



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7B

KENYA

This is the **summative (formal) assessment** for **Module 7B** 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 7B. 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 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: **[studentnumber.assessment7B]**. An example would be something along the following lines: 202021IFU-314.assessment7B. **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. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 19.5/50

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

Commented [DB2]: 7/10

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 one of the following **may not** make an application for bankruptcy on an individual?

- (a) A creditor.
- (b) A combination of creditors.
- (c) A supervisor of an individual voluntary arrangement.
- (d) The debtor.
- (e) The official receiver.**

CORRECT

Question 1.2

Which of the following is **not correct**?

A bankruptcy trustee may not cancel a charge created by a bankrupt if:

- (a) money was actually advanced or paid in good faith.
- (b) the actual price or value of property sold or transferred was paid.
- (c) there was any other valuable consideration given for the charge.
- (d) the official receiver deems it fit to cancel the charge.**

CORRECT

Question 1.3

When should the liquidator of a company convene a creditors' meeting after appointment?

- (a) Within 30 days.**
- (b) Within 28 days.
- (c) Within 21 days.
- (d) Within 14 days.

CORRECT

Question 1.4

Which of the following officeholders **has no power** to challenge a transaction at an undervalue under section 682 of the Insolvency Act?

- (a) An administrator.
- (b) A liquidator in a creditors' voluntary liquidation.
- (c) A liquidator in a compulsory liquidation.
- (d) An administrative receiver.**

CORRECT

Question 1.5

Which one of the following **may not** appoint or make an application for the appointment of an administrator?

- (a) A creditor.**
- (b) The Official Receiver.**
- (c) Directors.
- (d) A qualifying floating charge holder.

CORRECT

Question 1.6

Which one of the following powers / functions **are not** bestowed on an administrator?

- (a) Power to sell charged assets.**
- (b) Power to borrow money.
- (c) Power to hire or fire directors.
- (d) Power to disclaim onerous contracts.

WRONG- THE ANSWER IS (d).

Question 1.7

Within how many days of the company entering into administration must the administrator hold an initial meeting of the company's creditors?

- (a) Within 14 days.**

- (b) Within 30 days.
- (c) Within 60 days.
- (d) Within 67 days.

WRONG- THE ANSWER IS (d).

Question 1.8

Within how many days is a supervisor of an individual voluntary arrangement (IVA) required to file his report on the IVA?

- (a) Within 7 days.
- (b) Within 14 days.
- (c) Within 21 days.
- (d) Within 28 days.**

WRONG- THE ANSWER IS (b).

Question 1.9

Which of the following **may not** make a proposal for a company voluntary arrangement (CVA)?

- (a) Creditors.**
- (b) Directors.
- (c) Liquidator (where the company is in liquidation).
- (d) Administrator (where the company is in administration).

CORRECT.

Question 1.10

Which of the following **oversees** a company voluntary arrangement:

- (a) A director.
- (b) Official Receiver.
- (c) Receiver.
- (d) Liquidator.
- (e) Supervisor.**

CORRECT.

QUESTION 2 (direct questions) [10 marks]

Commented [DB3]: 4.5/10

Question 2.1 [maximum 2 marks]

What are the options available to a secured creditor in the event of bankruptcy under the Insolvency Act?

[Secured assets do not form part of the debtor's assets so the secured creditor has the right to sell the asset for the realisation of his due but if a moratorium is in place, he can sell such only with the consent of the court or the insolvency practitioner overseeing the insolvency process.]

AWARD 0.5 MARK. ANSWER NOT SUFFICIENT.

Commented [Mungai4]: This answer does not set out all the options under section 226 of the Insolvency Act.

Deleted: ¶

Question 2.2 [maximum 4 marks]

What are the grounds for the automatic discharge of a bankrupt? Does the automatic discharge have exceptions? If so, what are these exceptions?

[Everything being equal, a bankruptcy is discharged upon expiration of a 3 months period as provided by section 254 of The Insolvency Act except:

1. A bankruptcy trustee or a creditor has objected to the discharge and the objection has not been withdrawn within the 3 years lapse.
2. A public examination of the bankruptcy requested by either the bankruptcy trustee or a creditor is still pending.
3. [An objection has been raised to the discharge by either the insolvency trustee of a creditor.]

Commented [Mungai5]: Response unclear.

Commented [Mungai6]: Wrong analysis. A bankrupt is automatically discharged from bankruptcy three years after the bankrupt lodged a statement of the bankrupt's financial position in accordance with section 50, but may apply to be discharged earlier. Reference to 3 months as opposed to 3 years is a significant error.

Commented [Mungai7]: This is a repetition of paragraph 1.

AWARD 2 MARKS FOR CORRECT EXPECTATIONS IN PARAGRAPHS 1 AND 2 ONLY.

Question 2.3 [maximum 4 marks]

What are the **objectives** of the administration procedure under the Insolvency Act?

[The overall purpose of administration under the Insolvency Act is the rescue of the company and/or its business. The specific objectives are:

- Maintain the company as a going concern
- Obtaining a better outcome for creditors than they would if the company had to be liquidated.
- Realising the property of the company in order to satisfy a class of creditors.]

AWARD 2 MARKS.

Commented [Mungai8]: This should read:

- (a) -> To maintain the company as a going concern;
- (b) -> To achieve a better outcome for the creditors as a whole than would likely be the case if the company were liquidated (without first being under administration); and
- (c) -> To realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

Commented [DB9]: 2/15

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

PLEASE SELECT ONLY ONE OF THE FOLLOWING QUESTIONS BELOW. PLEASE DELETE THE QUESTIONS YOU CHOOSE NOT TO ANSWER.

Question 3.1 [maximum 15 marks]

Discuss the process of voluntary and involuntary liquidation in a winding up.

[Liquidation can either be voluntary or involuntary. Voluntary liquidation can happen either when a company has come to the end of its life cycle and the members in a general meeting pass a resolution in accordance with the form 32 prescriptions of the insolvency regulation to the effect of liquidating the company or in a special resolution the members vote to liquidate a company still in accordance of the prescriptions of form 32 of the insolvency regulation. However, any of these resolutions can be passed only after giving prior notice to any existing floating charge holder.]

Prior to the resolution for liquidation, the directors of the company are bound to make a solvency declaration stating that the company can fully take care of its debts. The voluntary liquidation can either be members driven or creditors driven. When it is creditors driven, a liquidator is appointed and he take over from the directors in the management of the company. The liquidator is held to organize a creditors' meeting not later than 30 days after he can assert that the company can fully take care of its debt. Upon the holding of this meeting, the liquidation is automatically converted to a creditor voluntary liquidation. The creditors may form a liquidation committee charged with overseeing the process.

Involuntary liquidation on the order hand is imposed on a company that has become insolvent. Any interested stake holder may apply to the court for such a company to be liquidated. Upon passing of such liquidation order, any transactions concerning the company's assets without consent of the court or insolvency practitioner is void. The court appoints a liquidator and he holds meetings with creditors destined to effectively carry the process to its best end possible.

]

AWARD 2 marks.

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

Question 4.2 [maximum 15 marks]

You have been approached by Mr X who claims to be a representative of UFO Limited, a foreign company registered in Kenya. Mr X claims that UFO Limited is being liquidated in its home jurisdiction and that an order directing that the company be wound up has been issued in its home jurisdiction. Mr X claims that UFO Limited has sufficient assets to pay its creditors in Kenya. Mr X requests that you **advise him** on how to proceed with the realisation of UFO Limited's assets in Kenya.

[The scenario described in the above-question is that of a foreign representative who seeks the recognition of a foreign proceeding and equally his standing as representative of that foreign proceeding in order to enable him deal accordingly with the debtor's assets in Kenya.]

AWARD 1 MARK.

In order to for Mr X to successfully carry out his mission in Kenya, I would advise him to start by filing in a recognition application with the Kenyan courts for the recognition of the foreign proceedings in which he was appointed. This application must have the following supporting documents:

- I. A certified copy of the decision commencing the foreign proceeding and appointing him as foreign representative.

Commented [Mungai10]: Wrong analysis. These Forms are the prescribed documents to be filed and not the operative provisions of the Insolvency Regulations.

Commented [Mungai11]: The student's response in this question are very generalized and lacks critical content. Student should have structure the answer as below.

- 1.After identifying that there is voluntary and involuntary liquidation, discuss each separately. Identify that voluntary liquidation can be commenced by members/directors or creditors and discuss each process.
- 2.Discuss resolutions to be passed for voluntary liquidation i.e. special resolution or an ordinary resolution on a general meeting.
- 3.Discuss notices to be filed and timelines. Statements and declarations by directors and what content should be included
- 4.Highlight filings need i.e. in Kenya Gazette, 2 newspapers and website if available.
- 5.Advise on consequences of non-compliance with above requirements.
- 6.Discuss, process of involuntary liquidation i.e. filing of petition and by whom.
- 7.Effects of the liquidation i.e. is there a moratorium? How is it procured? Can creditors take action?

For a detailed suggested answer please see the marking guide.

Commented [Mungai12]: Which type? Answer unclear.

Commented [Mungai13]: Incorrect supposition. The liquidator is to hold a creditors meeting within 30 days if he forms an opinion in a voluntary liquidation that the company cannot pay its debts as indicated in the statutory declaration of directors.

Commented [DB14]: 6/15

Commented [Mungai15]: Student has recognised that this relates to enforcement of foreign insolvency proceedings. The student should have structured the answer as follows:

- 1.Candidate to mention adoption by Kenya of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997, albeit with modifications.
- 2.Discuss who has capacity to pursue insolvency in Kenya on behalf of a foreign company i.e. a foreign representative and what constitutes a foreign proceeding.
- 3.Discuss the modalities of the petition for a recognition application by a foreign representative and when a Kenyan court can refuse to allow recognition. The contents of a recognition application e.g.
 - (a)a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
 - (b)a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative;
 - (c)any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative; and
 - (d)a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
- 4.Discuss when the Court is required to accept the Recognition Application i.e. where:

... [1]

- II. A certificate from the foreign court attesting the existence of the foreign proceedings and his appointment.
- III. Any other document relevant in attesting the truth of the facts raised above.
- IV. A statement identifying all other foreign proceedings already commenced in respect of the debtor

AWARD 4 MARKS- CORRECT IDENTIFICATION THAT APPLICATION CAN BE MADE AND DOCUMENTS TO BE FILED IN COURT FOR THE APPLICATION FOR RECOGNITION OF A FOREIGN PROCEEDING.

Upon submission of the application and accompanying documents, the court may grant any interim relief sought by Mr X if according to the appreciation of the court, the foreign proceeding is one related to the administration of the debtor's assets for either restructuring or liquidation. An example of such interim relief is the suspension to transfer, encumber or dispose of any of the debtor's assets inter alia.

AWARD 1 MARK.

When effective recognition is actually granted to the application, Mr. X is entitled to proceed with the realization of the debtor's assets as any other administrator in Kenya would do and since he purports that UFO is capable of satisfying its creditors, he must make a declaration of solvency and proceed with the liquidation in Kenya hitch free.

]

*** End of Assessment ***

Commented [Mungai16]: Student identified court can grant orders. Student should have also discussed criteria that court uses to determine whether to recognize the foreign proceeding or not. Refer to para above.

Commented [Mungai17]: Question relates to liquidation not administration.

Student has recognised that this relates to enforcement of foreign insolvency proceedings. The student should have structured the answer as follows:

1. Candidate to mention adoption by Kenya of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997, albeit with modifications.
2. Discuss who has capacity to pursue insolvency in Kenya on behalf of a foreign company i.e. a foreign representative and what constitutes a foreign proceeding.
3. Discuss the modalities of the petition for a recognition application by a foreign representative and when a Kenyan court can refuse to allow recognition. The contents of a recognition application e.g.
 - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
 - (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative;
 - (c) any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative; and
 - (d) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. Discuss when the Court is required to accept the Recognition Application i.e. where:
 - (a) the foreign proceeding properly instituted before the relevant body/court and the foreign representative has the capacity to play such a role;
 - (b) the criteria set out in paragraph 3 above have been met; and
 - (c) the application has been submitted to the Court.
5. Discuss the interim measures