



**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] [9 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 (Incorrect, correct answer is (b).)**

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]**

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

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The branch of the National Company Law Tribunal where the companies or limited liability partnerships have their registered office has jurisdiction for the insolvency and liquidation of the debtor.<sup>1</sup>

The jurisdiction of the National Company Law Tribunal in relation to the primary debtor is extended to the personal guarantor, in other words, the National Company Law Tribunal that judges the insolvency or liquidation of the relevant corporate debtor has competence to judge the insolvency or liquidation of the personal guarantor. The Supreme Court of India opined in May 2022 that the National Company Law Tribunal can have jurisdiction over the insolvency or liquidation of the personal guarantor even if no insolvency or liquidation proceedings are pending concerning the primary debtor.<sup>2</sup>

**Question 2.2 [maximum 4 marks] [4 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 has the scope of protecting the debtor's assets and operation, with the aim of enabling the success of the corporate insolvency resolution process. In this sense, under section 14 of the Insolvency and Bankruptcy Code 2016, during the moratorium it will be prohibited: (i) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;<sup>3</sup> (ii) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;<sup>4</sup> (iii) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property;<sup>5</sup> and (iv) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.<sup>6-7</sup>

Furthermore, the supply of essential goods or services to the corporate debtor shall not be terminated or suspended or interrupted during moratorium period.<sup>8</sup> The CIRP Regulation 32 defines essential goods and services as those that provide electricity, water, telecommunication service and information technology services. It is also possible to avoid the suspension or closure of the supply of other goods and services that are essential for the maintenance of the corporate debtor's activity. In this sense, the Supreme Court of India prohibited the termination of a contract that would have negative effects on

<sup>1</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 5.

<sup>2</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 5.

<sup>3</sup> Insolvency and Bankruptcy Code 2016, s 14(1)(a).

<sup>4</sup> Insolvency and Bankruptcy Code 2016, s 14(1)(b).

<sup>5</sup> Insolvency and Bankruptcy Code 2016, s 14(1)(c).

<sup>6</sup> Insolvency and Bankruptcy Code 2016, s 14(1)(d).

<sup>7</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 53-54.

<sup>8</sup> Insolvency and Bankruptcy Code 2016, s 14(2).

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the corporate debtor.<sup>9</sup> In another case, the Supreme Court held that it is only possible to intervene in contracts when termination is based on the insolvency of the debtor.<sup>10-11</sup>

**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 following are acts of bankruptcy under section 9 of the Presidency-towns Insolvency Act 1909: (i) if, in India or elsewhere, the debtor makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;<sup>12</sup> (ii) if, in India or elsewhere, the debtor makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;<sup>13</sup> (iii) if, in India or elsewhere, the debtor makes any transfer of his property or of any part thereof, which would, under the Presidency-towns Insolvency Act 1909 or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;<sup>14</sup> (iv) if, with intent to defeat or delay his creditors, (a) the debtor departs or remains out of India, (b) the debtor departs from his dwelling-house or usual place of business or otherwise absents himself, (c) the debtor secludes himself so as to deprive his creditors of the means of communicating with him;<sup>15</sup> (v) if any of the debtor's property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money;<sup>16</sup> (vi) if the debtor petitions to be adjudged an insolvent;<sup>17</sup> (vii) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts;<sup>18</sup> (viii) if the debtor is imprisoned in execution of the decree of any Court for the payment of money;<sup>19</sup> (ix) if a creditor, who has obtained a decree or order against the debtor for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has served on him a notice and the debtor does not comply with that notice within the period of not less than one month after its service on the debtor.<sup>20-21</sup>

**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?

Under section 44A of the Indian Civil Procedure Code of 1908, judgments of a reciprocating territories may be considered a decree passed by the court of India when that decree has been passed by a notified court in a reciprocating territory outside India

<sup>9</sup> Gujarat Urja Vikas Nigam Limited v Amit Gupta, Judgement dated March 8, 2021 in Civil Appeal No 9241 of 2019.

<sup>10</sup> Tara Consultancy Services Limited v Vishal Ghoulal Jain, Judgement dated November 23, 2021 in Civil Appeal No 3045 of 2020.

<sup>11</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 54.

<sup>12</sup> Presidency-towns Insolvency Act 1909, s 9(1)(a).

<sup>13</sup> Presidency-towns Insolvency Act 1909, s 9(1)(b).

<sup>14</sup> Presidency-towns Insolvency Act 1909, s 9(1)(c).

<sup>15</sup> Presidency-towns Insolvency Act 1909, s 9(1)(d).

<sup>16</sup> Presidency-towns Insolvency Act 1909, s 9(1)(e).

<sup>17</sup> Presidency-towns Insolvency Act 1909, s 9(1)(f).

<sup>18</sup> Presidency-towns Insolvency Act 1909, s 9(1)(g).

<sup>19</sup> Presidency-towns Insolvency Act 1909, s 9(1)(h).

<sup>20</sup> Presidency-towns Insolvency Act 1909, s 9(2).

<sup>21</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 12-13.

and the judgment relates to the payment of a sum of money without being taxable or similar. On the other hand, the enforcement of a judgment in a non-reciprocating territory will depend on a new suit before the Indian court, and this decree will only have evidential value.<sup>22</sup>

**QUESTION 3 (essay-type question) [15 marks] [Not attempted - 0 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.

[Type your answer here]

**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]**

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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.

Initially, the Company is considered an **operating** creditor as defined in section 5(21) of the Insolvency and Bankruptcy Code 2016.<sup>23</sup>

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In the event that MPL commits a default, either a financial creditor or an operational creditor, or the corporate debtor itself, will have the ability to initiate insolvency proceedings in relation to MPL.<sup>24</sup> According to section 4 of the Insolvency and Bankruptcy Code 2016, the minimum amount of the default is one lakh rupees.<sup>25</sup>

<sup>22</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 74.

<sup>23</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 52.

<sup>24</sup> Insolvency and Bankruptcy Code 2016, s 6.

<sup>25</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 52.



Considering that the MPL has not shown any intention of initiating the corporate insolvency resolution process, the analysis will be focused on the application file by the creditors.

The financial creditor's application must follow the form and manner provided for in section 7(1) of the Code, accompanied by the necessary fees.<sup>26</sup> In addition, the financial creditor must provide (i) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (ii) the name of the resolution professional proposed to act as an interim resolution professional; and (iii) any other information as may be specified by the Board.<sup>27</sup>

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In turn, section 8 of the Code provides that the operating creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor.<sup>28</sup> After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application before the National Company Law Tribunal for initiating a corporate insolvency resolution process.<sup>29</sup> The operating creditor application must be accompanied by the necessary fees,<sup>30</sup> in addition to providing: (i) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor; (ii) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt; (iii) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and (iv) such other information as may be specified.<sup>31</sup> Furthermore, operational creditor initiating a corporate insolvency resolution process, may propose a resolution professional to act as an interim resolution professional.<sup>32-33</sup>

In either case, the National Company Law Tribunal will, within 14 days of receiving the application, admit the application that meets the requirements of the Code and certifies the existing one of default. Although the Supreme Court of India has already understood that the application of the financial creditor that demonstrates the existence of a debt and default must be admitted by the National Company Law Tribunal,<sup>34</sup> in a recent decision the Supreme Court recognized that the admission of the application is at the discretion of the National Company Law Tribunal, which should consider relevant factors such as the feasibility of initiation of the corporate insolvency resolution process.<sup>35-36</sup>

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<sup>26</sup> Insolvency and Bankruptcy Code 2016, s 7(2).

<sup>27</sup> Insolvency and Bankruptcy Code 2016, s 7(3).

<sup>28</sup> Insolvency and Bankruptcy Code 2016, s 8(1).

<sup>29</sup> Insolvency and Bankruptcy Code 2016, s 9(1).

<sup>30</sup> Insolvency and Bankruptcy Code 2016, s 9(2).

<sup>31</sup> Insolvency and Bankruptcy Code 2016, s 9(3).

<sup>32</sup> Insolvency and Bankruptcy Code 2016, s 9(4).

<sup>33</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 52-53.

<sup>34</sup> Innoventive Industries Limited v ICICI Bank and Another, (2018) 1 SCC 407.

<sup>35</sup> Vidarbha Industries Power Limited v. Axis Bank Limited, Judgement dated 12 July 2022 in Civil Appeal No 4633 of 2021.

<sup>36</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 52.

Once the application is admitted, the court must declare the moratorium and appoint the interim resolution professional.<sup>37</sup> With this, the procedure for drawing up the resolution plan begins.

Subsequently, the corporate insolvency resolution process could be converted by the National Company Law Tribunal into liquidation, if any of the events in section 33 of the Insolvency and Bankruptcy Code 2016 occurs. The events are: (i) failure to submit the resolution plan approved by the committee of creditors to the National Company Law Tribunal; (ii) rejection of the resolution plan by the National Company Law Tribunal; (iii) the committee of creditors has resolved by two-thirds vote by value to liquidate the corporate creditor, an event which must occur prior to confirmation of the resolution plan; or (iv) any person may file for liquidation of the corporate debtor when adversely affected by the corporate debtor's breach of the resolution plan.<sup>38</sup>

**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.

Initially, the Company is considered an operating creditor as defined in section 5(21) of the Insolvency and Bankruptcy Code 2016.<sup>39</sup>

As noted in the previous note, once the application for initiation of the process has been admitted, an interim resolution professional will be appointed. Therefore, the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.<sup>40</sup> In this context, the debtor will not continue to fulfill its obligations as agreed, so that the Company may suffer losses by not participating in the process. By participating in the process, the Company has the right to influence the preparation of the resolution plan, making it possible to obtain a more advantageous form of payment, without incurring risks, as will be explained below.

It is noteworthy that the resolution plan is more advantageous to the operational creditor than a possible liquidation scenario. This is because section 30(2)(b) of the Insolvency and Bankruptcy Code 2016 provides that the repayment of the debts of operating creditors specified in the plan shall not be less than what would be paid in the event of liquidation of the corporate debtor under section 53 of the Code. In addition, Regulation 38 of the CIRP Regulations provides that the resolution plan owes priority payment to operational creditors over financial creditors.

On the other hand, only financial creditors may participate in the committee of creditors, pursuant to section 21(2) of the Code. Therefore, the Company does not have the right to participate in a relevant decision-making body in the corporate insolvency resolution process.

Considering what has been exposed so far, if the payment offered for not participating in the corporate insolvency resolution process is lower than the eventual payment that

<sup>37</sup> Insolvency and Bankruptcy Code 2016, s 13(1).

<sup>38</sup> KUMAR, Dhananjay, *Module 8D Guidance Text: India*, INSOL International, London (2022), p 34.

<sup>39</sup> KUMAR, Dhananjay, *Module 8D Guidance Text: India*, INSOL International, London (2022), p 52.

<sup>40</sup> Insolvency and Bankruptcy Code 2016, s 17(1)(b).

would be received in the liquidation scenario under section 53 of the Code, it would not be worth accepting the corporate debtor's proposal. This is because the payment that would be received with the resolution plan would be higher than the agreement.

Regarding the risk related to accepting the proposed payment, we have that the agreement does not fit into any of the hypotheses of adjustment of antecedent transactions.<sup>41</sup>

First, wrongful trading is envisaged only in relation to the acts of directors and partners of the corporate debtor, under section 66(2) of the Code.<sup>42</sup>

Second, there is also no fraudulent trading,<sup>43</sup> since the intention of the corporate debtor with the proposal is clear: to maintain the provision of services in order to continue operating. In addition, the proposal made involves only the payment of amounts due, without any diversion of assets that could justify possible fraud.

Third, it would also not be possible to allege an extortionate credit transaction, according to the explanation contained in section 50 of the Code: *"it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction"*.<sup>44</sup> In this context, it is reiterated that the payment that would be made stems from amounts due and that do not represent something exorbitant.

Fourth, by the arguments presented above, it would also not be the case that the agreement be considered an undervalued transaction, since only the payment of amounts due would be made.<sup>45</sup>

Finally, it would not be the case for a preferential transaction either. Pursuant to section 43(3)(a), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee.<sup>46</sup>

Therefore, there would be no risk in accepting MPL's proposal. In view of the above, it is up to the Company to determine whether it would be more advantageous to accept the proposal made by the corporate debtor or to receive the amounts due under the terms of any resolution plan that will be proposed in the corporate insolvency resolution process.

**\* End of Assessment \***

Total: **31 out of 50**

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<sup>41</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 67-69.

<sup>42</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 69.

<sup>43</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 68.

<sup>44</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 68.

<sup>45</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 68.

<sup>46</sup> KUMAR, Dhananjay, Module 8D Guidance Text: India, INSOL International, London (2022), p 67.