INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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

**(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)**

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

**Question 1.1**

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

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

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

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

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

**Question 1.2**

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

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

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

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

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

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

**Question 1.3**

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

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

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

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

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

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

**Question 1.4**

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

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

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

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

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

**Question 1.5**

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

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

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

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

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

**Question 1.6**

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

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

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

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

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

**Question 1.7**

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

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

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

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

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

**Question 1.8**

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

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

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

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

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

**Question 1.9**

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

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

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

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

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

**Question 1.10**

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

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

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

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

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

**Marks awarded 7 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.

Civil law insolvency systems originated from Roman law and have a long history of being creditor-focused and included harsh penalties against the insolvent debtor. The system evolved and gradually adopted a more balanced approach which allowed for debtor reorganization and a fresh start for the bankrupt. Some of the Countries that have adopted the civil law system include France, Germany, and Spain.

In Spain, insolvency proceedings are governed by **Act 22/2003, dated 9th July, on Insolvency**. The purpose of the Insolvency Act is to satisfy the various creditors' claims whilst preventing the liquidation of the bankrupt companies, in an attempt to ensure their economic feasibility. According to an article by **Clifford Chance on In Review: insolvency law, policy and procedure in Spain**, some of the main features of Spanish insolvency law are the classification of debts, the challenge of prior transactions, the general effects of the insolvency on debts and bilateral agreements, and the liability regime.

In contrast, the modern English system, especially after the Insolvency Act of 1986, seeks a balance between creditor rights and debtor rehabilitation. This approach is also reflected in the laws of former British colonies like Kenya, India, and Australia.

Kenya is a British colony and **the Insolvency Act No. 18 of 2015** borrows heavily from the English System. Some of the similarities that the Act has with English Law include but are not limited to: -

a) **Rehabilitation of Companies as a Corporate rescue measure** - The Insolvency Act introduced the concept of administration which grants a company a standstill period where the creditors of a Company are estopped from taking adverse actions against the Company under Administration. According to Mativo J. **in I & M Bank Limited v ABC Bank Limited & another eKLR**, the introduction of the device of Administration in the new laws to replace the receiver(s)/managers(s) under the Companies Act (Repealed) allows distressed companies to be given a "breathing space" so that they remain a going concern.

b) **Prioritizing creditors of the Company** – under both English and Kenyan laws, creditors' interests are protected. This position was recently buttressed in **Cytonn High Yields Solutions LLP (In Administration) v Official Receiver (Insolvency Petition E063 of 2021) [2023] KEHC 16 (KLR) (Commercial and Tax) (6 January 2023) (Ruling)** where the Court found that in administration proceedings, while an Administrator takes over the reins of the company and has control over the affairs of the company, Administration proceedings are class actions, and the interests of the creditors have to be considered in every step. An Administrator cannot act in the interests of the promoters of the debtor to the detriment of the creditors. He has to consider the wider interests of the creditors as a whole.

**This answer also required a discussion of the common law aspect of English law.**

**2**

**Question 2.2 [maximum 3 marks]**

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

According to **Sefa M Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014), 34.1 Oxford Journal of Legal Studies**, a number of theories were advanced to the correct underpinning of international insolvency laws and how such laws should be developed including the applicable choice of law principles. These principles include the principles of universalism, modified universalism, and territorialism and seek to create solutions to the problems associated with cross-border insolvency.

The principle of universalism calls for a unified approach in insolvency proceedings across different jurisdictions. Under this approach, once proceedings are commenced in one jurisdiction, no other proceedings ought to be possible or any form of execution commenced in other jurisdictions. Ideally, one forum should have jurisdiction.

Modified universalism is a more pragmatic approach that recognizes the need for international cooperation in cross-border insolvency proceedings. Where the approach is adopted, there are centralized proceedings, but the approach accommodates secondary or ancillary proceedings in another state. Courts dealing with separate proceedings cooperate and consider each jurisdiction's interests. In **McGrath v Riddell [2008] 3 All ER 869, 881[30]**, the principle has been described as the golden thread running through English cross-border insolvency law since the eighteenth century. In this case, the Court held that: -

> *"That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal."*

Under the principle of territorialism, each country seized with insolvency proceedings handles such proceedings within its territory/jurisdiction. This approach is opposed to the principle of universalism and is based on the concept that insolvency proceedings may be commenced in every state where a debtor has assets. This creates a multiplicity of insolvency proceedings over one debtor. According to **Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 Cornell Law Review**, this creates a lack of cooperation between countries and can lead to an inequitable return to creditors between different States.

**There is scope to elaborate, for example with respect to the role of COMI**

**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 America forms part of the States that have achieved long-lasting multilateral agreements to manage international insolvency issues. Some of the initiatives that Latin America has adopted include the following: -

a) Adoption of the **Montevideo treaties of 1889 and 1940** – this has been ratified by countries such as Argentina, Uruguay, and Paraguay. Even though the 1889 treaty has only been adopted by 3 countries, the 1889 treaty allocates jurisdiction based on the debtor's

commercial domicile in instances where the debtor has two or more autonomous businesses in different treaty states.

b) Adoption of the **Havana Convention on Private International Law** – this convention was concluded in 1928 between some Latin and Middle American states such as Haiti, Nicaragua, and Peru. The convention supplements the Montevideo treaties and allows for single proceedings with universal effects throughout its region. This resolution adopts the principle of universalism therefore preventing the multiplicity of insolvency proceedings over one debtor in the region.

c) Adoption of the **UNICTRAL Model Law on Cross-Border Insolvency** – According to the UN website, some of the Latin American countries have adopted the model law which facilitates the recognition of foreign insolvency proceedings between states.

**It would be beneficial to discuss the differences explicitly, rather than describe each and leave it for the reader to assess the differences.**

**3**

**Marks awarded 7.5 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 **Black's Law Dictionary, 9th Edition** describes "Insolvency" as the condition of being unable to pay debts as they fall due or in the normal course of the business. On the other hand, "Bankruptcy" is defined as a statutory procedure by which an insolvent debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of the creditors.

Even though the words "insolvency" and "bankruptcy" are used interchangeably in many instances, in Kenya, for instance, bankruptcy is used with natural persons and consumer debt proceedings while insolvency is used concerning corporations and in corporate insolvency proceedings.

Some of the essential characteristics of bankruptcy and insolvency include but are not limited to the following: -

a) The existence of a moratorium on proceedings against an individual or corporate debtor – where bankruptcy proceedings are instituted against an individual, the law may allow orders freezing any execution proceedings against such debtor. Under the Kenyan Insolvency laws, where a Company is placed under administration or liquidation, the law allows a moratorium of execution and legal proceedings against such company to enable it to have a breathing space during the insolvency proceedings.

b) The schedule of payment of creditors – in both bankruptcy and insolvency, claims are payable in order of priority. Secured creditors have the option of realising the secured asset and recovering their debts from the security and where there is a surplus of the proceeds of such

a sale, the same is handed over to the insolvency practitioner who then distributes it to the unsecured creditors whose claims rank in *pari passu*. In Kenya, for instance, the priority of payment of debts is provided for under the **second schedule of the Insolvency Act, No. 18 of 2015**.

c) Proceedings are like a class action – the assets of the debtor are pooled together to satisfy the debts owed to them replacing the piecemeal seizure of assets by various creditors. This position was buttressed in the Kenyan Insolvency Court decision by Mativo J in **Flower City Limited -vs- Polytanks & Containers Limited [2021] eKLR** where the Learned Judge held that insolvency proceedings are by their nature class actions and it is for this reason that the law requires such proceedings to be advertised.

The differences that may arise when a bankruptcy or insolvency involves a corporation rather than an individual are as follows: -

a) In dealing with consumer insolvency and bankruptcy, some assets may be excluded from the bankruptcy process to enable one to have a fresh start and meet some personal obligations during the entire process. This is not provided for corporate insolvency proceedings where the assets of the company are utilized towards satisfying debts and paying for the cost of insolvency. In some instances, the directors of the company may even be required to contribute towards the debt in cases of fraudulent trading under **Sections 505 and 506 of the Insolvency Act of Kenya**.

b) In Kenya, one of the things that differentiates the two is that personal bankruptcy proceedings are managed by a Bankruptcy Trustee in the Official Receiver's office. Corporate Insolvency proceedings may be managed by the Official Receiver's office, or an Insolvency Practitioner licensed under **Part II of the Insolvency Act**.

**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.

Cross-border insolvency may arise where the debtor has economic interests in more than one state or debts that have arisen in different foreign states. These challenges stem from the different legal systems within states and the different economic interests that different creditors from various states may have.

Some of the problems that arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation include the following: -

a) Conflict of laws due to different legal systems and insolvency laws – this is one of the major challenges in cross-border insolvency and calls for a case-to-case technique to resolve the conflict of laws. According to **Neil Hannan in Cross Border Insolvency, the Enactment and Interpretation of the UNCITRAL Model Law**, the Model Law does not harmonize the conflict of law rules of States adopting it, and the issue is left to the established rules and practices of each State.

b) Lack of formal treaties and domestic legislation - The absence of formal treaties or domestic legislation specifically addressing international insolvency issues leads to difficulties in coordinating insolvency administrations. According to **Neil Hannan in Cross Border**

**Insolvency, the Enactment and Interpretation of the UNCITRAL Model Law,** treaties are largely concluded between states that have close legal traditions and consistent cultural, linguistic, and political affiliations and therefore, where there is no common language, it is difficult to have a global insolvency legal text.

c) Differences in domestic norms on the position of creditors and creditor's priorities in different states. This is recognized under **Paragraph 22 of the preamble of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)**. The Union notes that the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different, and proposes to identify measures to curb that within the European level.

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

**2**

**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.

According to the **European Centre of Constitutional and Human Rights**, the term soft law can be used to define agreements, principles, and declarations that are not legally binding. Hard law on the other hand refers to obligations that are binding and legally enforceable in Court.

In the context of International Insolvency Law, hard law refers to treaties and international treaties that are binding on states. Soft law on the other hand is the solution that can be adopted to gain more success on a case-to-case basis.

The most successful soft law approach that has been adopted by various states is the UNICTRAL model law on cross-border insolvency which is recommended for adoption in member states.

The case of **Re Cooperative Muratori and Cementisti – CMC Di Ravenna (Insolvency) [2020] eKLR** is a success story in Kenya. In this matter, the company was undergoing insolvency proceedings in Italy, and an application was filed for recognition and enforcement in Kenya under the model laws. The court successfully recognized that the guide provided by the United Nations had been domesticated in Kenya and called for cooperation with foreign courts on cross-border insolvency matters.

**There is scope to elaborate, including with respect to examples of hard law and consideration of hard law success.**

**1.5**

**Marks awarded 10.5 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.

Under **Code 1525 of the Bankruptcy Code of 1978**, the court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation. Further, under **Code 1526 of the same Code**, the trustee or other person, including an examiner, authorized by the court, shall, subject to the supervision of the court, cooperate to the maximum extent possible with a foreign court or a foreign representative.

According to the United Nations, both the United Kingdom [UK] and the United States of America [USA] have adopted the UNCITRAL Model Law on Cross-Border Insolvency and therefore, there are routes of recognition of the foreign proceedings in the UK.

Under **Regulation 15 of the Model Laws**, the American insolvent representative may apply to the England Court for recognition of the foreign proceedings instituted in the United States. This application ought to be accompanied by the following documents and/or information: -

a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

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

**1.5**

**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.

Germany and Italy are both members of the European Union and therefore, the European Regulation on Insolvency Proceedings [EIR] applies to cross-border insolvency matters between member states.

According to **Article 3 [1] of the European regulations on Insolvency Proceedings**, 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 provision further states that: -

a) 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.

b) 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. This presumption only applies 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.

In this particular case, the main operations of the company that pertain to its trade are based in Germany and therefore, the Company's COMI is in Germany. The main proceedings should be opened in Germany in accordance with the provision aforementioned with the option of having secondary proceedings in Italy in accordance with the provisions of **Article 3 [2] and [3] of the EIR** which provide that: -

a. 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.

b. Where insolvency proceedings have been opened in accordance with Article 3 [1] of the EIR, any proceedings opened subsequently in accordance with Article 3 [2] shall be secondary insolvency proceedings.

**The COMI is in Italy**

**3**

**Question 4.3 [Maximum 1 mark]**

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

No. India, South Africa and Australia are not members of the European Union and therefore not bound by the **Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).**

According to **paragraph 25 of the preamble of the EU(Recast) Insolvency Regulation**, the Regulation applies only to proceedings in respect of a debtor whose centre of main interests is located in the Union.

**1**

**Question 4.4 [Maximum 6 marks]**

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

Given that the insolvency proceedings have been initiated in Italy, the Italian laws shall apply and overall, the administration of the insolvent company's estate shall be governed by the Italian laws. Since both Italy and Netherlands are both members of the European Union, the EU regulations will play a critical role in the insolvency proceedings.

Under **Paragraph 68 of the preamble of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast),** the regulations provide that the proprietor of a right in rem should be able to continue to assert its right to segregation or separate settlement of the collateral security.

Where assets are subject to rights in rem under the lex situs in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there.

The regulations further provide that if secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights in rem should be paid to the insolvency practitioner in the main insolvency proceedings.

Therefore, in such a case, while the insolvency proceeding would be governed by Italian law, the real rights of security in the Netherlands would be subject to Dutch law.

**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.)

Given that the insolvency proceedings have been initiated in Italy, the Italian laws shall apply and overall, the administration of the insolvent company's estate shall be governed by the Italian laws. Australia is not a member of the European Union but has adopted the **Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law in the Cross-Border Insolvency Act 2008**.

Under **Article 35 of the UNCITRAL Model Law on Secured Transactions**, a security right that is effective against third parties under this Law at the time of the commencement of insolvency proceedings in respect of the grantor remains effective against third parties and retains the priority it

had before the commencement of the insolvency proceedings unless another claim has priority pursuant to the insolvency law of such state.

The Italian insolvency estate representative would need to seek recognition of the Italian insolvency proceedings under **Section 13 of the Cross-Border Insolvency Act 2008**.

According to the **Current Developments in Monetary and Financial Law by the International Monetary Fund published on 6th November 2008**, the law that will govern the real rights in the security situated in Australia will be Australian Law due to the principle of "*lex rei sitae*". Applying the *lex rei sitae* rule, the law applicable to the *right in rem* normally corresponds to the law of the place of the assets subject to the *right in rem*, in this case, Australian law.

**3**

**Marks awarded 11.5 out of 15**

*** End of Assessment ***

**TOTAL MARKS AWARDED 36.5/50**

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