



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]

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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)

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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:

- (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] [\[2 out of 2\]](#)

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

If in pursuance of the Insolvency and Bankruptcy Code, 2016 (the "**Code**"), there are insolvency proceedings (insolvency resolution or liquidation) against a corporate debtor before the National Company Law Tribunal, then under the Code it would also have jurisdiction to entertain insolvency proceedings (insolvency resolution or bankruptcy) against the personal guarantor(s) of that corporate debtor.

However, a 2022 decision of the Supreme Court of India has broadened that jurisdiction by holding that there need not be pre-existing insolvency proceedings against the body corporate (primary debtor) before the National Company Law Tribunal can entertain insolvency resolution or bankruptcy proceedings against the personal guarantor(s) of the indebted body corporate.

Question 2.2 [maximum 4 marks] [2 out of 4]

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.

The moratorium that is ordered (pursuant to s.14 of the Code) with effect from commencement of a corporate insolvency resolution process (CIRP) operates as a stay of various adverse acts against the corporate debtor and its assets, for the duration of the CIRP. The scope of the moratorium also extends to:

- (i) precluding the termination of a lease agreement and recovery of the leased property from the corporate debtor; and
- (ii) precluding termination or even suspension of contracts for the supply of essential goods and services to the corporate debtor (that is contracts for provision of water, electricity, telecommunication and information technology services to the corporate debtor which are deemed by the resolution professional to be vital to the continued operation of the corporate debtor as a going concern), provided that there is continued payment for the goods and services.

This is rooted in s.14 of the Insolvency and Bankruptcy Code, 2016 and regulation 32 of the CIRP Regulations.

Question 2.3 [maximum 3 marks] [3 out of 3]

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

The following constitute acts of insolvency under the Presidential Towns Insolvency Act, 1909 (the "**Act**") -

- (i) failure by a debtor to comply with an insolvency notice issued by a creditor;

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Commented [CAM2]: Entire scope not covered

Commented [CAM3]: Should also have covered the going concern contracts as identified by the RP.

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- (ii) a debtor getting imprisoned as a result of enforcement (against the debtor) of a judgment or order for payment of money;
- (iii) notification by a debtor to a creditor(s) that he has suspended or intends to suspend settlement of his indebtedness;
- (iv) lodgment of a petition by a debtor seeking to be declared insolvent;
- (v) where the debtor's property is sold or attached for a minimum of 21 days as part of enforcement of judgment or order for payment of money by the debtor;
- (vi) where a debtor absconds or keeps himself away from his usual place of residence or from the geographical territory covered by the Act, with a view to escape or postpone the honouring of debt obligations to his creditor(s);
- (vii) a transfer of the whole or substantially the whole of the debtor's property in India (or beyond) for the benefit of his creditor(s);
- (viii) transfer of the debtor's property in part or in whole with a view to escape or postpone the honouring of debt obligations to his creditor(s); or
- (ix) transfer of the debtor's property in part or in whole in circumstances where the transfer would be voided as a fraudulent conveyance under a statute other than the Act.

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?

Pursuant to the Code of Civil Procedure, 1908, the monetary judgments and orders of a court of competent jurisdiction in a reciprocating territory are enforceable in India on equal footing with judgments and orders of the Indian Courts.

QUESTION 3 (essay-type question) [15 marks] [11 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.

The Insolvency and Bankruptcy Code, 2016 (the “Code”) codifies the procedure for invitation and approval of a resolution plan. **The eligibility criteria** for resolution applicants is two fold:

- (i) disqualification criteria under s.29A of the Code; and
- (ii) qualification criteria set by a committee of creditors for inclusion in an invitation to be published by a resolution professional as a call for resolution plans.

In terms of the disqualification criteria under the Code, it expressly precludes persons plagued by the following circumstances (whether by themselves or jointly or in concert with others) from tendering a resolution plan:

- (a) undischarged insolvents;
- (b) wilful defaulters in terms of the relevant guidelines of the Reserve Bank of India;
- (c) holders of an account that is classified as a non-performing asset in terms of the Reserve Bank of India;
- (d) a convict of an offence under the Code, the sanction of which is imprisonment of 2 years or more or a convict of an offence under any other law, punishable with imprisonment of 7 years or more;
- (e) a person barred (by the provisions of the Companies Act 2013) from being a director of a company;
- (f) a person barred (by the Securities and Exchange Board of India) from trading in securities or participating on the securities market;
- (g) a person tainted as a promoter of or part of management or control of a corporate debtor adjudged (under the Code) to have engaged in a fraudulent transaction or improper disposition;
- (h) a person who is the guarantor of the corporate debtor the subject of insolvency resolution in circumstances where the guarantee has been invoked but not fulfilled;
- (i) a person who is subject to a disability that is the foreign law equivalent of any of the aforesaid; and
- (j) has a connected person (within the meaning of the Code) who is subject to any of the disabilities in (a) to (h) above.

The committee of creditors supervises the resolution professional and is the primary decision maker in the CIRP. It comprises creditors other than those whose debts emanate from the provision of goods and services to the corporate debtor as part of its operations. The latter cluster of creditors are for convenience referred to as ‘operational creditors’ whilst those that sit on the committee of creditors can be termed ‘financial creditors’.

As stated earlier, the committee of creditors sets a qualification criteria to be indicated by the resolution professional in his invitation for resolution plans. The invitation would be published by the resolution professional in the newspaper(s) and on the corporate debtor’s website (if any).

After receiving a resolution plan, the resolution professional would conduct a preliminary evaluation and assess it to check:

- (i) that the applicant is not disqualified under s.29A of the Code;
- (ii) that the applicant meets the qualifications set by the committee of creditors; and
- (iii) that the plan conforms to the mandatory requirements under s. 30(2) of the Code.

Commented [CAM4]: This is incorrect, every creditor who is not an operational creditor is not a financial creditor

Commented [CAM5]: Issuance of Request for Resolution plans should also have been included

The resolution professional would thereafter transmit the plan to the committee of creditors together with a report embodying his *prima facie* opinion after the preliminary evaluation. The resolution professional would proceed to convene a meeting of the committee of creditors and chaired by him but without any voting rights.

The resolution plan would thereat be subjected to a two stage approval process by the committee of creditors that is:

- (i) a decision on whether the resolution plan complies with the Code and CIRP Regulations (according to case law like *Arcelormittal v Satish & Ors* - Civil Appeal Nos. 9402-9405 of 2018, judgment dated 4th October 2018); and if so;
- (ii) a vote on whether to approve the plan or not, with due regard to its feasibility and viability.

The threshold for that vote and resolution to carry the day is a 66% majority of the committee of creditors (by value).

After the resolution plan is approved by the committee of creditors, it returns to the resolution professional for submission to the next tier of vetting, being the National Company Law Tribunal (the "**NCL Tribunal**").

The NCL Tribunal for its part evaluates the resolution plan for:

- (i) compliance with the Code and the CIRP regulations; and
- (ii) to ascertain that it has provisions for effective implementation.

If the resolution plan is approved by the NCL Tribunal:

- (i) it becomes binding on the corporate debtor and its employees, shareholders, creditors, guarantors and stakeholders who were involved in its creation;
- (ii) the moratorium terminates; and
- (iii) the resolution professional ceases to hold 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] [6 out of 7]

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.

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The Insolvency and Bankruptcy Code, 2016 (the “Code”) allows for insolvency resolution proceedings to be taken out against a corporate debtor by *inter alia* operational creditors (s.6) where there has been an occurrence of default in payment of a debt of at least INR10,000,000.

In the matter at hand, the Company provides services (marketing) to MPL to aid MPL in operating its business of a cricket league. The Company thus qualifies as an operational creditor as defined in s. 3(20) of the Code. Further, the debt which MPL owes to the Company is INR20 Crores, which is more than the minimum debt threshold required as earlier stated.

There is also a disqualification criteria under s.11 of the Code and the Company does not fall under the categories of corporates that are disqualified from taking out insolvency proceedings.

In terms of the steps to be taken:

- (i) the Company would have to issue a demand notice to MPL (in the prescribed form) for payment of the debt (s.8(1) of the Code);
- (ii) MPL would have a grace period of 10 days from service to respond with either payment or by disputing the debt (s. 8(2));
- (iii) if the grace period elapses without MPL paying or disputing the debt then the Company can proceed to file an application before the National Company Law Tribunal (the “NCL Tribunal”), exhibiting the invoices, demand notice, proof of service and anything else that will show existence of the debt and default, coupled with an attestation of MPL’s inaction to the demand notice (s.9); and
- (iv) the Company could also propose an interim resolution professional (s.9(4)) if so desired.

Commented [CAM6]: debt can not be disputed at this stage.

In arriving at its decision on whether to admit the Company’s application, the NCL Tribunal would also assess whether it has been proven *prima facie* that-

- (i) that there is a debt;
- (ii) that there is default; and
- (iii) that the insolvency resolution process is feasible (according to s.9(5) of the Code and case law such as *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*, judgment dated 12 July 2022 in Civil Appeal No. 4633 of 2021)

Commented [CAM7]: excellent point. Although there have been judgements after this to further clarify the position.

The possible outcomes of the application are that the NCL Tribunal could:

- (i) admit the application, declare a moratorium and appoint an interim insolvency professional; or
- (ii) dismiss the application.

If the Company is successful, the insolvency resolution proceedings would be deemed to commence on the day when the NCL Tribunal admits the Company’s application (s.9(6)) and the commencement would be published coupled with an invitation for submission of claims against MPL (s. 15(1)(c) of the Code.

Question 4.2 [maximum 8 marks] [6 out of 8]

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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.

If the Company accepts the deal to get part payment and continue providing the services to MPL then in the event of the secured creditors taking out insolvency resolution proceedings, the Company would be bound by the moratorium (then in force) to continue to provide MPL with the services. The Company would be precluded from suspending or terminating its contract with MPL (s.14(2) of the Code). This is because as discussed earlier, the Company is an operational creditor of MPL, since the marketing services are essential to the continued operation of MPL as a going concern.

Commented [CAM8]: Only on grounds of insolvency.

The proposed deal with MPL would also call for the Company to refrain from participating in the insolvency resolution process, which participation would typically include the Company registering its claim (operational debt) with the interim resolution professional or resolution professional in response to the publication of the proceedings and invitation for claims (s.15(1)(c), 18(b), 25(2)(e) of the Code). Further, if the debt owed to the Company constitutes atleast 10% of MPL's total indebtedness then the Company would also be entitled to attend the meetings of the committee of creditors albeit as a non-voting participant.

It must be noted that a possible logical progression of resolution proceedings is approval of a resolution plan by the committee of creditors and later the NCL Tribunal, at which point it would become binding on *inter alia* all creditors of MPL (s.31(1)).

A risk that flows from non-participation of the Company is that the balance on the pre-existing debt of INR20 Crores would not be factored in the resolution plan (as an outstanding payment or at all). The situation would have been mitigated if the Company had been a secured creditor with the leeway to recover (by way of enforcement of security) outside of the insolvency resolution process. Thus as an unsecured creditor, it would be risky for the Company to abstain from participating in the insolvency resolution proceedings altogether.

Commented [CAM9]: Correct and which will lead to extinguishment of the claim.

*** End of Assessment ***

Total: **41 out of 50**

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