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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.

The remedies against an order of the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016 include inter alia: (i) an appeal to the National Company Law Appellate Tribunal or NCLAT within 30 days of the release of the order of the National Company Law Tribunal; and (ii) in case there are challenges to the interpretation of law for particular or special circumstances, remedies can be requested by appealing before the Supreme Court of India.

**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.

During the corporate insolvency resolution process (CIRP), the moratorium commences from the date of admission of the CIRP application by the National Company Law Tribunal and the moratorium takes effect until the end of the CIRP period. The moratorium prohibits the constitution and continuation of legal proceedings against the debtor and all possible recovery and enforcement actions of security by creditors.

However, there are exceptions to the moratorium as follows:

* If there is a payment default on the supply of services and goods that are essential or deemed to be essential by the interim resolution professional, then the moratorium can be lifted for any enforcement or remedy by the suppliers
* Transactions specified by the Central Government are not covered by the moratorium
* Actions in rem of a surety for a guarantee relating to the corporate debtor
* The rescission or change of government licenses, approvals, permits and concessions subject to absence of payment default
* The moratorium cannot restrict proceedings related to the fundamental rights embedded in the Indian Constitution (constitutional rights under article 32 or 136)

**Question 2.3 [maximum 3 marks]**

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

Personal bankruptcy in India is governed by the Presidency-towns Insolvency Act 1909 with a specific requirement that the debtor must ordinarily have resided or made business within the jurisdiction of the court within a year from the bankruptcy petition presentation. The debtor must be an individual or person who is subject to Indian law by virtue of birth or residence. The key acts of insolvency according to the Act are:

* Transfer by the debtor, in India or elsewhere, of assets for the benefit of their creditors
* Transfer by the debtor of their property aiming to delay or defraud creditors
* Transfer by the debtor of their property through act of fraudulent conveyance i.e., a transfer of their property to a third party not bona fide and not for a valuable consideration
* Departure or seclusion of the debtor from India to escape the payment of debts
* Sale or attachment of any precluded asset
* Petition by the debtor to be adjudged an insolvent debtor
* Presentation of a notice of suspension of payments
* Imprisonment as a result of the execution of a money decree
* Non-compliance with an insolvency notice presented by a creditor

**Question 2.4 [maximum 1 mark]**

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

The Insolvency and Bankruptcy Code (IBC) 2016 includes two relevant provisions with respect to cross-border insolvency arrangements in the Indian regime:

* Section 234 allows the central government to execute reciprocal agreements with other countries to apply IBC provisions
* Section 235 enables courts in India to cooperate with foreign courts with respects to debtors’ assets outside India in a country where an agreement has been executed in relation to section 234 of IBC. Such process is managed through an application to the National Company Law Tribunal.

**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.

Under the Insolvency and Bankruptcy Code 2016, a company liquidation results in a sale process of the assets and distribution of the proceeds among creditors to settle outstanding claims. Upon the appointment of a liquidator by the National Company Law Tribunal, the liquidator takes control and record all of the company assets and forms a liquidation estate after inviting and collecting all the claims from creditors.

In a liquidation scenario, the available methods to sell the assets include (i) public auction (as specified in the Liquidation Regulations); or (ii) private sale. As well, the liquidator could sell the assets piecemeal, collectively as a whole, through a “slump sale” by consolidating the assets, or as a going concern but only at the first auction.

The liquidator is required to evaluate the assets of the debtor to be undertaken by at least two registered valuers appointed by the liquidator. This valuation should be documented in an asset memorandum providing *inter alia* the value of the assets, the methods of sale, and the expected realization values to be submitted to the National Company Law Tribunal.

The liquidator needs to consult with creditors at various levels: the liquidator collects claim proofs from creditors within a period of 30 days from the date of commencement of the liquidation proceedings. The remuneration of the liquidator is approved by the committee of the creditors, which monitors as well the sale of assets, including such processes as stalking horse bids and credit bids. The various sale methods are tested on an evaluation matrix which is then approved by the credit committee through a resolution plan.

The liquidation waterfall per IBC s 53 is as follows:

* the costs of the insolvency resolution process and liquidation which are considered the major privileged claims in liquidation and have super seniority status
* ranking pari-passu with secured creditors, workmen’s dues for the period of 24 months preceding the liquidation commencement date
* wages and unpaid dues to employees other than workmen for the period of 12 months prior to the liquidation commencement date
* unsecured financial debts
* amounts owed to the central government and state government
* other remaining debts and dues
* preferred shareholders
* ordinary shareholders

**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.

Dear Board Members,

Based on the current situation of Big Air Limited, it appears that Big Air Limited is legally able to file and commence a voluntary reorganisation in line with the provisions of the IBC. Such voluntary reorganisation would require the initiation of a corporate insolvency resolution process. Big Air Limited meets the basic requirement of this process because it is in default of more than 10 million rupees in the repayment of its debt.

The initiation of a corporate insolvency resolution process requires the submission of an application with the National Company Law Tribunal (NCLT). This application requires the following steps:

* Special resolution of the shareholders of the company
* Documents showing the debt and default
* Filling of the prescribed form of the NCLT

Once the application is accepted by the NCLT, and passed through an admission order, a moratorium starts and an interim resolution professional is appointed to oversee the resolution process which typically lasts 180 days and can be extended to a maximum of 330 days by the NCLT under certain circumstances.

It is important to know that the powers of your board of directors will be suspended and transferred to the interim resolution professional. The interim resolution professional collects claims from creditors and forms a creditors committee that will confirm or replace the interim resolution professional and will hold regular meetings with the committee of creditors.

Then a resolution plan complying with IBC requirements ought to be prepared and submitted for creditors vote. A threshold of 66% of the creditors vote is required for the plan acceptance; further to that, the proposal is submitted to NCLT for final approval.

If no plan is agreed or approved or if it is rejected by NCLT, the company can be sent to liquidation, unless the NCLT decides to further extend the 330-day in extreme circumstances.

**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.

Dear Board Members,

If the application for corporate insolvency resolution process is accepted by the NCLT, a moratorium will come into effect according to section 14 of the IBC. The moratorium prohibits the following with respect to the aircraft leasing:

* Initiation of any legal proceedings by the lessors
* Enforcement of security by the lessors
* Recovery of the aircrafts by the lessors where the aircrafts are in the possession of Big Air Limited
* Termination of the aircraft leasing agreement since these are considered critical for the operation of Big Air Limited (being its core business) as going concern

However, since there is a pre-petition payment default, it is important to know that if there is a payment default during the moratorium period, the lessors have the right to terminate the agreements. Therefore, it is key that Big Air negotiates a restructuring plan with the lessors for the lease payments during the moratorium and resolves a payment plan on the outstanding overdue lease payments. Since the aircrafts are key to the viability and rehabilitation of Big Air, it is important to provide additional security and comfort to the lessors such as a parent guarantee or assignment of insurance proceeds as part of the negotiation process.

While it is not clear exactly what security the lessors have, it is most likely a form of mortgage or lien, that is enforceable under Indian law and international conventions, where there is a security interest on the aircrafts; the ownership title of the aircrafts remain with the lessors and the mortgage is perfected and registered in a public registry.

Under IBC, the aircrafts can be retained by the Company due to the moratorium effect and the security of the lessors will be suspended. However, should Big Air fail in its obligations during the moratorium period following the agreement on a restructuring plan, the lessors could repossess the aircrafts to cut off their exposures and losses, putting Big Air into a risk of corporate liquidation.

**\* End of Assessment \***