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.

Whether a country's insolvency law system is based on English law or civil law affects the way that system deals with the rights and issues that are at play in insolvency proceedings.

Countries that follow the English law approach, such as England, the United States, and Australia, tend to be historically pro-debtor in their construct, as they emphasize the interests of the debtor's continuing business. For example, the system in place in the United States is viewed as having a "liberal fresh start approach" to the rehabilitation of the debtor through the discharge of debt. Discharge of debt is also a fundamental aspect of the insolvency law system in England, where it was first introduced in the Statute of Ann in 1705.

In contrast, countries whose insolvency law systems are based on a civil law approach, such as France, the Netherlands, and Germany, tend to historically be pro-creditor, in that they emphasize the interests of creditors in recovering their claims. For example, French insolvency law is historically very pro-creditor since it allowed for the arrest and detention of debtors. However, even countries whose insolvency law system is based on civil law are evolving to take on more pro-debtor attributes. For example, until the introduction of schuldsanering, Dutch insolvency law did not allow for discharge of the debtor unless the creditors agreed. Now, Dutch insolvency law allows for a fresh start in the area of consumer credit.

A better approach to answering this question would involve listing countries that are historically English based and countries that are historically civil law based and discussing their differences, especially with respect to the adoption of common law in English based countries cf codification in civil jurisdictions.

1.5

Question 2.2 [maximum 3 marks]

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

Approaches to cross-border insolvency are generally defined by two opposing and incompatible principles, namely universalism and territorialism. The principle of universalism is based on the premise that there should only be one universal insolvency framework that covers the entirety of a debtor's assets and debts worldwide, that all of a debtor's assets, no matter where they are located, should be included in the debtor's insolvency proceeding, and that all creditors of the debtor worldwide should have the opportunity to assert claims against the debtor. The principle of universalism can manifest in a number of ways, including the belief that there should only be one insolvency proceeding for all of the debtor's assets and that once an insolvency proceeding is initiated, no other insolvency proceedings or other forms of execution of the debtor's assets would be allowed. Another approach would be for the allowance of more than one insolvency proceeding but the law of the main proceeding, (*e.g.* where the debtor has its center of main interests) would control worldwide over all insolvency proceedings of the debtor. Another approach to universalism would be the creation of a worldwide insolvency law. Generally, universalism is very compatible with globalization and the operation of multinational corporations operating in international markets.

In contrast, territorialism is premised on the belief that insolvency proceedings can by commenced in every jurisdiction in which the debtor holds assets but each such proceeding

should be limited in its scope to those assets located in the jurisdiction. Under this approach, there could be multiple concurrent proceedings in different jurisdictions for the same debtor and each insolvency proceeding would only apply to the assets of the debtor in that jurisdiction. The aim of territorialism is to protect local interests and local creditors, who may have only relied on local assets in providing credit and who may face substantial obstacles in participating in foreign insolvency proceedings. A significant issue with territorialism is that it would not treat the debtor's creditors equally. A debtor could have no assets in one jurisdiction and significant assets in another jurisdiction. The creditors in the first jurisdiction would not be able to receive distributions based on their claims against the debtor while creditors in the second jurisdiction would potentially be able to receive distributions based on their claims against the debtor from the assets in that jurisdiction.

Modified universalism tries to split the difference between universalism and territorialism. It provides for a main proceeding in the jurisdiction where the debtor has its center of main interests and ancillary proceedings in other jurisdictions, as needed. The courts in the respective jurisdictions would, in theory, co-operate with each other.

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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.

A number of initiatives have been undertaken to assist with the resolution of international insolvency issues in Latin America such as the ratification of the Montevideo treaties and the Havana Convention on Private International Law.

The Montevideo treaties were ratified in 1889 (by Argentina, Bolivia, Columbia, Paraguay, Peru, and Uruguay) and 1940 (by Argentina, Paraguay, and Uruguay). The 1889 Montevideo treaty covers both personal and corporate insolvency and provides for bankruptcy jurisdiction based on the debtor's commercial domicile. If a debtor has a commercial domicile in a state that is party to the treaty, even if the debtor does business in other states, there will only be one set of proceedings in the state where the commercial domicile is located. If a debtor has two or more economically autonomous businesses in different states that are party to the treaty, concurrent insolvency proceedings are allowed in each such state.

The Havana Convention on Private International Law occurred in 1928 between Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. The Havana Convention on Private International Law is similar to the Montevideo treaties in that it provides for only one proceeding with universal effect throughout its region if the debtor has only one civil or commercial domicile and for concurrent proceedings in subject states that contain businesses of the debtor that are operated entirely separately economically. Where there are concurrent proceedings, however, the Havana Convention on Private International Law does not provide procedures for cooperation or coordination between such concurrent proceedings. The Havana Convention on Private International Law, however, does provide that insolvency proceedings in one member state will have extraterritorial effect in other member states.

There are other differences which should be considered and explicitly discussed.

3

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.

Whether the terms “bankruptcy” and “insolvency” can be used interchangeably depends on the context in which the terms are being used. While the terms are synonymous in some systems, generally speaking “insolvency” refers to the state of the financial affairs of the debtor (e.g., balance sheet insolvency, where the debtor’s liabilities exceed their assets), while “bankruptcy” refers to the state of being subject to a formal bankruptcy proceeding. Further, in some systems, the terms have very specific and distinct meanings. For example, in Australia, “insolvency” refers to the insolvency of a corporation, while “bankruptcy” refers to the insolvency of a natural person.

The universal features of insolvency or bankruptcy law are as follows: (i) all actions against the debtor are stayed so that individual debtor enforcement cannot be pursued during the pendency of the proceeding; (ii) the debtor’s assets are pooled to be made available to all creditors; and (iii) creditors are paid pari passu, i.e., on a pro rata basis from the pool of assets based on the creditors’ claims.

Differences also arise between the underlying purposes of bankruptcy/insolvency of an individual and a corporation. For individuals, the process is typically to protect the debtor from harassment from their creditors while providing the debtor with the ability to make a fresh start, by reducing the debtor’s indebtedness through repayment that takes into consideration the debtor’s ability to repay and other personal circumstances.

In contrast, the goal of insolvency/bankruptcy for a corporation is generally to protect the debtor’s business going forward and, where appropriate, impose personal liability on responsible individuals.

The specifics of insolvency/bankruptcy can also be different for individuals and corporations. For example, individual debtors may be eligible for exemptions, certain assets that the individual debtor is allowed to keep to maintain themselves and their dependents. Exemptions, on the other hand, are not available for corporate debtors in the systems that provide for exemptions for individual debtors.

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 significant number of challenges that arise in cross-border insolvency that contribute to the difficulty in developing a single cross-border insolvency paradigm. Most fundamentally, each independent state is autonomous and governs itself through its own legislation. Accordingly, establishing a single cross-border insolvency paradigm would involve such independent states to not only agree to work together but to give up some autonomy. These are formidable obstacles. Further, as they stand now, insolvency systems differ drastically in their quality. Many have laws that are outdated or otherwise no longer appropriate for the modern world.

In addition, the development of a single cross-border insolvency paradigm is difficult because different states emphasis different goals for insolvency proceedings. Some states approach insolvency proceedings from a pro-debtor viewpoint while others approach insolvency proceedings from a pro-creditor viewpoint. Accordingly, some systems see the goal of insolvency proceedings as enabling creditors to recover their claims (pro-creditor), while other see the goal of insolvency proceedings as allowing the debtor to continue to do business (pro-debtor). Further, states all have their own specific and individual interests, such as protection of local creditors or an unwillingness to recognise foreign claims, that necessarily will create conflicts among the different states. In addition, insolvency proceedings can involve significant areas of substantive law that can vary wildly from state to state, making universal application very difficult.

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

1.5

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" means binding law. Examples of "hard law" include treaties signed by a state and conventions to which a state has joined. In doing so, the state has bound themselves to the terms of the treaty or convention which, in turn, may affect the state's domestic law. Although there have been successful multilateral treaties, such as the Nordic Convention of 1933 from the Scandinavian region of Europe, most have not been successful in the area of international insolvency. The European Union has achieved some success through the European Insolvency Regulation (EIR) from 2000, which has had a strong influence on the subsequent development of international insolvency law.

In the context of international insolvency, "soft law" means non-binding efforts to affect international insolvency. It is typically the result of the work of multinational organizations, as opposed to states and governments. A primary example of an organization involved in the development of "soft law" is the Hague Conference on Private International Law (the Hague Conference), established in the 19th century to work towards the unification of private international law. Its Model Treaty on Bankruptcy from 1925, while never ratified, introduced concepts that have had a profound effect on international insolvency. The United Nations Commission on International Trade Law (UNCITRAL) has had the most success with the "soft law" approach in its development of the Model Law on Cross-Border Insolvency (MLCBI). The MLCBI is not a treaty or convention but a model law, draft legislation that UNCITRAL has offered to member states to adopt. A number of states have adopted the MLCBI, with or without modifications, leading to its influence on the development of international insolvency law.

3

Marks awarded 11.5 out of 15

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

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

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

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

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

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

Question 4.1 [Maximum 4 marks]

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

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

Dear Client,

I am writing to inform you of the applicable English cross-border sources that you may use to request recognition of your status as estate representative in the American insolvency proceeding of Norton Cars, Inc. ("NCI") in order to deal with the assets of NCI that are located in England.

Insolvency law in England is governed by the Insolvency Act 1986, which covers both personal and corporate bankruptcy, as well as common law precedent. Although additional analysis must be done, there is a House of Lords decision, *McGrath v, Riddell* [2008] UKHL 21 at [62], that speaks directly to the present situation, where the English court ordered the turnover of assets located in England to a foreign principal liquidator for distribution under foreign laws. In the case, Lord Hoffman cited the court's "jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign system of distribution." *Id*. Accordingly, it is clear that English courts will cooperate with "courts in the country of the principal distribution" to ensure that the debtor's assets are distributed to the debtor's creditors. *Id*. Of note, however, Section 426(5) of the Insolvency Act 1986 authorizes English courts to apply either foreign or local laws in cross-border insolvency matters. **This section does not apply as the US is not designated**

In addition, both England and the United States have both adopted the UNCITRAL Model Law on Cross-Border Insolvency, which promotes co-operation and co-ordination in cross-border insolvency, and have incorporated it into their respective insolvency statutory frameworks. Accordingly, courts in England will be receptive to recognizing your status as estate representative in NCI's American insolvency proceeding and to co-operating with you with regard to the administration of NCI's estate.

Accordingly, although further research is needed to determine the procedure that will need to followed, it is clear that avenues exist to request recognition of your status as estate representative in NCI's American insolvency proceeding in order to deal with the NCI assets that are located in England.

Please let me know if you would like to discuss further.

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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 Client,

I am writing to you to address the appropriate legal sources to be used in Norton Cars Inc.'s ("NCI") cross-border insolvency matter between Italy and Germany and to address the issue of which country the main proceeding should be opened.

The European Insolvency Regulation (Recast) ("EIR (Recast)") applies to both Germany and Italy as member of the European Union. Accordingly, the EIR (Recast) will govern the proper jurisdiction for NCI's cross-border insolvency matter between Germany and Italy. Pursuant to the EIR (Recast), primary jurisdiction is appropriate in the member state within which the "center of the debtor's main interests" ("COMI") are located. Here, NCI's COMI is Italy. Accordingly, the strongest argument is for Italy to be the location of the main proceeding.

Please note, however, that the EIR (Recast) also allows for the possibility of subsidiary territorial proceedings in other member states when the debtor has an "establishment", *i.e.*, "any place of operations . . . where the debtor carries out non-transitory economic activity with human means and assets." *See* EIR (Recast). Since NCI's main operations have occurred in Germany, it is likely that such secondary territorial proceedings may go forward in Germany also. In that case, we will have to address any conflicts that may arise between the two jurisdictions. Of note, German insolvency law is governed by a unified insolvency code, the Insolvenzordung, which will need to be researched in the event that secondary territorial proceedings go forward in Germany.

Please let me know if you would like to discuss further.

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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?

Indian, South African, and Australian courts will likely be eligible to apply the EIR (Recast) when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation because the EIR (Recast) was recently amended to provide for the recognition of the existence of insolvency proceedings outside of the EU for the purposes of coordinating proceedings within and outside of 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.)

The law that will apply to the subject insolvency proceeding with regard to the real rights of security situated in the Netherlands is governed by the European Insolvency Regulation (Recast) ("EIR (Recast)"). The EIR (Recast) applies to both Italy and the Netherlands as members of the European Union. Pursuant to the EIR (Recast), primary jurisdiction is allocated to the member state within which the "center of the debtor's main interests ("COMI") is located. Accordingly, assuming the COMI of Norton Cars, Inc. ("NCI") is in Italy, the primary insolvency proceeding would take place in Italy and Italian law would apply in that proceeding.

However, the EIR (Recast), also allows for the possibility of subsidiary territorial proceedings in other member states when the debtor has an "establishment", *i.e.*, "any place of operations . . . where the debtor carries out non-transitory economic activity with human means and assets." *See* EIR (Recast). Here, NCI has an establishment in the Netherlands, since it operates external branches of its business there. Accordingly, a subsidiary territorial proceeding may be initiated in the Netherlands regarding the assets located in the Netherlands and Dutch law would apply to address the real rights of security to which those assets are subject.

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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.)

With regard to an insolvency proceeding in Australia regarding the assets located in Australia and the real rights of security to which those assets are subject, it would appear that Australian law would govern.

Australia is not a member of the European Union and so is not subject to the EIR (Recast). Australian insolvency law is governed by a number of Acts and it does not have a single unified bankruptcy or insolvency act, although generally the Corporations Act 2001 governs the insolvency of corporations and, therefore, would govern the insolvency proceeding concerning the assets of Norton Cars, Inc. ("NCI") located in Australia. Sections 580-581 of the Corporations Act 2001 permit co-operation between courts in Australia and foreign courts in "external administration" matters. For example, in the case In re Chow Cho Poon (Pte) Ltd [2011] NSWSC 300, the Australian court granted assistance to a foreign liquidator, allowing the foreign liquidator to control assets in an Australian bank account. The court in that case also referenced the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency, which has been adopted by Australia, and its interaction with the Corporations Act 2001, in reaching its decision.

3

Marks awarded 13.5 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.