



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9**

**ETHICS AND PROFESSIONAL PRACTICE**

This is the **summative (formal) assessment** for **Module 9** of this course and is compulsory for 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 9.** 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: **[studentID.assessment9]**. An example would be something along the following lines: 202122-336.assessment9. **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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **8 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**

Please choose the **most correct answer** from the options below.

INSOL International's *Ethical Principles for Insolvency Professionals* –

- (a) are mandatory and apply to all its members.
- (b) creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.
- (c) creates a set of rules by which stakeholders and the public in most jurisdictions would be able to determine whether insolvency practitioners are acting in accordance with ethical principles.
- (d) **creates a set of best practice principles to inform and educate insolvency practitioners and stakeholders by providing ethical and professional guidance on issues of importance.**

**Question 1.2**

The “Enlightened Creditor Value” approach to insolvency proposes the following with regard to the protection of competing interests in insolvency proceedings:

- (a) Creditors' interests are of paramount importance and as such only these interests should be protected in insolvency.
- (b) The interests of stakeholders should be regarded in the same manner as those of creditors.
- (c) **Creditors' interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors' interests.**
- (d) Only the shareholders of the company and the creditors of the company should be protected by the insolvency law (and in that order).

**Question 1.3**

All insolvency professionals are fiduciaries.

- (a) **True**
- (b) **False**

Commented [JL1]: TOTAL 47 out of 50  
Well done!

Commented [JL2]: 9 out of 10

Commented [JL3]: b

**Question 1.4**

Being truthful and being honest is the same thing.

- (a) True
- (b) **False**

**Question 1.5**

Select the **correct** answer:

Tony has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Supplies. Tony owns 30% of the shares in ABC supplies.

This situation is an example of a / an \_\_\_\_\_ threat.

- (a) self-review
- (b) **self-interest**
- (c) advocacy
- (d) intimidation

**Question 1.6**

A lack of independence and impartiality due to a prohibited relationship with a stakeholder can always be remedied by disclosing the relevant relationship to the relevant parties and issuing a declaration of independence.

- (a) True
- (b) **False**

**Question 1.7**

Select the **correct** answer:

Thembi is a well-known insolvency practitioner and is often sought out for her knowledge and expertise. She currently has ten ongoing insolvency matters (most of them quite complex) and has been feeling somewhat overwhelmed. Due to her impressive *curriculum vitae* she is contacted by a very large designer company in distress inquiring whether she would be able to take an appointment as an administrator. Thembi should:

- (a) Accept the appointment as it will boost her career even further.
- (b) Accept the appointment as she can get one of her junior associates to take over all her other cases.

- (c) Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.
- (d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.

#### Question 1.8

Select the **correct** answer:

Rajesh has been appointed as a new associate at the firm where he is employed. In his new role he has to meet certain targets in relation to the fees he earns for taking appointments. Rajesh is currently appointed as a liquidator for a small company. He realises that he will not meet the firm's target for fees. The most ethical thing for Rajesh to do would be to:

- (a) Call a creditors' meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.
- (b) Ask his administrative assistant to invoice the estate for the use of the firm's conference venue for meetings held there at a 50% increased fee.
- (c) Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.
- (d) Ask his administrative assistant to double check all the calculations in the case file and then bill the hours as part of his invoice.

#### Question 1.9

Select the **most correct answer** from the options below.

An insolvency practitioner using a percentage-based fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.

- (a) This statement is true since jurisdictions always allow for an adjustment of fees where it is necessary.
- (b) This statement is false since the practitioner might have carried out more work and invested more resources than the value of the realisable or distributable assets.
- (c) This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.
- (d) This statement is false since the only way to receive a fair amount of remuneration is to calculate the remuneration on an hourly rate.

#### Question 1.10

Select the **most correct answer** from the options below.

Fathima has just completed Module 9 of INSOL International's Foundation Certificate. She works as a junior insolvency practitioner at a large firm. Her firm is contemplating the acquisition of a new information technology system to help ease the administrative burdens of the practitioners at the firm. This new system will digitise all of the documents in relation to

insolvency appointments. All the practitioners and administrative personnel employed by the firm will have access to these files as long as they have access to an internet connection. Fathima should advise someone in the office to implement procedures and policies on \_\_\_\_\_ in relation to this proposed new system.

- (a) Quality control
- (b) Risk management
- (c) Compliance management
- (d) Fidelity insurance

**QUESTION 2 (direct questions) [10 marks]**

Commented [JL4]: 8 out of 10

**Question 2.1 [maximum 2 marks]**

The ethical principle of integrity implies "fair dealing". How would this apply in an insolvency context?

[The IP should treat people equitably as it would not be possible to treat all stakeholders equally. Equitable treatment would amount to fair dealing as insolvency system tends to favour certain stakeholders. Stakeholders, in the same class, to be treated fairly and impartially as per their respective rights.]

Commented [JL5]: 2

**Question 2.2 [maximum 4 marks]**

Briefly explain the two-pronged nature of the duty to act with independence and impartiality.

[IPs have been accorded immense power and discretion in the insolvency process due to legislation and the nature of assignment. However these have to serve the best interest of stakeholders that would require the independence and impartiality of the IP.

Balancing of stakeholder interest requires impartiality to deal with competing interests where IP should not allow bias, a conflicting interest or undue influence of others to override professional judgement.

[IPs should not take up appointments where they have an existing relationship with stakeholders. Independence must be in fact that is seen or perceived to be independent.]

Commented [JL6]: The question required some elaboration on this statement.

IPs must avoid all personal and professional relationships and direct or indirect interests that will adversely influence, impair or threaten their ability to make decisions. Further they should avoid circumstances that would lead a reasonably informed third party to conclude otherwise on the integrity or impartiality of the IP.

Breach of belief of independence or impartiality would negate the trust and reliance placed upon IPs by the stakeholders thereby leading to discontinuance of co-operation that shall negatively affect the outcome of the insolvency process.

Safeguard to these threats could be by way of joint appointments, disclosure of relationships and declaration of independence. However mere disclosure in certain relationships or joint appointment where IP has long-standing involvement with stakeholder may not form adequate solutions.]

Commented [JL7]: 2

**Question 2.3 [maximum 4 marks]**

Contingency fee arrangements have been a controversial issue in relation to insolvency practitioners and their remuneration. Briefly reflect on this practice and the possible ethical issues in relation to this method of calculation.

[Remuneration of IP is a sticky subject irrespective of the method of calculation as it directly impacts the realisable value of the insolvency estate. However, if the method adopted exhibits the basic principle of reasonableness that is commensurate with qualification, experience and case specific risks undertaken the issue becomes less contentious. There are various methods for calculating including fixed fees, percentage-based fees, time-based fees, contingency fees or a combination of these methods.

Where the IP is remunerated by contingency fee arrangement, the entitlement is based on a specific outcome or condition being met. The specific outcome usually would be a favourable outcome for the stakeholders and should be objectively measurable. This method should benefit stakeholders as it encourages improved realisation values of the insolvency estate.

The method highlights certain ethical issues since IPs are fiduciaries. Contingency fee also known as success fee or conditional fee is towards success of a desired outcome that already form part of the IPs professional duty. Second, IPs may be singularly focussed on the outcome rather than having a holistic approach to the process. Further, IPs may have a bias towards dominant stakeholders thus giving up on their professional principle of being impartial while balancing all stakeholder interest.

Safeguards that an IP may undertake to overcome possible trust deficit would be by improving practice management and achieving a truly remarkable **outcome**.]

Commented [JL8]: 4

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

Commented [JL9]: 15 out of 15

#### Question 3.1 [maximum 8 marks]

The ethical principle that requires insolvency practitioners to act with and maintain professional and technical competence is often linked to the duty of care. Elaborate on this duty and on the yardstick that would be used when determining whether a practitioner acted with the necessary care, skill and diligence.

[Professional and technical competence entails the IP to be experienced, remain abreast with legislative/regulatory changes and to undertake continuing professional education. IP is regarded as an expert in the field of restructuring and liquidation and are remunerated as skilled professionals.

IP are expected not to be negligent or act in a reckless manner while conducting insolvency process. This is critical as he undertakes the responsibility of a company in financial distress. Since an IP is regarded as an expert, he should not accept appointments that are beyond his technical expertise. Any sort of incompetence of IP is greatly amplified and therefore he should conduct every process with meticulous planning and should educate himself to overcome deficiencies in order to act in the best interest of the stakeholders.

IP should endeavour not to undertake cases where he unable to provide the level of attention required in the case due to overload.

Care would also reflect in the IPs actions to obtain adequate degree of understanding of the nature of company's business and of the knowledge of the industry in which the company operates.

To assess IP's level of care, skill and diligence, one may apply the two-fold test of objective & subjective determination. Objective test determines what the reasonable person would

have done in the same situation and the subjective test takes in to account the general knowledge, skill and experience of the specific person.

In the case of *Charnely David*<sup>1</sup>, the court observed “An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company’s assets is, therefore, a complaint of professional negligence and in my judgement the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession but by those of an ordinary, skilled practitioner.”

Further, UNCITRAL Guide<sup>2</sup> states the standard to be no more stringent than would be expected to apply to the debtor in undertaking its normal course of business activities in a state of solvency. However it does suggest that in some States, the standard could higher as insolvency representative deals assets belonging to another [person].

Commented [JL10]: 8

### Question 3.2 [maximum 7 marks]

As insolvency appointments often involve complex legal issues, it is common practice for insolvency practitioners to rely on the advice and services of legal professionals. What ethical considerations should be borne in mind, especially regarding the fees of these legal professionals?

[The IP may treat the costs paid to legal professionals either as disbursements or third-party costs as explained by Singapore High Court in case of *Kao*<sup>3</sup>. When costs were claimed as disbursements, the IP is responsible to ensure the reasonableness of the bill and what is appropriate given the circumstances. The court noted that the IP was duty-bound to act with care and ensure that there was no unnecessary work performed and the work was not duplicative.

In another case, *Re Korda*<sup>4</sup>, the judge observed that the IP should exercise his commercial judgement in appointing legal professionals by negotiating for best prices and monitoring the fees. Personal relationships should not obscure the professional duty.

If the costs were directly billed to the company as third-party costs, the IP should make sure to monitor the fees and make scrutiny of the bills.

A typical issue with legal costs is the duplication of work performed and the IP requires justifying the claim of work performed especially if there were other professionals instructed on the same matter. The issue was highlighted in the case of *Dovechem*<sup>5</sup> where the liquidators had charged four times more than the solicitors that were instructed to institute action on behalf of the company. The liquidators in this case were able to prove that work done by them was very different from that of the solicitors.

Appointing a legal professional at times may be a contentious as any payment made to professionals is questioned by the stakeholders. However, it is a necessity since IPs in certain jurisdictions might not be trained in law or have requisite legal knowledge. In such a situation having proper guidance to make such appointments is addressed by ICAEW<sup>6</sup>. The ICAEW requires an IP to

<sup>1</sup> *Re Charnley David Ltd* 1990 BCC 605 at 618

<sup>2</sup> UNCITRAL Guide on p184 para 61

<sup>3</sup> *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC, [2016] 1 SLR 21, 23 [SINGAPORE]

<sup>4</sup> *Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424, 443 [51] [AUSTRALIA]

<sup>5</sup> *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd* [2015] 4 SLR 955 [SINGAPORE]

<sup>6</sup> Insolvency Code of Ethics by Institute for Chartered Accountants of England and Wales



1. Evaluate the need for appointing a third party for advice or work;
2. Document reasons for choosing a particular service provider;
3. Make full disclosure of any relationship with the service provider;
4. Establish the service provider is providing the best value and service by considering;
  - a. The cost of service, the expertise and experience of the service provider;
  - b. Professional has appropriate regulatory authorisations; and
  - c. The professional and ethical standards applicable to the service provider.]

Commented [JL11]: 7

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

Commented [JL12]: 15 out of 15

WeBuild Ltd is a private company registered in Euraficlia. The company specialises in construction and property development and is well known in the area where it conducts its business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of the company. The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the financial decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace-related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.

Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality.

After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.

In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.

At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks

that the interests of lower ranking creditors should sometimes outweigh “big money” (referring to financial institutions). She immediately feels uncomfortable with his appointment as administrator.

Several months later the administration fails due to a “lack of funding” to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.

### **INSTRUCTIONS**

There are at least **THREE** major ethical issues in this factual scenario.

**You are required to identify these ethical issues and explain in detail why they are in fact ethical issues. Your answer should include reference to the ethical principles and the commentary thereon. Where appropriate and suitable, you should also endeavour to elaborate on possible remedies or safeguarding mechanisms to minimise or remove the ethical threats.**

**You may also make use of case law and secondary sources to substantiate your answer.**

*[In this case study “some of the shareholders recognised Mr Relation as Mr B Inlaw’s brother-in-law and godfather to his daughter... Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality.”*

Personal relationships with stakeholders can result in a lack of **independence** due to the perception created thereby. There are threats of self-interest and familiarity. The administrator has prior to being appointed disclosed his relationship with the director stating a declaration of remaining independent and impartial. During the course of the administration there were no factual evidence of impropriety against the administrator but his long standing relationship with the director would create doubt with a fair-minded person<sup>7</sup>.

*“Mr Relation suggests that the company enter into a voluntary administration procedure.”*

There should be limits to what is deemed as acceptable **pre-commencement involvement** else the IP would no longer be deemed independent. In modern day insolvency, early intervention and being prepared to act when and if necessary<sup>8</sup>. However, the administrator should not give any advice to the board of directors, creditors or any other stakeholders.

*“During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.”*

On being **appointed**<sup>9</sup> the independence and impartiality of the administrator is drawn into question due to his agreement to the approach with the appointing stakeholder. The IP should not make any promises to those who appointed him and should make it very clear that he is expected to act in the interest of all beneficiaries. Moreover he has compromised his powers to investigate the affairs of the company and the directors.

<sup>7</sup> *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291 [AUSTRALIA]

<sup>8</sup> *Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd)* [2017] FCA 914 [AUSTRALIA]

<sup>9</sup> *Re 1 Blackfriars Limited* (in liquidation) [2021] EWHC 684 (Ch) [ENGLAND AND WALES]

*“Several months later the administration fails due to a “lack of funding” to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.”*

His **subsequent appointment** and acceptance to the role of liquidator post the failure of administration leads to self-review threat where he will not be able to appropriately evaluate the results of the previous judgements made or services rendered. Self-interest threat has arisen since the IP has inappropriately influenced his judgement. He was unable to put his best efforts to rescue the debtor due to the fact that he knows he would subsequently be appointed as liquidator and shall be paid again.

*“Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks that the interests of lower ranking creditors should sometimes outweigh “big money” (referring to financial institutions)”*

The IP raises advocacy threat on his biased view towards institutional finance favouring lower ranking creditors. Thus he raises the ethical question of **impartiality**. The IP will not be able to exercise his discretion and powers in the best interest of the beneficiaries if he is not impartial especially when he has to perform a balancing act in considering and dealing with competing interest of the stakeholders.

*“At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company’s directors.”*

*“When the company’s financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses.”*

The IP has compromised on the principle of **integrity**. IP should demonstrate impeccable probity and honesty in his dealings. Honesty implies that the IP should refrain from lying while truthfulness means that the IP should not conceal any facts. IP must refrain from misleading stakeholders thorough any act or omission. Further the IP should treat all stakeholders fairly and equitably.

The IP was aware of the wrongdoing carried out by the directors who continued to trade even as they were aware of the company’s financial distress.

*“He relies on detailed reports drafted by Mr B Inlaw regarding the company’s business and drafts a strategic plan for recovery.”*

IP’s **professional competence** is put to question by his conduct in the administering the process. The IP could be charged with neglecting his duty of care as he carries out a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. He relies on detailed reports on the company’s business drafted by directors, who are instrumental in pushing the company to insolvency due to their wrongful conduct, and drafts a strategic plan for recovery based on such reports. He fails the two-fold test where objectively a reasonable person with general knowledge, skill and experience would not have done in the same situation

*“At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company’s directors.”*

IP has violated the ethical principle of **professional behaviour** as he was aware of the insolvent position of the company and the wrongdoing perpetrated by the directors. The IP is duty bound to make communication with stakeholders that is accurate, honest, clear, succinct and timely. His primary duty is towards the estate and not on behalf of the **directors.**]

Commented [JL13]: An excellent answer, well done!  
15

**\* End of Assessment \***