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 (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 202223-336.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 dealing 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 time and date for the submission of this assessment is **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 **9 pages**.

ANSWER ALL THE QUESTIONS

Commented [BB1]: TOTAL = 36/50 (72%)

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

Commented [BB2]: Sub-total = 10 marks

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** a debtor-in-possession process?

(a) Small company restructuring.

(b) Bankruptcy.

(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.

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 100,000 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 debt agreement under Part IX.

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

(c) A small company restructuring.

(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 claims **are not provable** in a liquidation?

(a) Future debts

(b) Contingent claims

(c) Penalties or fines imposed by a court in respect of an offence against a law

(d) Claims for damages for personal injury

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.

MULTIPLE CHOICE: 10/10

QUESTION 2 (direct questions) [10 marks]

Commented [BB3]: Sub-total = 7 marks

Question 2.1 [maximum 3 marks]

Name the five types of voidable transactions that can be reversed by a liquidator on application to the court, and explain whether it is a complete defence to each of these types of voidable transactions if the defendant proves that they were not aware that the company was insolvent at the time they entered into the transactions.

Unfair Preferences through a court application by the liquidator. No it is not a complete defense if the defendant proves he/ she was not aware that the company was insolvent at the time they entered in the transaction. The Court will look at the ultimate effect of the transaction to see if there was unfair preference. There are also three elements that need to be proved by the party i.e:

a. They acted in good faith
b. Was not aware at the time of the transaction that the company was insolvent
c. Provided valuable consideration for the transaction

Uncommercial Transactions through a court application by the liquidator. No it is not a complete defense if the defendant proves he/ she was not aware that the company was insolvent at the time they entered in the transaction. There are three elements that need to be proved by the party i.e:

a) They acted in good faith
b) Was not aware at the time of the transaction that the company was insolvent
c) Provided valuable consideration for the transaction

Unreasonable director-related transactions. No it is not a complete defense if the defendant proves he/ she was not aware that the company was insolvent at the time they entered in the transaction. An unreasonable director-related transaction can be recovered even if the company was not insolvent at the time of the transaction.

Unfair loans. No it is not a complete defense if the defendant proves he/ she was not aware that the company was insolvent at the time they entered in the transaction. An unfair loan can be recovered even if the company was not insolvent at the time of the transaction. The court considers a loan to be unfair if the interest or charges relating to the loan were extortionate.

Circulating security interests. No the circulating security interest is deemed to be void if it was created in a six month period prior to commencement of the external administration and the secured creditor did not provide new value for the security interest.

QUESTION 2.1: 3/3

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?

The court has specified that the scope of stay under Article 20 of the Model Law is the same as would apply if the stay arose under the Bankruptcy Act or Chapter 5 of the Corporations Act.

QUESTION 2.2: 1/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

With regard to the differences between liquidations and the simplified liquidation process for small companies the most noticeable differences are:

a. The clawback of voidable transactions will only apply to unfair preferences over the value of AUD 30 000 that were paid to related parties of the company within three months prior to the commencement of liquidation.
b. In a normal liquidation section 533 requires a liquidator to report to the ASIC suspected wrongdoing. In a small company liquidation the liquidators are only required to report potential misconduct where there are reasonable grounds to believe that the misconduct has occurred
c. In a normal liquidation the liquidator is required to provide statutory reports to creditors but in the small company liquidation only one reports is required within three months of the liquidators appointment.
d. In a normal liquidation the liquidator may convene creditors meetings and in some instances is obliged to convene creditors meetings if directed by creditors or the ASIC. No creditors meetings or committees of inspection are required to be held in small company liquidations. Instead there are provisions for electronic communications and voting between the creditors and the liquidator.
e. There is a simplification of the proof of debt process and only one dividend payment can be made by the liquidator

QUESTION 2.3: 3/4

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

Commented [BB4]: Sub-total = 11 marks

"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.

Creditor-friendly insolvencies are generally more supportive of secured and unsecured creditors. Reimbursement of creditors is the main aim of the liquidation as is the ranking of claims and protecting security interests of secured creditors. The insolvency process is controlled by an independent person who reports to creditors and often requires their approval. The directors of the insolvent company are more often restricted from alienating the companies assets and continuing to trade. There are also generally claw back which allow the liquidator to set aside voidable transactions and hold the directors personally liable for certain transactions made prior to liquidation.

Debtor-friendly sequestrations on the other hand are generally supportive of the insolvent debtor and its directors. The debtor can remain in control of the assets and more attention is given to restructuring. More attention is also given to the idea of the debtor receiving a fresh start.

I agree that certain legislation has been passed in recent years which has made made Australia a more debtor-friendly jurisdiction than it was before.

There are two debtor-in procedures namely a creditors schemes of arrangement and small business company restructuring. Both these procedures allow the directors to remain in office throughout the restructuring process in the hope that the company may be saved.

With regard to creditors schemes of arrangement the directors enter into negotiations with creditors prior to insolvency in an effort to restructure the company's debts. If supported by creditors, the directors will bring an application to court for an order convening a meeting of creditors where they will decide whether or not to approve the scheme. At the meeting the scheme must have support of the majority of creditors present at the meeting and 75% approval of the total amount of debts and claims at the meeting. If the scheme is approved at the meeting a second court application must be brought to approve the scheme. The court will consider whether or not there has been a full disclosure of all material facts, whether or not the meeting was properly convened and whether or not there was any unfairness to creditors. If the scheme is approved by court the scheme will be implemented in terms of the scheme document. There is no requirement that an administrator be appointed. The effect of the approval of the scheme will result in a moratorium of all enforcement action against the company. *Ipso facto* rights with regard to contracts entered into on or after the 1 July 2018 will also be prohibited while the scheme is being negotiated and implemented. This will result in the creditors being unable to rely on *ipso facto* clauses to cancel contracts solely on the basis that the company is financially distressed. The scheme can also bring dissenting creditors provided a majority of votes are met. It can also release creditors rights against third parties other than the company.

Another debtor-in procedure is that of the small company restructuring process whereby the distressed small companies are able to restructure their debt. The directors retain control of the business and affairs while developing a restructuring plan although there are restrictions and their powers. In order to be eligible certain criteria need to be met. The company debts must not exceed AUD 1 million, No current director of the company must have been a director of another company that had been under restructuring or a simplified liquidation process in the last seven years and the company itself must not have been under restructuring or a simplified liquidation process within the last seven years. It must be noted that the directors must appoint a restructuring practitioner if the directors are of the opinion that the company is insolvent or is likely to become insolvent in the future. In this case the restructuring practitioners role is that of an advisory role although there are limits on the alienation of company property by the directors. When a restructuring practitioner is appointed

the restructuring begins. The directors commit an offence if they entered into an agreement relating to the companies property without the consent of the restructuring practitioner or a court order. Any transaction entered into in good faith, by the restructuring practitioner, the company with the consent of the restructuring practitioner or under a court order in also not liable to be set aside in the winding up of the company. Third party rights cannot be enforced without consent of the restructuring practitioner or the court. There is also a stay on the enforcement of *ipso facto* clauses by creditors.

In recent years there has been the implementation of the two debtor-in friendly restructuring procedures which has veered from the more creditor-in friendly procedures that were traditionally used in Australia.

11/15 marks.

The answer identifies some of the ways in which insolvency options have become more debtor-friendly. However, it failed to mention the insolvent trading safe harbour. The essay tangentially mentions the increased procedural rights which creditors have in the insolvency process but much more could be said on this to demonstrate the creditor-friendly aspects of insolvency law (ie the right for creditors to require Ips to provide information, easier to vote out Ips etc).

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

Commented [BB5]: Sub-total = 8 marks

Question 4.1 [maximum 8 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 in both Sydney and in Lyonesse. Its warehouses are only in Sydney. Aussiebee regularly sells its chocolates all over the world, with orders received in Lyonesse and shipped from the Sydney 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 under the *Cross-Border Insolvency Act 2008*, 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?

I would advise the Australian Taxation Office (ATO) to intervene in the recognition application in order to have representation at the application so their interests are considered by the court when making is decision on the application and perhaps attempt to modify any order that may be granted.

Based on the decision in *Ackers v Saad Investments Co Limited (in official liq)* (2010) 190 FCR 285 and Article 16(3) of the Cross Border Insolvency Act of 2008, I believe that the foreign representative will easily establish that NewYums (Pty) Ltd (NewYums) center of main interest is in Australia as it is an Australian-incorporated company. NewYums would certainly fall within the definition of *Foreign Main Proceeding* set out in Article 2(b) of the CBIA. Provided the foreign representative meets the requirements set out in Article 15 the recognition order will most likely be granted. Article 20(1) provides automatic relief to a recognition order of a foreign main proceeding.

Article 14(1) requires the foreign representative to notify all creditors of the recognition application which would include the ATO. I would then advise them to intervene in the recognition application in order to ensure that they can present there case to the court and ensure that their rights are protected. By intervening in the application the court will take into account ATO representations and may vary or modify it order. I would advise them to request the court to make an order entrusting all NewYums assets to a Australian liquidator so that local creditors are not prejudiced in terms of Article 21(2) and 22.

I would advise the court of the decision in Ackers v Deputy Commissioner of Taxation (2014) 223 FCR 8 where an order was made to modify the recognition order by the Deputy Commissioner of Taxation to enforce its tax claim in Australia for the purpose of recovering an amount up to the *pari passu* amount the Revenue Department would have received if they were entitled to prove a claim.

4/8 marks – the answer identified the correct law (*Ackers* and the relevant sections of the CBIA) however, it applied them incorrectly. Aussiebee is the debtor, not NewYums. Therefore, it would be necessary for Aussiebee to *displace* the presumption that the COMI is the place of incorporation. There were a number of facts in the question which could have established this. Although there is a strong grasp of the substantive law, I cannot give you more than 4 marks for failing to apply the law to the correct entity.

Question 4.2 [maximum 7 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.

A competitor has recently approached HA with an attractive offer to purchase the 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?

I would advise the directors to immediately cease all trading and not to enter into any contracts nor alienate any of the HA's property. I would further advise that because HA is insolvent and there is no more funding available to continue operations that the directors should consider either corporate rescue options or liquidation of the company. Corporate rescue options come in the form of voluntary administration, creditors scheme of arrangement or the small company restructuring process. A scheme of arrangement would not be an option in this scenario as HA is insolvent and has exhausted all avenue for further funding. Its highly unlikely that the directors would receive support from creditors for the approval of the scheme if this is the case. Small company restructuring would also not be possible as HA debts are more than AUD 1 million and would exceed the threshold. The directors could apply for voluntary administration of HA. The purpose of a voluntary administration is for the maximizing the chance of the company or its business continuing or produce a better return for creditors in liquidation. The advantage of entering the company in voluntary administration would be moratorium on the enforcement of creditors rights during voluntary administration. There is also a moratorium on the enforcement of *ipso facto* clauses by creditors.There is also a moratorium on the enforcement of creditors rights against the directors of the company for any guarantees they may have provided for the companies debts during the voluntary administration.

The other option would be for the directors to resolve to place Ha into liquidation by way of a creditors voluntary liquidation. *Ipso facto* clauses can be enforced along with other voidable transaction provisions.

The issues that the directors should be aware of would be possible insolvent trading and the personal liability that may extend to the directors or Hyrofine Group (Pty) Ltd. A director will be liable for insolvent trading when he or she was director at the time of inuring the debt, the company was insolvent, there were reasonable grounds to suspect that the company was insolvent, the director failed to prevent the company from incurring the debt. So if HA continued to trade after October 2020 even though it was insolvent and incurred more debt, the directors or the holding company will be liable for insolvent trading. The court may impose a civil penalty, disqualification order or even criminal penalty.

There is also the issues of possible transactions that could be declared voidable transactions. The loan from the major shareholder of Hyrofine Group could be enforced with the *ipso facto* clauses if HA is placed in liquidation but cannot be enforced if placed in voluntary administration.

With regard to the three trucks mortgaged to Commonwealth Bank of Australia, because the mortgages were not registered on the Personal Property Security Register the security interest of Commonwealth Bank of Australia would not be perfected meaning that the trucks will vest in HA and Commonwealth Bank of Australia would not have a secured claim.

The damages claim of Best Oil Refining could be proved as a claim in liquidation because it arose from a contract.

QUESTION 4.2: 4/7

*** End of Assessment ***