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.

Early Roman law largely formed the legal framework of civil law jurisdictions. Civil law jurisdictions include most of continental Europe, most of Latin America, and certain African countries (including Angola and Mozambique).

English Law procedures spread throughout the common law States, which include Australia and India.

Both systems enforced coercive measures with respect to defaulting debtors. In early Roman times, pursuant to Table 3 of the Twelve Tables, a debtor pledged their own body for debt repayment. The debtor could be imprisoned, sold as a slave, executed and even cut into pieces to distribute to creditors. In English Law, defaulting debtors could be imprisoned.

In both systems, debt collection has developed from basic individual debt collecting to collective debt collecting / formal insolvency procedures.

Important developments in English Law include:

- The Statute of Anne 1705 which introduced the notion of the statutory discharge of debt. This had a significant impact on the development of insolvency policy.
- The English Bankruptcy Act of 1542, which contained two fundamental principles which formed the basis of modern insolvency laws – (i) collective participation of creditors, and (ii) pari passu distribution among creditors of the debtor's available assets.

With regards to the concepts of universalism and territorialism, some consider that civil law countries are more likely to take a territorial approach to jurisdiction. Common law States (those rooted in English law) are more likely to side with universalism.

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

1.5

Question 2.2 [maximum 3 marks]

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

The key principle of universalism is that there should only be one insolvency proceeding that covers all of a debtor's worldwide assets and liabilities. Regardless of location / jurisdiction, all of the debtor's assets are included in the insolvency proceeding and all creditors may participate in the proceedings, with their claims treated equally. **There is scope to elaborate regarding forum and COMI**

Modified universalism allows for more than one insolvency proceeding. It is an approach that allows for the "main proceeding" to be opened in the jurisdiction where the debtor has its centre of main interests ("**COMI**"). The main proceeding is supported by secondary or ancillary proceedings in

another / other State(s). For an effective insolvency process, it is important that the respective courts cooperate.

Territorialism opposes the concept of universalism. Territorialism is an approach that allows for multiple insolvency proceedings to be commenced and run concurrently in every jurisdiction where a debtor holds assets. Each proceeding is territorially restricted to the assets in its jurisdiction and in respect of which creditors may file claims. A key principle of territorialism is that national interest is protected before any assets are transferred abroad.

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.

The following initiatives have been undertaken to assist with resolution of international insolvency issues in Latin America.

1. The Montevideo Treaty on International Commercial Law (1889) – ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay.
2. The Montevideo Treaty on International Commercial Terrestrial Law (1940) – ratified by Argentina, Paraguay and Uruguay.
3. The Havana Convention on Private International Law (the Bustamante Code) – ratified by 15 States, (not including Argentina Colombia, Paraguay and Uruguay).

The member States of the Montevideo Treaties and the Bustamante Code differ. Careful analysis is therefore required when considering which treaty / treaties to apply with regards to international insolvency between certain States.

The Montevideo Treaties and the Bustamante Code also differ with respect to the extent to which they allow for a single proceeding with universal effect throughout the member States.

The Bustamante Code allows for a single proceeding with universal effect throughout its region, even if the debtor is occasionally trading in multiple States. However, where a debtor has economically autonomous businesses in multiple Havana Convention States, it is possible for there to be concurrent proceedings. The Havana Convention does not provide procedures for cooperation between concurrent proceedings.

The Montevideo Treaty (1889) allocates bankruptcy jurisdiction based on a debtor's commercial domicile. If a debtor is domiciled in one treaty State, even if the debtor is occasionally trading in multiple States, the Treaty prescribes one set of proceedings in the commercial domicile. However, if a debtor has economically autonomous businesses in multiple treaty States, the Treaty allows for concurrent proceedings.

4

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.

I disagree that the terms "bankruptcy" and "insolvency" can be used interchangeably. Although the terms are used as synonyms in many systems, I consider them to mean slightly different things.

"Insolvency" is a state of financial distress, whereby an individual or corporation (the debtor) is unable to pay their debts as they fall due (cash flow insolvency) and/or the debtor's liabilities exceed its assets (balance sheet insolvency).

The term "bankruptcy" only applies to individuals and is a formal legal process / proceeding that follows when an individual has been declared insolvent (or bankrupt). I would refer to the corporation equivalent as a formal "insolvency proceeding", for example a liquidation.

I understand that the same meaning of "bankruptcy" is not ascribed to in the US, where an insolvent company can file for bankruptcy.

Differences arise when an insolvency process involves a corporation rather than an individual. These differences are, in part, attributable to the objectives of insolvency for individuals versus corporations.

According to Sealy and Hooley, an objective of insolvency for an individual is to protect the debtor from harassment by their creditors. Insolvency processes provide the debtor with breathing space while their debts are reduced by present and future income of the estate of the debtor.

An insolvency process for an individual provides an opportunity for a fresh start, particularly in cases where the insolvency the debtor is not as a result of their poor conduct.

The debtor's personal circumstances are considered and therefore not all income into the personal estate must be used for settling the individual's debt. In some cases, an individual's assets can be deemed "exempt" from the insolvency process and retained by the debtor in order for them to maintain them / their dependents. An equivalent concept is not available to corporations.

According to Sealy and Hooley, for corporations, to the extent possible, an objective of an insolvency process is to preserve the *business* in whole or in part. This does not necessarily mean preserving the *company*.

Other differences are attributable to the nature of the type of debtor. For example, a corporation is dissolved once its affairs have been "wound up". However, an individual cannot be "dissolved" after bankruptcy and instead is discharged of their unpaid debt and able to continue without the pre-bankruptcy debt.

In situations where it is found that an officer of a corporation has acted improperly, an objective of the insolvency process is to impose personal liability on the responsible person.

This is a 7 mark sub-question and elaboration is warranted, including with respect to essential characteristics identified by Wood.

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.

There are a number of challenges that arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation – examples of which are set out below.

The differences between domestic insolvency laws (and even essential areas of general law) is a significant problem. State to State, domestic insolvency systems differ (sometimes substantially) in policies, procedures and approach – e.g., country-specific laws in respect of labour issues.

Omar states that *"[a]part form the general situation in conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one jurisdiction, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws."*

There are even differences in insolvency terminology between States. Friman discusses the difficulty in defining the term "insolvency" at an international level and the problem this causes in finding a common insolvency language.

Because of these differences, it is very difficult to develop and agree on a single set of global cross-border insolvency laws.

Further to the above, Westbrook, a supporter of universalism, identified the following nine key issues in cross-border cases:

1. Standing 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.

With regards to point 1 above, judgements given during the course of insolvency proceedings may not be "recognised" in foreign jurisdictions. Foreign judgements can raise questions with regards to which Court issued the judgement. This can present significant challenges for officeholders to carry out their duties. E.g., a Cayman Islands registered entity may hold millions of USD in a bank account in Hong Kong. Certain banking institutions in Hong Kong will not release cash assets overseas without being provided with a recognition order of the liquidation from the Hong Kong court. Recognition applications can be expensive and in some cases unsuccessful.

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 legally binding instruments. In contrast, "soft law" is not legally binding. Examples of "soft law" include agreements, recommendations, guidelines and standards. Both approaches are considered as part of seeking to harmonise and regulate international insolvency issues.

In the context of international insolvency, a number treaties ("hard law") have been developed, to varying degrees of success – examples below. Treaty member States are legally bound by the rules of the treaty.

- The Nordic Bankruptcy Convention of 7 November 1933 is an example of a successful multilateral treaty – ratified by Denmark, Finland, Iceland, Norway and Sweden. According to the convention, an insolvency (referring to both individuals and corporations) declared in one treaty State is automatically recognised in another treaty State as applying to the debtor's property in those countries.
- The Istanbul Convention, Council of Europe Treaty Series Number 136 is an example of an unsuccessful treaty. An insufficient number of European member States ratified the treaty for it to enter into force.

In the context of international insolvency, various "soft law" approaches have been undertaken to promote harmonisation of domestic insolvency laws. The following are examples of legislative framework set out by international bodies.

- In the mid 1990s, UNCITRAL developed a Model Law on Cross-border Insolvency, draft legislation that UNCITRAL recommended member States adopt (modifications allowed). This is considered to be the most successful "soft law" approach to date.

- In 2004, UNCITRAL put into effect a Legislative Guide on Insolvency Law. This guide was to be referred to by individual States when drafting new insolvency laws or reviewing their existing insolvency laws.

- In the early 21st century the World Bank also produced guidelines (which have been revised several times) – Principles for Effective Insolvency and Creditor / Debtor Regimes.

- In 2010 to European Union published a report on the Harmonisation of Insolvency Law at EU Level. The report identified a number of key differences between domestic and insolvency laws of EU countries and where harmonisation of these would be beneficial.

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 America and England have adopted the UNCITRAL Model Law ("**Model Law**") on Cross-Border Insolvency.

The American insolvent estate representative can refer to the Model Law as a source to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

They can also refer to common law. In the House of Lords decision in *McGrath v Riddell* Lord Hoffmann referred to the court's *"jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution"*.

This case involved the local liquidators of an insolvent Australian company who wanted to realise and protect the company's assets in England. Lord Hoffmann's decision referred to the English courts' co-operation with foreign courts, specifically in relation to the foreign company's assets, pursuant to English cross-border insolvency law and stated that:

"[t]he primary rule of private international law ... applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

Section 426 of the Insolvency Act 1986 (UK) allows courts of certain designated non-UK jurisdictions to request assistance including for the transfer of assets from an English insolvency. However, this will not provide assistance in this case as America has not been designated a "relevant country" under section 426 in the Insolvency Act.

4

Question 4.2 [Maximum 4 marks]

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

Italy and Germany are member States of the European Union ("**EU**").

The European Insolvency Regulation ("**EIR**") (2000), subsequently reviewed to become the current EIR (Recast) 2015 ("**EIR Recast**") (applicable since mid-2017), applies to cross-border insolvency matters between EU member States.

The EIR allocates primary jurisdiction based on where the "centre of the debtor's main interests" is situated. Therefore, in this case, the main insolvency proceeding of Norton Cars Inc should be opened in Italy.

The EIR does also allow for subsidiary territorial proceedings in other member States if the debtor has an "establishment" in that jurisdiction – defined as meaning *"any place of operations … where the debtor carries out a non-transitory economic activity with human means and assets".*

Given that Norton Cars Inc's main operations transpired in Germany, this jurisdiction appears to meet the definition of an "establishment" and therefore justifies ancillary proceedings to be opened in Germany, should this be required / desired. **Italy is the COMI**

The EU has also drafted treaties and conventions to address international insolvency matters between its member States.

3

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 - these States' courts cannot apply the EU (Recast) Insolvency Regulation because they are not member States of the EU.

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.)

Italy and the Netherlands are member States of the EU.

The EIR Recast, applies to cross-border insolvency matters between EU member States.

The EIR Recast allocates primary jurisdiction based on where the "centre of the debtor's main interests" is situated – in this case, Italy.

Therefore, Italian law will apply to both the insolvency proceeding and with regard to any cross-border insolvency matters between two EU member States (including the real rights of security situated in the Netherlands).

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 is not an EU member State.

An insolvency proceeding in Australia would be governed by Australian insolvency law, which has adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**").

Australian law would govern the real rights of security situated in the jurisdiction.

With regards to the Italian insolvent estate representative of Norton Cars Inc seeking cooperation with the Australian courts and realise and protect the Australian asset, they could benefit from / refer to certain sections in Australian insolvency law and the fact that Australia has adopted the Model Law.

- Australia has statutory in sections 580-581 of the Corporations Act 2001 (Cth) which permit co-operation between Australian and foreign courts (in this case Italy) in "external administration" matters, such as liquidations. It could be argued that these sections are of even more importance in this case given that Italy has not adopted the Model Law.

- UNCITRAL has finalised a Model Law on Secured Transactions (2016), which is an attempt at harmonise the rules relating to security interests around the world.

Greater elaboration of the MLCBI and general application of Australian law for securities is relevant.

1.5

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41.5/50

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