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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8D**

**INDIA**

This is the **summative (formal) assessment for Module 8D** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 8D**. 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 **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next 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.assessment8D]**. An example would be something along the following lines: 202223-336.assessment8D. **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 **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**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**

Which of the following legislation provides for the rescue of a company:

1. The Insolvency and Bankruptcy Code 2016.
2. The Companies Act 2013.
3. The Presidency-towns Insolvency Act 1909.
4. The Provincial Insolvency Act 1920.

**Question 1.2**

Which one of the following remedies is available to a non-Indian creditor:

1. Recovery proceedings before the Civil Court.
2. Enforcement of security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002.
3. Recovery proceedings before the Debts Recovery Tribunal.
4. Mandatory participation in an out-of-court restructuring under the inter-creditor agreement.

**Question 1.3**

Which of the following is not a function of the Insolvency and Bankruptcy Board of India under the Insolvency and Bankruptcy Code 2016?

1. Registration of insolvency professionals.
2. Registration of insolvency professional agencies.
3. Carrying out inspections and investigations of insolvency professionals.
4. Appointing an insolvency professional as a resolution professional for a company.

**Question 1.4**

Which of the following forms of security cannot be enforced under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002?

1. A mortgage in English form.
2. A pledge.
3. A charge.
4. A hypothecation.

**Question 1.5**

Which one of the following will make a creditor’s petition for adjudication as a bankrupt under the Presidency-towns Insolvency Act 1909 and the Provincial Insolvency Act 1920 non-compliant with the requirements:

1. The debt owing exceeds INR 5,000.
2. The debt is a liquidated sum payable immediately or in some certain future time.
3. The relevant act of insolvency occurred five months prior to the presentation of the petition.
4. The debtor did not defraud its creditors.

**Question 1.6**

Indicate which one of the following enjoys **the highest priority** in distribution of proceeds from a bankrupt’s assets under the Insolvency and Bankruptcy Code 2016:

1. Fees of the bankruptcy trustee.
2. Dues owed to the State and Central Government.
3. Workmen’s dues for 24 months.
4. Employees’ dues for 12 months.

**Question 1.7**

Which of the following is **not a requirement** for initiating voluntary liquidation under the Insolvency and Bankruptcy Code 2016?

1. Special resolution of the shareholders of the corporate debtor.
2. Declaration of the directors of the company on the ability of the company to repay its debts from available assets.
3. Approval of two-thirds of the creditors.
4. Approval of the National Company Law Tribunal.

**Question 1.8**

In which one of the following processes is the entire section 29A of the Insolvency and Bankruptcy Code 2016 **not applicable**?

1. Corporate insolvency resolution process of an MSME.
2. Pre-pack insolvency process of an MSME.
3. Sale of assets of a company in liquidation.
4. Sale of assets under voluntary liquidation.

**Question 1.9**

In which of the following situations can an **application for initiation** of corporate insolvency resolution process **not be** filed under the Insolvency and Bankruptcy Code 2016?

1. The corporate debtor is a bank.
2. The corporate debtor is an MSME.
3. The creditor is an operational creditor who has issued a demand notice for the debt.
4. The corporate debtor is in financial difficulties but has defaulted to only one creditor to the extent of INR 20 million.

**Question 1.10**

**Approval of the committee of creditors** is not a requirement for the following transactions undertaken by the resolution professional under the Insolvency and Bankruptcy Code 2016:

1. Raising interim finance.
2. Undertaking any related party transactions.
3. Payment of the approved insolvency resolution process costs.
4. Amending the constitutional documents of the corporate debtor.

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

**Question 2.1 [maximum 2 marks]**

Briefly describe the remedies against an order of the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016.

[A debtor can appeal against the order of the National Company Law Tribunal within 30 days at the National Company Law Appellate Tribunal (NCLAT) and any order from the NCLAT can be appealed at the Supreme Court of India in 45 days on question of law. The Supreme Court with the High Court have constitutional power over all other courts and tribunals and supervise the courts and tribunals if there is any breach in respect of the constitutional rights of the Constitution.]

**Question 2.2 [maximum 4 marks]**

Briefly describe the exceptions to the moratorium during the corporate insolvency resolution process under the Insolvency and Bankruptcy Code 2016.

[There are some exceptions to the moratorium which occurs during a CIRP as follow:

1. The Government is in a position to notify an exception against a moratorium during a CIRP.
2. Normally the termination and suspension of supply of essential goods and services are not allowed during the moratorium except if the debtor fail to settle his debts during the period of moratorium;
3. Moratorium is not also applicable for transaction which have been specified by the Central Government and does not apply for proceedings or any actions initiated against a surety which is covered in the contract of guarantee of the debtor;
4. The Government can terminate any licences, approvals, permits and concessions if the debtor fail to settle the required payment.

In “Gujarat Urja Vikas Nigam Limited v Amit Gupta, the supreme court aver that the NCLT will not terminate the contract if it is based only on ground of insolvency and not on other unrelated ground. ]

**Question 2.3 [maximum 3 marks]**

Indicate the acts of insolvency under the Presidency-towns Insolvency Act 1909.

[Presidency-towns Insolvency Act 1909 applies for cities of Kolkata, Chennai and Mumbai. The acts of insolvency under the Presidency-towns Insolvency Act 1909 are as follow:

1. If a debtor is transferring all or significantly all of his asset to the creditors on the basis of misrepresentation or has been done on a fraudulent basis to cheat some creditors or all creditors.
2. Transfer of asset or part of the asset with the aim of defeating or delaying creditors. The debtor is not required to transfer all the asset to commit an act of insolvency. The intent is to defraud or delay the creditors. If the transfer is made to delay only one creditor, the act is not applicable. It will apply when the transfer and/or the fund received is not being made available to all creditors.
3. The transfer of asset or some part of the asset on a fraudulent conveyance basis and there should be two conditions attached:
4. There has been a transfer of asset; and
5. The transfer is on a fraudulent conveyance.]
6. If a debtor isolates or exit from his/her usual place or depart from the territories of the court where the bankruptcy order was made with the intention to defeat or delays the creditors, and no creditor is in a position to communicate with the debtor.
7. If there has been a petition under the court and the debtor sell the asset or make an attachment on the property during a period of at 21 days as from an order of the court or the debtor sell or make an attachment on his property which is in execution. If the asset has been later found as being bad under the law, the act of insolvency shall not applied.
8. If a debtor, make a petition to be ordered as an insolvent and same will continue even if the petition is later dismissed.
9. If a debtor goes to jail in execution of a money decree.
10. If the debtor does not comply upon receipt of a notice from any creditor (or an assignee) whereby there has been an order from the court that the debtor has to pay the creditor.

**Question 2.4 [maximum 1 mark]**

Explain the cross-border insolvency arrangements in the Indian regime.

[As from the publication of his paper, the cross-border insolvency law is not yet developed and in some scared scenarios, the Indian courts have applied the principle of comity and convenience. In a past case, the Indian court has permitted a foreign bankruptcy trustee to control the asset of a debtor in India. The Government is trying to adopt the UNITRAL Model Law and the ILC Report has advocate the application of the Model law with some changes which comply with the Indian jurisdiction. Indian law normally does not provide for recognition and enforcement and remain territorial like in BCCI, the court order for a territorial insolvency but in Jet Airways, the NCLAT recognised the foreign judgement on insolvency. Section 234 of the Code as an interim measure allow the Government to enter bilateral treaties to enforce the Code. Section 235 of the Code allow creditor to make petition at the National Company Law tribunal for asset which are found overseas.

Section 44A of the Code of Civil Procedure, 1908 enable Indian court to recognise foreign judgement as a decree ordered by Indian courts if the decree is from a designated court in a reciprocate state out of India and no taxes or other charges like tax issues are attached. There are 12 reciprocate states and order outside these states will need a fresh suit. The order of the 12 states can be refused if the foreign court does not have jurisdiction, is based on fraud, is in breach of Indian law or incorrect with international law.]

**QUESTION 3 (essay-type question) [15 marks]**

Write a short essay on the process of sale of assets of a company, and distribution of proceeds under liquidation in terms of the Insolvency and Bankruptcy Code 2016.

Your answer should make reference to at least the following:

* available methods to sell the assets;
* requirement for valuation and consultation with the creditors; and
* priority of different types of claims in distribution.

[A liquidator is able to sell the assets under the Code on an independent basis, jointly, as a slump-sale basis or in parcel and as a going concern basis which should occur at the first auction only. First the liquidator shall attempt for a scheme of arrangement or compromise with 90 days at the start of the winding up process unless same has already been recommended by the committee of creditors (“Committee”) in a CIRP. If the Committee has recommended the sale as a going concern in a CIRP, the insolvency practitioner must sell the asset at the first action only. The Committee may pick out which asset will be sold as a going concern or if not, the liquidator will pick out the assets. If within 90 days, the liquidator is unable to sell the asset on an ongoing basis, the insolvency practitioner can proceed with the sale as piecemeal, in parcel or jointly.

The liquidator is normally require to proceed with the sales at public action but if the product is perishable, will deteriorate and loss value if not sold instantly, the liquidator can proceed by way of private sale. He can also proceed with private sale if the price will be higher than a failed auction or with approval of the National Company Law Tribunal.

The liquidator does not have the right to sell the asset to a related parties or to any professional that he has appointed if no consent has been received from the Adjudicating Authorities. The liquidator is not able also to sell the asset to a disqualified person as per section 29A of the Code.

If the asset is secured by way of security, the secured creditor may dispose of his asset without intervention of the liquidator or give up his right to the liquidator to dispose of the asset.

The liquidator is required to consult the Committee or may consult the Court before taking any action.

Within 75 days from his appointment, the liquidator must prepare an asset memorandum which include the value of the debtor’s asset, the way and mode of how to process with the realisation and the expected amount to be recouped from the total asset and submit the memorandum to the National Company Law Tribunal. The valuation of the asset is performed by at least two registered valuers who would be appointed by the insolvency practitioner.

The priority of claims is as follow:

1. The liquidation cost and liquidator fees to be paid in full;
2. The secured creditor (if he has relinquished his right to the liquidator equally with workmen’s dues for the 12 months which precede the start of the winding up process;
3. Outstanding amount owed to employees for the period of 12 months before the start of the winding up.
4. The outstanding amount due to unsecured creditors in respect to financial debts;
5. Any sum owed to Central and State Government which may be received on account of the Consolidated Fund of India or Consolidated Fund of the state equally with the fund due to secured creditors which the secured creditors have not been able to recoup from the enforcement of their security;
6. Any debts or dues which are left;
7. Preference stakeholders (if any); and
8. The equity stakeholders or partners.

Any disturbance of the waterfall will be ignored by the liquidator for contractual agreement between the stakeholders of same rank.]

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

Big Air Limited, an Indian company, (the Company) is a commercial airline company in India. It has leased aircrafts from various lessors. The Company has failed to pay the lease rentals in the last few months which now aggregate to INR 2 billion. The lessors seek to terminate the leases and take away the aircraft from the Company’s control. However, the Company has not defaulted to its other creditors.

The Board of the Directors of the Company has contacted you to advise them on the options available and key considerations. In this context, answer the questions below.

**Question 4.1 [maximum 7 marks]**

Prepare a note for the Board on the ability to initiate insolvency proceedings and the steps to be taken in this regard.

[Date: March 09, 2024

To the Board of Director

Big Air Limited

India

Dear Board,

I am required to provide you with a note if the Company can initiate insolvency proceedings based on the scenario above and on the steps to be taken.

In view that the Company is indebted for an amount of INR 2 billion, the Company may initiate a corporate insolvency resolution process (“CIRP”) to protect its interest. The CIRP which aim to rescue the Company, need to be approved by 75% of the shareholders and the Company may make an application to the National Company Law Tribunal (the “Tribunal”). The Tribunal shall within 14 days as from receipt of the CIRP application shall admit the application as there has been a default in payment from the Company to various lessors. Please note that the Supreme Court has also stated that existence of debts and the debtor has default payment on a prima facie proven case shall not be the only criteria for initiation of a CIRP. The admission of the CIRP shall be at the discretion of the Tribunal and the latter shall also consider if the CIRP is shall also consider is achievable and realisable.

Upon admission of the CIRP, a moratorium shall be issued by the Tribunal and no legal actions in term of CIRP or liquidation process can be initiated by a creditor until the CIRP is terminated. The supply of essential goods and services cannot be suspended or terminated, and licences, approval, permits and concessions delivered by government cannot be ended.

The Tribunal shall appoint a resolution professional to take control of the asset of the Company and protect the interest of the Company and its creditors. The resolution professional shall invite creditors to submit their claim and built on a list of creditors. The resolution professional shall also constitute a committee of creditors (the “Committee”) and his responsibility shall be as follow:

1. Give public announcement of the CIRP and invite creditors to provide their claims;
2. Verify the claim received and keep an updated list of creditors;
3. Take control of the property of the debtor and protect them;
4. Draw up an information memorandum in respect of the information of the Company;
5. Prepare a resolution plan and submit to the Committee;
6. Upon acceptance of the Committee of the plan, submit the plan to the Tribunal for acceptance;
7. Deal with antecedent transaction as per the code and regulations; and
8. Engage two valuers for valuation of the Company.

Upon acceptance of the resolutions plan, the moratorium end and the resolution professional has to vacate office.

The Timeline of the CIRP shall be 180 days as from date of order of the Tribunal and extended if the with a majority of 66% vote on the extension. If the Tribunal found out that the CIRP cannot be completed within 180 days, it can as a one-off measure provide an extension of a maximum of 90 days. In August 2019, section 12 of the Code was amended and A CIRP process has be terminated within 330 days as from initiating date and the creditors shall be classified as operational creditors.

Please note that during the coronavirus pandemic (from 25 March 2020 to 24 March 2021), no CIRP process can be initiated.

The Committee can displace the actual resolution professional and replace him by another one (66% majority vote in value is required) with the approval of the Tribunal]

If the CIRP resolution plan failed, the Company will go in liquidation if approved by majority of creditors.

**Question 4.2 [maximum 8 marks]**

Prepare a note for the Board explaining the effect of insolvency proceedings on the rights of the lessors and whether the aircraft can be retained by the Company.

[Upon acceptance of the Tribunal of a CIRP, the lessors cannot take any legal suit against the debtor.

The creditors must receive a copy of the public announcement whereby the resolution professional invite creditors to submit their claim by way of post or electronic means. The creditors will have to file a proof of claim detailing the amount outstanding with supporting documents to prove the claim and provide any additional information if required by the resolution professional and the latter will verify the claim received within seven days as from the last date from the receipts of all claims as per the announcement.

The lessors can also form part of the Committee in the absence of any financial creditor. 18 operational creditors with the highest value in term of debts with one elective person of the workman and employees can form part of the Committee.

As member of the Committee, the lessors will have the following right in respect to transactions if approved by a majority of 66% in value:

1. Approved the raising of an interim finance;
2. A change in the capital structure including the issuance of more securities;
3. Instruct banks to maintain accounts for activities which exceed limited previously approved by the Committee.
4. Accept related party transaction;
5. Approved change in constitutional documents of the Company;
6. Approved that the resolution professional delegate his authority to other person.
7. Change the management of the debtor

The lessors may also appeal the decision of the Tribunal at the National Law Appellate Tribution or at the Supreme Court if they think that the decision of the Tribunal is unjustified or the CIRP is unjustified or is illegible.

An operational creditor has also the right to be present at the committee’s meeting as non-voting member if his claim is or exceed 0% of all debt of the debtor.

Any lessor may submit a resolution plan if he satisfied Section 29A of the Code.

Any lessor as an operational credit may also apply for a CIRP if same has not been initiated by the Company. The creditor will have to serve a notice to the debtor in a specified form to claim the outstanding amount with the relevant invoices supporting the outstanding debt. The debtor will have 10 day to reply to the creditor that the payment has already been effected or the outstanding debt is disputable. Hence, the creditor would not be in a position to apply for a CIRP.

In the absence of any reply for the debtor, the tribunal can also refuse he application of the CIRP from the creditor if the claim is disputable.

A moratorium become take place until the CIRP is completed whereby no lessor can proceed with the recovery of their asset. Hence if the CIRP has been approved by the Tribunal, the lessors would not be in a position to recover their aircraft. The aircraft will still be in the possession of the debtor until the moratorium end when the CIRP is terminated. We should also note that during the moratorium process, the corporate debtor should not default any payment toward the lessors. But in “*Gujarat Urja Vikas Nigam v Amit Gupta*”, the Supreme Court of India verdict was that if a supply of an essential service which will affect the going concern of a debtor and the agreement is essential for the success of the CIRP, the supply should not be stop if only based on ground of insolvency and not on other unrelated ground. Hence, the lessors may also find it difficult to end the lease agreement and recoup their aircraft in the eventually that the debtor fail to settlement the rental during the CIRP process.]

**\* End of Assessment \***