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.

The reference text provides a historical perspective on the development of insolvency or bankruptcy laws in countries with roots in both civil law and English law. Here's a brief comparison of these systems:

Civil law systems:

- Rooted in Roman law: Civil law systems traced their origins back to Roman law, where the execution of judgments and debt execution had the debtor pledging their own body for loan repayment. This could lead to extreme measures like imprisonment, death sentences, or even slavery.
- Evolution from individual to collective debt collection overtime, civil law systems developed collective debt collecting mechanisms (insolvency law) from individual debt collection procedures. This evolution was influenced by Roman procedures like “cessio bonorum” (assignment of property) and “distractio bonorum” (forced liquidation of assets).
- Influence of Lex Mercatoria: insolvency law in Europe under civil law systems was further shaped by the Lex Mercatoria, customs and usages among merchants.
- Gradual shift towards humane approaches: initially, these systems favored creditors with harsh measures, but they later evolved to incorporate concepts like the discharge of debts, providing a more humane approach.

English law systems:

- Rooted in English common law: the development of insolvency law in English law systems has started in the 16th century.
- The provision for imprisonment for debt was introduced in the late 13th century. Which means, prior to the insolvency law.
- Transition to bankruptcy laws: the first English bankruptcy act of 1542 introduced the form of compulsory sequestration for dishonest and absconding debtors, viewing them as quasi criminals. It also established the principles of collective participation by creditors and a pari passu distribution of assets, which remained foundational in modern insolvency laws.
- Evolution towards true bankruptcy statutes: the Act of Elizabeth in 1570 is considered one of the first true bankruptcy statutes. It introduced additional acts of bankruptcy but did not include a discharge provision until the 18th century.
- Statutory discharge: the statute of Anne in 1705 introduced the notion of statutory discharge, subject to debt or compliance.

In summary, countries with roots in civil law have their historical insolvency systems influenced by roman law and collective debt collection procedures. In contrast, English law systems have a more recent history of insolvency law development, with focus on bankruptcy statutes, discharge provisions, and principles of collective participation and equal asset distribution. These historical foundations have shaped the modern insolvency laws in these respective legal systems.

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.

There are three key principles in the context of international insolvency: universalism, modified universalism, and territorialism. Here are the differences between these principles:

Universalism	Modified Universalism	Territorialism
Advocates that there should be one insolvency proceeding covering all of the debtor´s assets and debts worldwide	Is a compromise approach with both Universalism and Territorialism	Insolvency proceedings can be initiated in every State or jurisdiction where the debtor holds assets
It emphasizes that once insolvency proceedings are opened, no other insolvency proceedings or forms of execution should be possible for the debtor´s assets	It involves a "main proceeding" in the State where the debtor´s COMI is determined, supported by secondary or ancillary proceedings in other States	These proceedings are territorially limited to the property within the State where the proceedings are opened
The chosen State where the debtor´s centre of main interests (COMI) is located is typically the forum with jurisdiction	In this approach, courts dealing with the main and secondary proceedings are expected to cooperate with each other	Prioritizes the protection of local interests and local creditors within the domestic market
It aims to provide a unified and consistent approach to cross-border insolvency cases and treats all creditors worldwide equally	It seeks to balance the benefits of universalism with the practical challenges and political difficulties associated with it	Multiple insolvency proceedings can run concurrently for the same debtor, and the proceedings have limited impact outside the jurisdiction where they are opened

In summary, universalism advocates a single global insolvency proceeding, while territorialism allows multiple local proceedings. Modified universalism attempts to strike a balance by combining a main proceeding with secondary proceedings to address practical and political challenges while maintaining some elements of universalism. And territorialism maintains that the proceedings should take place in various places related to the debtor.

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.

Latin American States have undertaken initiatives to address international insolvency issues, primarily through multilateral agreements. Two key initiatives are the Montevideo Treaties (1889 and 1940) and the Havana Convention on Private International Law (the Bustamante Code, 1928). These initiatives aim to provide a framework for handling cross-border insolvency cases in the region.

1. Montevideo Treaties:

- Consists of: Montevideo Treaty on International Commercial Law (1889) and Montevideo Treaty on International Commercial Terrestrial Law (1940).
- Contain provisions related to bankruptcy and insolvency matters.
- The 1889 Treaty covers personal and corporate insolvency and allocates bankruptcy jurisdiction based on the debtor´s commercial domicile. It involves several Latin American States.
- If a debtor has a commercial domicile in one treaty State, concurrent proceedings may take place.

- Only three of the original treaty States have ratified the 1940 treaty, making it essential to analyse which treaty applies in international insolvency cases among Montevideo Treaty States.

2. Havana Convention:

- Consists of: The Havana Convention, concluded 1928, and includes a broader group of Latin and Middle American States.
- This Convention is more supportive of an approach allowing for a single insolvency proceeding with universal effect through its region.
- Its first chapter, titled "Unity of Bankruptcy or Insolvency", supports a single proceeding if the debtor has only one civil or commercial domicile.
- Acknowledges the possibility of concurrent proceedings in its member States but does not provide procedures for cooperation or coordination in such cases.
- Chapter II, titled "Universality of Bankruptcy or Insolvency and Their Effects", enforces the extraterritorial effect of insolvency proceedings commenced in one member State in another member State.

Differences:

The Montevideo Treaties focus on allocating jurisdiction based on the debtor´s commercial domicile and allow for concurrent proceedings when the debtor has businesses in multiple treaty States. However, the second treaty have limited ratification.

The Havana Convention is more supportive of a universal approach, allowing a single proceeding to have universal effect within its region. It enforces court decrees extraterritorially but does not provide specific provisions for cooperation or coordination in concurrent proceedings.

In summary, Latin American States have made efforts to address international insolvency issues through multilateral agreements. While in the Montevideo Treaties the allocation of jurisdiction is based on the debtor's domicile in concurrent proceedings, The Havana Convention supports a more universal approach with extraterritorial enforcement but lacks specific provisions for coordination in concurrent proceedings.

There's scope to elaborate on differences with respect to signatories

3.5

Marks awarded 8 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

It is said that the terms "bankruptcy" and "insolvency" may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to "bankruptcy" and "insolvency", (ii) the essential characteristics of "bankruptcy" and "insolvency" and (iii) any differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

I agree with such statement specially because during the current course, we were presented with several systems where such interchange occurs. Nevertheless, I believe since there is no compatibility of the various legal systems when regulating this area of law, and in some of them such interchange does not happen, it seems risky and inappropriate to use the terms as synonyms.

(i) In various legal systems, there is a distinction between the terms "insolvency" and "bankruptcy". For instance, in Australia, "insolvency" typically pertains to the financial distress of a corporation, while "bankruptcy" is often associated with the insolvency of an individual. While these terms often convey similar concepts, a key differentiation can be noted: "insolvency" may refer to the financial state of a debtor, where their liabilities surpass their assets (referred to as balance sheet insolvency), or when the debtor cannot meet their debt obligations due to cash flow issues (termed cash flow or commercial

insolvency). On the other hand, “bankruptcy” generally denotes the formal initiation of bankruptcy proceedings. It's important to note that these terms are used interchangeably in many legal systems.

(ii) While there are certain commonalities between individual (consumer insolvency or bankruptcy) and corporate insolvency, there are also significant distinctions. Notably, the concept of exempt or excluded assets only comes into play in the context of individual insolvency. In such cases, some legal systems permit insolvent individuals to retain specific assets necessary for their own and their dependents´ well-being. **Elaboration is warranted regarding essential characteristics**

(iii) According to Sealy and Hooley we can distinguish between the objectives of insolvency/bankruptcy for individuals and corporations, as follows:

Individuals	corporations	both
to shield the debtor from undue harassment by creditors	to, if feasible, preserve the business or viable components thereof, even if it doesn't necessarily entail saving the entire company	To ensure equitable distribution (pari passu) of assets to the extent possible, except when certain creditors hold priority
To offer the debtor an opportunity for a fresh start, particularly in cases where the depth receptions or conduct are not the primary cause of insolvency	in cases where personal liability has been abused, to impose personal liability on responsible individuals	To encourage secured creditors to deal fairly with both the debtor and other creditors
to reduce indebtedness by allowing the debtor to make contributions from their present and future income to the estate, taking into account their personal circumstances		To conduct investigations into the causes of insolvency recovering voidable transactions in cases where the insolvent debtor improperly dealt with assets

5.5

Question 3.2 [maximum 5 marks]

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

One could argue that challenges associated with cross-border insolvency range from the absence of a global system of insolvency laws and the universal court to handle such cases, to the absence of standardized terminology (Friman). Addressing cross-border insolvency, particularly, necessitates acknowledging the challenge posed by navigating domestic laws and the potential conflicts that may arise (Omar). Domestic laws typically exert a direct influence on insolvency proceedings concerning assets within a specific country. The complexity intensifies when these assets are subject to special forms of secured or priority credit.

While some states have statutory laws offering solutions for such scenarios, others rely on their courts to decide on a case-by-case basis. In jurisdictions following common law principles, courts may be approached to provide remedies in the absence of statutory rules, or in situations where legislation exists but leaves gaps in provisions. In these instances, private international law principles may come into play, or there might be a treaty or convention governing resolution of such situations.

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

1.5

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.

In the realm of international insolvency, two distinct categories of legal instruments or approaches are recognized: "hard law" and "soft law".
Firstly, "hard law" comprises legally binding international agreements, treaties, or conventions that possess a direct and mandatory influence over the involved parties. These instruments establish specific rules, obligations, and procedures that signatory states or parties are obligated to adhere to. Noncompliance with hard law can result in legal consequences, such as sanctions or enforcement actions. In the context of international insolvency, hard law mechanisms can include international treaties or conventions that delineate the real solution of cross-border insolvency cases, providing precise and enforceable guidelines for the treatment of debtors and creditors. As examples of hard law, we can mention the Convention of Havana (1928) in Central and Latin Americas and the European Insolvency Regulation (EIR 2000) made by the European Union to regulate the matter within its territory. The EIR has been amended a few times, but its core structure remains the same and is considered a huge success in the matter.
Conversely, "soft law" refers to non-binding or voluntary guidelines, principles, or codes of conduct aimed at fostering cooperation and coordination among states or parties without imposing legally binding obligations. The United Nations Commission on International Trade Law (UNCITRAL) has developed the Model Law on Cross-Border Insolvency (MLCBI) which is the best triumphant example of soft law in this field, but we can also name as example, the Model Treaty developed by the Hague Conference.
Soft law instruments lack the same level of legal enforceability as hard law and do not necessitate mandatory compliance, typically carrying no legal repercussions for noncompliance. In the context of international insolvency, soft law strategies may involve recommendations, best practices, or guiding principles designed to encourage cooperation and alignment of insolvency laws across diverse jurisdictions. These instruments seek to facilitate a more collaborative and efficient resolution of cross-border insolvency cases without imposing legal obligations.

3

Marks awarded 10 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 general information given by the text mentions that the Norton Carn Inc headquarter only moved out of England after it was no longer part of the European Union. The headquarter of a company usually comprises of its main operations and its management structure, and the Model Law calls it Center of Main Interest (COMI), which usually holds jurisdiction for the main insolvency proceeding.
So, in this case, the American insolvency representative may request recognition from an English Court in the terms of the EIR Recast of 2015. The referred legal document extended terms of cooperation and coordination in insolvency proceedings used within the European Union among its countries to outside of its range. The EIR Recast is an amendment to the EU Insolvency Regulation of 2000.

This sub-question required you to consider the MLCBI, common law and the non-applicability of s426.

0.5

Question 4.2 [Maximum 4 marks]

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

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

Since the question involves Italy and Germany and both are member states of the European Union, the legal source to be used in the case is the European Insolvency Regulation - EIR.
As to the country where the main proceeding should take place, the EIR, which is an adoption of the MLCBI - Uncitral, determines that the main proceeding should be opened in the country where the COMI is established.
The question proposition gives the information that the COMI of Norton Cars Inc was established in Italy when England left the EU, and then explains that the main operations were happening in Germany while the management was happening in Italy. According to the MLBCI, COMI stands for center of main interests meaning the main administration which in the current question could be taken as a synonym of management and therefore is placed in Italy.
In summary, the main proceeding should be opened in Italy, where the COMI is and be based on the EIR.

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?

The mentioned countries are not member states of the EU therefore they are not expected to recognise an EU insolvency representative based on the EIR, most probably they will refer to their private international law rules and regulations on cross-border insolvency matters. Nevertheless, if the situation was the other way around, that would be the document - EIR Recast – that EU member states would use to recognise representatives from the mentioned nations, since that document allows for cooperation and coordination with countries outside 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.)

Since the Netherlands is a member state of the European Union, the legal document to be used is the EIR/EIR Recast. It is important to mention that the EIR does not address directly the subject of assets with secured interests but establishes the foundation for coordination and cooperation between the countries. The domestic law (private international and cross-border insolvency) will be crucial to the rulings in this matter.

Greatly analysis was required with respect to the EIR and its application.

2

(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.)

Normally, in cases like this, it would be necessary to check the Australian private international law rules as well as its rules on cross-border insolvency. Australia has adopted the MLCBI – Cross-border Insolvency Act (2008), and the country might also have a specific treaty with the European Union on the subject which could bind it to cooperate and coordinate with the Italian insolvency representative in this case.

Take care to answer the sub-question in full.

1

Marks awarded 8.5 out of15

*** End of Assessment ***

TOTAL MARKS AWARDED 35.5/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.