INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

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 10 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 two insolvency law "families" known around the globe are the "civil law" system and the "common law" system. They are differentiated by the local culture, terminology and the way each system deals with basic rights.

An example of countries with civil law systems are the Netherlands, Spain, France, South American countries and Germany. Countries with civil law systems are based on Roman law and the Table 3 of the Twelve Tables, which dealt with the execution of judgments. They are premised on the procedures for the assignment of property, the forced liquidation of assets and the composition of creditors. This foundation on Roman law paved the way for procedures where the debtors were found insolvent in civil law countries.

Civil law countries may be considered as more "pro-creditor" and harsher or penalizing to insolvent debtors. An example of this is the Netherlands, who in its origins did not have a discharge provision for the Debtor, unless agreed to by the creditors. Another example of this initial pro-creditor characteristic is France, who in the 1807 commercial code provided for the imprisonment of the debtor.

On the other hand, countries with common law systems derive from English law. Even though the first English Bankruptcy Act of 1542 had penalizing and quasi criminal provisions it contained the two fundamental principles of bankruptcy which are: participation of creditors and a pari passu distribution to creditors from the realization of the available assets of the Debtor.

With time English law included provisions for regulators or "commissioners" to supervise the bankruptcy process and take control of the assets of the Debtor. Eventually, it incorporated the concept of discharge in 1705 and in 1883 it created the foundation for present English bankruptcy law, which includes a fair procedure that has adequate supervision and means to discourage the dishonest debtor. Some countries with civil law systems, like the United States can be considered to be "pro-debtor" and have a more liberal approach to insolvency procedures. Other of countries with common law system are England, Tanzania, India and Australia.

A greater consideration of common law vs codification is warranted

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.

Universalism is an approach to cross-border insolvency that believes that there should be a sole insolvency proceeding that includes all assets and liabilities of the debtor worldwide. It does not allow for multiple insolvency proceedings in different jurisdictions. The officeholder in this unified proceeding has sole authority and the tools to obtain all assets, no matter where they are located. Creditors worldwide would need to participate in this centralized case and all claims would be treated within the same on equal basis. It requires recognition by all states of the authority and extraterritorial effect of the sole insolvency proceeding. **Forum and COMI should be considered**

Territorialism on the other hand is a totally different approach. It is based on the premise that concurrent insolvency proceedings of the debtor may be commenced in each State or jurisdiction

where the debtor has assets and liabilities. Such proceedings are limited and restricted territorially. They address local interests and local creditors. This means that the creditors could only obtain relief in the proceedings commenced in the jurisdiction where they were territorially located and only over the assets of the Debtor located in such jurisdiction.

Modified Universalism is an approach that has emerged since there is no global consensus towards the application of universalism and the fact that states may lean more towards territorialism in order to protect their respective national interest. It provides for a main insolvency proceeding commenced in the jurisdiction where the Debtor's centre of main interest (COMI) is located and allows for other ancillary proceedings in other states. This approach therefore requires communication and collaboration between the courts of these multiple jurisdictions.

2.5

Question 2.3 [maximum 4 marks]

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

Latin American has the most long-standing initiatives or multilateral agreements for managing international insolvency issues. These are the Montevideo Treaties of 1889 and 1940 and the Havana Convention on International Commercial Law of 1928.

The 1889 Montevideo Treaty was adopted and ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. The 1889 Montevideo Treaty includes provisions for both personal and corporate insolvency proceedings and allocated jurisdiction on the debtor's commercial domicile. Depending on how many "commercial domiciles" the Debtor may have is how many insolvency proceedings are to be allowed within treaty states.

The 1940 Montevideo Treaty contains a title on bankruptcy but was only ratified by Argentina, Paraguay and Uruguay. There is also the 1940 Montevideo Treaty on International Procedure Law which contains a title on Civil Meetings of Creditors, also only ratified by Argentina, Paraguay and Uruguay.

The Havana Convention on Private International Law (The Bustamante Code) of 1928 was adopted by Bolivia Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. This treaty is more supportive of universalism, since it provides for a single insolvency proceeding with effect throughout the region of treaty states. It allows concurrent proceedings, but in circumstances where the Debtor has separate economical operating commercial establishments. Different than the Montevideo Treaties, the Havana Convention does not include provisions that provide procedures for cooperation and coordination of concurrent insolvency proceedings.

There is scope to greater explain the differences between the agreements.

3.5

Marks awarded 8 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.

Insolvency and bankruptcy are terms that may be used interchangeably when generally speaking about the subject matter. Nevertheless, if you study them closely you realize that their meaning differentiates and distinguishes them. Personally, I would not use them as synonyms, but I acknowledge that in some jurisdictions they may be used as one of the same. **There is some scope to elaborate on this issue**

Insolvency is a financial state that can be defined in one of two ways: (i) the Debtor has more liabilities than assets (balance sheet definition) or (ii) the Debtor is unable to meet its financial commitments as they become due (cash flow definition). Bankruptcy on the other hand, is a judicial process available for Debtors that are unable to pay their creditors in an organized fashion. It may allow for the liquidation of the assets of the Debtor, in order to provide an equitable distribution amongst its creditors or in the alternative, it may allow for the financial reorganization of the Debtor which grants payment to the creditors of the Debtor through a feasible payment plan.

It should be noted that a Debtor may be insolvent, but may not be bankrupt. Bankruptcy requires the commencement of a proceeding either voluntarily (filed by the Debtor) or involuntarily (filed by creditors of the Debtor). Insolvency is on the other hand an involuntary state. Debtors do not (or should not) seek to become insolvent.

Also, a Debtor in bankruptcy may be solvent from a balance sheet approach (has more assets than liabilities) but has temporary cash flow problems that require that it seek assistance from the Court in order to have a breathing spell and be able to provide payment to its creditors.

A bankruptcy proceeding for an individual may differ from a bankruptcy proceeding of a corporation. A few examples are the allowance of exemptions (which is available to individuals but not to corporations) and the concept of the discharge (which in some jurisdictions or circumstances is a remedy only available to individuals). Also, corporate cases tend to handle more complex issues which may not be present in a bankruptcy proceeding of an individual such as:

1. A single corporation with multiple operations in different jurisdictions which are subject to the regulatory and governmental legislation in each individual state.
2. Executory contracts or labour law situations that are not present in individual cases.
3. Interrelated but separate corporate entities that seek relief jointly or simultaneously in either one or various jurisdictions.
4. Director or officer breach of fiduciary actions that can be pursued by the liquidator or reorganized entity in order to maximize recovery for the creditors.
5. Shareholder considerations and/or liquidation of shares in a corporate reorganization to allow for a new structure and governance of the reorganized entity.
6. Corporate cases may be subject to social and public policy considerations when they impact a sector of the community or state through employment of citizens, provide essential services (i.e. hospitals, schools, security) or are related to an important economic sector of the state which may be subject to additional regulations.

As it has also been distinguished by Sealy and Hooley there are varied objectives in the bankruptcy/insolvency proceedings for corporations and individuals such as:

1. In the cases for individuals the proceedings are designed to protect the debtor from harassment by creditors and allow it to obtain a fresh start. Individual cases also allow

the debtor to reduce his/her indebtedness by providing a payment plan that contemplates present and future income as well as his/her personal needs and circumstances.

2. In the case of corporations, the corporate entity does not need to be preserved. These cases may seek to preserve the business or its viable components and a new corporate entity may emerge or purchase such assets or business.

There is also scope to elaborate regarding 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.

The development of a single global cross-border insolvency legislation faces various challenges. These challenges stem from fundamental differences in the main legal systems related to insolvency law in countries worldwide. These difficulties may include the inclination that each system may have to the administration of the estate and distribution to creditors, if their national approach or policy is either pro creditor or pro-debtor. These factors are governed by the local or domestic law of each particular state, as well as the national interest or reluctancy to recognize foreign insolvency proceedings.

The local legal culture, diverse rules, terminology, legal standard, procedures for insolvency proceedings in the different countries and substantive domestic law differences represent some of the challenges when establishing rights of creditors, the Debtor, securities or payment priorities in a cross-border case. There may be lack of cooperation, lack of recognition of foreign proceedings, the need to determine the applicable choice of law to establish the substantive rights of the parties involved, among others. Also, the treatment to executory contracts or other labour contracts may be determined by domestic law in an incompatible fashion to the other concurrent cross border insolvency case/s. Procedurally you may find a case in one jurisdiction where the entity is liquidating, while it may be seeking reorganization or rehabilitation in another jurisdiction.

Westbrook identified the following nine (9) key issues in cross border cases which need to be addressed: standing for (recognition of) the foreign representative, moratorium on creditor's actions, creditor participation, executory contracts, coordinated claims procedures, priorities and preferences, avoidance provisions, discharges and conflict of law issues. These key issues need to be harmonized in order to have a unified or global cross-border insolvency, but the differences between countries' legal systems discussed above continue to challenge the obtention of this goal.

Fletcher identified three important issues: jurisdiction for the main proceeding, choice of law to be applied in the case and international effect of the proceeding and enforcement. If there is little or no cooperation and coordination between states, then there will be little or no extraterritorial effect of foreign proceedings and each state would implement their own domestic law to resolve the key issues that arise in a cross-border insolvency case. This creates a greater challenge when trying to create a globalized cross-border procedure as well as inconsistent results in multiple jurisdictions.

5

Question 3.3 [maximum 3 marks]

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

Hard law is the binding set of laws or regulations promulgated by a State or group of States, to the manner in which such jurisdiction will regulate international insolvencies. Soft law on the other hand,

are a series of regulations, conventions or treaties that are promulgated by a range of multilateral organizations like the World Bank or the United Nations among others. They are persuasive or may influence the manner in which a state regulates international insolvency matters.

Hard law solutions to international insolvency issues have not been successfully achieved and thus there is no global insolvency regulation applicable worldwide. Hard law solutions require that states reach a common ground and establish a unified procedure for international insolvency which would become binding to them. This has been difficult because of the distinct nature and interests of various States, as well as their own national interests.

An example of a hard law solution currently in place is the European Insolvency Regulation of 2000, along with the EIR Recast of 2015. This set of insolvency regulations was the product of the efforts of the member States of the European Union to create legislation that would bind them in international insolvency cases.

On the other hand, the soft law approach has been more successful due to its persuasive nature and the fact that the same is worked by multilateral sectors related to the insolvency field. The most successful soft law approach in the Model Law on Cross-border Insolvency proposed by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL's Model Law proposes a draft of legislation recommended to the members of the United Nations which they may adopt with or without modification.

In order to illustrate how soft law may be adopted by a State we can look at the United States. The United States' Congress enacted the Bankruptcy Code of 1978, as amended, along with the Federal Rules of Bankruptcy Procedures. These are the binding set of laws and rules which govern all matters related to bankruptcy cases filed in the United States. Within the Bankruptcy Code, Chapter 15 governs international insolvencies. Chapter 15 was enacted in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). It responds to the United States's adoption of UNCITRAL's Model Law on Cross-border Insolvency and its repealing of the prior provisions of the Bankruptcy Code which dealt with cross-border insolvencies.

3

Marks awarded 13.5 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.

The American insolvent estate representative needs to refer to Section 426 of the 1986 Insolvency Act to invoke assistance by the English court for its recognition and the UK's Cross Border Insolvency Regulations which adopted in 2006 UNCITRAL's Model Law on Cross-Border Insolvency to deal with international insolvency matters, including, among others recognition. **The US is not designated in relation to s426**

2

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.

A cross-border insolvency matter between Italy and Germany is regulated by the EIR Recast of 2015, as the same was amended by way of Regulation 2021/2260 of 15 December 2021, since both countries are member states of the European Union. Accordingly, the main proceeding should be opened in the state where Norton Cars, Inc has its centre of main interest or COMI. The EIR Recast defines in Article 3 that the "centre of main interest shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties." In this situation the COMI is in Italy and therefore the main proceeding shall be filed in that jurisdiction.

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 EIR Recast is binding and applicable only to member states of the EU. India, South Africa and Australia are not 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 7 marks.)

Since the insolvency proceeding was commenced in Italy, the law which will apply to the insolvency proceeding is Italian law, as is provided by the EIR Recast of 2015, as amended. With regards to the real rights of security related to the assets located in the Netherlands, the applicable law is also Italian law, since under the EIR Recast, the law of the State of the opening of the proceedings will apply to in rem rights of creditors over the assets of the Debtor, as well as the distribution upon the realization of such assets.

In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.

1.5

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 7 marks.)

If the main insolvency proceeding is filed in Italy, where the debtor's COMI is located and there is a concurrent insolvency proceeding filed in Australia a cross-border insolvency issue is created. Australia is not a member of the EU. Therefore, it is not subject to the EIR Recast of 2015. Sections 580-581 of the Corporations Act 2001 (Cth), as well as the Cross-border Insolvency Act of 2008 (Cth) which adopted UNCITRAL's Model Law are the legal provisions that are applicable in order to allow cooperation between Australia and the Italian courts in the liquidation of the Debtor's assets. Australian law governs the security interests situated in Australia.

3

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 43/50

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