



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 [JL1]: TOTAL: 42 OUT OF 50
Well done!!

Commented [JL2]: 9 out of 10

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

Commented [JL3]: b

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]

Commented [JL4]: 10 out of 10

Question 2.1 [maximum 6 marks]

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

[Section 123 of the Act contains two types of bankruptcy, one is cash flow bankruptcy and the other is balance sheet bankruptcy.

Section 123 (1) (e) of the Act provides that a company is deemed insolvent if it proves to be insolvent when the debt is due. The main issue for the court's primary consideration is the fact that the debt cannot be repaid "at maturity". For a long time, this was thought to include only debt owed in the present with no future factor. This thinking has now changed and the court may take into account debts currently owed and those due in the near future.

If the value of the company's assets is less than its liabilities (taking into account any future or contingent liabilities and its current liabilities), the balance sheet becomes insolvent. It is important to keep these two types of bankruptcies in mind, as a company can go bankrupt due to short-term cash flow problems but with a very strong balance sheet. Similarly, a company may have many large future liabilities that it has no chance of paying, but is currently cash-flow solvent because it can repay its current liabilities when they mature.

In consideration of future liabilities or future contingent liabilities, cash flow insolvency may fail, relying more on the test of asset liability [insolvency].

Commented [JL5]: 6

Question 2.2 [maximum 4 marks]

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

[(a) Shall not pass any resolution concerning the termination of the Company; (b) No winding-up order shall be made against the company (except on public interest grounds); (c) Without the consent of the administrator or the permission of the court, no measures shall be taken to enforce the security of the company's property; (d) Not to recover goods owned by the Company under the lease agreement (including the retention of title contract) except with the consent of the Administrator or with the permission of the court; (e) The Owner shall not peacefully exercise forfeiture in respect of premises leased to the Company except with the consent of the Administrator or with the permission of the court; (f) No legal proceedings (including any legal proceedings or enforcement of any judgment) shall be instituted or continued against the Company or its property except with the consent of the Administrator or the permission of the court; And (g) no administrative receiver shall be appointed. The purpose of the suspension is "to give the administrator time to develop proposals and submit them to the creditors and then implement any proposals approved by the creditors". The suspension is procedural, because while the power to enforce the rights is suspended, those rights have not been eliminated. When a creditor wishes to enforce any of its rights against an administrative company, the creditor may do so with the consent of the administrator or with the permission of the court.]

Commented [JL6]: 4

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

Commented [JL7]: 15 out of 15

Question 3.1 [maximum 6 marks]

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

[Under Part 26 of the Companies Act 2006, a company may enter into a scheme of arrangement which is binding on all its creditors. Creditors may vote by different classes of creditors. Broadly speaking, this means secured debt

Rights and unsecured creditors must vote separately to approve the plan. This scheme can be used by both solvent and insolvent companies. In fact, it was primarily designed to

restructure solvent companies, although it is often used by those that have gone bankrupt or may go bankrupt. The process to enter the Part 26 program is led by the court. It begins with an application to the court. The company, creditors, members, administrators or liquidators may apply to the court. A plan may lead to the restriction of a certain class on a few creditors, but it cannot suppress an entire class of dissenters. The plan must be approved at each meeting (or group meeting) by a majority of 75% or more of the creditors or members present and voting.

The 2020 Act introduces a new Part 26A to the Companies Act 2006, which to a large extent replicates the scheme of arrangement mechanism under Part 26 of the 2006 Act. Similar to the Part 26 Plan, the Part 26 Part A reorganization plan requires an initial application to the court to order a collective meeting of creditors (and members). Once the reorganization plan is approved at those meetings, the court will be asked to approve the plan and then put it into effect through a court order. Part 26A of the reorganization plan is a debtor-in-possession proceeding. It allows companies with financial difficulties to arrange or rebuild. Part 26A applies to all companies, including overseas companies that may be wound up in England and Wales.

Compromises or arrangements under Part 26A are provided only if:

(1) The company has encountered or is likely to encounter financial difficulties affecting its ability to go on as a going concern (this appears to be a broad range

Defined period, which seems to include many trading companies); and

(2)

(a) an offer of compromise or arrangement between companies

(i) its creditors, or any class thereof, or

(ii) its members, or any class of them, and

(b) The purpose of the compromise or arrangement is to eliminate, reduce or prevent or alleviate the impact of any of the foregoing financial difficulties

Ring.

On the application of the Company, any creditor or member of the company, the liquidator or administrator, the court may order the law

To convene a meeting of creditors or classes of creditors or members or classes of members in such manner as the Court may direct.

Another key feature of part 26A reorganization plans that differs from Part 26 plans is the court's ability to suppress dissenting classes that do not approve the reorganization plans. In the case of an objection to one or more categories, if the following A

And B, the fact that the dissenting class has not agreed to the reorganization plan does not prevent the court from granting its approval.

Condition A is that the court is satisfied that, if granted, any dissenting class would be no worse off than if A "relevant alternative" (usually liquidation or administration) had occurred.

Condition B is a compromise or arrangement if there is a "relevant option" in which at least one class of creditors or members agree that they will receive payment or have a real financial interest in the company.

As long as conditions A and B are met, one class of creditors can impose A restructuring plan on all classes of creditors by court order, even those with dissenting views.]

Commented [JL8]: 6

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.

[First, cross-border insolvency proceedings involving a Comi in any EU Member State (except Denmark) are governed by the Eu Regulation on Insolvency Proceedings, which is a recasting (and slightly amended) version of the original Regulation. The approach of the EU regulation is not to harmonise the different insolvency regimes within the EU, but to provide rules for deciding which insolvency regimes in individual jurisdictions apply in particular cases. For example, if a company has a registered office (usually its registered office or principal place of business) in England and Wales, then only the courts of England and Wales have jurisdiction to initiate the main proceedings. So if a company in England and Wales is put into administration or liquidation, the rules set out in the act will govern the process across the EU (with some exceptions relating to secured creditors and employee rights). Other EU jurisdictions would automatically recognise the procedure and the official would be able to exercise all his powers over assets located in other member states. The EU regulation does not harmonize insolvency law between member States, but establishes rules on the jurisdiction to initiate insolvency proceedings and the law applicable to such proceedings. If a company is competitive in the UK, only the UK has the jurisdiction to initiate major insolvency proceedings, such as administration. These insolvency proceedings will be governed in all respects by UK law, with some exceptions, including security interests and security interests and rights under employment contracts in other Member States. In addition, but importantly, any appointment would be automatically endorsed in all other Member States and insolvency practitioners would be able to exercise all their powers, with limited exceptions. The great benefit of recognising one main procedure in all EU jurisdictions is that it allows for a single, consistent approach to insolvency, which may encourage any possible rescue,

Costs are often reduced so that the asset is realized in the most beneficial way.

Second: Under the Model Law on Cross-border Insolvency (the "Model Law"), cross-border Insolvency Regulation SI2006/1030 of 2006 (CBIR), this was incorporated into UK law with only minor modifications. There are no reciprocity provisions in the CBIR, so there are no real limits on the "inward-bound" consequences of cross-border insolvency. Insolvency practitioners in any overseas jurisdiction may apply for recognition in the courts of England and Wales. Britain's "extroversion" benefits are limited to other states that have passed model laws (44 have so far). A major weakness faced by the Model Law in comparison with eu regulations is that, under the Model Law, recognition of foreign insolvency proceedings is not automatic. It needs to apply to a local court for recognition and relief.

Third way: Section 426 of the Insolvency Act provides for assistance from English courts to overseas courts from certain listed jurisdictions. The origins of Section 426 can be traced back to the British Empire and the provision allowing recognition and assistance of court orders made in former colonies. Under section 426, court orders made by the Courts of the United Kingdom in bankruptcy matters are strictly enforceable throughout the United Kingdom. Furthermore, the courts of the United Kingdom and those of "any state or territory concerned" have a positive obligation to assist each other. These other countries or territories include the

Channel Islands and the Isle of Man, as well as any other countries or territories designated by the Secretary of State. Countries currently benefiting from the "inward" effects of Section 426 include Australia, Canada, Hong Kong, Ireland, Malaysia, New Zealand and South Africa. The court still decides on its own whether to grant any assistance.

Fourth: common law jurisdiction to provide assistance in foreign bankruptcy proceedings. Case law once showed that English law

Courts have powers at common law similar to those provided for in Section 426 of the Act to exercise overseas administration of domestic bankruptcy claims

Any authority to provide assistance. The Privy Council elaborated and extended the principle of "modification" universalism in Cambridge Gas Transport Company v. Official Committee of Unsecured Creditors of Navigator Holdings. The effect of this case law is that there is little "modified universalism" in common law to help overseas officials seek the help of English courts. It is usually best to advise him or her to consider using one of the above legislative provisions.

Finally, the impact of Brexit on cross-border bankruptcies remains uncertain. The likely consequence of the UK leaving the EU is that EU rules will no longer apply when the insolvency of UK officials involves the assets of other member states. The "outward" aspect of EU regulation will be lost unless the British government negotiates its retention. The British government's approach to Brexit is to preserve many aspects of existing EU law by incorporating existing EU law into UK law. As part of this, the "inward" aspect of EU regulation will continue to exist, so that it can be relied on by national officials.]

Commented [JL9]: 9

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

Commented [JL10]: 8 out of 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]

The floating charge in favour of Stercus Bank plc;

[Section 245 of the Act applies only to variable charges and does not apply to any other type of guarantee. It applies to the public

The Division is in administration or liquidation, and the provision is intended to prevent existing unsecured creditors from entering formal liquidation in the company

The production process was recently secured for variable costs. If the person setting up the variable fee is related to the company, the relevant time is any time within the two years prior to the commencement of bankruptcy. If the person setting up the variable fee is not associated with the company, the relevant time is any time in the 12 months prior to the commencement of bankruptcy.

Facts of the case, in November 2020 it went into liquidation and in January 2020 Cork Limited approved a bond in favour of Stucus Bank which contained a floating charge for the entire business of the company.

In accordance with the above provisions, the fee will become invalid. While the floating charges are invalid, the underlying obligations remain **valid.**

Commented [JL11]: The answer lacks some clarity of thought and expression. Some elements missing – e.g. any possible new consideration.
4

Question 4.2 [maximum 5 marks]

The sale of the van; and

[Under section 238 of the Act, a liquidator (or administrator) can attack transactions that took place before a company went into liquidation or administration.

Under section 238, the liquidator or administrator must prove that the company: (1) made a gift to another person; (2) transactions with others, stipulating that the company will not accept consideration; Or (3) a transaction with another person in which the value of money or money on the day of the transaction is significantly lower than the value of money or money for consideration offered by the Company. In order to be attacked, trades must be made in a "relevant time" of two years before clearing or administration begins.

The concept of "transaction" is broadly defined to include any gift, agreement or arrangement. There is little difficulty in identifying those transactions in which no consideration was given through gifts or companies.

In June 2020, the directors approved the sale of a company delivery van to Paul Watson (director) for £5,000 cash. The company bought the car for £10,000 a year ago. Therefore, the sale price of the vehicle is significantly lower than the purchase price at that time.

The liquidator may take action in respect of the sale of the goods vehicle pursuant to section **238.**

Commented [JL12]: Good answer but the possible defence was not discussed.
4

Question 4.3 [maximum 5 marks]

The payment to Gary's Grapes Ltd.

[One of the main purposes of liquidation is to ensure that the property owned by the company at the beginning of liquidation is distributed to creditors in accordance with statutory orders. The commencement of liquidation does not affect the company's ownership of its property, but its power to dispose of that property is very limited. In the case of compulsory winding-up, section 127 of the Act avoids any disposition of company property after the commencement of winding-up unless otherwise ordered by the court. The start date will be the date on which the closing petition is filed, so the recusal clause acts retroactively. It is common for companies that receive winding-up petitions to trade. If it does trade and fails to defend against the petition, the winding-up order, which can be made several months after the petition is made, will avoid any disposition of the company's property during the transition period.

The term "disposition of property" in Section 127 of the Act has a broad meaning and affects the payment of any money as well as assets that are sold or transferred. They include any type of transaction in which property no longer belongs to the company, such as by sale, gift, transfer, mortgage, charge, lease, loan, or exchange.

The courts will allow disposition to be made honestly in the normal course of business for the benefit of the company, such as the payment of employees' wages or the payment of supplies to enable the company to fulfil contracts that appear to be profitable. If the transaction allows the company to continue trading, it is usually validated. Suppose the court refuses to grant a confirmation order because the disposition will benefit only one creditor to the detriment of the company's other unsecured creditors.

Payments made to Gary Grapes Limited shall not be disposed unless verified.

Commented [JL13]: This question required a discussion of preferences.
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*** End of Assessment ***