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 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.

Civil law systems are generally characterised by codified statutes and ordinances with less importance placed on judicial rulings. Whereas, the English “common law” system is generally characterised by an abundance of case law or “judge-made law”, and past legal precedents will affect future decisions. Therefore, English insolvency law systems have been developed and influenced through a mix of statutes and case law, whereas civil law insolvency law systems have mostly developed through amendments and additions to codified laws with less influence from caselaw.

Civil law systems were generally seen as being more pro-creditor than common law systems. For example, the Dutch insolvency law previously did not allow for discharge of the debtor unless creditors agreed, and this position was only revised recently given developments in the area of consumer credit. However, English insolvency law had since The Statute of Ann of 1705 introduced the notion of statutory discharge, whereby a debtor who had conformed and co-operated during the proceedings could be discharged from existing debts. Another example is US insolvency law (with its stronger common law tradition) – it provides a pro-debtor system with its liberal approach to rehabilitation under Chapter 11 of the US Bankruptcy Code.

Civil law systems also seem to provide harsher consequences for the debtor's management where the debtor edges into the "twilight zone" of insolvency. Under French insolvency law, directors of French companies were traditionally subject to various obligations and potential criminal liability whenever their companies face financial difficulties – for example, they are obliged to file for insolvency proceedings within 45 days of occurrence of events that correspond to cash flow insolvency, and failure to comply with these obligations could result in criminal prosecution and administrative sanctions, in addition to civil liability. Compared to English insolvency law, there is no general duty on the directors of an UK company to file for insolvency proceedings when the company faces financial difficulties, though the directors may owe fiduciary duties to consider the creditors’ interests ahead of the shareholders’ interests in such circumstances.

Civil law systems generally provide a single unified insolvency legislation governing corporate insolvency and personal bankruptcy, presumably due to their codified law tradition. For example, German insolvency laws are unified under the *Insolvenzordnung* (InsO), while Spanish insolvency laws are unified under the Spanish Insolvency Act 2003. Compared to common law systems, quite a number of jurisdictions still do not have a single unified piece of legislation to deal with all aspects of insolvency matters. For example, in Australia, the Corporations Act 2001 regulates corporate insolvency and the Bankruptcy Act 1966 regulates personal bankruptcy; in Hong Kong, the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) regulates corporate insolvency and the Bankruptcy Ordinance (Cap.6) regulates personal bankruptcy; and likewise in the Cayman Islands, corporate insolvency is principally governed by the Companies Act, while personal bankruptcy is principally governed by the Bankruptcy Law.

It would be beneficial to also list relevant countries within each category. You raise a few examples. 2.5

Question 2.2 [maximum 3 marks]

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

In terms of opening insolvency proceedings across different jurisdictions – universalism pushes for the position for only one insolvency proceeding covering all of the debtor's assets and debts worldwide, such that only one forum with the debtor's centre of main interest (COMI) has jurisdiction. Territorialism on the other hand argues that insolvency proceedings may be commenced in every jurisdiction where the debtor holds assets, but such proceedings are territorially limited and restricted to property within the jurisdiction where the proceedings are opened. Modified universalism preaches for a position in-between the extremes – a main proceeding will be opened in the jurisdiction with the debtor's COMI, supported by ancillary proceedings in other relevant jurisdictions.

In terms of the consequences of insolvency proceedings in different jurisdictions – under universalism, since one single approach based on provisions of the COMI insolvency law will be applied, therefore the consequences of insolvency proceedings in the COMI will have worldwide effect. Whereas, under territorialism consequences of each insolvency proceeding will only apply to persons and assets in that jurisdiction. Under modified universalism, consequences of the COMI insolvency proceeding may be recognised and enforced in jurisdictions with ancillary proceedings, provided there are similar or equivalent consequences under the jurisdiction of the ancillary proceedings and that there are no public policy or other material objections to recognising and enforcing such consequences.

In terms of who can participate in insolvency proceedings in different jurisdictions – universalism permits all creditors worldwide to participate in any of these proceedings, with all claims being treated on an equal basis. Territorialism restricts only those creditors within the jurisdiction to file their claims, with a view that interests of local creditors be protected before any assets are transmitted abroad. Modified universalism provides a mix of these approaches – foreign creditors are permitted to participate in a local insolvency proceeding, however they are subject to local insolvency rules concerning priorities of payment, special rules concerning particular institutions, and other local policy concerns such that their claims may not be treated equally with certain local creditors.

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Question 2.3 [maximum 4 marks]

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

A number of Latin American States have entered into multilateral agreements on managing international insolvency issues, including: (i) the Montevideo Treaty of 1889 (ratified by 6 Latin American States) and the Montevideo Treaty of 1940 (ratified by 3 of the original treat States) (together, the "**Montevideo Treaties**"), and (ii) the Havana Convention on Private International Law of 1928 (ratified by 16 Latin American States) (the "**Havana Convention**").

The initiatives differ by the way they permit a single proceeding with universal effect throughout member states. The Montevideo Treaties are more accommodating to having more than one proceeding – normally, the commercial domicile of the debtor should be chosen as the jurisdiction governing the insolvency proceeding, however where the debtor has two or more economically autonomous businesses in different treat states, concurrent proceedings are possible. Whereas, the Havana Convention is more supportive of a single proceeding, setting out more clearly in the legislation that there should only be one insolvency proceeding if the debtor has only one civil or commercial domicile; however, the Havana Convention still permits concurrent proceedings to take place if economically separate commercial establishments have been set up.

The initiatives also differ in the extent of procedures provided for cooperation or coordination of concurrent proceedings. It appears that the Montevideo Treaties discuss these in greater detail than the Havana Convention.

There is scope to elaborate for example with respect to the different members of the different agreements

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Marks awarded 8.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

It is said that the terms “bankruptcy” and “insolvency” may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to “bankruptcy” and “insolvency”, (ii) the essential characteristics of “bankruptcy” and “insolvency” and (iii) any differences that may arise when a “bankruptcy” / “insolvency” involves a corporation rather than an individual.

From a legal perspective, whether the terms "bankruptcy" and "insolvency" may be used interchangeably mainly depends on the jurisdiction in question. In many common law jurisdictions such as the UK, Australia and Hong Kong, there is a difference in these terms since "bankruptcy" refers to the insolvency of a natural person, while "insolvency" refers to the insolvency of a company. In other jurisdictions such as the US and civil law systems (such as China), these terms are often used interchangeably and carry substantially the same meaning.

From an academic or more general understanding perspective, some commentators noted that "insolvency" may refer generally to the state of financial affairs of a debtor, while "bankruptcy" refers to the state of being put into formal bankruptcy proceedings.

The essential characteristics of "bankruptcy" and "insolvency" (no matter if these terms are used as synonyms or distinguished between the context of natural persons and companies), as explained by P R Wood, include: (i) an automatic stay or moratorium against individual debt enforcement action on commencement of the bankruptcy/insolvency proceedings; (ii) pooling of assets for payment to creditors in a centralised manner, instead of piecemeal seizure of assets by each creditor; and (iii) for unsecured creditors, *pari passu* payment of the debtor's assets on a proportionate basis based on their claims.

Certain differences arise when a "bankruptcy"/"insolvency" involves a corporation rather than an individual – (i) for corporations, the objective is to preserve the business of the corporation or viable parts thereof, whereas for individuals the objective is more to protect the person from harassment enabling him/her to make a fresh start, (ii) a focus in corporation bankruptcy/insolvency is to impose personal liability on persons responsible for the corporation's failure, but there is less of such focus in individual bankruptcy/insolvency, (iii) there is generally no notion of exempted/excluded assets in the context of a corporation bankruptcy/insolvency where the corporation is allowed to keep or retain certain assets from distribution to creditors, but this could feature in individual bankruptcy/insolvency where the individual could be allowed to retain assets necessary to sustain his/her normal living expenses.

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Question 3.2 [maximum 5 marks]

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

Substantial differences in the domestic insolvency laws across jurisdictions make it difficult to develop a uniform approach to deal with issues encountered in a cross-border insolvency. The lack of uniform conflict of law rules applicable to each jurisdiction produces uncertain outcomes when foreign insolvency laws/rules are applied in each jurisdiction.

First, there is the issue of whether and how foreign creditors can participate in local insolvency proceedings. Some jurisdictions restrict participation of foreign creditors in local proceedings, resulting in foreign creditors being unable to prove their debts and share in the realisation of local assets. This goes against a global cross-border insolvency dispensation where creditors should share in the worldwide assets of the debtor.

Secondly, there is the issue of priorities and preferences for local creditors in certain jurisdictions. Even if foreign creditors' claims are recognised and they can participate in local proceedings, assets of the company and proceeds of realisation are paid in priority to local creditors or certain groups of local creditors, notwithstanding security interests, retention of title clauses, set-off and netting arrangements and other protections over the local assets granted in favour of foreign creditors. This may defeat rules on priority and protection which creditors would have relied upon when initially entering into commercial relations with the debtor.

Thirdly, there are different rules in each jurisdiction on the recognition of and assistance to foreign insolvency proceedings. Some jurisdictions may not provide standing for foreign liquidators to make court applications or take other actions in the local jurisdiction, resulting in the need for local liquidators to be appointed. If there are multiple insolvency proceedings opened in different jurisdictions in respect of a debtor, it may be difficult for affairs and assets of the debtor to be dealt with in a unified and consistent manner unless the courts of and liquidators appointed in different jurisdictions cooperate and coordinate with each other.

Fourthly, there could be differences in treatment of executory contracts across jurisdictions. Some jurisdictions may provide powers for liquidators to decide whether to continue or disclaim an existing contract entered into by the debtor. Some jurisdictions may not recognise "ipso facto clauses" (which permit the contract to be terminated in the event of insolvency). Elections made by the liquidator in a foreign jurisdiction as to executory contracts governed by the local jurisdiction, may not necessarily be recognised by the local jurisdiction's court.

Fifthly, there are differences in avoidance powers available to liquidators in each jurisdiction. Some jurisdictions provide for longer lookback periods for certain categories of avoidable transactions. Certain transactions could be avoided under the laws of one jurisdiction, but not so under the laws of another jurisdiction. This makes it difficult for liquidators to investigate into, determine and maximise assets available for distribution to the creditors.

Sixthly, different jurisdictions may have different rules on a moratorium against creditor actions on liquidation of the debtor. Some jurisdictions may permit secured creditors to continue taking actions against the secured assets, otherwise impose a general ban on further creditor actions. This makes foreign liquidators seeking a stay of creditor actions in a particular local jurisdiction difficult, if the laws of the local jurisdiction on moratorium of action (or the court's power to grant a moratorium on application by foreign liquidators) are different from the foreign jurisdiction.

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, "hard law" are treaties or conventions or international instruments which states become signatories and bind themselves, usually by being implemented into domestic legislation, such that the terms of these instruments are enforceable in the courts of that state. "Soft law" on the other hand are often recommendations or best practices promulgated by multilateral organisations, designed to influence or provide guidance to states in drafting their domestic legislation, and as such are not binding on the states / signatories unless they voluntarily choose to implement the terms domestically.

There has been some success with "hard law" in international insolvency, for example the Nordic Convention on Bankruptcy (1933) between Norway, Denmark, Finland, Iceland and Sweden, which recognises the law of the place of insolvency adjudication (the home state) to determine most effects of insolvency orders in the other states. Another example is the European Insolvency Regulation Recast (2015) for members of the European Union, which regulates the applicable law in proceedings subject to the EIR Recast such that the law applicable to insolvency proceedings and their effect is governed by the state of the opening proceedings. However, likely due to differences in domestic laws, "hard law" has achieved limited success worldwide, as it is conceivably difficult to harmonise and mandate numerous jurisdictions to follow a uniform set of rules.

"Soft law" achieved considerably more success than "hard law", and a range of multilateral organisations have focused on this approach by developing "standard-setting" non-binding legislative texts for states' consideration. For example, the *United Nations Commission on International Trade Law* ("**UNCITRAL**") developed the *Model Law on Cross-border Insolvency* ("**Model Law**"), being a draft insolvency legislation recommended by UNCITRL for members States to adopt, with or without modification. As reported on United Nations' website, legislation based on or influenced by the Model Law has been adopted in 59 states in a total of 62 jurisdictions. Another example is the *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* ("**JIN Guidelines**") published by the Judicial Insolvency Network ("**JIN**"), being a set of guidelines for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings. As reported on JIN's website, the JIN Guidelines have been adopted in 17 jurisdictions.

Marks awarded 15 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.

There are two main pathways under which recognition and assistance could be requested under English law:

1. Under the *Cross Border Insolvency Regulations 2006 SI 2006/1030* (CBIR), the US insolvent estate representative may apply to the English court for recognition of the foreign insolvency proceedings. In this case, the US insolvency proceedings are likely foreign non-main proceedings, since Norton Cars Inc's COMI is likely situated in England where its headquarters reside. For foreign non-main proceedings, no automatic stay of action in the England applies, but appropriate discretionary relief may be granted by the English court to protect the assets of the debtor or the interests of creditors. Following recognition, the US insolvent estate representative can directly access the English court and seek a number of discretionary relief, including: staying commencement or continuation of action or execution against the debtor's assets, suspending the transfer or disposal or encumbrance of the debtor's assets, entrusting the administration or realisation of the debtor's assets located in England to the foreign representative, etc..

2. The US insolvent estate representative could apply for common law recognition and assistance. The English courts would generally recognise foreign insolvency proceedings commenced in the debtor's country of incorporation (i.e. the US, in the case of Norton Cars Inc). The English court can provide assistance to the US insolvent estate representative, however this is subject to the substantive law and public policy of England, such that the English court cannot grant assistance going beyond the powers available to the US insolvent estate representative in the US "home jurisdiction". Therefore, discretionary relief such as vesting orders over the assets situated in England, protective orders such as stay of commencement or continuation of action or execution against those assets, etc. could potentially be applied for by the US insolvent estate representative.

For completeness, there is a further pathway under section 426 of the Insolvency Act 1986 which allows the UK court to provide assistance to overseas insolvency proceedings from certain listed jurisdictions. However, the US is not listed as a jurisdiction which may benefit from section 426, therefore this pathway is not applicable to this case.

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.

Italy and Germany are both member states of the EU, therefore issues concerning cross-border insolvency matter between the two states should mainly be governed by the *Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)* (the "**EIR Recast**"). For completeness, there may be other local law gateways under which recognition and assistance of insolvency proceedings between the two states may be implemented, however the EIR Recast appears to be the most relevant in this case.

Under the EIR Recast, the main proceedings should be commenced in the debtor's centre of main interests (COMI). The COMI is the place where the debtor conducts administration of its interests on a regular basis and is ascertainable by third parties, tested at the date when the application to open the proceedings is filed. From the facts provided, the management of Norton Cars Inc is directed from Italy, therefore *prima facie* the debtor's COMI is in Italy. However, Norton Cars Inc appears to have recently shifted its COMI to Italy from England – there could be issues with abusive forum shopping in the context of determining COMI, such that the COMI might remain in England (and bring about complicated issues with the applicable legal source to use in determining the cross-border insolvency matter in Italy and/or Germany), however in this case Norton Cars Inc could argue that the COMI shift is to allow the company to continue to take benefit of the EIR Recast rules considering England's exit from EU, and not to avoid/achieve the company's insolvent to be governed by the laws of a particular EU member state.

In a cross-border insolvency matter of Norton Cars Inc involving Italy and Germany, from the facts available, the main insolvency proceedings should be opened in Italy. Under the EIR Recast, the opening of insolvency proceedings in Italy should then be recognised in all other member states (such as Germany), producing the same effects in all other members states where no secondary proceedings have been opened (e.g. staying of litigation, ability to remove assets from jurisdiction). Alternatively, secondary proceedings may be commenced in Germany since Norton Cars Inc has its main operations in Germany, therefore arguably it has an *establishment* in Germany (defined under the EIR Recast as 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), but this could restrain the powers of the officer holder in the main proceedings.

4

Question 4.3 [Maximum 1 mark]

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

No. The EU (Recast) Insolvency Regulation (i.e. the EIR Recast) is a legislative instrument applicable to members within the EU, for use in cross-border insolvencies within the EU. India, South Africa and Australia have not adopted the EIR Recast as part of their domestic laws, and as such the courts of these jurisdictions do not have power to apply the EIR Recast.

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.)

The Netherlands is a member state of the EU, therefore if the Italian insolvent estate representative seeks to collect assets of the company subject to real rights of security situated in the Netherlands, the EIR Recast will apply.

The general principle under the EIR Recast is that the laws of the member state where insolvency proceedings are opened should govern the conduct of the insolvency in another member state – assuming no separate insolvency proceedings were commenced in the Netherlands, then the default applicable law of the Dutch insolvency proceedings would appear to be Italian law.

However, the laws of the other member state may apply in certain exceptional circumstances – in particular, for rights *in rem* of creditors or third parties (including lien or mortgage rights) in respect of the debtor's assets which are situated within the territory of another EU member state at the time of opening of insolvency proceedings, the law of that other member state may apply to govern such *in rem* rights (*Art.8, EIR Recast*). Therefore, potentially the applicable law governing the real rights of security over the assets situated in the Netherlands is Dutch law instead.

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.)

Australia has enacted the *Cross-Border Insolvency Act 2008 (Cth)* ("**CBIA**"), which essentially incorporates the *UNCITRAL Model Law on Cross-Border Insolvency* ("**Model Law**") with amendments. Foreign insolvency representatives could seek recognition and assistance from Australian courts under the CBIA. In this case, the Italian insolvency proceedings representative could apply to the Australian courts to be recognised as the "foreign main proceedings" (which is likely, considering that the company's COMI is in Italy from the facts given), or failing that "foreign non-main proceedings", and the Australian courts can provide a variety of assistance and relief to the Italian foreign representative following recognition (such as stay of action against the debtor's assets, suspension of right to transfer encumber or dispose of the debtor's assets, entrusting administration or realisation of debtor's assets in Australia to the debtor). In such sense, while Australian law would govern the conduct of the Australian insolvency proceeding, relevant Italian insolvency law considerations may also be factored in during the course of such proceedings.

For completeness, section 581 of the Australia Corporations Act 2001 allows the Australian courts to recognise and grant assistance ("act in aid of and be auxiliary to") to foreign insolvency proceedings from prescribed jurisdictions (including some Commonwealth countries, the US and Switzerland) – however, this does not apply to the present case since Italy is not within the prescribed jurisdictions which can make use of section 581.

In relation to real rights of security over Australian assets governed by Australian law – Australia courts will likely apply Australian laws to govern the effect of such security rights, but could apply Australian conflict of law rules to determine whether such effects need to be modified or interpreted in a different manner in circumstances where foreign Italian insolvency proceedings have been commenced and recognised by the Australian courts.

3

Marks awarded 15 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 48.5/50

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