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] 7/10

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] 3.5/10

Question 2.1 [maximum 3 marks] 1.5/3

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 revocation clauses in the bankruptcy Law that allow the bankruptcy trustee to bring court action to revoke the effects of:

• Undervalued deals;

• Transfers designed to defeat creditors;

• Priority payments to creditors.

Transactions that occur during the retrospective period of the relationship but are transacted in good faith in the normal course of business and without notice of the creditor's application or the debtor's application are not retrievable under the revocation terms. In addition, if the original assignee has transferred the property to a third party who has acquired the property in good faith and at its market value, the bankruptcy trustee will not be able to recover the property.

Your answer has been copied verbatim from the Guidance Text, then put through translation software.

The rest of your answer below is not relevant to answering the question. It shows that you have not understood the question.

To recover an undervalued transaction, the bankruptcy trustee must show that:

• The transaction takes place within five years prior to the commencement of bankruptcy;

• The assignee gives no consideration for the transfer or less than the market price. 69

The assignee certifies that the transaction occurred more than two years ago (or related party transactions more than four years ago) and that the debtor paid at the time

Ability, that's a defense.

In order to recover the transfer of property to defeat the creditor, the bankruptcy trustee must prove that the debtor's primary purpose is to prevent, impede

Or delay repayment of creditors. The trustee in bankruptcy has a statutory presumption of interest, so that if it can be inferred that the debtor is or will be insolvent at the time of the assignment, the debtor will be deemed to have a prohibited purpose. There is no specific period of relationship recovery. Any transfer that defeats creditors, no matter how early it occurred, can be recovered by the bankruptcy trustee.

Under any of the following circumstances, the bankruptcy trustee shall have the right to recover the debts owed by the debtor within six months prior to the filing of the application by the debtor or creditor

Property transferred by the obligee:

• The debtor is insolvent at the time of assignment;

•The effect of a transfer is to give a creditor priority, priority or advantage over other creditors.

The creditor demonstrated that it had received payment in good faith in the normal course of business and in exchange for valuable consideration (only new consideration,

For example, the provision of new goods or services by the creditor, as opposed to the discharge of a debt relating only to past goods or services), is a defense.]

Question 2.2 [maximum 3 marks] 1.5/3

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?

[In Australia, the scope of the suspension provided for in article 20 of the Model Law (in CBIA s 16) is the same as in the case of suspension or suspension: (a) the Insolvency Bankruptcy Act; [this is only relevant to personal bankruptcies, not for corporate debtors] Or (b) Chapter V of the Companies Corporations Act (other than parts 5.2 and 5.4a), as the circumstances so require. Thus, when an Australian court is considering an application for recognition in relation to a corporate debtor, it needs to consider "what the case requires", i.e. whether the case requires a broader voluntary administration stay affecting secured creditors or a standard liquidation stay affecting only unsecured creditors. This is not a matter of discretion but of application according to the nature of the procedure. The former would be more appropriate if the foreign procedure was clearly a commercial salvage procedure. The latter would be more appropriate for foreign procedures that are more similar to liquidation. However, difficult questions will be raised if the foreign process is not clearly a commercial rescue or liquidation.]

Copied verbatim from the Guidance Text, then put through translation software.

Question 2.3 [maximum 4 marks] 0.5/4

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

[The personal bankruptcy system has adopted a more stringent approach, with the Bankruptcy Act making the de facto provisions in bankruptcy completely invalid.

An enforceable contract entered into by a debtor prior to bankruptcy shall remain enforceable after the debtor's bankruptcy. The bankruptcy trustee has the de facto prohibited benefit of law, which invalidates any provision in the contract that purport to give the other party the right to terminate, modify or recover property in the event of the debtor's bankruptcy. The trustee in bankruptcy has the right to waive the contract (as well as certain other property such as burdensome leases on land and hard-to-sell property) by notifying the other party in writing, first obtaining permission from the court if the contract is not an "unprofitable contract". If the contract is denied, the other party will claim damages, but will be required to submit proof of debt to recover the losses. There are no special rules for dealing with basic contracts, such as those relating to the provision of water, electricity and communications services. The question was about company liquidations, not personal bankruptcies.

De facto terms of contracts entered into prior to the restructuring cannot be enforced against the company until the restructuring is completed. This is correct, but not about liquidations. However, no rights arising from a contract, agreement or arrangement entered into following the company's reorganization are retained. Not sure what you mean by this sentence. The court has the power to extend or limit the stay, or order the power to be enforced only with its permission.] This last point is correct, but not relevant in liquidations.

QUESTION 3 (essay-type questions) [15 marks in total] **6/15**

"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.

[Critically discuss the statement and state whether you agree or disagree with it, providing a justification for your answer.

The arrangement plan of creditors is one of the corporate rescue mechanisms, which together with the voluntary administration of small business restructuring process and restructuring plan constitute the three major corporate rescue mechanisms in the Australian Bankruptcy Law.

Under the Arrangements procedure of the Companies Act, the directors of a company in financial distress, usually before formal insolvency, negotiate with the company's creditors to ensure their support for a formal restructuring of the company's debts and existing business. There are certain required matters that must be clearly disclosed to creditors in the proposed programme document, including the expected dividend of creditors in accordance with the provisions as compared to liquidation, the extent and amount of creditors' claims, and comprehensive information on the financial and other affairs of the company.

If the directors believe that there is support for the Plan, particularly from major secured creditors and other key financiers and suppliers, the directors will cause the Company to file a preliminary application with the Court to order a meeting of all creditors to consider whether to approve the plan. If it were proposed to treat creditors radically differently under

the plan (for example, if some creditors were given priority in the payment of their claims, even if they were not secured and otherwise would not be entitled to priority in a liquidation), the court would require separate meetings of different classes of creditors. It should be noted that if the court orders a meeting of creditors, the subsequent resolution approving the plan at the meeting requires the following support: a majority of creditors present at the meeting (in person or by agent, lawyer or company representative); 75% of the debts and total claims of creditors present and voting at the meeting. If multiple meetings of different classes of creditors are required, these voting conditions apply to each of the different classes, so that the plan cannot proceed unless all classes of creditors vote in favour by the required majority. If the plan is approved, the court will need a second application to formally approve it. The court will generally do so if all material matters relating to the plan have been fully disclosed to the creditors, the creditors' meeting or creditors' meeting has been properly convened and there is no clear case of unfairness or unfairness (based on a judge whose business interests the court considers to be better served by the creditors than by the court). Subject to court approval, the Plan will be implemented in accordance with the specific terms of the Plan documents, including long-term repayment to creditors and completion of any restructured debt arrangements provided for in the Plan. The administrator of the scheme is not specifically required by the Companies Act or ASIC, although it is usually appropriate to appoint an administrator if the scheme is to be in operation for a long period of time.

The scheme of arrangements for creditors is a complex and expensive procedure in view of the requirements for two court applications (there may be more if significant circumstances arise that require the attention of the court). In contrast, the voluntary administration /DOCA process does not require court approval and indeed may not involve the court if the voluntary or behavioural administrator does not apply to the court seeking direction at any stage and no creditor approaches the court to challenge the behaviour of the administrator or the terms of the DOCA.

The more complex arrangements for creditors mean it will take at least three months to fully implement, although in practice more than six months is not uncommon. On the other hand, depending on the nature of the arrangement proposed by DOCA, DOCA can complete 25 to 30 working days of work quickly after the voluntary administration period.

Nonetheless, the creditors' scheme of arrangement offers two significant advantages that cannot be achieved under the DOCA: it can bind dissenting secured creditors (as long as the required voting majority is met, which is not easy to achieve in practice); It may include the release of claims to third parties other than the company. These advantages allow for more innovative and broader corporate restructuring under a creditor arrangement plan than under a DOCA arrangement plan.

In view of the increasingly complex business and financial arrangements after the global financial crisis, there is a bigger creditors planned arrangements can be used to affect some of Australia's largest and most high-profile restructuring including wild boar, atlas iron, nine entertainment group, Australia, lehman brothers, the central group, options of gold and Lin Da o co., LTD. There may be an increase in creditor arrangements over the next few years.]

Copied directly from the Guidance Text, and then put through translation software.

QUESTION 4 (fact-based application-type question) [15 marks in total] 2/15

Question 4.1 [maximum 9 marks] 2/9

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?

[The ATO has applied to the Federal Court for permission to take steps to enforce claims that Aussiebee owes a $12 million in Australian taxes because the NewYums shares are worth a $20 million. The decision of the Full Court of the Federal Court of Australia concerns the application of article 22 of the Model Law, which states that in granting relief under article 19, the court must be satisfied that the interests of creditors are "adequately protected".] I think you are referring to *Ackers v Deputy Commissioner of Taxation*, but you need to say that.

You needed to explain a lot more about what the ATO should do. Also, you did not say anything about the COMI issue – is Aussiebee's COMI in Lyonesse or in Australia?

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.

[If more than one company in a group of companies is wound up by the same liquidator at the same time, the Act provides for a consolidated liquidation of these companies, including: 75% and 50% of unsecured creditors approve the liquidator's decision after the liquidator has determined that liquidation should take place; Not relevant. The court orders liquidation, and at the request of the liquidator, it is just for the court to order liquidation on the basis of liquidation. This sentence does not make sense. However, there is no broader "contribution order" offered in Australia than in the United States (in the course of a substantial merger) and New Zealand by the courts for the purpose of bringing a solvent group company into the pool in the interests of justice. Not relevant. Therefore, Shipmin applied for liquidation, and then ended Shipmin's operation by liquidating with the parent company, and maximizing Shipmin's return on assets by combining the assets and liabilities of the subsidiary and the parent company.] Voluntary administration would be better than liquidation. Otherwise Shipmax will face preference claims.

Also, you missed the other issue: CBA's security will vest in the voluntary administrator because it has not been registered.

Total Mark: 18.5/50