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.

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INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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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.

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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 business6.

(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.

Civil law

Civil law systems are (broadly speaking) those emanating from continental Europe and this is often reflected in the fact that countries adopting a civil law approach today are those that were subject to colonial control from continental European countries.

Historically, civil law emanated from Roman law and consisted of the brutal concept of the debtor pledging his body for his debts. According to I F Fletcher,[1] Roman law can be seen as the root of the principle of bankruptcy as a collective debt collection procedure. The civil law also developed as a result of customs between merchants trading on the continent. Originally seen as being pro-creditor, there was an eventual move towards the concept of discharge of debts.

Most Latin American countries adopt a civil law foundation, and have been successful in a harmonising approach across the region. African nations that were subject to colonial control from continental European countries also tend to adopt a civil law approach.

English law

As to the history of English bankruptcy law, whilst this stems back many decades, it was the English Bankruptcy Act of 1542 that contained the seeds of two fundamental principles on which modern insolvency law based: a) collective participation by creditors and b) a *pari passu* (i.e. proportionate) distribution amongst creditors from available assets. The Statute of Anne (in 1705) introduced the statutory discharge of debts, which has remained in most modern bankruptcy laws. The legislation introduced in England in 1883 is thought to be the foundation of the current Insolvency Act 1986 – including principle of enforcing a fair and independent approach, which encourages appropriate supervision and discourages dishonesty.

Australia is one country that has an English common law foundation, although (unlike the Insolvency Act 1986, it has separate legislation for corporate and personal bankruptcy). African nations that were subject to English colonial rule also tend to adopt English common law as a basis for their own insolvency laws (as does India), although some of these States have also started introducing their own, modern approaches to insolvency.

It's good that you raise some examples and refer to common law principles. There is scope to elaborate on countries within each category and to expand upon the distinction between codified law and common law.

2.5

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.

Universality is a concept that advocates for one set of insolvency proceedings governing all worldwide aspects of the debtor's insolvency. This would mean that once one set of proceedings in underway (typically in the debtor's centre of main interest) no others could be commenced. Furthermore, as a matter of recognition and enforcement, universalism would require that other States recognise the

[1] *The Law of Insolvency*, London (Sweet and Maxwell, 5th Edition, 2017) at p.6

one set of insolvency proceeding which have extra territorial effect in their own State. Universalism seeks to address the reality of many businesses being multi-national. However, in practice, it is thought to be impractical, as each State will be reluctant to completely cede power.

Territoriality, in contrast, is the principle that insolvency proceedings could (or should) be commenced in every State where the debtor has an interest, with each State's courts applying its own rules to the relevant assets within its jurisdiction, without any reference to concurrent foreign proceedings. This would also mean that creditors would be restricted as to where they could file their claims. Territorialism has the obvious drawback of inconsistent treatment of creditors and added costs. There may also be issues such as different States applying different definitions of "insolvency" such that the debtor is insolvent in one State but not another.

In practice, a hybrid approach of "**modified universalism**" has emerged, which acknowledges that there can be concurrent insolvency proceedings in different States, but that there will be a "main proceeding" in the debtor's centre of main interest, to which other proceedings are subordinate.

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.

The Latin American region has been very successful in instituting initiatives to harmonise cross-border insolvency issues. These include:

- **The Montevideo Treaties of 1889 and 1940:** The Treaty of 1889 has more signatories (Argentina, Bolivia, and Columbia, Paraguay. Peru and Uruguay) than the 1940 Treaty. The only signatories to the 1940 Treaty are Argentina, Paraguay and Uruguay. The 1889 Treaty covers both personal and corporate insolvency. Where the debtor has a commercial domicile in one treaty State, there will be one set of proceedings in that State. Where the debtor has two or more economically autonomous business in different treaty States, the Treaty allows for concurrent proceedings.

- **The Havana Convention on Private International Law of 1928 (also known as the Bustamante Code):** There a large number of signatories to the Havana Convention (with Bolivia and Peru being parties to both the Havana Convention and the 1889 Montevideo Treaty). The Havana Convention is more focussed that the Montevideo Treaties on there being a single, universal bankruptcy proceeding that would apply throughout the region. Nonetheless, there will be similarities with the Montevideo Treaties where there are business that operate entirely economically independent branches in different countries in the region. In cases where there are concurrent proceedings, the Havana Convention does not provide for co-operation or co-ordination of those proceedings.

There is some scope to better discuss and elaborate upon the relevant differences

3.5

Marks awarded 9 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.

Although some States do use the terms "insolvency" and "bankruptcy" interchangeably, it is advisable to use the terms with caution, as different nations/States may adopt the use of one or the other, whilst some States use both but in different contexts (for example, in Australia, "insolvency" usually refers to a corporation whilst "bankruptcy" refers to an individual).

i) Some States, if using both terms, will use "insolvency" to describe the state of financial affairs of the debtor (i.e. are they insolvent?) whilst "bankruptcy" is the formal process of being but into a bankruptcy proceeding. Another potential distinction is whether the State defines insolvency on a "balance sheet" basis (i.e. where the liabilities of the debtor exceed its assets or a "cash flow" basis (referring to the ability to pay debts as they fall due).

ii) P R Wood [2] helpfully identifies the following three essential characteristics of bankruptcy/insolvency:

- the stay, or automatic moratorium, on creditor actions (which Wood ultimately concludes to be the only truly universal feature of insolvency);
- assets being pooled to pay creditors (although some States do not follow this principle strictly); and
- creditors being paid *pari passu* (although most States acknowledge priority and secured creditors which creates many exceptions to this "rule").

iii) As to the different considerations arising in personal and corporate insolvency,[3] in the case of an individual's bankruptcy, the Courts are usually keen to protect a debtor from harassment from creditors and enable them to "wipe the slate clean". There will also be an acknowledgment that some assets (such as assets essential for the maintenance of the debtor and their family) should be protected from the insolvency.

For corporations, most systems will, where possible, seek to preserve the business (acknowledging it usually has more value as a going concern) or where this is not possible, preserve the viable parts of the business. It may also be appropriate to apportion personal liability (e.g. on a director) where that person's position has been abused.

In both cases, the aim is to ensure a *pari passu* distribution amongst creditors (except those with priority or security), ensure secured creditors are dealt with fairly and to maximise the value of the estate (e.g. through investigating voidable transactions).

7

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 a multitude of difficulties that may rise in a cross-border insolvency situation. At the outset, different States may have different tests for "insolvency", as noted at 3.1 above. Without a consistent

[2] *Principles of International Insolvency* (Sweet and Maxwell, 2007) p.3
[3] Also discussed by Sealey and Hooley in M A Clarke *et al, Commercial Law* (Oxford University Press, 2017) Chapter 28.

definition, the situation may arises where insolvency proceedings have commenced in one State but the debtor is not deemed insolvent in another State where they hold significant assets.

Differences may also arise depending on whether a State is "creditor-friendly" or "debtor-friendly", which is likely to affect the local legislation and tools available to an insolvency practitioner – this includes categories such as:

- voidable dispositions;
- the effectiveness of certain types of security;
- whether there is a moratorium on creditor actions;
- which creditors are considered "preferred" – e.g. differences in public policy approaches to salaries due to employees; and
- the extent to which creditors can participate in the insolvency (and the co-ordination of their claims).

Additionally, States will have different approaches to the recognition of foreign insolvency representatives and the recognition of foreign insolvency judgments, leading to potential difficulties in enforcement.

As a useful summary of the issues, J L Westbrook, has identified nine key issues in cross-border insolvency cases:[4]

i) standing for (and recognition of) the foreign representative;
ii) moratorium on creditor actions;
iii) creditor participation;
iv) executory contracts (i.e. how are contracts, commenced between the debtor and a third party before the bankruptcy but not executed, treated);
v) co-ordinated claims procedures;
vi) priorities and preferences (as noted above, for example, in relation to employee salaries);
vii) avoidance provision powers (for example, how far back can the trustee in bankruptcy/liquidator look when considering if a transaction was a voidable preference or a transaction at an undervalue?);
viii) discharges; and
ix) conflict of law issues.

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" provisions are those that provide a binding means to affect a State's legislation/domestic law (e.g. treaties), whilst "soft law" provisions merely seek to influence it (e.g. through guidelines and principles).

"Hard law" multi-jurisdictional treaties have had varied success. Perhaps as getting so many nations to agree a binding legal obligation that may result in them ceding power to another State's courts has been unpalatable. A successful example in a cross-border insolvency context is the European Insolvency Regulation 2000 (recast in 2015). There are also countless bilateral treaties existing between nations, which govern insolvency proceedings.

[4] "Developments in Transnational Bankruptcy" (1995) 39, *St Louis University Law Journal* 753, pp.753-757.

There has generally been more success, on a multi-national level, in implementing "soft law" solutions.

One of the most important "soft law" developments in international insolvency is the continuing adoption by States of the *UNCITRAL Model Law*. Its provisions/recommendations focus on increasing the co-operation and co-ordination efforts of insolvency Courts. A number of legal/judicial bodies have issued guidelines which accept or advocate the *Model Law* – for example the American Law Institute (with its NAFTA Principles, applicable in North America) and the Judicial Insolvency Network.

The impact these various guidelines (beyond the *Model Law*) have had is debatable. There appears to be a risk of a "too many cooks" situation, with numerous guidelines/principles being adopted by some States and not others. Significant changes to international co-operation are likely to need some unification of the various project groups to avoid a piecemeal development of the practice area. States will also be subject to political pressures and the pressures of foreign investors (e.g. wanting tough creditor protections), which affects the extent to which States are willing to adopt soft law guidance.

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.

There are three ways in which the American insolvency practitioner might request the assistance of the English Court:[5]

1. EU Provisions

[5] The cross-border provisions of section 426 Insolvency Act 1986 not applying to the USA.

It is unclear whether the liquidation is taking place at a time when the European Insolvency Regulations recast ("**EIR Recast**") still applies to the UK. The EIR Recast ceased to apply to the UK at 11pm on 31 December 2020 and so it seems likely that when Norton Cars Inc. ("**Norton**") was still headquartered in England, this would have been when the EIR Recast still applied (i.e. there was not a significant gap before Norton moved its headquarters).

If the American liquidator commences insolvency proceedings in the UK when the EIR Recast still applies then the EIR Recast provides that the State that should govern the bankruptcy across Member States is where the debtor's "centre of main interest" ("**COMI**") lies. On the information given, this would the England. The EIR Recast provides a number of presumptions as to the COMI, the main one being where the company has its registered office. Furthermore, the EIR Recast provides a general rule that the applicable law of the insolvency proceedings is the law of that State in which the proceedings have been commenced.

2. UNCITRAL Model Law/CBIR

The liquidator may rely on the provisions of the Cross Border Insolvency Regulations 2006 ("**CBIR**") (which incorporated the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**") with only minor amendments). Any insolvency practitioner can apply for recognition under CBIR (article 15, Schedule 1). The CBIR distinguishes between foreign "main" proceedings and foreign "non-main" proceedings. "Main" proceedings are where the foreign insolvency proceedings are taking place in the debtor's COMI,[6] with a rebuttable presumption this is where the debtor has its registered office. On present facts, this is not the USA, so the USA insolvency proceedings would be "non-main" proceedings. There is no automatic stay on creditor actions in the case of non-main foreign proceedings.

3. Common Law

English common law in respect of cross-border insolvency is somewhat in flux and an office holder would be better advised to rely on the clearer principles of either the EIR Recast or CBIR. The main common law principle remaining as good law is that there is a common law power to assist a foreign insolvency officer-holder (as far as the Court properly can, subject to domestic law and domestic public policy).[7]

It would also be beneficial to make reference to s426 and its non-applicability.

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.

[6] CBIR article 2(g), Schedule 1

[7] As per Lord Hoffman's judgment in the Privy Council decision in *Cambridge Gas Transport Corp v The Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC (the other principles expounded by Lord Hoffman having been disapproved in later judgments).

Jurisdiction

Italy and Germany are both subject to the EIR Recast. **It would be beneficial to explain why, ie both are members of the EU**

If the COMI is, indeed Italy, then this is where the main proceedings should be initiated. As noted above, the EIR Recast provides a number of presumptions as to the COMI, the main one being where the company has its registered office.[8] Although there is a provision that the presumption shall not apply if the COMI has moved from another Member State in the three months prior to the insolvency proceedings being commenced, as the UK is no longer a Member State there is no so-called "suspect" period here. Although one could try and rebut the presumption of the COMI on the basis of the activity in Germany, as management is also based in Italy, it would appear unproblematic that Italy is the COMI and the main proceedings should be commenced there.

The EIR Recast allows for subsidiary proceedings in any place the debtor has an "establishment." An establishment is defined as being "*any place of operations…where the debtor carries out a non-transitory economic activity with human means and assets*" in the three months prior to a request to initiate insolvency proceedings.[9] These subsidiary proceedings can either be "independent" (if they were initiated prior to the main proceedings) or "secondary" if initiated after the main proceedings.

To deal with assets in Germany (including the subsidiary Gladiator Manufacturing Ltd (albeit it is not clear where Gladiator has its registered office)) via secondary proceedings, it would need to be established that Norton has an "establishment" in Germany. Based on the information we have (i.e. that the main operations of Norton are in Germany, as well as the business of its subsidiary, Gladiator) it would appear that secondary proceedings could be commenced in Germany.

Applicable law

The EIR Recast provides a general rule that the applicable law to the insolvency proceedings is the law of that State in which the proceedings have been commenced.[10] The EIR Recast sets out uniform rules on conflict of laws that override any national rules. The general rule under the EIR Recast applies to secondary proceedings also. Thus secondary proceedings commenced in Germany will follow German law.

3

Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

No – the EIR Recast has only been effected into the laws of Member States. It would be a matter for the domestic insolvency law of India, South Africa or Australia as to whether their Courts would recognise an EU-appointed insolvency representative.

1

Question 4.4 [Maximum 6 marks]

[8] EIR Recast Article 3(1)
[9] EIR Recast Article 2(10)
[10] EIR Recast Article 7(1)

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

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 7 marks.)

Article 7 of EIR Recast provides the general rule that the law of the insolvency is the law of the State where proceedings are commenced (the *lex concursus),* in this case, Italy. This would mean Italian law governing the rights of creditors and the realisation of assets including those subject to security. As a general rule of Italian insolvency law, secured creditors cannot bring individual enforcement actions in relation to the secured asset once the bankruptcy has been declared (Article 51 of the Italian Bankruptcy Law). On this basis, the secured asset would be treated like any other.

However, an exception to Article 7 is in relation to rights *in rem* of creditors in respect of assets of the debtor, situated within Member States.[11] If, in the wording of the above, "real rights of security" can be taken to mean a right *in rem* (i.e. over real estate), then Article 7 does not apply. As a general rule, the law of where the asset is sited applies. Article 57 of the Dutch Bankruptcy Act would apply, meaning the creditor could exercise their right of recovery as if there was no liquidation process.

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 7 marks.)

Article 8 EIR Recast only applies where the encumbered asset is situated in a Member State, so different rules will apply to Australia. The EIR Recast does not address this situation so there are varying views as to approach. The decision of the Court of Justice of the European Union in *Ralph Schmidt v Lilly Hertel*[12] saw the CJEU take a wider view of the applicability of the EIR Recast, such that it could apply to relations with non-Member States. Thus there is an argument that Italian law would apply (as per the Article 51 provisions outlined at 4.4 a) above).

The contrary view is that in any proceedings where enforcement is required over an Australian asset, the insolvency practitioner would need to commence proceedings in the Australian courts and it would therefore be a question of a) Australia's approach to cross-border insolvency and conflict of laws[13] and b) its law in relation to rights of secured creditors.

Australian version of the UNCITRAL Model Law will probably apply and allow for recognition of the Italian estate representative but the real rights of security will be dealt with by Australian law.

2

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 45/50

[11] EIR Recast Article 8

[12] Case C-328/12 (16 January 2014)

[13] Noting that Australia has statutory provisions at sections 580-581 of the Corporations Act 2001 in relation to co-operation in cross-border insolvency and has also adopted the Model Law.

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