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: **[**FC202324-1467**.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 6 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.

Legal systems play a major role in development of law in any particular jurisdiction. Since Civil Law and Common Law are one of the most conventional legal systems across the world, it is imperative to base the insolvency system from here.

A. THE ORIGINS
   a. Roman Idea? Lex Mercatoria, Civil Law syatems & Europe
      Etymologically speaking, the word "bankruptcy" is of Italian origin meaning "break the bench". It can be said that the roots of bankruptcy law can be attributed to Roman Law (Civil Law). They were all individual measures but led further to the *development of collective debt mechanisms* and *from execution of man to that of his assets instead*. It further developed in Europe along with the trade custom and usage leading to instances of bankruptcy legislation in these regions between 13th and 17th century.
   b. English idea in 16th Century
      Although the non-payment of debt leading to imprisonment was prevalent from the end of 13th century, it was only in the 16th century, the word "bankruptcy" finds its first mention vide statute English Bankruptcy Act, 1842 which viewed defaulters as "quasi criminals".
   c. Today….
      Certain aspects of law will always be affected by local culture, rights, creditor or debtor centricity-security rights, its enforcement, and such other path dependencies.

B. Some instances of countries and their legal systems
   a. Americas (Common Law)- Here the Bankruptcy law is a federal legislation and the jurisdiction is regarded as pro-debtor with "balance sheet" test as a determinant to bankruptcy application. The USA has adopted the UNCITRAL Model Law.
   b. Australia (Common Law)- Regarded as a frontrunner in insolvency legislations, the jurisdiction does not have a unified bankruptcy legislation. Australia has too adopted the model law on cross border insolvency.
   c. Netherlands (Civil Law)- Initially insolvency was regulated through ordinances until the introduction of schuldsaneringswet in 18th Century that paved way for "fresh start" process in Dutch Bankruptcy Law. Initially, a pro creditor in their approach, however with the unification and introduction of consumer credit, there has been some new developments.
   d. French (Civil Law)- The ordinance De Commerce of 1673 formed the foundation for their commercial and insolvency law in 1807,1838 and thereon.
      i. 1807- Pro Creditor Approach- Arrest and Detention of Debtors
      ii. 1889- Judicial Liquidation- Liquidation of Assets
      iii. 1935- Treatmet of failed businesses
      iv. 1967- Reorganisation and Moratorium
      v. 1985- A comprehensive legislation

Another approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries cf codification in civil jurisdictions.
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.

In addressing the problems associated with cross border insolvency, one line of approach taken is the principle of universalism and the principle of territorialism.

- Universalism- One insolvency proceeding covering all of debtors assets and debts worldwide.
  - Ideal solution- Only one proceeding commences and no other proceedings entertained. All assets included and all creditors entitled to participate in such a setting.
  - Efficiency and Low transaction costs coinciding with the onset of globalisation- If businesses affairs spread across jurisdictions, the states must ensure that its distress must also be addressed unified.
  - Opponents point out the difficulties- The states must cooperate on the Choice of Law and Priority Rules- Ascertainment of Single State is a diplomatic affair-
  - Practical Issues- Creates uncertainty in domestic markets and vulnerable to strategic manipulation.

    A discussion of forum and COMI is warranted
- Territorialism- The insolvency proceedings may commence in every state where the debtor holds asset but should be territorially limited and property be restricted to that state where proceedings are opened.
  - Concurrent proceedings in line with national laws. Preference to national interests before assets are transmitted abroad.
  - Addressing local interests and local creditors who evaluate local assets before rendering credit is a good idea but this also leads to a situation where local creditors may suffer with inability to participate in beyond local assets- foreign proceedings. Only a very strong/large creditor would be enabled to access such a setting then.
  - Thresholds for insolvency- wherein the debtor may be declared insolvency in one state whereas the not in other states where the asset is located.

- Solution- Somewhere in between? There comes the modified universalism or modified territorialism-Territoriality is costly and universalism has a cooperation problem that we find a mix of approach in between.
  - Modified Universalism- An actual unity of proceeding concept wherein it allows for more than one proceeding to be originated, for instance in the state where debtor has centre of main interests (COMI). This will lead to a scenario wherein the "main proceeding" will have worldwide effect with a possibility of a "non-main proceeding" in other states concurrently subject to overall regulation under the "main proceeding".
  - Cooperative Territorialism- Every state has jurisdiction over their matters and the courts endeavour to collaborate through proper communication and cooperation amongst themselves
  - Contractual planning of distress resolution by having clauses in AoA.
  - Co-operation protocols which are specific or general.
  - Internationalist Principle- Do what is best.

2.5

Question 2.3 [maximum 4 marks]

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

Latin America geographically refers to the regions that were once ruled by the Portuguese, French and Spanish empire. UN has identified 33 nations as part of the Latin Americas.

These states have tried to achieve address the international insolvency issues amongst themselves by way of some multilateral agreements, namely,:

- Montevideo Treaties (1889) & (1940)
- Havana Convention of Private International Law @ Bustamante Code (1928)

	Montevideo Treaty (1889)	Montevideo Treaty (1940)	Bustamante Code (1928)
Adopting States	*Argentina,* **Bolivia**, Columbia, *Paraguay,* **Peru,** *and Uruguay*	*Argentina, Paraguay, and Uruguay*	**Bolivia**, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Equador, El Salvador, Guatemela, Haiti, Honduras, Nicargua**,** **Peru,** and Venezuela
Coverage	*Covers personal and corporate insolvencies*	*An extension of 1840 treaty but only three member states have ratified it*	Argentina, Columbia, Paraguay and Uruguay are not parties
Jurisdiction allocation	Based on commercial domicile in one treaty state; provides for one set of proceedings in commercial domicile even if the debtor has operations in other member states	*International Commercial Law 1940-* *Enhanced Title VIII on "Bankruptcy" issues*	Unity of Proceedings in line with "universalism effect" approach.
Concurrent Proceedings	Possible if debtor has two or more economically autonomous business in different treaty states empowering the local creditors to initiate the same in their local state	*International Procedural Law 1940* *Title IV on Civil Meetings of Creditors*	Separate concurrent proceeding possible in treaty states that contain commercial establishments operating entirely separately economically.

It would also be beneficial for you to explain the differences in addition to describing the agreements in table form.

3.5
Marks awarded 8 out of 10

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

Question 3.1 [maximum 7 marks]

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

(1) Bankruptcy and Insolvency- Meaning
(a) Etymologically speaking, the word "bankruptcy" is of Italian origin meaning "break the bench" which referred to a situation wherein the debtor being unable to pay his debts in a market and that the creditors closed the debtors business by breaking the bench or the counter.
(b) Nomenclature- Some systems use the term insolvency and some others use bankruptcy. For instance- Australia and India where insolvency is a terminology for insolvency of corporations and bankruptcy is for insolvency of individuals.
(c) Meaning- Insolvency is more of a state of affair in finance subject wherein the liabilities exceed the assets in a given balance sheet or wherein a debtor is unable to pay hid debts.

(2) Essential features of insolvency or bankruptcy law as laid down by Wood[1]
   a. Automatic stay on actions of individual creditors vide moratorium
   b. Ascertainment, tracing and pooling of assets
   c. The Pari Passu Principle

(3) Differences that may arise for individuals with that of corporations[2]
- Individuals have unlimited liability (single unit involved) – therefore the object here is protect from creditors harassment, enable fresh start, etc
- Corporations have limited liability in general (lot of stakeholders involved)- therefore the object here is preserve businesses wherever feasible and where limited liability abused- impose personal liability on persons responsible.
- The Pari Passu Treatment however remains applicable to both the cases.
- Notion of exempt / excluded assets only applies to natural persons.

It would be beneficial to structure your essay into proper paragraphs with complete sentences

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.

[1] P R Wood, Principles of International Insolvency (Sweet & Maxwell, 2007)
[2] Sealy and Hooley's Commercial Law: Text, Cases, and Materials (Oxford University Press, 2017)

These are some of the challenges that arise in cross border insolvency-

- Universalism, territorialism, diplomacy and sovereign supremacy- Every state would wish to retain their sovereign supremacy for various reasons such as national interests, diplomatic interests, interests of local creditors
- LEGAL SYSTEMS- the differences in legal systems namely the civil law and the common law system may affect the states to bring about a uniform framework in addressing insolvency.
- PUBLIC POLICY – All states have different priorities in respect of rescue process- Some prefer to save labourers, while some prefer to save capital wastage. Some prefer to rescue whereas some prefer to recover. Such preferences are partially due to prevailing conditions/norms in a particular state.
- APPROACH AND RIGHTS- Differences in approach and differences in contractual & property rights- Some jurisdiction prefer to be debtor centric such as US and while others may prefer creditor centricity such as European States which altogether change the approach as well as the property rights in a particular state.
- STRATEGIC REASONS- Forum shopping and strategic manipulation by private players is also seen as one of the challenges in the age of globalisation of corporations and their operations.
- RECOGNITION of foreign laws and representatives.
- CO-ORDINATION- Recognition and cooperation is another issue concerning the resolution of cross border insolvency.

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook 2

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.

The topic of international insolvency is incomplete without the key concept of hard law vs soft law as they are the modes through which insolvency is sought to be regulated. Since international insolvency has issues beyond national law and therefore involve international dimension and its consequent regulation.

International Law can be categorised into Public International Law wherein the parties are usually states and comes into effect by states locally adopting the same in their jurisdiction. And private international law is a setup wherein there are parties including non-state actors determining actions in private matters. International Insolvency whether a matter of public or private international law isn't as simple as the explanation sounds as involves a smart mix of state mechanism as well as private bargaining.

Hard Laws are those laws enacted by the state in their legislature. In terms of public international law, the states after signing the international treaties are obligated under the very same treaties to bring about a law to that effect. Until such enactment, the treaty so signed is infructuous.

Soft laws are those laws that come into practice by usage, conventions and sometimes by "nudges" and there are a lot of multilateral institutions

(UNIDROIT & UNCITRAL) working in this area as well. These soft laws have been more successful as they are generally effectuated by markets in the interest of trade and commerce. I would see these soft laws as more akin to "lex mercatoria" and the state generally doesn't intervene in such trade/custom usage.

However, unlike contractual rights, the crossborder insolvency isn't purely a private matter. In most jurisdictions, bankruptcy is part of public law and is expressely non-arbitrable that the challenge is that it requires more "hard law" than softlaws. Yes, UNCITRAL model law works as a quasi between the both the worlds but there is a long way to go.

3

Marks awarded 12 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.

Facts

- Incorporated initially in USA and later moved to Nottingham UK
- Brexit and COMI moved to Italy
- Norton Car Main operations- USA, EU and European Continents operations
- Another Gladiator Subsidiary operations- provides engines to Cars in Germany
- Financial Distress

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.

Issue: To advise on applicable English Cross Border Insolvency Law to deal with assets situated in England

Rule: UNCITRAL Model Law and UK Cross Border Insolvency Regulations 2006
Article 1(a) states that the Model Law applies where assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding;

Analysis: USA and UK both have adopted the UNCITRAL Model Law w.e.f 2006.
Given the Centre of Main Interest presumption in favor of place of incorporation unless rebutted.

But the facts stating the shifting of Headquarters and main businesses to UK indicate COMI shifted hence the UK becomes the jurisdiction that may commence main proceeding.

Conclusion: Either ways the model law will be the applicable law here.

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.

Issue: Advise as to applicable law/ appropriate legal source in CBI b/w Italy and Germany
Determination of Main Proceeding.

Rule: European Commission Regulation on Insolvency Proceeding 2000 and the Recast Regulations 2015

Analysis- The Regulation applies to all member states within the EU (except Denmark). Note that Germany and Italy have not adopted the UNCITRAL Model Law.

According to the regulations, COMI[3] determination is more focused on management[4] and the establishment is defined to include operations. A corporations may have multiple establishments but the COMI is determinant on where the management decisions are taken. ITALY is the state where main proceedings must commence.

Pertaining to the determination of main proceeding is a difficult one for the following reasons namely:-

(a) The regulation has an intent to have a common framework for commencement of proceedings, automatic recognition and cooperation of different member states. However, it does not intend to harmonise the laws due to which each member state may differ in their approach.

[3] Article 3 of Recast Regulations 2015- "……The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties……"
[4] *Clause (30) of the Recast Regulation 2015 object recitals reads as follows "……..In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual Centre of management and supervision and of the management of its interests is located in that other Member State……."*

(b) As a consequence, there is no mechanism for determining which set of proceedings are to be regarded as the main proceedings if two or more jurisdictions claims that their own proceedings are the main proceedings. [Re Eurofood IFSC Ltd (Case C-341/04), [2006] ECR 1-701]

Conclusion:
Applicable legal source- European Commission Regulation on Insolvency Proceeding 2000 and the Recast Regulations 2015

COMI is at Italy- Main Proceeding will commence at Italy.

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?

Yes, the EU Recast as well as the Insolvency Regulation has the effect of domestic law wherein it is invoked to determine the COMI amongst EU member states and if this determination falls in line with the UNCITRAL model law (in case of Australia (2008) and South Africa (2000)) and local law (in case of India), I believe the courts will recognize the same.

0.5

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.)

The applicable law will be the EU Insolvency Regulation 2000 as Netherlands form part of the EU.

Elaboration is warranted. In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.

0.5

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

Since Australia has adopted the UNCITRAL Model Law w.e.f 2008 and that this is a foreign proceeding involving cross border insolvency, the applicable law is UNCITRAL Model Law.

Elaboration is warranted. Australian law will apply to the real rights of security in this instance.

1

Marks awarded 8 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 34/50

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