



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4D

JAMAICA

This is the summative (formal) assessment ***for*** Module 4D ***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 4D. ***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.assessment4D]. An example would be something along the following lines: 202122-336.assessment4D. 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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.**

Commented [dp1]: 43 out of 50.

ANSWER ALL THE QUESTIONS

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

Commented [dp2]: 8 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

The Jamaican Insolvency Act is modelled on the insolvency laws of which jurisdiction, and what law in that jurisdiction?

- (a) The United States of America and the Bankruptcy Code.**
- (b) Canada and the Companies' Creditors Arrangement Act.**
- (c) England and Wales and the Insolvency Act.**
- (d) Canada and the Bankruptcy and Insolvency Act.**

Question 1.2

Which of the following is not one of the requirements for a debtor to be within the definition of an "insolvent person" under the Jamaican Insolvency Act?

- (a) The debtor must reside, carry on business or have property in Jamaica.**
- (b) The debtor must have liabilities provable as claims under the Jamaican Insolvency Act of no less than JMD 300,000.**
- (c) The debtor is unable to meet their obligations as they generally become due.**
- (d) The debtor must have its centre of main interest in Jamaica.**

Question 1.3

Which of the following are among the duties of a Trustee in Bankruptcy?

- (a) To notify all creditors of their appointment and, in the case of a corporate entity, to notify the Companies Office of Jamaica.**

(b) To take possession of all property, books and records of the bankrupt and to make an inventory.

(c) To deposit all monies received for an estate in a separate trust account for that estate

(d) All of the above are among the duties of a Trustee in Bankruptcy.

Commented [dp3]: (d) is the correct answer all of these are duties of the Trustee in Bankruptcy

Question 1.4

Which of the following persons may not make a proposal on behalf of an insolvent person that has entered the JIA's rescue modality?

(a) The insolvent person

(b) The Trustee

(c) A creditor of the insolvent person.

(d) A receiver.

Question 1.5

When a Notice of Intention to File a Proposal has been filed, how many days does the debtor have to file a Proposal?

(a) 30 days

(b) 45 days

(c) 60 days

(d) 90 days

Question 1.6

Which of the following is the correct threshold for acceptance of a Proposal?

(a) more than 50% in number and no less than 66 2/3% in value of each class of unsecured creditors.

(b) more than 25% in number and no less than 50% in value of each class of unsecured creditors.

(c) more than 75% in number and no less than 75% in value of each class of unsecured creditors.

(d) more than 50% in number and no less than 50% in value of each class of unsecured creditors.

Question 1.7

Indicate whether the statement below is True or False:

A debtor facing financial difficulties must access either the Proposal Provisions or the Bankruptcy Process under the Jamaican Insolvency Act.

(a) True

(b) False

Question 1.8

Indicate whether the statement below is True or False:

A Receiver must deal with any property of the debtor in their possession or control, in a commercially reasonable manner.

(a) True

(b) False

Question 1.9

Indicate whether the statement below is True or False:

The Jamaican Insolvency Act prohibits a supplier to the debtor from requiring immediate payment for goods or services after the debtor has filed a Notice of Intention to File a Proposal.

(a) True

(b) False

Commented [dp4]: No, there is no legal duty for the debtor to seek protection under either the Proposal Provisions or the Bankruptcy Process. It is however in their interest to do so.

Question 1.10

Indicate whether the statement below is True or False:

A creditor is required by the Jamaican Insolvency Act to continue to extend additional credit to a debtor that has filed a Notice of Intention to File a Proposal.

(a) **True**

(b) **False**

QUESTION 2 (direct questions) [10 marks]

Commented [dp5]: 10 out of 10

Question 2.1 [maximum 3 marks]

What are the policy objectives of the Jamaican Insolvency Act?

There are two main policy objectives of the Jamaican Insolvency Act. These policy objectives are set out in section 3 of the Act. The aim of the legislation is to create an environment in which (1) debtors can be rehabilitated and viable companies can be preserved, and (2) the costs associated with insolvencies can be fairly allocated with a view to strengthening the economic and financial system. This latter goal is the overriding purpose of the Act which also seeks to ensure that there is sufficient credit available and circulating in the financial system.

Practically, these objectives seek to set out a mechanism where companies which are substantively viable can avoid the serious adverse consequences of the liquidation process while ensuring that companies which cannot be rescued or rehabilitated can access an organised insolvency system which considers the interests of all relevant stakeholders.

This is an outstanding answer full marks.

Question 2.2 [maximum 3 marks]

Briefly describe the duties of a Trustee appointed under the Proposal Provisions of the Jamaica Insolvency Act?

A trustee appointed under the Proposal Provisions of the JIA is so appointed by the debtor and must be named in the notice of intention as per section 16. His duties are mainly procedural and process driven although he may advise the debtor in relation to the preparation of the proposal and assist in its negotiations with creditors and other stakeholders.

The more formal duties of the Trustee include advising creditors of his appointment. This duty is imposed by section 12(1) of the JIA and must be done within 5 days of the filing of the notice of intention by the debtor. Similarly, under section 13(1)(b) of the JIA the Trustee had an express duty to provide an opinion on whether the cash flow statement and the underlying assumptions are reasonable. In respect of this, he is also obliged to provide a copy of the supporting documents to any creditor who requests it.

It should be pointed out that there are no express duties owed to creditors by the Trustee who duties even in relation to the debtor are very specific. As such, most the financial decisions in relation to the company are not made by the Trustee but the officers and directors of the debtor who remain in control of the day to day running of the underlying business.

Full marks. Great answer.

Question 2.3 [maximum 4 marks]

Describe the process by which a Judge in the Insolvency Division will determine whether to give recognition to foreign insolvency proceedings in Jamaica under the Jamaican Insolvency Regulations 2015.

In determining whether to give recognition to foreign insolvency proceedings in Jamaica, the IR 2015 provide significant guidance. The IR have adopted a modified version of the UNCITRAL Model Law. The modifications made in Jamaica essentially model the Canadian modifications and follow on from Jamaica's adoption of the Canadian model of insolvency legislation.

The procedure for the recognition of foreign insolvency proceedings in Jamaica is set out in regulations 61 to 66. Regulation 61 essentially defines the main terms relative to the recognition process which differ in material respects from the Model Law. By way of example, there is no definition of "centre of main interests". Rather that place is assumed to be the registered office in the case of a company or the ordinary residence of an individual debtor. Also, the definition of "foreign non-main proceedings" does not include a requirement for the debtor to have had an establishment in the relevant foreign jurisdiction.

The process commences by the foreign representative making an application to the Insolvency Division. The foreign representative is entitled to commence proceedings as if he were a debtor or creditor under the JIA and may apply for and receive any orders in law or equity which does not conflict with the scheme for the recognition of foreign insolvency proceedings. However, he must apply for recognition in respect of a foreign proceeding in which he is the actual foreign representative.

As per regulation 62(2), the application submitted by the foreign representative must include the following documents:

- i. *A certified copy of the instrument pursuant to which the foreign proceeding was commenced or a certificate from the foreign court confirming the existence of the foreign proceedings;*
- ii. *A certified copy of the foreign representative's authorisation instrument or a certificate from the foreign court confirming his authority to act as foreign representative*
- iii. *A statement identifying all foreign proceedings known to the foreign representative regarding the debtor;*

These documents will be accepted by the court without further proof. Other evidence of i and ii may be accepted by the court in its discretion. All documents are to be in English or accompanied by a translation.

Following the submissions of the documents, the court must satisfy itself that the application relates to a foreign proceeding and that the applicant is indeed the foreign representative. Once so satisfied, the court is obliged under regulation 62(6) to make an order recognizing the foreign proceeding. In doing so it must designate the foreign proceeding as either foreign main proceeding or foreign non-main proceeding as per regulation 62(7).

Once the court has designated the foreign proceedings as foreign main proceedings then the automatic stay and consequential provisions set out in regulation 63(1) (a) - (c) come into effect. This essentially stays enforcement action against the debtor subject to the exceptions available in Jamaican insolvency proceedings. The debtor is also prohibited from transferring assets in Jamaica other than in the usual course of business.

If the court designates the proceedings as foreign non-main proceedings, then the foreign representative may apply for relief pursuant to regulation 64(1) in order to protect the debtor's property or safeguard the interests of creditors. The court has broad powers to make any order it considers appropriate which obviously include stays of execution among other relief.

Very thorough analysis. Full marks.

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

Question 3.1 [maximum 7 marks]

Set out any requirements as to form, required term(s) or content for a valid Proposal set out in the Jamaican Insolvency Act?

*The requirements for a valid proposal under the JIA are set out in sections 17 to 19 of the JIA and regulations 6 - 11. **It should be noted that there is no prescribed format for***

the submission of a proposal and it is likely to be accepted once the information discussed below is included.

Commented [dp7]: 1 mark

Essentially, the proceedings for a proposal have to be commenced by the filing of a copy of the proposal which sets out the terms of the proposal together with the details of any securities or sureties proposed. It must be signed by the person making the proposal and any sureties. The trustee who has been identified in the notice of intention may advise in the preparation of the proposal and may also assist in the negotiations surrounding the proposal and may advise the debtor relating to same.

The contents and mode of filing of the proposal depend on the person making the proposal. The proposal must be lodged with a trustee who has been appointed where the person is a person facing imminent insolvency, a receiver or a debtor who is not a bankrupt. In the case of a bankrupt then the proposal has to be lodged with the trustee in bankruptcy.

The proposal where the person is a not bankrupt must be accompanied by a statement of affairs. This is supplemented by regulation 11 which provides that that statement of affairs must be in the statutory Form 3. Form 3 requires the bankrupt to include all assets and liabilities as stated and estimated by the bankrupt. This specifically includes the following:

- a. Unsecured creditors in list A (including names, address and amounts of claim)**
- b. Secured creditors in list B (names, addresses, amount of claim, particulars of any security, date and valued of security, estimated surplus or balance unsecured)**
- c. Preferred creditors in list C (details and nature of claim, amounts, whether payable in full, difference if any)**
- d. Contingent liabilities, trust claims and other liabilities in list D (names, amount, expected ranking, date of liability and nature of liability)**
- e. Inventory and trade fixtures and other tools of trade**
- f. Accounts receivables and other receivables in list E**
- g. Bills of exchange, promissory notes and related instruments in List F**
- h. Bank deposits and cash in hand**
- i. Real property owned by the bankrupt in List G**
- j. Furniture and fittings**
- k. Insurance and securities**
- l. Other property in List H**

This information must be verified by a declaration of the person which states that it is correct to the best of his knowledge and belief.

In respect of a bankrupt, that person is required to file with the trustee a statement of affairs to accompany the proposal. This statement must be filed within 5 days of the bankruptcy event and must be the proposal must be filed within 30 days of the filing of the notice of intention or any other extended period. It must be in the prescribed form and must show:

- a. Assets and liabilities**

- b. Name and details of creditors together with the details of any securities held including dates when the securities were given
- c. Any additional or other information required by the trustee

In the event that the affairs of the bankrupt are more complicated than usual such that they prevent the compilation of a proper statement of affairs, the trustee is empowered to approve the hiring of a duly qualified person to prepare the statement and charge it as an expense of the administration. All of this information is required to be verified by evidence taken on affidavit.

It should be noted that any security of guarantee accompanying the proposal shall be held with it and may not be withdrawn.

The proposal is made to the creditors. It can be made either as a group or separated into classes as divided in the proposal or alternatively to secured creditors in any class as per section 18b. The proposal may be made to secured creditors in one class who have a commonality of interest having regard to the nature of the debts giving rise to the claims, the ranking of those claims and the remedies available among other factors set out in section 18(5). The proposal is required to place all secured creditors having equity claims in the same class.

Commented [dp8]: 2 marks.

The response largely misses the mark. I was looking for the minimum requirements in relation to content namely: (a) the proposal must not provide for equity claims unless all other claims are paid in full; (b) where the debtor is an employer the proposal must provide for a priority payment of certain employee claims; (c) where the proposal is made conditional on a contribution from creditors, creditors must be given an option to not to participate and those that do not participate must be given the option to receive a cash payment. (See sections 37 and 38 of the JIA) 3 out of 7 marks.

Question 3.2 [maximum 8 marks]

Briefly set out the duties of a receiver as required by the Jamaican Insolvency Act.

The rules relating to the appointment and duties of receivers have been set out in sections 71 to 90 of the JIA, in particular section 74. In order to be eligible for appointment, the receiver must be licensed as a trustee under the JIA.

Once he has been appointed, either by the court or by private agreement the receiver must fulfil certain obligations. He is obliged to act in accordance with the terms of conditions of his instrument of appointment if done privately and in accordance with the order of the court if done by court process.

It should be noted that arguably the first duty of the receiver is to act honestly and in good faith in dealing with the property of the debtor.

Within 10 days of his appointment, the receiver shall send a notice in accordance with Form 24 to:

- i. The Supervisor of Insolvency or Registrar where the receiver is a corporation. This notice must be accompanied by the prescribed fee.*
- ii. To the trustee where the debtor is bankrupt, otherwise to the debtor.*
- iii. On the direction of the Supervisor, to all the debtor's creditors who have been reasonably ascertained*

He is required to publish notice of his appointment in one issue of a local daily newspaper in Jamaica and must identify himself as receiver in all subsequent correspondence.

On his appointment, the receiver must take possession of the debtor's property and security in accordance with the security agreement or the terms of his appointment and must prepare a statement including information related to the receivership and provide a copy to the relevant parties (trustee, debtor, bankrupt, Supervisor or creditors. This obligation continues until up to 6 months post-receivership. He has a duty to deal with the property of the debtor in a commercially reasonable manner given that the debtor is not in liquidation and the intention is not to dissolve the debtor.

He is obliged to open accounts in his name for the recording of monies coming into his possession. He must also keep accounting records of the financial dealings conducted with the debtor's properties in accordance with the accepted accounting standards. In respect of this, monthly summaries of his administration must be prepared and made available to interested parties.

It should be noted that in the event that the receiver fails to carry out his duties properly he may be subject to the sanction of the court and may attract personal liability for any improper actions.

Answer misses the distribution element of the receiver's duties. 7 out of 8 marks.

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

Commented [dp9]: 15 out of 15 marks.

Big Bank Limited (Big Bank) is has made a secured loan of JMD 10,000,000 to Haulage Co. Limited (Haulage Co). Haulage Co granted a debenture over all of its assets, property and undertaking as security for the loan. Haulage Co is a small business engaged in transportation of raw materials to and from building sites. Haulage Co's service agreements tend be long-term with fixed rates. Due to recent spikes in the oil price (one of the main inputs for Haulage Co) and wage inflation, Haulage Co's service agreements are no longer profitable. Big Bank has been monitoring the haulage market and has noticed that several of the large competitors of Haulage Co have been under financial strain. Big Bank has requested updated financial statements from

Haulage Co. Haulage Co has not obliged and has been illusive in regards to its financial performance and prospects. Big Bank is very concerned.

Question 4.1 [maximum 2 marks]

What steps must Big Bank take to enforce its debenture and appoint a receiver over all of the assets, property and undertaking of Haulage Co?

The first step that Big Bank would need to take would be to issue a demand letter to Haulage. This demand letter would set out the breaches of the service agreements and demand payment of the sums advanced with interest in accordance with the terms of the debenture. It is assumed that the terms of the debenture impose an obligation on Haulage Co to provide updated financial statements to Big Bank. This would be an ordinary term include in debentures and is usually enforced by a clause which provides that the failure to provide those financial statements constitutes a breach of the debenture which then entitled Big Bank to call in the loan as Haulage would be considered to have been in default. If not, then Big Bank must wait until Haulage actually defaults, usually by not making a payment.

Upon Haulage's default, the floating charge (inferred from the fact that the debenture is granted over all Haulage's assets) would crystallise into a fixed charge in respect of which a receiver can then be appointed. This, of course, happens after the period (if any) set out in the debenture for Haulage to cure its default has passed. In those circumstances, if Haulage provides the financial statements or makes the outstanding payment with interest etc then no further enforcement of the default provisions of the debenture can take place.

To enforce the debenture and appoint a receiver, Big Bank will need to issue a Notice of Enforcement to Haulage under section 72 of the JIA. Once 10 days have passed, Big Bank will be able to appoint the receiver and thereafter enforce the terms of the debenture.

Complete answer. 2 out of 2.

Question 4.2 [maximum 4 marks]

Prior to enforcing its debenture, Big Bank has been served with a Notice of Intention to File a Proposal from Haulage Co. What is the effect of Notice of Intention to File a Proposal, and what is the purpose of doing so? Who has control of Haulage Co?

The main reason why Haulage would serve Big Bank with a NOI to file a proposal would be to access the proposal provisions in the JIA. These provisions seek to preserve a viable company where possible by allowing the debtor to come to an agreement with the creditors listed in the proposal for the liquidation of their debts etc. Essentially, the proposal provisions give Haulage the opportunity to restructure its

business by entering into appropriate arrangements with the creditors while still operating the underlying business as a going concern.

Once a NOI has been filed, an automatic stay pursuant to section of the JIA comes into effect. This stay prevents creditors from commencing, enforcing and continuing any current enforcement proceedings against the debtor. The stay would only apply to creditors who have been named in the proposal. This automatic stay is initially for 30 days.

It should be noted that the stay can be lifted on application to the court in terms of section 7 of the JIA if it is materially prejudicial to the creditor or it is in the interests of equity to do so. In practice these thresholds are very difficult to meet.

Haulage then has the obligation to file a cash flow statement in Form 8 which should include all its assets and liabilities as well as the due dates etc. Should it fail to do so within 14 days, then it enters into the bankruptcy in which case different rules apply. Haulage also has 30 days within which to file its proposal although extensions can be received for up to 6 months.

During the time that time, the directors and officers of Haulage continue to operate the business and they retain control over the business decisions and property in the usual way.

Complete answer. 4 out of 4 marks.

Question 4.3 [maximum 2 marks]

Big Bank wishes to know whether the mere filing of a Notice of Intention to File a Proposal can be used as a basis to terminate and accelerate its loan? Is Big Bank required to continue to extend credit to Haulage Co?

Section 53 of the JIA prevents the termination of agreements including loan agreements solely on the basis that the debtor has filed a NOI. The termination must be linked to some other default on the part of the debtor. Bank Big would therefore be prevented from terminating on this basis alone.

As per section 48 of the JIA, Big Bank would not be required to extend credit to Haulage after the filing of the NOI. Notwithstanding, the Court may still order interim financing if the facts justify such an order.

2 out of 2.

Question 4.4 [maximum 7 marks]

Assuming Haulage Co does not file a Notice of Intention to File a Proposal or a Proposal and Big Bank takes enforcement action, who may act as a receiver? And what are their main duties?

Big Bank would usually be entitled to appoint a receiver without resort to the court pursuant to the terms of its contracts. However, the receiver must be a licensed trustee in accordance with section 71 of the JIA. That receiver will be able get in and take possession of and exercise control over the assets of the debtor. In doing so, he must be mindful of the following duties:

- i. The duty provide notice of their appointment (within 14 days) by advertisement in a local daily newspaper*
- ii. Reporting to the Supervisor of Insurance on a regular basis*
- iii. Dealing with the property and assets of the debtor in a commercially reasonable way. He may of course procure an indemnity on the usual terms*
- iv. Acting honestly and in good faith in the performance of his duties as a receiver having regard to the overall obligations owed to the debtor and the creditor who appointed him*
- v. Distribute the proceeds of the property in accordance with the order of priority set out in the JIA*

7 out of 7.

* End of Assessment *

Commented [dp10]: Insolvency.