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.

Response: *Anglo-American systems*

Insolvency law systems with roots in English common law include:

- England & Wales: English insolvency law is governed by a unified insolvency legislation *i.e.* the Insolvency Act 1986, which applies to both corporate and consumer bankruptcy. To deal with cross-border issues, England & Wales have adopted the UNCITRAL Model Law on Cross-Border Insolvency ("UNCITRAL Model Law") through the Cross-Border Insolvency Regulations 2006. Courts may also extend cooperation to foreign insolvency proceedings by applying common law principles of recognition and/or to foreign insolvency proceedings relating to relevant countries under Section 426 of the Insolvency Act 1986.

- United States: American insolvency law is governed by a Bankruptcy Code applicable to all US states. The Bankruptcy Code is a unified insolvency legislation that applies to both corporate and consumer bankruptcies. The Code also adopts provisions of the UNCITRAL Model Law to deal with cross-border insolvency issues. American insolvency law is generally known for its pro-debtor approach.

- Australia: Australian insolvency law is based on English common law, but Australia does not have a unified insolvency legislation. Instead, the Corporations Act 2001 governs corporate insolvency while the Bankruptcy Act 1966 governs individual/ consumer bankruptcy. Australia has adopted the UNCITRAL Model Law to deal with cross-border insolvency issues.

Insolvency law systems with roots in civil law include:

- Netherlands: Dutch insolvency law includes the Faillissementswet, the Dutch Bankruptcy Act to deal with the bankruptcy of individuals and businesses. In 2021, Netherlands introduced the Dutch Scheme of Arrangement called Wat Homologatie Onderhands Akkoord.

- France: French insolvency law is codified such that the personal insolvency regime is governed by L330-1 of the French Consumer Code and the corporate insolvency regime is governed by Book VI of the Commercial Code. From a corporate insolvency law perspective, French law provides for both out-of-court restructuring proceedings as well as court-monitored formal restructuring and insolvency proceedings.

- Germany: German insolvency law is governed by a unified insolvency legislation, *i.e.* the Insolvenzordnung.

- Spain: Spanish insolvency law contained a single insolvency procedure that can be used by both individuals and corporations. This procedure was governed under the Spanish Insolvency Act 22/2003. Significant structural changes have been made to reform Spanish insolvency law vide the Law 16/2022 of 5 September on the reform of the Consolidated Text of the Law on Insolvency.

The historical roots of insolvency law systems have an impact on various aspects of insolvency law. For instance, arguably common law systems tend to have more universalist approaches to cross-border insolvency while civil law systems tend to adopt a more territorialist approach.

There is scope to elaborate on the common law application in countries with English roots cf codification in civil based states.

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.

Response: Universalism, territorialism and modified universalism are three differing approaches to resolving issues of cross-border insolvency.

Briefly, the universalism approach advocates for the existence of a single insolvency proceeding to deal with all of a debtor's debts as well as property worldwide. This single proceeding is to have extra-territorial/ worldwide effect, and the law of this proceeding is to apply to administer all the assets of the debtor and to deal with all its creditors.

In contrast to universalism, territorialism advocates for the opening of multiple territorially limited proceedings in each jurisdiction in which a debtor holds assets. Each proceeding is to deal with the affairs of the debtor in the relevant country and local assets and creditors are to be dealt with under the local insolvency law of the jurisdiction in which they are located.

Modified universalism is, as its name suggests, a modified approach to universalism. This approach allows for the opening of a "main proceeding" in the jurisdiction where the debtor's centre of main interests lies. However, this main proceeding may be supported by secondary proceedings in other jurisdictions. Courts and representatives of the debtor's main proceedings and secondary proceedings are required to cooperate and coordinate with each other to attempt to achieve consistent outcomes.

3

Question 2.3 [maximum 4 marks]

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

Response: Various Latin American states have entered into multilateral agreements that have assisted with the resolution of international insolvency issues. These treaties include:

- The Montevideo Treaty on International Commercial Law (1889),
- The Montevideo Treaty on International Commercial Terrestrial Law (1940) and the Montevideo Treaty on International Procedural Law (1940) (collectively, the "**1940 Treaties**"), and
- The Havana Convention on Private International Law (1928) (the "**Bustamante Code**").

Briefly:

- The Montevideo Treaty on International Commercial Law (1889) has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. This treaty covers both issues relating to personal and corporate insolvency. Significantly, the treaty resolves the issue of jurisdiction depending on where the debtor's commercial domicile is located, although it also provides for the possibility of taking out concurrent proceedings.

- The 1940 Treaties have been ratified by Argentina, Paraguay and Uruguay. Both of these provide for the country in which the debtor's domicile is located to have bankruptcy jurisdiction, but also envisage concurrent proceedings in certain circumstances.

- The Bustamante Code has been ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua,

Panama, Peru and Venezuela. This Code provides for a single proceeding in the debtor's domicile to have universal / extra-territorial effect. Although the Code envisages concurrent proceedings in those states where the debtor contains commercial establishments operating separately, it does not provide for cooperation or coordination in relation to the concurrent proceedings.

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.

Response: Whether the terms "bankruptcy" and "insolvency" can be used interchangeably differs from jurisdiction to jurisdiction. In some jurisdictions, the terms can be used interchangeably. However, in others they may have different connotations. For instance:

(a) In some jurisdictions, such as India, the term "insolvency" is used to refer to the insolvency of company and corporate bodies, whereas the term "bankruptcy" is used to refer to the bankruptcy of natural persons.

(b) In some jurisdictions, the term "bankruptcy" may be used to indicate that the debtor is in a formal bankruptcy proceeding, whereas the term "insolvency" is used to indicate the debtor's financial distress.

Given the above, I don't agree that the terms "bankruptcy" and "insolvency" can always be used interchangeably. **There is scope to elaborate here**

However, in the circumstances in which both "insolvency" and "bankruptcy" are used interchangeably to refer to the insolvency / bankruptcy proceedings of both corporate and individual debtors, there are certain characteristics that commentators such as Wood suggest may be essential characteristics of insolvency / bankruptcy proceedings. These include the following:

(a) The proceedings are collective proceedings, in which the debtor's assets are pooled to satisfy the collective body of creditors.
(b) Individual action, for piecemeal enforcement of debt, is stayed.
(c) The creditors of the debtor are paid out of the pooled assets on a *pari passu* basis.

However, these characteristics are arguably not essential characteristics of insolvency / bankruptcy proceedings as they are not universally applicable. To illustrate, most countries provide for preferential payment of debt to certain creditors, such as employees, meaning creditors are not paid *pari passu.* Similarly, individual action by way of piecemeal enforcement of the estate by secured creditors is allowed in various jurisdictions.

Where "insolvency proceedings" refers only to proceedings involving corporate while "bankruptcy proceedings" refers only to proceedings involving individuals, the objectives of the proceedings may also be different. In particular:

(a) A key objective of a bankruptcy process designed for individuals is to ensure that the individual's debtor's indebtedness is reduced while ensuring that the debtor is protected from harassment and is able to make a fresh start.

(b) Typically, the main objective of corporate insolvency proceedings is to rescue the business of the corporate debtor if the debtor's business is economically viable but only financially distressed. If the business is economically unviable, typically the objective is to wind up the debtor's affairs in a manner that results in maximisation of value of the debtor's assets in the interests of the corporate debtor's creditors.

The differences in the objectives for individual bankruptcy and corporate insolvency also affect the way in which bankruptcy / insolvency processes are designed for individuals and corporations. For instance, since individual bankruptcy proceedings aim to protect the debtor from undue harassment, typically the debtor is allowed to retain some key assets (i.e. excluded assets such as the debtor's home of upto a certain value) to maintain him/herself, whereas such a concept does not exist in corporate insolvency.

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.

Response: It is difficult to develop a single global cross-border insolvency dispensation for a variety of reasons.

*First, o*ne set of challenges arise due to procedural issues. Specifically, to create a single global cross-border insolvency dispensation, since countries' laws have limited territorial effect, if at all, all countries would have to agree to a single set of rules and amend their domestic insolvency legislations to incorporate these globally agreed rules on cross-border insolvency.

This becomes all the more challenging as historically, countries have not adopted a structured approach to dealing with cross-border insolvency issues.

Secondly, even if jurisdictions are willing to enact domestic legislation on cross-border insolvency, differences in legal systems makes it challenging to harmonise approaches and agree to a single dispensation.

Different countries have vastly different approaches to insolvency issues. In terms of policy approaches for example, some countries have a pro-debtor approach to insolvency proceedings whereas others have a pro-creditor approach. The difference in approach is usually attributable to the differences in the financial markets, sources of credit and other economic needs of countries, and may also result in different insolvency tools being available in different countries. Some countries for instances, rely heavily on informal or hybrid tools whereas other countries rely largely on formal restructuring mechanisms.

The broader legal cultures across different jurisdictions also vary considerably, and this has an impact on how their insolvency legislation is applied. For instance, generally common law countries recognise the concept of trusts, however, such a concept is generally not recognised in civil law countries. This has an impact on whether insolvency legislation recognises "trusts", and how it treats them.

Finally, the standards of insolvency legislation differ across jurisdictions. Some jurisdictions have outdated insolvency legislation that does not adequately address the needs of modern finance, whereas others have highly developed systems which nevertheless may not be suitable for countries with different socio-economic needs.

In the circumstances, a single cross-border insolvency dispensation has not been developed, although various initiatives have been commenced to help resolve the issues that arise in cross-border insolvency situations.

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.

Response: "Hard law" in international insolvency law refers to binding legal instruments to regulate and/or govern international insolvency issues. These include treaties, conventions and other such instruments to which countries become signatories, and which then have effect in / become enforceable in that country's domestic law. An example of a hard law instrument is the European Union's Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

"Soft law" on the other hand refers to non-binding legal instruments that are intended to influence the development of domestic insolvency law on international insolvency issues. Soft law instruments may include, amongst others, guidance texts, such as the UNCITRAL Legislative Guide on Insolvency Law (2004) or Model Laws, such as UNCITRAL's Model Law on Cross-Border Insolvency (1997), which are draft legislation that countries can choose to adopt into their domestic laws.

While hard law initiatives have met with varying success over the years, soft law instruments have arguably been more successful in developing commonly accepted solutions to international insolvency issues. This is likely because soft law instruments can be easily modified or adapted to suit each country's domestic legal system's requirements, which gives greater comfort to countries adopting these instruments to their own use.

3

Marks awarded 11.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

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.

Response: For the purposes of seeking recognition in England, the American insolvency estate representative may make an application for recognition under the Cross-Border Insolvency Regulations 2006, through which England has adopted the adopted the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**"). For recognition through this route, the American insolvency estate representative will have to prove that Norton Cars Inc at least has an establishment in the United States under the terms of the Model Law. Alternatively, the American insolvency representative may seek that English courts extend assistance / confer recognition to the American liquidation proceedings under common law principles of recognition and assistance.

Since the United States is not a relevant country under Section 426 of the Insolvency Act 1986, the insolvency representative will not have recourse to this method. Similarly, since the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (which were applicable in England when the American liquidation commenced, as the UK was still in the EU) will not cover the United States, the American representative will not have recourse to these regulations.

Common law is also relevant

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.

Response: To resolve cross-border insolvency matters between Italy and Germany, the following sources ought to be considered:

(a) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("**Recast EU Regulations**"),
(b) Any other EU regulation, for instance on choice of law, that may apply in relation to cross-border insolvency proceedings,
(c) Any bilateral treaty or convention between Italy and Germany affecting cross-border insolvency,
(d) The domestic law of Italy and Germany, including the private international rules applicable in each jurisdiction.

To determine in which the country the main proceeding should be opened, reference must be had to the Recast EU Regulations. Article 3 of the Recast EU Regulations provide that main

proceedings should be opened in the country in which the debtor's centre of main interests ("**COMI**") lies. As Norton Cars Inc's COMI lies in Italy, the main proceedings would open in Italy.

It is relevant to state that Italy and Germany are members of the EU. This question required more specific application.

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?

Response: Indian, South African or Australian courts will **not** be eligible to apply the EU (Recast) Insolvency Regulation as India, South Africa and Australia are not Member States of the European Union to whom the EU (Recast) Insolvency Regulation applies.

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.)

Response: Pursuant to Article 7 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("**Recast EU Regulations**"), the law applicable to the insolvency proceeding will be Italian law, being the law of the jurisdiction in which the insolvency proceedings have been opened. Generally, this would cover various aspects of the insolvency proceedings, such as commencement, conduct and closure. However, specific aspects may be governed by other laws.

Under Article 8 of the Recast EU Regulations, the real rights of security situated in Netherlands will not be affected by the opening of the insolvency proceedings in Italy, and the rights will be governed by Dutch law, being the *lex situs* and the law governing the security contract.

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.)

Response: If insolvency proceedings are opened in Australia, the law applicable to such insolvency proceedings would be Australian law. Generally, this would cover various aspects of the insolvency proceedings, such as commencement, conduct and closure. However, in determining various substantive issues, for instance, how the assets of Norton Inc should be distributed, the Australian courts may choose to give regard to the law applicable in the Italian insolvency proceeding (being the main proceeding in the instant case).

The real rights of security situated in Australia will be governed by Australian law, being the *lex situs* as well as the law governing the security contract.

3

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 42.5/50

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