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 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.

Originally, civil insolvency law came from Roman law (specifically, Table 3 of the Twelve Tables) and later developed as a result of Lex Mercatoria, which dealt with laws between merchants in Europe.

Common law came later, initially in England, and first arose in the Bankruptcy Act of 1542 and the Act of Elizabeth in 1570.

Generally speaking, most insolvency systems arise either from civil law or common law backgrounds, although many states will have their own local differences.

The main characteristics of civil law bankruptcy is that it is considered a pro-creditor system. Originally, debtors could be sentenced to death or slavery under Roman law. Civil law states continue to be very pro-creditor in most instances. There is no longer any death sentence, but a bankruptcy filing may result in limitations on debtor's rights and/or future restrictions on incurring liabilities.

A pro-creditor stance also becomes very important when considering the effect of a discharge. For most of history, no discharge was granted at all in civil law jurisdictions, unless there was an agreement of the creditors. This was only changed very recently in most civil law regions. And civil law states also tend towards a territoriality system, meaning that an insolvency proceeding can be commenced in any state where there are assets and the local court will apply its own laws to the local proceedings.

In contrast, the main characteristic of the English (common) bankruptcy law is that it is considered a pro-debtor system. Most common law systems are governed by statutory law as well as precedent, or judge made common law. The concept of a discharge has been a crucial part of common law since England's Statute of Ann in 1705 which first created the discharge. Common law bankruptcies emphasize the need to give debtors a "fresh start". Common law systems also tend towards a universal system, meaning that there should only be one primary locality for the commencement of a bankruptcy – the center of main interests ("COMI").

This answer also required a discussion of the common law aspect of English law.

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.

The principle of universalism is that there is only one jurisdiction for a bankruptcy filing, the center where debtor's main interests are located (COMI-Center of Main Interests). This system requires that one region develop tools to acquire all assets and treat all creditors equally, regardless of location. Generally speaking, it is advocated as a lower cost alternative. However, in its pure form, it is difficult to implement because it requires a high degree of cooperation and trust between countries. For example, the COMI country's application of its laws to a foreign creditor may force a drastically different result than if that same creditor had been adjudicated by its local court. Universalism also creates uncertainty when forming an entity as to choice of law issues and can result in strategic forum shopping.

Modified universalism recognizes some of universalism's setbacks and impracticalities. In modified universalism, there is still only one main proceeding but secondary proceedings can be filed in other countries with assets, operations and/or creditors.

In contrast, territorialism advocates that insolvency can be commenced in any state where assets exist but that the proceeding is limited to administering only those assets contained within the state and only local creditors file claims. The problem for this approach is the high cost of insolvency for a company with assets in many jurisdictions. Also, a company or person could well be solvent in one country (where the primary assets are) and insolvent in another (where the damage or most of the creditors exist) which could lead to inconsistent treatment between creditors.

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 multiple treaties that include a chapter or title for bankruptcy and insolvency. These are among the longest duration of multilateral agreements on international insolvency in the world. However, some of the treaties are only adopted by a few countries, so it is very important to analyze which treaties apply in an international insolvency matter.

The first is the Montevideo Treaty on International Commercial Law (1889) which has been ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. It deals with personal and corporate bankruptcies and determines jurisdiction based on debtor's domicile. If the debtor has domicile in one state and occasionally only does business in another, then there is only one bankruptcy filed within the treaty states. However, if a debtor has two or more separate businesses within the treaty states, there can be concurrent proceedings (the second being initiated by a local creditor in the concurrent state).

Second is the Montevideo Treaty on International Commercial Terrestrial Law (1940) which contains Title VIII on bankruptcy. There is also a 1940 Treaty on International Procedural Law containing Title IV on Civil Meetings of Creditors. These treaties have been ratified by Argentina, Paraguay and Uruguay.

Lastly, there is the Havana Convention on Private International Law (the Bustamante Code) which is ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominion Republic, Ecuador, El Salvador, Gautemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. The Havana Convention's first chapter is entitled "Unity of Bankruptcy or Insolvency" and provides for a single proceeding with universal effect within the treaty states. Nonetheless, there still can be concurrent proceedings if a state other than the domicile state has an entirely economically separate business operation. The Havana Convention also provides that insolvency proceedings in one treaty state have extra-territorial effect in another treaty state.

It would be beneficial to explicitly state the differences, rather than describe each and leave it for the reader to discern.

2.5

Marks awarded 7.5 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.

The terms of bankruptcy and insolvency are oftentimes interchangeable, depending on the applicable region’s definitions. However, in some regions these have different meanings entirely. In the United States, they are mostly synonymous, although insolvency proceedings can sometimes refer to reorganizations (chapter 11) while bankruptcy proceedings often refer to liquidations (chapter 7). Similarly, in Australia, insolvency is often used to refer to a corporation whereas bankruptcy is used for an individual. Insolvency can also be used, in some jurisdictions, to refer to a financial analysis (that of being insolvent, usually based on a balance sheet perspective or possibly a cash flow problem). Conversely, bankruptcy often refers to the actual filing of a bankruptcy petition.

The essential characteristics of bankruptcy and insolvency are that (1) there is a moratorium against individual debt collection; (2) the assets of the person/entity are generally combined in one forum to pay creditors; and (3) creditors are paid pari passu (on a pro rata basis) except where laws on security and priority dictate otherwise.

Differences between a bankruptcy/insolvency of a corporation and individual mostly pertain as to the motivation for the filing. Generally speaking, individuals are filing bankruptcy to stop being harassed by creditors and to get a discharge or fresh start. Individuals also generally receive exemptions (assets that do not get administered in the bankruptcy); this concept does not exist for corporate debtors. And, in some regions, individual bankruptcies do not even exist, or are restricted to traders. Also, individual debtors may have some debts which survive their bankruptcy (non-dischargeable). And, in some instances, an executory contract may be considered a “personal services contract” which cannot be assume by the estate representative.

In contrast, corporations are generally filing bankruptcy either to preserve the business (or parts of it) or possibly also to establish personal liability for principals, directors or officers when finances have been improperly transferred or otherwise abused. And, again, exemptions do not apply in a corporate filing and in most cases, corporations do not receive a discharge

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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.

There are many challenges which arise in cross-border insolvencies. First, the laws of the regions, both as to bankruptcy laws and related laws, may be entirely different. Some states are pro-creditor (generally civil law countries) and some states are pro-debtor (generally common law countries). This causes a lack of predictability and risk of multiple insolvency proceedings with inconsistent results. There may also be conflicting choice of laws provisions between the countries/regions, causing an uncertainty as to where to file the bankruptcy, how creditors should be treated, how the case should be administered and how assets should be distributed. This causes uncertainty in the marketplace when engaging in multi-district operations.

If a single proceeding is utilized, this requires a high level of trust between the regions (and is not practicable in most instances). However, if multiple proceedings are established, there is a high likelihood of inconsistent rulings and differentiating results for administration and distribution. One

can easily imagine a situation where one country might hold the majority of assets and the other may have very limited assets, but the majority of the creditors. And many countries have a territorial view regarding the assets and/or the creditors in their jurisdictions. Even the definitions of pertinent terminology can be drastically different between regions.

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

2

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.

Generally speaking, hard law is binding law which must be applied. This would include statutory law and/or (in common law jurisdictions) judge made precedential law. Internationally, it also includes treaties and conventions as to which the pertinent state has agreed to become bound. An example of a treaty is the Nordic Convention (1933) in the Scandinavian region (eg Sweden, Norway, Finland, Denmark and Iceland) which successfully united these countries as to insolvency issues. There is also the European Insolvency Regulation (2000) (as amended by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) which is known as EIR Recast. The EIR Recast is technically not a treaty but has been very successful in establishing multi-national agreement on insolvency between many European countries. Certain other hard laws have not been successful – either by not being adopted by sufficient countries or falling out of favor (for example, the Instanbul Convention, Council of Europe Treaty Series Number 136 which was not ratified by enough states to become effective).

More success has been accomplished with soft law. Soft law has arisen based on the work of multilateral organizations. One of the most notorious is the Hague Conference on Private International Law (the Hague Conference) which worked towards unification of private international law. The Hague Conference prides itself on being the champion of cross border cooperation. It acts in concert with two other multilateral organizations – International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL). Considered the most successful soft law to date, UNCITRAL developed the Model Law on Cross Border Insolvency which has been adopted across the world by many countries and its influence is growing every year. As a model law, Uncitral can be adopted with or without modification and has provided many solutions for cross border insolvency.

3

Marks awarded 12 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.

Dear Madam Representative,

It is a pleasure to represent you in the cross border international matter of Norton Cars. This memo is to advise you as to the applicable English cross-border sources that may come into play when you seek recognition of your estate representative status for assets located in England.

First, as you know, although the company was originally formed in the US, and then headquartered in England and, as of the last few years, the center of main interests is in Italy. It does not appear to conduct business in England any longer, although may still be registered there.

The laws that apply to England are common law based, as they are in the US. However, the laws are substantially different especially in the areas of priority of distribution, definitions of pertinent terms and general administration of insolvency proceedings. England law has statutory components as well as judge-made precedent (ie Private International Law) that will need to be reviewed. Generally speaking, an insolvency proceeding is governed by Section 426 of the Insolvency Act. The good news is that this section advocates cooperation between countries as to insolvency proceedings. The bad news is that Section 426(5) of the Insolvency Act allows an English court to apply either foreign or local law in insolvency matters. And, if there is a "sufficient connection" between England and the Debtor, dual proceedings may be required. **S426 does not apply as US is not designated**

Other good news is that, like the US, England has adopted Uncitral's Model Laws on Cross-Border Insolvency. Uncitral also advocates cooperation among courts in different countries, uniform conflict of law procedures and proposed uniform recognition laws. As such, it is likely that we will be able to request an order recognizing your status to administer any asset remaining in England and/or an agreement to coordinate any necessary dual proceedings (these are also known as protocols for cross-border insolvency agreements), which then gets approved by both the US and England court.

There also is a relatively new initiative from the Judicial Insolvency Network (JIN) Conference in Singapore 2016 which has similarly been adopted in US and England and calls for enhancing coordination and cooperation amongst courts. Since it was written by judges, it should be highly persuasive.

Lastly, there is a seminal case entitled Maxwell Communications Corporation which, although it resulted in appointments of two different and separate insolvency representatives, an insolvency

agreement was reached to resolve conflicts and facilitate information exchange, in order to minimize waste, conflict and expenses.

So, although it is unclear whether your status will be recognized, given that either all or the majority of assets are located elsewhere, we have a good chance of at least obtaining the cooperation of England.

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.

Dear Madam Representative,

I am writing to advise as to the appropriate legal sources to be used in the Norton cross-border matter between Italy and Germany and to further advise as to which location should be the main proceeding.

First, both Italy and Germany have adopted the European Insolvency Regulation 2000, as recast in 2015 (EIR Recast). There is, however, a complication in that Germany has legislated German StaRUG, so we should make ourselves familiar with these laws also. Importantly though, Germany remains bound by EIR Recast.

As you know, the COMI (Center of Main Interest) in this case is Italy. Thus, the proceeding most likely must be initiated in Italy. There is a possibility that we (or someone else) could initiate what is known as "subsidiary territorial proceedings" in Germany based on the location of an "establishment" there (this is defined as "any place of operations . . . where the debtor carries out a non-transitory economic activity . . ."). This subsidiary territorial proceeding can be initiated prior or subsequent to the Italy proceedings. So, we may have to address some territorial conflicts between the laws of Germany and Italy.

Alternatively, we may also be able to coordinate the Italy, England and US proceedings (in addition to Germany and others if proceedings are instituted there) through the use of UNCITRAL, which is the Model Rules for Cross-Border Insolvency. We could advocate at least for a cross-border agreement or protocol to harmonize the laws and administration. And, for Italy, we can also utilize the International Institute for the Unification of Private Laws (UNIDROIT) which is based in Rome and advocates international harmonization and coordination for private commercial law.

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?

The EIR (Recast) was recently amended to recognize insolvency proceedings outside of EU in order to further coordinate cooperation. So, likely other courts outside of EU can use EIR (Recast) to recognize

an EU insolvency representative. Also, Australia has adopted UNCITRAL, which advocates coordination and cooperation and also has enacted Corps Act 2001, which calls for cooperation between Australia and foreign courts.

South Africa originates from a mixture of Dutch and English law and India roots from English so the spirit of cooperation should also apply to these countries.

0.5

Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

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

The law that should apply to the real rights of security located in the Netherlands is the EIR (Recast) because both Netherlands and Italy are members of the EU and all member states are bound by the EIR (Recast) except Denmark. Also, the EU has choice of law provisions and cooperation protocols. The EIR Recast awards jurisdictional control to the court of the state where COMI exists (Center of Main Interests) which is Italy in the hypothetical. It is possible, however, that based on the "external branch" of the company in the Netherlands, a subsidiary territorial proceeding could occur in the Netherlands. A subsidiary territorial proceeding is "any place of operation . . . where the debtor carries out a non-transitory economic activity with human means and assets." Thus, if there are workers in the Netherlands in addition to assets, a subsidiary proceeding could occur. Nevertheless, the EIR (Recast) will mandate cooperation protocols and conflict of law provisions. Also, if these countries have adopted UNCITRAL, it is working on model laws of cooperation and harmony for secured transactions.

There is some scope to elaborate as to why the Netherlands law would apply

2.5

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

Australia does not have a centralized Bankruptcy Code or Act, but rather has a fragmented system for insolvency. For the most part, the Corporations Act 2001 applies with regard to a corporate bankruptcy and this Act encourages cooperation between foreign jurisdictions and Australia. Australia has also adopted the Uncitral Model Law on Cross Border Insolvency and is a participant in the Judicial Insolvency Network (JIN) which has set out to improve efficiency of parallel proceedings with improved coordination and cooperation. Lastly, Australia is a participant in a joint project between the Asian Business Law Institute and the International Insolvency Institute which composed a report on Corporate Restructuring and Insolvency in Asia.

As a common law country, Australia is similar to the UK. As such, likely it could institute a parallel proceeding for the assets and creditors located within Australia. With its involvement in Uncitral, JIN and the Asian Corporate Restructuring, cooperation and coordination of the parallel proceedings should be paramount and possibly a protocol or International agreement for handling the differences in secured creditor laws between Italy and Australia. Given that Italy is a civil law jurisdiction which is generally pro-creditor, Australia may agree to application of the Italian laws regarding security.

The applicable law is Australian.

1

Marks awarded 11 out of 15

* End of Assessment *

TOTAL MARKS AWARDED 39.5/50

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