INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B

THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM (ENGLAND AND WALES)

This is the **summative (formal) assessment** for **Module 3B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 3B. 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 MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[student number.assessment3B]**. An example would be something along the following lines: 202021IFU-314.assessment3B. **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 "studentnumber" 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**.

6.1 If you selected Module 3B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 3B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

What is the initial period for a Moratorium under Part 1A of the Insolvency Act 1986 where the directors file relevant documents at court?

(a) 20 days.

(b) 20 business days.

(c) 40 days.

(d) 40 business days.

Question 1.2

What is the maximum length of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

(a) 40 business days.

(b) One year and 20 business days.

(c) One year and 40 business days.

(d) One year.

Question 1.3

Which of the following is not a requirement for a company which wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

(a) the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

(b) a compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.

(c) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.

(d) the company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.

Commented [WA1]: 35/50 = 70% a somewhat mixed performance with some very good answers and some showing some weaknesses in identifying issues

Commented [WA2]: 7/10

Commented [WA3]: d is the correct answer

Question 1.4

What percentage of creditors must approve a Scheme of Arrangement under Part 26 of the Companies Act 2006?

(a) A majority in number and in value.

(b) A majority in number and 50% or more in value.

(c) A majority in number and 75% or more in value.

(d) 75% or more in value.

Question 1.5

Which one of the following is not a debtor-in-possession procedure?

(a) Administration.

(b) Restructuring Plan.

(c) Scheme of Arrangement.

(d) Company Voluntary Arrangement.

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is no greater than how much?

(a) £500

(b) £750

(c) £1,000

(d) £2,000

Question 1.7

Which one of the following is not, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?

(a) Wrongful trading.

(b) Breach of fiduciary duty.

Commented [WA4]: b is the correct answer

(c) Being found guilty of an indictable offence in Great Britain.

(d) Being found guilty of an indictable offence overseas.

Question 1.8

The administrator is under a general duty to make a statement setting out proposals for achieving the purpose of administration. He or she must send out the statement of proposals as soon as reasonably practicable, and in any event within how many weeks of the date the company entered administration?

(a) 6

(b) 8

(c) 10

(d) 12

Question 1.9

Which of the following has the power to bring an action for wrongful trading under the Insolvency Act 1986?

(a) A monitor of a Moratorium.

(b) A supervisor of a Company Voluntary Arrangement.

(c) An administrator.

(d) An administrative receiver.

Commented [WA5]: c is the correct answer

Question 1.10

Under section 176A of the Insolvency Act 1986, the prescribed part deducted from floating charge assets in favour of unsecured creditors is calculated as follows:

(a) 20% of the floating charge assets.

(b) 50% of the first £10,000 in value plus 20% of the excess in value above the £10,000 subject to a maximum amount of the prescribed part of £600,000.

(c) 20% of the first £50,000 in value plus 50% of the excess in value above the £50,000 subject to a maximum amount of prescribed part of £800,000.

(d) 50% of the first £10,000 in value plus 20% of the excess in value above the £10,000 subject to a maximum amount of prescribed part of £800,000.

QUESTION 2 (direct questions) [10 marks]

Commented [WA6]: 7/10

Question 2.1 [maximum 6 marks]

Commented [WA7]: 4/6 some good points made but it would have been helpful to reference s 123 and Eurosail

What is the difference between cash flow insolvency and balance sheet insolvency?

ANSWER :

1. Cash-flow insolvency is when a person or company has enough assets to pay what is owed, but does not have the appropriate form of payment. For example, a person may own

a large house and a valuable car, but not have enough liquid assets to pay a debt when it falls due.

2. Balance-sheet insolvency is when a person or company does not have enough assets to pay all of their debts.

3. Court use cash-flow test and balance-sheet test. Once the court has to consider more than the reasonably near future, the cash-flow test becomes entirely speculative and the balance-sheet becomes the only sensible test for insolvency.

4. The cash-flow test is concerned with debts presently falling due as well as those falling due in the reasonably near future. What constitutes the "reasonably near future" will depend on all the circumstances including, in particular, the nature of the company's business.

5. The balance sheet test is a legal test that requires the court to determine what value to attribute to the prospective and contingent liabilities of a company. The court must compare present assets with present and future liabilities and, making allowance for contingencies and deferred payments, assess whether the company can be reasonably expected to meet all of its liabilities.

6. Characterisation of the company having reached "the point of no return because of incurable deficiency in its assets" is not the correct test for balance-sheet insolvency and should not pass into common usage.

Question 2.2 [maximum 4 marks]

List **four (4)** elements of the statutory moratorium imposed when a company enters administration.

ANSWER :

1. During the Moratorium, the company cannot generally enter liquidation or administration; no landlord can exercise a right of forfeiture, generally security rights cannot be enforced and again, generally no legal process may be instituted or continued against the company.

2. Floating charges will not crystallise during the Moratorium and the directors may continue to run the company in the ordinary course of business with any major decisions being subject to the consent of the monitor or the court.

3. A Moratorium comes to an end if the company enters into a compromise or arrangement (under Parts 26 or 26A of the Companies Act 2006) or enters into a relevant insolvency procedure (for example, a CVA, administration or liquidation).

4. The Moratorium provides a stay on actions in relation to debts incurred prior to the Moratorium only. There are restrictions on the company paying any of its pre-Moratorium debts.

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

Question 3.1 [maximum 6 marks]

Explain the main differences between a Part 26 Scheme of Arrangement and a Part 26A Restructuring Plan.

Commented [WA8]: 3/4 the answer mistakes the statutory moratorium procedure for the moratorium under administration but still manages to explain in general terms some of the aspects of the administration moratorium

Commented [WA9]: 13/15

Commented [WA10]: 5/6 there is some repetition in places which suggests a lack of understanding.

ANSWER :

The principal differences between Part 26 Scheme of Arrangement and part 26A Restructuring Plan are:

1. Part 26A restructuring plan are only available to companies that have encountered or are likely to encounter financial difficulties likely to affect their ability to carry on business as a going concern.The scheme was accessible by all debtors, regardless of their solvency status.

2. Consent thresholds for creditor class. Restructuring Plan votes are calculated solely by the value of the relevant creditors' debt or members' shares (75% must vote in favour). No numerosity requirement applies.

A dissenting class of voters cannot block the plan if the court is satisfied that:

- none of the members of the dissenting class would be worse off than under a relevant alternative; and
- at least 75% by value of a class of creditor or members, which would receive a payment or have a genuine economic interest if the relevant alternative were pursued, had still voted in favour of the plan.

This is differs from a Part 26 Scheme which requires a majority in number as well as 75% or more in value of each class to approve the Scheme.

3. Scheme proponent. Restructuring Plan's proponents are Creditors holding a qualifying floating charge(meeting the requirements) ,the debtor or its directors. However, Part 26 Scheme's proponents are both debtoors and creditors.

4. Cross-class cram down. In circumstances where one or more classes dissent, if Conditions A and B below are met, the fact that the dissenting class has not agreed to the Restructuring Plan will not prevent the court from granting sanction.

Condition A is that the court is satisfied that, if sanctioned, none of the dissenting class would be any worse off than they would be in the event of the "relevant alternative" (which will usually be a liquidation or administration).

Condition B is that the compromise or arrangement has been agreed by 75% in value of at least one class of creditors or members, as the case may be, who would receive a payment, or have a genuine economic interest in the company, in the event of the "relevant alternative".

As long as Conditions A and B are satisfied, one class of creditor can impose, via a court order, the Restructuring Plan on all classes of creditor, even dissenting creditor classes.

5.Cross-border recognition. For Restructuring Plan,Brexit could creat recognition issues across EU members. For Scheme, the point of law remains undecide, however English court have proceeded on the basis that recognition can be granted under Article 8 or 25 of the Judgements Regulation.

Question 3.2 [maximum 9 marks]

Explain the different ways in which overseas officeholders may be recognised and request the assistance of the court in England and Wales.

ANSWER :

Commented [WA11]: 8/9 a generally very interesting and detailed answer - more detail would have been useful on the CBIR as they are the most useful and common in practice

There are four possibilities –under the EU Regulation,the CBIR,section 426 of the Act or at common law.

1. EU Regulation:Cross-border insolvency proceedings which involve companies with their centre of main interests (COMI) within any EU Member State (apart from Denmark) are governed by the EU Regulation on Insolvency Proceedings which is a recast (and slightly amended) version of the original Regulation.Any appointment will be recognised automatically in all other Member States and the insolvency practitioner will be able exercise all powers, subject to limited exceptions. The issues relating to recognition are covered in Chapter II of the EIR Recast. Article 19 contains a general principle, under which any judgment opening insolvency proceedings by a court of a Member State which has jurisdiction pursuant to Article 3 (that is, both main and secondary proceedings) shall be recognised in all other Member States from the moment that it becomes effective in the state of the opening of proceedings. The same approach applies to insolvency related judgments, deriving directly from insolvency proceedings and closely connected to them. One of the great benefits of the EU Regulation is that it works across the EU for both "inwardbound"(where a Member State office holder is automatically recognized in the UK) and "out-board "(where a UK office holder is recognized in other Member States)

2. Cross Border Insolvency Regulations 2006 SI 2006/1030 (CBIR): This Regulation is come from UNCITRAL Model Law on Cross-Border Insolvency, with minor changes. CBIR do not have automatically recognize mechanism. Insolvency practitioners from any overseas' jurisdiction may apply to the court in England and Wales to be recognised in the jurisdiction.The "outward-bound" benefits for the UK are limited to other States who have adopted the Model Law. It requires an application to a local court to gain recognition and relief.

3. Section 426 of the Act: This section is commonly used by foreign courts making in-bound requests for help to the English courts. The request must come from a court (not an office-holder) in one of the relevant countries or territories. The origins of section 426 date back to the British Empire and provisions which permitted recognition and assistance to court orders made in the former colonies.Under section 426 court orders made in insolvency matters by a court in the United Kingdom are strictly enforceable in all parts of the United Kingdom. In addition,there is a positive obligation on the courts of the United Kingdom to assist each other,and also the courts of "any relevant country or territory". These other countries or territories consist of the Channel Islands and the Isle of Man,and any other country or territory specified by the Secretary of State. Countries who currently benefit from the "inward-bound" effect of section 426 include Australia, Canada, Hong Kong, Ireland, Malaysia, New Zealand and South Africa.

The English courts may apply the insolvency law which is applicable to either court in relation to comparable matters falling within its jurisdiction (IA 1986, s 426(5)). Insolvency law is defined as follows:

• for England and Wales, as provisions made under the IA 1986 and Company Directors Disqualification Act 1986 (CDDA 1986) (IA 1986, s 426(10)(a))

• for foreign countries, as so much of the law of that country or territory as corresponds to provisions above (and their equivalents in Scotland and Northern Ireland) (IA 1986, s 426(10)(d))

The foreign court must send a 'letter of request' to the English Court specifying exactly what kind of relief is required.

Despite the wording that the English courts 'shall' assist the foreign court (IA 1986, s 426(4)), the English courts still retain discretion as to:

• whether or not to grant any assistance

• the nature of assistance granted

• which insolvency law to apply

If the English court agrees to the request from the foreign court, it can choose whether to apply its own general jurisdiction and powers (IA 1986, s 426(5)) and either:

• English insolvency law, or

• insolvency law applicable by the foreign court in relation to comparable matters

in each case, having regard in particular to the rules of private international law.

4. Common law: Case law at one point suggested that UK courts had a power at common law,similar to the power under section 426 of the Act,to exercise any powers which would be available to the overseas jurisdiction requesting assistance in a domestic insolvency.

In Common law, we have proper law doctrine. The proper law doctrine provides that the discharge of a debt may only properly be determined by the governing law of the debt. As such, and subject to the modifying effect of legal instruments in the area of cross-border insolvency, an English court may apply this common law doctrine to hold that a foreign restructuring, which purports to discharge an English law governed debt (or a debt governed by a law other than the law of the foreign restructuring), does not in fact do so in England, and consequently the court may allow a dissenting creditor to enforce the debt in England. The proper law doctrine is most likely to be successful in cases where the EU Recast Regulation on Insolvency, CBIR or IA 1986, s 426 do not apply.

This approach has subsequently been disapproved and a restrictive interpretation has been placed on the UK courts'common law cross-border jurisdiction.English common law has traditionally taken the view that fairness between creditors requires that,ideally,insolvency proceedings should have universal application. There should be a single insolvency in which all creditors are entitled to prove.A system of "modified" universalism would avoid the need for officeholders to be appointed in parallel proceedings in multiple jurisdictions.It would recognise the overseas'officeholder and provide the same remedies to that officeholder as if such equivalent proceedings had commenced in the UK.

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

Commented [WA12]: 8/15

Prior to going into liquidation in November 2020, under pressure from its bank, Stercus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Cork-In Limited granted a debenture in favour of Stercus Bank plc in January 2020. The debenture contained a floating charge over the whole of the company's undertaking.

In June 2020, as the company continued to struggle, the directors approved the sale of a company delivery van to Paul Watson (a director) for £5,000 in cash. The van had been bought for £10,000 a year before.

A month before the company went into liquidation, Paul Watson received an irate phone call from one of the company's key suppliers, Gary's Grapes Limited. The supplier demanded immediate payment of all sums owing to it (even those invoices that had not become payable). Fearing being cut off by the supplier, Paul arranged for a cheque for the full amount to be sent that day.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Stercus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

Commented [WA13]: 4/5 good on the law but the application to the facts was a little brief

The floating charge in favour of Stercus Bank plc;

ANSWER :

The liquidator can sue for invalid the floating charge.

The floating charge is invalidated, the underlying debt remains valid.

Section 245 of the Act applies where a company is in administration or liquidation and the provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure.It renders invalid floating charges given by a company at a relevant time,except to the extent,in substance,that "new" consideration is provided for the charge.Where the person in whose favour the floating charge is created is not connected with the company, the relevant time is any time within the period of 12 months prior to the onset of insolvency, but only if at the time of the creation of the charge the company was either unable to pay its debts (within the meaning in section 123 of the Act) or became unable to do so in consequence of the transaction.

There are two main categories of "new" consideration set out in section 245 of the Act,which,if satisfied mean the floating charge will not be invalid：

(1) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge. The consideration must be given at the same time as or after the creation of the charge. Where an agreement is made to execute a charge, followed by payments made to the company, followed in turn by the formal execution of the charge, any delay between the making of the payments and the execution of the charge must be minimal, such as the time to take a coffee-break.

(2) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the

company. This category, however, specifically provides that a floating charge is not to be invalidated to the extent of consideration by way of discharge or reduction of a debt of the company.

In this case the floating charge is created in January 2020,within the period of 12 months prior to the insolvency. The reason is in order to prevent it from demanding repayment of the company's loans.

According to the above rule and analyse，the floating charge set in this case do not fit the exceptions. In conclusion, Section 245 of the Act applies here, the liquidator can sue for invalid the floating charge.

Question 4.2 [maximum 5 marks]

The sale of the van; and

ANSWER :

1. The liquidator can attack this transaction due to it was at an undervalue.

The Act permits certain transactions which were entered into shortly before the company entered formal insolvency to be open to attack.

Under section 238, if a liquidator or administrator want to attack a transaction, they must show that the company：(1)made a gift to another person; or (2)entered into a transaction with another person on terms that provided for the company to receive no consideration; or (3)entered into a transaction with another person for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company.

In order to be attacked,the transaction must have taken place at a "relevant time" which is in the period of two years prior to the commencement of the liquidation or administration.

In this case ,the van sold price is £5,000 while it had been bought for £10,000 a year before. The transaction is in the period of two years prior the insolvency. The buyer is a director which is cannot be seen as in good faith and for value. Thus,The liquidator can attack this transaction, apply to the court for an order restoring the position to what it would have been if the transaction not entered.

2. If the court conclude that Paul Watson has been guilty of an offence of the van related fraudulent trading or has been guilty of this transaction in relation to the company or breach of duty,the liquidator can ask to disqualify Paul Watson according section 4 of the CDDA. As well as being disqualified, Paul Watson may under section 15A of the CDDA be made subject to a compensation order whereby he or she will be liable to make a payment to specified creditors, or contribute to the assets of the insolvent company where the conduct of that director caused loss to one or more creditors.The Secretary of State will not apply for a compensation order

Commented [WA14]: 3/5 more detail needed on s 238 especially around need to show insolvent and effect of connected party. The CDDA action is not open to the liquidator but it is an interesting point to make.

if the liquidator (or other office holder) has already decided to take alternative enforcement action.

Question 4.3 [maximum 5 marks]

The payment to Gary's Grapes Ltd.

ANSWER :

The liquidator can try to ask to disqualify Paul Watson according section 4 of the CDDA due to breach of duty, but in my view, it is hard.

Since 1928, the grounds for disqualification have increased significantly and most grounds were consolidated in the Company Directors Disqualification Act 1986 (CDDA). The main purpose of the disqualification regime is to protect the public and to act as a deterrent to wrongdoing directors so as to assist in raising the standards of behaviour of directors.

In this case, the company is continued to struggle at that time, and the director pay the invoices that had not become payable. This action harm all creditors , and make the distribution unequal.

However, for Paul Watson,there are may reasons to defend and even the disposition void claim cannot be hold.

First ,if transactions in the ordinary course of business which are entered into bona fide are not permitted, the parties interested in the assets of the company could be prejudiced. And in this case, the payment is related to a key supplier, and Paul can argue that she or he is act for the best interest of the company. The courts will permit dispositions where they are made honestly, in the ordinary course of business and for the benefit of the company, such as the payment of wages of employees or payments on supplies to enable the company to fulfil a contract that appeared to be profitable.

Second, Paul can argue that the payment is for commercially sensitive manner. Commercially sensitive manner is hard to identity and the court often believe they should not judge those action. The court would taking into account the policy of party autonomy and the upholding of proper commercial bargains.

In conclusion, The liquidator can try to disqualify Paul Watson or try to void the payment. But, according the case's fact, it is difficult.

*** End of Assessment ***

Commented [WA15]: 1/5 there is very little accurate, relevant law here. The liquidator cannot initiate disqualification actions. Section 239 needed to be identified, explained and applied.