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: 202223-336.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 2023***. The assessment submission portal will close at*** 23:00 (11 pm) BST (GMT +1) on 31 July 2023***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 8 pages**.**

ANSWER ALL THE QUESTIONS

31.5/50

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

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: 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 – a financing statement can be registered to perfect an interest, however perfection can also be achieved by possession. A financing statement otherwise determines the order of priority between competing interests, depending on timing of registration (firt in time wins).

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.

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

Question 1.7

Select the correct answer: 0 – a liquidator is there to protect the interests of unsecured creditors.

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: 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]

Question 2.1 [maximum 5 marks] 3.5

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.

Sections 292 and 293 of the Companies Act 1993 concerns the types of transactions that, when made in certain circumstances, are voidable.

Section 292 defines an 'insolvent transaction' as a transaction entered into by a company, at a time when the company was unable to pay its debts, and which enables another to receive more in satisfaction of a debt owed by the company than the person would (or would be likely to) receive in the liquidation. Transactions must have occurred within six months immediately preceding the liquidation for third party creditors, and within two years immediately preceding the liquidation for related party transactions.

Focus is on whether the company was unable to pay its due debts at the time of the transaction. Liquidity is the main focus. Balance sheet also relevant, however not determinative.

Voidable transactions include:

1. Insolvent charges. ***A liquidator may apply to set aside a charge granted within the six months immediately preceding the liquidation (s 293). Court will assess whether company insolvent as a result of the transaction***
2. Transactions at an undervalue. ***A liquidator may pursue transactions entered into by a company at an undervalue in the relevant period, which is generally two years before the commencement of the liquidation (s 297).***
3. Related party transactions. ***A liquidator accrues a right of action related to transactions entered into with the directors, relatives, or a related party, for inadequate or excessive consideration (s 298).***
4. Charges granted to related parties. ***The Court may set aside securities and charges granted in favour of related parties (s 299) (namely, directors, relatives of a director, a related entity controlled by the director, or relative, or related entity) in circumstances where the assets are insufficient to meet all debts of the company on a liquidation and it is just and equitable for the Court to do so. No requirement to demonstrate insolvency at time of transaction.***
5. Voidable dispositions and other actions. ***Dispositions of the company's property are voidable if made during the specified period (commencing on the date of the application to liquidate is made and ending when a liquidator is appointed or the Court disposes of the application).***

Question 2.2 [maximum 3 marks] 2

In what way can receivership come about in New Zealand?

In whose interests does the receiver act?
From where does the receiver's powers derive?

A receiver may be appointed by the High Court pursuant to statute or its inherent jurisdiction. However, the majority of receiverships in New Zealand arise by way of private appointment by a secured creditor exercising its contractual right under a security agreement. Court approval is not required for such an appointment.

The receiver must have reasonable regard to the interest of the grantor, parties claiming interests in the property through the grantor, unsecured creditors and sureties of the grantor's obligations – but only to the extent consistent with the obligation to act in the interests of the appointing party (Receiverships Act 1993, s 18(3)).

If appointed under contract, primary duty is to realise assets for benefit of secured creditor.

A receiver's powers are governed and conferred by the contractual terms pursuant to which they were appointed – and the Receiverships Act 1993.

The Receivership Act also applies to Court appointed receivers. The terms of the relevant Court order will overlay these obligations.

Question 2.3 [maximum 2 marks] 1

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

There are three statutory paths to the enforcement of a foreign judgment:

- ***Enforcement under the Reciprocal Enforcement of Judgments Act 1934;***
- ***Enforcement under the Enforcement of Commonwealth Judgments Under Senior Courts Act 2016; and***
- ***Enforcement under the Trans-Tasman Proceedings Act 2020.***

Foreign judgments may also be enforced at common law by action. Assuming the foreign judgment is final, the usual course is to bring summary proceedings to obtain judgment in New Zealand. The judgment must be for a monetary sum and be final and conclusive in the foreign jurisdiction.

Generally speaking, the New Zealand Court will not revisit the merits of the judgment on errors of fact or law. Nor can a complaint be raised that the foreign Court was not competent to grant the order under the relevant foreign law.

Depending on the process, the Court can assist with enforcement by providing the creditor with access to enforcement processes available under NZ court rules. This usually occurs once a judgment has been recognised or registered.

The Court can also assist by having the judgment entered as a judgment of the NZ Courts – once judgment has been obtained, the usual enforcement processes would then be available.

QUESTION 3 (essay-type questions) [15 marks in total] 10/15

Voluntary administrations have not received significant traction in New Zealand. Discuss 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 which would influence this advice and explain why.

Lack of traction of VAs in NZ

The voluntary administration regime, which is largely modelled on Australian legislative provisions relevant to VAs, has not received significant traction in New Zealand. Possible reasons for this include:

- *the lack of preferential status for the Inland Revenue Department (NZ's tax department) under a voluntary administration. Conversely, in a liquidation, the IRD receives preferential status under Sch 7 of the Companies Act, meaning there is little incentive for the IRD to vote in support of a deed of company arrangement as its debt claim would be further elevated in the course of a liquidation);*
- *the larger proportion of small and medium enterprises in New Zealand, which are less likely to be able to sustain the cost of a voluntary administration;*
- *that while there is an automatic moratorium that arises once an administrator is appointed, the moratorium is not absolute. Because of this, 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 means there is little utility in the voluntary administration unless it receives support from major secured creditors.* ***Also, creditors who have commenced enforcement prior to VA will be entitled to continue and are not subject to moratorium (though Court could potentially intervene).***

Circumstances where VA might be recommended

One benefit of voluntary administrations is the automatic moratorium that arises with respect to any legal action being taken by creditors while various options are explored. This includes proceedings against the company, recovery of leased property, the enforcement of a charge against the company, or assets utilised by the company in

trade. Given that a moratorium arises on the commencement of a VA, a company that wished to prevent legal action being immediately taken against it so that it may either continue to trade and reduce its liabilities, or in circumstances where it wished to consider restructuring, entering voluntary administration would give the board and the some breathing space to consider its options while preserving the company's position and preventing the filing of, for example, a winding up petition by a creditor in the interim.

Further, in circumstances where a board of a company is either inexperienced or struggling to improve the company's position, voluntary administration may be a very beneficial path so that the VA can take steps to get the company back to a better position. The directors of the company remain in office during the process, but their powers are restricted so that the administrator has the power to achieve what is needs to.

The prospects of VA being successful usually depend on early intervention. The company needs to be financially viable so that a rescue plan can be executed. If not, unlikely to work. Support from secured lenders is usually critical where the have security over all or substantially all of a company's assets.

Two considerations that would affect advice on entering VA

The commencement of a voluntary administration operates as a precursor to the company either executing and implementing a DOCA, or being returned to its directors, or proceeding to enter liquidation. What approach is to be taken is a matter for the company's creditors as determined at a meeting called by the administrator. Therefore, the mix of creditors and the likely unanimity that might be achieved as between those creditors, and the particular objectives of the company, will be significant factors in determining whether it is or is not viable or recommended that a company take steps to enter voluntary administration.

Further, and as above, in circumstances where a board of a company is either inexperienced or struggling to improve the company's position, voluntary administrator may be a very useful option so that the VA can take steps to get the company back to a better position. Considerations such as the level of debt the company has, its balance sheet and asset position, and how the company is fairing at an operational level will be relevant.

Practical considerations:

- ***What enforcement steps have been taken? Are these going to affect significant assets that impact on the company's business (e.g. a lease)? What are the prospects of negotiating a stay in action?***
- ***What support is there from creditors? Are the secured creditors supportive?***
- ***What is the proportion of supportive creditors (majority in number and by way of debt level)? Is there a 50% majority and 75% by value of debt?***

- ***Are there personal guarantees in place?***
-

QUESTION 4 (fact-based application-type question) [15 marks in total] 7/15

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 he 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 £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 £5,000 in his bank account in the United Kingdom. Otherwise, Ms Finder was unable to uncover any other assets in the United Kingdom which 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] 3/8

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

New Zealand's bankruptcy laws apply to debtors who have a presence or connection in or to New Zealand – which Mr Strong of course has. The adjudication of a debtor as a bankrupt affects all assets of the bankrupt, whether in New Zealand or overseas.

Where an insolvent party has assets or liabilities in another jurisdiction, or where assets are located in New Zealand, administration of the assets and liabilities occurs in New Zealand through:

- ***where applicable, assistance and recognition under the UNCITRAL Model; or***
- ***the recognition and assistance of the foreign state pursuant to the rules of private international law.***

Thus, insolvency practitioners who are seeking recognition and assistance in New Zealand can obtain such assistance under the UNCITRAL Model Law as enacted in NZ by the Insolvency (Cross-border) Act 2006.

If this Act does not apply, a party may seek the assistance of the High Court. ***Yes, but how?***

What factors would the Court consider when assessing whether to recognise the bankruptcy in New Zealand?

Williams v Simpson is the leading case on the assessment of "centre of main interest" (COMI) under the cross-border regime, which an applicant (i.e. the insolvency practitioner) must show is the place in which they were appointed in order to found a recognition application.

The Court observed that for recognition of the English bankruptcy proceeding as a foreign main proceeding to occur, it had to be shown that England was the place where the debtor had the centre of main interests. The Court held that the assessment was to be fact specific, but with specific reference to Article 16 of Schedule 1, had a starting assumption that the presumption of COMI was the person's place of habitual residence.

In this case before it, the Court held that the English proceeding did not qualify as a foreign main proceeding since the evidence did not show that, as at the relevant date, the debtor had had an establishment in England where he was carrying out a non-transitory economic activity. The definition of "establishment" in this regard, being in the present tense, meant that it was insufficient to show the debtor had past involved of trade in the foreign jurisdiction.

Notwithstanding this, the Court found that it had jurisdiction to order relief under Article 8 of Schedule 1 – which offers assistance to the English Court by enabling the trustee to realise assets in New Zealand.

Yes, but how does that apply in these set of facts?

- ***Is there a foreign representative?***
- ***Is there a foreign proceeding?***
- ***Is it a foreign main proceeding, or non-main proceeding? Where is the habitual place of residence of Mr Strong? Does the presumption apply in this case? Is there some form of economic activity in the UK which might suggest Mr Strong is still trading from the UK?***
- ***If neither, what other options are available? Would Article 8 assist as in Williams?***

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, if she believes she has insufficient information.

If Ms Finder was successful in applying for recognition of her role as Trustee of Mr Strong's bankrupt estate in the UK, she could seek to exercise the powers of the Official Assignee (OA).

In this capacity, the bankrupt is required to file a statement of affairs with the OA; to assist the OA with the realisation of assets; disclosing property; providing information relating to income and expenditure and financial information including duties to disclose bank accounts.

Ms Finder may also be able to apply for interim search and seizure orders.

- ***To obtain information about immovable property owned by Mr. Strong, Ms. Finder can visit the Land Information New Zealand data service to search for real property.***
- ***Seek assistance from High Court under s 8 of the Insolvency (Cross Border) Act – request foreign Court to issue request for assistance – apply to NZ Court to act in aid of UK Court. Search and seizure (as noted above)***
- ***Article 19 and 21(1)(d) Schedule 1 – information seeking/investigate affairs of Mr Strong to locate assets. Seek interim orders if necessary to prevent enforcement action against assets and/or vest assets in Ms Finder to preserve them if waiting for recognition application to be heard.***

(b) Assuming she has reliable information about concealed assets, what steps could she take to protect those assets?

Ms Finder may be able to apply for interim search and seizure orders which would enable her to locate and take possession of Mr Strong's assets.

If Ms Finder found out that Mr Strong had disposed of any such assets, she could commence a claim to recover assets which Mr Strong disposed of with the intention of defeating creditor claims, or may pursue transactions that fall within the definition of an "insolvent transaction".

Question 4.2.2 [maximum 3 marks] 2/3

Do you think an application for recognition would be successful? Explain why or why not?

As state above, Williams v Simpson is the leading case on COMI and states that the starting assumption for COMI is the place of habitual residence.
Mr Strong's situation in this regard is slightly unusual. While he was born in the UK, he has travelled between the UK and NZ for the most of his adult life as he has family and business interests there. Helpfully, he rented while living in the UK – and has bank accounts in both UK and NZ. He also worked in the UK for many years before returning to NZ. However, he sold his business in the UK and moved back to NZ and two years passed before the UK bankruptcy proceedings commenced. On this basis, it is hard to determine what the Court would consider his habitual place of residence. While currently it is New Zealand, he has spent considerable time living and working in the UK. ***Good – facts show now living in NZ and in absence of activity in UK, likely to be found to be resident in NZ, particularly as he owns assets in NZ.***

A particular risk to the recognition application is the fact that it may be deemed that Mr Strong, as at the relevant date, does not have a "establishment" in the UK where he was carrying out a non-transitory economic activity. As that term is used in the present tense, and as the Court held in Williams v Simpson, it is insufficient to show that Mr Strong had been involved in the past in trade in the foreign jurisdiction.

However, the Court held that, notwithstanding that the recognition application had not been made out, the Court found that it had jurisdiction to order relief under Article 8 of Schedule 1 – which offers assistance to the English Court by enabling the trustee to realise assets in New Zealand. This could be a very useful option for Ms Finder.

*** End of Assessment ***