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 8 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.

Following I present a comparison table between insolvency law systems that have civil law roots with countries with historical roots in English law:

Civil law historical roots countries	English law historical root countries
Notable examples include Germany, France, and Italy, as well as my own country, Guatemala. The insolvency systems in these countries were influenced by legislation that focused on debt collection procedures. Over time, these systems have evolved to include elements such as debtor rehabilitation and reorganisation. In Germany, for example, the insolvency law prioritises the restructuring of businesses to ensure their continuity, reflecting an approach to dealing with insolvency. In France, the system aims to strike a balance between the interests of debtors and creditors, with an emphasis on job preservation. The main difference in the approach to debtors and creditors is the emphasis in civil law on helping debtors and giving them a chance to start again. Civil law countries rely on comprehensive statutes within their civil codes or specific laws dedicated to insolvency matters.	The United Kingdom and former British colonies such as Australia and Canada are examples. English insolvency law developed independently of the common law. It has undergone significant changes since the 16th century. Historically, these systems focused on protecting creditors' rights and ensuring the distribution of assets. An important milestone in this regard was the UK's Insolvency Act 1986, which made advances in balancing the interests of debtors and creditors, while also including provisions for business rescue. In Australia, the insolvency regime reflects an approach inspired by the Corporations Act 2001 and the Bankruptcy Act 1966. However, the emphasis is on protecting the interests of creditors. The English law approach to debtors and creditors has traditionally prioritised the rights of creditors and ensuring the distribution of assets. English law countries rely on a combination of statute and case law, with a strong emphasis on judgments and precedents.

In summary, while there is a convergence of insolvency practices influenced by the UNCITRAL Model Law on Cross-Border Insolvency, there are still significant differences between civil law and English law jurisdictions due to their historical development and legal traditions.

3

Question 2.2 [maximum 3 marks]

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

The differences between universalism, modified universalism, and territorialism in the context of insolvency law is as follows:

1. Universalism: This principle advocates the consolidation of insolvency proceedings that may take place in jurisdictions under a single insolvency law. Typically, this is done in the jurisdiction where the debtor's centre of interest (COMI) is located. Under universalism, the law of the "proceeding" (lex concursus) is given effect. The objective is to promote a cross-jurisdictional approach to insolvency proceedings that minimises conflicts of law and ensures fair treatment of creditors worldwide.

2. Modified universalism: generally, refers to an attitude between universalism and territorialism. It recognises that primary authority should be given to the insolvency process (universalism), but also allows for certain exceptions or adaptations for local or secondary processes. This approach seeks to strike a balance between efficiency and respect for the diversity of legal systems and interests. It allows for a degree of coordination and cooperation between insolvency proceedings and ancillary proceedings in different jurisdictions, thereby incorporating aspects of both universalism and territorialism. **A discussion of forum and COMI is warranted**
3. Territorialism: on the other hand, suggests that the consequences of an insolvency proceeding are limited to the country in which it is opened. This approach may result in insolvency proceedings taking place in different jurisdictions, each governed by local laws. It prioritises the sovereignty of each country's system. It limits the effects of an insolvency proceeding to the assets and creditors within that particular country. This can lead to procedures and potential disparities in the treatment of creditors in different jurisdictions.

In summary, universalism advocates one applicable insolvency proceeding based on the debtor's centre of main interests (COMI), while territorialism supports multiple independent proceedings in each jurisdiction where the debtor has assets. Modified universalism seeks a basis by recognising the importance of the process while allowing for local proceedings where necessary to respect local legal systems and interests.

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.

Several Latin American countries have adopted or are considering adopting the UNCITRAL Model Law. This move aims to harmonise standards and improve cooperation in insolvency proceedings. It is an important step towards harmonising practices and streamlining cross-border insolvency proceedings, making them more efficient and predictable. Other countries such as Argentina, Colombia, Costa Rica and Peru have recently updated their insolvency laws. These reforms reflect efforts to modernise and align with contemporary business practices and international norms. In contrast, Brazil and Mexico, being larger economies, still operate under older, more formalistic laws that lack effective enforcement and are perceived as outdated in relation to current business practices. There is also a tendency in these countries to prioritise the preservation of businesses and employment over the rights of creditors.

In my country, Guatemala, the UNCITRAL Model Law was published in February 2022. The new insolvency law is designed to facilitate the resolution of credit obligations for individuals and companies, emphasising the continuity and restructuring of distressed businesses to meet creditors' obligations. It introduces flexible options for dealing with insolvency, including voluntary insolvency (with debtor control under supervision) and necessary insolvency (administered by a liquidator). It establishes the role of an insolvency administrator to protect and preserve the debtor's assets. A reorganisation plan is drawn up, focusing on the recovery of loans and the continuity of the debtor's business activities. The law simplifies procedures related to insolvency proceedings and provides for specific jurisdictional rules.

In conclusion, the insolvency law landscape in Latin America is undergoing a significant transformation, characterised by a trend towards harmonisation with global standards, as evidenced by the adoption or consideration of the UNCITRAL Model Law by several countries.

This answer required consideration of the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928) (Bustamante Code)

0.5
Marks awarded 6 out of 10

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

Question 3.1 [maximum 7 marks]

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

The terms 'bankruptcy' and 'insolvency' are often used interchangeably in financial discussions. However, this usage may oversimplify the differences and legal implications associated with each term. To determine whether it is appropriate to use these terms, it is important to examine their meanings, characteristics and how they are applied to both companies and individuals.

1. Meaning of "bankruptcy" and "insolvency": Bankruptcy; historically, derives from the phrase "banca rotta", which translates as a bank, symbolising a merchant's inability to continue his business. In this context, bankruptcy refers to a process by which a court declares that an individual or entity is unable to meet its debt obligations. This declaration sets in motion a process that focuses on the settlement of debts. Insolvency, on the other hand, refers to a state in which an individual or legal entity is unable to pay its debts as they fall due. Insolvency is primarily considered a condition rather than a strictly defined legal status and does not always lead to bankruptcy proceedings. **There is scope to elaborate upon different meaning in different jurisdictions**

2. Essential characteristics: The primary characteristic that distinguishes bankruptcy is its recognised status. The process of bankruptcy involves a procedure whereby debtors and creditors appear before a court to value the debtor's assets for distribution. This can result in the discharge of debts, providing the debtor with a fresh start with protection. On the other hand, bankruptcy focuses primarily on aspects. It refers to a situation where liabilities exceed assets or where a company is unable to repay its debts on time. Insolvency can be temporary. It can sometimes be resolved without the need for legal action. **It would be beneficial to elaborate, for example with respect to all the matters raised by Wood**

3. Differences in Application to Corporations and Individuals: For companies, insolvency does not automatically lead to bankruptcy. Companies may be able to negotiate with creditors to restructure their debts or explore alternative financing solutions. Corporate insolvency often involves either court-supervised restructuring or liquidation. In contrast, individuals facing insolvency are more likely to enter bankruptcy in jurisdictions with comprehensive frameworks for personal debt restructuring. The consequences of bankruptcy for individuals can include the sale of assets and have a significant impact on their credit rating. **Elaborate is warranted, for example with respect to different objectives and exempt property**

It's important to note that while 'bankruptcy' and 'insolvency' are related concepts, they should not be used interchangeably. Insolvency refers to a situation that may or may not eventually lead to bankruptcy proceedings. The way in which this applies to companies as opposed to individuals

highlights some differences. For companies, there are ways of dealing with insolvency without resorting to bankruptcy. For individuals, however, insolvency is more likely to result in the need for bankruptcy proceedings. It's important for financial professionals to understand these differences to provide advice and for debtors and creditors alike to understand their rights and options when facing financial difficulties.

4.5

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.

The resolution of cross-border insolvencies involving parties and assets in multiple jurisdictions presents a unique set of challenges. The complexities of establishing a framework for cross-border insolvency arise from various legal, economic, and cultural factors inherent in the international landscape. This essay seeks to explore these challenges by shedding light on the difficulties encountered in harmonising laws and practices across jurisdictions.

1. Diversity of legal systems: A major obstacle is the divergence of systems between countries. Jurisdictions adhere to either statutory or common law traditions, each of which has developed its own approach to insolvency. Unifying these frameworks into a single global system is a complex endeavour that requires reconciling fundamental differences in legal principles, procedures, and priorities.

2. Differences in insolvency laws: Insolvency laws vary in their focus (debtor vs. creditor rights), procedures (reorganisation vs. liquidation) and outcomes. Some countries prioritise preserving the debtor's business and facilitating its rehabilitation, while others emphasise maximising creditor recoveries. A global framework must take account of these priorities, which do not reflect legal preferences but also economic and social policies.

3. Economic factors: The way people think about bankruptcy and debt can vary greatly from one culture to another. In some societies there is a stigma attached to bankruptcy, which can affect people's willingness to participate in insolvency proceedings. The level of development also plays a role in shaping insolvency laws. Developed economies may have advanced legal systems, which may make it more difficult to integrate into a global framework.

4. Jurisdiction and conflict of laws: Determining jurisdiction in cases where insolvency crosses borders can be quite complicated, particularly where different parties have claims in different jurisdictions. Resolving these conflicts requires an understanding of the systems and agreement on which jurisdictions' laws should prevail.

5. Enforcement of foreign judgments: Recognising and enforcing insolvency judgments from one jurisdiction in another is a challenge. Each country has its own set of standards for recognising judgments and may be reluctant to enforce judgments that go against its domestic policies or interests.

6. International cooperation and coordination: Successful cross-border insolvency proceedings depend on cooperation and coordination. This can be hampered by differences in legal systems, economic interests, and political relationships. The creation of mechanisms for cooperation, such as common protocols or international agreements, is a challenge because of the number of parties involved.

There are many obstacles to establishing a system for dealing with cross-border insolvency. These challenges arise from differences in systems, different insolvency laws, cultural and economic factors, conflicts between jurisdictions, difficulties in enforcement and the need for cooperation. While initiatives such as the UNCITRAL Model Law on Cross-Border Insolvency are steps forward, standardisation to fully integrate these elements into a coherent global framework remains an ongoing and complex endeavour. Successfully addressing these challenges requires not only the alignment of practices, but also an understanding of the broader economic, cultural, and political contexts that shape insolvency laws and procedures around the world.

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.

When analysing insolvency, it is essential to understand the distinction between "law" and "soft law" as it affects the operation and implementation of legal instruments in different jurisdictions. The purpose of this paper is to examine the definitions of these terms, provide examples and assess their effectiveness in addressing the challenges posed by insolvency.

1. Understanding hard law: The term "law" refers to binding rules and regulations that can be enforced in a court of law. In the context of insolvency, hard law typically includes treaties, international conventions and national laws that have been formally ratified by participating countries. A notable example of hard law in insolvency is the European Union's Insolvency Regulation. This Regulation is binding on all EU Member States. It provides a framework for dealing with cross-border insolvency cases within Europe. It includes provisions on jurisdiction, recognition of insolvency proceedings and coordination between member states.

2. Understanding soft law: soft law, on the other hand, consists of binding guidelines, principles and standards that influence legal practice but are not enforceable. Soft law instruments are often used to provide guidance and promote harmonisation in areas where implementation of the law is complicated. Take the UNCITRAL Model Law on Cross-Border Insolvency as an example. Although it is not binding, it provides a model framework that countries can adopt or modify to suit their legislation. Its purpose is to facilitate cooperation and coordination in cross-border insolvency cases and to promote legal harmonisation without imposing binding obligations.

3. The success of hard and soft law: The success of hard law lies in its enforceability and the legal certainty it provides. For example, the EU Insolvency Regulation has significantly streamlined cross-border insolvency proceedings within the European Union. However, the development and ratification of law can be slow and fraught with challenges that limit its scope and adaptability. The strength of soft law lies in its flexibility and ability to adapt to legal systems. The UNCITRAL Model Law, for example, has been influential in shaping insolvency law and promoting international cooperation. However, due to its binding nature, adoption and implementation can vary widely, leading to inconsistencies and difficulties in cross-border recognition and enforcement.

The complexity of insolvency can be effectively addressed through a combination of soft laws. While hard laws provide certainty and enforceability, their effectiveness can be hampered by the complex processes involved in international lawmaking and ratification. Soft laws, on the other hand, offer flexibility and the ability to adapt to legal systems, but their success depends on voluntary adoption and implementation by individual countries. It is essential to strike a balance between these two types

of law to create a functional framework for dealing with insolvency issues. By harnessing the strengths of both soft laws, we can address these challenges and create a cohesive international insolvency regime that works efficiently.

3

Marks awarded 10 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.

I would like to advise the estate representative the relevant English cross-border sources for recognition under English law. The following points need to be considered.

1. UNCITRAL Model Law on Cross Border Insolvency: It is worth noting that the United Kingdom has adopted and implemented the UNCITRAL Model Law on Cross Border Insolvency. This law provides a framework for the recognition of insolvency proceedings and facilitates cooperation between courts and insolvency practitioners from different jurisdictions. In this case, it would be possible for the liquidator to apply to the English courts for recognition of its liquidation proceedings as either a "foreign main proceeding" or a "foreign non main proceeding", depending on whether Norton Cars Incs' centre of main interests (COMI) is in the United States or whether it has an establishment there.

2. English Insolvency Act 1986 and Cross Border Insolvency Regulations 2006: Another important aspect to consider is that, by incorporating provisions of the UNCITRAL Model Law, the English Insolvency Act 1986, together with amendments made by the Cross Border Insolvency Regulations 2006, allows for the recognition of US insolvency proceedings in England. Such recognition would confer the power to administer the assets of the company located in England under the supervision of a court.

3. Despite the UK's withdrawal from the European Union, there may still be provisions that apply to cases commenced before the end of the transitional period. However, as Norton Cars Inc. has moved its registered office from the UK. Now has its Centre of Interest (COMI) in Italy, this may limit the applicability of the EU Insolvency Regulation in this case.

To deal effectively with Norton Cars Inc's assets located in England, it is advisable for the liquidator to rely on the UNCITRAL Model Law on Cross Border Insolvency. This has been incorporated into English law by the Insolvency Act 1986 and the Cross Border Insolvency Regulations 2006. The liquidator should apply to the courts for recognition of the US liquidation proceedings, which would give him the power to effectively administer the assets of Norton Cars Incs located in England.

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

2

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.

Regarding the sources and the preferred location for the initiation of the primary proceedings in these cross-border insolvency case between Italy and Germany, the following appropriate legal sources must be considered:

1. European Union's Insolvency Regulation (Recast): As both Italy and Germany are members of the European Union, we should primarily refer to the European Union's Insolvency Regulation (Recast) when dealing with cross-border insolvency cases between these two countries. This Regulation lays down rules on jurisdiction, recognition, and coordination of insolvency proceedings between EU Member States.

2. UNCITRAL Model Law on Cross Border Insolvency: While it is important to prioritise the EU Insolvency Regulation for matters involving EU member states such as Italy and Germany, we can also consider referring to the UNCITRAL Model Law as a resource. This Model Law provides principles or guidelines that may be relevant in areas not explicitly covered by the EU Regulation.

Regarding the Venue of the main proceedings: Determining where insolvency proceedings should be opened depends on identifying the company's centre of main interests (COMI). Under the EU Insolvency Regulation, it is generally appropriate to open insolvency proceedings in the Member State where the debtor's COMI is located. The registered office is usually presumed to be its COMI unless proven otherwise.

1. Since Norton Cars Inc. moved its COMI to Italy after the UK left the EU and its management is based in Italy, it seems appropriate to open insolvency proceedings in Italy. The EU Insolvency Regulation recognises the location of management as a factor in determining COMI.

2. Although Norton Cars Incs' main activities take place in Germany, it is not only the location of the activities that determines the COMI. The COMI is typically associated with where senior management conducts the company’s affairs, which in this case is Italy.

In this cross-border insolvency case involving Italy and Germany, it is appropriate to use the EU Insolvency Regulation as the main legal reference. Given that the COMI of Norton Cars Incs is now in Italy and that its management operates from there, the opening of insolvency proceedings in Italy is consistent with the requirements of the EU Insolvency Regulation. The location of the management and the relocation of the COMI to Italy are factors that outweigh any significance attached to activities in Germany in determining the jurisdiction for the primary 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?

Based on the information provided and general legal principles, it is important to note that courts in India, South Africa or Australia are not empowered to apply the EU Insolvency Regulation (Recast) when determining the recognition of an EU insolvency practitioner duly appointed under that Regulation. Here's why:

1.The EU (Recast) Insolvency Regulation is a framework that applies specifically within the European Union. It is binding on EU Member States. It has no legal authority or applicability in non-EU countries such as India, South Africa, and Australia.

2. National Insolvency Laws; In countries outside the European Union, including India, South Africa and Australia, the recognition of insolvency proceedings (including those from the EU) is usually governed by their national insolvency laws or any applicable international treaties or conventions to which they are a party. These countries may have their own criteria and procedures for recognising and cooperating with foreign insolvency proceedings.

In summary, while Indian, South African, or Australian courts wouldn't directly apply the EU Insolvency Regulation (Recast), they could still Cooperate with EU insolvency proceedings through their national laws or by taking into account general principles of international comity and reciprocity.

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.)

As the insolvency proceedings have been initiated by law and both Italy and the Netherlands are members of the European Union (EU), the primary legal framework for the insolvency proceedings is the Insolvency Regulation (Recast) of the EU. This Regulation allows for the recognition of insolvency proceedings in the Netherlands. Dutch law will apply to security interests located in the Netherlands. The EU Insolvency Regulation states that while insolvency proceedings are recognised in all EU Member States, their effect on the rights of creditors or parties in relation to assets located in the

territory of another Member State is governed by the law of that Member State. Therefore, Dutch law would govern security interests in assets located in the Netherlands.

There is some scope to elaborate

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.)

As Australia is not part of the European Union (EU), the EU Insolvency Regulation does not apply. Instead, Australian insolvency law governs the recognition and handling of insolvency. As Australia has adopted the UNCITRAL Model Law on Cross Border Insolvency, this Model Law could serve as a framework for the recognition of insolvency proceedings in Australia.
In the case of Real Rights of Security, Australian law would govern the rights of security over assets located in Australia. In cross-border insolvencies, the general principle is that the law of the jurisdiction where the assets are located (lex situs) determines rights over those assets. Consequently, any security interest over Norton Cars Incs' assets in Australia would be governed by the law of Australia.

3

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 37/50

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