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] 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: 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: 1

(a) Receivership.

(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: 1

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.

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: 0

Assuming attachment has occurred, a financing statement:

(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 obtained 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: 1

Liquidators in New Zealand:

(a) can only be appointed by the Court as they are officers of the Court.

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

(c) act as agents for the appointing creditor.

(d) protect the interests of all creditors of the company.

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: 0

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

(b) stand outside the liquidation or administration of a company. [secured parties have rights to participate in the VA process]

(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] 6.5/10

Question 2.1 [maximum 5 marks] 2.5/5

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.

Answer 2.1

Voidable transactions are those transactions entered during the specified period which allows certain creditors additional benefit of the estate than they would have had during the insolvency proceedings. Liquidators have a power to set aside such voidable or insolvent transactions. These are entered when the company is unable to pay its debts.

The specified period was two years prior to the amendments brought out after onset of Covid-19 which has shortened the period to six months. However, the period is still two years for related party transactions.

Various types of voidable transactions are:

1. Preferential Payments/ Insolvent Transactions.
2. Transactions and Undervalue.
3. Insolvent Gifts.
4. Insolvent Charges.
5. Transactions with related persons.

There is no requirement that the company needs to be insolvent at the time of transaction. However, the insolvency should follow such transactions.

Insolvent transaction: insolvent at the time of the transaction (company unable to pay its due debts)

Charge over any property or undertaking of a company: Statutory test: becomes insolvent upon entering into the transaction. 6 month claw back for third party creditors, 2 years for related parties. Transactions within 6 months of liquidation presumed to be insolvent, unless proven to the contrary.

Transactions at undervalue: It is not a requirement to demonstrate that the company was either insolvent or became insolvent upon entering the transaction, merely that the transaction was within the specified period and entered into at an undervalue. 2 year claw back.

Transactions with a related person (including with a director, relatives or a related company for either excessive or insufficient consideration): There is no requirement for a liquidator to establish that the company was either insolvent or became insolvent as a result of this transaction. 3 years claw-back period.

Charges entered into with related parties: Section can be invoked where assets of the company are insufficient to meet the debts of the company in liquidation. No requirement that the transaction occurred when company either insolvent or became insolvent by virtue of the security/charge (but will be highly relevant).

Question 2.2 [maximum 3 marks] 2/3

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?

Answer 2.2

Receivership is a process which is different from collective insolvency proceeding. The receiver is usually appointed over a secured property.

To initiate the process of receivership, the applicant applies to the High Court for appointment of receiver which in turn will appoint a receiver on the property. The appointment is made for a specific purpose and the receiver has to act within the framework and court supervision. Also subject to Receiverships Act, unless ordered otherwise. Powers derived from Court order and Act.

Other way to appoint a receiver is the private placement by the creditor by virtue of contractual obligations. The eligibility of a receiver is defined in the Receiverships Act.

Subject to the security agreement the receiver will act in the interests of the secured creditor by bringing the repayment of the debt secured. He serves like an agent of the grantor company.

As regards the powers of the receiver, the are derived from the contractual terms under which she is appointed because the receiverships act does not provide specific powers available to the receiver.

Question 2.3 [maximum 2 marks] 2/2

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?

Answer 2.3

The options available to a creditor for enforcing foreign judgements in New Zealand are as follows:

1. Reciprocal Enforcement of Judgments Act, 1934.

2. Enforcement of Commonwealth Judgments Under Senior Courts Act, 2016.
3. Trans-Tasman Proceedings Act, 2010.
4. Common Law.

Apart from the above the UNCITRL Model Law of recognition and enforcement of insolvency related judgements has also been passed in 2018.

The New Zealand court recognises such judgments and does not revisit into the merits of the final judgment either on errors or a fact of law.

QUESTION 3 (essay-type questions) [15 marks in total] 12/15

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.

Answer 3

Voluntary Administration in New Zealand is a process which is aimed at maximisation of value of the debtor and maintaining its existence to deliver a better value than the Liquidation.

It is true that the process has not received enough momentum, but there are few underlying reasons for the same such as:

- The preferential status of statutory dues like Inland Revenue Department: Every promoter of the company wishes to avail the benefit of administration to reorganise its business and strike a deal with important creditors and stakeholders by way of an arrangement. However, the priority is given to taxation authorities before certain unsecured creditors which does not increase the viability of the business.
- Costs involved: There is a large proportion of Small and Medium enterprises in New Zealand which is not able to meet the cost of Voluntary Administrations. In return, the actual stakeholders get very little.
- Moratorium Excludes the Secured Creditors: The purpose of every administration is to avail a breathing space to formulate a plan and negotiate with its stakeholders. However, secured creditors have certain enforcement rights during the moratorium which results in the business having a lower bargaining power.

I as an advisor would advise the company to avail the benefits of Voluntary Administration only if:

- **When the secured creditors are agreeing to settle the dues:** Voluntary Administration is a good way to avail the benefit of administration and revive the company by availing the benefits of moratorium. However, the same should be considered only when the secured debtors are not exploring other enforcement measures such as appointing a receiver.

- **Possibility of revival of company:** As the management of company finds a possibility of revival of the business due to positive operating variables but it is in financial stress, the administration can be a quick and effective way to reorganize the debts by executing a binding Deed of Company Arrangement while the directors remain in the office.

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?)

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

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] 5/8

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?

Answer 4.1

The options available to Ms. Finder to recover the property belonging to Mr Strong located in New Zealand are:

- Apply for recognition and assistance under common law principles.
  The Court in New Zealand will recognise the administrator appointed in the place of individual debtors domicile. The recognition would be granted subject to certain exceptions such as contrary public policy. The court will however, consider the

assistance to UK court based on certain factors such as whether adequate protection is available to the creditors in the New Zealand.

- Section 135 of Insolvency Act, 1967.
  Under this approach the High Court has an obligation to assist a foreign court of commonwealth country having jurisdiction over the bankrupt. UK is a common wealth country so this option remains valid.

- Section 342 of the Companies Act.
  This is not applicable in the case as Mr. Strong is an individual

  Ms. Finder should be guided by case law of *Williams vs Simpson.*

Options are:

- Apply to Court for recognition as foreign main proceeding or foreign non-main proceeding by Ms Finder as foreign representative.
- 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.

Question 4.2 [maximum 7 marks]

Question 4.2.1 [maximum 4 marks] 2/4

What options are available to Ms Finder to:

(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?

Answer 4.2.1

(a) The information to be sought depends on the subject matter. As regards the information of immovable property, Ms. Finder can approach a licensed provider of LINZ (Land Information New Zealand). Further, the District Court Rules and High Court Rules, 2016 contain provisions where a creditor can obtain information.

(b) Ms. Finder would have to be recognised to be able to seek appropriate directions from the court in New Zealand to protect the assets located in the New Zealand. Once the Liquidator is appointed it becomes her duty to protect the assets as per section 208 for efficient realization.

Commented [AH1]: This is usually in respect of the judgment debt.

Commented [AH2]: Ms Finder could apply for recognition and as a part of that, seek orders for interim relief

Good practical answer (4.2.1 (a))

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). As you have identified, obtaining information is critical to assessing whether the bankruptcy proceeding would qualify as a foreign proceeding.

Question 4.2.2 [maximum 3 marks] **1.5/3**

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.

Answer 4.2.2

If Ms finder seeks recognition of her appointment in New Zealand, she would be successful by virtue of section 135 of Insolvency Act, 1967 and Insolvency (Cross-border) Act 2006 unless the recognition is contrary to public policy.

Since the debtor is habitual resident of New Zealand since past three years and has no operations in the UK, the COMI would lie in the New Zealand.
The UK proceedings can be recognised as Foreign Non-Main Proceedings as it only has a bank balance of GBP 5,000 in the UK.

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: 7/10

Total question 2: 6.5/10

Total question 3: 12/15

Total question 4: 8.5/15

Total mark: 34/50