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 8 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.

Civil law systems have their roots in Roman law tradition. Countries that have clear foundations in civil law include Holland, France, Germany and Spain.

The common law system has its roots in English law. Countries that have clear foundations in English law include the United Kingdom, Australia, and India. English law has changed over the years from its foundation, which used to provide for different legislation for companies to that for personal bankruptcy. Some countries that have their foundation based on English Law still reflect this, while others have amended their legislation (such as the United Kingdom) to update a single code or law that brings both under one umbrella.

Some countries across continents are split in the foundations of their laws, such as Africa, where the origins of their laws generally follow the former colonial powers. In Africa, Nigeria, Kenya, Botswana and Zambia all have English Law traditions, whereas countries in the West of Africa have evolved from civil law.

The alternative is a fragmented approach, with some countries having mixed legal systems rooted in both English and civil laws, such as South Africa and Namibia.

For many countries, their historical roots have formed the basis of their current legislation, but this is gradually being replaced with the introduction of new, modern legislation.

It would be beneficial to have further addressed common law precedent cf 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.

There are various approaches to insolvency proceedings that are followed around the world. The two main approaches that can be followed are universalism, and territorialism.

Universalism prescribes that the law of lex concurus should regulate the matter, in other words, the rules and regulations where the main proceeding have been opened should apply. This is usually the same place as the centre of main interest (i.e. the headquarters, place of incorporation etc of the company). The centre of main interest will issue the insolvency order, and the legal system in that location should regulate the whole insolvency matter, even if the assets are in other jurisdictions.

Conversely, territorialism, which prescribes that where a debtor has assets in more than one location, the local laws of each state where the debtor has an interest will apply.

The difficulties of territorialism are that the state where the debtor has an establishment may have jurisdiction to open separate insolvency procedures in relation to assets already subject to procedures elsewhere, which can cause concurrent insolvency proceedings. **Elaboration is warranted regarding territorial limits** Concurrent proceedings will rely on the courts of the various states to co-operate and communicate in relation to the assets, and this approach can lead to a modified universalism, whereby the main proceedings opened in the state where the main interest is located may be supported by secondary proceedings in the alternative location. **Elaboration is warranted here**

It is important to note that it is not always the case that in every jurisdiction full proceeding will be opened. Some systems will allow recognition orders, that will allow insolvency professionals to deal with assets in foreign jurisdictions without opening full concurrent insolvency proceedings. With universalism, recognition requires that other States recognise one set of insolvency proceedings, that all agree are in the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.

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.

Different groups of Latin American states have signed up to a series of general treaties, such as the following:

- The Montevideo Treaty on International Commercial Law (1889)
- The Montevideo Treaty on International Commercial Terrestrial Law (1940)
- Havana Convention on Private International Law (1928)

These treaties all aim to assist with the resolution of international insolvency issues, but differ in the extent to which they allow for a single proceeding with universal effect throughout the member States. For example, the Havana convention supports an approach that allows for a single proceeding with universal effect throughout its region, whereas the 1889 Montevideo Treaty allocates the bankruptcy jurisdiction based on the debtors commercial domicile and provides for one set of proceedings in that commercial domicile.

They also differ by the extent to which various States have signed up to each treaty, for example, only three States have signed up to the 1940 Montevideo Treaty, six States have ratified the 1889 treaty, and fifteen States have ratified the Havana Convention.

All South American countries have recently signed up to the Union of South American Nations agreement, which aims to establish a system of supra-national law.

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.

While the terms insolvency and bankruptcy may be used interchangeably in some locations, in others they have two distinct and separate meanings.

Insolvency

Generally, the term insolvency can be used to describe the state of affairs of a debtor i.e. they are “insolvent”.

In some locations, this term is used only in reference to corporations such as "corporate insolvency" - in these jurisdictions individuals are not subject to "insolvency" proceedings.

The term "insolvency" is also used more widely when referring to the tests of the financial state of individuals or corporations, such as balance sheet insolvency (where the liabilities exceed the assets of a debtor), or cash flow insolvency (where the debtor is unable to repay debts as they fall due). There is no similar definition here that would offer the use of the word "bankruptcy".

Bankruptcy

Bankruptcy is generally used to describe the formal state of being placed into insolvency proceedings.

However, in other locations (such as Australia), the term insolvency is used to describe the insolvent state of an individual, such as "individual bankruptcy", and is never used in reference to a corporation.

In summary, one can agree with the statement that the two words can be used interchangeably, however the true definition of each word depends on the terminology of the jurisdiction in which it is being used, and so can only be used interchangeably in locations where it is broadly accepted that they have a similar meaning.

This is a 7 mark sub-question which also specified the need to address essential characteristics and matters of difference (see the sub-question above).

2.5

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.

The main challenges that arise when dealing with insolvency law in a cross-border context that make it difficult to develop a single global cross-border insolvency dispensation are often due to the differences between the legal systems and the laws of the counties involved.

Several commentators have touched on some of these differences.

Friman says the problems start with the basic concept of finding a common insolvency language[1]. Even the term "Insolvent" in different places can have different criteria, from the situation of total liabilities exceeding total assets, to short term liquidity issues. International conventions and instruments generally do not even attempt to provide a proper definition, and instead focus on defining insolvency proceedings. This fundamental definition would need to be universal to create a single cross-border dispensation.

Omar states that differences in domestic regularities can affect the position of the creditor and the priorities they have within a set of proceedings, which raises the issue of conflict of laws.[2] For example, security, set-off or netting arrangements, or retention of title clauses may mean some title protection is available to creditors in some places, but not others. It would be difficult to agree a single priority that could be developed globally.

Westbrook has also identified nine key issues in cross border cases, that reflect not only the issues that are faced when dealing with cross border insolvency cases from a practical perspective, but also

[1] I F Fletcher, The Law of Insolvency, London (Sweet and Maxwell, 5th Ed, 2017), pp 3 - 5

[2] P J Omar, "The Landscape of International Insolvency", (2002) 11, *IRR* 173, pp 173 - 174

in the development of a single global cross border dispensation. These issues include standing and/or recognition of the foreign representative, moratorium on creditor actions, creditor participation, executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance provision powers, discharges, and, as mentioned above, conflict of law issues.[3] Again. Alignment on all these issues would be needed in order to create a single dispensation.

5

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of "hard" and "soft" laws in providing solutions to the challenges of international insolvency.

Hard laws are those that are binding. This includes treaties and conventions, to which States become signatories and therefore bind themselves and amend their domestic laws accordingly to address international issues. Examples of successful hard laws includes the Nordic Convention (1933) in Scandinavia, and the European Insolvency Regulation (EIR) (2000) and the Corporations Act 2001 in Australia. Australia's example promotes co-operation and co-ordination where there are concurrent proceedings [4], which permits co-operation between Australia and foreign courts in external administration matters such as liquidation.

The extent to which a change in binding rules and 'hard' laws will have an impact on addressing international issues is dependent upon the number of States who make such changes. A single change in a single state goes little way to resolving the issues, but success can only be maximised when widely carried out. Even once widely carried out, changes such as that made in Australia noted above, only go so far as to encourage co-operation and communication between states and does not address specific differences in domestic laws between States.

Soft laws are those that seek to influence regulation. Again, this approach has seen varying success. Examples of successful soft laws are the UNCITAL Model Law on Cross-Border Insolvency, which provided draft legislation that UNCITRAL recommended member states adopt (with or without modification). UNCITRAL's success can be attributed to the number of States that have adopted it, which has allowed it to gain momentum.

3

Marks awarded 10.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

[3] J L Westbrook, "Developments in Transnational Bankruptcy" (1995) 39, St Louis University Law Journal 753, pp 753 - 757

[4] Sections 580-581 Corporations Act 2001

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.

1) UNCITRAL Model Law on Cross-Border Insolvency

Both the United Kingdom and America have adopted the UNICTRAL Model Law on Cross-border Insolvency (Model Law), therefore the easiest route that the insolvent estate representative in America can use to apply for recognition in England is using the Model Law. In the UK, the model law has been implemented under the Cross-Border Insolvency Regulations 2006.

The liquidator in America (as a Foreign Representative[5]) can apply to the court in England for recognition of the foreign proceedings in which they have been appointed.[6] From the time of filing an application for recognition, until the application is decided upon, the court may, at the request of the liquidator, stay an execution against the assets of Norton Cars in England[7], if relief is urgently needed to protect the assets or the interests of the creditor.

2) Principal of Comity under existing common law

In cases where the Model Law cannot be applied, recognition can be applied for under common-law. Common law recognition is a based on the principal of judicial comity, under which English courts have extended recognition and given effect to the bankruptcy laws of other countries within the English jurisdiction.

English courts will recognise overseas representatives if there is sufficient connection between the foreign court and the debtor (incorporation in the country in which the representative is appointed will be sufficient connection, as in this case), recognition is not contrary to public policy, and there is no fraud or unfairness in relation to the appointment of a representative.[8]

3) Insolvency Act (1986)

The American representative also has the option to wind-up the affairs of Norton in the UK as an un-registered company under section 221 of the Insolvency Act (1986)

It would be beneficial to note the non-applicability of s426

3.5

[5] UNCITRAL Model Law on Cross-Border Insolvency Article 2 (d)
[6] Cross-Border Insolvency Regulations (2006) Article 15.1
[7] *Idem* Article *19* (a)
[8] UK Perspective Recognition of Overseas Insolvency Procedures: Spoiled for Choice. Jones Day Publications

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 European Insolvency Regulation (EIR), which was amended in 2015 in the EIR (Recast) will dictate cross-border matters between Italy and Germany, as both countries are EU member states.

The EIR Recast states that the law applicable to insolvency proceedings and their effects shall be that of the "State of the opening of proceedings"[9]. The jurisdiction to open insolvency proceedings ("main insolvency proceedings") is restricted to the courts of the Member State within the territory of which the debtor's centre of main interest (COMI) is located.[10]

Article 3.1 of the EIR Recast states that in the case of a company, "*the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties"* shall be presumed to be the COMI in the absence of proof to the contrary. For Norton, the management of the Company is based in Italy, therefore this is the COMI. Italy will therefore be the jurisdiction to open the main insolvency proceedings.

The EIR Recast further states in Article 3.2 that where the COMI is situated within the territory of a Member State, the courts of another Member State shall only have jurisdiction to open insolvency proceedings against that debtor if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. An establishment is defined as meaning "*any place of operations… …where the debtor carries out a non-transitory economic activity with human means and assets*". In the case of Norton, they will be classed as having an establishment In Germany, because they have operations there. If proceedings were opened in Germany, they would be secondary 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, because the EIR (Recast) is only binding on EU Member States,

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

[9] Article 7 EIR (Recast) 2015
[10] Article 3 EIR (Recast) 2015

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 Netherlands and Italy are both EU Member States and are therefore bound by the EIR Recast (2015). Article 7 of the EIR Recast states that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, in this case, Italy. In particular, it shall determine the "*rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem".*[11] Article 8 further states that "*the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets… belonging to the debtor which are situated within the territory of another Member State at the time of the opening proceedings."* For Norton, this means if there are assets in the Netherlands that are subject to rights in rem by third parties, such as a mortgage or lien on those assets, then the applicable law will be that of the Netherlands.

3

(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 have adopted the UNCITRAL Model Law in its Cross-Border Insolvency Act (2008).

Under the Cross-Border Insolvency Act, upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under the laws of Australia as defined under Article 12.

Under the Act, there is no real guidance on the determination as to the COMI of the insolvency, other than to create a rebuttal presumption that the location of the registered office of the company will be its COMI. It requires the Australian court to decide whether foreign proceedings are "foreign main proceedings", or "foreign non-main proceedings".

For Norton, it is stated that the COMI is in Italy, but the Australian court would apply the Australian law to determine that fact. If determined that Italy is the COMI, then proceedings in Italy are the foreign main proceeding.

In relation to the real rights of security, under the Act, if a foreign proceeding is recognised as being the foreign main proceeding, it will be mandatory for the Australian courts to:

- Stay any actions in Australia against the debtor.
- Stay the execution against any assets of the debtor located in Australia;
- Suspend the right of the debtor to transfer, encumber, or otherwise dispose of its assets; and
- Permit proceedings to be commenced in Australia if the debtor has assets in Australia and the proceedings are restricted to those assets.[12]

3

Marks awarded 14.5 out of 15

*** End of Assessment ***

[11] EIR (Recast) 2015 Article 7 2. (i)

[12] Australia Adopts the Model Law on Cross-Border Insolvency | Insights | Jones Day

TOTAL MARKS AWARDED 41/50

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