragraph 1

<sup>29</sup> *idem* Chapter III, Article 21 paragraph 2

<sup>30</sup> Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation) <<

[https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=\(sc.Default\)>>](https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=(sc.Default)>>), accessed 29 October 2023

bound by. Chapter I, Article 3 states that "[t]he 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"<sup>31</sup>. Furthermore, Article 3 states that "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". Assuming that the headquarters have been moved from England to Italy (as we have been told the COMI was moved), and knowing that management is directed from there, we can assume that Italy would be Norton's COMI.

This would mean that Italy would have jurisdiction to open 'main insolvency proceedings' under the EU Recast under Article 3. Article 3 paragraph 2 does also allow for the court of another Member State to open insolvency proceedings against the debtor if they can show they have an 'establishment' within that Member State, however it is important to note that the "effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State"<sup>32</sup>. As we know Norton has its main operations in Germany, this would be considered an "establishment" under the definitions in Chapter I, Article 2 ("any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets"<sup>33</sup>). Any proceedings opened in accordance with paragraph 2 would be considered secondary insolvency proceedings, however these can be opened prior to the main insolvency proceedings if certain conditions are met (see Article 3 paragraph 4).

Chapter II covers Recognition of Insolvency Proceedings. Article 19 states that any judgment opening insolvency proceedings in a court of one Member State "shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings"<sup>34</sup> and shall "produce the same effects in any other Member State as under the law of the State of the opening of proceedings"<sup>35</sup> (Chapter II Article 20). As we have established that Norton's COMI is in Italy, the main proceedings would be under the law in Italy, which would be the Italian Code for Business Crisis and Insolvency<sup>36</sup>, adopted by Legislative Decree No. 14/2019 in 2022.

Chapter III covers Secondary insolvency Proceedings, and we can see that any proceedings brought in Germany would follow the law of that Member State (Chapter III, Article 35<sup>37</sup>). For the secondary insolvency proceedings opened in Germany, we would look at the Insolvenzordnung, InsO<sup>38</sup> which has been in force since 1999. In particular, Part 12 covers International Insolvency law, including the recognition of foreign proceedings (Section 343) and cooperation with other insolvency courts (Section 348).

Chapter III Article 41 of the EU Recast covers the co-operation between insolvency practitioners in the main proceedings and secondary proceedings concerning the same debtor, stating that they "shall cooperate with each other to the extent such cooperation is not

---

<sup>31</sup> *idem* Chapter I Article 3 <<

<sup>32</sup> *ibid*

<sup>33</sup> *idem* Chapter I Article 2

<sup>34</sup> *idem* Chapter II Article 19

<sup>35</sup> *ibid*

<sup>36</sup> Legislative Decree No. 14/2019

<<<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2019-02-14&atto.codiceRedazionale=19G00007&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=0&qId=&tabID=0.00800948662451062&title=lbl.dettaglioAtto>>> accessed 13 November 2023

<sup>37</sup> Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation), Chapter III Article 35 at <<[https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=(sc.Default))>>, accessed 29 October 2023

<sup>38</sup> Insolvenzordnung, InsO at << [https://www.gesetze-im-internet.de/englisch\\_inso/index.html](https://www.gesetze-im-internet.de/englisch_inso/index.html)>>, accessed 13 November 2023



incompatible with the rules applicable to the respective proceedings"<sup>39</sup>. This includes them communicating any information which may be relevant to the other proceedings, exploring the possibility of whether the debtor could be restructured, and co-ordinating regarding the realisations and distribution of the debtor's assets. Article 42 also imposes the requirement for the courts in each set of proceedings concerning the same debtor to communicate, including co-ordination in the appointment of insolvency practitioners, coordination regarding administration and supervision of assets, and regarding the conduct of hearings<sup>40</sup>.

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?

The EU (Recast) Insolvency Regulation is only applicable to European Union (EU) Members States, therefore the Indian, South African and Australian courts would need to look to their own domestic legislation when considering recognition of an EU insolvency representative.

It should be noted that Australia and South Africa have both adopted the UNCITRAL Model Law on Cross Border Insolvency into their domestic legislation and will therefore be likely to recognise the EU Insolvency Representative. India has not yet adopted this Model Law, although they have proposed a draft chapter to be included in their domestic legislation adopting the Model Law.

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 7 marks.)

As the Netherlands is a European Union (EU) Member State, the Italian insolvent estate representative (Representative) will look at EU Regulation 2015/848 on insolvency proceedings (EU Recast)<sup>41</sup> which they are bound by.

We can see from Chapter I, Article 7 of the EU Recast 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"<sup>42</sup>. As we know the proceedings have been opened in Italy, the law to be applied in these proceedings would be Italian law, namely the Code for

---

<sup>39</sup> Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation), Chapter III Article 41 at <<[<sup>40</sup> \*idem\* Chapter III Article 42](https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=(sc.Default)>>, accessed 29 October 2023</a></p></div><div data-bbox=)

<sup>41</sup> Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation), at <<[<sup>42</sup> \*Idem\* Chapter I, Article 7](https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=(sc.Default)>>, accessed 13 November 2023</a></p></div><div data-bbox=)

Business Crisis and Insolvency<sup>43</sup>, adopted by Legislative Decree No. 14/2019 in 2022. Article 7 also states that the law of the State opening the proceedings will determine certain conditions, including determining which assets form part of the estate, the powers available to the Representative and the ranking of claims brought and distribution from the realisation of assets<sup>44</sup>.

Further reinforcement of this is found under Chapter II Article 19 Paragraph 1 of the EU Recast, where it states that the insolvency proceedings in Italy will "be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings"<sup>45</sup>, therefore the Netherlands should automatically recognise the proceedings in Italy. Also, under Chapter II Article 21 of the EU Recast, the Representative "may exercise all the powers conferred on it, by the law of the State of the opening of proceedings, in another Member State"<sup>46</sup>.

Regarding the assets that are subject to real rights of security, Chapter I Article 8 of the EU Recast provides protection for creditors with secured interests. It states that insolvency proceedings being opened "shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable 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"<sup>47</sup>. This provides an element of protection to secured creditors. This Article 8 exemption does not apply to security granted over assets after the opening of the main proceedings in Italy, but we do not have this information available.

We would also need to look at the Dutch Civil Code to consider the applicable law for the assets situated in the Netherlands, as these will take priority over the law of the opening proceedings in Italy. Under Dutch law, a borrower's insolvency does not affect the rights of secured creditors, therefore they may still enforce their security rights regardless of the fact there are insolvency proceedings underway<sup>48</sup>. However, the Representative may be able to annul the security under certain conditions.

**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 7 marks.)

For Australia, the Representative will need to look at Cross-border Insolvency Act 2008 (the 2008 Act)<sup>49</sup>. This 2008 Act adopted the UNCITRAL Model Law on Cross-border Insolvency (Model Law) into Australia's domestic law. We know that under Chapter IV Article

---

<sup>43</sup>Legislative Decree No. 14/2019

<<<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2019-02-14&atto.codiceRedazionale=19G00007&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=0&qId=&tabID=0.00800948662451062&title=lbl.dettaglioAtto>>> accessed 13 November 2023

<sup>44</sup> Regulation (EU) 2015/848 on insolvency proceedings (Recast Insolvency Regulation), Chapter I, Article 7, at <<[https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/Document/I30E814DE710D495083639BAF754BE416/View/FullText.html?comp=pluk&transitionType=Default&contextData=(sc.Default))>> accessed 13 November 2023

<sup>45</sup> *idem* Chapter II Article 19

<sup>46</sup> *idem* Chapter II Article 21

<sup>47</sup> *idem* Chapter I Article 8

<sup>48</sup> DLA Piper, Effect of Borrower's Insolvency, at

<<<https://www.dlapiperrealworld.com/law/index.html?t=finance&s=borrower-insolvency-enforcement&q=effect-of-borrowers-insolvency&c=NL>>> accessed 13 November 2023

<sup>49</sup> Australian Government, Federal Register of Legislation – Cross-Border Insolvency Act 2008 <<<https://www.legislation.gov.au/Details/C2021C00032>>>, accessed 4 November 2023

25 the court in Australia should 'cooperate to the maximum extent possible' with the Representative.

The Representative can make an application for recognition of the Italian insolvency proceedings under Chapter III Article 15 of the 2008 Act. Paragraph 1 states that a "foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed"<sup>50</sup>. The insolvency proceedings in Italy should be recognised as it would meet the requirements for recognition under Article 17 Paragraph 1<sup>51</sup>.

We will assume the Representative has evidence of their appointment and the Italian proceedings and can provide a statement of all foreign proceedings as required by Article 15 Paragraph 2 and 3<sup>52</sup>. The Application would be submitted to a competent court as defined in Article 4 which we know has jurisdiction as the debtor has assets in Australia. The proceeding would likely be recognised as a foreign main proceeding as we have already established that Norton's COMI would be in Italy given that the headquarters are based there, and it is managed out of Italy.

If the Italian proceedings are recognised, relief could be granted in the form of staying commencement or continuation of individual actions or proceedings against the debtors assets (Article 21 paragraph 1(a)), staying execution against the debtor's assets (Article 21 paragraph 1(b)), suspending the right to transfer or dispose of the debtor's assets (Article 21 paragraph 1(c)) and entrusting administration of the assets located in Australia to the Italian Representative (Article 21 paragraph 1(e)) . The Court may also entrust the distribution of the assets in Australian to the Italian Representative (Article 21 paragraph 2).

Given that we know the assets in Australia are subject to real rights of security, we have to consider Article 22 which states in Paragraph 1 that when granting relief under Article 21, the court must be satisfied that the interests of any creditors are adequately protected. To consider the assets which are subject to real rights of security, the Representative would need to look at the Personal Property Securities Act 2009 (Cth) (PPSA). All security interests in Australia are registered on the Personal Property Securities Register (PPSR).

**3**  
**Marks awarded 13.5 out of 15**

**\* End of Assessment \***

**TOTAL MARKS 45/50**

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

---

<sup>50</sup> *Idem* Chapter III, Article 15

<sup>51</sup> *Idem* Chapter III, Article 17

<sup>52</sup> *Idem* Article 15