



Award 43 marks
43

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. X

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?

- (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. ✓

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

①

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.
- (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?

[Under section 226 of the Insolvency Act, a secured creditor has the following options in the event of bankruptcy:

1. He can realise the property by having it sold if the terms of the charge so provide.
2. He can have the property valued and prove to the bankruptcy for any balance due if it is the case as an unsecured creditor, after deducting the amount of the valuation.
3. He can surrender the charge to the trustee to the benefit of the whole body of creditors and prove in the bankruptcy as an unsecured creditor.

However if after having been served with a notice by the trustee to choose an option from the above, the charge holder would be disposed of 30 days from the day of notice to do so and if he fails to do so, he would be considered to have forfeited his right of choice and option 3 would be applied and he would have to prove in the bankruptcy as an unsecured creditor.]

Question 2.2 [maximum 4 marks]

4

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

[Section 254 of the 2015 Insolvency Act provides for automatic discharge of the bankrupt three years after the official commencement of the bankruptcy proceedings except:

1. The bankruptcy trustee or a creditor has objected and such objection has not been withdrawn within three years.
2. The bankrupt has a pending public examination upon demand of the bankruptcy trustee or a creditor.
3. An objection to the discharge has been raised by the bankruptcy trustee or a creditor. In case of a successful discharge, the bankrupt is cleared of all provable debts with the following exceptions:
 - Debts incurred by fraud
 - Fraudulent breach of trust
 - Amounts payable under the matrimonial causes Act or Children's Act.]

Question 2.3 [maximum 4 marks]

4

4

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

[Section 522 of the Insolvency Act provides that, the objectives of Administration are the following:

- A. To maintain the company as a going concern
- B. To achieve a better outcome for the entire body of creditors than it would be if the company were to be liquidated
- C. To realise the property of the company in order to make a distribution to one or more of secured creditors or preferential creditors

In effect the administrator is to perform his function for the good of the body of creditors as a whole.]

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

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$\frac{12}{15}$

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.

~~Section~~

[There are two types of liquidation as per ~~article~~ ^{section} 381(2) of the Insolvency Act: (a) voluntary liquidation and (b) liquidation by court (involuntary liquidation)

(a) Voluntary liquidation

Voluntary liquidation occurs when: (1) a company in a general meeting has passed a resolution providing for ~~its~~ its voluntary liquidation when the period fixed for the duration of the company by Articles of Association expires, or the occurrence of an event which the Articles provide that the company is to be dissolved; or (2) if the company resolves by special resolution that it be liquidated voluntarily. ✓

Prior to the passing of such a resolution, the company must give notice to the holder of any qualifying floating charge in respect of the company's property and such a resolution can be passed ~~only~~ upon expiry of a 7 days period after the notice was given or the concerned ~~person~~ has consented by writing for such a resolution to be passed.

Within 5 weeks immediately before ~~the~~ passing of the resolution, the company's directors shall make a solvency declaration wherein they attest to the fact that, after due inquiry into the company's affairs, they are of the opinion that, the company would be able to pay its debts in full, together with interest at the official rate, within such period as may be specified in the declaration. Within 14 days after the passing of the resolution for liquidation, the company shall lodge a copy of the declaration with the Registrar for registration. Any director who makes a declaration without having reasonable grounds as to the content of the declaration, commits an offence and upon conviction is liable to a fine, not exceeding two million shilling or to imprisonment of a term not exceeding five years, or both. ✓

The company is further obligated to publish once a notice within 14 ~~days~~ of the passing of the liquidation resolution in the Kenya gazette, once in at least two newspapers circulating in the area where the company has its principal place of business and on the company's website. Should the company fail to comply with this publication measures, each officer of the company is liable to a fine not exceeding KES 500,000 upon conviction.

A voluntary liquidation can either be a members' voluntary liquidation or a creditors' voluntary liquidation; in a members' voluntary liquidation, the company in a general meeting must appoint a liquidator who must be an authorized insolvency practitioner and he shall take over management of the company. If at any point, the liquidator is of the opinion that the company would be unable to pay its debts as stated in the directors' declaration, he must convene a creditors' meeting for a date not later than 30 days after forming such an opinion. Thereafter, the members' voluntary liquidation shall be converted to a creditors' voluntary liquidation. ✓

In creditors' voluntary liquidation, the company must convene a meeting of the company's creditors not later than the 14th ~~day~~ after the meeting at which the resolution for voluntary liquidation is to be proposed. The company is supposed to send notices of the creditors meeting not less than 7 ~~days~~ before the meeting is to be held and have such notices published in the gazette, in at least two newspapers circulating in the company's principal place of business and on the company's website. The directors of the company are to prepare statement of affairs of the company that must be laid out to creditors during the meeting. The statement must be verified by a statutory declaration signed by at least two or more of the company's directors verifying it to be true. The creditors may appoint a liquidation committee to supervise the liquidation. ✓

Good distinction

(b) Liquidation by court (involuntary liquidation)

Section 425 provides that, an application for court liquidation may be made by: (a) the company; (b) creditors; (c) shareholders; or (d) an administrator of the company. For public interest, the attorney general may also apply for a company to be liquidated according to section 426 of the Act.

When such an application has been made, the company, or any creditor or contributory, may apply to the courts to either stay or restrain proceedings against the company. Further, any disposition of property, transfer of shares or alterations of the company's status by the company after commencement of liquidation is void unless authorised by court.

Sections 429/430

The Official Receiver (OR) plays a great role in court liquidation. He investigates into the affairs of the company in order to establish reasons why the company failed and his investigation is sanctioned by a report which is considered evidence of the matter in its content except the contrary is proved.

Should be qualified if only where the OR is the liquidator

The OR being the liquidator in court ordered liquidation can equally appoint a qualified person as liquidator instead. The liquidation ensures the realisation of company assets for effective distribution to creditors and surpluses given the persons entitled to.

Once the liquidator is satisfied that the liquidation of the company is complete, he convenes a final meeting of creditors and presents his report. When those present at the meeting approve of the report, the final report is filed with OR and the company's name is struck off the register of companies.

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

[Type your answer here]

Question 4.2 [maximum 15 marks]

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13/15

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.

[The facts in this question allude to a foreign representative who seeks recognition of a foreign proceeding in order to realise the assets of a company (UFO Limited) that is being wound up abroad with a branch in Kenya ✓

Albeit some modifications, Kenya has domesticated the provisions of the UNCITRAL Model Law on cross-border insolvency and Recognition Application and Interim Measures in its Insolvency Act. The fifth schedule of the Act deals with cross-border insolvency with the purpose of attaining: ✓

- Co-operation between the courts and other competent authorities of Kenya and foreign states involved in cases of cross-border insolvency.
- Greater legal certainty for trade and investment.
- Fair and efficient administration of cross-border insolvencies that protect the interest of all stakeholders.
- Facilitation of business rescue.

Mr X being the representative of UFO Limited is the foreign representative seeking the recognition of ongoing proceeding in the home jurisdiction (foreign proceeding) of UFO Limited. In this perspective, he would have to apply for recognition of the foreign proceeding in Kenya. The Kenyan court however can deny such an application on grounds of public policy. ✓

The Recognition Application must be accompanied by the following documents:

- a- Certified copy of the decision commencing the foreign proceeding and appointing the foreign representative ✓
- b- A certificate from the foreign court attesting to the existence of the foreign proceeding and appointment of the foreign representative ✓
- c- Any other document attesting to the existence of the foreign proceeding and appointment of the foreign representative. ✓
- d- A statement identifying all existing foreign proceedings concerning the debtor known to the foreign representative. ✓

With the exception of public policy considerations, the court in Kenya would grant recognition if the foreign proceeding is a collective judicial or administrative, including interim proceeding under any law of the foreign state relating to insolvency in which the assets and affairs of the debtor are under the control or supervision by the foreign court either for the purpose of reorganisation or liquidation. Also, the court will consider if the foreign representative is a person or entity duly authorised in the foreign proceeding to cater for the debtor's assets and to act as a foreign representative before granting the recognition order and the application has been duly submitted to court. ✓

While the Recognition Application is being processed, the foreign representative can apply for interim measures and the court in Kenya has power to grant the following interim measures:

- 1- Staying of execution against the debtor's assets in Kenya ✓
- 2- Entrusting all or part of the debtor's assets in Kenya to the foreign representative or any other person designated by court for maximum realisation of such assets. ✓
- 3- Suspending the right to transfer, encumber or otherwise dispose of the debtor's assets. ✓
- 4- Providing for the examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets, financial affairs, rights, obligations or liabilities. ✓

Once recognition is granted, Mr. X would be able to realise the assets of UFO Limited as any other liquidator in Kenya for an effective liquidation. } ✓

*** End of Assessment ***