INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8F

NEW ZEALAND

This is the **summative (formal) assessment** for **Module 8F** of this course and is compulsory for 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 8F. 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.assessment8F]**. An example would be something along the following lines: 202021IFU-314.assessment8F. **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) BST (GMT +1) 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] Total mark: 5

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: 1

If a creditor is dissatisfied with the Official Assignee or Liquidator's decision in respect of its proof of debt, the creditor may:

(a) challenge the decision through an application to the ITS or MBIE.

(b) apply to the Official Assignee or Liquidator for the decision to be reversed or modified.

(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: 0

(a) Receivership. [receivership is not a collective process – generally for the benefit of the secured creditor or in case of Court appointment, to meet the purposes of Court order]

(b) Liquidation.

(c) Deed of company arrangement.

(d) Voluntary administration.

Question 1.3

Select the correct answer: 1

Voluntary administration **is not** used for the following reason(s):

(a) Maximisation of the company's prospects of trading through and/or continuing in existence.

(b) To enable a Deed of Company Arrangement to be entered into for the benefit of creditors.

(c) To minimise tax liability by giving the Inland Revenue Department preferential status.

(d) Enable the company to be administered in such a way to provide a better return to creditors than they would otherwise receive by way of an immediate liquidation.

Question 1.4

Select the correct answer:

A receiver: 0

(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.

Question 1.5

Select the correct answer: 0

Company A goes into liquidation. It has a secured creditor who has security over all present and after-acquired property, including accounts receivables and inventory. There are insufficient amounts to meet all creditor claims. Which of these claims would be last in priority?

(a) PAYE owed to the Inland Revenue. [PAYE is preferential to a limited degree under Schedule 7 of the Companies Act 1993, particularly where the security is over accounts receivables and inventory]

(b) Employee claims.

(c) The Liquidator's costs and expenses.

(d) Costs of the creditor who applied to put the company into liquidation.

(e) The secured creditor.

Question 1.6

Select the correct answer:

Assuming attachment has occurred, a financing statement: 0

(a) creates a security interest which gives a creditor priority over other creditors.

(b) is registered by the debtor on the Personal Property Securities Register to perfect a security interest.

(c) is the only way perfection of a security interest can effected. [perfection can also be achieved by possession]

(d) will determine the order of priority between competing security interests, based on time of registration.

Question 1.7

Select the correct answer:

Liquidators in New Zealand: 0

(a) can only be appointed by the Court as they are officers of the Court. [Liquidators may be appointed by a range of other parties under the Companies Act 1993, including the Board or shareholders]

(b) can be appointed by creditors at a Watershed meeting.

(c) act as agents for the appointing creditor. [Liquidators act as agent of the company]

(d) protect the interests of all creditors of the company. [Liquidators only protect the interests of unsecured creditors]

Question 1.8

Select the correct answer: 1

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:

Secured creditors in New Zealand: 1

(a) have absolute rights ahead of other unsecured creditors.

(b) stand outside the liquidation or administration of a company.

(c) have exclusive rights to appoint a receiver.

(d) have 10 working days within which they must elect to enforce their rights under the voluntary administration regime.

Question 1.10

Select the correct answer: 1

A monetary debt judgment obtained from an Australia High Court may be enforced in New Zealand under the:

(a) Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

(b) Reciprocal Enforcement of Judgments Act 1934.

(c) Trans-Tasman Proceedings Act 2010.

(d) common law.

QUESTION 2 (direct questions) [10 marks] 3

Question 2.1 [maximum 5 marks] 0

Name the different types of voidable transactions that can be avoided by a liquidator and indicate whether the company needs to have been insolvent at the time of the transaction, or become insolvent upon entering into the transaction.

[These can include :
- where there is a group of companies and pooling is appropriate,
- where proper records have not been kept and loss has arisen as a result, or
- where it is appropriate for directors or a manager or promoter to restore money or property to the pool of assets because their conduct has created loss to the company.]

- Voidable transactions: s 292 Companies Act. Company must be unable to pay its due debt at time of impugned transaction. Voidable period, 6 months for third party creditors, 2 years related parties (general rule)

- Voidable charge: s 293, Companies Act. Company must have been unable to pay its due debt as result of transaction.

- Transactions at undervalue. Transaction occurred at time company unable to pay due debts. 2 years.

- Transactions for inadequate or excessive consideration with certain related parties (directors, spouses, relatives) – 3 years. No need to demonstrate insolvency.

- Related party charges/security. No time limit. Company unable to pay all debts in liquidation.

Question 2.2 [maximum 3 marks] 1

In what way can receivership come about in New Zealand? In whose interests does the receiver act? From where does the receiver derive his powers?

[The option available to a creditor is Receivership. This can come about in New Zealand in respect to secured property. [Good]

The receiver act on behalf of secured creditor to collect and sell one or more of company assets over which they have financial claim

A receiver derives his/her power from the High Court pursuant to specific power conferred by statute. [see comments below]

The appointment will usually have a specific purpose, and the receiver's powers will be granted as necessary to meet this purpose. A court-appointed receiver is subject to the supervisory jurisdiction of the Court. The vast majority of receiverships in New Zealand arise through private appointment by a secured creditor exercising its contractual right under a security agreement. Court approval is not required for such an appointment, though the appointer must ensure that the appointment occurs in writing and all requisite conditions under the contractual terms have been met.]

A receiver in NZ can be appointed in one of two ways. Through the exercise of a contractual right to appoint a receiver (in which case the powers of the receiver are set out in the contract and the Receiverships Act). The receiver acts in respect of the secured debt, with the purpose of realising sufficient secured assets to repay the debt amount.

A receiver may also be appointed by the Court, in which case the receiver's powers are governed by the terms of the Court order, as well as the Receiverships Act.

Commented [AH1]: The receiver acts in respect of assets over which the secured creditor has security, and realises the assets to repay the secured debt.

Question 2.3 [maximum 2 marks] 2

Name the options available to a creditor who has obtained a judgment outside of New Zealand and who wishes to enforce the judgment in New Zealand. What role does the New Zealand court play in this process?

[- enforcement under the Reciprocal Enforcement of Judgments Act 1934;
- enforcement under the Enforcement of Commonwealth Judgments Under Senior Courts Act 2016;
- enforcement under the Trans-Tasman Proceedings Act 2010; and
- enforcement under common law.

The role the New Zealand court plays in this process is to co-operate either directly or through an insolvency administrator]

QUESTION 3 (essay-type questions) [15 marks in total] 1

Voluntary administrations have not received significant traction in New Zealand. Discuss the potential reasons for this, having regard to the process and New Zealand's commercial context. In what circumstances would you advise a company to consider voluntary administration? Name 2 considerations that would influence this advice and explain why.

Voluntary administrations have not gained significant traction in NZ. One potential reason is that the IRD does not retain or have preferential status in an administration, which means they are unlikely to support it as a rescue option, compared to liquidation, where the IRD is afforded preferential status with respect to some of its debt.

Other potential reasons for its lack of popularity include:

- A large proportion of NZ businesses are SMEs (mainly small). The procedural aspects of a VA are fairly onerous and costly. This means the costs of a VA is generally difficult to sustain for smaller businesses. This context makes the NZ market different in Australia, where businesses are likely to be bigger, with a better ability to sustain costs.
- Lack of general understanding by commercial community of how VA operates.

Practical considerations which might influence decisions around whether VA is a viable option include as follows:

- Critical: Who are the secured creditors, and what security do they have? Are the major secured creditors, with security over all the company's assets, likely to support? If yes, then VA is a viable option. If no, then unlikely to reach DOCA stage (i.e. likely to appoint receiver within 10 working day window).
- Is the business likely to be sold as a going concern and/or is there the potential for the business to trade on?
- Under either scenario, what are the key assets that need protecting? Are there immediate assets, such a lease, which require the protection of the moratorium, while an administrator goes through the process of investigating the affairs and/or putting together a DOCA?
- What personal guarantees are in place?
- What is the debt level? What proportion is secured vs unsecured?
- Do the directors have a feel for general support (for example, is there one creditor who is causing trouble?)

[The companies act provides for two main corporate rescue system namely compromise and voluntary administration.
Voluntary administration (VA)
One of the key benefits of the VA regime is the moratorium that arises once an administrator is appointed. The moratorium provides the company with relief from creditor action while various options are explored. The moratorium is not absolute and secured creditors with security over substantially the whole of a corporate entity's assets, retain enforcement rights for a period of time. In practical terms, this generally means that VA has little utility unless there is support by the major secured creditors.

Commented [AH2]: Yes – this comes from the notes, but application is necessary.

Control of assets and business affairs
The administrator takes control of the business and property of the company. The administrator may carry out and manage the affairs of the company and terminate, or dispose of all or part of that business, and may dispose of property. The administrator may perform any function and exercise any power that the company or its officers could perform or exercise as though the company was not in administration. Any dealings or transactions by a company in administration is void unless entered into by the administrator on behalf of the company, or with the administrator's consent. Directors remain in office, however,

although their powers are restricted from the time administration commences. Directors may not perform or exercise any function or power other than with the administrator's written approval. Directors are also required to comply with certain obligations, including the provision of a statement of financial position, deliver books and records and to attend the watershed meeting.

Moratorium
On the commencement of administration, subject to some exceptions, enforcement actions against the company or its property are suspended unless the administrator consents to the action, or the Court gives its permission. This includes proceedings against the company, recovery of any leased property enforcement of a charge against a company, or asset utilised by the company in its trade. The moratorium commences from the appointment of the administrator and ends at the watershed meeting (or any extended date for the watershed meeting). The moratorium serves two purposes:

i) it prevents the preferential treatment of creditors or disposition of property while the administration is in progress and
ii) it ensures that the role of the administrator can be performed without impediment. The main exceptions to the moratorium are:

• Secured creditors with security over the whole or substantially the whole of a company's property. The secured creditors may enforce rights for a period of up to 10 working days after commencement of the administration. In New Zealand an administrator is unlikely to be appointed unless major secured creditors have been consulted by the board and are supportive of the appointment. A recent court decision suggests that the "decision period" can be extended through the written consent procedure set out at section 239ABC(a) of the Companies Act.
• Secured creditors who commenced enforcement action prior to the appointment. The Court will grant an order limiting the secured creditor's rights, or a receiver's powers, if the interests of these parties are adequately protected.
• Perishable goods – there is no moratorium against entitled persons (a receiver, secured creditor or other entitled person) from enforcing a charge over perishable property.]

QUESTION 4 (fact-based application-type question) [15 marks in total] 1

Mr Strong was born in the UK but has travelled between the United Kingdom and New Zealand for most of his adult life as he has family and business interests there. He rented while he lived in the UK. He has bank accounts in both the United Kingdom and New Zealand.

He worked in the UK for a number of years, but decided he wanted to return to New Zealand. He sold his business in the UK and moved back to New Zealand. About two years later, proceedings were issued in the United Kingdom pursuant to a guarantee against Mr Strong. The creditor obtained judgment for GBP 500,000 and subsequently petitioned for Mr Strong's bankruptcy in the United Kingdom. Ms Finder was appointed trustee of the bankrupt estate.

Mr Strong had GBP 5,000 in his bank account in the United Kingdom. Other than that, Ms Finder was unable to uncover any other assets in the United Kingdom that could be realised for the benefit of creditors. She did discover, however, that Mr Strong owned some property in New Zealand.

Mr Strong had stopped working for about a year before he moved back to New Zealand.

Question 4.1 [maximum 8 marks] 1

What options are available to Ms Finder to recover property belonging to Mr Strong located in New Zealand? What factors would be relevant in deciding what option to use and how Ms Finder decides to proceed?

[a. Assistance available in New Zealand to a foreign insolvency administrator such as Mr Strong is comprised of:
• recognition and assistance provided at common law;
• assistance previously provided under section 135 of the Insolvency Act 1967 in respect of bankrupt individuals;
• liquidation of assets of an overseas company pursuant to section 342 of the Companies Act. Common law : The common law position in New Zealand founded on English principles of private international law.

See comments below at 4.2.2.

Options are:

- Apply to Court for recognition as foreign main proceeding or foreign non-main proceeding.
- Seek assistance of Court at common law – perhaps granting powers to require examination of bankrupt.
- Factors that are relevant – see 4.2.2 regarding COMI. Also, consider value of assets and practical considerations such as difficulty locating Mr Strong and service issues.

Relevant Factors

The recognition granted was subject to any positive law in New Zealand. Once a recognition order was made, the New Zealand courts were required at common law to provide assistance to the foreign proceeding.
The nature of the assistance would be governed by New Zealand insolvency law and would be decided at the discretion of the Court. Assistance could include, for example, the staying of proceedings in New Zealand, or orders enabling a foreign administrator to dispose of assets for distribution in accordance with the laws of the foreign jurisdiction.
Assistance provided at common law in respect of foreign insolvency proceedings could be dependent on whether creditors in New Zealand were adequately protected under the insolvency law of the foreign jurisdiction which the Court was asked to assist with.
Other factors that justified the Court ordering ancillary New Zealand insolvency proceedings include where specific statutory powers were required (for example, powers of examination), or where rights of action vested in the liquidator by statute (for example, recovery of voidable / preference claims).

Question 4.2 [maximum 7 marks]

Question 4.2.1 [maximum 4 marks]

What options are available to Ms Finder to: 0

(a) find out further information about Mr Strong's affairs in New Zealand, if she believes she has insufficient information; and

(b) assuming she has reliable information about concealed assets in New Zealand, what steps could she take to protect those assets?

Ms Finder can ask the Court for assist either at common law, or, under the UNCITRAL model law for assist with finding out more information to assist her with ascertaining Mr Strong's financial affairs in NZ. Under the UNCITRAL model, she could apply to the Court for interim relief in the context of an application for recognition of the bankruptcy proceeding in the UK, in NZ (see Article 19, Chapter 2).

An application under Article 19 for interim relief would allow the Court to grant the specified orders at 19(1) which include staying executing, entrusting the affairs of the bankrupt to the foreign representative, or any of the orders at 21(c) or (d) (prohibition against disposal of assets or granting powers to examine witnesses or obtain information about the affairs of the bankrupt). Obtaining information is critical to assessing whether the bankruptcy proceeding would qualify as a foreign proceeding.

Question 4.2.2 [maximum 3 marks] 0

If Ms Finder sought to have her appointment recognised under the Insolvency (Cross-border) Act 2006 in New Zealand, do you think she would be successful? Provide reasons for your answer.

[Under this process, the Court would recognise the appointment and authority of a foreign insolvency administrator appointed to a debtor in the place of that debtor's domicile, in the case of an individual, or incorporation, in the case of an overseas company. Recognition would follow as a matter of course unless the foreign proceeding under which the foreign administrator was appointed was not final, was contrary to public policy or breached the rules of natural justice. The recognition granted was subject to any positive law in New Zealand. Once a recognition order was made, the New Zealand courts were required at common law to provide assistance to the foreign proceeding.]

In order for the application to be successful, Ms Finder would need to demonstrate that the UK bankruptcy proceeding is a foreign main proceeding. To do this, the foreign proceeding will be recognised as a foreign main proceeding if it is taking place in the state where the debtor has its centre of main interests. This term is not defined, however the habitual place of residence or registered office is presumed to be the center of the debtor's main interests. This presumption is rebuttable. The COMI needs to be determined by reference to objective factors that a third party can establish, so economic interests, family and social ties and other factors, can be taken into account.

Alternatively, Ms Finder could have the proceeding recognized as a foreign non-main proceeding, which will turn on place of establishment. This can occur where the bankruptcy proceeding does not have its COMI, but still has establishment. Establishment is defined as any place of operations where the debtor carries out non-transitory economic activity with human means and goods or services.

If a foreign main proceeding, the Court must grant relief, if foreign non-main proceeding, relief is discretionary.

On the known facts, might be difficult, given the bankruptcy order appeared to have occurred at a time when the habitual place of residence appears to be NZ. Mr Strong also appeared to have ceased economic activity in the UK approximately a year prior to moving back to NZ, suggesting that he no longer had employment or real economic ties in the UK. The facts also suggest that there was no longer any establishment in the UK. On either account, it is possible the Court will not be able to recognize the appointment under the UNCITRAL model, at least without more facts.

*** End of Assessment ***

Total question 1: 5/10

Total question 2: 3/10

Total question 3: 1/15

Total question 4: 1/15

Total mark: 10/50