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**.

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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 9 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.

Both civil law and common law traditions have a developed historically to the point where it can be said that both systems acknowledge insolvency law. Across both types of systems, one may find that States have chosen to implement a single Act or Code or have taken a fragmented approach by enacting several pieces of legislation to deal with insolvency.

The Civil law systems (such as those of the Netherlands, France, and Germany) have their historical roots in the Roman law tradition. Historically, these civil law jurisdictions were very pro-creditor, however legislative reforms have provided for increased debtor protection. South America is predominantly a civil law jurisdiction and is known to have one of the most unified systems in the world.

A common feature shared by Anglo-American common law systems such as those of England and Wales, the United States of America, and Australia is that they each have their historical roots in English law. A point of departure is that while England and Wales and the USA have their own respective single, unified piece of insolvency legislation that is applicable to both personal and corporate insolvency, (the Insolvency Act 1986 and the Bankruptcy Code, respectively) Australia has fragmented insolvency legislation such as the Corporations Act 2001 which deals with corporate insolvency through and the Bankruptcy Act of 1986 which deals with personal bankruptcy. Importantly, all three states have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

It is important to note that emerging markets and developing countries have largely implemented either common or civil law systems typically based on the laws of their respective former colonial masters. Some States, such as South Africa, have mixed legal systems due to the pervasive historical influence of both civil and common law on their legal systems.

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.

The principle of universalism purports that a debtor's global assets and debts should only be subject to one insolvency proceeding, ideally taking place in a singular forum – the locus of the debtor's assets. Consequently, the law of that forum would have global effect, even outside the territorial jurisdiction in which the insolvency proceedings were initiated. **There is scope to elaborate for example with respect to COMI.** The principle of territorialism, on the other hand, prioritises national interests and supports the launching multiple concurrent insolvency proceedings against the same debtor. It is grounded on the idea that such proceedings may be initiated in every State or jurisdiction where the debtor has assets, but that such proceedings should be territorially limited and confined to assets within State where proceedings are commenced. Modified universalism may be viewed as a compromise between territorialism and universalism in which primary proceedings are commenced in the jurisdiction deemed to be debtor's centre of main interests ('COMI') and secondary or ancillary proceedings take place in support in another jurisdiction. A critical element of this approach is judicial cooperation between the courts handling the respective proceedings.

2.5

Question 2.3 [maximum 4 marks]

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

Latin American States are credited as having some of the most enduring multilateral agreements on dealing with bankruptcy/insolvency matters. The Montevideo Treaty on International Commercial Law (1889), the Montevideo Treaty on International Commercial Terrestrial Law (1940) (the "Montevideo 1889" and the "Montevideo 1940", respectively), the Montevideo Treaty on International Procedural Law (1940) (the "1940 Procedural Law Treaty"), and the Havana Convention on Private International Law (1928) (the "Bustamante Code") are examples of general commerce and private international law conventions concluded by different groups of Latin American States which address insolvency matters.

The Montevideo 1889 has been ratified by six Latin American States and covers both personal and corporate insolvency. It provides for bankruptcy jurisdiction based on the debtor's commercial domicile in two circumstances. Firstly, where the debtor's commercial domicile is in one treaty State, it permits only one set of proceedings in the commercial domicile even if the debtor occasionally conducts business in other States. Secondly, where the debtor has more than one economically autonomous business in different treaty States, it permits concurrent proceedings. Therefore, if insolvency proceedings are commenced in one of the States, then a local creditor in another State(s) containing an economically autonomous business may commence insolvency proceedings in that State or seek another civil remedy against the debtor.

The Montevideo 1940 contains a title on bankruptcy and the 1940 Procedural Law Treaty contains a title on civil meetings of creditors. These treaties have only been ratified by three of the 1889 Treaty States – Argentina, Paraguay, and Uruguay. Consequently, care has to be taken in determining which treaty or treaties apply to which State Parties.

The Bustamante Code was concluded in 1928 between 15 Latin and Middle American States. Bolivia and Peru are parties to both Montevideo 1889 and the Bustamante Code. This Convention lends greater support than the Montevideo Treaties to an approach that permits a single proceeding with universal effect throughout its region. For example, article 414 of the Chapter "Unity of Bankruptcy or Insolvency", provides that where an insolvent or bankrupt debtor only has a single civil or commercial domicile, there can only be one preventive proceeding in insolvency or bankruptcy, or one suspension of payments, or a composition in respect of all a debtor's assets and liabilities in contracting States. Despite this provision, article 415 provides for possibility of concurrent proceedings in Bustamante Code States in which a commercial establishment operates entirely separately economically. It thus employs an approach akin to the Montevideo Treaties in permitting a single proceeding in circumstances where the debtor is only occasionally trading in more than one State/ only has branches or agents in other contracting State Parties. It should be noted however that in the case of concurrent proceedings, the Bustamante Code does not provide procedures for cooperation or coordination of any concurrent proceeding. Chapter II of the Bustamante Code, "Universality of Bankruptcy or Insolvency, and Their Effects" gives extraterritorial effect to insolvency proceedings opened in one member State in another member State. Court decrees are enforced from the time of their pronouncement and are subject only to compliance with local publication or registration rules.

It would be beneficial to explicitly state the differences, rather than describe each and leave it for the reader to discern.

2.5

Marks awarded 8 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.

One author explains that "insolvency" can refer to the state of a debtor's financial affairs, while "bankruptcy" deals with being put into formal bankruptcy proceedings. The term insolvency is also often frequently used to describe a situation in which a debtor's liability exceeds its assets (balance sheet insolvency) or where the debtor's cash flow problem renders it unable to repay debts as they fall due (cash flow/commercial insolvency).

While I agree that "bankruptcy" and "insolvency" may in some instances be used interchangeably, as is done in many systems, it is important to bear in mind that some systems only use one of the terms, and in others, both words convey slightly different meanings. The use and meaning given to the words in a particular legal system is therefore very important to determining whether the terms may be used interchangeably in a given context. In Australia for instance, 'insolvency' typically refers to the insolvency of a corporation while 'bankruptcy' is used in respect of insolvency of a natural person.

Wood both posits (and then to some extent discredits) the idea that "bankruptcy" and "insolvency" have some essential characteristics that are deemed to be universal principles. He suggests that the automatic stay of individual debt enforcement actions by individual creditors against the insolvent party is the sole truly universal insolvency principle. While he recognises the existence of a general principle that creditors are paid out of pooled assets as opposed to assets that are seized in a piecemeal manner by individual creditors, he acknowledges that this principle is not of universal application as different States have carved our exceptions to this rule. Additionally, the principle of *pari passu* payment of creditors has been eroded by the fact that in most, if not all States, priority and secured creditors are exceptions to this rule. These departures from so-called universal principles reiterate the fact that interchangeable use may circumscribed by the particular context.

It is also important to bear in mind the differences that may arise when a "bankruptcy"/ "insolvency" involves a corporation rather than an individual. Sealey and Hooley posit that a major distinction lies in the objectives of insolvency in respect of individuals as opposed to corporations. They suggest that in relation to natural persons, the objective is to shield the debtor from creditor-harassment, to enable the debtor to start anew, particularly where the debtor does not bear most of the responsibility for the insolvency and to reduce the debtor's indebtedness by supplying the estate with contributions from the debtor's current and future earnings while considering the debtor's personal circumstances. The objective for corporations is to as much as possible save the business or its viable aspects (though not necessarily the company itself) and to impose personal liability on culpable individuals (such as directors) where abuse has occurred. Common objectives when dealing with both corporations and individuals include distributing, as much as possible, on a *pari passu* basis (bearing in mind priority of creditors); ensuring that secured creditors treat debtors and other creditors fairly; investigating causes of the failure; and reclaiming voidable dispositions where the insolvent debtor has failed to appropriately deal with assets. A noteworthy distinction between individual and corporate insolvency is that the notion of exempt or excluded assets is only applicable to individuals – where permitted by the particular system only insolvent *individuals* can keep some assets to maintain himself or his dependents.

In summary therefore, context is the critical factor in determining whether the words “bankruptcy” and “insolvency” can be used interchangeably.

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.

There are several challenges which arise in cross-border insolvency that hinder the development of a single global cross-border insolvency dispensation. They include (i) a lack of cooperation and coordination in the case of multiple concurrent proceedings against the same debtor, (ii) difficulties in reconciling various national approaches to insolvency upon the commencement of discussions on cross-border proceedings, and (iii) problems associated with determining the debtor’s single “home” State where insolvency proceedings will be exclusively commenced. Each of these will be discussed in turn.

Multiple concurrent proceedings typically involves each state applying its own laws (including its choice-of-law rules) with little to no extraterritorial effect being given to foreign proceedings in some cases. A single global cross-border insolvency dispensation demands a significant amount of trust in foreign legal systems and foreign insolvency proceedings since proceedings under such a dispensation would have to have extraterritorial effect. To be successful, a global approach would also have to confront thorny legal issues such as choice-of-law and priority rules. This situation is further complicated by the relatively low standards of insolvency laws in many States. The insolvency legislation in many countries is antiquated or otherwise drafted in a manner that is ill-equipped to handle present-day trade and investment. In such circumstances, employing a strict territorial approach coupled with antiquated laws and a lack of cooperation and coordination between different States in addressing the cross-border insolvency elements is definitely an obstacle to the development of a single global cross-border insolvency dispensation.

Once discussions on cross-border insolvency issues have been initiated, reconciling the different national approaches to insolvency poses yet another difficulty. Local legal culture, basic rights, and the way in which a system deals with related matters such as security rights, socio-economic matters or labour issues have a significant impact on certain aspects of insolvency law. A significant point of contention concerns the interests that insolvency proceedings should cater to. The disparate interests in pro-creditor versus pro-debtor systems poses a significant hurdle. Other systems may focus on other interests that are more important in their domestic space for instance the approach to labour rights in France. Additionally, public policy reasons such as an unwillingness to recognise foreign public claims (in the case of taxes, social security, etc) or simply a need to protect local creditors may be given primacy. These approaches often lead to States contending with rather than cooperating with each other with respect to the debtor’s assets.

One of the major problems associated with determining the debtor’s single “home” State where insolvency proceedings will be exclusively commenced is that this will generate insecurity and uncertainty in the domestic markets and that “home” country standards may be indeterminate (particularly where the debtor is a corporate group) and susceptible to strategic manipulation. This uncertainty is another major stumbling block in the way of with establishing a single global cross-border insolvency dispensation.

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.

In the context of international insolvency, the term “hard law” is used to denote obligations pertaining to insolvency that are legally binding on States, and which can be legally enforced. Such obligations take the form of treaties and conventions signed and ratified by a State and thus forms part of a State’s domestic laws enforceable in its courts. Bilateral international insolvency treaties began springing up from the 13th and 14th centuries addressing issues such as fleeing debtors and then later from the 19th century dealt with critical matters including jurisdiction, winding-up and recognition and enforcement. Unfortunately, however, many multilateral treaties concerning insolvency have not fared very well and have had variable degrees of success in solving international insolvency law issues. The Nordic Convention of 1933 is a rare example of a successful multilateral insolvency convention. This Act champions the notion of universality of a nominated insolvency and promotes unity of proceedings, while allowing for concurrent proceedings in limited cases. Treaties such as the Istanbul Convention did not have significant buy-in because though signed by 8 states, it did not enter into force due to limited ratification. A silver lining is that although the Istanbul Convention failed to enter into force, it significantly influenced the EU’s response to international insolvency issues faced by its Member States. The European Insolvency Regulation of 2000 also impacted wider multilateral developments in international insolvency law so much so that its reviewed and amended version, the EIR (Recast), and the subsequent amendment by way of Regulation 2021/2260, is the current multilateral instrument on international insolvencies within the EU.

Soft law on the other hand refers to legally non-binding agreements, principles and declarations which often originate from international organisations such as the UNCITRAL Working Group V on Insolvency and insolvency organisations such as INSOL International. The adoption of a Model Treaty on Bankruptcy at the 1925 Hague Conference on Private International Law contributed to and paved the way for international discussions on the regulation of international insolvency. Soft law solutions to international insolvency law issues has seen more success than its hard law counterpart. Consequently, recent decades have witnessed an increased effort by multilateral organisations to employ this approach in addressing international insolvency law issues. UNCITRAL’s Model Law on Cross-border Insolvency represents the most effective soft law initiative to date. The number, economic size and geographic spread of the States that have adopted and continue to adopt the Model law has resulted in it having a significant influence on the development of international insolvency law.

3

Marks awarded 12.5 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.

The applicable English cross-border sources that the American insolvent estate representative may use to request recognition in terms of English law in order to deal with the assets of Norton Cars Inc situation in English are:

- Cross-Border Insolvency Regulations 2006 which were enacted in England to implement the UNCITRAL Model Law on Cross-Border Insolvency 1997 (the "Model Law"). The US has also adopted the Model Law, but it is important to note that the CIBR applies in any event without the need for reciprocity.
- English common law based on principles of comity and modified universalism. At paragraph 30 of McGrath v Ridell, Lord Hoffman referred to the applicability of the principle of (modified) universalism and described it as the "golden thread running through English cross-border insolvency law since the 18th century". He emphasised the fact that the principle requires that "English Courts should so far as consistent with justice and UK public policy, cooperate with courts of the country of the principal liquidation".

The American insolvent estate representative may also be advised that while section 426 of the UK Insolvency Act 1986 provides a legal avenue for a foreign office holder to seek recognition in England, it applies only to requests made by relevant countries which are predominantly Commonwealth states or UK overseas territories. Therefore, an American insolvent estate representative could not use this source.

4

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.

As Italy and Germany are both EU States, European Insolvency Regulation (Recast) ("EIR (Recast)") is the appropriate legal source to be used in a cross-border insolvency matter between these two States.

Under the EIR (Recast) framework, the debtor's "centre of the debtor's main interests" ('COMI') determines and allocates international insolvency jurisdictional competence to courts of that member State. The COMI is the place where the debtor ordinarily conducts the administration of its interests,

and which is ascertainable by third parties where opening or considering insolvency proceedings. As a general principle, the law applicable to the main insolvency proceeding is that of the Member State in which the proceeding is opened. That law would determine the conditions for the commencement of the proceeding, its conduct, and its conclusion. Since Norton's management is directed from Italy, it's COMI is Italy and consequently the main proceeding should be opened in Italy under Italian law.

Importantly however, while the EIR (Recast) allocates primary jurisdiction to Italy based on Norton's COMI, it also permits the commencement of subsidiary territorial proceedings in other member States. Subsidiary territorial proceedings are allowed where the debtor has an "establishment". An establishment is defined as "any place of operation where the debtor carries out a non-transitory economic activity with human means and goods or services". Therefore, given that Norton's main operations take place in Germany, subsidiary territorial proceedings could be initiated there.

4

Question 4.3 [Maximum 1 mark]

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

No. Only courts within the European Union can apply the EIR (Recast) when considering recognition of an EU insolvency representative. Its scope of the EIR (Recast) is confined to parties with their COMI within an EU member State.

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.)

Under the EIR (Recast), recognition of insolvency proceedings opened in another EU member state is automatic (art. 16) and has the same effect in other EU States as they had in the State in which the proceedings were opened (art. 17). Consequently, Italian law would apply to the insolvency proceedings. It is important to note that legal principles which are as an aspect of general law (non-bankruptcy law), will impact insolvency, for instance the rules that regulate rights of real security. Therefore, the real rights to security in the Netherlands, would be governed by Dutch law as the EIR does not change that.

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.)

Australia adopted the Model Law its Cross Border Insolvency Act 2008. Under the Model Law, the consequences of recognition depend on the domestic law of the recognising State. Australian law would apply to the insolvency proceedings and the Italian liquidator would be able to obtain assistance from the Australian court that she is entitled to under the Model Law. All the rights and obligations of Norton in respect to property in Australia will be governed by Australian law (or the choice of law of the contract).

3
Marks awarded 15 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 44.5/50

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