INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

Question 1.2

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

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

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

Question 1.3

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

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

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

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

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

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

(a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

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

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

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

(a) This statement is untrue because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Civil law systems originated from Roman law and the later codes that developed in continental Europe, such as those of France, Germany, the Netherlands, Spain and Portugal. These systems tend to rely on detailed and codified rules for insolvency law, with a strong focus on protecting creditor rights and ensuring judicial oversight. They also tend to be less sympathetic to debtors who seek discharge and a fresh start.

Common law systems inherited their legal traditions from the common law and equity of England and Wales, and spread to countries such as the United States, Australia, Canada, India, South Africa and many former British colonies. These systems tend to adopt a more flexible and pragmatic approach to insolvency law, with a balance between creditor and debtor interests. They also tend to be more generous to debtors who seek rehabilitation and a second chance.

3

Question 2.2 [maximum 3 marks]

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

Universalism is the idea that only one insolvency proceeding should take place in the country where the debtor has its main business base (COMI), and that this proceeding should apply to all the debtor's assets and debts, no matter where they are located. This means that the law of the COMI country would govern the whole insolvency process and its effects worldwide.

Territorialism is the opposite idea that each country has the right and power to deal with the debtor's assets and debts within its borders, regardless of the debtor's COMI or any other insolvency proceeding elsewhere. This means that different insolvency proceedings could happen at the same time in different countries, each using its own law and protecting its own interests and creditors, without caring about the impact on the debtor's global situation and the overall outcome for creditors.

Modified universalism is a middle ground between universalism and territorialism that allows for a main insolvency proceeding in the COMI country, but also accepts the possibility of other proceedings in countries where the debtor has some assets or interests. This means that the courts and authorities involved in the different proceedings have to work together and co-ordinate their actions, and that they respect the differences and independence of national insolvency laws.

3

Question 2.3 [maximum 4 marks]

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

To address the challenges of international insolvency, Latin America has undertaken several initiatives, such as:

a) The Montevideo Treaties of 1889 and 1940, which set up a system for recognizing and enforcing bankruptcy and insolvency judgments among six states, based on where the debtor had its commercial domicile or its independent businesses.
b) The Havana Convention on Private International Law (Bustamante Code) of 1928, which established a common framework for bankruptcy and insolvency proceedings among 15

Latin and Middle American states, based on where the debtor had its civil or commercial domicile and applying the law of that place to the effects of the proceedings.

c) The adoption of the UNCITRAL Model Law on Cross-Border Insolvency by some Latin American states, such as Mexico, Chile, Colombia, Peru and Panama.

These initiatives differ in several ways:

a) The Montevideo Treaties and the Havana Convention are binding treaties that create uniform rules of private international law for the contracting states, while the Model Law is a non-binding template that states can adapt to their own insolvency laws.

b) The Montevideo Treaties and the Havana Convention follow a territorial approach to jurisdiction and recognition, based on the debtor's domicile or establishment, while the Model Law follows a universalist approach, based on the debtor's centre of main interests and the principle of cooperation among courts and insolvency representatives.

c) The Montevideo Treaties and the Havana Convention do not have specific mechanisms for cooperation or coordination among concurrent proceedings, while the Model Law has detailed provisions for communication, coordination and cooperation among courts and insolvency representatives in cross-border cases.

It would be beneficial to also discuss the differences between the Montevideo Treaties and the Havana Convention

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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.

I do not agree that the terms "bankruptcy" and "insolvency" can be used interchangeably, because they may have different meanings and implications depending on the context and the legal system. In general, both terms refer to the situation where a debtor cannot pay his or her debts as they fall due, but there are some nuances and distinctions that I will explain below.

One way to look at the difference between the terms is to think of "insolvency" as a financial condition and "bankruptcy" as a legal status or procedure. A debtor is insolvent when their liabilities exceed their assets, or when they do not have enough cash flow to meet current obligations. A debtor is bankrupt when they go through a legal process to seek relief from their creditors. Therefore, insolvency is a prerequisite for bankruptcy, but not every insolvent debtor may file for bankruptcy, and not every bankrupt debtor may be insolvent at the time of filing.

Another way to look at the difference between the terms is to think of "bankruptcy" as a term that only applies to individuals, and "insolvency" as a term that applies to both individuals and corporations. This may reflect the historical origins of the terms, as bankruptcy was originally a

collective debt-collecting mechanism that applied to merchants or traders, while insolvency was a broader concept that could apply to any debtor.

In summary, the terms "bankruptcy" and "insolvency" may not be used interchangeably in some contexts and legal systems, because they may have different meanings and implications. Therefore, it is important to be aware of the specific definitions and characteristics of the terms in the relevant jurisdiction.

This sub-question requires further consideration of the essential characteristics of bankruptcy/insolvency and the differences when involving an individual or company, eg exempt property.

4.5

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.

Cross-border insolvency poses many challenges that make it hard to create a single global system for dealing with it. One challenge is the variety of the insolvency laws in different countries, which are shaped by their own legal systems, goals, and values. To align these laws, States would need to agree on a lot of issues and give up some control over their own insolvency rules. Another challenge is the absence of a global court or body that can oversee and enforce cross-border insolvency cases, especially when the debtor has assets, creditors, operations, or contracts in more than one country. This makes it difficult for courts and insolvency professionals to work together and to respect and follow foreign insolvency decisions and orders. A third challenge is the possibility of conflicts among the parties involved in cross-border insolvency cases, such as creditors, debtors, shareholders, employees, regulators, and tax authorities. These parties may have different interests for the insolvency outcome, and may try to use or abuse the choice of forum to their benefit. This may result in forum shopping, asset shifting, fraud, or evasion of liabilities.

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

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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.

Hard law and soft law are different ways of regulating or influencing how States or other actors behave at the international level. Hard law means legally binding rules that are specific, enforceable and subject to dispute resolution, such as treaties or conventions. Soft law means non-binding suggestions, guidelines, principles or standards that are often general and flexible, such as declarations, codes of conduct or model laws.

International insolvency is a field where hard law and soft law have been used to deal with the problems and challenges that happen when a debtor has assets, creditors, operations or interests in more than one State or legal system. These problems and challenges include, for example, deciding which State has the authority, recognition, enforcement and law to apply to insolvency proceedings, and making sure that courts, insolvency representatives and stakeholders cooperate in cross-border cases.

Some examples of hard law instruments in international insolvency are:

a) The European Insolvency Regulation (EIR) and its Recast version.
b) The Nordic Convention on Bankruptcy (1933.
c) Bilateral treaties or conventions on insolvency or related matters, such as the Convention between the United Kingdom and the United States of America for the Reciprocal Recognition and Enforcement of Judgments in Bankruptcy (1934).

Some examples of soft law instruments in international insolvency are:

a) The UNCITRAL Model Law on Cross-Border Insolvency (1997) and the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).
b) The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2016).
c) The UNCITRAL Legislative Guide on Insolvency Law (2004) and its supplements.

Hard and soft laws have different advantages and disadvantages in providing solutions to the challenges of international insolvency. Generally speaking, hard laws create clear and enforceable obligations and rights for the parties involved in cross-border insolvency cases, but they also have difficulties in reaching agreement, ratification and compliance among States with different legal systems. Soft laws, on the other hand, are more adaptable and persuasive for States to adopt or follow, but they also have difficulties in ensuring consistency and impact among States with different levels of commitment. Therefore, the choice and use of hard and soft laws in international insolvency may depend on various factors, such as the nature, scope of the instrument, needs and preferences of the States and stakeholders. **There is scope to elaborate specifically with respect to success**

3

Marks awarded 9.5 out of 15

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

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

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

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

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

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

Question 4.1 [Maximum 4 marks]

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

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

If I were the American insolvent estate representative, I would consider using one or more of the following cross-border sources to request recognition in England for the US liquidation of Norton Cars Inc:

a) The MLCBI, which the UK has adopted through the Cross-Border Insolvency Regulations 2006 (CBIR). This source provides a framework for foreign insolvency proceedings and representatives to be recognised and co-operated with by the English court, as long as they meet certain conditions. I could apply to the English court for recognition of the US liquidation as a foreign main or non-main proceeding, depending on whether the US is the centre of main interests or an establishment of Norton Cars Inc. Recognition would give me certain powers and rights under the MLCBI and the CBIR, such as staying actions against the company's assets in England, requesting co-operation and assistance from the English court and local insolvency officials, and participating in local insolvency proceedings. Recognition would also mean that the US law as the foreign proceeding would apply to some matters, such as the distribution of assets, the avoidance of transactions, and the discharge of debts, unless they go against English public policy.

b) Section 426 of the IA 1986, which allows the English court to assist and support the courts of some designated countries or territories, including the US, in insolvency matters. I could ask for the assistance of the English court under section 426 to recognise and enforce the US liquidation order or any other orders made in the US proceeding.

It would be beneficial to note that S 426 is not applicable as the US is not designated

c) The common law principle of (modified) universalism, which recognises the main authority of the court of the principal liquidation to deal with the company's assets and liabilities worldwide, and requires the English court to co-operate with the foreign court, unless it is unjust or against public policy. I could rely on this principle to seek the recognition and enforcement of the US liquidation order or any other orders made in the US proceeding, or to ask for the company's assets in England to be sent to the US for distribution under the US law.

3

Question 4.2 [Maximum 4 marks]

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

The legal sources that I would use in a cross-border insolvency case between Italy and Germany are:

a) The EIR Recast, which is a binding EU regulation that applies to insolvency cases opened in EU countries (except Denmark) after 26 June 2017.

b) The MLCBI, which is a non-binding model law that provides a template for national laws on cross-border insolvency.

c) The domestic insolvency laws of Italy and Germany, which may apply to some aspects of the insolvency case that are not governed by the EIR Recast or the MLCBI, such as the insolvency law of the country where the case is opened, the ranking and distribution of claims, the rights and obligations of the debtor and the creditors, and the avoidance of fraudulent or preferential transactions.

The main case should be opened in the country where the debtor has its COMI, according to the EIR Recast and the MLCBI. The COMI is presumed to be the place of the debtor's registered office, unless proven otherwise.

In this case, assuming that Norton Cars Inc moved its COMI to Italy when England left the EU, and that this move was genuine and not just for the purpose of forum shopping, the main case should be opened in Italy. However, this presumption may be challenged by creditors or other parties who can show that the COMI is actually in another country, such as Germany, where the debtor's main operations take place. The court that receives the request to open the main case would have to examine the evidence and decide whether the COMI is in Italy or in another country. If the court finds that the COMI is in Italy, it would open the main case and issue a decision that would be automatically recognized and enforced in other EU countries, subject to certain exceptions. If the court finds that the COMI is in another country, it would not open the main case and refer the matter to the court of that country. Alternatively, the court may open a secondary case in Italy, if the debtor has an establishment there, and if the secondary case is compatible with the main case.

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) Insolvency Regulation does not apply to courts in India, South Africa or Australia when they deal with the recognition of an EU insolvency representative who has been appointed according to the regulation. This regulation only governs insolvency proceedings that start in EU member states and the way that courts and insolvency practitioners from those states cooperate and recognise each other. It does not cover third countries outside the EU, unless they have a specific agreement with the EU on this issue.

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 applicable law for the insolvency proceeding and the security interests in the Netherlands depends on whether the EU Regulation on Insolvency Proceedings (EIR Recast) applies or not. This regulation sets out rules for determining jurisdiction, recognition, cooperation and coordination of cross-border insolvency cases within the EU. However, it does not cover

insolvency cases that start in a non-EU country, such as the USA, or cases involving certain types of financial institutions and funds.

If the EIR Recast applies, the main insolvency proceeding will be governed by the law of the member state where the debtor has its centre of main interests (COMI), unless the debtor has an establishment in another member state, which could allow for secondary proceedings there. The COMI is the place where the debtor conducts its main business activities and is visible to its creditors and the public. It is presumed to be the place of the registered office, unless there is evidence to the contrary. In this case, the COMI of Norton Cars Inc is in Italy, where it moved its registered office after the UK left the EU. Therefore, the Italian law will apply to the main proceeding, unless someone can prove that the real head office and decision-making centre of the company is elsewhere.

The security interests in the Netherlands will be governed by the law of the Netherlands. The opening of insolvency proceedings in one member state does not affect the rights of creditors or third parties who have rights over the debtor's assets located in another member state at the time of the opening. These rights include security interests, such as mortgages, pledges or liens. Therefore, the Italian proceeding will not interfere with the rights of the secured creditors in the Netherlands, and the Dutch law will determine the existence, validity and enforcement of those rights.

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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.)

If Australia has adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), the law of Australia will apply to both the insolvency proceeding and the real rights of security situated in Australia.

Australia has incorporated the MLCBI into its domestic law through the Cross-Border Insolvency Act 2008. Under this Act, a foreign representative can apply to the Federal Court of Australia for recognition of a foreign proceeding in which they have been appointed. The Italian insolvency proceeding is a foreign proceeding, and the Italian insolvent estate representative can seek recognition in Australia.

The recognition of a foreign proceeding does not affect the rights of a secured creditor to realise or otherwise deal with its security interest, according to the Act. Therefore, the Italian insolvency proceeding will not interfere with the rights of the secured creditors in Australia, and the law of Australia will govern the existence, validity and enforcement of those rights.

3

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40.5/50

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