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, France, Germany, and Spain.

Countries whose insolvency law systems have historical roots in common law include the United Kingdom (the "**UK**"), the United States of America (the "**USA**"), Australia, India, and Singapore.

One difference between the 2 groups of countries is that the systems based on the common law have case law that serve as an additional source of law for insolvency matters. This is because decided cases in common law systems have binding effect and can help to develop the law or fill legal lacunas in the existing insolvency legislation. Systems based on the civil law generally do not have such a system, and legislation and codes are their main source of law.

There are also similarities between the 2 groups of countries. For example, countries in either insolvency law systems can be signatories to international treaties and conventions and bind themselves to them by enacting local legislation in compliance with these international instruments. In this regard, Germany, Spain, the UK, Australia, India, Singapore, and various states in the USA are all signatories to the UNCITRAL Model Law on Cross-Border Insolvency ("**Insolvency Model Law**").

It should be noted there are differences even within insolvency law systems with similar historical roots. For example, even though the insolvency law systems of UK, USA, and Australia have historical roots in the common law, there are notable differences between these jurisdictions. In this regard, the UK and the USA have a single and unified piece of bankruptcy legislation covering all aspects of bankruptcy (i.e. the UK Insolvency Act of 1986 and the USA Bankruptcy Code 1978), whereas Australia has a number of statutes dealing with aspects of insolvency including separate statutes that deal with corporate insolvency (i.e. the Corporations Act 2001) and the insolvency of natural persons (i.e. the Bankruptcy Act 1966).

**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 principle of universalism is that there should only be a single insolvency proceeding in a single jurisdiction that deal with all the debtor's assets and debts, even if these assets and debts are in other jurisdictions. The insolvency officeholder should also be accorded the right to control and obtain all the debtor's assets, and the creditors should all also have an opportunity to participate in these proceedings and have their claims treated equitably. **It would be beneficial to discuss forum further**

The principle of territorialism is completely opposed to the principle of universalism. The principle of territorialism advocates for insolvency proceedings to be allowed to be commenced in every jurisdiction where the debtor holds assets, and for these proceedings to be limited to dealing with assets and creditors within that jurisdiction. Although assets can be transferred overseas to satisfy the claims of creditors outside the jurisdiction, the principle of territorialism advances the view that the national interest of the jurisdiction in which proceedings have been commenced should be protected before any assets are transmitted overseas. Although a key problem of the principle of territorialism is that the debtor may be declared insolvent in one jurisdiction but not in another jurisdiction, proponents of territorialism believe that the solution to this is a co-operative form of territorialism.

The principle of modified universalism recognises that in reality, no jurisdiction adopts the principles of universalism or territorialism in their purest form. This is because territorialism is too expensive where multiple proceedings have to be commenced, and universalism is too politically and practically difficult to achieve given the differing legal systems and national interests. The principle of modified universalism therefore advocates that there should be a "main proceeding" in the jurisdiction where the debtor's centre of main interests is, and this main proceeding can be supported by secondary or non-main proceedings in other jurisdictions. The principle of modified universalism also advocates for the respective main and non-main proceedings to co-operate with one another.

**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.

The Latin America states have concluded a series of treaties on private international law which include portions that deal with bankruptcy and insolvency:

(i) the Montevideo Treaty on International Commercial Law (1889). This Treaty has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru, and Uruguay;

(ii) the Montevideo Treaty on International Commercial Terrestrial Law (1940) and the Montevideo Treaty on International Procedural Law containing Title IV on Civil Meetings of Creditors (1940). These treaties have been ratified by Argentina, Paraguay, and Uruguay; and

(iii) the Havana Convention on Private International Law (1928) (Bustamante Code) (the "**Havana Convention (1928)**"). This treaty was concluded between Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.

The Montevideo Treaties deals with individual and corporate insolvency, where it allocates bankruptcy jurisdiction based on the debtor's commercial domicile. If the debtor only has a commercial domicile in one treaty state, this treaty provides for one set of proceedings in that commercial domicile even if the debtor occasionally trades in / has branches in / agents in other states. If the debtor has more than one economically autonomous businesses in different treaty states, the Montevideo Treaty (1889) allows for concurrent proceedings.

The Havana Convention (1928) also promotes the ideal of a single insolvency proceeding, although it is possible for concurrent proceedings to take place if the debtor has commercial establishments that operate entirely separately economically.

One difference between the Montevideo Treaties and the Havana Convention (1928) is the identities of their signatories as stated above.

Another difference between the Montevideo Treaties and the Havana Convention (1928) is that the Havana Convention (1928) is more supportive of having a single insolvency proceeding with universal effect than the Montevideo Treaties. This can be seen from how Article 414 of the Havana Convention (1928) mandates that "*if the insolvent or bankrupt debtor has only one civil or commercial domicile, there can be only one preventive proceeding in insolvency or bankruptcy, or one suspension of payments, or a composition (quita y espera) in respect of all his assets and his liabilities in the contracting States*."

The Havana Convention (1928) also does not provide procedures for co-operation or co-ordination of any concurrent proceedings.

**4**

**Marks awarded 9.5 out of 10**

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

**Question 3.1 [maximum 7 marks]**

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

Generally, I agree that the terms "bankruptcy" and "insolvency" may be used interchangeably as both terms would be understood to refer to a situation where a debtor is unable to pay his debts. However, these terms should not be used interchangeably in some jurisdictions (such as Australia and Singapore) as the laws there might only use the term "*bankruptcy*" for individuals and the term "*insolvency*" for corporations who are unable to pay their debts.

Although the terms "insolvency" and "bankruptcy" carry the same meaning in many legal systems, they can also have different meanings ascribed to them. For example, "insolvency" can sometimes refer to the state of the financial affairs of a debtor who is unable to pay his debts, whereas "bankruptcy" can sometimes refer to the formal state of being subject to a formal bankruptcy proceeding. The term "insolvency" can also mean a situation where the liabilities of a debtor exceed his assets (i.e. balance sheet insolvency) or a situation where the debtor cannot repay debts as they fall due by reason of a cash flow problem (i.e. cash flow insolvency).

According to P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), the following are possible essential features of insolvency and bankruptcy:

1. actions by individual creditors against the insolvent debtor are frozen or stayed;

2. the insolvent debtor's assets are pooled and made available to pay creditors, though different states might have exceptions to this rule; and

3. that creditors are paid on a *pari passu* basis, though different states might similarly have exceptions to this rule in the form of according priority to the debtor's assets to certain classes of creditors.

There are several differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual. In this regard:

1. corporations generally cannot be "*discharged*" from bankruptcy and as a result corporations that are put into liquidated normally end up being dissolved after the winding up of its affairs has been concluded. While individuals obviously cannot be dissolved, they might under some insolvency laws, be eligible to receive a discharge of unpaid debts where they would be allowed to continue without their pre-bankruptcy debt burdens. The underlying principles and conditions relating to such a discharge would differ from jurisdiction to jurisdiction;

2. the objectives of insolvency for individuals and corporations also differ according to Sealy and Hooley in M A Clarke *et al, Commercial Law* (Oxford University Press, 2017), chap 28. For individuals, the objective of insolvency proceedings is to protect the individual debtor from harassment by his creditors, to enable the debtor to make a fresh start especially in less blameworthy cases, and to also reduce his indebtedness through contributions from his present and future income. For corporations, the objective is to preserve the business where possible, and to impose personal liability on responsible persons if there has been an abuse of the corporate form; and

3. the concept of having certain assets be exempted or excluded from distribution to the debtor's creditors only applies to insolvency involving an individual. This is because the purpose of doing so is to ensure that insolvent individuals are still capable of maintaining themselves and their dependents, which is not a concern with insolvent corporations.

**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.

A key challenge that makes it difficult to develop a single global cross-border insolvency dispensation is that different jurisdictions have different cultures, socio-economic conditions, as well as political considerations. This generally makes it difficult for different jurisdictions to accept another jurisdiction's insolvency rules where, for example, one jurisdiction's treatment of employment contracts of an insolvent company might be unpalatable to another jurisdiction.

Another challenge is that developing a single global cross-border insolvency dispensation will require a high level of trust in foreign legal systems to deal with the insolvency of the debtor. While establishing this level of trust might be possible among jurisdictions with similar legal systems and cultures, establishing it across the globe will prove challenging given the diversity of legal systems and cultures in the world.

The pressure that domestic governments face to safeguard and prefer the interests of local creditors vis-à-vis assets of the debtor that are located within the jurisdiction is yet another challenge that make it difficult to develop a single global cross-border insolvency dispensation.

Another challenge stems from how a single global cross-border insolvency dispensation might create uncertainty for creditors. This is because creditors might not be able to anticipate or predict which jurisdiction's insolvency proceedings they would have to participate in if the debtor goes insolvent or bankrupt, especially if the debtor has a presence in multiple jurisdictions.

The potential practical and economic challenges of participating in foreign insolvency proceedings that creditors might face is another reason why it is difficult to develop a single global cross-border insolvency dispensation. Even if local and foreign creditors are treated equally in the insolvency proceedings, the practical challenges of engaging foreign counsel and taking part in foreign insolvency proceedings might cause significant hardship for creditors than if local insolvency proceedings were allowed to be brought.

**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.

"Hard law" in the context of international insolvency refers to international instruments like treaties or conventions that bind signatory states to affect their domestic law in accordance with what was agreed in these treaties or conventions. An example of hard law that has successfully provided solutions to the challenges of international insolvency is the Nordic Convention (1933) – with Sweden, Denmark, Norway, Finland, and Iceland as signatories – that governs how cross border bankruptcies are to be dealt with in the Scandinavian region. The Nordic Convention (1933) is generally considered a success as it has been ratified and complied with by the Scandinavian states. However, as noted by Professor Michael Bogan, the Nordic Convention (1933)'s success might not be suitable for universal use because its success might be attributed to how the Scandinavian countries "*understand each other, … are geographically close, [have] legal systems [that] are similar and … have a high level of confidence in each other's legal systems*".

"Soft law" in the context of international insolvency refers to non-binding instruments that seek to influence how states regulate and deal with international insolvency issues. The clearest example of a soft law that has successfully provided solutions to the challenges of international insolvency is the UNCITRAL Insolvency Model Law. It is soft law because it did not seek to compel or bind states to them through a treaty or a convention. The UNCITRAL Insolvency Model Law simply took the form of a draft legislation that UNCITRAL recommended member states to adopt with or without modification. The UNCITRAL Insolvency Model Law can be considered to be a success given the substantial number of jurisdictions across the world that have adopted it into their domestic legislation.

In the context of providing solutions to international insolvency law issues, more success has been achieved through soft law options. This is because it is challenging to persuade states to bind themselves to treaties or conventions. For example, the Istanbul Convention was not ratified by enough states for it to enter into force. The UNCITRAL Insolvency Model Law on the other hand, has been much more successful than many treaties or conventions where legislation based on or influenced by the UNICTRAL Insolvency Mode Law has, to date, been adopted in 59 states.

**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 should refer to the UK legislation that incorporates the provisions of the UNCITRAL Insolvency Model Law, i.e. the Cross-Border Insolvency Regulations 2006 (the "**CBIR 2006**"). The key provisions concerning recognition can be found at Articles 15 to 21 of Schedule 1 of the CBIR 2006.

The American insolvent estate representative should also refer to the UK's Insolvency Act 1986, which is the UK's unified insolvency legislation that deal with corporate insolvency, including cross-border issues (e.g. section 426). **The US is not designated.**

The American insolvent estate representative should also refer to case law interpreting the provisions of the CBIR 2006. This is because England is a common law jurisdiction and English cases are therefore binding and would be useful in assisting the American insolvent estate representative understand how the English Court have dealt with past cases and issues relating to the recognition of foreign insolvency proceedings.

A key issue that the American insolvent estate representative would need to gather from English case law is the requirements that need to be fulfilled before the English Courts would confer upon the American insolvent estate representative the right to deal with the assets of the Norton Cars Inc in England. This is especially since such right is not automatically conferred upon a successfully recognition, but is discretionary pursuant to Article 21(1) of Schedule 1 of the CBIR 2006.

Another source of law that the American insolvent estate representative should refer to is the "*Legislative Guide to the UNCITRAL Insolvency Model Law*". Although the Legislative Guide might not have binding effect in England, it is likely to be persuasive to the English Court especially since it is an official documents prepared by UNCITRAL.

**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.

Key legal sources that should be used in a cross-border insolvency matter between Italy and Germany include the "*European Union's Regulation (EU) 2015/848 of the European Parliament*" as well as the "*Council of 20 May 2015 on Insolvency Proceedings (Recast) ("**EIR Recast**")*" as amended by Regulation 2021/2260 of 15 December 2021. These are the current multilateral instruments on international

insolvencies in the European Union which were derived from the European Insolvency Regulation ("**EIR**") (2000).

The country that the main proceeding should be opened is that of Italy because the EIR allocates primary jurisdiction based on debtor's COMI, where the insolvency proceedings there would be considered as the "*main proceedings*". The applicable law would be Italian Law because Article 7.1 of the EIR Recast states that the law applicable to insolvency proceedings and their effects shall be that of the state of the opening of proceedings.

**4**

**Question 4.3 [Maximum 1 mark]**

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

No – an Indian, South African, or Australian court cannot apply the EU (Recast) Insolvency Regulation, because only EU member states are eligible to do so.

**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 apply to the insolvency proceeding because Article 7.1 of the EIR Recast states that "*the law applicable to insolvency proceedings and their effects shall be that of … the 'State of the opening of proceedings'*", which in this case is Italy.

The law that will apply with regard to the real rights of security situated in the Netherlands is Netherlands Law because the asset in question is located in the Netherlands.

**3**

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

Australian Law will apply to both an insolvency proceeding in Australia and the real rights of security situated there.
**There is scope to elaborate**

**2**

**Marks awarded 13 out of 15**

*** End of Assessment ***

**TOTAL MARKS AWARDED 44/50**

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