



**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 12<sup>th</sup> century.

#### Question 1.2

Which of the following **best describes** an “executory contract” and its enforceability?

- (a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.**
- (b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.
- (c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.
- (d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

### Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

- (a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).
- (b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.
- (c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.
- (d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

### Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

- (a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.
- (b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.
- (c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.
- (d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

### Question 1.5

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the **correct** statement:

- (a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.
- (b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

#### Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

#### Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

#### Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

- (b) This statement is untrue because African nations all have a civil law tradition.
- (c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.
- (d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

#### Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

- (a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.
- (b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.
- (c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.
- (d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

#### Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

- (a) This statement is untrue because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.
- (b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.
- (c) This statement is true because globalisation makes the principle of universalism redundant.
- (d) This statement is true because modified universalism enables a “main proceeding” to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 9 out of 10

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

#### Answer:

Civil law which takes its origin from Roman Law is an organised system wherein a written constitution is in place and applied for all cases as far as possible. A successful attempt will always be made in the courts by all the players to bring every case within the boundaries of the set legislation. Former French, Dutch, Spanish, German, Portuguese colonies and protectorates usually follow Civil Law where the rulers were dispensing judiciary as a part of their responsibility. Writings of scholars used to impact the administration of laws and such matters used to be incorporated as laws later by the law makers.

Under Common law past legal precedents or judicial rulings are used to resolve present cases. Institutionalised opinions and interpretations from judicial authorities and public juries are made use of while hearing the present case. US Common law systems evolved from British tradition spread to North America during the colonial rule therein. It is also practiced in Australia, New Zealand, India, Canada, Hong Kong and UK. It was found that common law could easily solve certain cases wherein the existing statutes or written laws could not be exactly applied.

Of course there are countries like South Africa who follow a hybrid mode which is a combination of Civil Law and Common Law.

With more and more of globalisation of international trade, countries with common law/hybrid law approach to their insolvency law find it easier to adopt instruments like UNCITRAL Model Law on Cross-border Insolvency.

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### 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.

#### Answer:

##### Definition of territorialism:

When handling insolvency cases if exclusive jurisdiction of local laws are applied over the insolvency estate of a company in its territory by a state and the property of the same company is subject to the jurisdiction of the relevant states if the company has business and assets across the border, then principle of territorialism is said to be in operation. Territorialism is also known as the 'Grab Rule' because each country is motivated to apply its laws to collect debtors' assets to defend its creditors' interests. Thus the principle of territorialism rejects a global perspective on cross-border insolvency and asserts that the effects of a country's insolvency declaration can only extend to the territory of the country in which the insolvency is declared. **Elaboration is warranted regarding territorial limits**

### Pros and cons of territorialism

Following the principles of territorialism helps the domestic creditors the most as it provides the necessary understanding to them as only the local laws are applied. Additionally it adds certainty to the transactions involved in respect of the end results.

In the present day environment, rarely the business is operated with in one country, the principle of territorialism ends up looking too much inward and affects the value maximisation of the entity when its business assets are lying across the border.

### Definition of Universalism

The principle of universalism is simply application of “one court and one law” meaning that in any cross-border insolvency case, the insolvency legislation of one country should be applied to all matters involving insolvency that is filed before any other court. Thus universalism means existence of a perfect society wherein, in the words of Edward S. Adams and Jason L. Finke ( article in Columbia Journal of European Law, 15(43), all courts and legal systems must uphold all judgments of the courts in which the insolvency proceedings are conducted and that the proceedings will encompass the business transactions of the debtor without restriction of any border whatsoever. [It would be beneficial to discuss forum and COMI](#)

### Pros and cons of universalism:

Applying the principle of Universalism will, in the strict sense, help achieving the end results of any insolvency case which is either to resolve the financial stress faced by the business enterprise or liquidate the assets more effectively and fairly distribute to all the creditors of the enterprise in an equal and fair manner. However, it is definitely not possible to create such a perfect society and perfect law which can be applied universally.

### Definition of Modified Universalism:

After understanding that the principle of territorialism is not suited today's business environment which is more globalised and that the principle of universalism is more utopian in concept and not practical, a combination of both is being attempted under the name modified Universalism. We can also call it as modified territorialism or co-operative territorialism. This model helps to build the principle which will help resolving cross border insolvency cases with more of ease. [It would be beneficial to discuss forum and COMI](#)

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### 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.

### Answer:

The South American Congress of Private International Law 1888-89 was the earliest attempt to address impacts of insolvency on cross-border transactions. In that congress the **Montevideo Treaty of 1989** came into existence which provided rules for liquidation, the concept of unity of proceedings and jurisdiction for the state according to the commercial domicile of the debtors.

The **1940 revision of the Montevideo Treaty** defined the commercial domicile and provided guidance for handling insolvency cases of the commercial transactions which took place in more than one state.

During the interim period, in 1928, a conference in **Havana** in which 15 members of Latin American countries participated, the famous code named **Bustamonte Code** was adopted by the participants. It provided the concept of Unity and Universality in dealings among the member countries which were



integrated economically and culturally. The uniqueness of the code was that while it gave an international outlook to the insolvency problems for the commercial transactions which took place across the borders of the member countries, the preference was given to local creditors in settling the matters.

Till date, the initiatives undertaken by the Latin American countries stand out as a model for resolution of international insolvency may be because, as I.F.Fletcher has stated in his book titled *Insolvency in Private International Law*, the “multilateral arrangements are more likely to be successful among states which are regionally grouped in such a way that functional interaction takes place constantly and at many levels”.

**Elaboration is needed regarding the differences between the agreements**

**1**

**Marks awarded 6 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.

**Answer:**

Even though the terms bankruptcy and insolvency are used interchangeably, in a strict sense both do not mean the same. Actually, the end result of insolvency is bankruptcy, particularly in the case of corporates, as they are declared bankrupt only if they cannot be restructured after becoming insolvent.

- (i) An individual is declared insolvent if he is unable to pay out his liabilities and thereafter he is declared bankrupt.

In the case of corporates, insolvency can be due to the fact that the value of their liabilities exceeds their assets (balance sheet insolvency) or despite having sufficient assets which exceed their total liabilities, they are unable to keep the operations going for want of cash which means that they have a liquidity crunch.

- (ii)&(iii) Given below.

**Objectives of bankruptcy /insolvency for individuals**

1. Providing an opportunity to smooth exit from business without harassment by creditors;
2. Arrange for arriving at the residual value of business after allowing sufficient estate for the individual for continuing his living ( including his family);
3. Allowing the individual to retain minimum requirement of plant and machinery to continue his trade;
4. Giving an opportunity to the individual clear the liabilities, if necessary, from out of his future revenues.

Thus when an individual becomes insolvent, he is treated as bankrupt and exiting from the business is the only option given. May be, depending upon the law of the country to which he belongs, he could resurrect after a period of exile.

### **Objectives of insolvency/bankruptcy for corporations**

1. Preserve and protect the business and its assets from further deterioration;
2. Arrange for a 'calm period' for the management to reorganise themselves;
3. Find out possibility of maximising the value of the business/assets;
4. Identify any preferential, undervalued, extortionate and fraudulent transactions that took place in the corporate and find possibilities to the effects disgorged from the wrongful beneficiaries of such transactions;
5. Arrange for keeping the company as a going concern and ensure continuity of the economic activity of the corporate and identify another management and handover the operations;
6. In cases where resolution or restructuring or revival of the corporate is not possible then only it is treated for bankruptcy ensure that the corporate is dissolved at the earliest if its revival is impossible so that allocation of economic resources are not wasted.
7. In cases where the corporate has become bankrupt, arrangements for realisation of entire assets need to be made and the proceeds need to be distributed fairly and equitably to the creditors and balance if any to the other stake-holders.

**This is a 7 mark essay sub-question which would have benefitted from elaboration and explanation, including with respect to essential characteristics and meaning.**

**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.

#### **Answer:**

A country's insolvency law is based on the following:

1. There are two systems of law in operation namely Civil Law and Common Law and the countries follow, due to historic reasons, either of them. Of course, nowadays many of them do not practice neither of them in the pure form and in practice they follow a mix of both to achieve the goal.
2. There are also two basic principles namely Universalism and Territorialism being practiced in international insolvency matters. Combining the two principles to the necessary extent, a third principle namely Modified Universalism is also in existent.
3. Countries also try and fall into groups and subject themselves to various instruments such as treaties, conventions and Model Laws to reap the benefit of a close knit group to easily resolve problems that arise in trade related transactions at lesser cost.
4. Countries also have the practice of applying the law in hard or soft form or in a combination of both.

Hence it is difficult to develop a single global cross-border insolvency law. This is the reason as to why the law designed by UNCITRAL is called model law on cross-border insolvency. The countries are allowed to develop their own insolvency law based on the model law.

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

**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.

**Answer:**

**Hard law:**

Binding the parties involved with legal obligations which can be enforced in a court of law are the hallmark of hard law. A law enacted by a country to deal with international trade which compels commitment by the parties to the transaction is a form of hard law. It is based on rules and regulations developed and adopted with the participation and consent of states or other participants who are bound by such rules. It is understood that the organs who participated in such conventions agree that the resolutions or decisions taken in the conventions will be allowed to regulate the cross-border transactions between the organs. This will be embodied in the law enacted by the states who participated. The advantages of such hard laws are that besides strengthening the international relations they also strengthen the credibility of commitments and decreases the transaction costs. Also, they help to resolve problems that might arise in such transactions in much cheaper way.

**Examples of hard law:**

Nordic Convention 1933  
Istanbul Convention  
European Insolvency Regulation (EIR) (2000)

**Soft law:**

If the participating bodies, states or otherwise, agree to use the term ‘recommendations’ and also incorporate in the resultant treaties clauses which convey that the participants will have the same converted into a statute and incorporated in their legislation, the resolutions or decisions taken in the convention are called soft laws. Though the vague nature of the instruments under soft law is a problem for the practitioners efforts by various organisations such as INSOL, International Bar Association, International Monetary Fund (World Bank) and Judicial Insolvency Network (Organisation of Judges) have been able to fine tune the understanding so that the matters are able to be discussed even International Court of Justice when cross-border insolvency matters are taken up.

**Examples of Soft Law:**

The Hague Conference on Private International Law  
The Montevideo Treaties of 1889 and 1940  
North American Free Trade Agreement (NAFTA)  
Model Law on Cross-Border Insolvency by UNCITRAL  
Judicial Insolvency Network Guidelines 2018

**Elaboration is warranted with respect to success or otherwise.**

2

Marks awarded 8.5 out of 15

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

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company’s main place of business

as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

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

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

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

**Question 4.1 [Maximum 4 marks]**

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

**Answer:**

Both UK and USA have adopted the UNCITRAL Model Law on Cross-Border Insolvency and have been working in close tandem in extending co-operation in closing out the cases.

Cross Border Insolvency Regulations 2006 (CBIR) was enacted in UK to give effect to the UNCITRAL Model Law. As per CBIR, the insolvent estate representative for Norton Cars Inc appointed under the insolvency proceedings filed in USA can seek cooperation between Courts in UK and USA. She can also ask for fair and efficient administration to protect the interest of all creditors.

She can get the proceedings in USA declared under CBIR as foreign main proceedings and the proceedings in UK as the non-main proceedings. Similarly, she can ask for deposit of the assets of the company in UK to US courts for purposes of consolidation. If any proceedings are commenced against Norton Cars in UK under its insolvency regimes, she can ask them to be annulled or she can join the proceedings in UK courts.

**It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.**

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.

**Answer:**

Italy and Germany are members of European Union and hence the EC Regulation on Insolvency Proceedings 2000 will apply.

In terms of ECIR the main insolvency proceedings will be opened in the Member State in which the debtor has its COMI (centre of main interests). On that basis, the proceedings should be opened in Italy. However, that will cover all the assets of Norton Cars wherever situated in EU region. A secondary proceedings can be opened in Germany. The Insolvency Law of Italy will apply to the 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?

**Answer:**

India – India has not adopted the UNCITRAL Model Law.

South Africa – Yes. Possible as they have adopted the UNCITRAL Model Law.

Australia - Yes. Possible as they have adopted the UNCITRAL Model Law.

**It would be beneficial to consider whether any are members of the EU**

0

**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.)

**Answer:**

Dutch Bankruptcy Act 1893 is applicable for insolvency proceedings in Netherlands. Also, being a member of the European Union, EU legislation EIR 2000 has a direct impact on the local proceedings. Hence the proceedings in the case filed against Norton Cars in Italy and judgements thereof will be honoured in Netherlands with applicable rules. However, it is to be noted that Netherlands has not adopted the Model Law of Cross border Insolvency of UNCITRAL.

Under Dutch law enforcement of judgements passed by a court in another EU member country can be enforced as if they are the orders of the local court. However, real rights of security lying in Netherland can be enforced subject to equal rights to the local creditors.

**In principle EU Ins Reg will apply and law of *Lex Concursus* (Italy) will probably be the main proceeding, but there are exceptions to EU reg where the *lex loci rei* situated will apply – like in this instance.**

**1.5**

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

**Answer:**

Generally, the Corporations Act 2001 will be the law applicable in Australia to an insolvency proceedings. For international cases, Australia has formally adopted UNCITRAL Model Law on Cross-Border Insolvency by implementing a separate legislation named the Cross Border Insolvency Act 2008 ( in short Cross Border Act).

Some of the most important features of the legislation include:

- the participation by foreign creditors in the local proceedings;
- facilitating cooperation between the insolvency practitioners and the courts of other countries;
- allowing access to foreign representative to local courts;
- setting out conditions for recognition of the foreign proceedings and allow reliefs to the foreign representative;
- effective coordination with the foreign courts;

With regard to security interests, the foreign creditors will be provided with equal rights as that of the local creditors with exceptions of tax portion and penalty added if any in the claims by the foreign creditors. The foreign courts can make orders for transfer of assets involved in the local proceedings in favour of the foreign representatives.

Under Australian Cross Border Act, COMI ( centre of main interest) is equated to the principal place of business or the registered office of the corporate.

**There is further relevant consideration in relation to the MLCBI and the application of Australian law.**

**2**

**Marks awarded 9.5 out of 15**

**\* End of Assessment \***

**TOTAL MARKS AWARDED 33/50**

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