**Text, logo, company name

Description automatically generated**

**FORMATIVE ASSESSMENT: MODULE 1**

**INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW**

This is a **formative assessment** relating to **Module 1** and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is **not compulsory** and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2023.

**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.assessment1formative]**. An example would be something along the following lines: 202223-336.assessment1formative. **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 number 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 October 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 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 **10 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**

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

1. This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.
2. This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.
3. This statement is true since all systems have at least the same general insolvency concepts.
4. The statement is true since the historical roots of all insolvency systems are the same.

**Question 1.2**

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

1. This statement is true since this Act introduced imprisonment of debt.
2. This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.
3. This statement is true since it introduced the notion of discharge.
4. This statement is true since it introduced fraudulent conveyances into English law.

**Question 1.3**

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

1. This statement is true because UNCITRAL’s model legislative guidelines apply automatically to all member States.
2. This statement is true because all member States supported its automatic implementation in their respective jurisdictions.
3. This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.
4. This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

**Question 1.4**

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

1. This statement is true since business rescue is important for socio-economic reasons.
2. This statement is true because liquidation is viewed as a medieval and outdated process.
3. This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.
4. This statement is untrue since some systems have no formal rescue procedure.

**Question 1.5**

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions – hence these do not pose problems in a cross-border insolvency matter.

1. The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.
2. This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.
3. This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.
4. The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

**Question 1.6**

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

1. Public International Law.
2. UNCITRAL Legislative Guide on Insolvency Law.
3. World Bank Principles for Effective Insolvency and Creditor Rights Systems.
4. Private International Law.

**Question 1.7**

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

1. ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).
2. EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).
3. UNCITRAL Model Law on Cross-border Insolvency (1997).
4. JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

**Question 1.8**

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does **not** provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

1. Montevideo Treaty on International Commercial Law (1889).
2. Montevideo Treaty on International Commercial Terrestrial Law (1940).
3. Montevideo Treaty on International Procedural Law (1940).
4. Havana Convention on Private International Law (1928).

**Question 1.9**

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade’s operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is **not** addressed in the EIR Recast?

1. Proceedings to restructure a debtor that is facing the likelihood of insolvency.
2. Definition of “centre of the debtor’s main interests”.
3. A centralised insolvency register of insolvency proceedings opened in member states.
4. Co-operation and co-ordination provisions applicable to corporate groups.

**Question 1.10**

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings.What aspect is an international insolvency issue?

1. The local Court’s jurisdiction over the Debtor.
2. The standing of the foreign Creditor to sue for its debt in the local Court.
3. The foreign liquidator’s standing to request a stay of the local proceedings.
4. The fact that the debt owed to the Creditor is in a foreign currency.

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

**Question 2.1 [maximum 2 marks]**

Explain what the term “international insolvency law” means.

International insolvency law refers to a general framework of insolvency principles and legal systems governing collective debt collecting procedures. While most states have a developed bankruptcy or insolvency system, there is currently no single governing body, legislation or procedural rules unifying all states.

Professor Wessels defines "international insolvency law" as being:

*"…commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case".[[1]](#footnote-1)*

**Question 2.2 [maximum 5 marks]**

Differentiate between the concepts of universality and territoriality in cross-border insolvency.

Cross-border insolvency cases arise in a number of different circumstances, for example, where the debtor has interests in property located in more than one state, economic relationships with a foreign counterparty or creditors, or where there are contractual obligations which fall under a foreign state's jurisdiction. These circumstances may give rise to insolvency proceedings being commenced in more than one state thus contributing to its cross-border characteristics.

However, problems arise due to the fact that independent and sovereign states may govern their own legislation, or may not subscribe to the available treaties or conventions. Insolvency proceedings commenced in one state may not be easily recognised in another and vice versa, depending on the framework available in those states. As such, there are competing views on how to proceed in cross-border insolvencies, being (i) **universality** where there should only be one insolvency proceedings covering all of the debtor's assets worldwide; or (ii) **territorialism** which is based on the premise that insolvency proceedings may be commenced in every state or jurisdiction where the debtor holds assets, but that they should be territorially restricted to property within the state where proceedings are commenced.

Territorialism is much more focused on the local creditor and local interests within its domestic market. With universalism, there is a real risk that the strongest creditors would receive payment and any distributions diluted. Smaller creditors may also encounter difficulty participating in foreign proceedings and it may be impractical, effectively shutting them out.

The universalist approach is more widely accepted in common law based states whereas civil law countries are more inclined to take a territorial approach. The difficulty is that territorialism tends to become too costly and a universalist approach can often become political.

While these concepts appear diametrically opposed, there are other approaches which adopt a combination or hybrid of the two, which is more often than not the reality in practice. Modified universalism accepts that most states are closer to territorialism, and therefore where there is a "main proceeding" in one state where there is a centre of main interests, it is supported by secondary or ancillary proceedings through co-operation of the courts. Other concepts include co-operative territorialism (courts should communicate), contractualism (as stated in articles of association), co-operation following a protocol (i.e. Maxwell case), or internationalist principle (modified universalism with a pragmatic approach).

**Question 2.3 [maximum 3 marks]**

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

There are currently no international insolvency instruments with the goal of harmonising insolvencies in the Middle East. However, the World Bank has worked closely for a number of decades with the countries comprising the Gulf Cooperation Council.

A joint initiative in 2009 between Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International launched a comparative survey of insolvency systems in the Middle East and North Africa (MENA) region.

In 2019, the UAE Cabinet approved the Federal Decree-Law No. 19 of 2019 on Insolvency to regulate the cases of insolvency of natural persons. According to the UAE Ministry of Finance website, *"this law aims at enhancing the competitiveness of the UAE by ensuring the ease of doing business, creating favourable conditions for individuals facing difficulties and protecting those who are unable to pay their debts because of their bankruptcy."[[2]](#footnote-2)* The law bolsters the previous provision introduced in 2016 to enhance the creditworthiness of the country ensuring a favourable environment in the business sector.

Saudi Arabia followed the footsteps of the UAE in February 2018 as part of their overall reform efforts to further facilitate a healthy business environment attempting to strike a balance between foreign and domestic investors including local and small to medium enterprises.[[3]](#footnote-3) The legislation includes *"general regulations, preventative actions, measures for financial restructuring, as well as settlement procedure*."[[4]](#footnote-4) While titled as "Bankruptcy Law", its main objectives appear to be aimed at introduction of a modern restructuring regime to the jurisdiction facilitating international insolvencies. Dubai also followed suit with the UAE and Saudi Arabia in 2019, enacting the DIFC Insolvency Law (Law No.1 of 2019) and the Dubai International Financial Centre adopted the Model Law on Cross-Broder Insolvency in 2019.

Bahrain has also adopted the Model Law on Cross-Border Insolvency in 2018.[[5]](#footnote-5)

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

**Question 3.1 [maximum 5 marks]**

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

From the perspective of an insolvent company or bankrupt individual, the differences in objectives are fairly straightforward. Sam and Hooley set out the differences between the two in their text as summarised below.[[6]](#footnote-6)

Individuals are afforded protection from creditors and afforded the opportunity to establish a "fresh start". Whereas a company upon entering formal proceedings may be ultimately dissolved and the assets distributed or sold according to the relevant insolvency law of the state. An individual also cannot be placed into "restructuring" as would a company in restructuring their assets.

Corporations also have the ability to preserve certain assets or viable parts thereof and continue as a going concern. A company can also pass on personal liability to former directors and officers to impose personal liability on responsible persons. Individual cannot, or it is very unlikely.

State laws surrounding the estates of individuals may also provide for classes of excluded assets (i.e. assets which are individual to them for the benefit of themselves or dependents).

**Question 3.2 [maximum 5 marks]**

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

The insolvency regimes across the globe are influenced directly by their innate origins being civil law or common law systems.

The sources of law and legislation are the first hurdle when dealing with insolvency law in a cross-border context. Unless the system is federally controlled (United States and to some extent the EU), there are guaranteed to be differences in not only terminology but procedure and recognition as well. These sources of law may be in a single Act or Code or fragmented into multiple legislation, for example different codes governing individual bankruptcy and those of corporate entities.

In addition to sources of law, the underlying legal principals applying to securities law or for example avoidable dispositions (developed from *action pauliana* in civil law systems and the Act of Elizabeth in 1570) may differ.

Crucially, in some systems there are no collective procedures for individuals to enter bankruptcy protection or otherwise. These differences equally apply to corporate entities where restructuring proceedings may be available in one jurisdiction but not another, or it may be governed by Code, judge-made law or a combination of the two. Further difficulties arise when considering the level of territorial or universalism approaches of each jurisdiction which may give rise to even further friction or coordination.

**Question 3.3 [maximum 5 marks]**

What multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.

The UNICTRAL Model Law (UNICTRAL Legislative Guide on Insolvency Law) and Model on Secured Transactions (2016) are possibly to best attempt in the 21st century to promote harmonisation of domestic insolvency laws.

It is unclear how these attempts to harmonise domestic insolvency laws may impact future issues. The fact remains that each state (or most) have unique insolvency systems in addition to underlying differences in law and approaches to their legal system. How UNICTRAL Model Law is able to be adopted into these systems is highly dependent on the adopting state itself. Some states may also be limited to what they are able to adopt, for example crown dependencies or countries with limited resources.

We have seen attempts in the Middle East and Africa to adopt generally accepted principles in the international insolvency and World Bank initiatives, however, this does not negate or overcome the difficulties set out in the paragraph above.

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

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

**Question 4.1 [maximum 5 marks]**

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator’s investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The Erewhon liquidator could apply for a stay of the court proceedings as brought by Apex in Uptopia against Nadir. Following the principles of UNICTRAL Model law on Cross-Border Insolvency (Model Law), the Utopian court may recognise the Erewhon proceedings as the main centre of the liquidation to promote efficiency in the proceedings.

**Question 4.2 [maximum 2 marks]**

Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?

1. Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
2. Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

(a) There would be no difference in the approach. A stay is still achievable of the Utopian proceedings based on the establishment of the main proceedings, not the timing of the hearing.

(b) This may add a complication to the proceedings, however if there is a mechanism under the Utopia Insolvency Act which allows for corporation, this could be utilised.

**Question 4.3 [maximum 8 marks]**

**NB: This question is not related to Questions 4.1 and 4.2**

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company’s incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

**\* End of Assessment \***

1. B Wessells, *International Insolvency Law* (Kluwer, 2006), p 1. [↑](#footnote-ref-1)
2. "Protection of insolvent natural persons", at <<<https://u.ae/en/information-and-services/business/protection-of-insolvent-natural-persons>>>, accessed 10 October 2023. [↑](#footnote-ref-2)
3. "Saudi Arabia approves landmark bankruptcy law", at << <https://www.thenationalnews.com/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236>>>, accessed 10 October 2023. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. "Status: UNICTRAL Model Law on Cross-Border Insolvency (1997)", at << https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\_insolvency/status>>, accessed 10 October 2023. [↑](#footnote-ref-5)
6. In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017), chap 28. [↑](#footnote-ref-6)