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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**.

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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

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.

①

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.
- ① (d) the official receiver deems it fit to cancel the charge.

Question 1.3

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

- ① (a) Within 30 days.
- (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. ✓ ①

Question 1.5

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

- (a) A creditor. ✗
- ① (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?

- ① (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. ✓ ①

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. ✓ (1)

(c) Within 21 days.

(d) Within 28 days.

Question 1.9

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

(a) Creditors. X

(b) Directors.

(c) Liquidator (where the company is in liquidation).

(d) Administrator (where the company is in administration).

Question 1.10

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

(a) A director.

(b) Official Receiver.

(c) Receiver.

(d) Liquidator. (1)

(e) Monitor. ✓

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

What are the options available to a secured creditor in the event of bankruptcy under the Insolvency Act? 9/10

The secured creditor has the option of realising the asset upon which it has a charge. It also has the option of surrendering its asset for the benefit of the general body of creditors and claiming as an unsecured creditor. (1) Candidate only identifies one option.

Where there is a moratorium in effect, the secured creditor may only realise its asset with leave of court or approval of the relevant insolvency practitioner. There is for corporate insolvency X

Question 2.2 [maximum 4 marks]

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

(4)

Under Section 254(1) of the Insolvency Act, 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 Act. However, the bankrupt may apply to be discharged earlier.

Under sub-section (2), a bankrupt will not automatically discharged if any of the following instances arise: -

- a) 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 in subsection (1).
- b) The bankrupt has to be publicly examined in accordance with section 180 and has not completed that examination; or
- c) The bankrupt is undischarged from an earlier bankruptcy.

Question 2.3 [maximum 4 marks]

What are the objectives of the administration procedure under the Insolvency Act? (4)

Under Section 522 of the Insolvency Act, there are three objectives of administration namely:

- a) To maintain the company as a going concern.
- b) To achieve a better outcome for the company's creditors 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.

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 3.4 [maximum 15 marks]

Fully discuss the priority of creditors under the Insolvency Act.

The priority of creditors is key in determining the manner in which the assets of the bankrupt or insolvent company or the proceeds from the realisation of the assets will be distributed in satisfaction of the creditors' claims. The priority list, also known as the waterfall, provides for the orderly resolution of creditor claims.

Schedule 2 of the Insolvency Act sets out the priority to be followed in settlement of creditor claims.

In the First priority claims, we have the following: -

- a) The expenses of the bankruptcy or liquidation namely the remuneration of the bankruptcy trustee or liquidator, the fees and expenses properly incurred by the trustee or liquidator in performing the duties imposed and exercising the powers conferred by or under this Act.

- b) Then we have the reasonable costs of the person who applied to the Court for the order adjudging the person bankrupt or placing the company in liquidation and finally, in the case of a creditor who protects or preserves assets of the bankrupt or company for the benefit of the creditors of the bankrupt or company by the payment of money or the giving of an indemnity, the amount received by the bankruptcy trustee or liquidator by the realisation of those assets, up to the value of that creditor's unsecured debt and the amount of the costs incurred by that creditor in protecting, preserving the value of, or recovering those assets.

In the **Second priority**, we have the following: - ✓

- a) All wages or salaries payable to employees in respect of services provided to the bankrupt or company during the four months before the commencement of the bankruptcy or liquidation.
- b) Any holiday pay payable to employees on the termination of their employment before, or because of, the commencement of the bankruptcy or liquidation.
- c) Any compensation for redundancy owed to employees that accrues before, or because of, the commencement of the bankruptcy or liquidation.
- d) Amounts deducted by the bankrupt or company from the wages or salaries of employees in order to satisfy their obligations to other persons (including amounts payable to the Kenya Revenue Authority in accordance with Income Tax Act (Cap. 470)).
- e) Any reimbursement or payment provided for or ordered by the Industrial Court under the Labour Institutions Act, 2007 to the extent that the reimbursement or payment does not relate to any matter specified in the Labour Relations Act, 2007 (No. 14 of 2007) in respect of wages or other money or remuneration lost during the four months before the commencement of the bankruptcy or liquidation.
- f) Amounts that are preferential claims under section 175(2) and (3).
- g) All amounts that are by any other written law required to be paid in accordance with the priority established by this subparagraph paid by the buyer to a seller on account of the purchase price of goods.
- h) All amounts that are held on behalf of the Kenya Revenue Authority by a person licensed under the Banking Act who has been appointed as an agent for revenue banking services by the Commissioner at the point of receivership or liquidation of the bank or institution.

In the **Third priority**, we have the following: - ✓

- a) Tax deductions made by the bankrupt or company under the pay as you earn rules of the Income Tax Act (Cap. 470).
- b) Non-resident withholding tax deducted by the company under the Income Tax Act.
- c) Resident withholding tax deducted by the company under the Income Tax Act.
- d) Duty payable within the meaning of section 2(1) of the Customs and Excise Act.

Subject
to a
Maximum of
KES. 200,000/-
payable to
employees

Fourth priority - non-crystallised floating charge holders

Unsatisfied claims of the same priority to abate equally. Claims having the same priority rank equally among themselves and subject to any maximum payment level prescribed by or under any written law, are payable in full, unless the property of the bankrupt or company is insufficient to meet them, in which case they abate in equal proportions.

The claims that rank equally are the claims of unsecured creditors which will be resolved in accordance with the *pari passu* principle.

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 4.2 [maximum 15 marks]

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8/15

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.

In this case, Mr. X would be categorised as a foreign representative. According to Section 720, referring to the 5th Schedule of the Act, a "foreign representative" means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or financial affairs or to act as a representative in the foreign proceeding.

A foreign representative has a right of direct access to the High Court of Kenya. A foreign representative is entitled to apply to commence a proceeding under the Act or any other written law relating to insolvency if the conditions for commencing such a proceeding are otherwise satisfied.

The proceeding, in this case, will be recognised as a foreign non-main proceeding because according to the facts, Mr. X is coming as a representative from the jurisdiction in which the main proceeding was commenced. Secondly, the facts refer to UFO Limited as a foreign company registered in Kenya. As such, the branch in Kenya is an establishment and therefore not the centre of main interests of UFO Limited.

Under Paragraph 19 ^{not referenced} the application for recognition will depend on whether the following conditions are met: -

- a) The foreign proceeding is a proceeding within the meaning of paragraph 4. A foreign proceeding means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding under to 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 reorganisation or liquidation.
- b) The foreign representative applying for recognition is a person or body within the meaning of that paragraph. This has been defined above.
- c) The application meets the requirements of paragraph 17(2) ^{not referenced}. Under this paragraph, the application for recognition must be accompanied by the following:

- i. A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative.
- ii. A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.
- iii. In the absence of evidence referred to in sub-paragraphs (a) and (b)—any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.

From the facts, it is seen that the assets in Kenya are sufficient to settle creditor claims in Kenya. This will be key in determining whether to grant the application.

Once the application is lodged and the Court considers that the application meets the requirements stated above, the effects of recognition would follow. Paragraph 23 provides that on recognition by the Court of a foreign proceeding, whether main or nonmain, if necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief which include: -

- a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities, to the extent they have not been stayed in accordance with paragraph 22(1)(a).
- b) Staying execution against the debtor's assets to the extent it has not been stayed in accordance with paragraph 22(1)(b).
- c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended in accordance with paragraph 22(1)(c).
- d) 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.

Once recognition is complete, Mr. X will ably manage the assets in Kenya. It is likely that the Court will want assurances that the proceeds from the realisation of the assets in Kenya will

*** End of Assessment ***

Wangari