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 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.

[It is important to distinguish between English law and Civil law at the outset as these are the roots that govern not only the laws of insolvency and bankruptcy but general law as well.

Civil law is loosely based on Roman law where the debtor pledged his own body as security for the loan, whether it be imprisonment, death or being sold as a slave in order to repay debts.

On the other hand English law is often seen as pro-Debtor and debtors were treated more humanly and could be given a 'fresh start' or rehabilitated.

For obvious reasons the UK have their roots in English law and as a founder member of the EU Insolvency regulations. Even as the UK are former members of the EU, the EU Insolvency laws still apply, as it does with other relevant countries. Some 59 states have adopted the UNCITRAL model law on cross-border insolvency (including Australia, the United States of America and South Africa).

The civil law group are more pro-Creditor. Creditors ultimately must agree when and how a debtor is rehabilitated. Each State has its own laws and processes to follow, and these are amended from time to time. Countries such as the Netherlands, Germany, France and Spain fall into the group who apply civil law when dealing with insolvency.

African countries largely follow the laws of their formal colonial powers. The Francophone countries apply civil law while the commonwealth countries English law. Latin America is largely civil law based while India is English law based]

A better approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries cf codification in civil jurisdictions.
1.5

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.

[Universalism, in its ideal form, would result in one set of laws adopted by all countries that would manage the processes of insolvency. Once a debtor declares insolvency in one country (and assuming this State is the centre of the debtors' interests) then all the remaining States where the debtor has an interest would follow the same approach. All of the debtors' assets would be included and all of the creditors would have the opportunity to participate in the proceeds on a unified basis. Having a unified insolvency system with disparate general laws would be fraught with difficulties.

Territorialism proposes that individual insolvency proceedings are opened in each State where the debtor has an asset. The proceedings would be run concurrently and restricted to the assets in that State. The interest on the local creditors would be paramount. This would result in a debtor being solvent in one State and potentially not in another State. The strongest of creditors would manage according to self-interest.

Modified universalism would be a combination of both universalism and territorialism where a debtors insolvency proceeding would start in the centre of the debtors interests and the States where assets are located would have secondary, or ancillary proceedings. Courts dealing with these proceedings would be expected to co-operate with each other.]

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.

[Latin American countries have entered into 2 treaties worthy of mentioning, namely the Montevideo Treaties and the Havana Convention on Private International Law.

The Montevideo treaty of 1889 was ratified by 6 countries while only 3 of the original countries, namely Argentina, Paraguay and Uruguay, ratified the 1940 updated treaties. This means careful analysis of which treaty would apply must be done when there are insolvency proceedings between these States. The 1889 treaty allocates the debtors domicile in the primary State and provides for one set of proceedings. Where the primary proceedings are split between 2 or more States the treaty provides for the possibility of concurrent proceedings.

The Havana Convention was concluded in 1928 and encompasses 15 countries. Only Bolivia and Peru and parties to the Havana convention of 1928 and the Montevideo treaty of 1889. The Havana Convention is more supportive of a single proceeding with a universal effect across the region. While allowing for concurrent proceedings where a debtor has primary businesses in more than one state, The Havana Convention does not provide procedures for co-operation and co-ordination of any concurrent proceedings]

4

Marks awarded 8.5 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.

[Various countries use the terms insolvency and bankruptcy to mean different things. This colloquial use of the terms needs to be taken in the context of the country where the discussion and/or proceedings are taking place.

The dictionary meaning of insolvency refers to the financial state of the affairs of the debtor. Can the debtor meet its financial obligations in the foreseeable future, known as commercial insolvency, or do the liabilities exceed the assets, otherwise known as balance sheet insolvency?
Should the debtor fail the solvency test and enter into formal insolvency proceedings (voluntarily or involuntarily) this could be referred to a bankruptcy. Thus bankruptcy refers to the formal insolvency proceedings against the debtor. However the dictionary definition also refers to bankruptcy as a noun ‘a company is facing bankruptcy’.

In Australia insolvency refers to a corporation while bankruptcy refers to an individual.

According to Sealy and Hooley (In M A Clarke et al, Commercial Law, Oxford University Press, 2017, Chapter 28), the objective of insolvency for individuals and corporations differ.

Individuals are protected from creditors and enable the individual to make a fresh start while contributing to the estate from present and future income to the benefit of creditors. When a corporation becomes insolvent the objective is to save the business (or parts thereof) and not necessarily the company.

In both instance the objective is a *pari passu* distribution to creditors according to the priorities of the debt. Individuals often benefit from the exclusion of certain assets.]

There is some scope to elaborate. The question is worth 7 marks.

6

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.

[Universalism, in its ideal form, would result in one set of laws adopted by all countries that would manage the processes of insolvency. This is a theory that would make it possible to manage an insolvency proceeding where a debtor has operations across the globe.

Unfortunately, this theory would be difficult to implement. Countries have reached different levels of maturity at different times across the globe resulting is laws in various stages of maturity and having differing origins e.g. English law and civil law.

Firstly defining insolvency would be difficult due to the differing circumstances and priorities of the States. Then there is the issue of not having a global court to hear issues. Various States will have different procedures and processes depending on the insolvency law that has been adopted. Fletcher asks that 3 questions are answered (a) in which jurisdiction must the proceedings be opened, (b) which countries laws should be applied, and (c) what international effects will be accorded to proceedings conducted?

UNCITRAL is an example of various States getting together in an attempt to harmonise the rules on the approach to insolvency and the co-operation between member States. While gaining traction it does not cover all aspects of insolvency.

General laws in a State often differentiate the preference of securities. The 'Crown Preference' is a term used to prioritise the debt to the State and in some instances State taxes are still prioritised over other creditors. The same holds for employees as a creditor of a corporation where employees are protected and enjoy superior ranking of creditors.

Different States also have special rules for different types of industry, whether it be large corporations, banking and financial institutions (such as insurance companies and pension funds), State Owned Enterprise and Non-profit Organisations.

Costs associated with insolvency proceedings are also treated differently in various States. In some States the costs are preferred i.e. costs of administration are paid first. In other States the creditors fund the proceeding and in a small instance the regulator pays the costs of administration.

JL Westbrook, Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court, has identified 9 key issues:

1. Standing for (recognition of) the 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.

Where a corporation has operations in various States the general law, insolvency law, treaties, special exceptions etc. need to be considered before deciding on how to proceed. Having one set of procedures, while preferable, seems a long way off.]

5

Question 3.3 [maximum 3 marks]

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

[International law is categorised as public international law or private international law. Public International Law governs States (when adopted domestically) and Private International Law (also domestic law) governs parties.

Where insolvency treaties and other international resolutions are adopted by a country these are often written into the State's own domestic law. If they are not adopted, the State's own private international law will determine forum, recognition and enforcement and more importantly the law that will be used to resolve the matter.

When treaties are signed these principles become written into the domestic law of the country and become 'hard law'. Treaties are only agreed between certain countries and govern certain types of insolvency. These treaties are not globally recognised nor do they cover every aspect of the insolvency procedures.

Various multinational organisations have been working together towards developing a unified approach to various aspects of Private International Law. An example of an early initiative is the 1925 Model Treaty on Bankruptcy. While never adopted formally it set out principles that can and have been included in 'hard law' in various States. The Hague Conference describes itself as the 'World Organisation for Cross-border Co-operation in Civil and Commercial Matters' and has been instrumental in drafting the UNCITRAL Legislative Guide on Insolvency Law (2004). The most notable examples of 'soft law' is the development of the MLCBI (Model Law on Cross-border Insolvency). This 'soft law' is available, and is gaining traction, to States to implement domestically with or without modification.]

Success, or otherwise, also needs to be considered

2.5

Marks awarded 13.5 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.

[American insolvency law is federal; it applies to all US states. The law is considered pro-debtor i.e. with a liberal approach to rehabilitation. The US insolvency law has been updated/amended in the 1990's and now includes the 1997 UNCITRAL Model Law on Cross-border Insolvency ("MLCBI").

The MLCBI has not been formally adopted in the UK legislature, however in the UK there have been recent rulings that require recognition and co-operation with foreign insolvency adjudications and proceedings. In the case of McGrath v Riddell, Lord Hoffman referred to the *"golden thread running through English Cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far is consistent with justice and UK policy, co-operate with the courts in the country of the principal liquidation."*

The UNCITRAL Model Law on Cross-Border Insolvency was implemented in England and Wales through the Cross-Border Insolvency Regulations 2006

The American insolvent estate practitioner should initiate a concurrent liquidation of the company in the UK and agree the procedures to wind up the assets in the UK and in the words of Lord Hoffman to "*ensure that all the company's assets are distributed to its creditors under a single system of distribution*".

Lord Collins, in the case of Rubin v EuroFinance SA; New Cap Reinsurance Corp (in liq) v Grant, stated "*there is nothing to suggest that [article 21 of Model Law on Cross-border insolvency] applies to the recognition and enforcement of foreign judgements against third parties*". This means that the co-operation is voluntary and that rulings made in the US will not automatically be binding in the UK.]

This question required a consideration of the non-applicability of s426, the regulation version of the MLCBI and the relevance of common law.

1.5

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 European Union passed a Council Regulation on Insolvency Proceedings (the European Insolvency Regulation, EIR) in 2000. There have been subsequent amendments which have for most members become effective in January 2022 (known as the EIR (Recast)). The essence in this situation is that the EIR (Recast) allocates the judicial competence to the courts of the member state within which is situated the "centre of the debtors main interest (COMI)". The EIR (Recast) does allow for subsidiary proceedings in other member States where the debtor has an 'establishment. The definition of establishment is a place where "*the debtor carries out a non-transitory economic activity with human means and assets*". **It would be beneficial to explain that Italy and Germany are both member states.**

In the facts per the question Italy would be the COMI in that the business is run from Italy (as the management was directed from Italy) and the German operation would be an establishment (as there are activities of manufacture using human means and assets). The main proceedings would be opened in Italy and subsidiary proceedings opened in Germany.

The EIR (Recast) includes the extending the scope of the insolvency and expanding the provisions of the centre of debtors' main interest to include recognising proceedings in outside of the EU for the purposes of co-ordinating these procedures being held outside of the EU, namely the US.

As the UK have left the EU, the EIR (Recast) no longer applies to the insolvency matters where the main proceedings were opened post 11pm on 31 December 2020. Regulations still apply where proceedings were opened before that date. However, the principles formulated in McGrath v Riddell would provide for agreements of co-operation.]

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?

[The EIR (Recast) has made amendments since the original adoption, namely in 2015 and 2022. These amendments included extending the scope to pre-insolvency and hybrid proceedings. They also included amendments to recognising the existence of insolvency proceedings outside of the EU for the purposes of co-ordinating proceedings both inside and outside of the EU. Thus courts in India, South Africa and Australia could apply for recognition.]
It needs to be discussed how these countries are not EU members

.5

Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where

the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

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

[Dutch insolvency law is an example of civil law. These laws have evolved since 1772 when the Ordinance of Amsterdam was applied. It was updated with the *Faillisementswet* of 1897 and later the Commissie van Onderzoek gave rise to the *Schuldsaneringswet*. Dutch law was, like many of the West-European countries, pro-Creditor. Creditors decided on whether the debtor would be discharged or not. The *Schuldsaneringswet* introduced the concept of a "fresh start".

The Netherlands are in the process of reforming their insolvency laws and the "*Wet Homologatie Onderhands Akkoord*" (WHOA) came into force in January 2021 where, amongst other changes, a scheme of arrangement can be entered into between the parties.

These laws, together with the general civil laws (such as the *Burgerlijk Wetboek*) decide on whether rights of security exist over assets that prioritises one creditor over another.]

There is scope to explain why Dutch law is the applicable law.

2.5

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

[Australian law is based on English Common law. It does however have two specific Acts that deal with insolvency, one for corporations and one for individuals. There is not one piece of legislature that deals with both aspects of insolvency.

The Corporations Act of 2001 deals with aspects of insolvency. When not specifically stated in the insolvency act, general laws and principles therein would have effect in insolvency matters specifically when it comes to rights of ownership or security

Xxx deal with the UNCTRAL securities initiatives xxxx.]

There is scope to explain why Australian law is the applicable law.

2.5

Marks awarded 10 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 40 /50

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