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.

Civil law tradition takes its origin from Roman law or Germanic law and is described as inquisitorial in contradiction to English or common law tradition which is adversarial.
Most continental European countries such as Netherlands, France, Germany, Spain, and countries colonised by these countries, especially former French colonies of Africa, and most South American countries adopt civil law tradition.

Similarly, England and Wales, United States of America, Canada, Australia and most countries colonised by the United Kingdom such as India, Ghana, Nigeria, Kenya etc. common law tradition.

In terms of cross-border insolvency laws and how they are approached by these different legal traditions, it is apparent that both insolvency laws in both traditions have evolved from an initial highly pro-creditor regime (including criminalisation of indebtedness and imposition of custodial sentences) to a more liberal or pro-debtor regimes including discharges and fresh start provisions.

Leading common law tradition countries such as England and Wales, the United States of America and Australia have adopted the UNCITRALL Model Law on Cross-border Insolvency. **There is scope to elaborate on the 'common law' of English systems.**

The same is not apparent with the civil law tradition countries.

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.

[Universalism advocates a unified or a single insolvency proceeding which covers all assets of the debtor and claims of all creditors and other interested parties such as employees, taxes etc. Thus, under universalism, even where multiple insolvency proceedings have been commenced by different creditors or claimants in different jurisdictions, attempts would be made to consolidate the different proceedings into a single insolvency proceeding. It also implies that there should not be concurrent execution against the assets of the debtor. Such an approach is believed to ensure satisfaction of all legitimate claims and equitable distribution of available assets in the insolvency estate at a relatively lower cost. A major drawback of this approach is the lack of uniformity in insolvency laws around the globe and the potential for courts in foreign jurisdictions not recognise or enforce some foreign claims.

Due to the challenges with universalism, a concept of modified universalism has emerged. This approach advocates the conduct of insolvency proceedings in the jurisdiction where the insolvent company has its centre of main interest, supported by ancillary insolvency proceedings in other states where the insolvent company may have operations or assets. The insolvency estate representative would then attempt to seek co-operation and coordination between the courts undertaking the concurrent insolvency proceedings. The dictum of Lord Hoffmann in *McGrath v. Riddell* [2008] UKHL 21 succinctly articulates the concept of modified universalism under the laws of England and Wales where he stated *"..if the country of the principal winding up is a 'relevant country or territory' for*

Section 426 purposes and the liquidators in the country have requested English liquidators to remit to them the assets collected in England so that they (the principal liquidators) can, pursuant to the insolvency law of that country, implement a universal scheme of pari passu distribution to ordinary unsecured creditors, the request is one to which, in principle, the English liquidators ought, in my opinion, to accede."

Territorialism on the other hand, promotes separate or concurrent insolvency proceedings either involving the same debtor or an enterprise with connected subsidiaries operating in different States. **The territorial limits warrant elaboration.** The advocates of territorialism justify this approach as having the capacity to better protect local interests in cross-border insolvency proceedings since some local stakeholders such as creditors, employees etc. may lack the means to participate effectively in cross-border insolvency proceedings. Additionally, differences in domestic laws regarding matters such as the legal definition of insolvency, securities, priorities etc. could make a single insolvency proceeding more complex and potentially compromise or alter legal rights of local stakeholders such as creditors who had considered the domestic laws before lending. One challenge with territorialism is that an insolvent company with cross-border operations may have more assets in one jurisdiction as compared to other places of operations. This approach would produce a result where creditors and other stakeholders in the jurisdiction with minimal assets could be short-changed since the global assets would not be consolidated for a common execution and *pari passu* distribution to creditors.

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 countries have largely succeeded in introducing multilateral cross-border insolvency treaties that deal with personal and corporate insolvency among its member countries. These treaties, among others, seek to resolve challenges with cross-border insolvency proceedings such as choice of forum and the cooperation and coordination of concurrent proceedings where it occurs.
Specific multilateral initiatives on bankruptcy among Latin American countries include:

a. The Montevideo Treaties (1889) and (1940); and
b. The Havana Convention on Private International Law (1928) (Bustamante Code).

The 1889 Montevideo treaty has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay.

The Havana Convention on the other has been ratified by Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.

Under the Montevideo Treaty (1889) has provisions that determine bankruptcy jurisdiction in the event of cross-border insolvency. Jurisdiction in such situation is determined by the debtors commercial domicile; i.e. the jurisdiction is allocated to the state in which the debtor has its main business even if it has branches or agents in other states. Where the debtor has more than one economically autonomous operations in multiple member states, then concurrent insolvency proceedings may be resorted to.

The Havana Convention is perceived as more supportive of universalism as it encourages the adoption of a single insolvency proceeding in a cross-border insolvency with universal effect in all member states.
However, where concurrent proceedings ensure, the Havana Convention has no provisions for cooperation and coordination.

4
Marks awarded 9 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.

[In many jurisdictions, the terminologies "bankruptcy" and "insolvency" may be used interchangeably. However, in other jurisdictions, for example Ghana, insolvency (under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) is used in reference to corporates while under the Companies Act, 2019 (Act 990) and the Insolvency Act, 2006 (Act 708), "bankruptcy" is used to describe persons.

Again, broadly speaking insolvency may be use to describe a situation where a debtor is unable to pay its debts as they fall due. In relation to a corporate, insolvency may arise where its liabilities exceed its assets (balance sheet insolvency) or due to liquidity challenges (cash flow or commercial insolvency).

Bankruptcy on the other hand may connote a formal determination of an individual's inability to pay their debts as they fall due.

Whether in reference to an individual natural person (bankruptcy) or a body corporate (insolvency) the essential common principles that apply to both include the following:

1. Except where a creditor has a priority, there must, as much as possible, be a *pari passu* distribution of the assets of the estate;
2. The insolvency laws must ensure that creditors deal fairly with the debtors and other creditors;
3. There must be an investigation into all dispositions and dispositions which are fraudulent either because they are intended to conceal or place assets beyond the reach of creditors or made without fair value must be avoided;
4. There must be an investigation to determine the cause of the failure or bankruptcy/7insolvency.

As a result of the above common characteristics of insolvents or bankrupts, P. R. Wood lists the following as the essential characteristics of insolvency or bankruptcy laws:

a. Individual creditor actions must be frozen (moratorium or automatic stay)
b. Piecemeal seizure of assets is discouraged while collective approach of pooling the assets of the insolvent is encouraged.
c. Creditors must be paid on *pari passu* basis; i.e. amount paid to each creditor is proportionate to the debt owed them.

There is additionally, different policy rationales underlying insolvency proceedings involving an individual natural person as compared to insolvency proceedings concerning a corporate.

Normally, insolvency proceedings involving an individual would among others, seek to protect the debtor from harassment by creditors, explore the possibility of discharge to enable the bankrupt to make a fresh start and reduce indebtedness by making contributions from the present and future income. **Exempt property is relevant**

In relation to a body corporate, the policy rational of insolvency proceedings may not necessarily be to protect or preserve the company or make life comfortable for the company. Rather, it is usually intended to preserve the business or the part of business that is viable. In such an instance, the focus would be on rescue, involving restructuring etc. Where there is no such viable business prospect exists, the approach adopted is liquidation. Additionally, the conduct of persons involved in the management of the solvent corporate is also investigated to ensure that there are no improprieties.

6

Question 3.2 [maximum 5 marks]

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

[I.F. Fletcher in his book *The Law of Insolvency*, London (Sweet and Maxwell 5th Edition 2017) at page 1 defines international or cross-border insolvency as a situation "*…in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issue raised by the foreign elements of the case".*

Increased globalisation has resulted in increased trading and flow of credit across boundaries. Many enterprises may raise capital from one market and use the proceeds to establish business operations in other markets. These markets are usually in separate sovereign jurisdictions with their own distinct law and judicial systems. An indebtedness of such a corporate entity or closely related corporate entities and any insolvency proceedings by creditors would transcend national boundaries and it would not be possible to resolve the insolvency situation within a single country.

Thus, the main challenge of cross-border insolvency is the non-existence of uniform global insolvency laws, both in the substantive and the procedural law on insolvency as well as the non-existence of an insolvency court with global jurisdiction. The potential for differences in the definition of basic concepts such as situations that constitute insolvency, conflicting laws, lack of willingness based on public policy considerations to recognise and enforce foreign judicial order or incompatible concurrent insolvency proceedings (e.g. restructuring proceedings versus liquidation) and potential piecemeal realisation of assets by creditors are some of the challenges of cross-border insolvency.

Independent sovereign states determine the content of their domestic laws, including insolvency laws. These countries usually consider their own national interest and that of their citizens in enacting their laws. The interests that drive the content of domestic insolvency laws may be incompatible with other interests, thus inhibiting uniformity of laws and cooperation and effective coordination of concurrent insolvency proceedings.

Another challenge that flows from the above situation is that the standard of insolvency laws differ significantly across jurisdictions. A lot of countries have outdated insolvency laws.

Yet another challenge that inhibits the development of a single global cross-border insolvency dispensation is whether insolvency laws should be pro-creditor or pro-debtor. Because

Many stakeholder rights are involved in insolvency proceedings, including creditors, shareholders, management, employees, suppliers, Government etc., it is not always easy to determine across countries, which of the stakeholder interest should be prioritised above the others.

The above-mentioned tensions in cross-border insolvency proceedings eventually find expression in the advocates of either universalism or territorialism.
J.L Westbrook, in his "Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court" (2018) 96 Texas Law Review p. 1473 identifies the following nine key issues on cross-border insolvency proceedings:

a. Recognition of foreign representatives;
b. Moratorium on creditor actions;
c. Creditor participation;
d. Executory contracts;
e. Co-ordinated claims and procedures;
f. Priorities and preferences;
g. Avoidance provision powers;
h. Discharges; and
i. Conflict-of-law issues.

5

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of "hard" and "soft" laws in providing solutions to the challenges of international insolvency.

"Hard law" generally refers to obligations that are binding. Usually, they are international treaties among nations that are ratified and adopted to become part of the municipal or domestic laws of a nation. Specific examples of hard law in relation to cross-border insolvency proceedings are the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928), both of which have been ratified by several Latin American States. Although this approach is helpful, it has not resulted in great success globally.

"Soft law" on the other hand, is a terminology used in reference to international instruments or declarations which are non-binding in character. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (MLCBI) is an example of, and has indeed been the most successful "soft law" to date undertaken by UNCITRAL. The MLCBI is not a treaty or convention. On the contrary, it is a draft legislation recommended by UNICTRAL for adoption by States, either with or without modification. To date, a significant number of nations with wide geographical spread have adopted the MLCBI.

3

Marks awarded 14 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.

This is clearly a cross-border insolvency matter. The operations of Norton Cars Inc span across the United States of America (the place of its initial incorporation), Italy (where it had its centre if main interest), Germany by virtue of its subsidiary (i.e. Gladiator Manufacturing Limited), other EU and non-EU member states where it operates and India, South Africa and Australia where Norton Motor has branches for the distribution of its products.

As typical of such cross-border insolvency cases, there could be conflict on the insolvency domestic laws of the various countries where Norton Cars Inc and its subsidiary have operations and interested stakeholders. As noted by I.F. Fletcher, the key issues for consideration in such matters are:

a. The choice of forum;
b. The recognition and effect accorded foreign proceedings in the same matter; and
c. The choice of law to apply to the matter.

Once the insolvent estate representative has filed for liquidation in terms of American law when the centre of main operation was still in England, then the insolvent estate representative may apply to the Courts of England for the recognition and enforcement of any ancillary order they may issue from the insolvency proceedings in the United States of America to deal with the assets of Norton Cars Inc situated in England. Such an application would be to ensure that all the assets of the insolvent estate are pooled and become available for payment to all creditors on *pari passu* basis.

Based on the decision of the United Kingdom House of Lords in the case of *McGrath v. Riddell* [2008] UKHL 21, the grounds for the application for the recognition and enforcement of the foreign insolvency proceedings as well as cooperation and coordination between any insolvency estate representative in England in respect of Norton Cars Inc could be grounded either under the court's jurisdiction at common law (per Lord Hoffmann) or under Section 426 of the English Insolvency Act of 1986 (per Lord Scott).

England and Wales adopted the UNITRAL Model Law on Cross-Border Insolvency in 2006 and the United States has also adopted the Model Law. Since the Model law encourages agreements concerning the coordination of insolvency proceedings and taking advantage of the famous Maxwell Communication Corporations plc cross-border insolvency case of 1991, the insolvency estate

representative in the United States of America could enter into similar Cross-Border Insolvency Agreement and it will be recognised and given effect by the courts of England.

S426 does not apply as the US is not a designated country.

3

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.

Since both Italy and Germany are members of the European Union, then the main the law that will regulate the cross-border insolvency proceedings involving Norton Cars Inc's operations in Italy and Germany will be the European Insolvency Regulation (EIR) as amended.

The EIR allocates jurisdiction in cross-border insolvency cases among member states to the courts of the state with the centre of main interest (COMI). Given that Norton Car Inc's COMI is in Germany, then the main proceedings should open in the courts of Germany in accordance with the EIR. EIR permits the pursuit of subsidiary proceedings in other territories member states. Given that the insolvent estate has its management in Italy, subsidiary insolvency proceedings could be commenced in Italy as well.

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. The EIR is not applicable to India, South Africa and Australia.

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.)

Since both Italy and Netherlands are both members of the European Union, although the proceedings commenced in Italy under Italian insolvency laws, the EIR which regulated cross-border insolvency cases among member countries such as Italy and Netherlands would still apply.

Regarding securities created in respect of the assets of the insolvent company under Dutch laws, the insolvent estate representative appointed under the Italian insolvency proceedings can go under the EIR and commence a secondary proceeding under Dutch laws in the Netherlands.

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.)

Since Australia is not a member state of the European Union, the EIR will not apply in Australia. Thus, it is the domestic laws of Australia that will apply. However, Australia has adopted the UNCITRAL Model Law on Cross-Border insolvency, which encourages cooperation and coordination. It should be possible therefore for insolvency estate representative to obtain recognition and enforcement of orders made by the courts of Italy which are not contrary to Australian public policy.

3

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 45/50

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