



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The meaning of the word “bankruptcy” has a historical root pertaining to the “rupture” of a banking system. Select from the following the **best response** to this statement.

- (a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.
- (b) This statement is untrue since the word “bankruptcy” is believed to derive from non-English origins and has a historical root from destroying a vendor’s place of business.**
- (c) This statement is true, although the word “bankruptcy” is not an English phrase.
- (d) The statement is true and the phrase “bankruptcy” is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an “executory contract” and its enforceability?

- (a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.**
- (b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.
- (c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.
- (d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).
- (b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

- (a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.
- (b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.
- (c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.
- (d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the **correct** statement:

- (a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.
- (b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

- (c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.
- (d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.
- (b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.
- (c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.
- (d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

- (a) This statement is untrue because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.
- (b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.
- (c) This statement is true because globalisation makes the principle of universalism redundant.
- (d) This statement is true because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

The historical roots and characteristics of insolvency law systems that are based on civil law compared to those based on English law can be distinguished by their foundational legal traditions and their influence on the development of their respective insolvency laws.

Countries with a civil law foundation often have insolvency laws that originate from Roman law and the Napoleonic codes. Civil law systems are usually codified, meaning they are written in a systematic collection of laws that apply to all matters the code addresses. Civil law traditions in insolvency might focus on preserving the business and maintaining operations, where possible. Countries such as Angola and Mozambique have civil law traditions based on Portuguese law, and Francophone countries in West Africa follow French law. Civil law systems are generally more prescriptive with detailed provisions covering various aspects of law.

On the other hand, countries with an English law tradition, such as Nigeria, Kenya, Botswana, Zambia, and Tanzania, follow the common law system, which is characterized by the doctrine of judicial precedent. This means decisions of higher courts bind lower courts on similar matters. The English insolvency law system, specifically, tends to emphasize the fair treatment of creditors and the orderly liquidation of assets. It is less codified and more adaptable than civil law, often allowing for a more case-by-case approach. English law influences insolvency practices in its former colonies and dominions, with many of these countries still largely following the laws of their respective former colonial powers.

Some countries, like South Africa and Namibia, have mixed legal systems influenced by both Roman-Dutch law (civil law) and English law.

To sum up, legal systems around the world have either an English common law or a civil law-based foundation. This affects several aspects of insolvency law, such as how legal systems deal with security rights, labour issues, and the terminology used to describe similar principles across different jurisdictions. However, both types of systems are increasingly adopting elements from each other and new, more modern legislation that addresses contemporary challenges in insolvency.

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Question 2.2 [maximum 3 marks]

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

Universalism is an approach where a single insolvency proceeding is recognized as having a worldwide effect, regardless of where the debtor's assets are located. The law of the state where the insolvency proceeding is opened (the *lex concursus*) applies globally. This approach supports the unity of proceedings and allows for a consolidated handling of the debtor's insolvency across different jurisdictions if the debtor's centre of main interests (COMI) is in that state.

Territorialism is an approach that restricts the effects of an insolvency proceeding to the state in which it is opened. This means that the insolvency process is limited to the assets and parties within that specific state, and it could result in multiple concurrent insolvency proceedings in different states for the same debtor. Under this principle, each jurisdiction handles the insolvency proceedings independently, based on its laws and assets located within its territory.

Modified universalism is a compromise between the two aforementioned principles. It acknowledges that a global consensus on universalism is unlikely and that many states prefer a territorial approach. Under modified universalism, a main insolvency proceeding is recognized where the debtor's COMI is

established, but this is complemented by secondary or ancillary proceedings in other states where the debtor may have interests. The courts in different jurisdictions are expected to cooperate with one another. This model allows for central coordination of insolvency proceedings while still respecting the legal autonomy of different states

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Question 2.3 [maximum 4 marks]

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

In Latin America, several initiatives have been undertaken to address international insolvency issues. Notably, the region has seen the formation of long-standing multilateral agreements concerning private international law and commerce, which include chapters or titles on bankruptcy or insolvency. Among these initiatives include:

- (a) *The Montevideo Treaties*: These treaties, established in 1889 and 1940, included provisions related to bankruptcy or insolvency and were among the earliest examples of regional efforts to harmonize legal approaches to insolvency.
- (b) *The Havana Convention on Private International Law*: Also known as the Bustamante Code, this convention dates back to 1928 and represents another comprehensive effort at harmonizing private international law within the region, including insolvency law.

The differences between these initiatives primarily lie in their historical context, the specific legal traditions they draw from, the scope of their application, and the insolvency-related provisions they contain. The Montevideo Treaties, for instance, might have provisions that reflect the legal traditions and needs of the Southern Cone countries, while the Havana Convention could have a broader application within the Americas. For example, the Havana Convention is more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout its region (see Article 414 of the Havana Convention). Nevertheless, there may be concurrent proceedings in Havana Convention States that contain commercial establishments operating entirely separately economically. It therefore adopts a similar approach to the Montevideo Treaties of providing for a single proceeding if the debtor is only occasionally trading in more than one State, or only has branches or agents in another contracting State.

There are further differences, including different ratifying states

3

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.

I agree that the terms "bankruptcy" and "insolvency" may be used interchangeably and are often used interchangeably in many systems. However, this is subject to the qualification that they can have distinct meanings based on the context and jurisdiction. In reaching this conclusion, it is important to

discuss the following: (a) the technical meaning of bankruptcy and insolvency as it is used in the literature; (b) the essential characteristics of insolvency; and (c) the differences in the usage of these terms as between corporations and individuals.

- (a) *Meaning of Bankruptcy and Insolvency*: Insolvency refers to the financial state of a debtor when their liabilities exceed their assets (balance sheet insolvency) or when they cannot pay their debts as they fall due (cash flow or commercial insolvency).

On the other hand, bankruptcy refers to the formal legal status of a person or entity that cannot repay the debts they owe to creditors. It is a legal proceeding involving a person or business that is unable to repay outstanding debts.

- (b) *Essential Characteristics of Insolvency*: The essential characteristic of insolvency is the inability to pay debts, which may lead to various legal outcomes, including restructuring or liquidation.

Bankruptcy is a legal process that includes actions like the automatic stay, which freezes actions by individual creditors against the bankrupt party. This moratorium prevents individual debt enforcement and allows for the orderly resolution of the debtor's financial obligations. **Pari passu distribution is relevant**

- (c) *Differences in the usage of these terms as between corporations and individuals*: When a corporation becomes insolvent, it refers to the situation where the company cannot meet its financial obligations to its creditors as they become due. In some jurisdictions, such as Australia, "insolvency" is specifically used in reference to corporations.

In contrast, "bankruptcy" often applies to individual natural persons and entails a legal process that can lead to the discharge of personal debts after the liquidation of assets or a structured repayment plan.

The distinction between bankruptcy and insolvency can be more pronounced when dealing with corporations because corporate insolvency may lead to different outcomes, such as restructuring, to continue the business's operation. In contrast, individual bankruptcy usually leads to the liquidation of personal assets to satisfy debts, after which the individual can start afresh. The legal and procedural frameworks governing corporate insolvency often include additional complexities, such as corporate officers' and directors' rights and responsibilities, which do not apply in individual bankruptcy cases.

There is scope to elaborate, including with respect to differences such as exempt property

5.5

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.

Developing a single global cross-border insolvency dispensation is fraught with challenges due to various factors:

- (a) *Lack of a Common Insolvency Language*: A primary difficulty in addressing cross-border insolvency cases is finding a common language for insolvency. While "insolvency" tends to be clearly defined within a domestic context, it varies across different jurisdictions, which can lead to discrepancies in understanding and applying insolvency laws in international scenarios

- (b) Complexity of Cases: Cross-border insolvency cases can be complex, involving insolvency proceedings in one state, creditors in another, and possibly subsidiaries, assets, and operations across multiple states. This complexity is compounded when multiple insolvency proceedings run simultaneously in different states. Each sovereign state has its own legislation, which needs to be involved in any amendments to address the challenges of cross-border insolvency.
- (c) Legal and Regulatory Differences: Different countries have varying legal systems and regulations regarding security rights and priority payments in insolvency. Harmonizing these differences to create a uniform global insolvency framework is a significant challenge.
- (d) Race for Assets: Insolvency proceedings can result in a race among creditors to secure assets, which may contradict the principle of equality between creditors, known as "*par conditio creditorum*". This situation is further complicated in a cross-border context where assets and legal proceedings may span multiple jurisdictions.
- (e) Risk of Fraud and Forum Shopping: There is also the risk of fraudulent activity and strategic forum shopping, where parties may choose to file insolvency proceedings in jurisdictions that offer more favourable outcomes, which can undermine the fairness of the process.

Given these challenges, it is essential to establish clear and uniform rules for cross-border insolvency to provide clarity and predictability. This is critical for maintaining fairness in the treatment of creditors and ensuring efficient administration of insolvency proceedings across borders.

It would be beneficial for you to also consider the matters raised by Westbrook

2.5

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of "hard" and "soft" laws in providing solutions to the challenges of international insolvency.

In the context of international insolvency, "hard law" refers to binding legal instruments, such as treaties and conventions, that have been formally adopted and ratified by states. These laws become part of a state's domestic legal framework and are enforceable in courts, thus having a direct impact on how states regulate insolvencies that have an international dimension. Examples of hard law in this context include the European Union's Regulation (EU) 2015/848 on Insolvency Proceedings (Recast) (EIR Recast) which was binding on member states until the UK's exit from the EU.

"Soft law," on the other hand, consists of guidelines, principles, and model laws that are not legally binding but can influence and shape state behaviour and domestic laws. Soft law instruments are often voluntary and provide a framework that states can adapt and implement according to their legal systems and practices.

Regarding the success of hard and soft laws, while hard laws provide a clear and binding framework for states to follow, achieving consensus on such laws can be challenging due to the need for ratification and the potential for conflict with domestic legal principles. Soft law options, such as the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), have been more successful in some respects because they offer flexibility and can be adapted by states to fit their legal systems, leading to wider acceptance and implementation. In particular, the Model Law has been adopted by numerous states and has become an influential tool in guiding the practice of cross-border insolvency without imposing rigid requirements that may not align with all domestic legal systems.

3

Marks awarded 11 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The American insolvent estate representative may turn to the following sources: (a) English common law; and (b) English statutory law.

- (a) English common law: The case of *McGrath v Riddell* in the House of Lords exemplifies this approach, where the court exercised its jurisdiction to direct the remittal of English assets to a foreign principal liquidator for distribution under foreign laws, despite differences between English and foreign distribution systems. This case underscores that English courts can, under their common law jurisdiction, recognize and cooperate with foreign insolvency proceedings, particularly where assets located in England are concerned.
- (b) English statutory law: The representative may refer to the Insolvency Act 1986 (UK). Specifically, under section 426 of the Insolvency Act 1986, this section allows English courts to recognize winding-up proceedings from foreign companies and can aid foreign liquidators. The English court may refuse to grant a local winding-up order over the same company and instead recognize the authority of the foreign liquidator to control local assets. Furthermore, under the aid and assistance statutory provisions of the Insolvency Act 1986, the English court may apply either English law or foreign law to the proceeding (see section 426(5) of the Insolvency Act 1986 (UK). **S426 will not apply as the US is not designated. The MLCBI is relevant**

2.5

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.

In the context of a cross-border insolvency matter between Italy and Germany, particularly given the shift of Norton Cars Inc's COMI to Italy post-Brexit, the main legal source to be used would be the European Insolvency Regulation (Recast), also known as the EIR Recast (Regulation (EU) 2015/848). This regulation sets out the rules governing the jurisdiction for opening insolvency proceedings, recognition of such decisions, and the applicable law within the member states of the European Union.

It would be beneficial to explain why, ie both a members of the EU

According to the EIR Recast, the main insolvency proceedings should be opened in the state where the debtor has its centre of main interests (COMI). Given that Norton Cars Inc has shifted its COMI to Italy, the Italian courts would have jurisdiction to open the main insolvency proceedings. These proceedings would have universal scope and would be recognized by other EU member states, including Germany, where the company's main operations transpire.

Therefore, the insolvency representative would rely on the EIR Recast to coordinate insolvency proceedings between Italy and Germany.

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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?

Courts in India, South Africa, or Australia would not be directly eligible to apply the EU (Recast) Insolvency Regulation. This regulation is specific to member states of the European Union and governs jurisdiction, recognition, and applicable law for insolvency proceedings within the EU.

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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.)

On the law applicable to the insolvency proceedings, the insolvency proceeding opened in Italy under Italian law will generally be recognized in the Netherlands since Italy and the Netherlands are both member states of the European Union. This is due to the European Insolvency Regulation (EIR), which applies to member states. The EIR stipulates that the law applicable to insolvency proceedings and their effects is the law of the member state within the territory of which the proceedings are opened (Article 7 of EIR Recast). Therefore, Italian law would govern the insolvency proceedings.

In relation to the law applicable to the real rights of security, Article 8 of the EIR Recast recognizes that the law applicable to *in rem* rights, such as real rights of security, is the law of the location where the property is situated (*lex rei sitae*). Therefore, Dutch law would apply to the real rights of security over the assets located in the Netherlands, the territory of another Member State.

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- (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.)

The recognition and cooperation regarding proceedings commenced in Italy would be subject to Australia's domestic enactment of UNCITRAL Model Law on Cross-Border Insolvency *vide* the Australian Cross-Border Insolvency Act 2008.

For real rights of security situated in Australia, the local law (*lex situs*) would apply, meaning that Australian law governs the real rights of security over the assets located within its territory.

There is some scope to elaborate

3

Marks awarded 12.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41.5/50

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