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.

As most general legal systems are either based on civil law or English/common law, insolvency law systems can also be broadly grouped and analysed based on their historical roots in one or the other of these systems.

Generally speaking, the judiciary often has greater powers and discretions in systems having historical roots in English law in which judge-made law has greater prominence. This may have contributed to the phenomenon where many English law originated systems (such as Australia and Hong Kong) do not have a single, unified piece of legislation dealing with all aspects of insolvencies in that jurisdiction. This is in contrast to civil law originated systems, many of which (such as Germany and Spain) adopt a single, unified insolvency legislation.

Some scholars have observed that civil law countries are more inclined to take a territorial approach to jurisdiction, and that countries with English law roots are more aligned with universalism. For example, the common law concept of comity reflects the underlying philosophy that the courts will respect decisions by other courts as a matter of courtesy. Perhaps this may be due to the fact that the different approaches adopted by these legal systems in various questions of law may affect how the insolvency processes are ran and the outcome of such processes. For example, choice of law issues only arises if the parties seek to apply foreign law in their English legal proceedings, whereas the question automatically arises in proceedings in civil law systems.

It has also been observed that many civil law originated systems seem to be harsher for debtors and are more pro-creditors. For example, prior to it reforms in recent years, there is no discharge of a debtor under Dutch law unless there is creditors' consent.

However, due to the evolution of legal systems and how they influence one another as well as the culture/fundamental principles entrenched in the local legal system, legal systems usually take hybrid forms and adopt characteristics from other systems, rather than just reflecting characteristics from their own historical roots, in real life.

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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.

Under the principle of universalism, there should only be one proceeding covering all of the debtor's assets and debts in all jurisdictions and dealing with the claims of all creditors in all jurisdictions on an equal basis. As for the principle of territorialism, it allows for multiple concurrent insolvency proceedings in different jurisdictions in relation to the same debtor, each dealing with the creditor claims within their own jurisdiction.

The universalism principle requires the unity of proceedings - the proceeding need to be opened in one chosen forum (e.g. where the center of the debtor's main interests is located) which is recognised by all other states which will give extraterritorial effect to such insolvency proceeding. On the other hand, under the territorialism principle, concurrent proceedings can be commenced in every relevant state but the territorial effect of each concurrent proceeding would be limited to the property, creditors and officeholders within the state where such insolvency proceeding has been opened.

The principle of modified universalism is by its name a modification of the purist universalism principle, and while it still envisages that there should be a "main proceeding", such "main proceeding" can be supported by secondary or ancillary proceedings in other states. The underlying theme of this principle is the cooperation of the courts dealing with the respective proceedings with one another.

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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 American states have undertaken multiple initiatives to resolve international insolvency issues, including:

- The Montevideo Treaty on International Commercial Law (1889) ("Montevideo 1889 Treaty") and The Montevideo Treaty on International Commercial Terrestrial Law (1940) ("Montevideo 1940 Treaty", together with the Montevideo 1889 Treaty, the "Montevideo Treaties")
- Havana Convention on Private International law (1928) ("Bustamante Code")

The member states ratifying each of these treaties are different. The Montevideo 1889 Treaty has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay; the Montevideo 1940 Treaty has only been ratified by Argentina, Paraguay and Uruguay; and the Bustamante Code has been ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.

These treaties also differ in terms of the extent of their support for a single proceeding with universal effect within the region. The Montevideo Treaties provide for a single proceeding within the treaty states where a debtor has a commercial domicile, unless the debtor has economically autonomous businesses in different treaty states. The Havana Convention is more supportive of the approach for a single proceeding with universal effect in the region but concurrent proceedings in treaty states where there are commercial establishments that operates entirely separately economically are still allowed (although the Havana Convention does not provide for co-operation or co-ordination procedures for concurrent proceedings).

4

Marks awarded 10 out of 10

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

Question 3.1 [maximum 7 marks]

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

"Bankruptcy" usually only refers to the insolvency for individuals while insolvency also describes financial state of corporates and other entities. **Elaboration is warranted regarding the meaning ascribed to bankruptcy and insolvency**

The essential features of insolvency and bankruptcy law are: (i) moratorium against debt enforcement by individual debtors, (ii) pooling of assets which becomes available to pay creditors and (iii) *pari passu* distribution to creditors as far as possible (subject to priority creditors and secured creditors who are excepted).

The objectives of corporate insolvencies are different from that for individuals. The objectives for individual insolvencies is to protect the individual from harassment of creditors and to rehabilitate the individual (by allowing the individual to reduce his/her indebtedness and have a fresh start by discharging the pre-bankruptcy debts at the end of the bankruptcy process). Certain assets will also be reserved from the insolvency estate to allow the individual to maintain himself/herself and dependents.

These concepts are not applicable for corporate insolvencies, the objectives of which is to preserve the whole or viable parts of the company's business where possible. Personal liability on responsible persons is also a focus in corporate insolvencies (but not insolvencies for individuals) where such responsible persons would be held personally accountable for their abuse (eg. fraud or dishonesty).

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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.

Due to the absence of a global insolvency law system and a global court to deal with insolvency proceedings, the underlying fundamental differences in the domestic law of the various jurisdictions posts various difficulties in developing a single global cross-border insolvency dispensation.

For instance, for a global cross-border insolvency dispensation to be developed, the different jurisdictions will need to reach a consensus on a spectrum of legal principles, including the nine key issues identified by Professor Westbrook:

i. standing for/recognition of the foreign representative
ii. moratorium on creditor actions
iii. creditor participation
iv. executory contracts
v. co-ordinated claims procedures
vi. priorities and preferences
vii. avoidance provision powers
viii. discharges
ix. conflict of law issues.

Given the underlying (and, very often, fundamental) differences in local laws and cultures, it may not be easy nor feasible to reach a universally acceptable uniform approach on these issues. Taking moratorium as an example, whilst many jurisdictions have rules regarding the stay of proceeding, the circumstances in which such stay are granted, the breadth of the actions stayed and applicable exceptions to such stay differ from jurisdiction to jurisdiction. As such, complications and difficulties would arise where an insolvency representative seeks to stay proceedings in more than one jurisdiction.

Furthermore, other scholars such as Friman and Omar have also identified that the difficulties in unifying the approach in cross-border insolvency starts in finding common terminologies (such as coming up with a universal definition of what constitutes "insolvency" which would be difficult at an international level due to the different tests adopted in the various jurisdictions), and the differences in domestic norms also give rise to differences in matters such as the position of creditors and their priorities in insolvency situations, and the rules regarding security, setting off or protection of assets.

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.

In the context of international insolvency, "hard laws" are essentially treaties and conventions between states/governments which have been introduced into the domestic law of its signatories states who are bound by such international instruments. An example of "hard law" is the European Insolvency Regulation (EIR) and its recasts.

On the other hand, "soft laws" refers to guidelines and initiatives introduced by multilateral organisations, which seek to provide recommendations and influence states to reform their domestic legislations. An example of "soft law" is the UNCITRAL Model law.

In terms of their successes in providing solutions to the challenges of international insolvency, "hard laws" are enforceable in the domestic court so it can be argued to have a more direct impact. However, since changes in the form of "hard law" may not be as forthcoming in every state, "soft law" options have more success in terms of promoting uptake of trend-setting initiatives in a larger number of states with greater economic scale and wider geographical reach.

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 EU Insolvency Regulation (EIR) no longer applies to insolvencies in the United Kingdom after Brexit.

The United Kingdom has adopted the UNCITRAL Model Law on Cross-Border Insolvency with little amendments, through its Cross Border Insolvency Regulations SI 2006/1030 (CBIR). The recognition mechanism under the CBIR is not based on reciprocity, and so the American insolvent estate representative can apply to the English courts for recognition and relief. The recognition mechanism is not automatic and requires an application to the English courts. It should also be noted that the scope of recognition and relief available under the CBIR is also much more limited that what was afforded under the EIR.

English courts can also grant assistance to foreign insolvency proceedings under their common law jurisdictions. The English courts traditionally adopts the principles of "modified" universalism, and would traditionally recognise proceedings commenced in the debtor's place of incorporation (which incidentally is the USA under the present facts). The assistance granted by the English court will be limited to what is available to the USA insolvency representative under its "home" jurisdiction. However, this route arguably has more uncertainties so it would be advisable to pursue the recognition pursuant to the CBIR mechanism mentioned above.

For completeness, while section 426 of the Insolvency Act 1986 provides that the English courts shall "assist the courts having the corresponding jurisdiction any other parts of the United Kingdom or any relevant country or territory", the USA is not a relevant country or territory for the purposes of this provision, so it would not be relevant in the present case.

The common law is also relevant

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.

As both Italy and Germany are EU Member States, and the COMI of Norton Cars Inc is in Italy, the cross-border proceedings will be governed by the Regulation (EU) 2015/848 of the European parliament and the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast) which provides the framework for deciding the jurisdiction to commence insolvency proceedings and the applicable law for such proceedings.

The test for COMI under the EIR Recast is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. Although the COMI of Norton Car Inc was shifted to Italy from England, it seems unlikely from the facts available that the shift would be considered abusive forum shopping as (i) the shift occurred some time ago when England exited the EU and (ii) the impacts of Brexit could be a legitimate explanation for such shift. Therefore, on prima facie, the COMI of Norton Car Inc would indeed be Italy where its management was directed.

The main proceedings should be opened in Italy where its COMI is located, and the rules under Italian law will largely govern the cross-border insolvency process. The main proceedings will be automatically recognised in Germany if no secondary proceedings have been commenced in Germany and the insolvency representative duly appointed by the Italian courts will be able to exercise powers over Norton Car Inc's assets situated in Germany where

no security interests are involved. The local German law may however still be relevant to certain exception areas, such as rights of secured creditors and employees.

Since Norton Car Inc have its main operations in Germany (a member state), it would also be possible to commence secondary proceedings there if it can be shown that an "establishment" existed in the jurisdiction in the three months preceding the opening of proceedings.

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, as India, South Africa and Australia are not EU member states (and have not adopted the EU (Recast) Insolvency Regulation), they are not eligible to apply such regulations when considering the recognition of an EU insolvency representative.

That being said, local laws of these jurisdictions and treaty/convention arrangements in relation to the recognition of foreign insolvency representatives may also need to be taken into account to determine the relevant of the EU regulations.

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 7 marks.)

The Netherlands is an EU member state and is bound by the EIR Recast, and the EIR Recast rules will apply where the Italian insolvency representative (who is appointed in an EU member state) applies for recognition in the Netherland courts.

Since the COMI of Norton Cars is in Italy as discussed in Q4.2, assuming no secondary proceedings have already been commenced in Netherlands, the main insolvency proceedings opened in Italy are automatically recognised in Netherlands. As such the Italian insolvency representative is authorised to exercise his/her powers in accordance with Italian law.

However, security interests are a right in rem, and so the creation, validity and effectiveness could be determined by the governing law applicable to such security interests. Rights in rem are exceptions to the lex fori concursus principle (see Article 8 of the EIR Recast which clearly states that "the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings").

Elaboration is warrant to answer the sub-question as to the relevant law.

1.5

(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 7 marks.)

Section 581 of the Corporations Act 2001 (Cth) provides that an Australian court must assist courts of prescribed countries and has a discretion to assist courts of other countries. Italy is not a prescribed country for the purpose of this section, but the Australian court may still exercise its discretion to provide assistance.

Australia has also adopted the UNCITRAL Model Law (which was implemented (with some amendments) into its local laws as a stand-alone legislation in the Schedule to the Cross-Border Insolvency Act 2008 (Cth) (CBIA)) which provides an alternative route for the foreign insolvency representative to seek recognition – the Australian court is required to cooperate to the maximum extent possible with all foreign courts in matters within the scope of the Model Law (Article 25 of the Model Law). The CBIA provides that the Model Law shall prevail over the Corporation Act in case of any inconsistency.

As the Model Law does not specify the applicable law for the proceedings and security interests, these will be determined by the Australian law (subject to the conflict of law principles thereunder).

Italian law may also need to be considered in certain aspects depending on the positions (particularly the conflict of law rules) under Australian law.

The Australian courts will also be able to grant relief to the Italian insolvency representative subject to local conflict of law principles.

3

Marks awarded 12.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 46.5/50

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