



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.

English law originated from England and Wales, and spread through the common law states, including British overseas countries (e.g. Cayman and the British Virgin Islands), a number of African countries and former colonies (e.g. Nigeria and Kenya), as well as Australia and New Zealand. These common law countries all draw on England's 1986 Insolvency Act as influence for their own insolvency legislation. **Elaboration is warranted regarding 'common law' precedents**

These common law countries include British Overseas Territories that benefit from access to the UK Court of appeal and UK Supreme Court to address unresolved disputes or *lacunaes* in law.

On balance - Common law countries are perhaps more likely to embrace the concept of modified universalism and subscribe to the UNCITRAL MLCBI which means they are more likely to recognise foreign insolvency proceedings. Common law countries are also more likely to be familiar with the concept of a "floating charge" (unlike civil law countries).

This contrasts European countries who's insolvency law systems have historical roots in civil law, born out of the vestiges of Roman Law. They are more likely to have a propensity with (modified) territoriality. Consider Switzerland for example, that in the context of an internal cross-border insolvency, typical insists on ancillary proceedings and their own mini bankruptcy, thereby ensuring priority of Swiss creditors.

European countries, being part of the EU, will automatically adhere to the European Insolvency Regulation (EIR) recast (2015) (apart from Denmark).

Outside of Europe, it is noted that South America contains a large amount of countries who's insolvency law systems are steeped in civil law.

Large swathes of West Africa are also influenced by civil law due to their colonial historic roots.

Note that South Africa and Namibia, have legal systems which are influenced by both civil law and common law due to colonial history.

2

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.

According to universalism, insolvency proceedings are usually begun where the debtor has their Center of Main Interests (COMI) – i.e. where business primarily takes place, the debtor is domiciled, and or where the majority of assets are located. In universalism, Insolvency proceedings will take place under the umbrella of once insolvency law (*lex concursus*) to regulate matters. These insolvency proceedings will ideally have extra-territorial influence and there will be no other concurrent insolvency proceedings. The debtor's global assets are included in the main insolvency proceedings and all creditors have opportunities to participate on an equal basis.

The principles of universalism contrast directly with that of territoriality, whereby numerous insolvency proceedings can take place concurrently. The location of these multiple proceedings will depend on where the assets of the debtor are located or the debtor has an establishment (where it has economic activity). Once begun, these insolvency proceedings are limited to the domestic assets and liabilities (and creditors) of the state where the insolvency proceedings began. Territoriality is therefore typically protectionist to local creditors. Insolvency proceedings have no extra-territorial effect, however ideally the relevant courts communicate and cooperate with each other.

It should be noted that one of the drawbacks of plural proceedings is that it drives higher overall costs compared to universalism where only one insolvency proceeding is necessary.

Practically, countries are likely to adapt a principal that embraces some aspects of both universalism and territorialism. In “Modified Universalism”, main proceedings are opened in the COMI and supported in ancillary proceedings in other jurisdictions where assets are located. The debtor’s assets are distributed to its creditors under a single system of distribution and court-to-court cooperation is expected.

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 America has pioneered some of the longest-lasting multilateral agreements on administering international insolvency issues. Finalised treaties on private international law and commerce that included legislation on bankruptcy or insolvency include the following:

The Montevideo Treaty on International Commercial Law (1889). It contains helpful legislation to allocate bankruptcy jurisdiction based on the debtor’s commercial domicile, yet also allows for concurrent proceedings where the debtor has two or more economically autonomous businesses in different treaty States. Judicial cooperation exists between the courts in respect to balances of funds after the payment of dividends. The 1889 Montevideo treaty has been ratified by Bolivia; Columbia; Paraguay; Peru; and Uruguay.

Montevideo Treaty on International Procedural Law (1940) Title IV on Creditors Meetings Article 21 also provides for balances of funds after the payment of dividends where there are concurrent proceedings. The 1940 treaty has been adopted by Uruguay, Paraguay and Argentina.

Where there are concurrent proceedings, the Havana Convention on Private International Law (1928) (Bustamante Code) does not provide procedures for co-operation or co-ordination of any concurrent proceeding. Under article 414, it provides for only “one preventative proceeding in insolvency”. In contrast to the Montevideo Treaty (1889), the Bustamante Code can be described as universalist in that insolvency proceedings commenced in one member State will have extraterritorial effect in another member State. Bolivia, Brazil, Chile, Cost Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela have all ratified the Bustamante code.

It would be beneficial to elaborate on the relevant differences

3.5

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.

It would be confusing to use the terms bankruptcy and insolvency interchangeably, especially when discussing these topics with professional accountants or lawyers. This is because “bankruptcy” usually refers to the personal bankruptcy of an individual (natural person), whereas insolvency refers to the insolvency of a corporation. Australian legislative jargon is a good example of this. **It is not ‘usual’ in every nation. Elaboration is warranted in this respect.**

All that being said – the term “bankruptcy” can be understood to encompass insolvency when referring to the US Bankruptcy Code of 1978 which includes both bankruptcy and insolvency in its legislation.

Sometimes, “insolvency” sometimes means the state of financial affairs of a debtor, whilst “bankruptcy” refers to the state of being put into a formal bankruptcy proceeding. The insolvent state of the financial affairs of a debtor can come around on account of being either cashflow insolvent, or balance sheet insolvent.

Bankruptcy may come around for an individual to protect them from harassment by creditors and help them make a fresh start. In a bankruptcy (unlike an insolvency), an individual may be able to keep certain assets essential to maintain them and their dependants, such as essential household goods. **This is relevant as a difference as well see comment below.**

According to PR Wood (Principles of International Insolvency (Sweet & Maxwell, 2007), note 2, p55);, the essential features of all insolvency or bankruptcy law include the following: i) a stay on proceedings; ii) assets are pooled iii) creditors are paid on a *pari passu* basis. Wood then goes on to discredit ii) due to domestic laws at times prohibiting this and iii) due to secured and priority creditors not falling within this rule.

A good example of a practical difference between insolvency and bankruptcy is that an individual would not be “dissolved” at the completion of a bankruptcy, the same way that they would following the conclusion of a liquidation. Instead, they would be rehabilitated, and their pre-bankruptcy debt forgiven (or agreed to be paid pursuant to a payment plan). **Elaboration re exempt property is warranted here.**

A bankrupt individual is likely to be prohibited from acting as director of an active company or from obtaining new credit without consent from the bankruptcy trustee. This may not necessarily be the case in an insolvency – although the director of an insolvency might be held personally liable in instances of fraudulent transfers if these occurred within a voidable window.

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.

Currently, the standard of insolvency laws in many countries is considered relatively low, with many laws outdated or inherited from colonial pasts. These insolvency laws also differ between states, and

there is no one supra national or global parliament to harmonise insolvency regulations amongst all countries and world states. The World Bank principals for effective insolvency systems and UNCITRAL MLCBI, have taken steps to reform these outdated laws and make them more predictable, however these best practices remain “soft law” and participation is voluntary.

There does exist some supra-national bodies – such as the EU – which would mandate participation of international insolvency law such as the European Insolvency Regulation 2015 (recast). However to a certain degree this is voluntary too: consider the case of Brexit which meant that the EIR (recast) ceased to apply to the UK from December 2020.

Countries also differ fundamentally in their approach to court-to-court coordination and recognition of concurrent insolvency proceedings depending whether they have adopted territorialism or universalism. A single global cross-border insolvency dispensation would necessitate worldwide homogeneity of countries’ main insolvency framework and whether this is grounded in either universalism, territorialism, modified universalism, or modified territorialism, to be effective.

Different jurisdictions also have different requirements for Insolvency Representatives and whether these should be qualified accountants, lawyers – or if no qualification is required at all. It would be difficult to achieve universal agreement as to which is right.

Countries also fundamentally differ as to whether they are generally more pro-creditor or pro-debtor, and this could permeate their application of legislation. The US for example, has a more pro-debtor approach, favouring a “clean slate” whereas in Cayman, which is more pro-creditor, it may be more difficult to achieve statutory discharge. It is noted that Cayman hasn’t adopted the MLCBI.

Countries also differ culturally, take for example France in the context of labour issues. France is quite protective when it comes to worker’s rights compared to US for example and as such, this may affect how they would want to treat employee creditor’s rights and priorities in a distribution waterfall. Unlike the US, France hasn’t adopted the MLCBI.

Finally, even if all countries were to adopt some homogenous insolvency legislation governed by a supra-national body – this legislation would interact uniquely with local domestic laws, such as transactions law, or property law, as well as a country’s culture, that would result in differences that would require local legal counsel to navigate.

It would be beneficial for you to also consider the matters raised by Friman, Omar and Westbrook
2.5

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.

Hard law in the context of international insolvency refers to cross-border transnational treaties and conventions that bind countries by legal agreement. Examples of this usually involve public international law. An example of this is the Nordic convention of 1933, between Norway, Denmark, Sweden, Finland whereby countries agree that the law of the insolvency would depend on where main proceedings take place. Other examples of hard law include the European Insolvency Regulation (EIR) (recast) of 2015.

In contrast, soft laws are the product of multilateral (non-government) organisations, that often try and promote template model laws and solutions. They aren’t mandatory - but persuasive, in that they

seek to influence domestic laws. The best example of this to date, is the Model Law on Cross-border Insolvency (MLCBI) undertaken by UNCITRAL in the 1990s which provides draft template insolvency legislation for UN members to adopt and adapt as they see fit and which has gained increasing popularity in the past decade has been adopted by 46 countries to date. The Model Law “focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation”¹.

The Hague Conference has also pushed similar soft laws agenda as seen for example with the adoption of a Model Treaty on Bankruptcy at the 1925 conference. Although never adopted by any countries this sowed for a need for consistency in how countries dealt with international insolvency proceedings and paved the way for MLCBI. UNIDROIT have also made efforts to publish soft laws to create consistency between countries’ insolvency laws and regulations.

Other examples of soft law include:

World Bank Principles for Effective Insolvency and Creditor Rights Systems (2011); and European Parliament report on Harmonisation of Insolvency Law at EU Level (2010).

Elaboration is warranted with respect to the issue of success or otherwise.

2

Marks awarded 10.5 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.

¹ [UNCITRAL Model Law on Cross-Border Insolvency \(1997\) | United Nations Commission On International Trade Law](#)

Section 221(5) of the Insolvency Act 1986 provides for a court-ordered winding-up of unregistered companies – which would be the case of Norton Cars Inc, as it is registered in the US but has its COMI and Headquarters in England – and therefore satisfies the provision that the Company in question should have sufficient links to England and Wales in that it will have assets in that jurisdiction and creditors within that jurisdiction over whom the English and Welsh courts can exercise jurisdiction. The winding-up order of the foreign company could be made on the basis that the “company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs” – i.e. it is being wound-up in the US. The question of chosen law will need to be considered by the English Courts, and whether to apply US or English law going forward.

The American insolvent estate representative could also review Section 426 of the UK Insolvency Act 1986. Section 426 draws on the UNCITRAL Model Law on Cross-Border Insolvency in 2006 and legislates on the co-operation between courts exercising jurisdiction in relation to insolvency. Specifically, section 426(5) of the UK Insolvency Act 1986 authorises the local court to “apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction”. Both the US and the UK have adopted the model law. That being said, she should also review *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant* (2012) where the UK Supreme Court held that “there is nothing to suggest that [Article 21 of the Model Law on Cross-Border Insolvency] applies to the recognition and enforcement of foreign judgments against third parties.”

It would be beneficial to note that S 426 is not applicable as the US is not designated and to elaborate regarding common law.

2

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.

Reference should be made to the current European Insolvency Regulation (Recast) 2015 (EIR), effective since mid-2017 as a legal source, which would automatically be applicable to both Germany and Italy as EU member states.

According to the EIR, the primary jurisdiction should be where the debtor’s COMI is located – so in this case, Italy. Due to the main operations taking place in Germany, there will exist assets and creditors there and subsidiary territorial proceedings under the EIR will be permitted as Norton has an “establishment” there – the establishment (according to the EIR) meaning “any place of operations ... where the debtor carries out a non-transitory economic activity with human means and assets”. The proceedings are permitted to begin in Germany as independent proceedings or as subsidiary proceedings following the Italian winding-up, where the COMI is located.

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?

India, South Africa and Australia are not part of the EU and not bound by the EIR or its principles of comity. They will need to apply their own domestic insolvency law and consider the impact of the UNICTRAL Model law to how they would recognise a foreign insolvency proceeding and representative. Note that all 3 countries have legislation influenced by the UNICTRAL Model law.

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 Netherlands is part of the EU and therefore the EIR (Recast) 2015 should predominantly apply in that these assets will fall under the remit of the representative. Article 7.1 states that “[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of ... the ‘State of the opening of proceedings’”. However, the fact that the real rights of security are established in terms of Dutch law will mean that private international law (domestic Dutch law) will be applicable. The representative should seek the guidance of local counsel in respect to Dutch law on the real rights of security. For the avoidance of doubt, Italian law will not apply to the real rights of security, and Dutch law may differ to Italian law in this respect. The Dutch security holders would have a right to submit a claim in the Italian insolvent estate and all things equal should be treated equally to other Italian security holders.

3

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

It should be noted that Australia is a subscriber of the UNCITRAL Model law. Therefore, “provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment.” The MLCBI does not require reciprocity therefore it is not an issue that Italy has not adopted the model law. The estate representative can apply to the Australian court for recognition of the Italian insolvency proceedings and their appointment as the insolvency representative. Because Italy was the COMI, it is likely that the Italian winding-up order will be recognised as the main proceeding, providing all other requirements are met. Once recognised, the Australian Court can consider applications for specific types of relief made by the Italian Court.

Failing the above, it would also be possible for the Italian and Australian courts to develop a cross-border protocol, in the style of *Maxwell Communications Corporation plc* (1991) as seen between the US and the UK, or more recently in Lehman brothers, to agree in advance how domestic creditor’s rights and repatriation of assets would work in practice.

Australian, and not Italian, domestic law will still apply to the terms and conditions of the real rights of security situated there. Note that Australian and Italian law may be different in this respect.

3

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41 /50

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