



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The meaning of the word “bankruptcy” has a historical root pertaining to the “rupture” of a banking system. Select from the following the **best response** to this statement.

- (a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.
- (b) This statement is untrue since the word “bankruptcy” is believed to derive from non-English origins and has a historical root from destroying a vendor’s place of business.**
- (c) This statement is true, although the word “bankruptcy” is not an English phrase.
- (d) The statement is true and the phrase “bankruptcy” is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an “executory contract” and its enforceability?

- (a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.**
- (b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.
- (c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.
- (d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).
- (b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

- (a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.
- (b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.
- (c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.
- (d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the **correct** statement:

- (a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.
- (b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

- (a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.
- (b) This statement is untrue because African nations all have a civil law tradition.
- (c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.
- (d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.
- (b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.
- (c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.
- (d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

- (a) This statement is untrue because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.
- (b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.
- (c) This statement is true because globalisation makes the principle of universalism redundant.
- (d) This statement is true because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

Anglo American countries have the roots of their insolvency law system in common law while continental Europe has its roots in the civil law systems. The major differences occur regarding how each system deals with related matters such as security rights and differing terminologies. **It would be beneficial for you to elaborate regarding the relevant countries here. You do this at times below.**

In terms of creditor orientation, American insolvency law which has its roots in common law is pro-debtor while the Dutch Insolvency Law having roots in Civil law systems is pro-creditor. The pro-creditor systems view the discharge of debt as a secondary objective and focus on value or benefit to creditors while the pro-debtor system prioritizes the discharge and rehabilitation of the debtor.

The ranking of employee claims in the waterfall differs among countries though not entirely dependent on the historical roots of their insolvency law systems. In Australia and England, which borrow from the common law systems, secured creditor rights rank first but employee creditor claims rank before floating security creditors.¹ On the contrary, in Germany, which has roots in civil law systems, employee creditors do not enjoy any priority.

The approaches to cross border insolvency also differ among countries based on their historical roots. For example, in the Netherlands, where civil law is the root, the legal doctrine applicable in dealing with cross border insolvency is territoriality and thus insolvency representatives are required to obtain recognition and enforcement to be able to execute in other jurisdictions.² On the flipside, the United Kingdom, a common law jurisdiction, adopts the universalism approach by allowing all creditors within the United Kingdom i.e., England, Scotland, Wales and Northern Ireland to participate in insolvency proceedings.

You raise some relevant points. You also needed to address the fundamental difference with respect to common law in more detail.

2.5

Question 2.2 [maximum 3 marks]

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

The principles of universalism, modified universalism and territorialism are approaches aimed at resolving cross border insolvency issues relating to jurisdiction, choice of laws, recognition, and enforcement.

Universalism adopts a unified approach to cross border insolvency by advocating for one proceeding covering all the debtors' assets and debts worldwide. Under the principle, once a proceeding is opened, it should act as automatic stay and it should be impossible to open any other proceeding or execute against the debtor. **Elaboration is warranted, including with respect to COMI.**

The principle of modified universalism aims to address the challenges faced in implementing universalism such as the level of trust states have in foreign systems and the uncertainty in domestic markets. According to modified universalism, a main proceeding opened at the debtor's centre of

¹ An International Comparison of Insolvency Laws, Wang Huaiyu, accessed on 23 October 2023 at <https://www.oecd.org/china/38182541.pdf>

² Cross border aspects of Insolvency accessed on 23 October 2023 at <https://www.bis.org/publ/gten06c.pdf>

main interest is supported by ancillary proceedings in other states and courts dealing with the various matters are urged to cooperate.

Territorialism on the other hand aims at protecting the states national interest by allowing each state to deal with the assets of the debtor within its geographical jurisdiction. The insolvency representative is in turn restricted on the assets they can deal in and the creditors who can file their claims which are limited to the national borders.

While the approaches vary in terms of scope of duty of the insolvency representative and the jurisdiction of courts over assets, most states have modified each of the approaches in dealing with cross border insolvency matters.

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.

Initiatives undertaken to resolve international insolvency issues in Latin America date back to 1889 when the Montevideo Treaty on International Commercial Law (1889 Treaty) was ratified by Argentina, Bolivia, Columbia, Paraguay, Peru, and Uruguay. In 1940, the Montevideo Treaty on International Commercial Terrestrial Law (1940 Treaty on Bankruptcy) was ratified by Argentina, Paraguay, and Uruguay. In the same year, the Montevideo Treaty on International Procedural Law (1940 Treaty on Civil Meetings of Creditors) was also ratified by the same parties. The Montevideo instruments address the question of jurisdiction by allocating jurisdiction based on debtor's commercial domicile.

In 1928, the Havana Convention on Private International Law (Bustamante Code) was concluded between Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. The Bustamante Code provides for a single proceeding with a universal effect except where debtor has economically independent businesses in different states.

The major difference between the Montevideo initiatives and the Bustamante code lies in the parties that have ratified each of the treaties as expounded above. Of all the states, it is only Bolivia and Peru that have ratified both the 1889 Treaty and the Bustamante Code.

Secondly, the 1889 Treaty provides for one set of proceedings where debtor has a commercial domicile in one treaty.

On the other hand, the Bustamante Code advocates for Unity of Bankruptcy where a single proceeding has universal effect throughout the region.

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.

Bankruptcy and insolvency both denote a state of indebtedness, and the terms may be used interchangeably for reasons explored below.

First, it is important to understand the origins of both terms. Bankruptcy originates from the ‘break the bench’ where merchants (individuals) who were unable to settle their debts would have their benches (places of business) broken. On the other hand, insolvency denotes the state of not being able to meet financial obligations as and when they fall due. Both insolvency and bankruptcy thus originated from indebtedness and attempts to address the rights of creditors where a debtor is unable to pay its debts and the terms can therefore be used interchangeably.

It would be beneficial to also consider the different use of the terms in different countries. Elaboration is warranted, for example although these terms carry the same meaning in many systems, one explanation is that “insolvency” sometimes means the state of financial affairs of a debtor, whilst “bankruptcy” refers to the formal state of being put into a formal bankruptcy proceeding. To achieve a higher mark, you needed to address and respond to these issues

Additionally, the essentials of bankruptcy and insolvency both aim at an automatic stay which is most often enforced by imposing a moratorium, pooling together of assets for the benefit of all creditors to replace piecemeal creditor action and sharing of the assets of the debtor pari passu among creditors. While differences may arise depending on whether a system is pro-debtor or pro-creditor, the essential features of both bankruptcy and insolvency remain rooted in the three principles above thus the terms can be used interchangeably.

Historically, the term bankruptcy denoted an individual merchant, presumably before businesses were organised into separate legal entities away from the natural persons. With the doctrine of corporate personality coming into play, there was need to draw a distinction between the management of indebted natural persons and corporates. The insolvency of individuals would then be focussed on protecting the debtor from harassment by the creditors (what would amount to breaking the bench), enabling the debtor to make a fresh start as supported by the discharge of a debtor and reducing indebtedness by making contributions from present and future income of the estate. While in corporate insolvencies the key objective is to preserve the viable parts of the debtor’s business and impose personal liability on responsible persons, a key difference exists between individual insolvencies and corporate insolvencies in relation to excluded assets. Based on the commonalities here, the terms can then be used interchangeably.

In conclusion, the terms bankruptcy and insolvency can be used interchangeably with a distinction being made on procedures and assets when dealing with individual and corporate insolvencies.

5

Question 3.2 [maximum 5 marks]

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

Globalisation has enabled limitless trade, interconnectedness and commercial transactions transcending physical and legal boundaries. The impact is that debt management and insolvencies arising from these global transactions need to be dealt with within the same framework of globalisation. However, there are several challenges which make it difficult to develop a unified global cross border insolvency dispensation as discussed below.

Legal cultures of various states influence the general laws for instance the laws that apply to security rights creation, registration and enforcement which have a direct impact on insolvency laws. The differences in legal cultures and domestic norms across states thus make it difficult to have a uniform insolvency dispensation for cross border issues as the local laws affecting matters such as employment, enforcement of contracts and security perfection come into play. The cultures also affect the policy considerations such as whether a jurisdiction is pro-creditor or pro-debtor. These differences make it difficult to unify the insolvency regime globally.

Secondly, according to Friman, the difference in terminology across various jurisdictions make it difficult to have a single and uniform global dispensation. While some jurisdictions may differentiate between corporate and individual insolvencies, certain jurisdictions use the terms insolvency and bankruptcy interchangeably thus the applicability of a single dispensation would be subject to a unification and harmonization of key insolvency terms.

Additionally, insolvency proceedings are both procedural and substantive. With many countries relying on inherited colonial laws, it is difficult to develop a single global cross border insolvency dispensation since the colonial systems were different and both procedural and substantive laws that affect the administration of the insolvent's estate will depend on the laws of the colonial masters.

Similarly, conflict of laws questions which arise in cross border insolvency where forums clothed with jurisdiction to determine cross border insolvency issues must determine which laws apply poses a challenge in the implementation of a single cross border dispensation. This emanates from the doctrine of territoriality and the efforts by each state to preserve their sovereignty and territorial jurisdiction.

In conclusion, while a single global cross border insolvency dispensation is desired, the global legal landscape does not provide an environment for the same to thrive. Therefore, states and parties must continue to mutually cooperate and adopt multilateral efforts to address these challenges.

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

3

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.

Efforts to create an international insolvency regime have led to regulatory approaches in the form of hard law and soft law instruments.

Generally, hard law is binding upon ratifying parties once it is ratified while soft law is merely a persuasive guidance for parties and places no positive obligation on states.

Hard law instruments come in the form of bilateral and multilateral treaties and conventions and could address one specific legal issue i.e., insolvency, or broader issues such as commercial law. Once a state adopts an instrument, the rights and obligations provided for become part of domestic laws of that state. For example, in the European Union, the European Insolvency Regulation and its subsequent amendment are binding upon member states and cease to bind a state that exits the European Union as was the case in 2020 when Britain exited the European Union.

The binding nature of hard law instruments once ratified and the potential sanctions for non-compliance could be considered as reasons why certain states are hesitant to ratify multilateral agreement thus reducing the desired outcome of success of these instruments.

On the other hand, soft law instruments majorly emanate from efforts by multilateral organisations to harmonise and offer guidance on certain aspects of cross border insolvency. These are not binding on parties though states are encouraged to adopt them. Key in this sector is the UNICTRAL Model Law on Cross Border Insolvency which offers guidance to states on what a model insolvency law should look like.

While hard law instruments are binding, soft law instruments have attained more success with the major success of the UNICTRAL model law since many states have improved their insolvency laws or even adopted the model law without any modification as part of their domestic legislation thus widely applicable.

It is therefore clear that both soft law and hard law instruments have an important role as regulatory instruments in international insolvency with soft law approaches being a more attractive option for states.

3

Marks awarded 11 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 insolvency estate representative can rely on the Cross-Border Insolvency Regulations 2006 which incorporate the UNCITRAL Model Law on Cross Border Insolvency which has been adopted by both USA and England. Under the Model Law, while recognition is not automatic, the estate representative can apply to England Courts for recognition of the American order to be able to access assets in England as the local laws will apply to the assets within England.

Under Section 426 of the UK Insolvency Act, courts of certain countries are eligible to receive assistance from UK courts as the provisions place a positive obligation on the states to assist the listed countries including South Africa and Australia where Norton Cars Inc have business presence. Thus, such assistance could be provided to the insolvent estate representative to be able to access assets in England.

Answer: S 426 is not applicable – US not designated

Assuming that the insolvency proceedings for Norton Cars was opened before 11pm 31 December 2020, American insolvent estate representative was appointed pre-BREXIT, the EU Recast would apply as it governs the recognition and enforcement of insolvency proceedings.

The insolvent estate representative could also rely on the Judicial Insolvency Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters. The Guidelines, as adopted by both Americas and England, address recognition of foreign proceedings, and provide for modalities of court-to-court cooperation and communication. The insolvent estate representative thus has a source to rely on to request recognition and obtain orders to enable them access assets situated in England.

It would also be beneficial to reference common law

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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.

The appropriate legal sources will include the EU (Recast) Insolvency Regulation of 2015 which provides for rules to determine which laws will apply in a cross-border insolvency within the EU where both Italy and Germany are member states.

The applicable laws will be determined based on where Norton is registered or where the place of business is, this being Italy where the centre of main interest was moved during following BREXIT. The main proceeding should thus be opened in Italy.

Additionally, both Italy and Germany have adopted the UNCITRAL Model Laws on Cross border Insolvency thus the provisions of the model law on cooperation, coordination, communication, and recognition will apply in cross border insolvency matters between Italy and Germany.

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 EU Recast is a legislation applicable to states who are members of the European Union, which India and South Africa and Australia are not. Questions of recognition of insolvency representatives in India, South Africa or Australia can only be determined based on multilateral agreements, if any, that address the same or the domestic laws of each of the states.

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.)

The doctrine of Lex Rei Situs will be relevant in this case. Under the doctrine, law of the state where an asset is situated applies where real rights of security exist on an asset. In this case, the assets situated in Netherland and whose security rights were established in terms of Dutch law will be administered in accordance with the Dutch Insolvency Law. The assets situated in Australia whose rights were established under Australian law will be administered according to the Australian Corporations Act 2001.

Additionally, real rights of security are governed by respective domestic property and security laws. While the insolvency laws will apply broadly regarding the insolvency proceedings and the powers, duties and obligations of the estate representative, the respective domestic property and commercial laws also apply in addressing the disposal and dealings with the assets of the debtor's estate.

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- (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.)

The doctrine of Lex Rei Situs still applies in this regard. The applicable laws will include the Australian Corporations Act 2001 which governs all matters insolvency in Australia.

Additionally, the Personal Property Security Act 2009 would apply as it governs the creation, registration, and enforcement of security rights in both tangible and intangible assets.

It is also relevant to note, however, that UNCITRAL model law will apply and likely allow recognition of the Italian State Representative

3

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 42 /50

A very good paper that generally addresses the questions asked and substantiates its answers.