



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8D

INDIA

This is the **summative (formal) assessment** for **Module 8D** 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 8D. 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.assessment8D]**. An example would be something along the following lines: 202122-336.assessment8D. **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 **7 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] (10 out of 10)

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 (Correct)

The Insolvency and Bankruptcy Code 2016 currently **does not** apply to:

- (a) Small companies.
- (b) Limited Liability Partnerships.
- (c) Individuals and Partnership Firms not being guarantors to corporate debtors.**
- (d) All of the above.

Question 1.2 (Correct)

Which of the following remedies **is** available to a non-Indian creditor?

- (a) Recovery proceedings before the Debt Recovery Tribunal.
- (b) Enforcement of security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002.
- (c) Initiation of insolvency proceeding against corporate debtors under the Insolvency and Bankruptcy Code 2016.**
- (d) Mandatory out-of-court restructuring under the inter-creditor agreement.

Question 1.3 (Correct)

Which of these **is not** a function of the Insolvency and Bankruptcy Board of India under the Insolvency and Bankruptcy Code 2016:

- (a) Registration of insolvency professionals.
- (b) Registration of insolvency professional agencies.
- (c) Carrying out inspections and investigations of insolvency professionals.
- (d) Appointing an insolvency professional as a resolution professional for a company.**

Question 1.4 (Correct)

Who among the following **can be appointed** as a liquidator under the Companies Act 2013:

- (a) An Insolvency professional agency.
- (b) An insolvency professional.**
- (c) A creditor.
- (d) A judge of the National Company Law Tribunal.

Question 1.5 (Correct)

Which one of the following **is not** a ground for a court to refuse to grant a discharge order under the Presidency-Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920?

- (a) The debtor has travelled outside India without court's approval.**
- (b) The debtor has borrowed provable debt when he had a reasonable expectation that he will not be able to repay such a debt.
- (c) The debtor has failed to maintain proper books and records of its financial position.
- (d) the debtor has brought about the insolvency due to rash and hazardous speculations.

Question 1.6 (Correct)

Indicate which one of the following **is not** a disqualification for an insolvent under the Provincial Insolvency Act 1920:

- (a) Appointment as a magistrate.
- (b) Election to a local authority.
- (c) Voting as a member of a local authority.
- (d) Entry into a partnership for a new business.**

Question 1.7 (Correct)

Which of the following **has the highest priority** in bankruptcy of an individual under the Insolvency and Bankruptcy Code 2016:

- (a) Workmen's dues for 24 months preceding the bankruptcy order.**
- (b) Amounts due to the Government.
- (c) Debt owed to the Government banks.
- (d) Dues of the employees for a period of 12 months preceding the bankruptcy order.

Question 1.8 (Correct)

In which of the following processes is section 29A of the Insolvency and Bankruptcy Code 2016 **not applicable**?

- (a) Corporate insolvency resolution process of an MSME.
- (b) Pre-pack insolvency process of an MSME.
- (c) Sale of assets of a company in liquidation.
- (d) Sale of assets under voluntary liquidation.

Question 1.9 (Correct)

Which of the following avoidance actions is only available during a liquidation process under the Insolvency and Bankruptcy Code 2016?

- (a) Avoidance of preferential transactions.
- (b) Avoidance of undervalued transactions.
- (c) Disclaimer of onerous property.
- (d) Avoidance of transactions defrauding creditors.

Question 1.10 (Correct)

Which of the following **is not** a requirement for withdrawing a corporate insolvency resolution process under the Insolvency and Bankruptcy Code 2016:

- (a) Approval of the National Company Law Tribunal.
- (b) Approval of creditors by 90% majority by value.
- (c) Application to be made by the person on whose application the corporate insolvency resolution process was commenced.
- (d) Approval of a resolution plan.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] (2 out of 2)

In the insolvency resolution process for individuals under the Insolvency and Bankruptcy Code 2016, briefly describe the difference between the moratorium upon filing of the petition and upon admission of the petition?

[Type your answer here]

On the filing of an application for an insolvency resolution process, a moratorium is declared in relation to all creditor actions and continues until the date of admission of the application. Once the application is admitted, a moratorium is declared on all

creditor actions and disposal of assets by the debtor, which continues for a period of six months beginning on the date of admission of the application.¹

Question 2.2 [maximum 4 marks] (4 out of 4)

Commented [CAM1]: Good answer

Briefly describe the priority of debts in bankruptcy under the Presidency-Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920.

[Type your answer here]

The priority of debts under the Presidency-Towns Insolvency Act 1909 and Provincial Insolvency Act 1920 are largely similar with certain variables which are listed for each act hereunder:

Presidency-Towns Insolvency Act:

- First Priority is given to the expenses of administration of the debtor's estate
- The following priorities rank next and rank equally among themselves until paid in full, if assets are insufficient, in equal proportion among themselves:
 - All debts due to the Government or to any local authority
 - Salary and wages of a clerk, servant or labourer for the period of four months for rendering services to the debtor (not exceeding INR 300 for each such clerk and INR 100 for each such servant or labourer)
 - Rent due to a landlord not exceeding one month's rent.
- All debts of the debtor entered in the schedule are to be paid rateably from the proceeds of the realisation of assets without any preference.²

Provincial Insolvency Act:

- First Priority is given to the expenses of administration of the debtor's estate
- The following priorities rank next and rank equally among themselves until paid in full, if assets are insufficient, in equal proportion among themselves:
 - All debts due to the Government or to any local authority
 - Salary and wages of a clerk, servant or labourer for the period of four months for rendering services to the debtor (not exceeding INR 20 for each such clerk and for each such servant or labourer)
- All debts of the debtor entered in the schedule are to be paid rateably from the proceeds of the realisation of assets without any preference.³

Question 2.3 [maximum 3 marks] (0 out of 3)

Indicate the situations in which an adjudication as a bankrupt may be sought under the Insolvency and Bankruptcy Code 2016?

[Type your answer here]

The Insolvency and Bankruptcy Code 2016 ("**Code**") for individuals and partnership firm only (currently) applies in respect of personal guarantors.⁴ A "debtor" under the Code is interpreted in a wide fashion and includes a judgment debtor, however the Code only governs the insolvency regulation and bankruptcy of personal guarantors, therefore a "debtor" would be a reference to a Personal Guarantor.⁵

¹ Kumar, Dhananjay, Foundation Certificate in International Insolvency Law Module 8D Guidance Text India 2021/2022 ("Guidance Text") page 29, 6.2.16.5

² Guidance Text pages 23 – 24, 6.2.10.3

³ Guidance Text pages 23 – 24, 6.2.10.3

⁴ Guidance Text page 27, 6.2.16

⁵ Guidance Text page 27, 6.2.16.1

Adjudication as a bankrupt under the Code for a “debtor” as to which the code applies as defined above is done through an insolvency resolution process. The Code provides for an insolvency resolution process for debtors upon the default in the amount of INR 1,000 or more in the payment of his debts. Upon such default the debtor can either personally, or through a resolution professional initiate an insolvency resolution process by application to the relevant court. A creditor can also, either personally or through a resolution professional, file an application for the initiation of the insolvency resolution procedure of the debtor having served a 14-day demand in prescribed form on the debtor.⁶

Adjudication as a bankrupt under the Code of a company or a limited liability partnership (“corporate debtor”) may be sought either following a corporate insolvency resolution process (CIRP) or by voluntary liquidation of the corporate debtor directly.⁷

Commented [CAM2]: This is not correct. This is only for the resolution process. Please see 6.2.16.8 of the guidance text

Question 2.4 [maximum 1 mark] (1 out of 1)

What kind of foreign judgements are eligible for enforcement in India?

[Type your answer here]

Section 44A of the Code of Civil Procedure, 1908 provides for the execution by Indian courts of decrees passed by foreign courts as a decree passed by Indian courts, provided that such decree has been passed by a notified court in a reciprocating territory outside India (which reciprocating territory only includes about 12 territories, including the UK, Singapore, UAE and Hong Kong); and the decree is in relation to payment of a sum of money not being taxes or other charges similar in nature to taxes.⁸

If a decree is obtained in a non-reciprocating territory, enforcement of such a decree/judgment will require a fresh suit to be brought before the Indian Courts, with the foreign obtained judgment being accorded only evidentiary value.⁹

Enforcement of a decree from a reciprocating authority can be refused, if it can be proved, on a number of grounds including if it has been pronounced by a court without jurisdiction, the decree has not been given on the merits of the case, the decree was obtained by fraud, or the decree is founded on a breach of Indian law.¹⁰

QUESTION 3 (essay-type questions) [15 marks in total] (12 out of 15)

Write a short essay on the liquidation process of a company under the Insolvency and Bankruptcy Code 2016, focusing on the process of the disposal of assets and distribution of the proceeds.

Your answer should make reference to at least the following:

- the various means of sale of assets available to the liquidator including the eligibility requirements to purchase assets in liquidation;
- the priority of debts in liquidation; and

⁶ Guidance Text pages 27 – 28, 6.2.16.2

⁷ Guidance Text page 33, 6.3

⁸ Guidance Text page 72, 8

⁹ Guidance Text page 72, 8

¹⁰ Guidance Text pages 72-73, 8

- a timeline for completion of the liquidation process.

[Type your answer here]

The Insolvency and Bankruptcy Code 2016 (“**Code**”) provides for the liquidation of companies as one of two liquidation regimes for companies in India, the other is under the Companies Act, 2013 (“**Companies Act**”). The Code is more frequently used and applies to the insolvency and liquidation of companies registered under the Companies Act or other legislation, as well as limited liability partnerships.¹¹

A company or limited liability partnership (“**corporate debtor**”) can enter liquidation under the Code in two ways, the first is following a corporate insolvency resolution process (“**CIRP**”) and the other is a voluntary liquidation where the corporate debtor can directly enter into liquidation.¹²

The inability to pay debts as contemplated in the Companies Act is not a ground upon which to wind up a company and creditors can only petition for winding up of a corporate debtor under the Code. The Code gives the National Company Law Tribunal (“**NCLT**”) jurisdiction to deal with cases relating to the insolvency and liquidation of Corporate Debtors.¹³

Following the CIRP, the liquidation of a corporate debtor can be ordered by the NCLT by either non-submission by the resolution professional of a resolution plan; rejection of the resolution plan by the NCLT; intimation by the resolution of professional to the NCLT; or contravention by the relevant corporate debtor of the resolution plan approved by the NCLT.¹⁴

A company may place itself in voluntary liquidation, provided it has not defaulted in its payment obligations towards creditors. A special resolution of 75% of the shareholders of the company will be required, resolving that it be placed in voluntary liquidation and appointing an insolvency professional to act as the liquidator (an ordinary resolution will suffice if the company’s articles of association provides that the company is to be liquidated after a specified period). Liquidation commences on the date of the passing of such resolution.¹⁵

Following the passing of an order by the NCLT for the liquidation of a company, a moratorium is placed and no suit or other legal proceeding may be instituted by or against the corporate debtor.¹⁶ A liquidation order passed by the NCLT is deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except where the business is continued during the liquidation process by the liquidation (such as if the liquidator finds that it may receive a better return if the business is sold as a going concern).¹⁷

Liquidation Regulations provide that the liquidator can sell the assets either

- on a stand-alone basis
- collectively
- on a slump-sale basis
- in parcels, or

¹¹ Guidance Text page 33, 6.3

¹² Guidance Text page 33, 6.3

¹³ Guidance Text page 33, 6.3

¹⁴ Guidance Text pages 33-34, 6.3.1.1

¹⁵ Guidance Text page 42, 6.3.2.1

¹⁶ Guidance Text page 34, 6.3.1.2

¹⁷ Guidance Text page 35, 6.3.1.3

Commented [CAM3]: Within the specified period

Commented [CAM4]: Unclear what is being said

- the corporate debtor or the business of the corporate debtor as a going concern¹⁸

Liquidators are required to make efforts to propose a scheme of arrangement / compromise under the Companies Act within the first 90 days from the date liquidation commences. If during the CIRP the committee of creditors has recommended the sale of the corporate debtor as a going concern, the liquidator is first required to attempt the selling of the corporate debtor as a going concern, if this has not occurred within 90 days from the liquidation commencement date, the liquidator must then sell the assets on a standalone basis, in parcels or collectively.¹⁹

The liquidator is required to sell the assets by way of public auction unless the assets are perishable, the assets are likely to deteriorate in value significantly if not sold immediately, the assets are sold at a higher price than the reserve price for a failed auction, or by private sale if prior permission has been obtained from the NCLT.²⁰

The liquidator cannot sell asset to his own or the corporate debtor's related parties, to any professional appointed by him without the approval of the Adjudicating Authority. The liquidator also cannot sell the assets to any person who was ineligible to submit a resolution plan for the corporate debtor under section 29A of the Code.²¹

As far as a secured creditor is concerned, it may either relinquish its security interest to the liquidation estate and receive the proceeds from the sale of assets by the liquidator with the same priority over the assets that were subject to the security interest so relinquished; or realize the security. If the secured creditor wishes to realize the security, it must inform the liquidator within 30 days from the commencement of liquidation of its decision to do so, failing which it is presumed that the secured creditor wishes to relinquish its security and such assets will become part of the liquidation estate.²²

Once the assets are realized, the liquidator is required to pay all proceeds received by him into an account opened by him with a scheduled bank in the name of the corporate debtor (in liquidation) in a distribution priority, being the liquidation waterfall, as follows:

- First to the insolvency resolution process costs and the liquidation costs paid in full;
- Then to the following debts which rank equally:
 - Workmen's dues for the period of 24 months preceding the liquidation commencement date;
 - Debts owed to a secured creditor in the event such secured creditor has relinquished its security to the liquidation estate
- Then to wages and any unpaid dues owed to the employees (other than workmen) for a period of 12 months preceding the liquidation commencement date;
- Then to financial debts owed to unsecured creditors;
- Then the following dues rank equally among:
 - Any amount due to the Central Government and the State Government, including the amount to be received on account of the

¹⁸ Guidance Text page 38, 6.3.1.7

¹⁹ Guidance Text page 38, 6.3.1.7

²⁰ Guidance Text page 38, 6.3.1.7

²¹ Guidance Text page 38 - 39, 6.3.1.7

²² Guidance Text page 39, 6.3.1.8

Consolidated Fund of India and Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

- Debts owed to a secured creditor for any amount unpaid following the enforcement of its security interest;
- Then any remaining debts and dues;
- Then to preference shareholders, if any; and
- Thereafter to equity shareholders or partners as the case may be.²³

It is worth noting that the liquidator will disregard any contractual arrangement between stakeholders with the same ranking if it disrupts the liquidation waterfall.²⁴

For a liquidation following a CIRP the liquidator is required to complete the liquidation within one year from the liquidation commencement date, with an additional 90 days allowed if a sale as a going concern was attempted for a liquidation following a CIRP. If the liquidator does not do so, he is required to apply to the NCLT explaining why the liquidation could not be completed in a year and how much additional time is required.²⁵ For a voluntary liquidation, the liquidator is required to endeavor to complete the liquidation process within 12 months of the liquidation commencement date. If it takes more than 12 months, the liquidator is required to hold a meeting of the contributories of the company within 15 days from the end of the 12-month period (and every successive 12 months thereafter) and present an annual status report. A final report is to be prepared on completion of the liquidation process and must be filed with the NCLT, the Registrar of Companies and the Insolvency and Bankruptcy Board of India.²⁶

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

Fours and Sixes Limited (the Company) owns a cricket stadium in India. Due to the COVID-19 pandemic, there were no games played in the stadium and the revenue was negligible. In the latest meeting of the Board of Directors of the Company, it was noticed that the financial performance of the Company has not improved materially and that the Company is likely to default on an upcoming payment instalment to its creditors in June 2022. The lenders of the Company are primarily Indian banks.

The Board of the Directors of the Company has contacted you to advise them on the options available to them and key considerations. In this context, answer the questions below.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 7 marks] (4 out of 7)

Prepare a note for the Board on the legal regime for an out-of-court debt restructuring for the Company.

[Type your answer here]

The Reserve Bank of India ("RBI") has issued revised guidelines on 7 June 2019, which did away with all previous guidelines relating to out-of-court restructuring, as issued by the RBI. Under the revised guidelines, the Indian Banks and financial

²³ Guidance Text pages 39 – 40, 6.3.1.9

²⁴ Guidance Text page 40, 6.3.1.9

²⁵ Guidance Text page 41, 6.3.1.10

²⁶ Guidance Text page 43, 6.3.2.2

institutions are required to review the financial situation of the debtor for the first 30 days after default and decide whether they would like to restructure the debt of a debtor. If the creditors decide to restructure the debtor of the debtor, they are required to enter into an inter-creditor agreement, which provides for a stand-still and mechanics for arriving at an out-of-court resolution plan. If o such plan has been agreed and implemented by the creditors within 180 days of default (note from the date of default, not the date of decision to restructure, at least 30 days will lapse from the date of default to the date of decision to restructure the creditor under these guidelines), the creditors are required to make additional provisioning (20% from the 181st day and another 15% from the 366th day) over and above the usual provisioning for non-performing loans, which may be reversed in half when creditors file to initiate insolvency proceedings for the debtor under the Code an the rest when the petition is accepted.²⁷

Commented [CAM5]: typo

Therefore the banks and financial institutions will initiate an out-of-court debt restructuring per the RBI's guidelines, by their election, following 30 days from the date of default. The mechanics and workings of an inter-creditor agreement under this mechanism allows for discretion within as to how they wish to arrive at a resolution plan for the debtor, which resolution plan must meet with requirements to mandatorily provide for certain things such as a distribution tantamount to the liquidation waterfall and demonstrates that it addresses the cause of default by the corporate debtor.²⁸

Commented [CAM6]: typo

Commented [CAM7]: the resolution plan in the Code is different from that in the June 7 circular.

Question 4.2 [maximum 8 marks] (7 out of 8)

Prepare a note for the Board describing their powers and duties during a corporate insolvency resolution process of the Company.

[Type your answer here]

A corporate insolvency resolution process ("CIRP") can be initiated by either a financial creditor (being a creditor whose debt due to it arises from financial provision to the corporate debtor (in this case reference Fours and Sixes Limited) and has an interest component to it) or an operational creditor (which is a creditor who has provided operational debt to the corporate debtor such as goods or services including employment or arising from any law of government); upon the occurrence of a default for a minimum of INR 10,000,000 by filing an application before the National Company Law Tribunal ("NCLT")²⁹ The corporate debtor itself, or any shareholder or partner or any other person who has control and supervision over the financial affairs of the company may also apply to the NCLT for a CIRP, provided that the application is approved by 75% of the shareholders or partners of the corporate debtor.³⁰

After hearing the application the NCLT may admit the application, declare a moratorium and appoint an interim resolution professional ("IRP") to the corporate debtor (or the NCLT may dismiss the application).³¹ From the date of his appointment, the management of the affairs of the corporate debtor is vested in the IRP and the powers of board of directors, or any other governing body of the corporate debtor are suspended.³² This does not mean that the Board is relieved of duties, the officers and managers of the corporate debtor are to report to the IRP and

²⁷ Guidance Text page 49, 6.5.1

²⁸ Guidance Text page 61 – 62, 6.5.3.10

²⁹ Guidance Text page 51, 6.5.3.1

³⁰ Guidance Text page 51, 6.5.3.1

³¹ Guidance Text page 52, 6.5.3.1

³² Guidance Text page 55, 6.5.3.5

provide him with access to all documents and records of the corporate debtor as may be required. All financial institutions maintaining bank accounts of the corporate debtor are to act only on the instructions of the IRP and they are obliged to furnish all required information to him.³³ Once the first meeting of creditors is held, a resolution professional is appointed to replace the IRP.³⁴ The duties of the Board remain the same.

Shareholders are not required to furnish a resolution for approval of the resolution plan, any resolution required pursuant to the Companies Act are deemed to be given on approval of the plan by the NCLT. This is so even though there may be any consent requirements under the shareholders' agreements or joint venture agreements.

Note that if the approved resolution plan provides for a change in management or control of the corporate debtor from its existing shareholders, any criminal proceedings/investigations in respect of offences committed by the corporate debtor prior to commencement of CIRP shall cease, however the proceedings/investigations against the erstwhile officers/managers of the corporate debtor shall continue and the corporate debtor is to provide all assistance to the investigating authorities in such proceedings/investigations.³⁵ This should only concern the board if there are any criminal offences committed.

Commented [CAM8]: Should have covered avoidance transactions and fraudulent trading etc

If the corporate debtor is defined as a MSME (micro, small, or medium enterprise), then a Fast-track CIRP can be obtained. A small company as defined in the companies act having a paid up share capital of less than INR 5 million and turn over of less than INR 20 million; or a start-up (other than a partnership firm) defined as company or limited liability partnership established less than seven years ago whose turnover has not exceeded INR 250 million in any of the financial years since incorporation; or an unlisted company with total assets as reported in the financial statements immediately preceding financial year of less than INR 10 million can qualify for a Fast-track CIRP.³⁶

If the corporate debtor does so qualify for a Fast-track CIRP and a Pre-Pack is approved, the powers of the Board of Directors are not vested in the resolution professional and the Board continues to function. Additional duties of the Board of Directors apply during the pre-pack process, which includes the duty to protect and preserve the property of the MSME and managed its operations as a going concern.³⁷

(40 out of 50)

*** End of Assessment ***

³³ Guidance Text page 55, 6.5.3.5

³⁴ Guidance Text page 56, 6.5.3.6

³⁵ Guidance Text page 63, 6.5.3.11

³⁶ Guidance Text page 67, 6.5.3.15

³⁷ Guidance Text page 69, 6.5.3.15