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 historical roots of civil law stem from Roman Law where debt execution and repayment of a loan was developed from a debtor using his 'body' as a pledge (such as imprisonment, death or being sold as a slave to repay the debt). Whereas initially English law did not provide for the imprisonment of a debtor and was only introduced by the Statute of Marbridge in 1267 but abolished by the Debtors Act in 1869.

Fletcher, in The Law of Insolvency, stated that the roots of civil law and development of individual debt collecting procedures can from procedures included in Roman law:

- Cessio bonorum (assignment of property);
- Distractio bonorum (forced liquidation of assets); and
- Remission and dilation (compositions of creditors).

English law also first provided for individual debt collecting procedures prior to collective debt collecting procedures (which were introduced in the first law designed specifically as a true bankruptcy statute, namely the Act of Elizabeth).

Many European countries adopted a civil law approach and bankruptcy in these countries stemmed from a situation where merchants in a market would have their bench broken if they were unable to pay their debts. Therefore, the term 'bankruptcy' stems from the banca rotta which translates to 'break the bench'.

The Stature of Ann of 1705 was introduced in English law and introduced the notion of statutory discharge. The following legislations also helped to develop English insolvency law:

- Bankruptcy Act of 1542;
- Debtors Act 1869; and
- Act of 1883 and Official Receiver's office.

It would be beneficial to list examples of relevant countries and to discuss common law vs codification

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.

The principle of universalism is where there is only one insolvency proceeding (in the state where the debtor's centre of main interests is located) and the single proceeding covers all of the debtor's assets.

Whereas the principle of territorialism is the opposite to universalism and is where there are multiple insolvency proceedings in all jurisdictions where the debtor's assets are located. However, the respective insolvency proceedings are limited to the assets located in that specific jurisdiction.

The principle of modified universalism combines both of these principles and identifies a 'main proceeding' (usually where the debtor's centre of main interest is located) and this proceeding is supported by secondary proceedings in other states where the debtor's assets are located.

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.

One multilateral agreement between Latin American States developed to manage insolvency issues is The Montevideo Treaties of 1889 and 1940 ("the Treaty"). The Treaty of 1889 was accepted by six Latin American jurisdictions and covered both personal and corporate insolvency. Whereas the of 1940 was only accepted and ratified by three Latin American jurisdictions. This means that an insolvency with cross-border issues between Latin American jurisdictions which are party to the Treaty or Treaties need to be assessed carefully to see which of the treaties applies.

A further agreement which was developed to manage insolvency issues was The Havana Convention on Private International Law (The Bustamante Code 1928) ("the Code"). Fifteen states accepted the Code (including three that are also party to the Treaty). Therefore, the states which are party to the Treaty and the Code differ.

The Montevideo Treaty allocates jurisdiction based upon an insolvent party's commercial domicile. Under the Treaty, a single insolvency proceeding is commenced in the jurisdiction party to the Treaty where the debtor has commercial domicile and occasionally trades in another jurisdiction. The Treaty also allows for concurrent proceedings where an insolvent party has two or more autonomous operations in different jurisdictions party to the Treaty.

Alternatively, the Code takes a more universalistic approach to proceedings and a single proceeding has a universal impact throughout the different jurisdictions. The single proceeding is also based upon the commercial domicile, similarly to the Treaty, and where there is only one commercial domicile then there can only be one insolvency proceeding. However, concurrent proceedings are permitted under the Code where an insolvent debtor has commercial businesses operating separately and thus adopts a similar approach to the Treaty in that respect.

Finally, the Code does not include procedures to support cooperation between concurrent proceedings.

4

Marks awarded 8.5 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.

Across many jurisdictions, the terms 'insolvency' and 'bankruptcy' are used in the same context and are deemed to have the same meaning. However, there are some jurisdictions which deem the meaning of these terms to differ.

In those jurisdictions where the meanings of the two terms differ, the term 'insolvency' sometimes means the financial state of the subject (i.e. where the value of liabilities exceeds the value of assets) whereas the term 'bankruptcy' is used when referring to a subject that is in formal process or proceeding as a result of being insolvent.

As noted, many systems use them terms interchangeably and synonymously. Ultimately, I am in agreement with this approach as the two terms loosely have the same meaning.

Ultimately, the essential characteristic of either 'insolvency' or 'bankruptcy' is a situation where the combined total value of liabilities exceeds the realisable value of assets (balance sheet insolvency) or where a debtor is able to pay debts as they fall due (cash flow insolvency). Being in an 'insolvent' state can sometimes be mistaken with liquidity issues which is where a debtor is unable to service its debts. **It would also be beneficial to consider the matters raised by Wood**

Although insolvency systems across the globe differ, they generally stem from either English or civil law. Terminology will also differ between jurisdictions but fundamentally all insolvency systems have the same essential features and characteristics. In some cases, the use of the term 'bankruptcy' often relates to an individual whereas the term 'insolvency' refers to corporations.

The UNCITRAL Legislative Guide sets out the key objectives and structure of insolvency law i.e. to provide a legal system for addressing the satisfaction of outstanding claims from the assets of a debtor.

Firstly, when an insolvency proceeding commences it needs to be determined whether the debtor is an individual (i.e. a person) or a corporate (legal entity). Individual and corporate insolvency have some differences which are outlined below.

Sealy and Hooley distinguished the different objectives of both corporate and individual insolvency. The objectives of a corporate insolvency proceeding include preserving the viable parts of the business; and imposing personal liability of responsible individuals where necessary. Whereas the objectives of corporate insolvency are to: protect the debtor from creditor harassment; enable the debtor to make a fresh start; and reduce indebtedness.

A further difference between individual and corporate insolvency is that in most jurisdictions, especially those which do not have a unified law, there are different legislations which govern and provide guidance for individual and corporate insolvencies. For example, the insolvency system in Australia has separate acts which govern individual and corporate insolvency.

The impacts of insolvency effects individuals and corporates in different ways. For an individual, insolvency can adversely impact their ability to obtain credit or whether they can fill certain positions e.g. director of a company. For corporates, there are certain impacts on their directors such as personal liability as a result of fraudulent activity that may have taken place.

In addition to this, there are different outcomes for when an individual or corporate insolvency comes to a conclusion. For individuals, there are rehabilitation mechanisms available which discharge the individual debtor from its unpaid debts at the conclusion of the bankruptcy. However, these same mechanisms are not available to corporates. Corporates either are 'dissolved' which means they are

removed from the Registrar of Companies or they enter a corporate rescue process to restore the business. The corporate rescue process usually takes place where there are valuable parts of the business or where it is in the public interest to retain an ongoing business (i.e. to provide jobs for local society).

Overall, the terms 'bankruptcy' and 'insolvency' can be used interchangeably as they have the same fundamental meaning of a debtor (whether corporate or individual) being unable to meets debts as they fall due or when the value of liabilities exceeds the value of assets.
There is scope to elaborate, for example with respect to differences in objectives and exempt property

4.5

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.

Although the foundations on insolvency across different jurisdictions are similar, the differences in domestic insolvency laws creates significant challenges in cross-border insolvency cases. Judge Hakam Friman noted that as a starting point the difference in key terminology between jurisdictions creates challenges in cross border insolvency. For example, the term 'insolvency' has alternative meanings in different states which makes it difficult to define the term on a global basis and therefore makes it even more challenging to develop a single global dispensation.

The standard of domestic insolvency laws across jurisdictions is also different. In some countries the standard of insolvency laws is low and they are outdated. This means that they are not suitable for modern day trade and therefore lack applicability to cross-border insolvency cases. A high standard of global insolvency laws would therefore help to reduce cross border insolvency challenges and help to manage issues however this would require cooperation and coordination between courts in a situation where there are concurrent insolvency proceedings.

PJ Omar states that "differences in domestic norms have a particular impact on the position of creditors and their priorities in insolvency" and nevertheless the conflict of laws also further adds to this issue and creates challenges in cross-border insolvency.

Across the different laws and jurisdictions, there is also a lack of reconciliation between approaches taken to deal with international insolvency issues. This may stem from the fact that some systems are pro-debtor (liberal approach to discharging debt) whereas others are pro-creditor (conservative approach to the discharge of debt). These differences oppose the idea that a uniform set of global insolvency laws can be developed due to the foundations on individual systems.

Local culture and rights in jurisdictions such as labour laws also differ globally. The difference in these rights make it difficult to deal with cross-border insolvency matters and in turn to develop a single approach to insolvency on a global basis.

Westbrook identified the following nine issues in cross-border insolvency cases:

1. Standing (locus standi) for (recognition of) the foreign representative;
2. moratorium on creditor actions;
3. creditor participation;
4. executory contracts;
5. co-ordinated claims procedures;

6. priorities and preferences;
7. avoidance provision powers;
8. discharges; and
9. conflict-of-law issues.

These issues create challenges in cross border insolvency matters and barriers to the development of a single uniform set of global insolvency laws.

Furthermore, the different accounting treatment used in different jurisdiction e.g. treatment of security interests, set-off and treatment of assets means that it is difficult to develop a single set of insolvency laws to deal with cross-border issues.

5

Question 3.3 [maximum 3 marks]

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

"Hard law" refers to instruments which are legally binding. In the context of international insolvency, these instruments include treaties and conventions.

Many "hard law" approaches and instruments are rarely successful as they rely on states ratifying them and therefore as jurisdictions do not ratify them they have limited success.

An example where a "hard law" approach has been successful is the Nordic Convention (1993) where jurisdictions in the Scandinavian region, namely Norway, Denmark, Finland, Iceland and Sweden, ratified the convention. The Nordic Convention recognises the law in the home state and this has affects on all other members states.

However, efforts to implement "hard law" approaches in Europe have proved to be unsuccessful as in 1990 it introduced the Istanbul Convention which was only ratified by eight of the fourty seven member countries.

Whereas "soft law" refers to instruments which are not legally binding. In the context of international insolvency, these instruments provide recommendations and approaches to deal with cross-border insolvency issues.

UNCITRAL develop a Model Law in the 1990s which has proved to be a successful "soft law" approach. This is because it can be adopted by member states with or without modification and provides recommendations to states on how to respond to international insolvency issues. The large number and size of jurisdictions which have adopted the Model Law has lead to its high levels of success.

3

Marks awarded 12.5 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.

Both the United Kingdom (UK) and United States of America (USA) have adopted the UNCITRAL Model Law on Cross-Border Insolvency as part of their domestic laws. However, the Model Law does not require reciprocity so as long as one state has adopted then the Model Law can be applied.

The American insolvency estate representative can apply to the English court for recognition of the winding up filing and appointment of insolvent estate representative. If the requirements are met and the Insolvency Act 1986 recognises the winding up of Norton Cars and appointment of the liquidator, then the liquidator can apply to the English courts to deal with the assets situated in England.

The Model Law authorises co-operation and direction communication between foreign courts and therefore this allows the courts of the USA and UK to communicate and co-operate so that the American liquidator can deal with the assets situated in England.

The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation is an information source for liquidators on the practical aspects of co-operation and coordination in cross-border insolvency cases and can therefore be referred to in this scenario when the American liquidator is communication with the UK courts.

It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.

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.

The European Insolvency Regulation (EIR), later amended to the EIR Recast, is the legal resource that applies to all EU countries (which includes Italy and Germany). The EIR Recast regulates the law applicable to cross border insolvency proceedings within the EU.

As the EIR Recast allocates jurisdiction to insolvency proceedings where the debtor's centre of main interests (COMI) is situated, insolvency proceedings must be commenced in Italy and the domestic insolvency laws in Italy will apply. The proceedings commenced in Italy will be considered the "main proceeding" however, pursuant to the EIR Recast, concurrent proceedings can also be opened in other jurisdictions where the debtor has an "establishment" and "carries out non-transitory economic activity with human means and assets". Therefore, if required, concurrent proceedings can be commenced in Germany . The subsidiary proceedings can be secondary to the "main proceeding" in Italy or can be independent.

A further applicable resource is the European Guidelines on Communication and Cooperation. Although non-binding, these rules provide a draft protocol for cooperation with foreign courts for jurisdiction which the EIR Recast applies to.

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 only applies to states which are members of the European Union and can only be applied by such jurisdictions. Therefore, as non-EU member states, courts in India, South Africa and Australia cannot apply the EIR Recast.

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.)

As both Italy and the Netherlands are part of the European Union, the European Insolvency Regulation (EIR) and EIR Recast would apply. The liquidation proceeding of Norton Cars were opened in Italy and the company's centre of main interests (COMI) is also located in Italy. Therefore, should a subsequent proceeding be commenced in the Netherlands then the Italian proceedings would be considered the "main proceeding" under the EIR Recast. As Norton Cars has an "establishment" in the jurisdiction, then under the EIR, proceedings may be commenced in the Netherlands.

The EIR Recast regulates the applicable law in proceedings and states that "the applicable law to insolvency proceedings and their effects shall be that of the state in which the proceedings were opened". As such, the Italian domestic insolvency laws apply to the assets located in the Netherlands and the real rights of security over the assets would be subject to Italian insolvency law even though they are situated in the Netherlands. The EIR also permits the Italian insolvency

representative to communicate and coordinate with the Netherlands' courts in order to obtain control of the assets.

The European Union has also taken significant steps to harmonise domestic insolvency laws and therefore it is likely that the treatment of security rights in Italian insolvency law will be similar if not the same as it is in Dutch insolvency law.

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 6 marks.)

Australia has adopted the UNCITRAL Model Law of Cross-Border Insolvency (MLCBI) and therefore the Italian insolvency representative would have to apply this as it does not require reciprocity. Under the MLCBI, a "security interest" is defined as a right in an asset to secure payment or other performance of obligations.

Provisions included in Australian insolvency law also permit co-operation between Australian and foreign courts and therefore the Italian insolvent estate representative will be able to communicate with the Australian courts to obtain control of the assets.

A key feature of the MLCBI is coordination and co-operation between courts. This is encouraged with the view of improving the efficiency of insolvency proceeding and administration of the insolvent estate.

However, although the MLCBI is applicable as it has been adopted by Australia, there is no existence of a mechanism between Italy and Australia that can be applied by the Italian insolvent estate representative. Therefore, in relation to the real security rights of the assets located in Australia, Australian insolvency law and legislation would apply.

3

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 42.5/50

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