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

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.

Commented [DB1]: 25 out of 50 = 50%

Note from Course Leader: the marker has pointed out that you have copied and pasted extensively from the guidance text which has cost you dearly in terms of marks. Your attention is drawn to pages 15 and 17 of the Course Handbook as well as instruction 5 of the assessment.

(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.

There are three types of transactions that are voidable transactions under the provisions of the Bankruptcy Act. These transactions can be reversed by the bankruptcy trustee through court proceedings.

1. **Undervalued transactions**: To recover an undervalued transaction, the bankruptcy trustee must show that: (a) the transaction took pace in the five-year period before the commencement of the bankruptcy, (b) the transferee gave no consideration or less than market value consideration for transfer. It is a defence for a transferee to show that the transaction occurred more than two years ago (or more than four years ago for related party transactions) and that the debtor was solvent at that time (Sections 120(1) and 120(3))

2. **Transfers to defeat creditors:** To recover a transfer of property to defeat creditors, the bankruptcy trustee must show that the debtor's main purpose was to prevent, hinder or delay creditors from being paid. The bankruptcy trustee is given the benefit of a statutory presumption so that a debtor will be taken to have the prescribed purpose if it can be inferred that at the time of the transfer, the debtor was or was about to become insolvent. There is no specific relation-back period. Any transfer to defeat creditors regardless of how early it occurred is recoverable by the bankruptcy trustee (Sections 121(1) and 121(2)).

3. **Preferential payments to creditors:** A bankruptcy trustee is entitled to recover a transfer of property made by a debtor to a creditor in the six months prior to the presentation of a debtor or creditors petition, if: (i) the debtor was insolvent at the time of the transfer, (ii) the effect of the transfer was to give the creditor a preference, priority or advantage over the creditors. It is a defence for the creditor to show that it received the payment in good faith, in the ordinary course of business and in return for valuable consideration. Good, this sentence identifies one of the circumstances in which a transaction is not reversible. (Sections 122(1) and 122(2)).

I was looking for the following two circumstances in which voidable transcations will not be reversible:

- 1. Transactions which occurred during the relation back period but were transacted in good faith, in the ordinary course of business and in the absence of notice of a creditor's petition or debtor's petition, are not recoverable under the voidable transaction provisions (s 123).
- 2. The bankruptcy trustee will 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] 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?

Under the CBIA (s 16), the specified scope of stay under Article 20 of the MLCBI is the same as when the stay would apply under the Bankruptcy Act or Chapter 15 of the Corporations Act as the case requires. Accordingly, as held in the case of *Tai-Soo Suk v. Hanjin Shipping Co Ltd [2016] FCA 1404,* when an Australian court is considering a recognition application in relation to a corporate debtor, it needs to consider what the case requires that is whether the case requires the broader voluntary administration stay which affects the secured creditors or the standard of liquidation stay that affects only unsecured creditors. It is not a question of discretion but rather which stay would apply according to the nature of the proceeding. When the foreign proceeding is clearly a business rescue procedure, the former would be more appropriate. The latter will be more appropriate for foreign proceedings that are more analogous to liquidations. (Guidance Text p. 65).

Commented [ELB2]: Copied verbatim from the Guidance Text

The issues surrounding stays, process and duration were dealt with in detail in the cases of *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v. Rizzo-Bottiglieri-De Carlini Armatori SpA [2018] FCA 153; Alari v. Rizzo-Bottiglieri-de CArlini Armatori SpA [2018] FC 1067* which become relevant for this answer. To resolve lacunae in relation to stays, the court observed that in the future, stay orders should be fixed for a period of about 3 months and to require the foreign representative at regular intervals to report to the court to justify each extension of stay, failing which the stay would be vacated automatically.

The court further observed that the determination of which type of Australian stay should apply becomes significant vis a vis impact on creditors. In the present instance, foreign proceedings in Italy were consider as analogous to a liquidation and a liquidation moratorium was applied. Further the Italian proceedings were considered as the main proceedings since it impacted a large number of secured creditors.

In addition to the above, the interaction of cross border insolvency law and maritime law also play a role in relation to stays and the cases of *Hur v Samoun Logix Corporation (2015) 238 FCR 483, Being Yu v. STX Pan Ocean Co Ltd (2013) 223 FCR 189 and Yakushiji v Daiichi Chuo Kaisen Kaisha [2015] FCA 1170* support this. In the first case it was held that the consequence of allowing the stay and suspension under Article 20(2) to apply to the right of a crew to arrest a shop for unpaid wages would be that the crew would be made de facto slaves of the defaulting shipowner until the conclusion of the foreign insolvency. In the following two decisions, this principle was extended as a practice in cross border insolvency cases involving

ships. Thus, any application by a creditor to arrest a vessel which is the subject of the stay under the MLCBI should be brought before a judge of the federal Court along with a copy of the order for recognition and copies of the two main authorities in which this issue was discussed. Good.

Question 2.3 [maximum 4 marks] 3/4

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

During a creditors voluntary liquidation or compulsory liquidation, the liquidator is entitled to disclaim certain property such as land burdened with onerous covenants, unsaleable property and contracts (Section 568). One such covenant is an ipso facto clause. Unfortunately no. Ipso facto clauses by definition operate before the liquidator can disclaim property.

An ipso facto clause in a contract is a right of party to terminate or modify the contract in the event of an insolvency proceeding being initiated against a counterparty 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 clause could also include the repossession of a property upon the debtor's bankruptcy Good- s 301 Bankruptcy Act.

Subject to certain exclusions, on and post July 01, 2018, creditors are prevented for enforcing such ipso facto contractual rights contingent only on a company's insolvency or entry into an external administration. The Australian personal insolvency regime takes a stricter approach with the Bankruptcy Act rendering ipso fact clauses void outright when a person becomes bankruptcy.

Statutorily, the Australia insolvency regime addresses ipso facto enforcements and ipso facto moratoriums in liquidation in the following manner:

The below is copied straight from the Guidance Text. A clearer answer would have been: the stay on the operation of *ipso facto* clauses only applies to restructurings, not liquidations. 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. The Guidance Text refers to the situation where the operation of an *ipso facto* clause has been suspended during a VA or attempt to negotiate a scheme, but once the company is in liquidation, the *ipso facto* clause operates.

If a liquidator wishes to maintain an important supply contract for a period of time to facilitate the temporary conduct of the company's business pending a possible sale, the liquidator will not, subject to one except, have the benefit of the ipso facto enforcement prohibition that applies during bankruptcy, so that a supplier or other contractor is generally able to terminate its contract with the company as soon as the company enters liquidation (assuming ipso facto rights have been incorporated into the contract).

The exception relates to the circumstance where a creditors voluntary liquidation immediately follows a prior voluntary administration or attempt to negotiate a creditors scheme of arrangement in which case the ipso facto moratorium introduced as a part of the Corporations Act will be invoked. While there will be a moratorium itself in such a scenario, the ipso facto clause itself will not be void unlike during bankruptcy.

There are no special rules for treatment of essential contracts such as those relating to the provision of water, electricity and communications services.

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.

Under the Corporations Act, directors of a financially distressed company, prior to the initiation of a formal insolvency proceeding, enter into negotiations with the company's creditors in an effort to secure their support for a formal restructure of debts and existing operations of the company. There are certain prescribed matters which must be specifically disclosed to creditors in a proposed scheme document, including creditors expected dividends under the scheme compared to a winding up, the extent and amount of creditors claims and comprehensive information about the company's financial and other affairs. (Corporations Regulations, Schedule 8, part 2).

If it appears that a good level of support for the proposed scheme is received from the major secured creditors, financiers and suppliers, an initial application is made by the company to the court to convene a meeting of all creditors to consider whether to approve the scheme. I the event of differential or preferential treatment, the court will require separate meetings of different classes of creditors to be convened. [*First Pacific Advisors LLC v. Boart Longyear Ltd [2017] NSWCA 116]*.

If the court orders a meeting of creditors to be convened, a resolution approvind the scheme requires the support of : (a) majority of creditors present and voting at the meeting and (b) 75% of the total amount of debts and claims of creditors present ad voting at the meeting. The voting conditions apply to each separate class if multiple meetings of different classes of creditors are required so that a scheme cannot proceed unless all classes of creditors vote in favour of it by the required majorities (*Refer Guidance Text p. 54)*.

If the scheme is approved, a second court application is then required for the court to formally approve the scheme. The court will generally do so if there has been full disclosure of all material matters concerning the scheme to creditors, the meeting or meetings of creditors have been properly convened and there is no clear circumstance of unfairness or injustice (on the basis that the court considers creditors to be better judges of their own commercial interests than the court) [*Re Centro Properties Ltd [2011] MSWSC 1465]*

If court approval is obtained, the scheme is implemented in terms of the specific terms and completing the terms of any restructured debt facilities provided in the scheme. An administrator of the scheme is not specifically required although it will often be appropriate for an administrator to be appointed if the implementation of the scheme will occur over a protracted period.

In a creditors scheme of arrangement an ipso facto clause exclusion also applies [Section 415D(1), Corporations Act]. This enhances the prospect of a scheme being effectively used as a corporate or a business rescue mechanism which is binding on all creditors, notwithstanding the dissent of minority creditors.

A creditors scheme of arrangement is a costly and a complex process with the requirement of two application and possibly more if material circumstances arise. Voluntary administration or a DOCA process do not require court approval and could be entirely out of court if a voluntary or deed administrator does not apply to the court to seek directions and no challenge to the conduct of the administrator or provisions of the DOCA are made. With the complexity of a scheme of arrangement – it takes 3 months for full implementation which in practice can extend to six months or more. Under the formal processes such as the DOCA and voluntary administration the resolution can take place after 25-30 days – voluntary administration period.

Creditors schemes of arrangements offers two significant advantages: (a) it can bind dissenting secured creditors [*Re Nine Entertainment Group Ltd (No1) (2012) 211 FCR 439*] and (b) it can include the release of creditors rights against third parties other than the company [*Fowler v. Lindholm, Re Opes Prime Stockbroking Ltd (2009) 74 ACSR 124*]

Commented [ELB3]: Copied wholesale from the Guidance Text

All of the above has been copied directly from the Guidance Text. The question asked you to critically discuss a statement, not copy the summary of how a scheme comes into being from the Guidance Text.

Creditors schemes of arrangement remain relatively rare in practice. In general, the process is efficient, novel and wide-ranging but since it is not a formalised court process (not sure what you mean here, schemes are approved in a very formalised court process), is expensive and the method in Australia is engineered towards more court-oriented processes – creditors schemes of arrangement have struggled with popularity. In the recent past, Despite an uptake, particularly in light of the increasing complexity of corporate and financial arrangements in general following the global financial crisis where schemes have been used to effect some of Australia's largest and most high profile corporate restructurings including, Nine Entertainment Group, Lehman Brothers Australia, Centro Group, Opes Prime Group and Alinta Limited.

Commented [ELB4]: Copied (poorly) from the Guidance Text

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

Question 4.1 [maximum 9 marks] 5/9

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 present instance the case of *Ackers v. Deputy Commissioner of Taxation* becomes relevant. The decision of the Full Court of the Federal Court of Australia concerned the application of Article 22 whereby the court must be satisfied that the interests of the creditors are "adequately protected" when granting relief under Article 19. In this case, liquidation of a Cayman Islands registered company had been recognised as a foreign main proceeding in Australia. The foreign representatives wished to remit AUD 7 million approximately, being the proceedings of sale of Australian assets of the company, from Australia to the Cayman Islands for distribution there as part of the Cayman Islands liquidation. The company owed over AUD 83 million in tax and penalties in Australia. A debt payable to a revenue creditor is not admissible to proof in Cayman Islands liquidation nor is such a debt admissible to proof in Australian liquidation. On the application of the Deputy Commission of Taxation, The Federal Court modified the recognition orders, giving leave to the DCT to take steps to enforce its claim in Australia, expressly for the purpose of recovering an amount up to the pari passu amount the ATO would have received if he were entitled to prove for the tax debt as an unsecured creditor in the foreign main proceeding. On appeal, the Full Court upheld the decision, finding that the modification of the recognition orders was an appropriate way to ensure that the interests of the DCT as a creditor were adequately protected. You then need to apply this decision to the facts in this case.

It is also significant to note that the *Ackers v. Saad Investments (2010) 190 FCR 285* where it was held that the centre for main interests is to be determined having regard to the objectively ascertainable factors of the debtor whilst relying on Re Eurofoods IFSC Ltd [2006] Ch 508. You needed to apply this to the facts.

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.

ATO could challenge the recognition of foreign main proceedings given that all primary properties and debt is situated in Australia and also rely on an amendment to the recognition order.

Question 4.2 [maximum 6 marks] 0/6

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.

In a liquidation process, secured creditors have priority of payment. Security interests that are not land – for instance the ship in this instance are to be registered on the national Personal Property Securities Register. Failure to register a security interest will result in other security interests taking priority over the unregistered interest. Security interests continue to exist in the proceeds of sale of secured assets. You needed to apply these general observations to the facts in this case.

Shipmax's debt of 180 million is reduced by 20 on account of the sale of the cargo ship. Thus Shipmax is owed a debt of 160 million. Shipmax is an unsecured creditor and has also interest in Shipmin, Shipmin being a wholly owned subsidiary. CBA has to be paid by Shipmax or with the sale of the cargo ship. CBA should be paid 5 million AUD by Shipmax and 15 million from the sale of the cargoship. The debt of 155 million by Shipmax can be arranged through reorganisation. No.

From a maximisation standpoint, Shipmax could discharge the debt to CBA of 20 million AUD as a guarantee, retain the asset or absorb it as a part to increase the business and then reorganise. No.

Shipmax's liquidator should, using her power as the sole shareholder of Shipmin, have the directors of Shipmin place Shipmin into voluntary administration on the grounds of insolvency or likely future insolvency (it owes CBA more than the present value of its only major asset – whilst this is balance sheet insolvency, it may well lead to cash flow insolvency when combined with the collapse of its parent company).

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).