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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Broadly speaking, a country's legal system is classified as having been based on English (or common) law or, what can be broadly described as, a civil law orientated foundation. Examples of countries that have adopted English (or common law) legal systems are: England (of course), the United States, and commonwealth jurisdictions such as Australia, the Cayman Islands, the British Virgin Islands and Hong Kong. Examples of countries that adopt civil law systems are: France, the Netherlands, Germany and Spain.

Speaking generally common law jurisdictions tend to favour universalism whilst civil law jurisdictions tend to favour territorialism.

This answer also required a discussion of the common law aspect of English law in greater detail, and in comparison with codification.
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 two principal broad doctrinal principles for cross-border insolvency are, on the one hand, universalism and, on the other, territorialism.

Put simply, proponents of universalism take the view that there should only one insolvency proceeding covering all of the debtors assets and debts worldwide. In other words, their view is that: there should be a worldwide insolvency law; that all the debtors assets should be included in the proceeding; that the officeholder should be provided with the tools necessary to control and obtain the debtor's assets; and that all creditors worldwide should have the opportunity to participate in the proceedings and that all claims should be treated on an equal basis. Proponents of universalism cite globalisation and the growth of the complexity and international focus of commercial transactions and relationships as reasons why universalism should be adopted. **There is scope to explain forum and COMI in greater detail**

Proponents of territorialism take a viewpoint that is diametrically opposed to universalism. Unlike universalism which envisages one global insolvency proceeding with creditors from across the world joining in on an equal basis, territorialism is based on the premise that insolvency proceedings may be commenced in every state /jurisdiction in which the debtor holds assets but that they should be territorially limited and restricted to assets within that particular state. Domestic laws would apply to each proceeding. Critics of territorialism criticise the theory on the basis that it could lead to inconsistent decisions in different jurisdictions (i.e., a debtor could be bankrupt in one jurisdiction but not in another).

Modified universalism is seen by some as a more practical, real-world approach to cross border insolvency law that the extremes of universalism and territorialism. In reality, it is an attempt to appease proponents of bot universalism and territorialism by shoe-horning aspects of the two polarized principals into a modified theory. In cross border insolvency cases, it envisages that a "main proceeding" will take place in the jurisdiction in which it is determined that the debtor has a "centre of main interests". Further, it is envisaged that that main proceeding would be supported by ancillary

or secondary proceedings in other jurisdictions in which the debtor has assets/liabilities and that the "first" and "second" courts will engage co-operatively to manage the proceedings in a way which is "joined up" and universally fair to the debtor's creditors.

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.

Some of the countries in the Latin American states have entered into long-lasting multilateral agreements that address the management of the international insolvency issues. Those treaties (between different groups of Latin American states) are: (a) the Montevideo Treaties (1889) and (1940) and (b) Havana Convention on Private International Law (1928).

The 1889 Treaty has been ratified by (a) Bolivia, (b) Colombia, (c) Paraguay, (d) Peru and (e) Uruguay. The 1889 Treaty addresses personal and corporate insolvency and it deals with the question of jurisdiction based on the debtor's commercial domicile. There followed the Montevideo Treaty on International Commercial Terrestrial Law (1940) which contained Title VIII on Bankruptcy and a 1940 Treaty on International Procedural Law which contains Title IV on Civil Meetings of Creditors. The 1940 Treaties have been ratified by only three of the countries that ratified the 1889 Treaty – i.e., (a) Argentina, (b) Paraguay and (c) Uruguay. Since not all the parties to the original 1889 Treaty are parties to the 1940 Treaties, a careful analysis of the application law is required where an insolvency proceeding involves several of the member states.

The other primary multilateral arrangement in Latin America is the Havana Convention which was concluded between the following states: (a) Bolivia, (b) Brazil, (c) Chile, (d) Costa Rica, (e) Cuba, (f) Dominican Republic, (g) Ecuador, (h) El Salvador, (i) Guatemala, (j) Haiti, (k) Honduras, (l) Nicaragua (m) Panama, (n) Peru and (o) Venezula. Notably, on Bolivia and Peru are parties to both the Montevideo 1889 Treaty and the Havana Convention; and major Latin countries Argentina, Colombia, Mexico, Paraguay and Uruguay did not ratify the Treaty and are not parties.

As to differences, the Havana Convention is more supportive than the Montevideo Treaties of an approach that allows for a single proceeding with universal effect throughout the region. Notwithstanding this, the Havana Convention provides that it is possible for there to be concurrent proceedings provided that the debtor is conducting operations entirely separately economically. In that respect, it is similar to the Montevideo Treaties in providing for a single proceeding if the debtor is only occasionally trading in more than one State. The Havana Convention does not provide procedures for the co-operation or co-ordination of the Courts in different jurisdictions where there are 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 do not agree that the terms "bankruptcy" and "insolvency" should be used interchangeably. The term "bankruptcy" and/or to be made "bankrupt" are concepts that apply, under the umbrella of the more general term "insolvency", and apply specifically to individuals. Using "bankruptcy" and "insolvency" interchangeably, only serves to introduce ambiguity.

First, it is plain from the origins of the term "bankruptcy" in Italian (i.e., *banca rotta or "break the bench"*) that what was being described was a specific consequence befalling an individual merchant when he was unable to pay his debts (i.e., his means of trade were damaged). Whilst the term "bankruptcy" has evolved significantly in the period since the 13th century, the term "bankruptcy", properly construed, still relates to an event (i.e., being made bankrupt by Court order) that happens to an individual. Under English law, the concept of "bankruptcy" is a distinct aspect of the law and it relates solely to one outcome which can follow an individual if he/she is insolvent. It is dealt with under Part IX of the Insolvency Act 1986. **There is some scope to elaborate regarding terminology matters.**

The essential characteristics of "bankruptcy" is that: (a) an individual is declared bankrupt on application of a creditor or himself on the basis that he is unable to pay his debts, (b) the Trustee in Bankruptcy is appointed to collect and distribute the bankrupt's assets to creditors, (c) the bankrupt is, for a period, unable hold positions such as directorships and would need to declare the fact of his bankruptcy to his professional body if he were, for example, a solicitor or accountant, (d) after a period of time, the bankruptcy would be discharged and the bankrupt would have a "fresh start" without any liability to his (former) creditors.

By comparison, the term "insolvency" is far more fluid both historically and in its usage in modern legal and commercial contexts. It is broadly accepted that "insolvency" is to mean that either an individual or a corporate entity is in (or is approaching) financial difficulty. Unlike "bankruptcy", the term "insolvency" is incapable of being pinned down to an event (i.e., as with a bankruptcy order). Indeed, there are differing definitions for when an individual or entity is "insolvent". It could be said that an individual or company is insolvent if they/it does not have enough assets to pay their/its liabilities as they fall due (otherwise known as the "**Cash Flow Test**"). Similarly, it could be said that an individual or company is insolvent if its liabilities exceed their/its assets (the "**Balance Sheet Test**"). Notably, English law incorporates both the Cash Flow Test and the Balance Sheet Test into the statutory test to determine corporate insolvency (see section 123 of the Insolvency Act 1986). Therefore, pinning down precisely what is meant by "insolvency" or determining precisely when an individual or company is insolvent is difficult to do particularly in circumstances where, for example, a company could be solvent under the Balance Sheet Test and insolvent under the Cash Flow Test. Alternatively, a company could be insolvent on day 1 of the month pursuant to the Cash Flow Test but be solvent on day 21 pursuant to that same test.

It would also be beneficial to consider the universal characteristics raised by Wood

The essential characteristics of "bankruptcy" is that: (a) an individual is declared bankrupt on application of a creditor or himself on the basis that he is unable to pay his debts, (b) the Trustee in Bankruptcy is appointed to collect and distribute the bankrupt's assets to creditors, (c) the bankrupt is, for a period, unable hold positions such as directorships and would need to declare the fact of his bankruptcy to his professional body if he were, for example, a solicitor or accountant, (d) after a period of time, the bankruptcy would be discharged and the bankrupt would have a "fresh start" without any liability to his (former) creditors.

Further, there are practical differences when “bankruptcy” / “insolvency” involves a corporation rather than an individual. As set out above, "bankruptcy" is in many English law jurisdictions a specific type of order that can be made when an individual is unable to pay his debts. In those jurisdictions, it does not apply to corporations. By comparison there are various options available to both companies and individuals if they are "insolvent." In England, an "insolvent" company could make an arrangement with its creditors or go into administration. Similarly, an individual could make an arrangement with his creditors as an alternative to bankruptcy. One of most stark differences is that where a company is insolvent and is wound up, it will go through liquidation and cease to exist (be struck off the register). Obviously, this is at odds with the concept of a "fresh start" for individual discharged bankrupts.

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

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.

It can be challenging to deal with the assets of insolvent estates that are situation in foreign States, that is, States where an insolvency proceeding has not yet been commenced. The first challenge is that one must understand the laws of the foreign jurisdiction. In some jurisdictions, there are statutory provisions in place which deal specifically with this scenario. In other jurisdictions, there are no statutory dispensations but applications can be made to local courts on an adhoc basis to allow a foreign insolvency representation to deal with assets in that jurisdiction. Further, courts in common law states can provide a remedy in the absence of statutory rules or where there is a lacuna in the applicable legislation.

The other challenge is understanding whether a treaty or convention exists that is applicable as both sources can provide guidance as to how to regulate these situations.

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

1

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" consists of various sources of law to include: (a) domestic legislation, (b) international legislation, (c) conventions and treaties/multi-lateral agreements and (d) case law (which may, or may not, have binding/persuasive effect). "Hard law" has had some success in providing solutions to the challenges of international insolvency. For example, domestic legislation has been used to adopt into law the UNCITRAL Model Law - in England the Model Law was adopted in the form of the Cross-Border Insolvency Regulations 2006. This was a progressive step because a key feature of the Model Law is the power granted to courts to provide a range of discretionary assistance once foreign proceedings have been recognised. But progressive steps taken by the legislature of a State like, for example, adopting the Model Law, cannot, on their own, provide an answer for all the challenges of international insolvency. This is because the Model Law is essentially a template piece of legislation that has been adopted with differences by different States. It has also been interpreted differently by different state courts. Essentially, it can be the case that some sources of "hard law" like legislation assist the challenges of international insolvency only for other sources of "hard law" (such as case law)

to muddy the waters by the Courts in different jurisdictions analysing different law in different ways. This creates mixed results and makes it more difficult to predict or advise on likely outcomes.

"Soft law" consists of sources such as draft legislation or guidance produced by multilateral organisations. The most obvious example of draft legislation is the Model Law which has been adopted by various states and has gathered momentum as an influential response to international insolvency law. The Model Law has also been the most successful "soft law" development and has arguably been more influential that "hard law" because it can be adapted prior to adoption by states.

3

Marks awarded 9 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 insolvency representative may apply under Schedule 1, Chapter III, Article 15 of the Cross-Border Insolvency Regulations 2006 for recognition of the American insolvency proceedings. This is the domestic legislation that was used by the UK to adopt UNICTRAL's Model Law. If American insolvency proceedings are recognised, it will allow the representative to administer the insolvent estate without having to commence parallel proceedings in England.

Consideration should be given to the guidance provided for in pertinent case law on the recognition of foreign (USA) insolvency orders in England, namely: (1) *Maxwell Communication Corporation plc* and (2) *Rubin v. Eurofinance SA*.

It would be beneficial to note that S 426 is not applicable as the US is not designated

3

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 EU (Recast) Insolvency Regulation applies to both Italy and Germany as they are Members States of the European Union. Art 3(1) provides that determining where COMI is located will inform the question as to where proceedings should be initiated. Since Norton's COMI is (now) Italy, the main proceeding should be commenced there and a secondary proceeding could brought in Germany because, on the facts presented, Norton Cars has an "establishment" in Germany.

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, they're not EU Member States and, therefore, are not bound by the EU (Recast) Insolvency Regulation.1

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.)

Italian law will apply unless a secondary proceeding is commenced in the Netherlands. This is permissible because the Netherlands is a EU Member State and, therefore, is bound by the EU (Recast) Insolvency Regulation. Arts 8-18 address rights relating to real property.
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

(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 could apply its own laws because it has adopted the UNICTRAL Model Law. Australia's laws on real rights of security would apply unless they are in conflict with the applicable Italian law (i.e., the laws where the main proceeding is being conducted).

There is scope to elaborate

2

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 38/50

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