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**.

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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 7 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.

Global insolvency laws can typically be categorized into two buckets, English common law or civil law which relates back to the historical roots these systems draw from. Civil law tends to trace its origins to Roman law, which can be seen in counties such as Germany or France, whereas common law has roots in English legal traditions, such a system can be found in the United Kingdom. **Some further examples would be beneficial**

Insolvency law based in common law tends to have more of a pro-debtor system. The United States of America's insolvency legislation is viewed as a gold standard example of a pro-debtor system due to its liberal approach to concepts such as the rehabilitation of Companies, or fresh starts, also known as discharges.

However, Insolvency law based on civil law is typically much more of a pro-creditor system. For example, in French insolvency law no discharge is allowed unless all the creditors agree to it. Therefore, it's clear to draw that common law tends to leverage a pro-debtor system, compared to civil law which is more likely to be based upon a pro-creditor system.

Another aspect which demonstrates the difference between common law and civil law can be found in the varying flexibility of the systems rooted in each law. For example, the Italian legal system tends to provide a clear and predictable legal landscape which outlines exact requirements for the dealing of various aspects on insolvency. The Unites States insolvency law however allows for the evolution of case law dependent upon the changing circumstances surrounding each case, or insolvency law trends.

3

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 theory that there should be one single insolvency process which encompasses all the debtor's assets and debts globally is called Universalism. Due to the ideation of their being one insolvency process then no other insolvency actions could be possible in other States, nor any form of execution of the debtor's assets. In addition, the chosen State should be at the centre of where the debtor's interest are located at the time of appointment.

Territorialism however is passed on the principle that bankruptcy processes could occur in every single State where the debtor holds assets. Although, the proceedings would be territorially restricted to assets within the jurisdiction where the petition is brought, and therein territorially limited. In this case, it is possible to have multiple insolvency proceedings ongoing concurrently in regard to a single debtor, much opposite of Universalism.

Universalism has however been developed further into a new concept known as Modified Universalism and is intended to assist in merging the gap between the opposing ideas of Universalism and Territorialism. Modified Universalism presents the idea that the "main proceeding" is filed in the State which contains the centre of the main interests of the debtor, which is then supported by secondary processes in another State. In circumstances such as

those the courts dealing with the respective processes are intended to co-ordinate with each other and allows elements of both Universalism and Territorialism to co-exist.

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.

Most South American countries tend to be civil law counties, and as a collective they currently have one of the most unified systems around the globe. This is as recently all the South American countries have signed on to the Union of South American Nations agreement. The goal of this agreement is to create a system of supra-national law similar to that of the European Union.

Historically within Latin America a string of treaties have been concluded on private international law and commerce which include a chapter on bankruptcy. Due to this some of the longest standing multilateral agreements concerning international insolvency are found in Latin American jurisdictions. Two of these are:

- The Montevideo Treaties (1889) and (1940); and
- Havana Convention on Private International Law (1928) (Bustamante Code)

The Montevideo Treaties
These contain relevant premises for both personal and corporate insolvency, the treaties work by identifying the insolvency State founded on the debtor's commercial domicile where this is only in one treaty jurisdiction. However, if the debtor has two or more economically individual businesses in varying States there can be concurrent processes.

The Havana Convention (Bustamante Code)
The Bustamante code differs from the Montevideo Treaties as it is more encouraging of one single proceeding which has a universal effect throughout its region, essentially aligning with the concept of Universalism.
Although, there could be simultaneous processes in the Convention, specifically for cases which contain commercial operations which are disparate economically. If this occurs, the Code then selects an approach much like the Montevideo Treaties and provides for only one single insolvency process and this occurs if the debtor is intermittently operating in more than one State. Nevertheless, when there are simultaneous processes, there is no provision for co-operation between any of the processes in this code.
Herein demonstrates one of the differences between both the Treaties and the Code, that being the extent that they will allow for one proceeding to have total effect throughout the various jurisdictions.

An additional key difference between the two codes is the fact that different States within South America are part of these initiatives. For example, Bolivia and Peru and both parties to the Montevideo Treaty (1889) and the Bustamente Code (1928). Yet Argentina, Columbia, Mexico, Paraguay and Uruguay did not confirm the treaty and are therein not aligned.

4

Marks awarded 10 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.

The terms bankruptcy and insolvency can be used interchangeably and frequently are, but they have separate applications and meanings depending on the jurisdiction, and history involved.

Firstly, it's crucial to acknowledge that different legal systems employ either the term "insolvency" or "bankruptcy." Some systems use both terms with slight variations. For instance, in Australia, "insolvency" commonly denotes the financial distress of a corporation, while "bankruptcy" typically refers to the insolvency of an individual.

The English Insolvency Act 1986 serves as an example of unified legislation, addressing both personal and corporate bankruptcy within a single act, with provisions duplicated for individuals and companies alike.

The term "bankruptcy" traces its origins to Italian, specifically "banca rotta," where "banca" signifies table or counter, and "rotta" denotes broken. In a commercial context, it symbolizes financial ruin, reflecting a permanent state of financial failure. On the other hand, "insolvency" is rooted in Latin, derived from "insolvens," meaning to loosen or release, conveying an inability to free oneself from financial obligations. It is often used more broadly to describe a financial condition where entities are unable to meet financial obligations promptly.

As such, one potential explanation or the different treatment of each term across the globe could be that insolvency sometimes refers to the state of financial affairs of a debtor, where on the other hand bankruptcy refers to the formal state of being entered into formal bankruptcy proceedings. For example, insolvency can encompass restructuring processes or other resolutions such as debt restructurings. However, bankruptcy tends to be a more formal process which cannot be recovered from, and therein there can be no options for recovery following a bankruptcy process.

In essence, the timing of the two terms can be a differentiating factor, as insolvency can be a temporary financial distress situation, but bankruptcy is usually declared formally and is more final in its application.

The timing requirements of either bankruptcy and insolvency become especially evident with individuals and corporations, as an individual may be insolvent without immediately resorting to the legal process of bankruptcy, whereas for corporations insolvency often triggers a more immediate need for legal intervention.

Historically, only merchants or traders could be declared bankrupt, emphasizing a collective debt-collecting mechanism that favored creditors. The formalized process for discharging debts and eliminating imprisonment for debt came later, along with the term insolvency.

Furthermore, when an individual goes into bankruptcy, they don't cease to exist, but the debts against them are discharged, providing them with an opportunity for a fresh start. Whereas a Company going into bankruptcy frequently ceases to exist after the bankruptcy process, with no option of a fresh start. This highlights the requirement to consider which term used i.e., bankruptcy or insolvency should also be based in whether the insolvent entity is an individual or a corporation.

In summary, while "bankruptcy" and "insolvency" may appear interchangeable in colloquial language, their legal and specific implications in some States do render them distinct. "Bankruptcy" involves a formal legal process, while "insolvency" is a broader term signifying financial incapacity. The differences are accentuated when considering individual versus corporate contexts, as the goals and processes diverge significantly. Therefore, it is crucial to recognize the custom in whichever state you are dealing with before using them interchangeably.

There is scope to elaborate, including with respect to differences and essential characteristics

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 of the largest challenges when it comes to cross-border insolvency is simply that there is no single set of insolvency laws which apply on a global basis, every jurisdiction with a developed legal system has some kind of debt collecting initiative related to insolvency, but they all have different policies, rules and approaches. This becomes especially evident when there are insolvency proceedings which involve more than one State, where those States have vastly different insolvency laws, which do not co-operate with each other. This can also be known as conflict-of-law issues.

An example of a difference between two States insolvency laws can be found when it comes to the distribution of assets, this is as the are a range of differences between the types of security found in each State, as an example floating charges are routine in English law, but generally unheard of in civil law jurisdictions. This can affect the process of preference of creditor claims, and which creditor gets preferential claims over other creditors.

Another challenge when it comes to cross border insolvency occurs when one debtor has operations or assets across different States as it brings rise to the question of where the main insolvency proceeding should be held, which assets it should encompass, which insolvency laws should be enforced and which creditors in which States are entitled to what assets, particularly if one of the States in question has foundations in Universalism, and another has law following the concept or Territorialism.

There are also cases where the creditors for a debtor are in a different State to the debtor, this brings a new set of challenges which are often compounded by a lack of co-operation from the debtor based on the State it's in, and the lack of necessity to co-operate with the foreign insolvency proceedings based on each States insolvency laws and principles. This can leave the creditors at a loss if the insolvency proceeding cannot gain control of the foreign company, or any of its assets.

Executory contracts can also pose a challenge to cross-border insolvency proceedings as the continuation of any existing contracts is subject to the decision of the insolvency practitioner, understanding the existing contracts and the work involved to finish any contract can be challenging to grasp, especially when they're in a foreign jurisdiction. Another layer added to this is if the contract is held in one State and the work involved within the contract is in a

differing State, and they both have contradicting insolvency law as to whether the contract should be honoured or not.

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.

When referencing hard law, this essentially means the law is specific and binding. In international law this can include treaties or international agreements, such as the Montevideo Treaties. Hard law is also legally enforceable, traditionally it has been challenging to implement hard law into international insolvency due to the wide range of existing insolvency laws in each State, which may or may not lend themselves to international agreements on insolvency laws.

A good example of hard law can be found in the European Insolvency Regulation (EIR) (2000), which is applied to all European Union (EU) countries and has gone on to influence wider developments in international insolvency law, it has been amended over the years to reflect developments in insolvency. The EIR itself has been fairly successful as a concept, particularly after the recast in 2015, but it has been formulated by the EU and therein it must be remembered that the goals of these countries were already aligned, making hard law easier to implement. When hard law is attempted to be introduced with States which have largely different laws and not as much alignment as the EU members, putting into place enforceable law becomes a lot more challenging.

On the other hand, soft law ideas contain no binding rules, and are more of a concept in practice. Forms of soft law in international insolvency can include guides, recommendations and model law. Soft law is generally seen as the more successful endeavour.

One of the most successful soft law proposals was developed by UNCITRAL known as the Model Law on Cross-border Insolvency (MLCBI). It's a model law with draft legislation which is recommended to member States and has been adopted by more than 20 jurisdictions globally.
One of the key factors in the success of MLCBI is that these member states can then modify the model law to fit with their existing law or implement it as is.

Due to the lack of enforcement involved in soft law, it is generally considered the "weaker" version of hard law. But the flexibility of this does mean that more member states are likely to undertake the suggestions and sign up under the various initiatives.

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 English Court, will acknowledge winding-up proceedings of a foreign company initiated in another jurisdiction. Instead of granting a local winding-up order for the same company, the English Court will recognize the foreign proceedings. This recognition empowers the foreign liquidator to take control of local assets. This procedural aspect is governed by Section 426 of the Insolvency Act 1986, which deems America a "relevant" country. This provision in English law addresses cross-border insolvency matters, enabling UK courts to collaborate with foreign counterparts and insolvency representatives. **The US is not designed.**

Moreover, the American insolvent estate representative, can also turn to the UNCITRAL Model Law on Cross-Border Insolvency. This international framework, adopted by the United Kingdom in 2006, provides a structured approach to handle insolvency cases spanning multiple jurisdictions.

By invoking the UNCITRAL Model Law, the American insolvent estate representative gains the opportunity to pursue recognition in England while adhering to universally accepted principles in cross-border insolvency matters. This dual legal framework underscores the commitment to international cooperation and efficient resolution of complex insolvency cases.

Furthermore, the American insolvent estate could fall back on McGrath v Riddell, which is a case which ended in the turnover of assets in a local liquidation to a foreign liquidator for distribution under the House of Lords foreign law. Due to the precedent being set in this case, it could be relied upon again as precedent in case the English Court does not co-operate with the American insolvent estate.

3.5

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.

In relation to Germany, the Insolvenzordnung (InsO) 1999 is the current bankruptcy code that applies and provides the primary legal framework for governing insolvency matters within Germany. It also incorporates principles of the UNCITRAL Model Law to facilitate coordination with foreign insolvency proceedings, by doing so it allows for the recognition of foreign insolvency proceedings.

One key feature of the InsO is the consideration of the debtor's centre of main interests (COMI), this is where the debtor's operations are centrally managed, in cross-border cases the establishment of the COMI is essential for deciding where the main proceeding should be brought. The InsO will refer to the COMI, and the jurisdiction of the COMI will guide the application of insolvency legislation.

In the insolvency matter involving Norton Cars Inc, it can be established that the COMI is Italy, as stated in the question, therefore the main proceeding should be opened in Italy, and this is supported by both InsO and the UNCITRAL Model Law on Cross-Border Insolvency. As both Germany and Italy have adopted UNCITRAL, its provisions can be invoked to facilitate cooperation and coordination between the courts of these jurisdictions.

In line with InsO and UNCITRAL, the main proceeding would be brought in Italy and Germany would recognize the Italian insolvency proceedings as the main proceeding, and any additional proceedings in Germany would be considered as "non-main proceedings" that complement the main proceeding.

This is further supported by the EIR (Recast), as both Italy and Germany are members of the EU, the Recast can be applied. It supports the framework of the main proceeding being brought in Italy as the COMI and provides for automatic recognition of this insolvency proceeding in Germany as an EU member state.

To conclude, InsO, the UNCITRAL Model Law and the EIR (Recast) can all be applied in the case of this insolvency proceeding and all support the main proceeding being opened in Italy as the COMI.

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, Indian, South African, or Australian courts would not be eligible to apply the EIR (Recast) Insolvency Regulation for the recognition of an EU insolvency representative. This is as the EIR (Recast) does not apply to countries which are not in the EU, and the three aforementioned countries are not in 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.)

The insolvency process in the Netherlands would be subject to Dutch law, specifically The Faillisementswet of 1897 which provides legislation for the bankruptcy of both individuals and businesses.

This legislation includes the determination of the treatment of real rights of security in the Netherlands during an insolvency proceeding. The Faillisementswet of 1897 recognizes the concept of secured creditors and ranks creditors claims accordingly, with secured creditors over unsecured creditors.

Secured creditors can also separately enforce their security interests outside of the general bankruptcy process. Therefore, it is important for the Italian insolvent estate representative to understand whether the assets they've discovered in the Netherlands have any secured claims over them, or whether they in fact hold the secure claim over the assets, this will be imperative in the success of the realization of these assets.

By co-operating with the Dutch Court through utilizing the UNCITRAL Model Law, and understanding Dutch laws on the hierarchy of creditors, the Italian insolvent estate representative should be able to determine if the assets held in the Netherlands are realizable in the Italian process.

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. There is some scope to better explain this

2.5

(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.)

Similarly to the approach taken by the Italian insolvency representative in Dutch law, the same approach should be applied to the assets in Australia, by referencing Australian law.

In Australia, the Corporations Act 2001 ("The Act") regulates corporate insolvency, which would be the relevant law for this case, as the insolvent entity is defined as a Company. Under this Act the Australian legal system would govern the recognition and treatment of the Italian insolvency proceedings in Australia. The Act also aligns with international principles, such as the UNCITRAL Model.

The Act recognizes the rights of secured creditors, and they hold real rights of security over the specific assets of a debtor, they hold legal recourse to the assets which they hold security over. The Act has also established a registration system for security interests, which provides notice to other creditors, and is required for some security interests to be valid and enforceable, which is something the Italian insolvency representative can rely on to review claims over the assets but must also ensure the insolvent company has complied with in order to maintain the claim over the assets in Australia.

Therein, it's important for the Italian insolvency representative to understand any existing secured claims over the assets, whether they hold one of them and whether the claim(s) have been registered in line with The Act to establish the recoverability of the assets in the insolvency process, but with all being right they should be able to realize these assets.

3
Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 41/50

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