



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 8 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.

Countries whose insolvency law systems have historical roots in English law include England, America and Australia, India, and parts of Africa. In the past, English law did not provide for imprisonment for unpaid debts until the thirteenth century, with the imprisonment of debtors being abolished in 1869. As for bankruptcy laws, these started in 1542 (the first English Bankruptcy Act of 1542) to provide for the taking of possession of assets from dishonest and absconding debtors. The 1542 Act further provided for creditors to apply for commissioners, who could proceed against a trading debtor. This enabled the compulsory administration and distribution of assets equally amongst the creditors. This formed the foundational principles of the *pari passu* distribution amongst creditors, and collective participation by all creditors.

Similar to the development of the civil law systems, these bankruptcy concepts under English law were developed from individual debt-collecting procedures to a collective (bankruptcy) procedure.

Countries whose insolvency law systems have historical roots in civil law include the Netherlands, France, Germany, Spain, parts of Africa and much of Latin America. The roots of the civil law system can be traced back to Roman law and the third table of the Twelve Tables which dealt with the execution of judgments. The concept of debt execution evolved from the past practice of the debtor pledging his/or own body for loan repayment, and the fact that the debtor could be imprisoned, face the death penalty, or sold as a slave to secure repayment of the debt.

According to Fletcher, the roots of bankruptcy law can be found from the following procedures of Roman law: the assignment of property; forced liquidation of assets; and composition with creditors. These procedures were developed from individual debt collection steps to collective debt collecting mechanism when the debtor becomes insolvent.

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

2

Question 2.2 [maximum 3 marks]

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

The principle of universalism entails there being only one insolvency proceeding which covers all of a debtor's assets and debts worldwide. Therefore, once the insolvency proceedings have been started, it should not be possible to start any other insolvency proceedings. Other forms of execution on the debtor's assets should not be possible as well. All the debtor's assets would be included in that sole insolvency proceeding, and all the creditors would have equal opportunity to participate in the proceedings, with their claims being treated equally. The officeholder would be empowered to deal with the debtor's assets as necessary in the sole insolvency proceedings.

In contrast, modified universalism does not entail there being only one insolvency proceeding which covers all of a debtor's assets and debts worldwide. Instead, modified universalism involves there being a "main proceeding" being started in the country of the debtor's centre of main interests ("COMI"), which is to be determined. Additionally, the "main proceeding" would be supported by other secondary or ancillary proceedings in other countries. The various courts dealing with these respective proceedings are supposed to co-operate with each other.

The principle of territorialism is starkly different from universalism and modified universalism as it entails insolvency proceedings being commenced in every country or jurisdiction where the debtor holds assets. These individual proceedings would be limited to property within the country or jurisdiction where the proceedings are opened. This necessarily means that it would be possible for there to be multiple concurrent insolvency proceedings relating to the same debtor. Accordingly, each individual proceeding would be limited to claims and mandates within the national borders of that country or jurisdiction. National interests would thus be protected (i.e. the interests of local creditors) before assets are transmitted abroad.

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 countries have concluded treaties on private international law and commerce which includes a chapter or title on bankruptcy or insolvency, such as the Montevideo treaties in 189 and 1940, and the Havana Convention on Private International Law in 1928.

With respect to the Montevideo treaties, the earlier treaty was ratified in 1889 by Argentina, Bolivia, Columbia, Paraguay, Peru, and Uruguay, whilst the later treaty was ratified in 1940 by Argentina, Paraguay, Uruguay. The earlier treaty relates to personal and corporate insolvency and provides for the jurisdiction of the bankruptcy to be based off the debtor's commercial domicile. Specifically, if a debtor is commercially domiciled in a treaty state, there would be one set of proceedings in that particular commercial domicile, notwithstanding that the debtor occasionally trades outside that state, or has branches or agents in other states. Moreover, if a debtor has more than one autonomous businesses in different treaty states, there is an option for concurrent proceedings. When insolvency proceedings against one of the autonomous businesses are opened in a treaty state, a local creditor in another treaty state (which contains an economically autonomous business) may open bankruptcy proceedings in that treaty state as well, or other relevant civil action.

In contrast, the Havana Convention on Private International Law in 1928 was concluded between Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. It is more supportive of an approach which allows for a single proceeding consisting of universal effects in its region as compared to the Montevideo treaties. For instance, Article 414 provides that if a debtor only has one civil or commercial domicile, "there can be only one preventive proceeding in insolvency or bankruptcy, or one suspension of payments, or a composition... in respect of all his assets and his liabilities in the contracting States". However, it is similar to the Montevideo treaties in the sense that there may be concurrent proceedings under the Havana Convention where it relates to commercial establishments that are operated in a manner that is entirely economically separate from the debtor. Where there are concurrent proceedings, the Havana Convention does not provide for cooperation or coordination for the concurrent proceedings.

4

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 disagree with the statement that the terms “bankruptcy” and “insolvency” may be used interchangeably. This is because I am from a jurisdiction (Singapore) which generally uses “bankruptcy” to describe the insolvency of an individual, and “insolvency” to describe the insolvency of a corporation. For example, in Singapore, prior to recent insolvency reforms that consolidated most of the insolvency and bankruptcy provisions under the Insolvency, Restructuring and Dissolution Act 2018, the insolvency of individuals was previously dealt with primarily under the Bankruptcy Act, and the insolvency of companies was dealt with under the Companies Act. Therefore, based on the common practice of my jurisdiction, I am of the view that “bankruptcy” refers to the insolvency of an individual, and “insolvency” refers to the insolvency of a company.

As for what “bankruptcy” and “insolvency” means generally, “bankruptcy” refers to the formal proceedings that have been instituted where one is put in the official state of being bankrupt. “Insolvency” on the other hand, refers to a situation where a debtor is unable to repay debts as they fall due (cash flow or commercial insolvency), or where the assets of a debtor are less than that of the liabilities (balance sheet insolvency).

I am of the view that it may be advantageous to have “bankruptcy” refer to individuals and “insolvency” refer to companies. This is because there are different considerations in relation to the insolvency of individuals and companies. Having a different conceptual term assigned to each scenario may make it easier to delineate between the contrasting policy considerations for both. With respect to the bankruptcy of an individual, one policy consideration is to protect the debtor from continual harassment by his creditors, and to provide the opportunity for the debtor to make a fresh start. This is especially so in cases where the bankruptcy has not been brought about by the conduct of debtor (e.g. Covid-19 pandemic or other market related factors). In this connection, the bankruptcy proceedings for individuals would have to take into consideration how to best reduce indebtedness of the individual by getting the individual to make contributions from the present assets and future income, whilst taking into account the need for a fresh start, as well as other personal circumstances into consideration. Importantly, unlike the insolvency of companies, in the bankruptcy of individuals, the principle of excluded assets applies to allow the individual to keep some of the assets required to maintain himself or any dependents. For example, in Singapore, the ownership of public housing flats, and of mandated retirement funds (in the Central Provident Fund account) is excluded from bankruptcy proceedings and remains with the individual bankrupt.

With respect to the insolvency of companies, different policy considerations apply where as far as it is possible, consideration should be given to how the business can be preserved, or at least the viable parts thereof. Additionally, since the actions of companies are directed through their legal minds, the directors and other officers, where this structure has been abused, consideration must be given to how personal liability can be imposed on responsible persons who have perpetrated such misconduct. Moreover, in my view, the policy consideration of a fresh start for the company is not one that is taken into account because the company (unlike the individual) can be simply wound up and the assets divided amongst the creditors.

In this vein, when it comes to creditors, both the bankruptcy of an individual or insolvency of a company are similar as the general principle of ensuring a *par passu* distribution of assets amongst creditors applies, and the concept of priority claims for certain types of creditors apply as well (e.g. secured creditors). There is also the need to reclaim voidable dispositions where the assets of the debtor have been improperly dealt with by the creditors.

There is scope to elaborate, for example with respect to essential characteristics.

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.

There are many difficulties arising in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation. These challenges include, first, the territorial limits of enforcement associated with a country's jurisdiction. Given these territorial limits, multiple insolvency proceedings might be commenced against the debtor in different countries. Second, the different insolvency regimes that are available in different legal systems, where creditors may not be able to obtain certain remedies, or certain priorities. This could lead to much uncertainty over the treatment of creditors' rights and would encourage forum shopping.

Third, there needs to be coordination and cooperation between the courts of different countries in a cross-border insolvency situation where there are multiple proceedings. In such situations of parallel insolvency proceedings being commenced, a lack of cooperation may lead to unnecessary losses for creditors as it may be more difficult for a rescue or a scheme to be reached. Fourth, not all domestic legal systems are properly equipped to deal with cross-border insolvency. This could exacerbate the earlier issues raised.

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

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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" refers to rules and regulations which are binding on countries. For instance, treaties and conventions to which countries become signatories to and accordingly bind themselves and affect their domestic law form part of a country's "hard law". In the context of international insolvencies, these would mean that domestic insolvency rules and regulations are affected by the treaties and conventions which the country has signed. The successful multilateral treaty, the Nordic Convention (1933) is an example of "hard law" where the Nordic Convention recognises the law of the place where the insolvency adjudication is located, as being determinative of almost all the effects of the related orders in all signatories, without the need for further formalities to be taken.

On the other hand, unlike treaties and conventions which seek to bind, "soft law" refers to approaches that seek to influence, such as legislative guides and model legislation. These "soft law" options are not binding on parties, but are instead an approach that encourages countries to voluntarily align their domestic insolvency regimes with the unified approach proposed. For instance, the Model Law on Cross-border Insolvency developed by UNCITRAL has been gathering momentum as an effective and influential solution to international insolvency law as more countries have begun adopting it.

3

Marks awarded 10.5 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.

There are two ways through which the American insolvent estate representative can use to request recognition in terms of English Law to deal with the English assets of Norton Cars Inc. First, the representative may request for recognition under the UNCITRAL Model Law on Cross-Border Insolvency which England has adopted in 2006. Second, the representative may request for recognition under the English common law jurisdiction for the English courts to grant assistance to foreign insolvency proceedings.

As a side note, the representative cannot request for assistance via s 426 of the English Insolvency Act 1986 because the US is not a relevant country under the Act.

4

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.

Since Italy and Germany are both part of the European Union, the applicable legal source to be used in such a cross-border insolvency is the EU (Recast) Insolvency Regulation and any subsequent amendments to the EIR Recast such as the Regulation 2021/2260 of 15 December 2021 ("EIR Recast"). According to the EIR Recast, jurisdictional competence is allocated to the court of the country within which the debtor's COMI is located in. Therefore, in the present case, since the COMI is in Italy (having shifted from England), the main proceedings should be opened in Italy. In any event, it must be observed that the management of Norton Cars Inc operations are directed from Italy as well.

Additionally, besides the main proceeding being opened in Italy, the EIR Recast allows for subsidiary territorial proceedings to be opened in Germany as well, because Norton Cars Inc has an “establishment” in Germany. This is due to Norton Cars Inc having its main operations in Germany. Such subsidiary proceeding in Germany can either be “independent proceedings” that are opened prior to the main proceedings in Italy, or “secondary proceedings” that are opened after the bankruptcy adjudication in Italy.

4

Question 4.3 [Maximum 1 mark]

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

No, the Indian, South African or Australian court would not be eligible to apply the EU (Recast) Insolvency Regulation as they are not part of the EU. The EU (Recast) Insolvency Regulation is only applicable between EU members.

1

Question 4.4 [Maximum 6 marks]

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

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

Since Italy and Netherlands are part of the EU, the EU (Recast) Insolvency Regulation (“EIR Recast”) is applicable in the present case. Article 7 of the EIR Recast applies such that Italian law will apply in the present case because the insolvency proceedings had been opened in terms of Italian law. However, Article 8 of the EIR Recast applies in relation to the assets in Netherlands which are subject to the real rights of security. In particular, Article 8 provides that “the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets... belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings”. Therefore, Italian law will not apply to the assets in Netherlands that are subject to real rights of security. Dutch law would apply to these assets instead.

3

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

Since Australia is not part of the EU, the EIR Recast is not applicable in the present case. Australian law will thus apply to any concurrent insolvency proceedings taking place in Australia, as well as govern any real rights of security over assets located in Australia.

The insolvency representative can take note that Australia has similar statutory provisions similar to the UK’s s 426 Insolvency Act which permit cooperation between Australian and foreign courts for liquidation matters. The insolvency representative should also note that Australia has adopted the UNCITRAL Model Law on Cross-border Insolvency and therefore, it may be advantageous to make use

of any of the relevant recognition and enforcement provisions that relate to the issues of the real rights of security over the Australian assets.

2.5

There is some scope to elaborate

Marks awarded 14.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 42/50

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