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

Commented [WA1]: 40/50 = 80% a good effort showing clear understanding

Commented [WA2]: 8/10

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.

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 [WA3]: b 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.

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]

Question 2.1 [maximum 6 marks]

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

Balance sheet insolvency is the situation in which a company's liabilities are greater than the value of its assets. The company's liabilities include all its future, contingent and current liabilities. On the other hand, cash flow insolvency refers to the event in which a company is unable to pay its debts as they fall due.

Commented [WA4]: c correct answer

Commented [WA5]: 8/10

Commented [WA6]: 4/6 true but lacking in detail especially around where the line is drawn between the two.

Question 2.2 [maximum 4 marks]

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

When a company enters in administration a moratorium prevents the following actions:

(i) Resolutions to wind up the company must not be passed.
(ii) There cannot be any winding-up order against the company.
(iii) Securities cannot be enforced against the company's property without consent of the administrator or permission of the court.
(iv) No legal process (including legal proceedings or execution judgments) may be instituted or continued against the company or its property, except when there is consent of the administration or court.

Commented [WA7]: 4/4

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

Commented [WA8]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WA9]: 5/6 a good answer but more clarity around solvency or insolvency gateway would have been helpful.

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

[A Part 26 Scheme was designed for the reorganization of solvent companies (although it is mostly used for insolvent debtors) and the Restructuring Plan is available for financial distressed companies.

In the Restructuring Plan the court can sanction a compromise or arrangement if a number representing 75% or more in value of the creditors or class of creditors, or members or class of members agree to the terms of the Restructuring Plan, whereas in Part 26 Scheme the majority in number as well as 75% or more in value of each class must approve the Scheme.

A Restructuring Plan has the option to cram down a class of creditors that voted against the reorganization plan, therefor such plan can be approved by the court despite the class that opposed the plan. Under Part26A it is not possible to make such cramdown. Consequently, the Court can approve the Restructuring Plan if it is satisfied than if sanction, none of the dissenting class would be worse than in the event of another alternative, such as liquidation or administration. The Court will also analyse that the compromise has been agreed by 75% in value of at least one class of creditors or members, who would receive a payment or have an interest in the company, in the event of the “relevant alternative”. Procedures of Part 26 schemes can cram down minority creditors but not whole dissenting classes.]

Question 3.2 [maximum 9 marks]

Commented [WA10]: 7/9 a strong answer - perhaps more explanation of the Model Law in England and Wales through the CBIR would have been helpful

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

There are different approaches for overseas officeholders to ask for recognition or request assistance of a court in England or Wales.

The first approach are those insolvency proceedings that involve companies that have their centre of main interest in a EU Member State (besides Denmark) since they are govern by the EU Regulation on Insolvency Proceedings. If a main proceeding is open in a Member State in which company has its COMI it will be recognized in all EU jurisdiction but the proceeding will be governed by the law of the country in which the proceeding was opened. If the company has an establishment in England or Wales a secondary proceeding can be opened for the company's assets to be ring-fenced for the benefit of the creditors. Consequently, overseas officeholders of companies with main proceedings and its centre of main interest is in a country of the EU the proceeding will be automatically recognized in England and Wales and their courts, and if there is an establishment of the company in England or Wales the court can open a secondary proceeding.

A second possibility would be dealing with cross-border insolvency under the UNCITRAL Model Law on Cross-border insolvency. Insolvency officeholders from overseas' jurisdiction may apply to the court in England and Wales to be recognized in the jurisdiction. However, the recognition is not automatic, like in the case of EU companies, it requires an application to the local court to grant recognition and relief. The benefit of recognition and assistance under the Model Law is available to those States that have adopted the Model Law.

A third option under section 426 of the Act foresees the assistance to overseas courts of some countries, this section commands that court orders made in insolvency matters by a court in the UK are enforceable in all parts of the UK. Furthermore, there is an obligation for courts in the UK to assist each other and courts of any relevant country or territory. These territories are Channer Islands and Isle Man, as well as other specified by Secretary of State. As this provision has its origins in the British Empire, the countries that benefit from it currently are Australia, Canada, Hong Kong, Ireland, Malaysia, New Zealand, and South Africa. The court will be decided whether to grant the assistance.

Another possibility for assistance is the common law jurisdiction to grant assistance in foreign insolvency proceeding. According to case law UK courts had the power at common law to exercise powers which would be available to overseas jurisdiction requesting assistance in a domestic insolvency. This view has been disapproved, as it is believed that in order for creditors to be treated fairly, insolvency proceeding should be universal. Thus, a system of modified universalism would avoid for office holders to be appointed in parallel proceedings going on in multiple jurisdictions. Consequently, the officeholder would be recognized and the same remedies to that office holder would be provided as if the proceeding would have been commenced int he UK.

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

Commented [WA11]: 12/15

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 [WA12]: 4/5 a good answer but needed to reference s 245 explicitly and its requisite criteria (which it mostly does)

The floating charge in favour of Stercus Bank plc;

Stercus Bank could try to appoint an administrator as a qualifying charge holder to enforce its charge, this would prevent the liquidator from being appointed before the administration is completed. However, the bank could opt to agree with the appointment of the liquidator instead of an administrator. The liquidator may realise the charged assets and pay the bank according to its priority.

As soon as the company enters liquidation creditors are prevented from taking legal actions against the company without permission of the court. If the bank intends an execution against the company such execution will be void.

The liquidator could ask for the court to invalidate the floating charge granted to Stercus Bank, since, according to the facts, the bank was an unsecured creditor who was giving a security at a relevant time.

Since the bank is not connected to the company the relevant period would be 12 months prior to the date of insolvency. Also is important to consider the creation of the charge was made because the company was unable to pau its debts.

The floating charge will not be invalid if:

(i) the value of so much of the consideration for the creation of the charge consists of money paid, or goods or services supplied, to the company at the time of the creation of the charge. The consideration must be given at the same time or after the creation of the charge. Where an agreement is made to execute the 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.

(ii) 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.

If the floating charge did not under the assumptions described in (i) and (ii) the floating charge granted to the bank can be considered invalid, however the debt will remain valid.

According to the facts the money loaned to the company was not given at the time of creation of the charge so it could be invalidated. However it must be analysed if it was made to discharge or reduce the debt of the company with the bank, thus it would not be invalidated.

Question 4.2 [maximum 5 marks]

Commented [WA13]: 4/5 a generally good answer on s 238 but s 127 cannot apply due to the timings. Again more specific detail on s 238 would have been helpful.

The sale of the van; and

The liquidator could investigate the sale of the van to the director and if he considered it appropriate could sue the director.
The liquidator could bring fraudulent trading action against the director if he believes that the sale of the van was intended to defraud the creditors. If the court finds the director liable for fraudulent trading it may order him to make a contribution to the company's assets and may also add a punitive element to the amount ordered to emphasise his culpability

The liquidator could also investigate if the sale of the van falls into the hypothesis of "disposition of property" in section 127 and ask for it to be declared void by the court. However, if the disposition was made honestly and to benefit the company it will be validated.

The sale of the van could also be considered a transaction at undervalue, as the worth of the transaction was significantly less than the value of the van and it took place at a relevant time prior to the commencement of the liquidation. As the transaction was made with a connected person (the director) the company would be presumed to have been insolvent at a time (which according to the facts it was already strugguling). If it is proven before the court that the transaction was entered in good faith and to benefit the company and its business, the court will not make an order under section 238. Nonetheless, if the court concludes the sale was made at an undervalue or preference will order restoring the position to what it would have been if the transaction was not entered. According to the facts the sale was made to give the company liquidity, thus it may have been done in good faith and to benefit Cork-In Limited.

Question 4.3 [maximum 5 marks]

Commented [WA14]: 4/5 another well reasoned answer which needed a little more detail on s 239 itself.

The payment to Gary's Grapes Ltd.

The liquidator could apply to open up for attack the payment to Gary's Grape LTD for having being paid in full by the company being that it could have only expected a dividend as an unsecured creditor.

In the application the liquidator must show that Gary's Grape Llt was a creditor of the company, that the company did the payment which had the effect to put Gary's Grape in a better position than the position it would have had in the liquidation, that the company when giving the preference to Gary's Grape was influenced by a desire give a preference to the creditor and the preference was given at the relevant time.

As Gary's Grape is not connected to the company there is no presumption that the company was influenced by a desire to prefer such creditors.

The pressure of Gary's Grape to the company is not relevant that would not be considered as prove of the desire to prefer the creditor.

The liquidator will have the problem to prove that that the company was influenced by the desire to prefer Gary's Grape as, apparently, it was made under the fear that the supplier would cut off the company. There are decisions that have concluded that if the company was influenced solely by commercial considerations, such as ensure that the company could continue trading, there could be no desire to prefer, thus the preference may not be proved.

*** End of Assessment ***