



**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: 202223-336.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 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 **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)**

In terms of which of the following legislation can a company be wound up:

- (a) The Insolvency and Bankruptcy Code 2016.
- (b) The Insolvency and Bankruptcy Code 2016 and the Companies Act 2013.**
- (c) The Insolvency and Bankruptcy Code 2016 and the Presidency-towns Insolvency Act 1909.
- (d) The Companies Act 2013 and the Presidency-towns Insolvency Act 1909.

#### **Question 1.2 (correct)**

Which one of the following remedies **is not** available to a non-Indian creditor:

- (a) Recovery proceedings before the Civil Court.
- (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) Becoming part of an out-of-court restructuring under the inter-creditor agreement.

#### **Question 1.3 (correct)**

Which of the following 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)**

Which of the following forms of security **requires actual possession** of the secured property:

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(a) A mortgage in English form.

(b) A pledge.

(c) A charge.

(d) A hypothecation.

**Question 1.5** [\(correct\)](#)

Which one of the following is **not a requirement** for a creditor's petition for adjudication as a bankrupt under the Presidency-towns Insolvency Act 1909 and the Provincial Insolvency Act 1920:

(a) The debt owing exceeds INR 500.

(b) The debt is a liquidated sum payable immediately or in some certain future time.

(c) The relevant act of insolvency occurred within three months prior to the presentation of the petition.

(d) The debtor defrauded its creditors.

**Question 1.6** [\(correct\)](#)

Indicate which one of the following is **not a disqualification** for a bankrupt under the Insolvency and Bankruptcy Code 2016:

(a) Appointment as a trustee or a public servant.

(b) Election to a local authority.

(c) Borrowing money after informing the other party of his bankruptcy.

(d) Acting as a director to any company.

**Question 1.7** [\(correct\)](#)

Which of the following is **not a requirement** for initiating voluntary liquidation under the Insolvency and Bankruptcy Code 2016:

(a) Special resolution of the shareholders of the corporate debtor.

(b) Declaration of the directors of the company on the ability of the company to repay its debts from available assets.

(c) Approval of two-thirds of the creditors.

(d) Approval of the National Company Law Tribunal.

**Question 1.8** [\(correct\)](#)

In which one 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)

In which of the following situations can an **application for initiation** of corporate insolvency resolution process be filed under the Insolvency and Bankruptcy Code 2016:

- (a) The corporate debtor is a bank.
- (b) The corporate debtor is an MSME.
- (c) The creditor is an operational creditor and the debt is disputed.
- (d) The corporate debtor is in financial difficulties but there is no payment default.

**Question 1.10** (correct)

**Approval of the committee of creditors** is not a requirement for the following transactions undertaken by the resolution professional under the Insolvency and Bankruptcy Code 2016:

- (a) Raising interim finance.
- (b) Undertaking any related party transactions.
- (c) Payment of the approved insolvency resolution process costs.
- (d) Amending the constitutional documents of the corporate debtor.

## QUESTION 2 (direct questions) [10 marks in total]

**Question 2.1** [maximum 2 marks] (1 out of 2)

Briefly describe the jurisdiction of the National Company Law Tribunal in relation to insolvency of personal guarantors of corporate debtors.

The National Company Law Tribunal has 15 benches across India and the bench which will be relevant will automatically be the one in whose jurisdiction the registered office of the corporate debtor is. However, in this situation whereby there is a personal guarantor, the same bench will hold jurisdiction over the guarantor even if they are not located in that jurisdiction.

**Question 2.2** [maximum 4 marks] (2 out of 4)

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Briefly describe the scope of the moratorium during the corporate insolvency resolution process under the Insolvency and Bankruptcy Code 2016, with a focus on the moratorium on termination of contracts.

A moratorium will be initiated under section 14 of the Code, and this has the effect of prohibiting several actions, predominantly focussed on the creditors of the Company. Such actions include prohibiting the initiation or continuance of legal proceedings against the debtor, transfer, creation or encumbrances of disposing of any of the debtors' assets or legal rights and enforcement of security by the creditors of the debtor.

**Commented [CAM3]:** timing of moratorium not specified and scope not exhaustive

There are also provisions to prevent the termination of certain contracts. This is put in place to ensure the debtor can continue operating during the moratorium. Therefore, the moratorium prevents the termination of supply of goods and services which are critical to operate the debtor as a going concern (subject to the judgment of the resolution professionals). This is subject to their not being a payment default during the moratorium period, to protect the supplier. This gives the debtor the best chance of continuing as a going concern and the plan being successful.

In addition, the moratorium prohibits the termination of a license or approval provided by the Government, subject to their being no payment default during the moratorium period.

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

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Indicate the acts of insolvency under the Presidency-towns Insolvency Act 1909.

The Presidency-towns Insolvency Act 1909 combines with the Provincial Act to collectively become the Bankruptcy Acts. The Presidency-towns act applied for debtors within Kolkata, Chennai and Mumbai, whilst the Provincial Act applies in the rest of India.

There are 9 acts of insolvency under the Bankruptcy Acts, which are as follows:

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- 1) Whereby the debtor transfers all or substantially all their property for the benefit of their creditors. This act is deemed to deprive the debtor of the power to carry on trading and making property available for distribution to their creditors. Should the creditor have consented to the transfer (unless through misrepresentation or fraud), the creditor cannot then take advantage of the act of insolvency by filing for a bankruptcy petition.
- 2) The transfer of property by the debtor to defeat or delay their creditors. Said transfer would not represent all the assets of the debtor and the transfer is not for the benefit of the general body of creditors. Therefore, this act is likely to be made with the intent to delay or defraud a portion of the creditors (rather than a single creditor).
- 3) For the debtor to transfer its property (or part of) which would be void under any other enactment as a fraudulent conveyance. This act relies on there having been a transfer of property and that such transfer would have been void as a fraudulent conveyance under any other bankruptcy law application to the debtor.
- 4) The department or seclusion of the debtor. This is whereby the debtor departs of remains out of the relevant territory with the aim of defeating or delaying their creditors.
- 5) The sale or attachment of property in execution.
- 6) A petition of insolvency made by the debtor is judged to be act of insolvency, even if the petition is dismissed or withdrawn.
- 7) Suspension of payments to creditors is defined as an act under this insolvency.
- 8) Imprisonment in execution of a money decree will be defined as an act of insolvency whilst the debtor is imprisoned.
- 9) Non-compliance of an insolvency notice issued by a creditor to the debtor. However, there are conditions that may be used to set aside the insolvency notice.

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

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What is the relevance of reciprocating territories in respect of the enforcement of foreign judgements in India?

There are currently about 12 territories that are defined as reciprocating territories. If a creditor has a judgment in one of these territories and would like to enforce the judgment in India, provided that the judgment is in relation to the payment of a sum of money not being taxes or other charges similar in nature to taxes, the Indian court will allow execution in India of the judgment. This bypasses the need to bring a fresh suit in the Indian court, which is the case for non-reciprocating territories. Therefore, it is quicker and cheaper to enforce a judgment in India from a reciprocating territory.

**QUESTION 3 (essay-type question) [15 marks] (12 out of 15)**

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Write a short essay on the process of invitation and approval of a resolution plan for a company under the Insolvency and Bankruptcy Code 2016.

Your answer should make reference to at least the following:

- the eligibility criteria that the resolution applicants will need to comply with;
- process and threshold for approval by the committee of creditors; and
- approval by the National Company Law Tribunal.

Resolution plans are a preferred option over liquidation as they allow the continued trading of a debtor, whilst satisfying the creditors. In theory, this provides a better result for both the debtor and creditors. The resolution professional will invite potential resolution applicants to submit resolution plans for the debtor.

This invitation will be issued through a prescribed form and is published in local newspapers, uploaded to the website of the corporate debtor, on websites prescribed by the Insolvency and Bankruptcy Board of India and any other manner stipulated by the committee of creditors. The invitation will stipulate the conditions for the eligibility of resolution applications, which will have been decided by the committee of creditors. The conditions are typically a combination of technical and commercial criteria considering the size and complexity of the corporate debtor. Any such applicants will be provided the required information from the resolution professional.

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Whilst the Code does not restrict anyone from submitting a resolution plan, there will be eligibility criteria which should be set out in the invitation for a resolution plan. These criteria are stipulated in Section 29A of the code and outline the following applicants who are not eligible to submit a resolution plan:

- (a) an undischarged insolvent;
- (b) a wilful default as per the guidelines of the Reserve Bank of India (Banking Regulation Act, 1949).
- (c) The resolution plan has an account (or an account of such person or of whom such person is a promoter), classified as a non-performing asset. The person can submit the plan should they make payment of all overdue amounts with interest and charges before the plan is submitted.

- (d) Has been convicted for an offence punishable with imprisonment for two years or more under any Act specified under the Twelfth schedule or for seven years or more under any law for the time being in force. This expires 2 years after being released from imprisonment.
- (e) Under the Companies Act, 2013 has been disqualified to act as a director.
- (f) Has been blocked from trading in securities or accessing the securities markets by the Securities and Exchange Board of India.
- (g) Where an Adjudicating Authority under this code has made an order that the party was a promoter or in the management or control of a corporate debtor in which a preferential transaction, extortionate credit transaction, fraudulent transaction or undervalued transaction has taken place. This is subject to exclusions where the said transaction has taken place before the acquisition of the corporate debtor by the applicant.
- (h) Has executed a guarantee in respect of a corporate debtor in favour of a creditor against which an application for insolvency resolution made by the creditor has been admitted under this Code.
- (i) If under any law outside of India, they subject to the conditions stipulated above and below.
- (j) The party has a connected person not eligible under the criteria listed above.

The full restrictions are disclosed in Section 29A and should any of these restrictions be breached by the applicant, they will not be able to submit a resolution plan under the Code.

On the basis that the applicant is eligible to submit a resolution plan, the plan has real flexibility in what can be included. This may be the transfer / sale of assets of the company, consolidation of the company, mergers / demergers etc. This flexibility must be underpinned by the following requirements:

- a) The insolvency resolution process costs to be paid in a manner specified in the CIRP regulations and in priority to all other debts of the corporate debtor.
- b) That the operational creditor will be paid their debts at a rate that is not less than in the event of a liquidation under the priority of payments or what would have been paid out in the resolution plan but using the liquidation waterfall (higher of).
- c) That any dissenting creditors are paid the same or more than they would have received in a liquidation subject to the priority waterfalls.
- d) Details around how the corporate debtor affairs will be managed after the approval of the plan.
- e) The implementation and supervision of the resolution plan.
- f) All applicable laws have been complied with.
- g) All other requirements of the CIRP Regulations have been followed.

The plan must also outline how the debtor will remain a going concern after the plan has concluded. It must also include the content outlined by the CIRP Regulations, as follows:

- 1) The amounts due to the operational and dissenting creditors will be paid in priority to assenting financial creditors.
- 2) An explanation how the interest of all stakeholders has been dealt with.
- 3) Details around the impact if the resolution application or its related parties fail to implement or contribute to the failure of the resolution plan.
- 4) The basis schedule of plan, including terms and implementation.
- 5) How the plan will deal with the management and control of the corporate debtor during the plan, including how it will be supervised.
- 6) How avoidance transactions will be pursued.



Once the plans have been developed in line with the above requirements and submitted by an eligible party, the plans will be examined by the resolution professional for compliance with the Code. The next approval will need to be obtained from the creditor committee and the plan will need to be provided with an opinion from the resolution professional with a due diligence report. The creditor committee will then need to decide whether the plans comply with the requirements of the Code and the CIRP Regulations.

On the basis that the resolution plan is compliant, it is put to a vote by the creditor committee alongside other compliant resolution plans. 66% of creditors in value must vote in favour for a plan to be approved. Once this approval has taken place, the plan will be submitted to the resolution professional for approval from the National Company Law Tribunal.

The National Company Law Tribunal will check that the plan is compliant and that it has good prospects of effective implementation. The Tribunal will also ensure it is binding on the debtor, employees, members, creditors, guarantors, and other stakeholders involved. The plan must provide a clear picture of the debts due and once paid, the debtor will be free of historical debts.

**Commented [CAM6]:** Binding effect is achieved by plan approval

In addition, the resolution professional will provide a copy of the approval order to all participants in the committee and the resolution applicant. Within 15 days of approval, the professional will inform each claimant of the principle of formula for repayment of such claimant's debt under the resolution plan.

The resolution plan will then be effective notwithstanding any consent requirements under shareholders' agreements or joint venture agreements. The moratorium will end and the resolution professional vacates their office.

#### **QUESTION 4 (fact-based application-type question) [15 marks]**

Haphazard Limited, an Indian company, (the Company) provides marketing services in India. Most Premium League Limited (MPL), an Indian company that runs a cricket league, is a customer of the Company. MPL has failed to pay the last few invoices from the Company which now aggregate to INR 20 Crores. MPL appears to be in severe financial difficulties as it has defaulted in payments to many of its creditors, including secured creditors. However, it has offered to pay the Company in part if the Company continues providing the services and does not participate in a corporate insolvency resolution process that may be initiated by the secured creditors of MPL.

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

##### **Question 4.1 [maximum 7 marks] (3 out of 7)**

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Prepare a note for the Board on the ability to initiate insolvency proceedings in relation to MPL and the steps to be taken in this regard.

The failure to pay the outstanding invoices totalling INR 20 Crores represents a ground to wind up a company under the Insolvency and Bankruptcy Code, 2018. MPL could enter liquidation under the Code through either a liquidation following a corporate insolvency resolution process or voluntarily where the debtor can enter liquidation directly.

**Commented [CAM7]:** Since MPL is in default with its creditors, voluntary liquidation would not be possible.

In this case, MPL does not appear to be open to entering insolvency and still believes that it can continue as a going concern. Therefore, the corporate insolvency resolution process (CIRP) is expected to be required first, before winding up the company

The Code outlines the requirements for a CIRP which aims to rescue / rehabilitate the company. Part II of the code outlines the procedures and regulations required for this are detailed in the Insolvency and Bankruptcy Board of India Regulations, 2016. It can be initiated by a creditor of the debtor, in this case either the Company or the secured creditors. There must be a minimum outstanding debt of INR 10,000,000, which the Company currently has outstanding, and the process is begun with the filing of an application before the National Company Law Tribunal.

The application must include evidence of a default (which should be straightforward in this scenario) and within 14 days of the application, the National Company Law Tribunal will admit the application. The Company must have provided notice to MPL before filing the application claiming the unpaid amount by enclosing copies of the unpaid invoices. The Company should be aware that MPL could dispute this notice within 10 days stating that either:

- (a) A dispute exists between the parties, or other legal proceedings are already pending in respect of the claim; or
- (b) Payment of the claimed amount has been made with evidence of payment.

If this were to occur, the CIRP application cannot be initiated. This does not appear to be a risk due to MPL only offering part payment of the Company's debt.

The CIRP application will need to include details of the debt, details of the transaction and copies of bank statements. The Company should prepare these documents and after hearing the parties, the National Company Law Tribunal may admit the application, declare a moratorium and appoint an IPR, or dismiss the application.

Should the Company be successful in obtaining a CIRP (or the secured creditors), the moratorium takes effect from that date until the completion of the CIRP. This will prevent recovery actions against MPL. The CIRP must be completed within 180 days from the date of admission of the CIRP application unless the creditor committee passes a resolution with 66% majority voting share to extend the CIRP.

During the CIRP, the resolution professional will manage MPL's affairs, and the professional will have a full picture of the MPL's assets and liabilities. The Company should apply to be a member of the creditor committee as this will give visibility and control over the process.

During this period, the Company can prepare a resolution plan and present this to the professional. There are several rules outlined in the CIRP Regulations regarding the content of the plan, but this may offer a better recovery to the Company. The plan will have to ensure the secured creditors receive the same or more recoveries than if the company were to move to liquidation.

Should the Company's resolution plan (or that of another creditor) be successfully approved by the resolution professional and National Company Law Tribunal, it will become binding and in force. Should no resolution plan be successfully approved or should the committee of creditors resolve to liquidate the corporate debtor, the National Company Law Tribunal can order the liquidation of MPL.

Should this order be made, a public announcement will be made that MPL is in liquidation and a moratorium will be in place and the board of directors and employees will be discharged.

The liquidator will then liquidate the company with the goal of maximising recoveries for the creditors.

**Commented [CAM8]:** inclusion of IRP not mentioned

**Commented [CAM9]:** IRP and not IPR

**Commented [CAM10]:** relevance unclear

**Commented [CAM11]:** Company is unlikely to be made a member since it is an operational creditor.

**Question 4.2 [maximum 8 marks] (3 out of 8)**

Prepare a note for the Board explaining the risk of accepting the part payment as well as not participating in the corporate insolvency resolution process.

Should the Company accept the part payment and not participate in the CIRP, there is first a risk that the payment is deemed a preference and a claim may be made against the Company. This would be evident if the Company were aware that the MPL is insolvent and accepted the payment regardless. This appears to be the case here and the Companies Act could be used to reverse the payment.

An undue preference is dealt with by the Bankruptcy Acts and applies within three months of presenting the insolvency petition where the debtor has been adjudged insolvent. The conditions for avoidance are as follows:

- (a) The debtor must at the date of transfer or payment be unable to pay from his own money his debts as they become due;
- (b) The transfer or payment must be in favour of a creditor;
- (c) The transfer or payment in fact prefers one creditor over others; and
- (d) The transfer or payment must have been made with a view of giving such creditors a preference over other creditors.

On the facts presented, a part payment of the Company's invoice in exchange for not participating in the CIRP would constitute an undue preference.

Should the Company not participate in the CIRP, they will also be able to influence the process and may miss out on an opportunity to file a resolution plan to the resolution professional. Whilst a successful plan should not result in the Company receiving less than were MPL to move into liquidation, it may not maximise their returns were they actively involved.

The Board should also be aware that once a CIRP is submitted, a moratorium comes into place and no recovery action can be taken against the debtor. This will mean that cooperation in the CIRP is likely to yield the biggest return on the outstanding debt.

Finally, their participation in a CIRP would enhance the opportunity for a successful CIRP. The proposal put forward by the secured creditor would include the cooperation of the Company as a debtor and therefore they would be more likely to succeed, resulting in a better return for all creditors.

**\* End of Assessment \***

**Total: 35 out of 50**

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Commented [CAM12]: Reference of Companies Act in CIRP is incorrect.

Commented [CAM13]: The IBC applies here and not Bankruptcy Acts

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