INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8A

AUSTRALIA

This is the **summative (formal) assessment** for **Module 8A** 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 8A. 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.assessment8A]**. An example would be something along the following lines: 202021IFU-314.assessment8A. **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 **7 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 27 out of 50 = 54%

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

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

Select the correct answer:

If a creditor is dissatisfied with the bankruptcy trustee or liquidator's decision in respect of its proof of debt, the creditor may:

(a) apply to AFSA or ASIC for the decision to be reversed or varied.

(b) apply to the bankruptcy trustee or liquidator for the decision to be reversed or varied.

(c) bring court proceedings for a money judgment in respect of the debt.

(d) apply to the court for the decision to be reversed or varied.

Question 1.2

Which of the following **is not** a collective insolvency process:

(a) Receivership.

(b) Liquidation.

(c) Deed of company arrangement.

(d) Voluntary administration.

Question 1.3

Select the correct answer:

The purpose of the Assetless Administration Fund is to:

(a) finance preliminary investigations and reports by AFSA to trustees into the bankruptcies of individuals with few or no assets, to assist trustees in deciding whether to commence enforcement action.

(b) finance preliminary investigations and reports by ASIC to liquidators into the failure of companies with few or no assets, to assist liquidators in deciding whether to commence enforcement action.

(c) finance preliminary investigations and reports to AFSA by trustees into the bankruptcies of individuals with few or no assets, to assist AFSA in deciding whether to commence enforcement action.

(d) finance preliminary investigations and reports to ASIC by liquidators into the failure of companies with few or no assets, to assist ASIC in deciding whether to commence enforcement action.

Question 1.4

Select the correct answer:

Newco Pty Ltd has 3 employees and an annual turnover of AUD 950,000. It currently owes AUD 300,000 to its trade creditors, and it has a AUD 800,000 secured loan from its bank. Which of these restructuring processes is Newco **ineligible** for?

(a) A voluntary administration followed by a deed of company arrangement.

(b) An informal restructuring with the agreement of creditors.

(c) A small business restructuring plan.

(d) A deed of company arrangement.

Question 1.5

Select the correct answer:

Which of the following is **not** "divisible property" in a bankruptcy?

(a) Wages earned by the bankrupt.

(b) Fine art.

(c) Choses in action relating to the debtors' assets.

(d) The bankrupt's family home.

(e) Superannuation funds.

Question 1.6

Which of the following **is not** a relevant period for the entry into a transaction which constitutes an unfair preference in a liquidation?

(a) The six-month period ending on the "relation back day".

(b) The one-year period ending on the relation back day where the creditor had reasonable grounds for suspecting that the company was insolvent.

(c) The four-year period ending on the relation back day where the creditor is a related entity of the company.

(d) The 10-year period ending on the relation back day where the transaction was entered into for a purpose that included defeating, delaying or interfering with the rights of creditors in the event of insolvency.

(e) After the relation back day but on or before the liquidator was appointed.

Question 1.7

Select the correct answer:

A receiver:

(a) is an agent of the secured creditor that appointed the receiver.

(b) owes a duty of care to unsecured creditors.

(c) is an agent of the company and not of the secured creditor that appointed the receiver.

(d) is an agent of the company until the appointment of a liquidator to the company.

(e) is required to meet the priority claims of employees out of assets subject to a non-circulating security interest.

Question 1.8

Select the correct answer:

A voluntary administrator must convene and hold a first meeting of creditors within how many business days of his appointment?

(a) 3 business days.

(b) 8 business days.

(c) 12 business days.

(d) 24 business days.

(e) 45 business days.

Question 1.9

Select the correct answer:

Australia has excluded from the definition of “laws relating to insolvency” for the purposes of Article 1 of the Model Law the following parts of the Corporations Act:

(a) The part dealing with schemes of arrangement.

(b) The part dealing with windings up of companies by the court on grounds of insolvency.

(c) The part dealing with taxes and penalties payable to foreign revenue creditors.

(d) The part dealing with the supervision of voluntary administrators.

(e) The part dealing with receivers, and other controllers, of property of the corporation.

Question 1.10

Select the correct answer:

Laws regarding the following came into effect on 1 January 2021:

(a) an *ipso facto* moratorium in voluntary administrations and liquidations.

(b) simplified restructuring and liquidation regimes for small companies.

(c) reducing the default bankruptcy period from three years to one year.

(d) a safe harbour from insolvent trading liability.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks] 3/3

Name the three types of voidable transactions that can be reversed by a bankruptcy trustee and describe the circumstances in which such a transaction will not be reversible.

The three types of voidable transactions that can be reversed by a bankruptcy trustee are as follows: -

1. Preferential transactions/payments to creditors

2. Undervalued transactions

3. Transfers to defeat creditors

The transactions which occurred in good faith, in the ordinary course of business and in absence of notice of a creditor's petition or debtor's petition are not reversible or recoverable (s 123). Further the property shall not be recoverable which the third party has received in good faith and for market price from the original transferee. (s 120(1)).

Good answer

Question 2.2 [maximum 3 marks] 3/3

How does a court determine the scope of the stay in relation to a corporate debtor under Australia's implementation of Article 20 of the Model Law?

In Australia the scope of the stay has been specified under Article 20 of the Model Law (in s 16 CBIA) and it will the same as the stay would be applied to: -

1. The Bankruptcy Act or

2. Chapter 5 of the Corporations Act except part 5.2 & 5.4A. as per the requirement of the case. Good

It means the court will consider the facts of the case and then decide what should be applied. Whether the broader voluntary administration stay should be applied which also impacts secured creditors or the standard liquidation stay should be applied which only affects unsecured creditors. The court looks for the nature of proceedings (rather than exercising discretion: *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at [24]), if it's a business rescue procedure then voluntary administration stay would be applied and if the foreign proceeding is more analogous to liquidations, then liquidation stay will be applied. Could include the point that difficult questions will be raised where the foreign proceeding is not clearly either business rescue or liquidation-like.

Great answer overall.

Question 2.3 [maximum 4 marks] 2/4

What is an *ipso facto* clause and what is the relevance of *ipso facto* clauses in liquidations?

The Ipso facto "by the fact itself" clause is a contractual provision that allows one party to the contract to terminate or modify the operation of the contract upon the occurrence of a specified insolvency related event in respect of another party. Need to have more detail about these insolvency events- e.g. upon a debtor's bankruptcy (s 301 Bankruptcy Act), or upon the company entering voluntary administration or because of the company's general financial position while it remains in voluntary administration (s 451E Corporations Act).

The relevance of ipso facto clauses in liquidations you have set out the relevance during restructurings, not during liquidation is that the debtor which is already in financial distress may suffer from the following if the other party to contract terminates or modifies the operation of the contract: -

a) significantly impacts the financial viability of debtor's business and general cash-flow;

b) reduces the ability of debtor's to successfully restructure and continue to trade through such restructure;

c) reduces the value of the business, if a sale of the business is being contemplated;

d) disrupts the business's other contractual obligations, such as with its creditors; and

e) potentially reduces what creditors may be able to recover in an Insolvency administration.

But from 1st July 2018 onwards, Changes have been made to the Corporations Act 2001 which allows for the enforcement of rights under an ipso facto clause under the following circumstances:

1. A company enters into administration

2. A company has a managing controller appointed over all or substantially all of the company's property or
3. The company is undertaking a compromise or arrangement to avoid being wound up

The said changes will apply to all new contracts, agreements and arrangements between parties entered into after 1st of July 2018.

Now, an ipso facto clause will be put on hold in the above said three circumstances. The stay will not affect most of the other rights being enforced, such as where party fails to meet a payment obligation, however if the ipso facto clause effectively goes against the reforms, then the stay may be extended to these rights.*

Need to come back to the specific question asked – what is their relevance *in liquidations*? The answer is that the stay on the operation of *ipso facto* clauses only applies to restructurings (as you've identified above), so once a company is in liquidation, the *ipso facto* clause will operate and the liquidator will not be able to keep contracts with *ipso facto* clauses on foot. See Guidance Text, p 30.

**https://www.mondaq.com/australia/contracts-and-commercial-law/813978/changes-to-enforcement-of-ipso-facto-clauses-in-contracts*

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

"Creditors' schemes of arrangement are costly and time-consuming and are an ineffective corporate rescue mechanism in Australia."

Critically discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.

Let us first understand what is Creditors' scheme of arrangement before looking at its advantages or disadvantages.

A Creditors' scheme of arrangement is a formal debt restructuring mechanism which involves a compromise or arrangement to vary the terms of debts or claims between the company and a creditor or class of creditors (including secured creditors).

The Scheme can include a number of different proposals to reduce the companies' debt obligations, such as renegotiation of interest payments, increase the period of time of repayment or proposal of swapping debt against equity.

It ultimately allows the company to continue to trade. The Scheme is proposed to creditors on the basis that the creditors, or a class of creditors, will be in a better position if a Scheme is agreed than they would be in if the company went into Voluntary Administration or Liquidation.

The below seems to have all been copied from https://www.claytonutz.com/knowledge/2018/september/creditors-schemes-of-arrangement-a-restructuring-tool-to-pre-empt-class-action-risks

There are various disadvantages or constraints and legal impediments in Creditors' scheme of arrangement, which could undermine the utility of a scheme, such as: -

1. No automatic stay of proceedings: - There is no guarantee that the Court will exercise its discretion to stay proceedings against the company after a scheme has been proposed.

Commented [ELB2]: David: all cut and pasted with small word changes from the website. The answer is good, but only because Clayton Utz' article is good! The mark for the content would be 15/15, but I'm inclined to only give 3/15 for the intro and then having found the right answer on google.

Note from Course Leader: Please consult the Course Handbook regarding the acknowledgement of sources. See also instruction 5 of the assessment. The marker is justified in taking this action.

2. Limitations of the ipso facto stay: - It means there may be a situation where ipso facto clause may not apply and the company may still need to obtain the prior consent key stakeholders, before proposing a scheme.

3. Uncertainty as to merit and appropriate settlement sum: - The lack of clarity as to the merits of any threatened or initiated action at such an early stage, may inhibit a compromise. Further, it may be difficult to determine the appropriate settlement sum that would be acceptable to the requisite majority of shareholder claimants

4. Time constraints and disclosure requirements: - Another constraint is time, the Company is required to quickly put forward a scheme proposal, ideally before proceedings are commenced and/or before any litigation funder has committed resources and taken control. However, a substantial amount of information will need to be gathered and prepared. The process of preparing and verifying the explanatory statement, and the drafting of the scheme itself, takes a lot of time.

5. No guarantee of creditors' approval: - Generally before proposing a scheme pre-approval of key creditors is taken to avoid any future complication or denials but there is no guarantee of creditors' approval in the conclusion stage.

6. Costing: - Creditors' scheme of arrangement is generally a costly affair as compared to other options since it requires to go through the lengthy legal process, creditor's approval etc. A lot of information, scheme documents which requires professional consultancy is need to be submitted.

Along with above mentioned limitations there are number of advantages also which makes Creditors' scheme of arrangement a good option to go for, such as: -

1. Binding effect of schemes: - If approved, the scheme will become binding on all shareholder claimants, including those who did not attend the meeting and those who attended but voted against the scheme.

2. Stay of proceedings: - The court may, on a summary application by the company, make orders restraining further proceedings against the company (whether or not such proceedings have already been commenced).

3. No requirement of insolvency: - It is not necessary for the Company to be insolvent, or likely to become insolvent at some future time, in order for it to propose a creditors' scheme of arrangement.

4. Releases of third parties: - The schemes can be used to release creditors' claims against both the Company as well as the third parties, including directors and officers of the Company.

5. Ipso facto stay: - The stay on enforcement of ipso facto rights against a company in respect of which a scheme has been proposed has somewhat reduced risk of contractual counterparties terminating key contracts, or secured parties taking enforcement action against the Company.

Conclusion: -

Where the company is solvent, although the Creditors' scheme of arrangement is both time-consuming and costly to go through the process of providing certain materials to creditors, ASIC and the court, and the documentation associated with a Creditors' Scheme of

Arrangement is very complicated but there are circumstances where a creditors' scheme would be preferred. For example, the company may seek to benefit from a Scheme as: -

1. Clauses in the contract allowing a party to terminate the contract should insolvency occur cannot be triggered when a company applies to enter into a Creditors' Scheme of Arrangement; and

2. Creditors' Schemes of Arrangement can bind secured creditors that do not vote to approve the Scheme.

And where the Company is insolvent or nearing insolvency, it should instead consider placing the Company into voluntary administration with a view to compromising all creditors' claims against the Company though a deed of company arrangement (DOCA).

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

Question 4.1 [maximum 9 marks] 4/9

Aussiebee Pty Ltd (Aussiebee), a company incorporated in the fictional country of Lyonesse, sells chocolates flavoured with Australian native plants. The chocolates are manufactured in Australia by NewYums Pty Ltd (NewYums), an Australian-incorporated wholly-owned subsidiary of Aussiebee.

Aussiebee has offices and warehouses in both Sydney and in Lyonesse. Aussiebee regularly sells its chocolates all over the world, from both its Lyonesse and its Sydney offices and warehouses. AussieBee and NewYums share a board of directors, made up of six Australians and one Lyonessian. Aussiebee employed 40 staff: 20 in Sydney and 20 in Lyonesse. Aussiebee's CEO is an Australian, but resident in Lyonesse. Aussiebee's CFO is an Australian, resident in Australia.

Aussiebee is insolvent. NewYums, however, remains solvent.

A liquidator has been appointed to Aussiebee in Lyonesse. She applies to the Federal Court of Australia for recognition of the Lyonessian liquidation as a foreign main proceeding, and for orders entrusting Aussiebee's assets (including Aussiebee's shares in NewYums which are worth AUD 20 million) to her, so that she can realise them for the benefit of creditors in the Lyonessian liquidation.

Aussiebee owes AUD 12 million in taxes in Australia, payable to the Australian Taxation Office (ATO). Assume that revenue creditors such as the ATO are not entitled to prove in the Lyonessian liquidation.

You are advising the ATO. What should the ATO do to protect or improve its position?

In the given case I would like to suggest Australian Taxation Office (ATO) that if their interest is not protected while recognition and relied under article 19 No, art 21 – the liquidator is seeking recognition and consequent relief, not interim relief prior to recognition then they should file application with the Federal court to secure their interest and enable then to take recovery action up to the pari passu amount the ATO would have received if they were entitled to prove for the tax debt as an unsecured creditor in the foreign main proceeding. My suggestion is in the light of a case law which has similar facts as in the given case. In the matter of "Akers & Ors v Deputy Commissioner of Taxation" it was held that the court must be satisfied that the interest of the creditors is adequately protected when granting relief under article 19. Correct.

Following is the brief summary of the matter of “Akers & Ors v Deputy Commissioner of Taxation” **

1. The Model Law on Cross Border Insolvency was developed and adopted by United Nations Commission on International Trade Law (UNICTRAL). The Model Law was designed to address cross border insolvency, generally where an insolvent debtor has assets in more than one State, and to encourage cooperation and coordination between jurisdictions. The Model Law has the force of law in Australia with certain modifications contained in the Cross Border Insolvency Act 2008 (the Model Law).

2. Saad Investments Company Limited (In Official Liquidation) (Saad) was a Company registered in the Cayman Islands. On 18 September 2009 Saad was wound up in the Cayman Islands and joint official liquidators appointed (the liquidators). The Commissioner subsequently raised income tax and penalty (the tax debt).

3. On 7 September 2010 the liquidators filed an application in the Federal Court of Australia seeking recognition of a proceeding in the Cayman Islands under the Model Law and certain other relief (the recognition proceedings).

4. On 22 September 2010 the Deputy Commissioner of Taxation (DCT) filed an interlocutory application in the recognition proceedings. On 22 October 2010 the liquidation of Saad was recognised by the Federal Court of Australia as a 'foreign main proceeding' within the meaning of the Model Law (the recognition orders).

5. The recognition orders were made subject to certain undertakings, including an undertaking by the liquidators not to remit the proceeds of any realisation of assets outside Australia without giving 14 days’ notice. If assets had been remitted from Australia to the Cayman Islands, the DCT would not have been able to recover the tax debt, which being a revenue debt, would not be admitted to proof in the Cayman Islands liquidation. The recognition orders also prevented the DCT from taking any legal action, recovery action in respect of the tax debt.

6. On 21 September 2012 the liquidators gave the Commissioner 14 days' notice of their intention to remit assets from Australia to the Cayman Islands.

7. The DCT filed an application seeking modification of the recognition orders to issue statutory notices and take other recovery action, including action to obtain payment of the tax debt on a pari passu basis from the assets in Australia.

8. The DCT was successful before Rares J at first instance and the modification orders were made.

9. The liquidators appealed the modification orders to the Full Federal Court.

10. On appeal the liquidators contended the primary judge erred in modifying the recognition orders, and that the modification orders were in excess of the jurisdiction under the Model Law and without due regard to the proper interpretation, policy and purpose of the Model Law.

In dismissing the appeal, the Full Federal Court held that:

(a) There was nothing in the Model Law which imported foreign insolvency law into Australia so that domestic tax debts could not be recovered

(b) There was no legislative or common law basis which destroyed the rights of the DCT to seek leave to proceed against the company in liquidation or to employ his enforcement rights under tax legislation

(c) When granting or modifying relief under the Model Law, the Court must ensure that the interest of local creditors are protected, and

(d) The primary judge had not misapplied the exercise of discretion by making the modification orders because to have found otherwise would have meant that the DCT's rights as a local creditor would have been transformed into a foreign creditor and that as the primary judge permitted the DCT to recover only a pari passu entitlement, the principles of fairness between all creditors was upheld.

11. The liquidators sought special leave to appeal the Full Court's decision to the High Court which was heard on 17 October 2014. The Court dismissed the application noting that whilst it was an interesting issue there was nothing to persuade them that the Full Court judgment was attended with sufficient doubt to warrant the granting of special leave.

12. The Full Federal Court's decision and the subsequent dismissal of the special leave application support the ATO view that Australian Courts have the power to make orders under the Model Law to protect the Commissioner's ability to recover revenue liabilities from assets located in Australia in circumstances where the revenue liability would not be admitted in a foreign liquidation.

Lengthy summary of *Ackers v Saad* copied from the web not needed. Your time would have been better spent considering all aspects of the problem question.

Conclusion: -

In view of the above cited case law, I believe the interest of ATO will be secured or protected while recognizing the Lyonessian liquidation as a foreign main proceeding and further granting relief. If ATO's interest is not protected in the said recognition and relief, then I suggest the ATO should file an application with court seeking protection in the light of above discussed case law.

***https://www.ato.gov.au/law/view/view.htm?docid=LIT/ICD/NSD1933-2013/00001&PiT=99991231235958*

You missed the other big issue. The ATO should intervene on the recognition application, arguing that:

- The COMI of Aussiebee is Australia, not Lyonesse, and so the assets of Aussibee should not be entrusted to the Lyonessian liquidator.
    - *Ackers v Saad Investments* is the leading Australian decision on COMI. It followed and expressly adopted the principles in *Re Eurofoods IFSC Ltd* that COMI is to be determined having regard to the objectively ascertainable factors of the debtor.
    - Need to displace presumption that place of incorporation is COMI
    - Six of the seven directors are Australians
    - The CEO is Australian (although resident in Lyonesse)
    - The CFO is Australian and resident in Australia
    - Sells Australian product, manufactured by its subsidiary in Australia.
    - Do not know whether Aussiebee holds itself out to be an Australian-based company, but its name and its product seem to indicate that it does.

Question 4.2 [maximum 6 marks] 2/6

Shipmin Pty Ltd (Shipmin) is a company incorporated in Australia. Shipmin owned two cargo ships, one valued at AUD 20 million, the other at AUD 15 million. About 3 months ago, Shipmin sold the AUD 20 million cargo ship and paid the full proceeds of AUD 20 million to its parent company Shipmax Ltd (Shipmax) to reduce Shipmin's intercompany debt to Shipmax. Shipmax is also incorporated in Australia and owns 100% of the shares in Shipmin.

Shipmin now owns only the one cargo ship with a value of AUD 15 million. Shipmin owes AUD 20 million to the Commonwealth Bank of Australia (CBA), which is secured by a mortgage over the remaining ship. The mortgage is not registered on the Personal Property Securities Register.

Shipmin's debt to CBA has been guaranteed by Shipmax. Shipmin owes Shipmax AUD 180 million in inter-company debt. Shipmin has no other creditors.

Shipmax has been placed into liquidation. Advise Shipmax's liquidator on the best way to bring the operations of Shipmin to an end and maximise the return to Shipmax from the assets of Shipmin.

Since Shipmax has been placed into liquidation and Shipmax's liquidator is seeking best way to bring the operations of Shipmin (wholly-owned subsidiary of Shipmax) to an end and maximise the return to Shipmax from the assets of Shipmin. Further, the mortgage (ship against the loan of AUD 20 million to the Commonwealth Bank of Australia) is not registered on the Personal Property Securities Register, I would advise the liquidator that he has right to access the Shipmin's assets since any unperfected security interest will automatically vest in the grantor immediately prior to the liquidation of the grantor. Correct.

In the given case, Shipmin owes AUD 20 million to the Commonwealth Bank of Australia which has been guaranteed by Shipmax and the mortgage (cargo ship with a value of AUD 15 million) is not registered on the Personal Property Securities Register. Now, since the Shipmax has been placed into liquidation, the security interest will automatically vest in the Shipmax and CBA will lose the interest on security.

Voluntary administration would be a better option. Immediately before the Shipmin enters voluntary administration, the mortgage over the ship will vest in the voluntary administrator because CBA failed to register its security interest on the PPSA. Unperfected (ie unregistered) interests vest in the voluntary administrator immediately before the commencement of a voluntary administration (*Personal Property Securities Act*, s 267).

The voluntary administration can then sell the ship to provide a return to unsecured creditors, or the creditors can vote to place Shipmin into a DOCA. Shipmax will carry any vote on value, as there are only two creditors and Shipmax holds the overwhelming majority of the debt.

However, note that a liquidation would be risky, because Shipmax may find itself the target of:

- a preference claim by the liquidator for the $20 million already repaid to Shipmax in the last 12 months. Shipmax as the parent company would have had knowledge of Shipmin's insolvency.
- creditor-defeating disposition claim (see Guidance Text, pp 75-76)

If Shipmax can get Shipmin into a DOCA whereby the remaining ship is sold and the proceeds paid equally to all unsecured creditors, Shipmax will receive most of the assets of Shipmin, as its unsecred debt to Shipmax ($200m) swamps the now-unsecured debt to CBA ($20m).