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 10 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.

I will start by saying that one of the common denominators is that both types of insolvency law systems had originally brutal ways to deal with defaulting debtors and had severe coercive measures including imprisonment or slavery.

Countries that have historical roots in civil law stem the roots of their insolvency systems, as pointed out by Fletcher, in the procedures of *cession bonorum* (assignment of property), *distraction bonorum* (forced liquidation of assets), *remission and dilatio* (composition with creditors) embedded in the Roman law and further cemented through the *Lex Mercatoria,* meaning the trade customs and traditions, that eventually formed the basis of civil law. Civil law countries are said to be more inclined to adopt a territorial approach to international insolvency issues.

In contract, countries that have historical roots in English law are more inclined to take a universalist approach to international insolvency issues. In fact, the common law approach is more geared towards a modified universalist approach by ensuring fairness between creditors, implying a universal application of insolvency proceeding, even if there are concurrent proceedings.

In addition, there are other important differences between both systems:

- Civil law systems tend to rely heavily on formal statutory codes and approaches, implying that the court takes a leading role in inquiring about the resolution of the cases, while English law systems take a judicial role, relying on the evidence to be provided by the parties and giving important weight to precedent cases; and
- Civil law systems are often focused on preserving the interest of creditors and ensuring collective proceedings result in fair distribution of assets among creditors, while English law systems are focused on business rescue, restructuring, and rehabilitating debtors. In essence, civil law systems lean more towards predictability of outcomes while English law systems lean towards flexibility of results based on evidence provided by the parties.

It would be beneficial to also list some relevant countries in each category

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 principle of universalism in cross-border insolvency involves the consolidation of all of the debtor's assets and liabilities into one single unified case at the jurisdiction of the debtor's main centre of interest (*lex concursus*) and all proceedings, locally and internationally, would be aggregated under one single proceeding; as such creditors will be treated on an equal basis. Equally, universalism involves recognition and effect of the appropriate jurisdiction (for example the State where the debtor has its COMI) by other States and the other States recognise that one set of insolvency proceeding having extraterritorial effect in other States.

By contrast, territorialism favours the treatment of the proceedings based on the location of the assets and therefore the assets on which creditors have claim against, which implies that the concept of national interest primes. This implies a plurality of insolvency proceedings whereby each State apply its own laws to decide on the insolvency proceedings within its own confines. This results in a lack or absence of cross-border coordination and recognition of insolvency proceedings due to concurrent proceedings.

Finally, the principles of modified universalism rely on both the principle of universalism and territorialism in the sense that it captures the concept of main proceeding at COMI (from universalism) and the concept of multiple proceedings in other States (territorialism) but creates some pecking order whereby the main proceeding is supported by secondary proceedings in other States but in a cooperative manner. So modified universalism recognises the principle of universalism but takes into account the need for multiple cases in other States considering the local jurisdiction and legal and cultural factors.

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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 and Middle America states have ratified various multilateral conventions and treaties to deal with international insolvency issues. Here is a summary of the main initiatives undertaken and differences between these initiatives:

- Montevideo Treaty on International Commercial Law (1889)
    - Compare to the other treaties, this treaty covers both corporate and personal insolvency and has been ratified by 6 Latin American countries. It determines the jurisdiction based on the commercial domicile, with the possibility of concurrent proceedings if the business (in case of corporate insolvency) has 2 or more autonomous businesses in different treaty States

- Montevideo Treaty on International Commercial Terrestrial Law (1940):
    - This treaty contains Title VIII on Bankruptcy and has been ratified by 3 countries
- Montevideo Treaty on International Procedural Law (1940)
    - This treaty contains Title IV on Civil Meetings of Creditors and has been ratified by 3 countries (as for Montevideo Treaty on International Commercial Terrestrial Law)
        - Compared to the other treaties, the 1940 treaties have only been ratified by a few countries (Argentina, Paraguay, and Uruguay) and therefore an international insolvency between 2 or more of the Montevideo Treaty states needs a careful analysis of which treaty actually applies

- Havana Convention on Private International Law (1928).
    - Ratified by 15 Latin American countries, this treaty is more geared towards an universalist approach to international insolvency, as indicated in its first chapter "Unity of Bankruptcy or Insolvency". Indeed, as per article 414 "if the insolvent or bankrupt debtor has only one civil or commercial domicile, there can be only one preventive proceeding in insolvency or bankruptcy…". Thus, it enables a single unified proceeding with universal effect.
    - However, compared to the Montevideo treaties, it does not provide procedures for coordination in case of concurrent proceedings. Indeed, compared to the other treaties, this treaty does not provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state

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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.

I disagree because nowadays the meaning of bankruptcy is generally referred to the formal state of being put into formal bankruptcy proceeding which correspond to an entity or individual not able to repay its debts to creditors, meaning that it is a formal legal process governed by bankruptcy laws. However, insolvency refers to a state of financial affairs where liabilities exceed assets (balance sheet insolvency) or the debtor can not repay its debts as they fall due (cash flow insolvency).

According to Wood, the essential features of bankruptcy and insolvency are (i) the automatic stay where actions by individual creditors against the bankrupt are stayed to provide a moratorium against individual debt collection; (ii) the pooling of assets to enable the distribution of assets to creditors with some exceptions state-wise; and (iii) the *pari passu* distribution of assets among creditors based on their claims with the exception of priority and secured creditors.

In terms of differences when a bankruptcy or insolvency involves a corporation rather than an individual, Sealy and Hooley identify a number of objectives for each type, and from there we can identify nuances and differences: the objectives of insolvency for individuals pertain to enabling a fresh start for the individual by reducing the level of indebtedness and protecting the individual from the actions of creditors and ensuring personal circumstances are taking care of, such as minimum living conditions and taking into account future income. Indeed, it is only in relation to individuals that the notion of exempt assets is pertinent. However, for corporations this concept of exempt or excluded assets is not pertinent.

Additionally, while for individuals the objective is to protect the debtor and enable a fresh start, this objective for corporations is only viable to the extent possible (rehabilitation) before other legal processes are activated to resolve the assets to creditors (liquidation for instance).

It would also be beneficial to consider its different use in countries, such as Australia

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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.

There are many challenges that arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation. At the very basis, according to Friman, the definition of insolvency in itself may differ by country which triggers the commencement of insolvency proceedings equivocally across States. This issue is compounded by the fact that there is no clear internationally recognized definition of insolvency proceeding in cross-border international insolvency conventions. Omar also states that the additional challenge in cross-border insolvency harmonization that make it difficult to uniform the process is that there are differences in domestic norms that exacerbate the issue of conflict of laws.

Westbrook identifies 9 key issues that challenge a cross-border dispensation or a universalist approach to international insolvency as these key factors differ, contrast, and may contradict each other by

State, including: 1) recognition of foreign representative; 2) moratorium on creditor actions; 3) creditor participation; 4) executory contracts; 5) co-ordinated claims procedures; 6) priorities and preferences; 7) avoidance provision powers; 8) discharges; and 9) conflict of law issues.

Indeed, as a matter of example, the challenges can stem from differences in the types of real security such as, for instance, the existence and applicability of floating and fixed charges per jurisdiction; the cash waterfall and distribution rules from State to State when it comes to priority of payment and restructuring of capital structure, such as, for instance, the payment of administrative costs; and the existence or non-existence of subordination of claims per applicable laws. Political pressures could play a role in the way local insolvency regimes differ and operate and there are also cultural barriers that make an insolvency regime either pro-debtor or pro-creditor that render insolvency law in cross-border situations difficult to deal with.

All these factors pose challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

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Question 3.3 [maximum 3 marks]

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

In the context of international insolvency, the meaning of hard law is related to the multilateral approaches that aim to regulate international insolvencies by binding regulation; in contrast the meaning of soft law pertains to guiding principles that aim to influence, and not bind, the regulation of international insolvencies.

Treaties and conventions signed by member States become embedded in domestic laws and as such form hard laws. One of the most successful examples of hard law is the Nordic Convention signed in 1933 and the European Insolvency Regulation (EIR) (2000) (evolved into EIR Recast) to address the issues of recognition and enforcement of foreign proceedings, gathering of assets, winding-up, not least. These successes come after many attempts, less successful, such as the Istanbul Convention which failed to attract sufficient ratifications.

Arguably, more success has been achieved through the use of soft law aimed at the unification and harmonization of private international law. The Hague Conference on Private International Law, now The World Organization for Cross-border Co-operation in Civil and Commercial Matters, has paved the way to better outcomes on international deliberations. For instance, it allocated the proceeding jurisdiction where the statutory registered seat was situated. Another successful example, is the development of by UNICITRAL of the Legislative Guide on Insolvency Law (2004) and Model Law on Cross-border Insolvency (MLCBI), with the MLCBI being a potent force and example of soft law in international insolvency addressing key issues of uniform recognition laws, cooperation and coordination.

3

Marks awarded 14 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 applicable English cross-border sources to use by the American insolvent estate representative to request recognition in terms of English Law in order to deal with the assets of Norton Cars situated in England are as follows:

- The Insolvency Act 1986 Part XVI that deals with cross-border insolvency allows an English court to recognize a local winding-up over the same company by recognizing the effect of the foreign proceeding. Indeed according to Lord Scott, according to section 426, "... if the country of the principal winding up is a 'relevant country or territory' for section 426 purposes and the liquidators in that country have requested English liquidators to remit to them the assets collected in England so that they (the principal liquidators) can, pursuant to the insolvency law of that country, implement a universal scheme of pari passu distribution to ordinary unsecured creditors, the request is one to which, in principle, the English liquidators ought, in my opinion, to accede." Hence a cooperation of the English courts with foreign liquidators should be warranted.
  It would be beneficial to note that S 426 is not applicable as the US is not designated
- The UNICITRAL Model Law (MLCBI) as potent soft law which has been adopted by the UK will provide tools and guidelines for cooperation, coordination, and recognition between the US and UK. The model law was incorporated in the Cross-Border Insolvency Regulations 2006 and allows the recognition of foreign insolvency proceeding by applying to the local English court for recognition and relief.
- Finally, the American representative could use common law and precedent case to request the English court, although it has less strength than the first two sources above, as case law changes based on cases. It is therefore advised to consider the legislative provisions of the Insolvency Act 1986 and the MLCBI as primary sources.
  It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider 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 to be used in a cross-border insolvency matter between Italy and Germany are the European Insolvency Regulation Recast which was adopted in 2015 and had amendments subsequently. While Italy and Germany did not adopt the Model Law (MLCBI), both have recognized the principles of the Model Law and these could be used in the context of this cross-border insolvency case.

According to the European Insolvency Regulation Recast Article 3.1, the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties." Accordingly, in this situation, it is from Italy that Norton Cars administers its affairs as management is located there. Therefore, according to EIR the primary place of proceeding should be Italy. According to articles 7 to 18 of EIR, Italy, as state of opening of proceeding, should determine "the conditions for the opening of those proceedings, their conduct and their closure."

Since Norton Cars has an establishment in Germany (i.e. ""any place of operations … where the debtor carries out a non-transitory economic activity with human means and assets" according to EIR), then secondary proceedings in Germany could be opened and be coordinated with the Italy main proceeding.

3

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, it will 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 because EIR Recast has been amended to facilitate the recognition of the existence of insolvency proceedings outside the EU for the purposes of co- ordinating proceedings both inside and outside the EU. Indeed, the EIR Recast approach is grounded in the principle of favor *recognitionis* to facilitate recognitions.
No, it is not applicable outside the EU

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Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

As the COMI is in Italy and the primary insolvency proceeding has been opened in terms of Italian law, then based on EIR Recast it will be the *lex concursus.* The Italian law will therefore drive the main proceeding and determine the enforcement authorities and process.

However, with regards to the real rights of security onto the assets in the Netherlands and Australia it is typically the local applicable law and legal systems governing those security interest agreements that shall prevail. Therefore local law will determine the appropriate course of action for the enforcement and realization of those rights.

There is some scope to elaborate and clarify

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.)

Since Australia is non-EU and there is no bilateral agreement between Italy and Australia, then Australian law will apply and govern the insolvency proceeding in Australia. However, as Australia has also adopted the UNCITRAL Model Law on Cross-Border Insolvency, it will be possible to recognize the Italian proceeding to the extent it does not contradict with the legal principles of Australian law (common law).

The real rights of security In Australia will be governed by Australian law even If, as pointed above, the Model Law would allow the Italian proceeding to be recognized in Australia. The law of Australia where the assets are indeed located will determine the security rules pertaining to those assets.

3

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 44.5 /50

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