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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5F**

**MAURITIUS**

This is the **summative (formal) assessment** for **Module 5F** 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 5F**. 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.assessment5F]**. An example would be something along the following lines: 202223-336.assessment5F. **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**

Upon which of the following grounds will the Court **not** make an order for bankruptcy?

1. Upon an admission to the creditors that the debtor is insolvent.
2. Upon failure to comply with a bankruptcy notice.
3. Upon the debtor incurring more liabilities.
4. Upon departure from Mauritius with intent to defeat or delay a creditor.

**Question 1.2**

Under section 8 of the Insolvency Act 2009, **within which timeframe** must a debtor comply with the exigencies of a bankruptcy notice?

1. Within 42 days of the service of the bankruptcy notice.
2. Within 42 days of the date of the bankruptcy notice.
3. Within 14 days of the service of the bankruptcy notice.

1. Within 14 days of the date of the bankruptcy notice.

**Question 1.3**

Who **are not bound** by a deed of company arrangement?

1. The members of the company.
2. The future creditors of the company.
3. The secured creditors of the company.
4. The directors of the company.

**Question 1.4**

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to**?

1. The charger.
2. The unsecured creditors.
3. The shareholders.
4. The directors.

**Question 1.5**

Under the Insolvency Act 2009, the winding up of a company may **not** be effected by way of:

1. creditors’ voluntary winding up.
2. Court winding up.
3. shareholders’ voluntary winding up.
4. directors’ voluntary winding up.

**Question 1.6**

Within **what timeframe** is a liquidator required to give written notice of his appointment to the Director of Insolvency Service?

1. Within seven days of appointment.
2. Within 14 days of appointment.
3. Within 21 days of appointment.
4. Within three days of appointment.

**Question 1.7**

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

1. The liquidator has custody and control of the assets of the company.
2. The assets automatically vest in the liquidator.
3. The directors remain in office but cease to have any powers except those provided under the Insolvency Act 2009.
4. Shares in the company cannot be transferred.

**Question 1.8**

Which one of the following persons is **not** qualified to act as Insolvency Practitioner?

1. A member of the Chartered Institute of Management Accountants of United Kingdom.
2. A law practitioner.
3. A director of the company.
4. A qualified auditor.

**Question 1.9**

**In which of the following circumstances** can a liquidator apply to the Court for an order that he be released as liquidator?

1. Where he found that a director of the company has siphoned money belonging to the company;
2. Where is unable to access the books and records of the company;
3. Where is appointed to act as the liquidator of another company;
4. Where he is removed from office.

**Question 1.10**

**After how long** can a creditor enforce a foreign judgment which has been rendered executory in Mauritius?

1. 10 days after the judgment.
2. Immediately after the judgment is delivered.
3. 14 days after the judgment.
4. 21 days after the judgment.

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

**Question 2.1 [maximum 2 marks]**

Identify and describe the different securities available to a creditor to secure banking facilities and the protection afforded thereby.

Under the Mauritian legal framework, there are several types of securities available to secure the settlement of a debt. The same are created either by operation of law or by contract as discussed below.

First are fixed charges which can only be granted over the entirety of immovable property and inscription of the same is mandatory as it affects the validity. Fixed charges afford protection to creditors as the creditors can enforce the same by power to seize given to an Usher of the Supreme Court and the sale proceeds goes to all creditors with the secured creditor having priority.

Second type of securities are floating charges which are instruments created over present and future movable and immovable assets. A creditor has a right to enforce this security upon crystallisation in the same manner as the enforcement of a fixed charge.

Third is the personal guarantees which can either be a simple guarantee where the guarantor becomes liable to pay the debt of principal debtor upon default or joint guarantee where the guarantor is equally bound by the debt and becomes a co-debtor. In both types, the creditor can recover amounts owed to them from the guarantors.

Fourth are mortgages which are instruments created over commercially available immovable property and is only valid if created by way of notarial deed stating the amounts guaranteed and the property being used as collateral. A creditor is afforded protection in that they can sell the mortgaged property to recover their monies.

Fifth category of securities are pledges which can be created over immovable property. Pledges could be on shares where the seller is expected to inscribe their privilege within 2 months of the deed of sale of the property or pledge over rental income. Both types of pledge entitle the creditor to benefit from the property but no to acquire the property.

Finally, gage is a type of security that allows the creditor to be paid in preference to other creditors and the pledge asset is kept by the creditor or an agreed third party who will have property right on the pledged asset.

**Question 2.2 [maximum 2 marks]**

What are the duties of the Director of the Insolvency Service when dealing with Insolvency Practitioners?

The Director of Insolvency Services as the regulator responsible for insolvency services has a duty to monitor the performance and discipline of insolvency practitioners and can apply to court for the removal or discipline of an insolvency practitioner.

Additionally, the director has a duty, in collaboration with other professional bodies, to set rules, standard and guidance governing performance and conduct of insolvency practitioners.

Further the director is responsible for the continuous professional development of insolvency practitioners in Mauritius.

The Director also has a duty to keep and maintain an up-to-date register of insolvency practitioners and their qualifications.

**Question 2.3 [maximum 2 marks]**

With reference to the Insolvency Act 2009, briefly describe the various meetings that an administrator must call upon his appointment and the aim of such meetings.

Upon appointment, the Administrator must call the first creditors meeting and the watershed meeting. The Administrator is at liberty to call upon any other meeting as required by the creditors committee or the Administrator.

The first meeting of creditors must be convened within 10 days of the administration commencing and its main aim is to decide whether to appoint a creditors committee and to replace the administrator. Notice of such meeting shall be sent to all known creditors and published in a daily newspaper.

Secondly is the watershed meeting to be held within 28 days of the appointment of the Administrator or within such timeframes as may be extended by the court upon the application of the Administrator. The aim of the watershed meeting is to consider the Administrator’s proposals on whether the creditors should execute a deed of company arrangement, end the administration or the company enters liquidation in which case the liquidator is to be appointed at the watershed meeting. The notice of the watershed meeting should be accompanied by the above proposal for consideration as well as the Administrator’s report setting out the state of affairs and finances of the company.

**Question 2.4 [maximum 4 marks]**

With reference to the relevant legislation, set out the circumstances in which a company will be considered unable to pay its debts in the ordinary course of business under the Insolvency Act 2009.

Under the provisions of Section 178 of the Insolvency Act 2009[[1]](#footnote-1), there are four circumstances where a company will be considered unable to pay its debts in the ordinary course of business. These are:

1. Where the company has failed to comply with a statutory demand.
2. Where an execution issued against the company in respect of a judgment debt has been returned unsatisfied.
3. Where a person entitled to a charge over all or substantially all the property of the company has appointed a receiver under the instrument creating the charge; or
4. Where a compromise between the company and its creditors has been put to a vote as per the provision of the Companies Act 2001 but the compromise has not been approved.

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

**Question 3.1 [maximum 5 marks]**

With reference to the relevant legislation, describe the different steps to be undertaken by a creditor to adjudge an individual bankrupt. The said debtor owes the creditor the sum of MUR 570,000.

A creditor can petition the court to adjudge an individual bankrupt where the debtor owes more than MUR 100,000. In this case where the creditor is owed MUR 570,000, they should undertake the following steps.

First, under Section 8 of the Insolvency Act 2009, a creditor must within 42 days before the date of the petition for a bankruptcy order, serve a bankruptcy notice on the debtor. The bankruptcy notice shall comply with the provisions of Section 6 of the Insolvency Act and require a debtor to pay a specific amount or give security for the amount to satisfy an order of court or amounts owed or to compromise the amount on terms satisfactory to the court and/or the creditor.

Once the bankruptcy notice has been served on the debtor 42 days prior to the filing of the petition and they have neither complied nor satisfied the Court that they have a cross claim within 14 days of service, the creditor shall file a petition to the Bankruptcy Division of the Commercial Court of Mauritius. Under Section 5(5) of the Insolvency Act 2009, the petition shall be verified by affidavit of the creditor, or some other person having knowledge of the facts, be served on the debtor and call on the debtor to show cause at the hearing of the application as to why the debtor should not be adjudged bankrupt.

Following the service of the petition on the debtor, the petition is then set for hearing by the Court. For the court to adjudge a debtor bankrupt, the creditor must satisfy the court that the requirements under Section 4(2) have been met i.e., the debtor has failed to comply with a bankruptcy notice, the debtor has departed from Mauritius with intent to defeat or delay the creditor, the creditor received notification in writing by the debtor that he has suspended, or proposes to suspend, payment of his debts or admission to creditors that the debtor is insolvent.

If the court is satisfied on the above, the court will adjudge the debtor bankrupt and the bankruptcy shall commence at the date and time when the bankruptcy order is made leading to the appointment of the Official Receiver as interim receiver to conserve the debtor’s property.

**Question 3.2 [maximum 5 marks]**

It is possible for the appointment of an overseas insolvency practitioner in relation to a Mauritian company. **Answer the two questions below**.

1. In what circumstances might a creditor consider the appointment of an overseas insolvency practitioner?

Mauritius has adopted the UNICTRAL Model Laws on Cross border Insolvency and promotes coordination and collaboration with other jurisdictions that have adopted the Model Law. To this end, an overseas insolvency practitioner can be appointed by a creditor of a Mauritian company. Some of the key considerations would include:

1. Where the assets of the debtor or other subsidiaries of the debtor are situated overseas. In such a scenario, an insolvency practitioner in that specific jurisdiction would be best suited to handle the assets and ensure the best outcome for all creditors is attained.
2. Where the business of the Mauritian company involves complex international assets or financial instruments, and an overseas practitioner is the only best suited person to deal with the complexities.
3. Similar to (ii) above, a creditor may consider the appointment of an overseas where there is a lack of qualified local practitioners in Mauritius.
4. What is the process for such proposed appointment and the required documents required to be submitted in support of such application?

Under Article 15 of the Ninth Schedule of the Insolvency Act 2009, a foreign representative can seek recognition in a Mauritius court which recognition will grant them locus standi as an insolvency practitioner in Mauritius for the purpose of the debtor.

An application for recognition shall be accompanied by the following documents:

1. certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
2. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
3. in the absence of evidence referred to in sub-paragraphs (i) and (ii), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.
4. a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
5. a translation of documents supplied in support of the application for recognition into an official language of Mauritius if required by court.

**Question 3.3 [maximum 5 marks]**

With reference to the relevant legislation, detail the different types of liquidation in Mauritius, along with the procedures required for the commencement of each type.

Under Section 100 of the Insolvency Act 2009, liquidation or winding up can be effected through court vide a winding up order, a creditors voluntary winding up for insolvent companies, shareholders voluntary winding up for solvent companies or by creditors at the watershed meeting in an administration. The procedures for the commencement of each are discussed below.

1. *Winding up by court*

In winding up by court, as per the provisions of Section 102 of the Act, a petition can be presented by the company, a contributory, a shareholder, a creditor, a liquidator, a director, or the Financial Services Commission where the company is licensed by the Commission.

Upon receipt of a winding up petition, the court may appoint the official receiver as a provisional liquidator if satisfied that there are reasonable grounds to believe that the company is insolvent and certain assets of the company are at risk of leaving Mauritius. The provisional liquidator will exercise all the powers of a liquidator.

Upon hearing the application, the court may either grant a winding up order, adjourn the hearing of the petition or dismiss the petition conditionally or unconditionally.

If the winding up order is granted, the winding up commences on the date of the order and the Official Receiver, or any other qualified person appointed by court will act as provisional liquidator. The appointed person must consent in writing to act as a liquidator.

Within 14 days of appointment, the appointed person must give notice of the appointment to the Director of Insolvency Services. The liquidator must also provide security to the Official Receiver and satisfactory evidence that they hold professional indemnity insurance.

Once liquidation commences the powers of the directors will cease unless as approved to continue by the committee of inspection if any. Additionally, there is a moratorium, and no creditors can take any action or bring legal proceedings against the company unless the court of the liquidator consents to such. This extends to dealings in the shares of the company.

The directors have a duty to provide the liquidator with a statement of affairs showing the assets, liabilities, details of creditors and charges held by them as well as when the same were created and any other information that the liquidator may require.

1. *Shareholders voluntary winding up*

A precondition to this type of winding up is that the directors must sign a declaration of solvency stating that the company will be able to pay all its debts including the cost of liquidation within 12 months of the commencement of liquidation.

28 days prior to the passing of a resolution by the shareholders to wind up, the directors must make a written declaration that the company will be able to pay all its debts within 12 months of the commencement of the liquidation. The declaration is to be accompanied by a statement of affairs showing the assets, liabilities, and the estimated costs of the liquidation. The declaration must be lodged with the Director of Insolvency Services before the notices for the shareholders meeting to pass the winding up resolution are sent. The winding up commences on the date of the resolution.

The shareholders must then pass a resolution that the company be wound up which resolution must be lodged with the Director of Insolvency Service within 7 days of its passing and be published in the Gazette and one daily newspaper within 10 days of the resolution. The director’s declaration must have been signed before the publication of the notices.

The shareholders meeting will then appoint a liquidator to wind up the affairs of the company and distribute the assets of the company. If the liquidator is of the opinion that the company is insolvent, they will cause a meeting of creditors to be held and the creditors may appoint another liquidator and the liquidation converts to a creditors’ voluntary liquidation.

1. *Creditors voluntary winding up*

This applies where a company is insolvent. The shareholders shall pass a winding up resolution to commence the process followed by a meeting of creditors of the company to be summoned by the directors to pass the winding up resolution. The winding up commences on the date of the resolution.

The directors shall cause a notice of at least 7 days to be issued to creditors. The notice should be accompanied by a statement showing the names of all creditors and amounts of their claims. The notice must be advertised in one daily newspaper at least 7 days before the meeting.

At the meeting of creditors, the creditors may nominate a liquidator, and if their nominee is different from the director’s nominee then the nominee of the creditors shall be the liquidator.

The liquidator shall then proceed to carry out the winding up of the affairs of the company and make a distribution to creditors from the realisation of available assets of the company.

1. *Liquidation passed by resolution of creditors at watershed meeting.*

Where the creditors of a company pass a resolution at a watershed meeting that the company be wound up, the company will be wound up following the steps in (c) above.

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

**Question 4.1 [maximum 6 marks]**

XYZ Trading Ltd is a company engaged in importing and distributing electronic goods in Mauritius. The company has been facing financial difficulties for several months, struggling to meet its obligations to creditors. Among its creditors is ABC Suppliers Ltd, a supplier of electronic components.

In April 2023, in an attempt to address its financial woes, XYZ Trading Ltd makes a significant payment of MUR 300,000 to ABC Suppliers Ltd, an unsecured creditor. At the time of the payment, XYZ Trading Ltd owed ABC Suppliers Ltd a total of MUR 500,000. The company's financial condition continues to deteriorate and three months later XYZ Trading Ltd is eventually placed in liquidation. The liquidator of XYZ Trading Ltd has appointed you to advise on the transaction made between the company and ABC Suppliers Ltd.

Providing reasons, with particular reference to the Insolvency Act 2009, describe the option available to the liquidator and the procedure to recover the sum of MUR 300,000 paid to ABC Suppliers Ltd.

In the case study above, the provisions of Section 313 of the Insolvency Act 2009 will apply as relates to voidable preferences and the power of court to set aside the same.

A voidable preference is defined under Section 313(2) of the Act as a transaction made at a time when the debtor is unable to pay their due debts and one that enables another person to receive more towards satisfaction of a debt by the debtor than that person would receive, or would be likely to receive, in the bankruptcy or liquidation. In the case study, the payment of 60% of monies owed to an unsecured creditor during a period when the company was facing financial difficulties and eventually being wound up three months later amounts to a voidable preference made at a time when XYZ Limited was unable to pay its debts as per the provisions of Section 313 (3) as it is made 6 months immediately before the winding up.

Having established that the payment to ABC Supplies Limited is a voidable preference, the option available to the liquidator is to file an application to court for the voidable preference to be set aside as envisioned by Section 321 of the Insolvency Act 2009.

First, the liquidator shall serve a written notice to ABC Suppliers Ltd specifying the voidable transaction to be set aside i.e., the payment of MUR 300,000 to themselves, stating that the liquidator intends to recover MUR 300,000 from ABC Suppliers Ltd, providing the address of the liquidator as well as giving ABC Suppliers Ltd a chance to object to the notice within 28 days and stating that if there is no objection then the transaction shall be automatically be set aside within 5 days of the expiration of the 28 days’ notice.

Under Section 322 of the Insolvency Act, the effect of setting aside the payment to ABC Suppliers Limited may be an order for retransfer of the said amount of MUR 300,000 to the liquidator or payment to the liquidator of a sum the court deems appropriate which must not be greater than the MUR 300,000.

ABC Suppliers Limited may have a defence against the setting aside of the transaction if they are able to prove as provided under Section 323 that they acted in good faith or that a reasonable person in their position would not have suspected that XYZ Limited was, or would become, unable to pay his due debts; and that they altered their position in the reasonably held belief that the payment to them was valid and would not be set aside. The liquidator should thus prepare to rebut such defences and prove that the payment was made within the relevant time and the pressure from ABC Suppliers Limited was as a result of apprehension that XYZ Limited would become insolvent.

Once the liquidator extracts the court orders for repayment of the said sums, the liquidator shall then execute the order as against ABC Suppliers Limited to recover the voidable preference amount.

**Question 4.2 [maximum 9 marks]**

NewsTyle Textiles Ltd is a long-established textile manufacturing company in Mauritius. However, due to increased competition from overseas manufacturers and a decline in domestic demand for their products, the company has been facing financial difficulties for the past few years. The situation has worsened following the Covid-19 pandemic to the point where NewsTyle Textiles Ltd is unable to meet its financial obligations to creditors, including suppliers, banks and employees.

The board of directors of NewsTyle Textiles Ltd is concerned about the company’s financial health and is considering various options to address the situation. They are aware of Mauritius’ insolvency laws and have approached you for guidance.

Your task is to analyse, with particular reference to the Insolvency Act 2009, the statutory obligation of the board of directors in light of the insolvent situation of NewsTyle Textiles Ltd under Mauritius’ insolvency laws and to describe the different steps that the directors must take to place the company in liquidation.

The board of directors have managed to find an investor who is willing to inject money in NewsTyle Textiles Ltd, however the investor will need some more time to secure the financing. Your task is to recommend to the board of directors, with particular reference to the Insolvency Act 2009, on the possibilities available to salvage the company.

Pursuant to Section 137(4) of the Insolvency Act 2009, the directors of NewsTyle Textiles Limited have an obligation to submit a declaration of insolvency to the Director of Insolvency Services before holding a general meeting to pass the winding up resolution. The declaration should state that the company cannot continue trading because of the existing liabilities and that meetings of both members and creditors have been summoned to happen in the next one month.

The directors must then forthwith appoint a provisional liquidator for one month and give notice of such appointment within 14 days of the appointment and publish the same in the government gazette and in a daily newspaper.

The directors must then ensure that the meeting of creditors to pass the winding up resolution is held on the next day after the day of the company meeting to pass the winding up resolution. At the creditors’ meeting, the directors must table a statement of the company affairs, the assets and how valuation was arrived at as well as the list of creditors and what is owing. The directors shall also appoint a director to attend the meeting on behalf of the company. At the creditors’ meeting, the creditors shall appoint a liquidator or endorse the choice of liquidator appointed by the directors. The effect of a voluntary winding-up is that as from the date of its commencement, the company ceases to carry on its business activities, except insofar as may be necessary, in the liquidator’s opinion, for the beneficial winding-up of the company.

Additionally, section 162 of the Companies Act requires a director who believes that a company is unable to pay its debts to convene a board meeting to consider whether to appoint a liquidator or administrator. If he fails to do so or fails to vote in favor of such an appointment at the board meeting, and the company subsequently goes into liquidation, the director may be personally liable for debts incurred when the company continued to trade while insolvent.[[2]](#footnote-2) In this regard, the directors of NewsTyle Textiles Limited have a duty to convene a board meeting to consider the appointment of a liquidator

Having identified a potential investor, and noting that a liquidator has been appointed, the directors of NewsTyle Textiles Limited should inform the liquidator of the potential investor. The liquidator may then consider a compromise between a company and its creditors to either cancel all or part of a debt of the company; varying the rights of its creditors or the terms of a debt; or relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt as highlighted in Section 253 of the Companies Act.

The liquidator would then propose a compromise, compile a list of all known creditors who are likely to be affected by the compromise and their classes and issue a notice of a meeting of creditors to vote on the proposed compromise, contact details and capacity of the liquidator together with a statement of the proposed compromise, reasons for the compromise, the impact it will have on each class of creditors, the directors’ interests in the compromise and procedures for varying the compromise. The notice, contact details and statement shall be registered with the Registrar.

Once the compromise is approved by the Court, it then takes effect and binds all creditors.

The liquidator and directors of NewsTyle Textiles Limited may also consider entering into arrangement to reorganize its share capital by issuing shares to the new investor to be able to raise capital to pay off its existing liabilities.

**\* End of Assessment \***

1. Accessed on 21 March 2024 at <https://www.fscmauritius.org/media/1155/insolvency-act-2009-130114.pdf> [↑](#footnote-ref-1)
2. <https://practiceguides.chambers.com/practice-guides/comparison/747/12151/19186-19187-19188-19189-19190-19191-19192-19193-19194-19195-19196> [↑](#footnote-ref-2)