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] 8/10

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:

Voluntary administration **is not** used for the following reason(s): 1

(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: 0

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: 1

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.

(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. Security can also be perfected 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: 1

Secured creditors in New Zealand:

(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] 9.5/10

Question 2.1 [maximum 5 marks] 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.

They include

i. Voidable (insolvent) transactions
ii. Transactions at an undervalue
iii. Insolvent charges
iv. Transactions & Charges entered into with connected/related parties for inadequate or excessive consideration
v. Voidable dispositions

For insolvent transaction & insolvent charges to be voidable, they must have been entered into at a time when the company is unable to pay its due debts, during the restricted period which tends to be either 6 months before the date the liquidation commenced or if it is a liquidation by the court, 6 months before the making of the application and ending at the time when the liquidator is appointed or the court order was made. However, liquidators are allowed to disregard the 6month period where the transaction was made in relation to a connected/related and look back two years to the restricted period.

With regards to transactions at undervalue, the test will be either the company was unable to pay its due debts when it entered into the transaction; or became unable to pay its due debts as a result of entering into the transaction. The restricted period here is two years.

With regards to excessive transactions with connected parties, there is no obligation on the liquidator to prove that the company was insolvent at the time the transaction took place; the restricted period is three years. For charges granted to connected parties, the liquidator however, has no requirement to establish the insolvent status of the company when the charge was entered instead, courts has wide discretionary powers to look into charges in favour of connected parties.

Question 2.2 [maximum 3 marks] 2.5/3

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?

Receivership arises upon appointment of a receiver by:

i. The court in exercise of either a statutory power or its inherent jurisdiction. By virtue of the court appointment, the receiver is required to act impartially and in accordance with the court's instructions. But is otherwise subject to the Receiverships Act.

ii. Through direct appointments by secured creditors. This type of a receiver usually to act in the best interests of the appointing entity/authority.

Receivers derive their powers from the respective appointing security agreements, the Receiverships Act and the IPRA which basically regulates & licenses them.

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?

There are four methods of enforcing foreign judgments in New Zealand which include: Reciprocal enforcement under statute i.e. enforceable under the Reciprocal Enforcement of Judgments Act 1934, so long as it is given by a country with which New Zealand has a reciprocal agreement with, enforcement of commonwealth judgments under statute, enforcement under the common law and enforcement of Australian judgments under the Trans-Tasman Proceedings statute.
The court in New Zealand will give recognition to judgments upon guidance of either of the aforementioned statutes and offer its assistance in implementing the judgement so long as it is not contrary to its public policy.

QUESTION 3 (essay-type questions) [15 marks in total] 14/15

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.

Voluntary administration is a form of corporate rescue for companies facing financial difficulty. However, the same is not receiving significant traction in New Zealand because there is no legal requirement that forces corporate entities under financial distress to apply or participate in business recue unlike its counterpart, Australia where the Voluntary Administration was modelled from.

Additionally, considering most business in New Zealand are SMEs, the cost incurred/to be incurred when restructuring and implementing the VA may pose to be a barrier for the businesses which are already facing financial difficulty. On the other hand, liquidation may be a more cost-efficient option to them, as the liquidator will take over the assets of the company, realize and distribute them then proceed to shut down the business. As a result, this reduces the implementation of a liquidation costs & not to forget the cost of professional

fees, in comparison to VA where an administrator may be in force for the one year period, or longer and continue to trade.

The Inland Revenue Department's (IRD) not having status as a preferential creditor unlike in Australia where it retains the status so long as the company is under a liquidation process. The refusal to grant this status was premised on the fact that IRD's preferential status would hamper Voluntary Administration's effectiveness. Therefore, it is not a wonder that the IRD will rarely support a VA as the DOCA entered into diminishes its rights

There is also the possibility that creditors do not have much confidence in the VA process. Secured creditors holding security over assets of the company will more often than not, appoint a receivers to realize their asset as opposed to surrendering it for the benefit of all creditors. For them, a VA may present an unnecessary risk, as appointing a receiver ensures a quicker return to them for as much as possible of their debt. They will therefore also be unwilling to forgo their rights by entering into a DOCA with other creditors since it will in fact, diminish the pool of assets available to satisfy the debt, resulting in a lower return than what would have been possible through appointing a receiver. The only way they would agree is unless they are confident they will get a better return in doing so. Unsecured creditors on the other hand will often prefer a liquidation process where they can cut their losses and recover what they can as opposed to agreeing to an arrangement that can result in them losing more and getting lower returns.

The availability of other procedures such as Liquidation which remains the most common procedure and Receivership. More so, it is not uncommon for companies that entered VA to end up liquidated, since the company was already terminally insolvent before the administrator was appointed.

I would advise a company to consider voluntary administration if it is under financial distress and there is a chance that entering a VA will allow the business and its affairs to be restructured in a way that maximises the chances of the company continuing to trade as a going concern. Therefore, any profitable portions of the business to continue, while the dead weight (such as projects nearing completion) can be cut loose. Also in circumstances where getting into a VA will result in a better outcome/return for the company's creditors and shareholders than would result from the company going into immediate liquidation. E.g. in a prepack sale where appointing an administrator may have been part of the pre-pack agreement between the company and its creditors, where the intent was to liquidate the company after the administration ended. Another reason would be because administration is only meant for a short period and after a positive outcome, control and management of the company is given back to the directors and end the administration. More so, during this period, the administrator is an officer of the court who acts for the benefit of the company and all creditors in general, not owing allegiance to the appointing authority.

Considerations that would influence this decision include:

i. The fact that there is a moratorium in place that kicks in immediately on appointment of an administrator. As a result, there is a moratorium on enforcement action by most creditors as both secured and unsecured creditors cannot enforce a charge over company’s property, and the owner or lessor of property that is in the company's possession cannot recover such property. In addition, proceedings may not be initiated or continued against the company without the administrator's written consent or the court's approval. This in turn gives the company some breathing space to assess the best way forward with the assistance of an independent administrator

who will take control of the company and help assess whether there is an opportunity for the business to continue as a going concern.

ii. The fact that where the VA is successful a Deed of Company Arrangement (DoCA) will come into force, its terms implemented and will be binding all creditors. In this context, the support of the company's creditors play a crucial role in supporting the VA. A DoCA & its recommended terms will be generated & spelt out in the administrator's report which is then delivered to creditors before the watershed meeting & contains/will have a recommendation that is designed to bring about the best possible outcome for both creditors and shareholders. This document will be the basis of the agreement reached between the company and its creditors and more so, the deal struck to ensure that the company can continue to trade. It will also contain arrangements to ensure the company survives and that liquidation is avoided. Upon approval, the DoCA is then executed within 15 working days & the VA comes to an end. The period of the DoCA commences, where the administrator will become the deed administrator and will now have a cooperative role with the directors of the company.

However, I'd caution the company to bear in mind that, if it cannot achieve the going concern objective, the next best plan would be to realise the assets of the business in a manner that will be more beneficial to all creditors & stakeholders than an immediate liquidation.

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] 7/8

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?

Ms. Finder being trustee is in possession of a foreign judgement which she is seeking to enforce in New Zealand (NZ) may apply to the NZ court seeking recognition and enforcement. Options available to Ms Finder to recover Mr Strong's property would be to enforce the judgement either under the Reciprocal Enforcement of Judgments Act 1934, the Enforcement of Commonwealth Judgments under Senior Courts Act 2016, or under Common Law.

Commented [AH1]: Assume you mean the judgment debt and not the bankruptcy order which is non-monetary in nature?

Factors relevant when deciding the option to use would include:

i. The fact that it is a monetary judgment and that it is final and conclusive. Where this is the case, the recognition and enforcement will take place under either of the above mentioned and allow Ms. Finder to recover property belonging to Mr. Strong.
ii. Forum in which the judgment was obtained – in this case, Ms. Finder would have to look into whether the other state is a commonwealth country and more so, whether there are reciprocal rights between the two states.
iii. Whether the judgment was obtained by fraud – since if this is the case, the judgment can be challenged by the judgment debtor.
iv. Whether implementing/recognising the judgment is contrary to the public policy of the recognising state, against the rules of natural justice, or conflicts with obligations of NZ arising out of a treaty. as NZ will shy away from implementing such judgments.
v. Whether the original court had jurisdiction
vi. Determination of COMI
vii. Cooperation, rules of comity,
viii. Whether enforcement will be by way of statute of common law
ix. Recognition of UK as foreign main proceedings – since it was Mr Strong's habitual residence/domicile, place of business when the transaction took place (although is now retired).

Question 4.2 [maximum 7 marks]

Question 4.2.1 [maximum 4 marks] 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?

(a) Upon recognition, Ms Finder can apply to the NZ courts for assistance, more so, the grant of ancillary orders and seek statutory powers to have Mr Strong submit to examination.
(b) She can apply to the NZ court for orders under section 8 of the Cross-Border Act to and procure search and seizure orders over the property of Mr. Strong, similar as in the case of Williams v Simpson[2011]3NZLR380.

Question 4.2.2 [maximum 3 marks] 1

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.

Ms. Finder would be successful in her application for recognition in New Zealand (NZ) owing to the applicability of the Insolvency (Cross-border) Act 2006 which is basically the UNCITRAL Model Law. The UK has adopted UNCITRAL model Law whereas NZ has implemented a modified law of the UNCITRAL model Law which is incorporated in its statutes as mentioned above. Furthermore, the implementation by NZ allows for customization of the model law in its proceedings, and bestows upon the High Court, power to aid in such proceedings.

Commented [AH2]:

Commented [AH3R2]: Yes, but what does Ms Finder have to establish under UNCITRAL Model Law? See comments below.

Additionally, both UK and New Zealand are commonwealth countries and as such, concepts of mutual cooperation, rules of comity and modified universalism will kick in. Moreover, the two countries being trade partners facilitates cooperation across the board which in turn streamlines processes & procedures and ensured efficiency.

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: 8/10

Total question 2: 9.5/10

Total question 3: 14/15

Total question 4: 12/15

Total mark: 43.5/50