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: **[studentID.assessment8F]**. An example would be something along the following lines: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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

40/50

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:

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.1

Question 1.2

Which of the following **is not** a collective insolvency process:

(a) Receivership.1

(b) Liquidation.

(c) Voluntary bankruptcy.

(d) Voluntary administration.

Question 1.3

Select the correct answer:

Which one of the following **does not** justify the use of voluntary administration:

(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. 1

(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:

(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.1

(d) is an agent of the company until the appointment of a liquidator to the company.

Question 1.5

Select the correct answer:

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.1

Question 1.6

Select the correct answer:

Assuming attachment has occurred, timing of registration of a financing statement:

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

(b) perfects a security interest.

(c) is the only way perfection of a security interest can effected.

(d) determines the order of priority between competing security interests. 1

Question 1.7

Select the correct answer:

Liquidators in New Zealand:

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

(b) act in the interests of unsecured creditors.

(c) act as agents for the appointing creditor.

(d) protect the interests of all creditors of the company.0

Question 1.8

Select the correct answer:

A voluntary administrator must convene and hold a watershed meeting **within how many business days** of his appointment?

(a) 3 business days.

(b) 8 business days.

(c) 12 business days.

(d) 24 business days.1

(e) 45 business days.

Question 1.9

Select the correct answer:

Secured creditors in New Zealand:

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

(b) stand outside the liquidation or administration of a company.0 – secured creditors will generally still be bound by the VA process unless they elect to enforce rights – see below

(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:

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 2010.1

(d) common law.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks] 4/5

Name three types of 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.

[Type your answer here]

Insolvent transactions, voidable transactions under the Companies Act, which are those entered into at a time when the company was unable to pay its due debts and which result in a creditor receiving more than its entitlement in a liquidation (a preference).[1] These transactions are made when the company is insolvent or shortly before the company becomes insolvent.

Insolvent Charges, a liquidator can set aside a charge granted six months immediately preceding the liquidation ("the restricted period") if, following the granting of the charge, the company was unable to pay its due debts. If the charge was granted to a related party, then the restricted period is two years.[2] These charges are made when the company is insolvent or shortly before the company becomes insolvent.(1.5 – note also the Court has the ability to set aside securities and charges granted to named classes of related parties where it is just and equitable to do so – insolvency will likely be a factor, but Court can take into account wider set of circumstances)

Transactions at undervalue, generally two years prior to the liquidation, if a transaction is entered into by a company at undervalue, the liquidator may pursue the transactions entered into by the company.[3] The company does not need to be insolvent at the time of the transaction. [Must be able to establish that company was unable to pay due debts at time of transaction or became unable to pay due debts as a result of entering into transaction]

Question 2.2 [maximum 3 marks] 3/3

In what way can receivership come about in New Zealand? In whose interests does the receiver act? What is the name of the Act that governs receiverships in New Zealand?

[Type your answer here]

The Receiverships Act 1993 governs receiverships in New Zealand.[4]1

There are two mechanisms by which a receiver is appointed which are either appointment by the High Court either pursuant to a specific power conferred by statute, or in the exercise if its inherent jurisdiction;[5] or through private appointment by a secured creditor exercising its contractual right under the security agreement.[6]

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[1] Van, Lynne, Foundation Certificate in International Insolvency Law Module 8F Guidance Text, New Zealand 2021/2022 ("**Guidance Text**") pages 40 - 41, 6.4.7.4
[2] Guidance Text page 41, 6.4.7.5
[3] Guidance Text page 42, 6.4.7.6
[4] Guidance Text page 15, 6.1
[5] Guidance Text page 66, 6.6.2
[6] Guidance Text page 67, 6.6.2

A court-appointed receiver is subject to the supervisory jurisdiction of the Court and is independent of all parties. A court-appointed receiver is not answerable to the debtor party or creditors unless ordered otherwise by the Court, and is required to act impartially and in accordance with the Court's directions.[7]

A privately appointed receiver has duties as prescribed by the Receiverships Act and the terms agreed in the security agreement. The prescribed statutory duties include having regard to the interests of certain parties on the exercise of various powers, including the power of sale. The Receiver is subject to the Court's supervision and has powers to seek directions on the extent of powers, rights or obligations relating to the receivership.[8]

The receiver is required to have reasonable regard to the interests of the grantor, parties claiming interests in the property through the grantor, unsecured creditors and sureties of the grantor's obligations to the extent consistent with the obligation to act in the interests of the appointing party. Unless the security agreement provides otherwise, a privately appointed receiver acts as agent of the grantor company.[9]

Question 2.3 [maximum 2 marks] 1/2

What options are available to a creditor who wishes to enforce a judgment obtained outside of New Zealand? What role does the New Zealand court play in this process, if any?

[Type your answer here]

Judgments obtained outside New Zealand do not have direct force in New Zealand. Judgments obtained in another jurisdiction are generally enforceable in New Zealand through one of four methods of enforcing foreign judgments in New Zealand depending on the forum the judgment was obtained. The four methods are:

- enforcement under the Reciprocal Enforcement of Judgments Act 1934 (for judgments obtained from Higher Courts from other countries that have agreed to grant reciprocal rights to be enforced);
- enforcement under the Enforcement of Commonwealth Judgments Under Senior Courts Act 2016 (for monetary judgment in the High Court of any Commonwealth Court);
- enforcement under the Trans-Tasman Proceedings Act 2010 (for judgments obtained in Australia); and
- enforcement under common law.[10]

What role does the Court play in each of the above?

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.

[Type your answer here]

[7] Guidance Text page 66, 6.6.2
[8] Guidance Text page 68, 6.6.4.2
[9] Guidance Text page 67, 6.6.3
[10] Guidance Text page 76, 8.1

Voluntary Administration ("**VA**") is modeled on the Australian legislative provisions. The primary objective of VA's are to maximize the insolvent company's prospects, or as much as possible of its business, continuing in existence under the terms of a deed of company arrangement ("**DOCA**"). It a DOCA is not possible, the goal is to administer the business and affairs of the company in a way that it results in a better return to creditors than immediate liquidation.[11]

VA has not received as much traction in New Zealand as it has in Australia, possibly because the process lacks preferential status for the Inland Revenue Department (IRD), another possible reason include the larger proportion of small and medium enterprises (SMEs) in New Zealand are less likely to be able to sustain the costs of a VA.[12] Yes

New Zealand has recorded a total of 546,735 enterprises in 2019 statistics. Small and medium sized enterprises make up almost 99% of businesses in New Zealand with small businesses making up 97% of all enterprises, employing 29% of the workforce and contributing 26% to the GDP.[13] Therefore the low rates of VAs in New Zealand as compared to Australia is likely due to the significant number of enterprises being classified as small enterprises. This is made even more expensive for an already small business in that an administration involves appointment of an administrator, at least two meetings of creditors, costs of the negotiation of the DOCA proposal and administration of the DOCA, a small business may feel that it may be better off skipping the VA and placing itself into liquidation instead.

In a winding-up, the IRD ranks as fifth priority on certain tax claims, after claims associated with the administration of the winding up including preservation of value assets; employee claims liens, Kiwisaver and claims under various pieces of legislation; sums owed on account of goods paid for on layby; and costs associated with putting together a proposal under sub-part 2, Part 5 of the Insolvency Act (re bankruptcies).[14] How does this compare in a VA? The IRD is essentially in a worse position in a VA because the do not have preferential status.

When a company is placed into VA, the outcome thereof can either result in the company being returned to the directors, being placed into liquidation or executing and implementing a DOCA. Usually the executing and implementing of a DOCA would generally be the desired outcome for a company (a return to its directors seems unlikely in most cases as the company is placed into VA because it is in financial trouble). The outcome of a VA depends on the decision reached by creditors at a watershed meeting called by the voluntary administrator.[15]

One of the main advantages of a VA is that it provides for a moratorium on commencement of the administration, subject to limited exceptions, enforcement actions against the company or its property are suspended. The main exceptions to the moratorium include secured creditors with security over the whole or substantially the whole of the company's property may enforce their rights for a period of up to 10 working days after commencement of the administration; Secured creditors who commenced enforcement action prior to the appointment; and perishable goods.[16] For this reason, major secured creditors to the company should be consulted and should

[11] Guidance Text page 51, 6.5.5.1
[12] Guidance Text page 51, 6.5.5.1
[13] Guidance Text page 2, 3
[14] Guidance Text page 24 – 25, 6.3.2
[15] Guidance Text page 52, 6.5.5.1
[16] Guidance Text page 55, 6.5.5.4

be supportive of the appointment otherwise an administrator is unlikely to be appointed. Consideration as to whether the company has major secured creditors would accordingly be a key factor in the decision of placing the company into VA.

Also consider other practical issues such as nature of the business, are there known interested parties who might acquire the business through a VA process (or can part of the business be 'hived' off. What about other creditors? Lessors? IRD? What proportion of the debt does the IRD have? How do the major creditors make up the voting numbers (by number and value of debt)? Affects prospects of DOCA being voted on, so should consider general level of support for DOCA, prior to appointment.

A company should consider VA if it is struggling to meet its payment obligations as and when they fall due, but is not so far gone that it may be considered hopeless to try to save it. If a company needs some breathing room and considers that if it comes to an arrangement with creditors, it can be saved, then the VA is certainly a great means to try to accomplish this. If the VA results in a DOCA, the chances are better for the company's survivability as it gives the company breathing room and allows the company to negotiate a resolution with its creditors that may result in the company surviving or a better return for its creditors. Placing the company into VA could also assist directors if claims are made against them for insolvent trading as a VA recognizes the struggling financial position of the company and proactive steps are taken to try to save it, or at least try to mitigate the extent of the insolvency.

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

Mr Strong was born in New Zealand 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 United Kingdom. He has bank accounts in both the United Kingdom and New Zealand.

He worked in the United Kingdom for a number of years, but decided he wanted to return to New Zealand. He sold some of his business interests in the United Kingdom 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:

- has three adult children, two of whom are located in New Zealand and one in the UK;
- continues to receive income from his business interests in the United Kingdom, but does not work in New Zealand. He has no active role in the business in the United Kingdom;
- has retired. Outside of the income he receives from the remaining business interests in the United Kingdom, he remains dependent on his wife's income for day to day living.

Question 4.1 [maximum 8 marks] 8/8

What options are available to Ms Finder to recover property belonging to Mr Strong located in New Zealand?

What factors point towards the bankruptcy being foreign main proceeding, compared to a foreign non-main proceeding?

[Type your answer here]

Ms Finder may seek assistance in New Zealand to a foreign insolvency through either recognition as assistance provided under common law; or assistance previously provided under section 135 of the Insolvency Act 1967 in respect of bankrupt individuals, now the Insolvency (Cross-border) Act 2006 applies.[17]

Under the common law 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. Recognition would follow as a matter of course unless that a foreign administrator's appointment was not final, contrary to public policy or breached the rules of natural justice.[18] Once a recognition order is made under common law, New Zealand courts are required at common law to provide assistance to the foreign proceeding, governed by New Zealand insolvency law, decided at the discretion of the Court.[19]

The facts of this matter are similar to *Williams v Simpson* [2011] 3 NZLR 380[20]. In this instance, the debtor's domicile would likely be considered to be New Zealand as the debtor's habitual residence is in New Zealand, despite the travel to and from the UK, the debtor has rented in the UK and he has returned to in New Zealand habitually. As the common law provides for recognition of an insolvency administrator from where the debtor is domiciled, Ms Finder would probably find difficulty in proving that factor and should instead seek recognition under the Insolvency (Cross-border) Act 2006.

The factors considered for Mr Strong's centre of main interest ("**COMI**") are that he has property in New Zealand, he rented where he lived in the UK, he lived New Zealand for the previous two years. He is reliant on his business interests in the UK for his income but it otherwise reliant on his wife (considering he is placed into bankruptcy in the UK and Ms Finder couldn't uncover anything further than GBP 5,000, it seems that his business interests in the UK are insignificant), he has no establishment in the UK at the relevant date where he was carrying out non-transitory economic activity.[21] Mr Strong's COMI would be New Zealand and the UK would be a foreign non-main proceeding.

Ms Finder should seek assistance under section 8 of the Insolvency (Cross-border) Act 2006. In *Williams v Simpson*, it was established that the court had jurisdiction to order relief under Article 8 of Schedule 1 to provide assistance to the English Court by enabling the trustee to realise assets in New Zealand.[22]

Question 4.2 [maximum 7 marks]

[17] Guidance Text page 70, 7.2; page 71, 7.2.4
[18] Guidance Text page 70, 7.2.1
[19] Guidance Text page 70, 7.2.1
[20] Guidance Text page 73, 7.2.5
[21] Guidance Txt page 73, 7.2.5; *Williams v Simpson*
[22] Guidance Txt page 73-74, 7.2.5; *Williams v Simpson*

Question 4.2.1 [maximum 4 marks] 3/4

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?

[Type your answer here]

Ms Finder could seek the court's assistance for recognition under the Insolvency (Cross-border) Act 2006, including assistance to allow her to interrogate the debtor to establish if the debtor is concealing assets. The High Court can aid in these proceedings as permitted in the Insolvency (Cross-border) Act. [23]

If Ms Finder has reliable information about concealed assets in New Zealand, she could apply for an order for assistance under section 8 of the Insolvency (Cross-border) Act and seek interim search-and-seizure orders for the assets. This was sought in *Williams v Simpson* and led to the seizure of certain property including gold bullion, foreign currency, computer data and documents found at Mr Simpson's residence.[24]

Question 4.2.2 [maximum 3 marks 1/3

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.

[Type your answer here]

As the COMI of Mr Strong would be established as New Zealand, it is unlikely that Ms Finder could seek recognition of her appointment as being from a country of a foreign-main proceeding of the debtor. New Zealand has adopted the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**"), which resulted in the enactment of the Insolvency (Cross-border) Act 2006, which is a modified form of the Model Law.[25] The Insolvency (Cross-border) Act 2006 provides for liquidation in New Zealand of an overseas company, extends the power of the High Court to aid in all insolvency proceedings. [26] Ms Finder's would be able to have her appointment recognized pursuant to the Insolvency (Cross-border) Act 2006, despite her jurisdiction being a foreign non-main proceeding.

*** End of Assessment ***

[23] Guidance Text page 72, 7.2.4
[24] Guidance Text page 73, 7.2.5; *Williams v Simpson*
[25] Guidance Text page 71, 7.2.3
[26] Guidance Tact page 72, 7.2.4