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**.

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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.

[1. Common law countries:
1.1**. US:**
1.1.1 It is a pro-debtor system with the liberal approach to fresh start (discharge of debts) and reorganisation mechanisms
1.1.2. Federal and State law are two distinct systems
1.1.3. The Bankruptcy Code of 1978 is federal law and applies to all US states.
1.2 **Australia:**
1.2.1 Does not have a single unified Insolvency/Bankruptcy Act, rather a number of Acts dealing with various aspects of insolvency
1.2.2 Adopted the UNCITRAL Model Law on Cross-Border Insolvency

2. Continental (Civil Law) Systems:
2.1 **The Kingdom of the Netherlands**:
2.1.1 In earlier times various ordinances (such as the ordinance of Amsterdam 1772) applied in parts of the Netherlands.
2.1.2 Was a very pro-creditor jurisdiction until the end of XIX century, when the notion of discharge was introduced into legislation

2.2 **France**
2.2.1 Has a single unified Insolvency Act – The Insolvency Act 1985
2.2.2 Initially, it had a pro-creditor system, with harsh treatment of debtors, in 1935 France revised its laws, introducing the concept of ancillary bankruptcy proceedings against the owners/managers of failed businesses and penalties and disqualification for directors.

2.3 **Germany**
2.3.1 Has a single unified insolvency Act ,which came into force on 1 January 1999.

2.4 **Spain**

2.4.1 Has a single unified insolvency Act, Spanish Insolvency Act 2003.

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 is an approach that allows for multiple insolvency proceedings (pending/originating) in different jurisdictions to be dealt with under the provisions of one insolvency law. If a debtor, for example, has their main centre of interest in a particular jurisdiction, this approach envisages that the law of the "main proceedings" will have worldwide effect, extending beyond the territorial jurisdiction of the State where the so-called main proceeding was initiated. It calls for so-called "unity of

proceedings", allowing the law of the State where the "main proceedings" are opened (the lex concursus) to regulate the matter.

The concept of territoriality prescribes that the effect of insolvency proceedings is confined to the state where the proceedings have been opened and can lead to a plurality of insolvency proceedings **There is some scope to elaborate**

Modified universalism is an approach pursuant to which the main proceedings opened in the State where the centre of main interests has been identified is supported by secondary proceedings in another State. The courts responsible for these respective proceedings are expected to collaborate and cooperate witch each other, with the aim to ensure effective coordination and exchange of information to facilitate a harmonised resolution of the insolvency case.

2.5

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.

[A series of general treaties were concluded on private international law and commerce that included chapter on insolvency/bankruptcy.

1. **The Montevideo Treaties (1889) and (1940)**

   1.1 The Montevideo Treaty on International Commercial Law (1889) has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. It covers both personal and corporate insolvency, allocating bankruptcy jurisdiction based on the debtor's commercial domicile. According to this Treaty:

   1.1.1 If a debtor has a commercial domicile in one treaty State, even if they occasionally trade in other states or have branches or agents in another state, the Treaty provides for a single set of proceedings in the commercial domicile.

   1.1.2 In cases where the debtor has two or more economically autonomous businesses in different treaty States, the Treaty allows for the possibility of concurrent proceedings. This means that if insolvency proceedings are initiated in one State, a local creditor in another State containing an economically autonomous business of the debtor may open insolvency proceedings in that State or take other civil actions against the debtor.

   1.2 The Montevideo Treaty on International Commercial Terrestrial Law (1940) includes Title VIII on Bankruptcy. There is also a 1940 Montevideo Treaty on International Procedural Law, containing Title IV on civil meeting of creditors. The signatories of this Treaty include Argentina, Paraguay and Uruguay.

2. **Havana Convention on International Private Law (1928),** also known as the Bustamante Code. It was concluded between a number of Latin and Middle American States, with Bolivia and Peru being parties to both the Montevideo Convention (1889) and the Bustamante Code. The Bustamante Code supports an approach that allows for a single proceedings with universal effect throughout the region. However, it also provides there may be concurrent proceedings in the Treaty states that contain commercial establishments operating entirely separately economically.

   Differences

3. One of the main differences between these initiatives lies in the specific member states involved. The Montevideo Treaties and the Bustamante Code encompass different countries as signatories, with Bolivia and Peru being parties to both Treaties. Additionally, they differ in the extent to which they allow for a single insolvency proceedings with universal effect throughout all participating states, with the Bustamante Code being more supportive of the approach that allows for a single proceedings with universal effect throughout the Havana Convention members.

4

Marks awarded 8 out of 10

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

Question 3.1 [maximum 7 marks]

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

[A. Bankruptcy and Insolvency]

Terminology

I broadly agree with the statement; however, although the terms "bankruptcy" and "insolvency" carry the some meaning in various jurisdictions, "insolvency" sometimes refers to the state of financial affairs of a debtor, whiles "bankruptcy" means the formal state of being formally put into a formal bankruptcy proceeding. Insolvency may refer to the situation where liabilities of a debtor exceed the assets of a debtor (balance sheet insolvency) or where a debtor cannot repay debts as they fall due to cash flow issues. In some jurisdictions (Australia), the term "insolvency" is used to refer to the insolvency of a corporation, whereas the term "bankruptcy" refers to the insolvency of a physical person.

Characteristics

Wood, a legal scholar, identifies "actions by individual creditors against bankrupt being frozen" as the only truly universal feature of insolvency or bankruptcy law. This means that once a person declares bankruptcy, individual creditors are prohibited from pursuing own debt enforcement. This is commonly referred to as the automatic stay or a moratorium on individual debt enforcement.

Another characteristic mentioned by Wood is the pooling of assets, where the bankrupt's assets are gathered and made available to pay off creditors. However, Wood notes that this principle has been eroded as different states have introduced exceptions to this rule.

The third characteristic noted by Wood is that creditors should be paid proportionately (on the pari passu basis) based on their claims from the available pool of assets. Wood, however, refers to this as an idealised principle that is rarely followed in practice as priority and secured creditors often receive preferential treatment in most, if not all, cases.

Differences between insolvency for individuals and corporations

1. *Different objectives*

1.1 For individuals, the objectives are as follows:

1.1.1 Protect the debtor from harassment by creditors to enable the debtor to make a fresh start, particularly in cases where the debtor is less responsible for their financial difficulties, to have a chance at starting a new.

1.1.2 Reduce indebtedness through contributions. Insolvency laws require the debtor to make contributions from their current and future income to the insolvent estate, with consideration given to their personal circumstances. This allows for the reduction of overall debt burden.

1.2 For corporations, the objectives are as follows:

1.2.1 Preserve the business, or viable parts thereof: insolvency law aim to safeguard the overall business, or its viable components, rather than solely focussing on preserving the company as a whole. This approach allows for potential continuation of the business operations.

1.2.2 Impose personal liability on responsible persons: In cases where personal liability has been abused, insolvency law may hold accountable the individuals responsible for the mismanagement or improper conduct that contributed to the insolvency of the company.

1.3 There are also principles that apply to both individuals and corporations in insolvency scenarios:

1.3.1 Pari Passu distribution: the aim is to distribute the valuable assets proportionately among creditors, subject to any priority claims or obligations.

1.3.2 Fair treatment of secured creditors

1.3.3 Investigation of reason for failure

1.3.4 Reclaiming voidable dispositions

1.4 It is worth noting that while there are overlaps between individual and corporate insolvency, there are also differences. For example, the concept of exempt or excluded assets typically applies only to individuals.

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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.

[Difficulties can arise in various aspects of cross-border insolvency, and one significant problem lies in the differences between domestic insolvency laws. Friman, a legal scholar, highlights several areas of divergence, including:

1. Terminology: the term "insolvency" itself can have various meanings across different jurisdictions.
2. Plethora of proceedings: there is a wide range of insolvency proceedings that can be encountered in different systems to address unpaid debt. These proceedings may vary in their objectives, processes and legal mechanisms.

Omar, a legal scholar, notes that "[a]*part form the general situation in conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one jurisdiction, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws*."

Westbrook, a proponent of universalism, has identified nine key issues in cross-border insolvency proceedings: (1) Standing (locus standi) 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.

In addition to the differences in local laws and the related issues outlined above, there is also the lack of a uniform approach globally to deal with cross-border matters.

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 is a set of binding rules that seek to regulate to regulate international insolvencies.

"International law" can be categorised as either public international law (governs States) or private international law (domestic law principles that States apply to determine an action against parties). that governs parties). International insolvency matters, which may be categorised as a sub-set of international trade law, various States have ratified or acceded to treaties or conventions which implement into their domestic legislation principles to resolve insolvency matters with international elements.

Treaties and conventions is a classic public law instrument to which States become signatories and as such bind themselves and affect their domestic law accordingly. The Nordic Convention (1933) adopted by the countries is the Scandinavian region is one of the rare successful examples of utilising " hard law" for regulating cross-jurisdictional matters.

A Convention on Certain International Aspects of Bankruptcy (1990) is a less successful attempt to regulate cross-border insolvency matters by way of "hard law". It was signed by 8 members States, but was not ratified by a sufficient number for it to enter into force.

More success has been achieved by the EU, by way the European Insolvency Regulation (EIR) (2000) (subsequently amended). This instrument influences broader multilateral development in international insolvency law.

Regulating international insolvency matters by way of so-called "soft law" proved to be more successful.

So far, the most successful "soft law" approach has been taken by UNICTRAL. It developed a Model Law on Cross-Border Insolvency (MLCBI), in a form of a draft legislation that UNCITRAL recommended the Members States to adopt (which increasing number of countries do) with or without modifications. **There is some scope to elaborate regarding this success**

The UNCITRAL Legislative Guide (2004) also represent an example of soft law. It is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations"

"Principles for Effective Insolvency and Creditor/Debtor Regimes" (revised in 2005, 2011, 2015 and April 2021) developed by the World Bank in 2000s representing guidelines on regulation of insolvency, is another successful example of the "soft law" approach.

3

Marks awarded 15 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.

[Section 426 of the Insolvency Act 1986 enables any court in the UK to assist with corresponding insolvency jurisdiction in the UK and to apply comparable insolvency law applicable by either court. However, the US is not a relevant country or territory for the purposes of section 426.

One of the applicable English cross-border sources includes the UNCITRAL Model Law on Cross-Border Insolvency (the MLCBI) which was adopted by England and Wales as part of its Cross-Border Regulations 2006.

The US also adopted the MLCBI in 2005 (however, the MLCBI does not require reciprocity in any event). Therefore, the MLCBI will be relied upon in the given scenario.

The American representative can apply to the UK court for recognition of the US liquidation order and for the appointment as the insolvency representative. If the requirements of the UK Insolvency At 1986 are met, then the UK court can recognize the foreign winding-up order and the appointment of the insolvency representative].

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.

[The most appropriate source to be used in a cross-border insolvency between Italy and Germany is Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast). **Why?** The EIR Recast governs the applicable law in proceedings subject to the Regulation.

Article 7.1 of the EIR Recast provides that "…the law applicable to insolvency proceedings and their effect shall be that of… the 'State of the opening of proceedings'" The main proceedings should be opened in Germany as country of the main operations, pursuant to Article 23 of the EIR Recast.

]**The COMI is in Italy**

1.5

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, they would not be eligible to apply the EU Recast Regulation as it only applies to the member of states of the EU and does not have extraterritorial effect outside the EU.]

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.)

[For the insolvency proceeding opened in Italy would be applicable the Italian Law. The real rights of securities situated in the Netherlands would be governed by the Dutch law. However, the two states are the members of the EU and therefore provisions of the EIR Recast (as defined above) are applicable. There relevant provisions of the EIR Recast that sets out course of action (ie opening a secondary proceedings in the Netherlands in relation to the real rights of security) set out below.

Article 23 of the EIR Recast states that "secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State."

Article 68 of the EIR Recast provides that "There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since such rights are of considerable importance for the granting of credit. The basis, validity and extent of rights in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of a right

in rem should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights in rem should be paid to the insolvency practitioner in the main insolvency proceedings".

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.)

[Australian law and international law due to the cross-border element.

The EIR Recast does not apply in Australia. Australia and Italy have incorporated insolvency legislation based the UNCITRAL Model Law on Cross-Border Insolvency (as noted above, it does not require reciprocity). Therefore, the Italian insolvency representative could apply to the Australian court for appropriate cross-border assistance as required, pursuant the principles established by NCITRAL Model Law on Cross-Border Insolvency]

Some elaboration is warranted regarding application of Australian law to real rights of security situated there.

2.5

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 44/50

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