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 "student number" 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]: 28.5 out of 50 = 57%

QUESTION 1 (multiple-choice questions) [10 marks in total] 9/10

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] 2/3

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 the bankruptcy trustee are the preferences, transfer to defeat creditors and undervalued transactions.

A preferred payment transaction is the situation where within six months prior to the presentation of a debtor's or creditor's petition for bankruptcy, the debtor makes a transfer for the benefit of a creditor while the debtor is insolvent at the time of transfer and the effect of the transfer was to give the transferee creditor a preference, priority or advantage over the other creditors.

The transfer cannot be reversed if it is shown that the transfer was received in good faith, in the ordinary course of business and in return for new valuable consideration distinct from discharge of indebtedness solely to the past goods or services in the absence of notice of a creditor's petition or debtor's petition (s 123).

Transfer to defeat creditors has no time limitation and is the situation where the debtor's main purpose in the transfer is to prevent, hinder or delay creditors from reaching the transfer to satisfy their claims against the debtor.

The transfer will not be reversed if at the time of the transfer, the transferee did not know and could reasonably have inferred that the transferor had the main purpose of defeating creditors or the transferor was insolvent or about to become insolvent.

Undervalued transaction is the situation where the transaction took place in the five-year period before the commencement of the bankruptcy proceedings and the transferee gave no consideration or less consideration than the market value consideration for the transfer.

The transfer will not be recoverable if the transferee can show that the transaction occurred more than two -years ago (or more than four-years ago for related party transaction) and that the debtor was solvent at the time of the transaction.

A bankruptcy trustee will also not be able to recover property if the original transferee has since transferred the property to a third party and the third party received the property in good faith and for market value (s 120(1)).

Question 2.2 [maximum 3 marks] 2.5/3

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?

The scope of stay in relation to a corporate debtor under the Australia's implementation of Article 20 of the Model Law is the stay or suspension under chapter five (other than Parts 5.2 and 5.4A) of the Corporations Act. You need to specify that the Australian Courts considers what "the case requires". You need to touch upon the fact that this exercise is not a question of discretion but rather which stay should apply according to the nature of the proceeding: *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at [24].
The court in considering the recognition application will have to decide whether to grant the (broader) voluntary administration stay that affects both the secured and unsecured creditors or the standard liquidation stay that affects only the unsecured creditors.

The Australian liquidation moratorium applies to unsecured creditors only. The elements are: i) stay in the enforcement action against the assets of the company and ii) a stay of proceedings against the company. Unsecured creditors cannot enforce their rights during liquidation outside the of the liquidation process whether by attachment, execution or court proceedings. The court may grant leave for court proceedings to be commenced or continue against the debtor company where it is appropriate to do so. The circumstances justifying a grant of leave include: where the proceedings were already well advanced before the liquidation proceeding began or when the claims is of such complexity that it is better determined by the court than by the liquidator in adjudicating on a proof of debt and in combination with either of the above, where it is likely that any decision by the liquidator in adjudicating on the proof of debt would be the subject of appeal by the creditor.
Under the voluntary administration regime, except with the consent of the administrator or the leave of court all creditors, both secured and unsecured cannot enforce their rights.
The exceptions are: a creditor with security interest over the whole or substantially the whole of the company's property can enforce its security interest by appointing a receiver within the decision period of 13 business days from the commencement of the voluntary administration or from the secured party receiving notice of the appointment of the voluntary administrator and subject to contrary order of the court, a secured creditor or owner or lessor that seeks to either continue with enforcement action commenced prior to the appointment of the voluntary administrator or otherwise recover perishable property. Additionally, the liability of a director or related party who has provided a guarantee in favour of the company cannot be enforced during voluntary administration without leave of court.

Question 2.3 [maximum 4 marks] **4/4**

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

An Ipso Facto clause is a provision inserted into contracts that allows a party to the contract to terminate or modify the operation of the contract (including accelerating payments) upon occurrence of certain event such as counterparty's insolvency or restructuring.

Except for one condition, the liquidator cannot stay the operation of an ipso facto clause in a contract during liquidation. The only exception relates to the circumstance where a creditor's voluntary liquidation immediately follows from a prior voluntary administration or attempt to negotiate a creditor's scheme of arrangement in which case the moratorium introduced as part of the recent amendment of 1st July 2018, to the Corporations Act will be invoked. Otherwise, an ipso facto clause in liquidation is fully operational.

QUESTION 3 (essay-type questions) [15 marks in total] 5/15

"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.

Creditor's schemes of arrangement are costly and time consuming but not an ineffective corporate rescue mechanism in Australia. BY the scheme the directors of a financially distressed company embark on negotiations with the company's creditors in an effort to secure their support for a formal restructuring of the company's debts and the existing operations. The company's creditors are made aware of certain prescribed matters including creditors expected dividends under the scheme compared to a winding up and the amount of creditors' claims and comprehensive information about the financial and other affairs during the negotiations.
It is only when the directors gain substantial support from the relevant creditors, in this case, the major creditors of the company such as the secured creditors, key financiers and suppliers that they apply to the court for a meeting of all the creditors. The court will then order a setup of the meeting of creditors and even order different classes of meetings for different group of creditors if all creditors are not being treated equally.
The creditors meet to consider and approve the schedule of arrangement and must approve it by a majority of those present and voting whether in person, by proxy, by attorney or by corporate representation.
At the meeting of creditors, the approval of the scheme must also have at least 75 percent of the total value of the debt and claims present and voting also approve the scheme. The scheme cannot proceed unless all classes of creditors vote in favour of it by the required majorities.
If the scheme is approved by the creditors, then a second application is made to the court for the court's approval of the scheme. The court will consider if all the conditions were properly met such as the meetings were properly convened and there was no clear case of unfairness or injustice at the separate meetings if there was that. Up to this point you have just introduced schemes without addressing the question asked.

Even though it takes more than one application to the court for the scheme of arrangement to be approved and it must be performed as approved, the cost and time expended on achieving the consensus of the creditors approval of the scheme makes it worth its while. The creditors can be assured that their input into the scheme of arrangement would be followed and has the judicial blessing. Good The cost of fees from filings in the court and the extra time can be factored into the scheme during the negotiations of the terms of the scheme with the creditors. Good If the scheme of arrangement was carefully thought through and designed to meet the exigent situation then if it is faithfully executed and implemented it bodes well for the customers and I will endorse it.

Needed to compare schemes with DOCAs. Schemes require two court applications, DOCAs require no court involvement. Schemes can bind secured creditors and provide releases for third parties, DOCAs cannot. Schemes are highly flexible, DOCAs are less so. DOCAs can be terminated by the court, schemes have already been approved by the court so are very unlikely to be terminated after they have been approved. No moratorium in the lead up to a scheme. There is the VA moratorium that provides breathing space while a DOCA is being prepared.

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?

You missed the first issue about recognition. 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.

In the Australian case of Ackers v Deputy Commissioner of Taxation (2014) 223 FCR8; [2014] FCAFC 57, the full court of the Federal Court of Australia tackled similar issues as in the fact pattern of this case. The court was to apply Article 22 "adequate protection" of the Model Law as adopted in the Australian CBIA to the situation where the debtor's company owes the Australia Tax Commission AUD 83 million and was attempting to transfer some AUD 7 million of proceeds out of Australia to settle the liquidation proceeding in the Cayman Islands of the Company. In the case at bar, there is an attempt to realise and transfer AUD 20 million to Lyonese while the company owes the Australian Taxation Office AUD 12 million.
In the Ackers v DCT case, supra the Federal Court modified the recognition orders upon application by the Deputy Commissioner of Taxation in Australia's leave to take steps to

enforce its claims in Australia, expressly for the purpose of receiving an amount up to the pari passu amount the ATO would have received if it were to prove for the tax debt as an unsecured creditor. This decision was upheld on appeal by the full bench of the Federal Court finding that the modification of the recognition order was appropriate way to ensure that the interest of the DCT as a creditor was adequately protected.
I shall, therefore, advise the ATO to apply to the Federal Court which has jurisdiction in the cross-border insolvency issues to apply to the court relying on the decision of the Ackers v DCT above for a similar decision. Good.

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.

The Shipmin is owned 100% by Shipmax and has only one asset. Shipmin owes CBA AUD 20 million and has mortgaged its only asset to secure that loan. However, the mortgage is not registered on the Australian PPSR. My advice to the liquidator of Shipmax will be to voluntarily liquidate This is one possibility, yes. Shipmin and dissolve Shipmin and since the mortgage is not registered, the property will revert to Shipmin and Shipmax can then take over the asset to improve and maximize its assets since it owns Shipmin totally. Good that you picked up on this.

The better alternative would be voluntary administration. 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).