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.

Some examples of countries whose insolvency law systems have historical roots in common law (or English law) are those of England and Wales, the United States, Ireland and Australia.

In England and Wales, the Insolvency Act 1986 (as amended by, *inter alia*, the Insolvency Act 2000 and the Enterprise Act 2002) is the main piece of governing legislation for corporate and personal insolvencies. England and Wales is an example of a jurisdiction that has a single unified piece of legislation for corporate and personal insolvencies rather than separate pieces of legislation for each.

In Ireland, the most important piece of legislation for corporate insolvencies is the Companies Act 2014, which is amended regularly. For personal insolvencies, the main pieces of legislation are the Personal Insolvency Act 2012 and the Bankruptcy Act 1988, both of which have also been amended on a number of occasions.

In the United States, the Bankruptcy Code of 1978 is a federal statute which provides for procedures for liquidations, municipalities, reorganisations/rescues, family farmer and rescheduling of debt in chapters 7, 9, 11, 12 and 13. Chapter 15 contains the adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency for international insolvencies. The United States is a classic example of a pro-debtor rather than a pro-creditor system due to its liberal approach to discharges of debt.

In Australia, like Ireland, there is no single unified Bankruptcy or Insolvency Act. The Corporations Act 2001 is the primary piece of legislation for corporate insolvencies and the Bankruptcy Act 1966 is the dominant piece of legislation for personal insolvencies.

In terms of countries whose insolvency law systems have historical roots in civil law, some examples are those of the Netherlands and France.

The Netherlands is presently going through a reform of its insolvency laws. By way of example, the Dutch Scheme of Arrangement commenced on 1 January 2021. The Netherlands had historically been grouped with many other West-European countries who were seen as pro-creditor jurisdictions. This was so until the introduction of the concept of a "fresh start" in preference to over-indebtedness.

In France, like in the Netherlands, the Commercial Code of 1807 was viewed as being particularly harsh to debtors. This was somewhat revised in 1889 and a complete revision of the system took place in 1967 which introduced a reorganisation procedure with a moratorium and court approved plan. In this way, the French system has moved away from its historically pro-creditor stance.

Generally speaking, countries whose insolvency law systems have historical routes in common law tend to be more pro-debtor systems whereas countries whose insolvency law systems have historical routes in civil law tend to have more pro-creditor elements. However, important influencing factors can be rooted in the local culture.

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.

Universalism is the theory that there should be a single set of insolvency proceedings to deal with a debtor's assets and debts, and therefore, once one set of insolvency proceedings has been opened in one jurisdiction, it should not be possible for a second set of insolvency proceedings dealing with any aspect of the debtor's insolvency to be commenced thereafter in a separate jurisdiction.

The concept of modified universalism has emerged recently. Under the principle of modified universalism, a main proceeding is commenced in the jurisdiction where the centre of main interests has been established, which may in turn be supported by secondary proceedings in a second jurisdiction.

Territoriality on the other hand is effectively the reverse of universality, as under this principle it is theoretically possible to have insolvency proceedings in every single jurisdiction where the debtor holds assets, since the principle is that proceedings dealing with a debtor's assets should be restricted to assets/property within the jurisdiction where the proceedings are commenced.

Universalism, modified universalism and territoriality all have pros and cons. It cannot be denied that universality would have the effect of significantly reducing costs, which would in turn ultimately benefit the creditors of the debtors, but the reality is that it is not generally possible for local courts to disregard national constitutions. Modified universalism would seem to be a balanced bridge between the two opposing concepts. **Elaboration is warranted**

Importantly, all three concepts also require proper enforcement of recognition and effect by the states affected or involved in order to be successful.

2

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 initiatives that we will discuss here are those of the Montevideo Treaties of 1889 and 1940 and the Havana Convention on Private International Law of 1928 (the Bustamante Code).

From the outset, it is important to note that there are 6 signatories to the Montevideo Treaty of 1889 and only 3 of those are signatories to the Montevideo Treaty of 1940 so careful analysis and consideration is required regarding which treaty or treaties may be applicable.

The Montevideo Treaty of 1889 deals with both personal insolvencies and corporate insolvencies. Jurisdiction for bankruptcy proceedings is based on the insolvent person or company's "commercial domicile". In situations where a debtor occasionally trades in multiple signatory States (including situations where a debtor may have a branch in another signatory State) but has its commercial domicile in a single signatory State, there is to be one set of insolvency/bankruptcy proceedings in the State where the debtor has its commercial domicile. In situations where the debtor may have more than one viable businesses in multiple signatory States, the 1889 Treaty allows for concurrent bankruptcy proceedings to be run in the various States.

The Bustamante Code has 15 signatory States. Two states, Bolivia and Peru, are signatories to both the 1889 Montevideo Treaty and the Busamante Code. There are 5 South American States which are not party to the Bustamante Code.

The Bustamante Code is more pro-universalism than the Montevideo Treaties. It provides in its first chapter that where the debtor has a single commercial domicile, there can only be one set of insolvency proceedings as between the signatory States. Article 415 however provides that where a debtor has arms of its business that operate separately, there may be concurrent insolvency proceedings in signatory States to the Bustamante Code. In this way, it is not unlike the Montevideo Treaties. A notable difference between the two is that in a situation where there are concurrent insolvency proceedings taking place, the Bustamante Code does not deal with procedures for co-operation of the multiple insolvency 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.

Generally speaking, the interchangeability of the terms "bankruptcy" and "insolvency" will depend on the jurisdiction in question. In some states they will have the same meaning but in other States there will be very important nuances between the two terms.

In Ireland for example, bankruptcy is a term that is specific to an individual, rather than a corporate, insolvency. There are various "tests" for whether a company may be insolvent (balance sheet insolvency vs cash flow insolvency), whereas bankruptcy is a procedure that an individual enters into. However, an individual may also go through a separate procedure in Ireland known as "personal insolvency" which is a relatively new procedure introduced in 2012. In that jurisdiction therefore, the two terms are not interchangeable. Insolvency may be used interchangeably for individuals and corporates but bankruptcy does not apply to corporates.

Commentary on the essential characteristics of "bankruptcy" and "insolvency" varies in terms of agreed shared features. Sealy and Hooley's chapter in M A Clarke et al, Commercial Law, argue that shared principles between "bankruptcy" for individuals and "insolvency" for corporations are (1) the principle of pari passu distribution (which carries exceptions such as priority creditors and secured creditors), (2) the importance of investigating the reasons that led to the bankruptcy or insolvency, (3) the importance of ensuring that secured creditors behave appropriately towards the debtor, (4) the importance of examining and attacking dispositions that may have been improperly made by the debtor prior to entering insolvency. Another shared principle listed by Wood in Principles of Insolvency is the concept that proceedings against the debtor must be frozen or stayed during the insolvency or bankruptcy.

There are inherent differences that will arise when dealing with a corporation in insolvency versus an individual in bankruptcy. One obvious difference is that an individual cannot be "dissolved" whereas with a corporation in insolvency, the dissolution of the entity might be the ultimate goal of the insolvency. Other differences might be that from the outset of the insolvency procedure for an individual, some assets might be completely excluded in order to ensure that the individual maintains a minimum standard of living. There might also be procedures in place to protect an individual from harassment from creditors whereas a corporate insolvency would not require the same level of

protection. A further difference might be that directors of an insolvent corporation might face some form of punishment for bringing about or causing the corporation's insolvency, whereas individual insolvencies are handled with much more sympathy.

To conclude, generally speaking, care should be taken when using the terms "insolvency" and "bankruptcy" as the two will not always be interchangeable.
There is some scope to elaborate regarding the different objectives.

6.5

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.

As a general rule, a State's jurisdiction does not stretch beyond its borders and so with this comes the difficulty of the enforceability of extra-territorial proceedings or judgments. Related to that issue is the fact that independent States decide on their own legislation and any amendments which may be required to overcome the challenges arising in cross-border insolvencies.

Lack of co-operation between States will inevitably result in chaos when an insolvent company or individual has assets that are being handled as part of insolvency proceedings across multiple States.

Even once discussions between States have opened regarding a cross-border insolvency, it can be difficult to reconcile each State's differing approaches to insolvency procedures.

For cultural (and other) reasons, some States may be seen as pro-creditor systems and some States may be seen as pro-debtor systems. Some States may even prioritise other interests, such as the importance of labour right in France. All of these collectively will result in competing interests between States when handling insolvency proceedings.

Even aside from the differing approaches, it can be difficult for States to agree from the beginning where the insolvency proceedings should be exclusively opened. This in turn may create uncertainty in the domestic markers and may leave the entire process predisposed to exploitation.

It would be beneficial for you to also consider the matters raised by Friman, 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 context of international insolvency, “hard law” are binding laws that seek to regulate international insolvencies, whereas “soft law” are merely influential over regulations.

Treaties and conventions may be adopted by States when the States become signatories. This in turn has the effect of the treaties and conventions forming part of the State’s “hard law” on insolvency.

The European Insolvency Regulation is an example of a very successful piece of hard law in the context of international insolvency. It has been amended on a number of occasions which means that it is

constantly being improved. The European Insolvency Regulation has influenced the drafting of many other multilateral developments in the context of international insolvency law.

A less successful example of "hard law" would be the Convention on Certain International Aspects of Bankruptcy (known as the Istanbul Convention), drafted by the Council of Europe in 1990. It was not ratified by enough States for it to even enter into force.

In terms of successes with "soft law", in the 1990s UNCITRAL developed a Model Law on Cross-border Insolvency. The reason why this particular initiative has been so successful is because UNCITRAL provided a form of draft legislation that it recommended member States to adopt when reforming their own insolvency laws. The member States could adopt the draft legislation either with or without amendments. The Model Law has been gaining serious momentum in recent years which is evident from the sheer volume of States who have now adopted it.

3
Marks awarded 11 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 main piece of insolvency legislation in England is the Insolvency Act 1986. The Insolvency Act 2000 and the Enterprise Act 2002 amended parts of the Insolvency Act 1986 and so should also be considered.

We know from the information provided that Norton Cars Inc moved its COMI to Italy once England left the EU. Therefore, on these facts, we know that at the point in time at which we are advising,

England was still a member of the European Union. For the period when England was a member of the EU, the EU Insolvency Regulation applied to cross-border insolvency matters between the UK and other EU member states. However, Norton Cars Inc has filed for liquidation in terms of American law, so the EU Insolvency Regulation will only be applicable insofar as there are aspects that might affect other EU states as well as England (for example, the assets / cars may be located in England, but might have finance owed on the asset that is governed by the law of another EU state).

In 2006, England and Wales adopted the UNCITRAL Model Law on Cross-Border Insolvency as part of its cross-border insolvency legislation so this will be the main piece of legislation that should be considered. Section 426 of the Insolvency Act 1986 is the key section and it applies to co-operation with the US as the US is one of the "relevant" countries listed. **The US is not designated. Further elaboration, including with respect to common law is required**

2

Question 4.2 [Maximum 4 marks]

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

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

The applicable law here is the European Insolvency Regulation, as both Italy and Germany are members of the EU. The European Insolvency Regulation was amended in 2015 and these amendments took effect in 2017. There were some further but more minor amendments recently in 2021which became effective for both Italy and Germany.

The most significant feature of the EIR is in relation to jurisdiction. The EIR provides that the State that should have jurisdiction over the primary set of insolvency proceedings is the State within which the debtor's "centre of main interests" or COMI is located. The EIR allows for secondary proceedings if the debtor has an "establishment". The EIR defines an establishment as "any place of operations…where the debtor carries out a non-transitory economic activity with human means and assets."

Therefore, as we are told that Norton Cars Inc shifted its COMI to Italy, it is Italy that should host the main insolvency proceedings under the EIR. Secondary proceedings may be opened in Germany as we know from the facts that Norton Cars Inc's main operations transpired in Germany, which would satisfy the definition of establishment under the EIR for the purpose of hosting subsidiary insolvency proceedings.

4

Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

No, the EU (Recast) Insolvency Regulation is only applicable to member States of the EU and none of India, South Africa or Australia are 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.)

With regard to the real rights of security situated in the Netherlands, this is a cross-border insolvency involving Italy and the Netherlands. Both the Netherlands and Italy are members of the EU and so it is the European Insolvency (recast) Regulation that is applicable here.

Further consideration of the regulation was required. Dutch law would apply.

0.5

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

Australia has adopted the UNCITRAL Model Law on Cross-Border Insolvency and this will be the applicable law regarding the real rights of security situated there.

Further consideration was required. Australian law would apply.

0.5

Marks awarded 8 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 37/50

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