INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9

ETHICS AND PROFESSIONAL PRACTICE

This is the **summative (formal) assessment** for **Module 9** of this course and is compulsory for 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 9. 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: **[studentnumber.assessment9]**. An example would be something along the following lines: 202021IFU-314.assessment9. **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 "studentnumber" 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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**.

ANSWER ALL THE QUESTIONS

Commented [JL1]: TOTAL: 35 out of 50

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

Commented [JL2]: 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

Please choose the **most correct answer** from the options below.

INSOL International's *Ethical Principles for Insolvency Professionals*

(a) are mandatory and apply to all its members.

(b) creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.

(c) creates a set of rules by which stakeholders and the public in most jurisdictions would be able to determine whether insolvency practitioners are acting in accordance with ethical principles.

(d) creates a set of best practice principles to inform and educate insolvency practitioners and stakeholders by providing ethical and professional guidance on issues of importance.

Question 1.2

The "Enlightened Creditor Value" approach to insolvency proposes the following with regard to the protection of competing interests in insolvency proceedings:

(a) creditors' interests are of paramount importance and as such only these interests should be protected in insolvency.

(b) The interests of stakeholders should be regarded in the same manner as those of creditors.

(c) Creditors' interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors' interests.

(d) Only the shareholders of the company and the creditors of the company should be protected by the insolvency law (and in that order).

Question 1.3

All insolvency professionals are fiduciaries.

(a) True

(b) False

Question 1.4

Being truthful and being honest is **not** the same thing.

(a) True

(b) False

Question 1.5

Tony has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Bank. A year prior to the liquidation of the Company, Tony was acting in an advisory capacity for ABC Bank in litigation against Company X where he attempted to advance ABC's position as a creditor.

This situation is an example of a/an _____ threat.

(a) self-review

(b) self-interest

(c) advocacy

Commented [JL3]: c

(d) intimidation

Question 1.6

A lack of independence and impartiality due to a prohibited relationship with a stakeholder can always be remedied by disclosing the relevant relationship to the relevant parties and issuing a declaration of independence.

(a) True

(b) False

Question 1.7

Julie is a well-known insolvency practitioner and is often sought out for her knowledge and expertise. She currently has ten ongoing insolvency matters (most of them quite complex) and has been feeling somewhat overwhelmed. Due to her impressive *curriculum vitae* she is contacted by a very large designer company in distress inquiring whether she would be able to take an appointment as an administrator. Julie should:

(a) Accept the appointment as it will boost her career even further.

(b) Accept the appointment as she can get one of her junior associates to take over all her other cases.

(c) Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.

(d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.

Question 1.8

Johnson has been appointed as a new associate at the firm where he is employed. In his new role he has to meet certain targets in relation to the fees he earns for taking appointments. Johnson is currently appointed as a liquidator for a small company. He realises that he will not meet the firm's target for fees. The most ethical thing for Johnson to do would be to:

(a) Call a creditors' meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.

(b) Ask his administrative assistant to invoice the estate for the use of the firm's conference venue for meetings held there at a 50% increased fee.

(c) Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.

(d) Ask his administrative assistant to double check all the calculations in the case file and then bill the hours as part of his invoice.

Question 1.9

Please choose the **most correct answer** from the options below.

An insolvency practitioner using a fixed fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.

(a) This statement is true since jurisdictions always allow for an adjustment of fees where it is necessary.

(b) This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.

(c) This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.

(d) This statement is false since the only way to receive a fair amount of remuneration is to calculate the remuneration on an hourly rate.

Question 1.10

Please choose the **most correct answer** from the options below.

Fathima has just completed Module 9 of INSOL International's Foundation Certificate. She works as a junior insolvency practitioner at a large firm. Her firm is contemplating the acquisition of a new information technology system to help ease the administrative burdens of the practitioners at the firm. This new system will digitise all of the documents in relation to insolvency appointments. All the practitioners and administrative personnel employed by the firm will have access to these files as long as they have access to an internet connection. Fathima should advise someone in the office to implement procedures and policies on _____ in relation to this proposed new system.

(a) quality Control

(b) risk Management

Commented [JL4]: b

(c) compliance management

(d) fidelity insurance

QUESTION 2 (direct questions) [10 marks]

Commented [JL5]: 6 out of 10

Question 2.1 [maximum 4 marks]

What are the main fiduciary and other duties usually associated with insolvency professionals?

The Duty to act in good faith.
The Duty to in the best interest of the beneficiary of the fiduciary duties.
The Duty to exercise the powers of the office in an independent and impartial manner.
The Duty to avoid a conflict of interest.
Insolvency professionals also have a duty of care, although this is not fiduciary in its nature.

Commented [JL6]: 4

Question 2.2 [maximum 4 marks]

Briefly explain the two-pronged nature of the duty to act with independence and impartiality.

The duty to act with independence and impartiality bears the same values as both the "no-profit" and "no-conflict" rules as that of Corporate Law. Very simply, the no-profit rule states that a person, acting as fiduciary may not profit from his position of trust and thereby receive some form of unjust enrichment – commonly demonstrated as commission or kick-backs. Similarly, the no-conflict rule states that the fiduciary should not allow for a conflict to arise in the appointment between their duty and the interests of the beneficiaries of the appointment.

Commented [JL7]: This first paragraph does not actually relate to the two-pronged nature.

In Australia, these have been reflected in the Code of Professional Practice released by ARITA that independence requires the practitioner to be independent in fact, and to be seen or perceived to be independent, as well as impartiality by ensuring that they are not influenced by person interest, feelings or prejudice and are only making decisions based on the known facts.

Commented [JL8]: The second paragraph does relate to the two-pronged nature but unfortunately provides little by way of explanation.
2

Question 2.3 [maximum 2 marks]

What is the preferred method of calculation of insolvency practitioner remuneration? Name one ethical issue in relation to this method of calculation.

There is no single preferred method of calculating insolvency practitioner remuneration. Each insolvency appointment requires the insolvency practitioner to adopt an appropriate method of calculating fees based on any number of issues, including the complexity and overall value of the appointment, but at the same time, it is the responsibility of the insolvency practitioner to ensure that the remuneration charged is fair, reasonably and proportionate in the circumstances as demonstrated in Mirror Group Newspapers plc v Maxwell.[1]

Commented [JL9]: Research has shown that a form of time-based calculation method is preferred by most jurisdictions.

Commented [JL10]: 0

[1] *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] I BCLC 638, 648.

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

Commented [JL11]: 11 out of 15

Question 3.1 [maximum 8 marks]

Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate.

Insolvency proceedings require insolvency practitioners to be completely independent and impartial in the way that they conduct the proceedings, and as such the practitioners need to be cognisant of how this issue could impact the nature of the proceedings moving forward, and how independence may vary throughout the different stages of insolvency proceedings, and how ultimately, any perceived issues pertaining to impartiality and independence can undermine insolvency proceedings.

What can cause concerns with respect to independence and impartiality:

Firstly, and before looking at the different stages of proceedings where any threats to independence or impartiality may cause additional difficulties, it is important to understand what may give rise to a lack of independence. Often, any professional or personal association with the company or a director of the company can be seen to raise concerns over independence and impartiality. Further, situations where the insolvency practitioner has some form of relationship with further shareholders, an employee, business partners of the company; other firms or companies within the control of the debtor may cause concerns over independence. Of particular concern for parties involved in the insolvency process, if the insolvency practitioner has existing relationships with creditors or debtors of the company understandably causes grave concerns over the independence and impartiality of the professional, and their suitability to take on such a role. Whilst this is not an exhaustive list, nor is the existence of any of the above relationships an indication of any immediate issues, it is important that a contextual assessment is undertaken to determine the independence or impartiality of the insolvency professional, and it is important that the insolvency professional is able to make this assessment themselves in the exercise of their duties.

Despite the existence of the above relationships, some would argue that the mere disclosure of these relationships to effectively 'cure' any concerns that stakeholders may have. The mere disclosure of a relationship, as elucidated in the Australian decision of Irving[2], highlighted how this is still, ultimately not sufficient to quell any concerns that stakeholders may have.

Appointment of the insolvency professional

Evidently, the time that can cause the greatest concerns to stakeholders is at the time of the insolvency appointment. Often, and particularly with various forms of rescue proceedings, the insolvency professionals are appointed by the board of directors, or even a creditor, and where the proceedings are more akin to liquidation, then often it is the credits (and sometimes the directors) who are responsible for the appointment of the insolvency professional. Naturally, this can then cause other stakeholders to have some concerns depending on the nature of the appointment and their relationship with the appointer. Further, insolvency professionals must always note their overriding duties to all of the stakeholders involved, and not just the parties responsible for their appointment.

Following on from the appointment of the insolvency professional, there can be further difficulties pertaining to a perceived lack of independence and impartiality where they are appointed to continue to provide advice where the insolvency regime has changed (i.e. from a rescue proceeding to liquidation). This poses problems for the practitioner in being able to

[2] *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291

be independent and impartial with respect to previous decisions made in respect of the company, as it is likely that they were partly or fully responsible for these decisions and thus they are in a position of both a self-interest threat as well as a self-review threat.

Similarly, where the insolvency professional has provided advice in pre-insolvency proceedings, which in reality is a common occurrence (for example, the company begins to experience financial distress so they approach a professional for assistance with the management of the company without entering into a formal procedure) can create a perceived lack of impartiality because of that continued involvement. As stated above however, the extent of the involvement is crucial to considering if this involvement is a real threat to the impartiality and independence of the practitioner, and thus a contextual assessment should continuously occur to ensure that the insolvency practitioner is discharging their duties with the utmost of care and independence.

Commented [JL12]: This answer touches on some of the elements but not all.
This question required you to identify elements of the insolvency PROCESS that might cause issues in relation to independence and impartiality. See page 16 of the GT for this discussion. It seems that you have misread or misunderstood the question. Your discussion is an accurate explanation of some of the issues or rather threats to independence and are not all elements of the insolvency process.
4

Question 3.2 [maximum 7 marks]

As insolvency appointments often involve complex legal issues, it is common practice for insolvency practitioners to rely on the advice and services of legal professionals. What ethical considerations should be borne in mind, especially regarding the fees of these legal professionals?

The reliance of insolvency practitioners on legal advisors can give rise to a number of ethical considerations that should be at the forefront of the insolvency professionals minds, and across the entire length of the insolvency process. These issues will be discussed in the following.

Firstly and foremostly, the main concern with the appointment of legal practitioners to any insolvency process is the value of their fees, and the impact that this may have on any chance of recovery for the creditors of the company. Generally, as part of an insolvency process, the costs of the liquidator or administrator (i.e. the insolvency professional), are given priority in terms of payments from the company. This can then mean ultimately, that where the insolvency professional and the legal professional are charging fees, that there can be double up in fees incurred, as well as high costs if they are not managed properly, by both the insolvency professional and even the legal advisors.

The fees of legal advisors often come under scrutiny and can cause significant issues. If the solicitor is engaged directly by the insolvency practitioner, the costs of the legal advisor then become costs directly attributable to the insolvency professional and of course are given priority. The insolvency practitioner will then find themselves in a position where they need to ensure that they use their commercial judgment when it comes to dealing with the legal fees of any insolvency process to protect the interests of stakeholder. As stated in the Australian decision involving Korda Mentha, the insolvency professional would not only use their commercial judgment, but would also continually monitor these fees to ensure that they remain commercial and ultimately reasonable.[3]

Further, where the costs are to be borne directly by the company (of course, this is dependent on the insolvency process), the fees of both the legal advisor and insolvency professional must be clearly examined. Concerns can easily be raised by any stakeholder in the process that both the legal advisor and insolvency professional are duplicated resulting in higher costs to be borne by the company. This again comes down to appropriate management of the legal advisor (and even the insolvency professional) in ensuring that the work that they are undertaking is not only correct and necessary, but also commercial.

[3] *Re Korda; In the matter of Stockford Ltd* (2004) 140 FCR 424, 443.

Secondly, a further issue with respect to legal advisors and their independence in their advice. Often legal practitioners and insolvency practitioners have ongoing relationships – whether it be on a professional level or a personal, and thus it is possible that the appointment of a certain legal advisor over and above an alternative advisor may be as a result of this ongoing personal or professional relationship. It is important to note that this issue may also work in – i.e. a company may use one specific lawyer for their legal issues, and then when the company enters financial difficulties, the lawyer may recommend the insolvency practitioner, who is then ultimately appointed by the Company.

This type of relationship notwithstanding any concerns over fees, gives rise to a real concern over the independence and impartiality of either professional; as well as the suitability of the appointment of either advisor. In the event of appointment of a lawyer to undertake specific work with respect to the company, and then to be appointed to insolvency process could give rise to a conflict with respect to the carrying out of their duties, and of course a view that they may not be impartial in the carrying out of the duties.

Commented [JL13]: A really good answer.
7

Commented [JL14]: 10 out of 15

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

WeBuild Ltd is a private company registered in Eurafriclia. The company specialises in construction and property development and is well known in the area where it conducts business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of the company. The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.

Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality.

After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.

In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulty of the company. He relies on

detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.

At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks that the interests of lower ranking creditors should sometimes outweigh "big money" (referring to financial institutions). She immediately feels uncomfortable with his appointment as administrator.

Several months later the administration fails due to a "lack of funding" to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.

INSTRUCTIONS

There are at least THREE major ethical issues in this factual scenario.

Please identify these ethical issues and explain in detail why they are in fact ethical issues. Your answer should include reference to the ethical principles and the commentary thereon. Where appropriate and suitable, you should also endeavour to elaborate on possible remedies or safeguarding mechanisms to minimise or remove the ethical threats.

You may also make use of case law and secondary sources to substantiate your answer.

Mr Relation has conducted himself in a way that gives rise to a number of ethical issues, which will be addressed in the following.

Evidently, Mr Relation is conducting himself in a way that gives rise to a perception of a lack of independence and impartiality. This arises in a number of ways. Firstly, Mr Relation has a number of personal relationships with the individuals involved in the company, including his brother in law, Mr B In Law and his goddaughter. Evidently, it could be seen that Mr Relaiton will always prioritise the interests of those people that he has a relationship with during this process, and may not act in the best interests of all stakeholders. Further, Mr Relation also finds himself, being appointed for pre-insolvency work, and for the actual appointment. In terms of the pre-insolvency work, Mr relation should have made it clear in any advice to the board (or the company generally) that his role may change, and as such the board is aware of this potential change, which could arguably lead to a change in his appointment.[4] Further the continuing appointment of Mr Relation may then proceed to create self-interest and self-review threats. The self-review threat can arise as a result of Mr Relation having had a longstanding relationship with the company, having to review the previous decisions made in respect of the company. The self-interest threat arises where there is a continued need to deal with Mr Relation's remuneration. Whilst we are not aware of the remuneration structure as part of the scenario, it is important to be cognisant of such a risk as it may be likely to be raised by a stakeholder.

Mr Relation has also failed to act with integrity. He has made fabricated comments regarding the accounts of the company and finding no wrongdoing or maladministration of the company, despite not adequately discharging his duties in respect to his investigations. Further, this

[4] *Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and mgrs. Apptd)* [2017] FCA 914.

shows a failure in moral or ethical principles, and would also constitute a failure with respect to his professional behaviour.[5] It is imperative that an insolvency profession undertake their duties with the diligence and communicate their findings and strategic plans for the insolvency process to all stakeholders, providing a transparent and fair process to all.

Mr Relation has also failed to act professionally in respect of his comments regarding banks, which again raises concerns about his independence and impartiality given his outspoken views on the role of banks in other insolvency proceedings, and now has to contend with the bank being a significant creditor. This clearly could even bring the profession into disrepute and cause a rift between two common stakeholders that have to work together as part of insolvency proceedings. Relevantly, it is noted that this has caused concerns over his appointment as the administrator, and such conduct would give rise to a view that Mr Relation would treat banks differently in the administration of the proceedings, and not ensure that their position is adequately protected like it should be (where a competent and ethical insolvency professional has been appointed). To avoid this, an insolvency practitioner should never make such comments publicly, particularly when they are aimed at one specific demographic or type of entity.

Mr Relation has also failed to act with objectivity, particularly with respect to his comments regarding his investigation of the company, saying that his focus was only on rescuing the company, and not on anything that the directors have done. Naturally, this would also lead one to view that Mr Relation has also arguably failed to discharge his duty of care, diligence and skill with respect to all of the internal investigations that he has conducted in respect of the company.

Commented [JL15]: This answer correctly identify the ethical issues and demonstrates an understanding of the principles and their application. I would have liked to see more detail on the "why" it is an ethical issue as stated in the question.
A reasonable attempt nonetheless.
10

*** End of Assessment ***

[5] J Dickfos, *"The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration"* (2016) 25 Int Insolv Rev.