INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) RESIT ASSESSMENT: MODULE 8A

AUSTRALIA

This is the **summative (formal) resit assessment** for **Module 8A** of this course and must be submitted by all candidates who **qualify for a resit assessment for this module**.

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 (where this must be done is indicated under each question).

2. All assessments must be **submitted electronically in MS Word format**, using a standard A4 size page and a 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 each question. More often than not, one fact / statement will earn one mark, but it is also possible that half marks are awarded (this should be clear from the context of the question, or in the context of the answer).

4. You must save this document using the following format: **[studentID.assessment8A]**. An example would be as follows 202122-336.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 "studentID" 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 paragraph 7 of the Course Handbook, specifically the information on pages 15 and 16, which deals with plagiarism and dishonesty in the submission of assessments. **Please note that plagiarism includes copying text from the guidance text and pasting it into your assessment as your answer**.

6. The final submission date for this assessment is **8 November 2021**. This assessment must be submitted to David.Burdette@insol.org via e-mail no later than 23:00 (11 pm) on **Monday 8 Novmber 2021**.

7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 28 out of 50 = 56%

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

Commented [DB2]: 9 out of 10

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

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:

Which of the following insolvency procedures **requires** court involvement:

(a) creditors' scheme of arrangement.

(b) deed of company arrangement.

(c) creditors' voluntary liquidation.

(d) voluntary administration.

(e) small company restructuring plan.

Question 1.4

Select the correct answer:

Newco Pty Ltd has three (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 company can only be placed into voluntary administration if:

(a) the directors declare that the company's liabilities exceed its assets.

(b) the creditors resolve that the company is unable to pay its debts as and when they fall due.

(c) a liquidator declares that the company is insolvent or likely to become insolvent.

(d) the directors resolve that the company is insolvent or likely to become insolvent.

Question 1.8

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 1.9

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]

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 question relates to a **bankruptcy trustee**, not a liquidator! Answer too long for 3 marks – ensure you read the question properly! **0 marks**

一、three types of voidable transactions are:
Unfair preferences.
uncommercial transactions.
unreasonable director-related transactions.
二、The liquidator may apply to the court for an order setting aside the unfair preference transaction. The following conditions must be met for such transactions:

1. There are strict requirements on the time of occurrence; Within a period of six months from the end of the "Reverse relationship Date" (generally the date on which the winding-up application for compulsory winding-up was made and the members decided to wind up the company, or the date on which any earlier voluntary administration period for creditors' voluntary winding-up began); Within four years of the end of the date of the association of the company in which the creditor is an associated entity; During the 10-year life of the transaction, its purposes include defeating, delaying or interfering with the rights of creditors in the event of bankruptcy; After the relationship date but on or before the date on which the liquidator is appointed;

2. What happens when the Company goes bankrupt or otherwise causes the company to go bankrupt;

3.Make it possible for creditors to receive more than a proportional distribution of the company's assets in the liquidation of the company.

三、The liquidator may apply to the court to challenge the order for the non-commercial transaction. The following conditions must be met for such transactions:

1. The time requirements for simultaneous transactions between the company and any person (not just creditors) are: within two years of the end of the relationship date; Within four years of the end of the relationship between the other party and the related entity of the

Company; During the 10-year life of the transaction, its purposes include defeating, delaying or interfering with the rights of creditors in the event of bankruptcy; After the relationship date but on or before the date on which the liquidator is appointed;

2. What happens when the Company goes bankrupt or otherwise causes the company to go bankrupt;

3.It is "non-commercial" because reasonable people would not trade given the benefits and harms of exchanges.

四、The liquidator may challenge in court any unreasonable transaction relating to a director of the company if the transaction was entered into within four years or before the appointment of a liquidator. It is worth noting that, unlike unfair preferences and non-commercial transactions, unreasonable director transactions can be recovered even if the company does not go bankrupt. Unreasonable director-related transactions meet the following criteria:

1. Must pay, transfer property or issue shares, or assume the interests of a director or a director's close partner, whether natural or corporate, on behalf of the director or close partner;

2. Reasonable persons in the case of the company, taking into account the benefits and damages arising from the transaction, would not enter into the transaction.】

Question 2.2 [maximum 3 marks]

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?

[First, the insolvency Act and Chapter V of the Companies Act (except parts 5.2 and 5.4a) have the same scope of suspension and suspension as article 20 of the Model Law;

Secondly, the Australian courts should consider the specific circumstances of the case when considering the application of the creditors of the company; That is, whether the case needs to affect the broader resource management reprieve of secured creditors or only the suspension of liquidation of unsecured creditors;

Furthermore, in analysing the specific circumstances of the case, the voluntary administration is suspended if the foreign proceeding is clearly a commercial salvage proceeding and suspended if the foreign proceeding is clearly a liquidation proceeding. If the foreign procedure is not obviously a commercial rescue or liquidation, more factors will need to be considered.

Finally, CBIA provides that, in any degree of inconsistency, the Model Law prevails over the insolvency Act and the relevant corporate law sections. Moreover, there is no requirement for reciprocity under the Model Law in Australia.]

Case law? Fair answer. **2 marks**

Question 2.3 [maximum 4 marks]

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

[Ipso facto clause is a clause that refers to the suspension of contractual rights after an

enterprise enters bankruptcy proceedings.

The purpose of the suspension of the bankruptcy agreement is not to restrict the exercise of rights by the other party for any reason (such as non-payment or non-performance of the contract, etc.). The bankruptcy covenant suspension does not apply to contracts entered into before July 1, 2018, and has many other exceptions, including certain classes of contracts and rights.

With respect to claims arising from the suspension of contractual rights, the obligee may declare the claims, provided that proof of losses suffered shall be provided.]

You should have distinguished between Bankruptcy Act and Corporations Act. Exceptions? **1 mark**

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

"Australia's insolvency and restructuring options have in the past been very creditor-friendly. However, recent reforms have made Australia more of a debtor-friendly jurisdiction."

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

[I agree with the above statement. The specific reasons are as follows:
一、Reorganization and bankruptcy proceedings in Australia are generally regarded as "beneficial to creditors", because the system and provisions of the bankruptcy system focus on ensuring that creditors can be paid off to the greatest extent. It is mainly reflected in the following aspects:
1. Unsecured creditors may issue specific notices in accordance with the provisions of the bankruptcy law and the company law to require individuals or companies to repay their debts. If it is not paid off within 21 days after the notice is given, the unsecured creditor may apply for personal bankruptcy or termination of bankruptcy of the company. Failure to comply with such requirements is an act of personal bankruptcy, which leads to the presumption of bankruptcy of individuals or companies. Although the court stated that this procedure should not be used as a debt collection tool for solvent individuals or companies, it is a very effective procedure;
2. The secured creditor has the right to enforce its rights during the bankruptcy proceedings of the bankrupt individual and the bankruptcy proceedings of the bankrupt company, and the main creditor who has secured all or substantially all the property of the company is still entitled to appoint a receiver of the voluntary administrator as long as a certain time limit is observed;
3. As the main formal corporate rescue procedure in Australia, one of the objectives of voluntary management is to maximize the opportunities of bankrupt companies or their business to continue to exist according to the terms of the corporate arrangement contract (DOCA), but another objective of voluntary management is to achieve the maximum return allocated to creditors and improve the debt repayment rate;
4. Australia's avoidable transaction system, especially in corporate liquidation, allows the recovery of transactions for the benefit of creditors without proving misconduct, such as intentional defeat of creditors.
二、 Australia's voluntary corporate governance system and some recent reforms to corporate insolvency proceedings are designed to encourage stronger corporate governance Corporate and commercial rescue culture and promote the dominance of existing creditor rights. The main manifestations are:
1. The main objective of the voluntary management system is to maximize the chances of a bankrupt company or its business continuing to exist in accordance with the provisions of DOCA;

2. Except for some exclusions, as of July 1, 2018, creditors were unable to enforce their ipso facto contractual rights only on the basis of the company's bankruptcy or entry into external management. The personal bankruptcy system adopts a more strict approach, and the bankruptcy law makes the ipso facto provisions of bankruptcy completely invalid;
3. As of September 2017, the directors of the company can use the "safe harbor" of bankruptcy transaction debt to continue to allow the company to bear debt, so as to implement informal restructuring attempts under the supervision of designated restructuring experts.
4. The Australian federal government recently passed the coronavirus economic response package omnibus act 2020 (hereinafter referred to as the "epidemic bill"). The Act came into force on March 25, 2020 and made temporary amendments to the Corporations Act 2001 (CTH) and the bankruptcy act 1966 (CTH) to mitigate the financial impact of the epidemic on enterprises. A temporary "safe harbor" provision has been added to the epidemic law, that is, the directors of the company can be temporarily exempted within 6 months after the epidemic law comes into force. This means that if the company incurs debts in the normal course of business within these six months, resulting in the company's insolvency, the directors can be exempted from personal liability. It should be noted that this exemption will not apply if the debt occurs before March 25, 2020. Moreover, the explanatory memorandum of the epidemic situation act points out that the generation of the debt must be "necessary", otherwise the directors cannot be exempted. The new safe harbor provisions also do not apply to corporate debts arising in some cases, but the relevant regulations have not been published.】

This could have been stated / set out more clearly, but you have touched on all the major points. **10 marks**

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

Question 4.1 [maximum 9 marks]

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?

[Aussiebee Pty Ltd (Aussiebee), a company established in the fictional Lyon, has appointed a liquidator for Aussiebee in Lyon. The liquidator applied to the federal court of Australia for recognition of Lyon liquidation as a foreign main proceeding. Aussiebee's centre of main interests is in Lyon. As a foreign main proceeding recognized by the federal court of Australia, the application of the liquidator shall be supported by the court. However, the tax interests of the IRS should be protected first. As in the Ackers V Department Commissioner of Taxation, the tax authority's application to the federal court for its tax claims needs to be fully guaranteed.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".]

No, COMI is in Australia! Some marks for correctly identified issues. **4 marks**.

Correct answer was:

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.

Applying *Ackers v Seputy Commissioner of Taxation*, that if the Court is to entrust the NewYums shares to the Lyonessian liquidator, then the ATO should give leave to the ATO 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 it were entitled to prove for the tax debt as an unsecured creditor in the Lyonessian proceeding, because this is an appropriate way to ensure that the interests of the ATO as a creditor were adequately protected (Model Law, Art 22).

Question 4.2 [maximum 6 marks]

Hyrofine Australia Pty Ltd (HA) is a company incorporated in Australia. It is in the business of re-refining waste oil from electric substations in Australia and selling the re-refined oil. All of the shares in HA are owned by HA's parent company, Hyrofine Group Ltd (HGL), also incorporated in Australia. The same Board of directors controls both HGL and HA.

HA operated an oil re-refining plant near Sydney, Australia as a joint venture with Best Oil Refining Pty Ltd (BOR). The joint venture proved to be unprofitable and the plant ceased operations in mid-2020.

HA's major remaining asset is a second re-refining plant that it operates near Perth, Western Australia. This plant has only been in operation for one year. The funding for the Perth plant has been provided by a major shareholder of HGL as an unsecured loan for AUD 30 million. The loan agreement provides that the loan is repayable by monthly instalments over a term of 5 years with the first payment due at the end of 2021. The loan agreement also provides that the loan becomes automatically due and payable in full if HA enters into any formal insolvency or restructuring process in Australia.

HA also owns three large trucks that transport waste oil to the Perth re-refining plant and transport re-refined oil to HA's customers. Those trucks were purchased with a AUD 3 million loan from the Commonwealth Bank of Australia (CBA). That loan is secured by mortgages over the three trucks. The mortgages are not registered on the Personal Property Securities Register.

In July 2020, BOR commenced proceedings against HA in the Supreme Court of New South Wales for damages in respect of the failed joint venture. On 1 October 2020, the Supreme Court found in favour of BOR, ordering that HA pay AUD 4.6 million in damages to BOR.

Between October 2020 and October 2021, HA continued to trade, incurring debts to trade creditors as well as borrowing AUD 5 million from its parent company HGL. It made only a small profit from its Perth re-refining plant.

In October 2021, you are called in to advise the Board of directors of HGL and HA about the financial predicament of HA. The Board tells you that HA has been insolvent since the judgment was handed down in October 2020, because HA does not earn enough from its second refining plant to meet the judgment debt and to start repaying CBA at the end of 2021. The Board also tells you that there is no more funding available for HA's operations, and that they have exhausted all possibilities for refinancing HA's debts.

What do you advise the Board to do about HA? What are the main issues that the board of HGL and HA should be aware of in light of the facts set out above?

【First of all, according to the facts of this case, ha company is insolvent and has no solvency to creditors. Therefore, the procedure of voluntary liquidation of members is not applicable, but only voluntary liquidation or compulsory liquidation of creditors.

Secondly, the board of directors of HGL and ha need to understand the following main issues:

1. If the board of Directors considers that the company is insolvent and adopts the procedure of voluntary liquidation of creditors after passing the special resolution of the shareholders' meeting, it is necessary to entrust a liquidator. The liquidator must convene the first creditors' meeting within 10 working days to determine whether to replace the Liquidator or determine the creditors' Committee;

2. If the court orders the company to declare bankruptcy according to the application of interested parties, the company shall be subject to compulsory liquidation. That is, if the debtor fails to repay the debt within 21 days after the creditor (the value must be at least $2000) makes a debt repayment request, the court can presume that the company is bankrupt.

3. Appointment of Liquidator: the directors of the company may appoint a liquidator when deciding on the liquidation of the company, but the creditors may replace the currently appointed liquidator with the liquidator nominated by themselves at the subsequent creditors' meeting. If the creditors decide to voluntarily manage the company, during the period of

voluntary management of the company, the voluntary manager himself will become the liquidator.

4. Duties of the liquidator: after the appointment of the liquidator, the directors are still in office, but their duties are suspended. Main responsibilities of the liquidator: occupy the assets of the company; Check the company's financial books and records, determine the scope of the company's property, the situation leading to the liquidation of the company and any

Any transaction that may violate the revocable transaction clause in the company law; Seek the assistance of the directors in the investigation of the liquidator, require the directors to complete the report on the company's affairs, attend the liquidator's meeting, and provide the information reasonably required; Regularly communicate with creditors, including notifying creditors of the appointment of the liquidator and the rights during liquidation, requiring the submission of debt certificates to the liquidator, providing the notice of initial remuneration and other information about the remuneration of the liquidator, and providing the statutory report on liquidation within three months after the appointment; Realize and distribute the company's property to creditors.

5. Suspension of execution of the company: Although CBA is a property secured creditor, it has not handled the registration of mortgaged property, so the exercise of contract rights is suspended; An unsecured loan of $30 million provided by HGL's major shareholders. Notwithstanding the provisions of the loan agreement, if ha conducts any formal bankruptcy or reorganization proceedings in Australia, the loan will automatically mature and be paid in full. The liquidator has the right to suspend the exercise of the rights under the contract.

6. Creditors need to provide debt proof to the liquidator as the basis for proving and paying off their claims.

7. In violation of the terms of the bankruptcy transaction, ha continued the transaction from October 2020 to October 2021, incurred debts to the transaction creditors and borrowed a $5 million from its parent company HGL. The directors may face the risk of compensation and punishment for the above transactions.

8. If the company carries out voluntary management and the creditors sign the DOCA at the second creditors' meeting, the DOCA must be implemented within 15 working days after the meeting. After the implementation, the voluntary management ends and the DOCA takes effect. The rights of directors will be restored when DOCA comes into force.

9. If the company adopts the creditor arrangement scheme for reorganization, it needs the consent of 75% of the total creditor's rights present and voting, but this method is time-consuming and expensive, and it takes at least 3 months to complete.

In summary, it is suggested that HA and HGL adopt the mode of voluntary management to restructure the company.]

Your advice should have been to place HA in voluntary administration. You refer to voluntary management but I assume you mean voluntary administration. Your answer has missed the point of the question though. **2 marks**

*** End of Assessment ***