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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: **[studentID.assessment7B]**. An example would be something along the following lines: 202122-336.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 “studentID” 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

5/10

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

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. +

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. ~~DE~~ ✓ (1)

Question 1.3

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

- (a) Within 30 days. ✓ (1)
- (b) Within 28 days.
- (c) Within 21 days.
- (d) Within 14 days.

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.

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.

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. ✗

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.

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.

①

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).

①

Question 1.10

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

- (a) A director.
- (b) Official Receiver.
- (c) Receiver.
- (d) Liquidator.
- (e) Monitor. ✓

①

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

②

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

[The options available to a secured creditor in the event of bankruptcy under the Insolvency Act are set out in sections 226 and 228 of the Act. The options are as follows:

- (a) Option 1; to realise the property by having it sold (but only if the creditor is entitled to do so under the terms of the charge); or ✓
- (b) Option 2; to have the property valued and prove in the bankruptcy as an unsecured creditor for the balance due (if any) after deducting the amount of the valuation; ✓

- (c) Option 3; to surrender the charge to the bankruptcy trustee for the general benefit of the creditors and prove in the bankruptcy as an unsecured creditor for the whole debts.¹] ✓

The Kenya Insolvency Act (the Act) however provides that the bankruptcy trustee may, at any time by Notice, require the secured creditor who holds a charge over a bankrupt's property to choose any of the options within 30 days after receipt of the notice, and if the creditor chooses option 2 or option 3, to exercise the chosen option within that period.² A creditor who, having been served with a notice, fails to comply with the notice is taken to have surrendered the charge to the bankruptcy trustee under option 3 for the general benefit of the creditors in which case the creditor may prove as an unsecured creditor for the whole debt. Under section 228 of the Act, a creditor who realizes property that is subject to a charge may prove as an unsecured creditor for any balance due after deducting the net amount realized. This does not however apply if the bankruptcy trustee has accepted a valuation and creditor's claim under section 231 of the Act. A secured creditor who realizes property subject to a charge shall account to the bankruptcy trustee for any surplus remaining after the following amounts have been paid;

- (a) The amount of the debt;
- (b) Interest payable on the debt up to the time when it is paid; ✓
- (c) Any proper payments to the holder of any other charge over the property.³

A creditor may claim interest on the debt up to the date on which the bankruptcy commences. Where the debt relates to a contract, interest is levied at the rate specified in the contract and where the debt is with respect to a judgment debt, then the interest is at the rate payable on the debt or the court rate (currently at 14%) if the contract does not provide an interest rate. Note however that the bankruptcy trustee can only pay interest on the allowed creditors' claims, if surplus assets remain after the bankruptcy trustee has paid the claims of the other creditors in full⁽⁴⁾

Question 2.2 [maximum 4 marks]

4

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

[The grounds for the automatic discharge of a bankrupt is set out in section 254 of the Insolvency Act, 2015. By the provision of the section, 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 of the Act⁵, but may apply to be discharged⁶, earlier.

¹ See, Kenya Insolvency Act, 2015, s226(2)(a)-(c)

² See, *ibid*, s226(3).

³ *Ibid*, s228(3).

⁴ See, Module 7B, Guidance Text, p12.

⁵ "(1) within fourteen days after being served with the notice in accordance with section 49 (or within such extended period not exceeding sixty days as the Official Receiver may allow), the bankrupt shall lodge with the Official Receiver a statement of the bankrupt's financial position setting out-

- (a) Particulars of the bankrupt's assets;
- (b) The bankrupt's debts and liabilities;
- (c) The names, residences and occupations of the bankrupt's creditors;
- (d) The securities held by the bankrupt's creditors;
- (e) The dates when the securities were given; and

Yes, the automatic discharge has exceptions, and these exceptions are set out in section 254(2) of the Insolvency Act as follows;

- (a) If the bankruptcy trustee or a creditor has objected under section 256 and the objection has not been withdrawn by the end of the three-year period referred to above;
- (b) If the bankrupt has to be publicly examined in accordance with section 180⁷ and has not completed that examination; or
- (c) If the bankrupt is undischarged from an earlier bankruptcy.]

Question 2.3 [maximum 4 marks]

(4)

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

[The objectives of the administration procedure under the Insolvency Act are set out in Section 522 of the Act as follows,

- (a) To maintain the company as a going concern;
- (b) To achieve a better outcome for the company's creditor as a whole than would likely to be the case if the company were liquidated (without first being under administration);
- (c) To realise the property of the company in order to make a distribution to one or more secured or preferential creditors.⁸

Note however, that the administration shall perform the administrator's functions with the objective specified in (a) above unless the administrator believes either

- (i) That it is not reasonably practicable to achieve that objective; or
- (ii) That the objective specified in (b) above would achieve a better result for the company's creditors as a whole.⁹

Also, the administrator may perform the administrator's functions with the objective specified in (c) above only if-

- (1) The administrator believes that it is not reasonably practicable to achieve either of the objectives specified in (a) and (b) above; and
- (2) The administrator does not unnecessarily harm the interests of the creditors of the company as a whole.¹⁰

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.

-
- (f) Such other information as may be prescribed by the Insolvency regulations or as the bankruptcy trustee may reasonably require.

⁶ See, the Act *ibid*, s254(1).

⁷ Section 180 of the Act relates to conduct of public examination before the court.

⁸ See, Insolvency Act *ibid*, s522(1).

⁹ See, *ibid*, s522(3)(a)-(b).

¹⁰ *ibid*, s522(4)(a) and (b).

[Type your answer here]

OR

Question 3.2 [maximum 15 marks]

13 7

Discuss the process of administration under section 534 of the Insolvency Act by the holder of a qualifying floating charge.

[The process of administration under the Insolvency Act, 2015 commenced by the appointment of an administrator. Section 533 makes provision for persons that can appoint an administrator under the Kenya Insolvency Act which are;

- (a) By administration Order of the Court in accordance with division 3;
- (b) By the holder of a floating charge under section 534; or
- (c) By the company or its directors under section 541.

X

Not clear

The process of administration under section 534 of the Insolvency Act by the holder of a qualifying floating charge commences with the administrator's appointment under the relevant section by the holder of a qualifying floating charge in respect of a company's property.¹¹ A floating charge under the section is a qualifying floating charge if it is created by a document that-

- (a) States that this section applies to the floating charge; or
- (b) Purports to empower the holder of the floating charge to appoint an administrator of the company.¹²

For the purpose of subsection (1) of section 534 of the Act, a person is the holder of a qualifying floating charge in respect of a company's property if the person holds one or more debentures of the company secured-

- (a) By a qualifying floating charge that relates to the whole or substantially the whole of the company's property;
- (b) By a number of qualifying floating charge that together relate to the whole or substantially the whole of the company's property; or
- (c) By charges and other forms of security that together relate to the whole or substantially the whole of the company's property and at least one of which is a qualifying floating charge.¹³

It is however important to note, that a person may not appoint an administrator under section 534 unless the person has given at least three days' notice to the holder of any prior floating charge under subsection (2) of section 534 of the Act.¹⁴ For the purposes of subsection (1) of 534 of the Act, the priority of a floating charge shall be determined in accordance with the Movable Property Security Rights Act.¹⁵

It is also relevant to note, that a person may not be appointed as administrator under section 534 if the floating charge on which the appointment depends is unenforceable.¹⁶ However, a person who appoints an administrator of a company under section 534 shall lodge with the court-

- (a) A notice of appointment that complies with subsection (2); and

¹¹ Ibid, s534(1).

¹² Ibid, s534(2).

¹³ Ibid, s534(3).

¹⁴ Ibid, s535(1).

¹⁵ [Act NO. 13 of 2017, Sch.]. See *ibid*, s535(2).

¹⁶ *Ibid*, s536.

- (b) Such other documents as may be prescribed by the Insolvency Regulations for the purposes of section 537.¹⁷

A notice of appointment complies with section 537 if –

- (a) It includes a statutory declaration by or on behalf of the person who makes the appointment-
- (i) That the person is the holder of a qualifying floating charge in respect of the company's property
 - (ii) That each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment; and
 - (iii) That the appointment is in accordance with this part and
- (b) It identifies the administrator and is accompanied by a statement by the administrator
- (i) that the administrator consents to the appointment;
 - (ii) That in the administrator's opinion the purpose of administration is reasonably likely to be achieved; and
 - (iii) Giving such other information and opinion of a kind prescribed by the Insolvency regulations for the purposes of this section.¹⁸

Correct but needs to introduce section 537 as opposed to subsection 4.

A statutory declaration under subsection (2) of section 537 is not effective unless it is made during the period prescribed by the Insolvency regulations for the purposes of section 537 of the Act.¹⁹ By section 538 of the Act, an administrator's appointment under section 534 of the Act takes effect when the requirements of section 537 of the Act are satisfied. It is the duty of the holder of relevant floating charge to notify the appointment under section 534 to the administrator and other persons as may be prescribed by the Insolvency regulation that those requirements have been satisfied.²⁰ A person who fails to notify the administrator and other persons named by the rules, commits an offence which upon conviction is liable to a fine not exceeding five hundred thousand shillings.²¹

By section 540 of the Act, if-

- (a) A person purports to appoint an administrator under section 534; and
- (b) The appointment is discovered to be invalid,

Any person who appears to the court to have a legitimate interest in the matter may apply to the court for an order under section (2) of section 540 of the Act. which is 7

On the hearing of an application made under subsection (1), the court may order the person who purported to make the appointment to indemnify the person appointed against liability that is solely attributable to the appointment's invalidity.²²

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Once the administration is effective, or where a petition for administration is pending, an automatic moratorium comes into effect pursuant to section 560 of the Insolvency Act.²³ The moratorium has the following effects;

- (a) A resolution may not be passed for the liquidation of the company;
- (b) The court may not make an order for the liquidation of the company;
- (c) A person may take steps to enforce security over the company's property only with the approval of the court;
- (d) A person may take steps to repossess goods in the company's possession under a hire purchase agreement only with the approval of the court;

¹⁷ Ibid, s537(1).

¹⁸ Ibid, s537(2). See also Form 35 Insolvency Regulation.

¹⁹ Ibid, s537(3).

²⁰ Ibid, s539.

²¹ Ibid, s539(2).

²² Ibid, s540(2).

²³ See, Guidance Text, ibid, p36.

- (e) A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the approval of the court;
- (f) A person may begin or continue legal process (including legal proceedings, execution, distress and diligence) against the company or property of the company only with the approval of the court;
- (g) A person may take steps to enforce security over the company's property only with the approval of the court; and
- (h) A person may take to repossess goods in the company's possession under a hire purchase agreement only with the approval of the court.²⁴

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However, upon appointment, the administrator is under a duty to publish a notice of his appointment in the Kenya Gazette and two newspapers of wide circulation. Additionally, the administrator has to send a formal notice to the Official Receiver within seven days of the order and within 14 days to the companies' registry, the registered office of the insolvent company and individual notices to each and every creditor of the company whose debt the administrator is aware of.²⁵ Thereafter, as soon as is reasonable practicable a notice to provide the company's information is required to be sent to the directors and /or other officers of the company who are under a duty to provide the company's state of affairs as prescribed in the Insolvency Regulations (within 12 days of receipt of notice), which include the following;

- (a) List of the company's assets, dividend into such categories as are appropriate for easy identification and with each category give an estimated value;
- (b) In the case of any property on which a claim against the company is wholly or partly secured, particulars of the claim and how and when the security was created;
- (c) The names and addresses of the preferential creditors, with the amounts of their respective claims;
- (d) The names and addresses of the unsecured creditors with the amounts of their respective claims;
- (e) Particulars of any debts owed by the company to persons connected with it;
- (f) Particulars of any debts owed to the company by persons connected with it;
- (g) The names and addresses of the company's members, with details of their respective shareholdings; and
- (h) Any other particulars that the administrator considers appropriate for inclusion in the statement.²⁶

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Upon reviewing the company's status, the administrator must draft proposal setting out how he intends to achieve the objectives of administration. Details set out by Regulation 110 of the Insolvency Regulations to be included in the administrator's proposals include (i) an account of the circumstances giving rise to the administration; and (ii) a summary of the statement of affairs of the company.

By section 566 of the Insolvency Act, the administrator can make proposals for voluntary arrangements or compromises to be sanctioned under the Companies Act. The proposal is required to be sent to the insolvent company's creditors and shareholders and thereafter an initial creditors meeting is to be conveyed for the purposes of reviewing the administrator's proposals.²⁷ Relevant to note is that the administrator may either elect to seek consent of the creditors with respect to the proposals or, in the alternative, proceed to implement the proposals without the creditors' consent.

²⁴ See *ibid*, p37

²⁵ *Idem*. See also Insolvency Regulations 108.

²⁶ *Idem*, p37-38.

²⁷ *Idem*.

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Regulation 110(1)(i) of the Insolvency Regulations provides that during the creditors' meeting the administrator must inform the creditors as to whether or not he will require their consent for the purposes of the proposals, but in that case he must state reasons as to why he will not be seeking their consent. There is however no general requirement that the administrator must seek approval for all his actions, save for the purpose of taking loans, using assets already secured with previous securities, for which the consent of the secured creditors will be required and, in its absence, an approval of 75% in value of the creditors. The administrator's powers /actions are however not unchecked as section 591 of the Act empowers a creditor or a shareholder to make an application to court claiming that the administrator's actions are detrimentally affecting their interest.²⁸ However, by section 573 of the Act, subsequent creditors' meetings may be convened by the administrator on his own motion, or upon court direction, or upon request by creditors holding at least 10% in value of the insolvent company's proven debt. All decisions taken at the creditors' meeting are to be notified to the court and the Official Receiver and if proposals are approved by the majority in value of the creditors, the administrator is under a duty to implement the proposals if approved.²⁹

Section 567 of the Act provides that conduct of a creditors' meeting is to be undertaken in accordance with the Insolvency Regulations which however, at Regulation 124 provide that the procedure to be followed is as set out in the Third Schedule. The key points relevant to note are:

- (a) Notices, voting and venues for meetings: The convenor of a creditor's meeting (the administrator) is required to send notices in the prescribed form (form 16).

The notice contains information such as the date and venue of the meeting, a statement of the date by which the creditor is required to send a proof in respect of the creditor's claim, failure to which a creditor risks losing voting rights and a statement that a creditor is owed an amount that is in total loss than KES 1,000,000. A creditor who does not submit a proof of claim to the administrator will not be able to vote.³⁰

- (b) Constitution of meetings; A creditors' meeting may ~~not~~ proceed unless there is a quorum, the requisite quorum being one (1) creditor. The implication here is that ~~there~~ is no correlation between the voting rights and the value a creditor has in an insolvent company, seeing that a meeting can proceed with only one creditor.³¹
- (c) Creditors' voting rights and majorities; Creditors are entitled to vote at a meeting only if they have proved their debt. The proof of claim has to be sent to the convenor of the meeting by 16:00 on the day preceding the date of the meeting and the proof has to be admitted and accepted. The votes are calculated according to the amount of each creditor's claim in a company administration.³² Regarding voting rights however, decisions are made by creditors when a majority (in value) of those voting have voted in favour of the proposed decision.³³
- (d) Regulation 25(8) of the Insolvency Regulations (third ~~schedule~~) provides that the value of a debt of a secured creditor for purposes of voting is "nil" where the debt is fully secured. Regulation 25(9) goes on to provide that where the debt is partially secured, the value for purposes of voting will be the portion of the unsecured debt. This means that a secured creditor is not entitled to vote in a creditors' meeting if the debt is fully secured.

²⁸ Idem.

²⁹ Idem.

³⁰ Ibid, p39.

³¹ Idem. See also Insolvency Regulation 15, Third Sch.

³² Idem, Regs 24 and 25, Third Sch.

³³ Idem, Reg 30, Third Sch.

However, what is not clear is who determines (and how do they determine) whether a creditor is fully or partially secured if the asset has not been realised at the relevant date.³⁴

An administrator has the power to dispose of the unsecured assets of a company and make distributions to the creditors. Section 582 provides that unsecured creditors must be paid in accordance with the priority of debtors' schedule as set out in the Insolvency Act. However, section 583 and paragraph 13 of the Fourth Schedule recognise that the payment of debts in the order of priority set out in the Insolvency Act may not be prudent at all times and an administrator may pay creditor without regard to the priority captured in the Insolvency Act if the administrator believes it likely to assist achievement of the purpose of the administration.³⁵

→ What about timelines for administration?
OR → Extensions?

Question 3.3 [maximum 15 marks]

Discuss the process of appointment of an administrator by the Court

[Type your answer here]

OR

Question 3.4 [maximum 15 marks]

Fully discuss the priority of creditors under the Insolvency Act.

[Type your answer here]

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



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

Question 4.1 [maximum 15 marks]

You have been approached by the directors of Eat it All Limited (EAL) to advise on their options in light of the company's recent financial problems. The directors disclose the following to you:

- The company has not been doing well for the past three (3) years and the directors knew the company was insolvent;
- The company has outstanding loans owed to certain creditors. 20% of these loans are secured while 80% are unsecured;
- The company recently dismissed three of its directors for the misappropriation of funds;

³⁴ Idem.

³⁵ Idem.

- One of the company's assets was sold to one of the main shareholder's spouse at a value lower than market price;
- During the last nine months the company sold some assets to pay certain creditors who had threatened to sue them;
- As a result of its insolvency, the company was in the process of transferring (but this has not yet been completed) one of its most valuable assets to an SPV owned by its parent company;
- The directors have provided you with an independent business review report by a top audit firm that shows the company is viable and can return to profitability if certain structural changes are adopted. The directors inform you that they have shared this report with the company's main creditors who are owed 80% of its total debts and who have shown their willingness to discuss any proposals from the company. The remaining creditors were unwilling to engage the directors.

The directors have asked you to **advise them** on the best course of action for the company and the various options available to them.

[Type your answer here]

OR

High Def Co Ltd (the Company) is engaged in the manufacturing of spoons. The Company has a total of 10 secured creditors with an outstanding debt of KES 1 billion in aggregate. The company also has outstanding unsecured debts of KES 100 million including employees who are owed KES 10 million in unpaid wages. The Company is a public company and also listed on the Nairobi Stock Exchange. As a result of prevailing bad market conditions, the Company's fortunes took a turn for the worst and the Company is unable to pay its debts. One of the secured creditors 1M Bank approaches you to advise on the steps to be taken and in addition you are informed of the following:

- (a) That one of the secured creditors has filed a liquidation petition in Court that has not yet been dispensed with and a final order given.
- (b) That 1M Bank has discovered that the directors have known for 12 months that the company is unable to pay its debts.
- (c) The Company has in the last 6 months paid off some of its unsecured creditors.
- (d) Part of the securities that 1M Bank holds relate to charges over land.

OR

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 Kenya Insolvency Act, 2015 made provisions for companies incorporated in Kenya as well as any foreign company registered under the Companies Act, 2015 (by way of ³⁶registration of a branch). Furthermore section 720 of the Act made provisions for cross-border Insolvency in Kenya, and the purpose as set out in Article 2 of the Fifth Schedule is to promote the objectives of attaining (a) co-operation between the courts and other competent authorities of Kenya and foreign states involved in cases of cross-border insolvency; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) protection and maximization of the value of debtors assets; and (e) facilitation of the rescue of financially troubled business with a view to protecting investment and preserving employment.

The scope of the application of the Schedule in the Act, involves where; (a) assistance is sought in Kenya by a foreign Court or a foreign representative in connection with a foreign proceeding; (b) assistance is sought in a foreign state in connection with a proceeding under the Act and any other written law relating to insolvency in Kenya; (c) a foreign proceeding and a proceeding under the Act and any other written law relating to Insolvency in Kenya in respect of the same debtor are taking place concurrently; or (d) creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participation in, a proceeding under the Act or any other written law relating to insolvency in Kenya.

Specify

A foreign representative who wish to realise assets of a company in Kenya in relation to Insolvency Act has the right of direct access. The foreign representative pursuant to article 11 of part 2 of the Fifth Schedule is entitled to apply directly to the court by satisfying the conclusions set out by the Act for commencing such a proceeding.³⁷ The conditions to be satisfied, is the Recognition Application of the foreign proceeding which must contain the following supporting documentation;

- (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; ✓
- (d) A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.³⁸ ✓

*Unclear
Commence
of process
through a
Petition to
Court for
Recognition
of a foreign
proceeding*

The Court is required to accept the Recognition Application where the foreign proceeding is a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, under a law relating to Insolvency in which proceeding the assets and financial affairs of the debtor are subject to control or supervision by a foreign court, either for the purpose of recognition or liquidation and the foreign representative, is a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the re-organization or the liquidation of the debtor's assets or financial affairs or to act as a

³⁶ See, Art. 3, Fifth Sch. Insolvency Act, 2015.

³⁷ Such a proceeding can be commenced where the foreign representative applies to the court of Kenya for recognition of the foreign proceeding in which the foreign representative has been appointed and the court recognise such proceeding. See, Articles 17 and 19 of Fifth Schedule of the Act.

³⁸ See, Art. 17(2) and (3) of Fifth Sch. Of the Act.

representative in the foreign proceeding.³⁹ In addition, the application has been submitted to the court.

However, prior to the determination of the submitted Recognition Application, the court has the power to grant the following interim measures; (i) staying execution against the debtor's assets (in Kenya); (ii) entrusting the administration or realisation of all or part of the debtor's assets located in Kenya to the foreign representative or another person designated by the Court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; (iii) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor; or (iv) providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, financial affairs, rights obligations or liabilities.⁴⁰

On recognition by the court of a foreign proceeding, if necessary, to protect the assets of the debtor or the interest of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief including;

1. Staying execution against the debtor's assets;
2. Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities;
3. Suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor;
4. Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, financial affairs, rights. Obligations or liabilities;
5. Entrusting the administration or realisation of all or part of the debtor's assets located in Kenya to the foreign representative or another person designated by the court; and
6. Extending any of the regime remedies.⁴¹

Furthermore, upon recognition by the court of a foreign proceeding, the court is under a duty, by the provisions of the Insolvency Act, to ensure that the interest of the creditors and other interested persons, including the debtor, are adequately protected.⁴² Also, on recognition by the court of a foreign proceeding, the foreign representative has standing to initiate any action that an Insolvency administrator may take in respect of a proceeding under the Insolvency Act that relates to a transaction (including any gifts or improvement of property or otherwise), security, or charge that is voidable or may be set aside or altered.⁴³

With regards to the relevant facts, Mr. X by his claims, is a foreign representative who also claimed that a liquidation order has been issued in the home jurisdiction of UFO Limited who also has a branch of the company registered in Kenya. Mr. X request on how to proceed with the realization of UFO Limited's assets in Kenya, even if the company has sufficient assets to pay its creditors in Kenya as claimed, will only be possible through the Cross-border provision of the Insolvency Act of Kenya as highlighted above. Mr X will have to apply directly to the Kenya court with a recognition application of the foreign proceeding in the home jurisdiction of UFO Limited.⁴⁴ The recognition application must be supported with (a) a certified copy of the decision commencing the foreign proceeding relating to the liquidation order directing that the company be wound up and appointing Mr. X in the home jurisdiction

³⁹ See, *idem*, Art 18(1).

⁴⁰ See, *idem*, Art 21.

⁴¹ *Idem*, Art 23.

⁴² *Idem*, Art. 24.

⁴³ *Idem*, Art 25.

⁴⁴ *Idem*, Art. 11.

of UFO Limited; (b) a certificate from the foreign court of the home jurisdiction of UFO limited affirming the existence of the foreign proceeding and of the appointment of the foreign representative, Mr. X; and (c) a statement identifying all foreign proceedings in respect of UFO Limited that are known to Mr. X.⁴⁵

Upon, the court determining the Recognition Application that the foreign proceeding through which the liquidation order directing the winding up of UFO Limited was issued qualify as a collective judicial or administrative proceeding in the home jurisdiction of UFO Limited, including an interim proceeding, under a law relating to insolvency in which proceeding, the assets and financial affairs of UFO Limited are subject to control or supervision by a foreign court of the home jurisdiction of UFO Limited, either for the purpose of recognition or liquidation and Mr X is a person or body, including one appointed on an interim basis, authorised in the home jurisdiction proceeding of UFO Limited to administer the re-organization or the liquidation of UFO Limited assets or financial affairs or to act as a representative in the foreign proceeding of the home jurisdiction of UFO Limited,⁴⁶ and after the application has been submitted to the court, the court may at the request of Mr. X, if necessary to protect the assets of UFO Limited in Kenya or the interest of the creditors, grant any appropriate relief including;

- Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
- Staying execution against UFO Limited assets;
- Suspending the right to transfer, encumber, or otherwise dispose of any assets of UFO Limited;
- Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning UFO Limited assets, financial affairs, rights, obligations or liabilities;
- Entrusting the administration or realisation of all or part of UFO Limited assets in Kenya to Mr. X or another person designated by the court; and
- Extending any of the regime remedies.⁴⁷

The appropriate reliefs to be granted upon recognition by the court of the foreign proceeding in the home jurisdiction of UFO Limited must be subject to ensuring that the interests of the creditors and other interested persons including UFO Limited are adequately protected.⁴⁸

Also, on recognition by the court of the foreign proceeding in the home jurisdiction of UFO Limited, Mr. X now has standing to initiate any action that an Insolvency Administrator may take in respect of a proceeding under the Insolvency Act of Kenya that relates to transaction (including any gifts or improvement of property or otherwise), security, or charge that is voidable or may be set aside or altered.⁴⁹

Even prior to the determination of the recognition application, the court has the power to grant the following interim measures;

- Staying execution against UFO Limited assets in Kenya;
- Entrusting the administration or realisation of all or part of UFO Limited assets located in Kenya to Mr. X or another person designated by the court, in order to protect and preserve the value of assets that by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

⁴⁵ See *idem*, Art. 17(2) and (3).

⁴⁶ *Idem*, Art 18(1).

⁴⁷ *Idem*, Art. 23.

⁴⁸ *Idem*, Art. 24.

⁴⁹ *Idem*, Art. 25.

- Suspending the right to transfer, encumber, or otherwise dispose of any assets of UFO Limited; or
- Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning UFO Limited assets, financial affairs, rights, obligations or liabilities.⁵⁰

In conclusion, the above process set out under the Insolvency Act of Kenya is how Mr. X can proceed with the realisation of UFO Limited's assets in Kenya based on the relevant facts.]

*** End of Assessment ***

⁵⁰ Idem, Art. 21.