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 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.

[Countries whose insolvency law systems have historical roots in civil law include the Netherlands and France.

Countries whose insolvency law systems have historical roots in English law include Australia, India, and certain African nations such as Nigeria, Kenya and Zambia.

One common factor between the insolvency law systems based on civil law and those insolvency law systems based on English law is that both systems were historically pro-creditor with harsh consequences imposed on debtors. For example, under the previous 1807 code under French insolvency law, it allowed for severe consequences to be imposed on debtors such and their arrest and detention. Historically, insolvency in English law was also pro-creditor as it did not initially provide for the discharge of debts for a debtor and harsh sentences could be imposed on debtors such as committing them to prison.

Generally, countries with historical roots in English law are based on the common law, and will have legislation or statutes as one of the main sources of insolvency law, but may also rely on common law principles that has been developed through case law and jurisprudence to fill any gaps in the existing insolvency legislation which has not been explicitly provided for. On the other hand, countries with civil law systems generally do not rely on decided case law to develop the law as such cases do not operate as binding precedents for future decisions, and the main sources of insolvency law for such legal systems will be found in legislation or codes.

That said, even within insolvency law systems based on English law / common law there exist differences. For example, countries such that the USA and United Kingdom have a single, unified piece of insolvency legislation covering all aspects of insolvency, including the insolvency of both natural persons and corporations, being the Bankruptcy Code 1978 and Insolvency Act 1986 (UK). On the other hand, even though Australia's insolvency law is based on the English law, it has a number of acts dealing with insolvency rather than a single unified act. For instance, the Corporations Act 2001 regulates corporate insolvency whilst the Bankruptcy Act 1966 regulates the insolvency of individuals.]

You raise some relevant issues. I'd have loved to see more examples of civil law based countries and a deeper discussion of common law cf codification.

2

Question 2.2 [maximum 3 marks]

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

[The principle of universalism entails an approach that permits more than one insolvency proceeding pending or commenced in different States to be governed by the provisions of one insolvency law, for instance, the State where the debtor has its centre of main interests (COMI). This means that the law of the "main proceeding" will have extraterritorial effect extending beyond the territorial jurisdiction of the State where the "main proceeding" has been opened. Under this approach, there will only one insolvency officeholder being appointed to administer the debtor's liquidation. All creditors located across the world would have the chance to participate in the insolvency proceedings with their claims being treated on a *pari passu* basis.

The principle of territorialism lies on the opposite end of the spectrum of universalism. Instead of a single insolvency law applying to all of the debtor's assets and debts on a global basis, it envisages the commencement of multiple concurrent insolvency proceedings being commenced in any State where the debtor holds assets, but that the consequences of such insolvency proceedings only apply to the State where the insolvency proceeding has been opened.

The principle of modified universalism lies somewhere along the middle of the spectrum, by still recognising the concept of a "main proceeding" opened in the debtor's COMI. However, the law of the "main proceeding" will not apply to govern other foreign "non-main" proceedings that have been commenced in other jurisdictions. Instead, the "main proceeding" will be supported by secondary or ancillary proceedings in another State where the debtor may have assets or creditors, and the courts administering the respective proceedings are to co-operate with each other.]

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.

[The Latin American States have implemented multilateral agreements to resolve international insolvency issues, such as treaties on private international law and commerce that includes provisions relating to bankruptcy or insolvency. These treaties are: (1) The Montevideo Treaty on International Commercial Law (1889) (the "**1889 Treaty**"); (2) The Montevideo Treaty on International Commercial Terrestrial Law (1940) (the "**1940 Treaty**") (collectively, the "**Montevideo Treaties**"); and (3) Havana Convention on Private International Law (1928) (Bustamante Code) (the "**Havana Convention**").

The first difference between these initiatives is the States that are members of the 1889 Treaty, the 1940 Treaty and the Havana Convention. Argentina, Paraguay and Uruguay are the only three original treaty States that ratified the 1889 Treaty and the 1940 Treaty thereafter. Bolivia and Peru are parties to both the 1889 Treaty and the Havana Convention, but Argentina, Colombia, Mexico, Paraguay and Uruguay did not ratify the Havana Convention.

The treaties also differ in the extent to which they allow for a single proceeding with universal effect that applies throughout the member States.

Under the 1889 Treaty, where the debtor's commercial domicile is only in one treaty State, the 1889 Treaty provides for one set of insolvency proceedings to take place within the commercial domicile. However, if the debtor has multiple economically autonomous business located in different treaty States, it envisages the possibility for multiple concurrent insolvency proceedings to be opened by creditors in each treaty State.

The Havana Convention provide more support for universalism than the Montevideo Treaties by mandating that there can only be a single insolvency proceeding with universal effect applying to the contracting States if the debtor has only one commercial domicile. However, in the event a debtor independently operates commercial establishments across various member States, there may be concurrent proceedings, and the Havana Convention does not provide procedures for co-operation or co-ordination of any concurrent proceedings in other member States (I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005, [5.23]).]

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.

[I agree with the statement that the terms "bankruptcy" and "insolvency" may be used interchangeably.

At the outset, while both terms are used interchangeably across many systems (I F Fletcher, *The Law of Insolvency*, London (Sweet & Maxwell, 5th ed, 2017) ("**Fletcher**"), Ch 1), it has been suggested that "insolvency" is sometimes used to mean the state of financial of affairs of a debtor whereby the debtor's liabilities exceed the assets of the debtor or where the debtor cannot repay debts as they fall due by virtue of a cash flow problem, while the term "bankruptcy" refers to the formal state of being put into a formal bankruptcy / insolvency proceeding.

It is also worth noting that certain jurisdictions have used both terms to mean different things. For instance, jurisdictions such as Singapore and Australia which use "insolvency" to refer to the insolvency of a corporation whilst the term "bankruptcy" is used to refer to the insolvency of an individual natural person.

Further, there are also a number of differences between the bankruptcy / insolvency of individuals and corporations, including the following:

- First, the objectives of individual insolvency and corporate insolvency are different. The objective of individual insolvency law includes protecting the debtor from harassment by his creditors, to enable the debtor to eventually make a fresh start and to reduce indebtedness by making contributions from present and future income to the estate while concurrently taking the debtor's personal circumstances into consideration. On the other hand, the objectives of corporate insolvency law is less focused on protection of the debtor and giving the debtor a chance for a fresh start, and there is a greater emphasis on preservation of the business' value or its viable parts (which may not necessarily include the company itself), and to impose personal liability on responsible persons where there has been an abuse of the corporate vehicle (In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017), chap 28).
- Second, the notion of exempt or excluded assets (by allowing an insolvent individual to keep certain assets required to maintain him or herself and his or her dependents) only applies to individuals and not corporations (Fletcher, Ch 1).
- Third, individuals are not dissolved after the conclusion of a bankruptcy, unlike a company which is dissolved after its affairs have been wound up.

However, notwithstanding the fact that different meanings may be ascribed to both terms, I would posit that these terms are just a matter of semantics. At their core, both terms ultimately seek to describe the financial status of a person (whether natural or a corporate entity) as being in a position of great financial distress and consequently being unable to satisfy liabilities owed to creditors.

In this regard, P R Wood has set out the following possible essential characteristics of bankruptcy and insolvency law: (P R Wood, *Principles of International Insolvency* (Sweet & Maxwell Ltd, 2007), p 3)

- pursuit of actions by individual creditors are stayed or frozen upon the commencement of an insolvency proceeding, also known as the stay or moratorium on individual debt enforcement;
- the pooling of the debtor's assets which become available to pay off creditors, replacing the piecemeal seizure of assets by individual creditors.
- creditors are to be paid *pari passu*, such that they are paid on a proportionate basis out of the available assets of the debtor based on claims which have been proved.

There are also similar principles that extend and apply to both individual and corporate insolvency, such as ensuring that secured creditors deal fairly towards the debtor and other creditors, investigate reasons for failure and reclaiming voidable dispositions where the insolvent debtor dealt improperly with assets (In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017), chap 28).

Accordingly, given that use of the terms "insolvency" and "bankruptcy" are simply meant to describe status of a debtor's financial affairs and have the same essential characteristics undergirding them, the fact that there exist some differences between the objectives of individual and corporate insolvency should not detract from the possibility of these terms may be used interchangeably.]

7

Question 3.2 [maximum 5 marks]

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

[One of the challenges which arises in developing a single unified global cross-border insolvency dispensation is the fact that the certain jurisdictions have adopted a civil law orientated foundation, whilst others have adopted a common law (or English law) orientated foundation. The differences in the manner in which these two broad families of legal systems operate, with common law legal systems also relying on judicial precedents and case law to fill any gaps in the existing legislation as opposed to civil law jurisdictions whose main sources of law stem from legislation and codes, make it difficult for a single uniform set of laws to apply to govern all cross-order insolvency proceedings.

Second, it has been suggested that civil law countries are more inclined to take a territorial approach to jurisdiction, and common law countries are more closely aligned with universalism (P J Omar, "A Panorama of International Insolvency Law: Part 1", (2002) *International Company and Commercial Law Review 366,* p 366-376*)*, which has in turn led to the creation of alternative theories such as "modified universalism" and "modified territorialism". The fundamental difference between the two approaches and ideologies makes it difficult to develop with a single global cross-border insolvency dispensation.

Third, it is difficult to achieve uniform laws that can be applied across all jurisdictions given that certain aspects of insolvency law will be affected by local legal culture, basic rights and the way in which a system deals with related matters such as the security rights provided for or the approach to labour issues.

Fourth, the different meanings ascribed to certain terminology by different jurisdictions. For instance, different jurisdictions ascribe different meanings to the words "insolvency" and "bankruptcy" (which has been used to refer to the insolvency of individuals instead of corporations), making it difficult to standardise and the definitions of terminology at an international level.

Fifth, States are unlikely to agree on fundamental issues such as the State which is to exercise jurisdiction over an insolvent corporate debtor whose activities cross borders and the where assets

located in a particular State. This is because States are likely to want to maintain their control and jurisdiction over assets located within their own territory.]

It would be beneficial for you to also consider the matters raised by Westbrook

2.5

Question 3.3 [maximum 3 marks]

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

[In the context of international insolvency, "hard law" generally means legally binding public international instruments that States have ratified and acceded to, such as bilateral or multilateral treaties and conventions on jurisdiction, recognition and enforcement regarding insolvency, bankruptcy and corporate rescue, the provisions of which are then imported into a State's domestic laws. Examples of "hard law" includes the Nordic Convention (1933) and European Insolvency Regulation (EIR) (2000) which has since been amended to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast), with a more recent amendment on 15 December 2021 under Regulation 2021/2260.

"Soft law" generally means instruments which are non-binding on a State, and are instead put forth as either guidelines or recommendations that a State may choose to adopt. For example, the Model Law on Cross-border Insolvency ("**MLCBI**") developed by UNCITRAL which takes the form of a draft legislation that member states may choose to adopt with modifications (if any).

Generally, "soft law" options appear to be more successful than "hard law" solutions to address the challenges of international insolvency. For instance, it has been rare for States to ratify treaties or conventions pertaining to international insolvencies, with the Istanbul Convention, Council of Europe Treaty Series Number 136 failing to enter into force because insufficient member states in the European Union agreed to ratify the convention. On the other hand, legislation based on or influenced by the MLCBI has been adopted in 59 States in a total of 62 jurisdictions, which includes major commercial jurisdictions such as the United Kingdom of Great Britain and Northern Ireland and the United States of America (see Status: UNCITRAL Model Law on Cross-Border Insolvency at << https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>>, accessed 15 November 2023).]

3

Marks awarded 12.5 out of 15

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

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

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

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

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

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

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

[The American insolvent estate representative may seek recognition of the American liquidation as a foreign non-main proceeding (assuming that Norton Cars Inc's COMI is England) and her appointment as a foreign representative before the English Courts under the Cross-Border Insolvency Regulations 2006.

Another English cross-border source the American insolvent estate representative may rely on is section 426 of the Insolvency Act 1986 (UK), which allows the English Court to co-operate with the American Court and thereby allow the American insolvent estate representative to seek assistance from the English Court to deal with the assets of Norton Cars Inc located in England (*McGrath v Riddel* [2008] UKHL 21 ("***McGrath***") at [62]). **The US is not designated.**

Alternatively, following Lord Hoffman's decision in *McGrath* at [30], the American insolvent estate representative may consider relying on the court's inherent jurisdiction at common law to co-operate with the courts in the country of the principal liquidation to the extent that it is consistent with justice and UK public policy to seek assistance from the English Courts to deal with the assets of Norton Cars Inc in England.]

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 part of the European Union, the relevant legal source would be the multilateral instrument on international insolvencies, being the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) ("**EIR Recast**"), and Regulation 2021/2260 of 15 December 2021.

Norton Cars Inc's "main proceeding" should be opened before the Courts in Italy under Italian law because Italy has been determined to be the company's centre of main interests (COMI). The EIR Recast regulates the applicable laws in proceedings subject to the Regulation, and Article 7.1 provides that "*the law applicable to insolvency proceedings and their effects shall be that of … the 'State of opening of* proceedings". Consequently, the applicable law that would apply to govern the "main proceeding" opened in Italy would be Italian law.]

4

Question 4.3 [Maximum 1 mark]

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

[No, the Indian, South African and Australian courts will not be eligible to apply the EU (Recast Insolvency Regulation. The EU (Recast) Insolvency Regulation only applies to international insolvency proceedings commenced within one of the European Union's member states, and can therefore only be applied by a member State of the European Union.]

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.)

[Italian law will continue to apply to the insolvency proceeding opened in Italy. However, Italian law does not have extraterritorial effect, and cannot govern the rights of security established under Dutch law in respect of the assets located in Netherlands respectively.

Consequently, Dutch law as the *lex rei situs* would apply in relation to real rights of security of assets located in Netherlands.]

Greater elaboration with reference to the EU regulation is warranted

2

(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.)

[If an insolvency proceeding is commenced in Australia, Australian law would apply with regards to the insolvency proceeding.

The real rights of security of assets situated in Australia would be governed by Australian law, as the *lex rei situs.*]

Elaboration is warranted

2

Marks awarded 12 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.