**“Appendix A”**

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**INSOL International**

**Foundation Certificate in International Insolvency Law**

**Formal Assessment for Module XX**

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**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment via the “dropbox” on the Foundation Certificate portal on the INSOL International web pages. Once you have submitted your assessment, the system will not allow you to substitute your uploaded assessment for another.**

**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. Where there are check-boxes, these have been enabled for you to check – please note that the document will only allow you to check one box under each question (where applicable).

**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.** You must save this document using the following format: [student number].[module number].[docx] or [doc]. An example would be: “12345.module1.docx”, or “12345.module8B.docx”. **Please also include the filename as a footer to each page of the assessment**. 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 students unmarked.

**4.** Before you will be allowed to submit your assessment via the “dropbox” on the Foundation Certificate portal on the INSOL International 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 paragraph xx of the Course Handbook which deals with plagiarism and dishonesty in the submission of assessments.

**5.** The final submission date for this assessment is xxxxxxxxxx. The dropbox portal will close at **23:00 (11 pm) BST** on xxxxxxxxx. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

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**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions)**

Questions 1(a) – (j) 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.

1. Which one of the following may not make an application for bankruptcy on an individual?
   1. a creditor
   2. a combination of creditors
   3. a supervisor of an individual voluntary arrangement
   4. the debtor
   5. the official receiver

Answer: (e)

1. Which of the following is not correct?

A bankruptcy trustee may not cancel a charge created by a bankrupt if:

* 1. money was actually advanced or paid in good faith
  2. the actual price or value of property sold or transferred was paid
  3. there was any other valuable consideration given for the charge
  4. the official receiver deems it fit to cancel the charge

Answer: (d)

1. When should the liquidator of a company convene a creditors meeting after appointment?
2. Within 30 days 
3. Within 28 days 
4. Within 21 days 
5. Within 14 days 

Answer: (a)

1. Which of the following office holders has no power to challenge a transaction at an undervalue under Section 682 of the Insolvency Act?
2. An administrator 
3. A liquidator in a creditors’ voluntary liquidation 
4. A liquidator in a compulsory liquidation 
5. An administrative receiver 

Answer: (d)

1. Which one of the following may not appoint or make an application for the appointment of an administrator
2. A creditor
3. The Official Receiver
4. Directors
5. A qualifying floating charge holder

Answer: (b)

1. Which one of the following powers/functions are not bestowed on an administrator?
2. Power to sell charged assets
3. Power to borrow money
4. Power to hire or fire directors
5. Power to disclaim onerous contracts

Answer: (d)

1. Within how many weeks of the company entering into administration must the administrator hold an initial meeting of the company’s creditors?
2. Within 14 days 
3. Within 30 days 
4. Within 60 days 
5. Within 67 days 

Answer: (d)

1. Within how many days’ notice is a supervisor of an individual voluntary arrangement (“IVA”) required to file his report on the IVA?

a) Within 7 days 

b) Within 14 days 

c) Within 21 days 

d) Within 28 days 

Answer: (b)

1. Which of the following may not make a proposal for a company voluntary arrangement (“CVA”)?

a) Creditors 

b) Directors 

c) Liquidator (where the company is in liquidation) 

d) Administrator (where the company is in administration) 

Answer: (a)

1. Which of the following oversees a company voluntary arrangement:
2. A director
3. Official Receiver
4. Receiver
5. Liquidator
6. Supervisor

Answer: (e)

1. What is the maximum amount of money payable to employees in insolvency during a distribution:
2. KES 20,000/=
3. KES 100,000/=
4. KES 200,000/=
5. KES 500,000/=
6. None of the above

Answer: (c)

1. What is the prescribed percentage of realisations that an administrator should place aside to settle unsecured debts upon the sale of assets secured by floating charges?
2. Ten percent
3. Twenty percent
4. Fifteen percent
5. Five percent
6. None of the above

Answer: (b)

**QUESTION 2 (a combination of these questions which adds up to 10 marks) (direct questions)\***

1. What are the options of a secured creditor in the event of bankruptcy under the Insolvency Act? (3 marks)

Answer:

Sections 226 and 228 of the Insolvency Act provide that the secured creditor has the option to:-

1. realise the security i.e. sell the charged asset and use the proceeds of such sale to settle the debt owed by the bankrupt;
2. surrender the charge to the bankruptcy trustee for the benefit of creditors; or
3. have the property valued and prove for the balance due after deducting the amount of the valuation
4. What are the grounds for the automatic discharge of a bankrupt? Does the automatic discharge have exemptions, if so what are these exemptions? (4 marks)

Answer:

Section 254 of the Insolvency Act provides for an automatic discharge of a bankrupt after three (3) years except under the circumstances set out under sub-section 2 which are, if:

1. the bankruptcy trustee or a creditor has objected and the objection has not been withdrawn by the end of the three-year period:
2. the bankrupt has to be publicly examined, on request by a creditor or the bankruptcy trustee, and has not completed that examination; or
3. an objection by a creditor or the bankruptcy trustee to the discharge has been raised.
4. What are the characteristics of a qualifying floating charge holder? (3 marks)

Answer:

Section 534 of the Insolvency Act provides that a qualifying floating charge is one which:

1. is a floating charge in respect of the whole or substantially the whole of the company’s assets;
2. is created by a document that states that section 534 of the Insolvency Act applies to the floating charge; or
3. purports to empower the holder of the floating charge to appoint an administrator of the company.
4. What are the objectives of an administration under the Insolvency Act? (3 marks)

Answer: Candidate to identify the three objectives. Note to distinguish whether all have to be achieved or either of them.

Section 522 of the IA provides that the objectives of an administration are to:

1. maintain the company as a going concern;
2. to achieve a better outcome for the company’s creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration); and/or
3. to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

OR

1. Briefly discuss the automatic moratorium in section 560 of the Insolvency Act and its effects (5 marks)

Answer: NB: Candidate to state at least 5 effects:

1. Once the administration is effective or where a petition for administration is pending an automatic moratorium comes into effect pursuant to section 560 of the Insolvency Act. The moratorium has the following effects:
2. a resolution may not be passed for the liquidation of the company;
3. the Court may not make an order for the liquidation of the company;
4. a person may take steps to enforce security over the company’s property only with the approval of the Court;
5. a person may take steps to repossess goods in the company’s possession under a hire purchase agreement only with the approval of the Court;
6. a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the approval of the Court;
7. a person may begin or continue legal process (including legal proceedings, execution, distress and diligence) against the company or property of the company only with the approval of the Court;
8. a person may take steps to enforce security over the company’s property only with the approval of the Court; and
9. a person may take steps to repossess goods in the company’s possession under a hire purchase agreement only with the approval of the Court.
10. Briefly discuss the circumstances under which a company is deemed unable to pay its debts (3 marks)

Answer:

Section 384 of the Insolvency Act provides that a company is deemed unable to pay its debts:

1. if a creditor (by assignment or otherwise) to whom the company is indebted for one hundred thousand shillings or more has served on the company, by leaving it at the company’s registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;
2. if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
3. if it is proved to the satisfaction of the Court that the value of the company’s assets is less than the amount of its liabilities (including its contingent and prospective liabilities).
4. You are the administrator of Swahili Limited and wish to sell a property over which Good Profits Commercial Bank has a legal charge. Good Profits Commercial Bank has refused you permission to sell the property. What steps can you take, if any, as administrator to overcome this and achieve a sale of the property? (3 marks)

Answer: Candidate should briefly state, the administrator’s powers, the objective of administration and the right of administrator to seek court approval to sell the charged asset. Candidate should demonstrate their understanding of the difference between fixed charge securities and floating charge securities.

**OR**

1. What are the objectives of a company administration? (3 marks)

Answer:

The Insolvency Act provides that the objectives of an administration are to[[1]](#footnote-1):

1. maintain the company as a going concern;
2. to achieve a better outcome for the company’s creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration); and/or
3. to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.
4. In accordance section 626 of the Insolvency Act, what matters must a nominee in a CVA comment upon in his report to the Court? (3 marks)

Answer:

The provisional supervisor shall, within thirty days (or within such extended period as the Court may allow) after that supervisor is given notice of the proposal, submit a report to the Court stating—

1. whether, in that supervisor’s opinion, the proposal has a reasonable prospect of being approved and implemented;
2. whether, in that supervisor’s opinion, meetings of the company and of the company’s creditors should be convened to consider the proposal; and
3. if that supervisor believes that those meetings should be convened—the date on which, and the time and place at which, it is proposed to hold the meetings.
4. Discuss the circumstances under which a company may be liquidated by the court (candidate to list at least 4) (4 marks)

Answer:

A company may be liquidated by court if:

1. the company has by special resolution resolved that the company be liquidated by the Court;
2. being a public company that was registered as such on its original incorporation—
   * 1. the company has not been issued with a trading certificate under the Companies Act, 2015; and
     2. more than twelve months has elapsed since it was so registered;
3. the company does not commence its business within twelve months from its incorporation or suspends its business for a whole year;
4. the company is unable to pay its debts;
5. the Court is of the opinion that it is just and equitable that the company should be liquidated; or
6. by an application made by the Attorney General.

**QUESTION 3 (Candidates to select one question from the below) (essay-type questions)\***

1. Discuss the process of voluntary and involuntary liquidation in a Winding Up. (15 marks)

**Question aims**

To test the candidate’s knowledge of the Winding Up process.

**Suggested answer**

Answers should include the following:

* Description of what is voluntary and involuntary winding up. Here candidates should discuss director/members voluntary winding up, creditors winding up and winding up by the court.
* Who can commence it
* Timelines and procedural requirements e.g. notices, advertisements and filings required e.g. reports on progress.
* Calling of creditors meetings.
* Extension of winding up if not finalised within the statutory 12 months.

1. Discuss the process of administration under section 534 if the Insolvency Act (15) marks)

**Question aims**

To test the candidate’s knowledge of administration by a secured creditor

**Suggested answer**

Answers should include the following:

* Description of what is section 534 and who is able to commence an administration process under that section.
* Definition of what constitutes a qualifying floating charge.
* The procedural requirements for such appointment e.g. notices issued, timelines for gazettement and publication, administrators report, contents of the report.
* Calling of creditors’ meetings, conduct of those meetings and the voting thresholds for decision making.
* Extension of administration if not finalised within the statutory 12 months.

1. Discuss the priority of creditors under the Insolvency Act (15 Marks)

Answer: Candidate should demonstrate understanding that secured creditor claims have priority over preferred debtors.

1. Schedule 2 of the Insolvency Act sets out the list of preferential debtors in priority as below:
2. **First priority claims:**
3. Costs of the liquidator’s/administrator’s remuneration and operational costs for the administration or liquidation;
4. Reasonable costs incurred during the court proceedings and costs incurred by a creditor to preserve an insolvent company’s assets.
5. **Second priority claims:** These include:
6. Wages and salaries payable to employees up to a maximum of KES 200,000;
7. Statutory deductions from employees (e.g. PAYE, NSSF (Retirement benefits contribution), NHIF (statutory health insurance contributions));
8. Other amounts required by other written law.
9. **Third priority claims**: Unpaid taxes, these are pay as you earn (PAYE) tax, withholding tax (resident and non-resident) and customs duty and excise duty.
10. **Fourth priority** claims: Holders of floating charges (non-crystallised).
11. **Fifth priority claims**: Unsecured creditors. These claims having the same priority rank equally among themselves and are payable on a pari-passu basis.
12. Secured assets do not form part of the insolvency’s estate in Kenya and the secured creditor has priority with respect to the secured assets and has the right to realise the security and set off debts due to them but must account for any excess funds from the realisation which must be remitted to the liquidator for distribution.
13. Candidates to also discuss:
    1. The place of Shareholders.
    2. Percentages set aside for unsecured creditors from the sale of assets subject to a floating charge.
    3. Circumstances in which the priority in Schedule may not be followed i.e. by an administrator.

**QUESTION 4 (Candidates to select one question from the below) (fact-based application-type questions)\***

1. You have been approached by the directors of Eat it All Limited (EAL) to advise on their options in light of their recent financial problems. The directors disclose the following to you:
2. That the company has not been doing well for the past 3 years and that the directors knew the company was insolvent;
3. That the company has outstanding loans owed to certain creditors. 20 percent of these loans are secured while 80 percent are unsecured;
4. That the company recently fired 3 of its directors for misappropriation of funds;
5. That one of the company’s assets was sold to one of the main shareholders spouse at a value lower than market price;
6. That the company during the last 9 months sold some assets to pay some creditors who had threatened to sue them;
7. That the company was in process of transferring (but not yet finalised) one of its most valuable asset to an SPV owned by its parent company, as a result of the insolvency.
8. The directors have provided you with an independent business review report by a top audit firm that shows the company is viable and can return to profitability if certain structural changes are adopted. The directors inform you that they have shared this report with the company’s main creditors who are owed 80% of its total debts and who have shown their willingness to discuss any proposals from the company. The remaining creditors were unwilling to engage the directors.

The directors have asked you to advise them on the best course of action for the company and their options.

**Question aims**

To test the candidate’s knowledge of corporate rescue

**Suggested answer**

Answers should include the following:

* Here the candidate should at the very least discuss administration and CVA’s as options. A discussion about schemes of arrangement under the Companies Act is an added advantage that will demonstrate the candidates grasp of corporate rescue options i.e. the impacts of each and why one would be preferred over the other.
* Discussion on reviewable transactions that the company may have entered into i.e. preference transactions, transactions at undervalue, transactions with connected persons.
* Wrongful /fraudulent trading i.e. the company was trading for 3 years with the knowledge that it was insolvent. Here the candidate should clearly illustrate what are the consequences and the remedies available.
* Definition of what constitutes a qualifying floating charge.
* Candidate to discuss the approval processes of CVA’s and Administration. Here the candidate is also being tested on the ability to demonstrate how the 20% secured creditors issue will be dealt with i.e. whether consent of the secured creditors if not procured is a deal breaker. Candidate should also discuss the thresholds for proposal approvals for the corporate rescue processes and their impact on secured creditors who refuse to participate.

**OR**

1. You have been approached by Mr X who claims to be a representative of UFO Limited, a foreign company registered in Kenya. Mr. X claims that UFO Limited is being liquidated in its original jurisdiction and that an order directing that the company be wound up has been issued. Mr. X claims that UFO Limited has enough assets to pay its creditors in Kenya. Mr. X asks that you advise him on how to proceed with the realisation of UFO Limited’s assets.

**Question aims**

To test the candidate’s knowledge of cross border insolvency

**Suggested answer**

Answers should include the following:

1. Candidate to mention adoption by Kenya of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997.
2. Discuss who has capacity to pursue insolvency in Kenya on behalf of a foreign company i.e. a foreign representative and what constitutes a foreign proceeding.
3. Discuss the modalities of the petition for a recognition application by a foreign representative and when a Kenyan court can refuse to allow recognition. The contents of a recognition application e.g.

1. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;

1. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative;

1. any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative; and

1. a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

1. Discuss when the Court is required to accept the Recognition Application i.e. where:

1. the foreign proceeding properly instituted before the relevant body/court and the foreign representative has the capacity to play such a role;

1. the criteria set out in paragraph 3 above have been met; and

1. the application has been submitted to the Court.

1. Discuss the interim measures the court can give e.g. stay execution, suspending disposition of assets.

1. Section 522 Insolvency Act [↑](#footnote-ref-1)