



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8E**

**SINGAPORE**

This is the **summative (formal) assessment** for **Module 8E** of this course and must be submitted by 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 8E.** 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.assessment8E]**. An example would be something along the following lines: 202122-336.assessment8E. **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 “studentID” 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 **9 pages**.

## **ANSWER ALL THE QUESTIONS**

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

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**

Which of the following **is not** one of the roles of a scheme manager?

- (a) To administer the scheme after it has been approved by the creditors.
- (b) To run the business of the debtor company.**
- (c) To prepare the scheme of arrangement proposal.
- (d) To adjudicate on the proofs of debt filed by the creditors.

#### **Question 1.2**

Which of the following forms of security **need not** be registered?

- (a) A fixed charge.
- (b) A mortgage.
- (c) A pledge.**
- (d) A floating charge.

#### **Question 1.3**

Which of the following factors may enable a foreign debtor to establish a “substantial connection” to Singapore?

- (a) The debtor has chosen Singapore law as the law governing a loan or other transaction.
- (b) The debtor is registered as a foreign company in Singapore.
- (c) The debtor is carrying on business in Singapore.
- (d) Any of the above.**

#### Question 1.4

What percentage of each class of creditors must approve a scheme of arrangement for it to be binding?

- (a) Over 50% in value.
- (b) 50% or more in value.
- (c) Over 75% in value.
- (d) 75% or more in value.

#### Question 1.5

Which of the following is **not** one of the statutory duties of a bankrupt?

- (a) To make discovery of and deliver all his property to the Official Assignee.
- (b) To attend any meeting of his creditors as may be convened by the Official Assignee.
- (c) To execute such powers of attorney, conveyances, deeds and instruments as may be required.
- (d) To not travel overseas under any circumstances whatsoever.

#### Question 1.6

Which of the following **is not true** of the Model Law as enacted in Singapore?

- (a) It allows foreign representatives to apply to court for the recognition of foreign proceedings.
- (b) The court can deny recognition only if recognition is "manifestly contrary" to public policy.
- (c) It provides for concurrent insolvency proceedings.
- (d) It provides for international co-operation and communication between courts and representatives.

#### Question 1.7

Which of the following new reforms **were not** introduced by way of the 2017 amendments to the Companies Act?

- (a) The automatic moratorium.
- (b) The cross-class cram down.
- (c) Restrictions on *ipso facto* clauses.
- (d) Pre-packaged scheme of arrangement.

### Question 1.8

Who amongst the following **may not** bring a judicial management application?

- (a) The company by way of a members' resolution.
- (b) The liquidator by way of an application to court.**
- (c) The directors pursuant to a board resolution.
- (d) The creditors either together or separately.

### Question 1.9

Which one of the following **is not** one of the statutory duties that a bankrupt is subject to?

- (a) Make discovery of and deliver all his property to the Official Assignee.
- (b) Disclose all property disposed of by gift or settlement without adequate valuable consideration within the five years immediately preceding his bankruptcy.
- (c) Not being able to travel overseas at all.**
- (d) Attend meetings with the Official Assignee and answer all relevant questions.

### Question 1.10

Which of the following **is not** one of reasons for which the Court will appoint an interim judicial manager:

- (a) The preservation of the company's property or business from dissipation or deterioration.
- (b) The more advantageous realisation of the property than in a liquidation.**
- (c) To bridge the gap between the application for judicial management and the hearing of the judicial management application.
- (d) To safeguard the interests of the company as well as its creditors.

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 4 marks]

What is the significance of the decision in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 and what did the Court of Appeal decide?

The Singapore Court of Appeal, in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60, clarified that the sole and determinative test to assess whether a company is deemed unable to repay its debt, as required under Section 254(2)(c) of the Companies Act (which became Section 125(2)(c) of the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA")), shall be the cash flow test (and not the balance sheet test). The cash flow test looks at whether a company can meet its liabilities as they fall due, whereas the balance

sheet test compares the amount of the company's liabilities and the value of the company's assets.

Section 125(2) of IRDA, which supersedes the provision of Section 254(2) of the Companies Act, enumerates a set of conditions in which cases a company is deemed unable to repay its debt, and thus satisfy the statutory ground for issuing a winding-up order. One of such conditions is where it has been proved to the satisfaction of the Court that the company is unable to repay its debt (Section 125(2)(c) of IRDA).

In its decision, the Court of Appeal decided that the cash flow test (and not the balance sheet test) shall be the sole determinative test under Section 125(2)(c) of IRDA. The Court of Appeal in its decision reasoned that; (i) the verbatim text of the provision does not contemplate using more than one test, (ii) the interpretation adopted by the Court is supported by UK case laws, and (iii) the single test contemplated in the provision is not the balance sheet test.

The Court of Appeal, in its decision, also set forth a non-exhaustive list of factors to be considered in conducting the cash flow test, which include;

- The quantum of all debts, including debts that are already due and debts that will be due in the reasonably near future;
- Whether payments have been demanded or likely to be demanded;
- Whether the company has failed to repay its debt, the quantum of the debt, and how long such debt has been in arrears;
- The length of time that has passed in the winding-up proceeding;
- The value of the company's assets at present, as well as those realizable in the reasonably near future;
- Expected net cashflow that can be generated from the company's present state of business;
- Other income or payment that the company may receive; and
- Any arrangement that the company may have with prospective lenders, such as its bankers and shareholders, that can provide some liquidity or borrowing.

**Detailed answer. Well done. 4 marks.**

### **Question 2.2 [maximum 2 marks]**

State **four (4)** new features that were only introduced in the IRDA **and were not in force** at the time of the 2017 amendments to the Companies Act.

The IRDA introduced the following new features that were not previously available under the 2017 amendments to the Companies Act:

- Section 94 of IRDA introduced a new process for launching voluntary judicial management, without having to apply to the Court and as such, without a Court order. Under this new feature introduced by IRDA, a company that is (or likely to be) unable to repay its debt, and have reasonable probability to achieve one or more purposes of judicial management, may place itself under juridical management by way of a resolution from its creditors.
- Section 239 of IRDA introduced new concept of wrongful trading, where a company incurred a debt without reasonable prospect of it getting fully repaid if the company becomes insolvent, or where a company is becoming insolvent because of the incurrance of such debt. The new wrongful trading concept under IRDA, imposes personal liability for a company's debt, without requiring criminal liability against the person as a pre-requisite, in cases where such person knew that the company was

trading wrongfully, or such person was an officer of the company who ought to have known that the company was trading wrongfully.

- Section 440 of IRDA introduced restriction (stay) on the exercise of contractual termination or modification clauses that is triggered solely by the counterparty's insolvency (the so-called *ipso facto* clauses), once any judicial management or scheme of arrangement proceeding is commenced.
- The IRDA also accorded judicial managers and liquidators the ability to assign proceeds of certain antecedent transactions in favor of third-party funders who fund the legal costs incurred by the company to pursue the company's claims against third parties related to the specified antecedent transactions, and as such the IRDA accorded the judicial managers and liquidators the ability to tap into litigation funding, to fund the pursuit of claims against third parties, that may otherwise not be pursued given the lack of funding and resources.

2 marks

### Question 2.3 [maximum 4 marks]

Describe the process involved in one of the alternatives to formal bankruptcy.

As an alternative to a formal bankruptcy, a debtor may propose a Voluntary Arrangement ("VA"), which is a negotiated settlement between a debtor and his/her creditors, to be overseen by a licensed insolvency practitioner who will act as a nominee. Through VA, the debtor can work out a settlement and thus resolve issues with the creditors, without going through formal bankruptcy process.

To pursue the VA, the individual debtor may appoint a nominee and apply to the court for an interim order for the VA, disclose his/her assets and liabilities, and propose how he/she intends to settle the debts with the creditors. Once the interim order is issued, no bankruptcy proceeding against the debtor may be commenced or continued, and no other proceedings (including any enforcement) may be commenced or continued against the debtor or his/her property without permission from the court. Following the interim order, the nominee will need to submit a report to the court to state his opinion on whether the creditors' meeting should be convened and if so, the proposed time and venue of such creditors' meeting. The nominee then shall summon the creditors' meeting unless otherwise instructed by the court.

If the creditors' meeting is convened, the creditors will then vote on the VA proposal. If supported by the required majority of creditors through special resolution of the creditors at the meeting, the VA proposal will become binding on all creditors who have been notified of the creditors' meeting and entitled to vote on the proposal. If subsequently the debtor defaults on any obligation under the approved VA, then the nominee or any creditor bound by the VA may file for a bankruptcy petition against the debtor.

Concise well written answer. 4 marks.

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

#### Question 3.1 [maximum 8 marks]

Write a brief essay in which you discuss some of the claims that a liquidator or judicial manager can bring and how the IRDA has enhanced their ability to do so.

Liquidators or judicial managers can bring legal action in the court to unwind or void impeachable transactions or acts, that are prejudicial or detrimental to the creditors, or to

clawback assets or values that were previously transferred under any of the following impeachable transactions;

- Undervalued transaction, where the value of the consideration received by the debtor was considerably less than the consideration provided by the debtor, and the debtor became insolvent because of the transaction.
- Unfair preference transaction, where the transaction was with a preferred party who is a creditor or guarantor of any of the debtor's liabilities, the debtor was insolvent when the preference was provided, the transaction would result in the preferred party to be in a better or preferred position than otherwise, and the debtor was influenced by the desire provide preference to the preferred party (which is presumed to be the case if the preferred party is an associate of the debtor).
- Extortionate credit transaction, where the debtor has received a credit that in turn requires grossly exorbitant payments to be made to the provider of the credit, or where the terms of the credit are harsh and unconscionable or substantially unfair.
- Wrongful trading, where the debtor has incurred a debt without reasonable prospect of it getting fully repaid when the debtor became insolvent, or where the debtor became insolvent because of the incurrence of such debt. **This is a new provision. Please explain further.**
- Fraudulent trading, where it is proved that any business of the debtor was carried out by any of its officers with the intent to defraud creditors or the debtor (the company) itself.

The provisions of IRDA have enhanced the ability of liquidators and judicial managers to bring the legal action to pursue claims related to the impeachable transactions above, given that IRDA has statutorily empowered judicial managers and liquidators with the ability to assign certain causes of action to third-party funders (with approval by the court or with authorization from committee of inspection) who will fund the legal action and pursuit of claims related to the above mentioned impeachable transactions (as well as funding for assessment of damages against delinquent officers of the debtor), which prior to IRDA may otherwise not be pursued given the lack of funding and resources.

**Concise but could have elaborated further on the elements of the voidable transactions. 5 marks.**

### **Question 3.2 [maximum 7 marks]**

Write a brief essay in which you discuss the process of commencing a voluntary judicial management application. In your answer you should also discuss how this differs from a judicial management application that is filed in court.

Section 94 of IRDA introduced a new process for launching a voluntary judicial management. On the voluntary route, there is no need to file an application to the court for the judicial management and as such, the judicial management is put in place without a court order. The voluntary judicial management is predicated on;

- (i) the company is (or is likely to become) unable to repay its debts;
- (ii) there is reasonable probability of achieving the objective of having a judicial management in place (the survival of the company, or preservation of all or part of its business as a going concern, or better realization of its assets than otherwise through winding up); and
- (iii) the company has obtained a resolution from its creditors to be put under a voluntary judicial management.

Once the creditors' resolution is passed by a majority in number and value of the creditors present and voting, the voluntary judicial management process can then commence without the need to go through any court proceedings and without the associated court expenses.



The company under voluntary judicial management will then benefit from moratorium of potential enforcements or legal processes, similar to moratorium accorded by the normal judicial management ordered by the court.

**Elaborate further on the process. How about the appointment of an interim judicial manager?**

The main difference between voluntary judicial management and the judicial management by court order, is obviously the relevant court proceedings and incurrance of court expenses, which are absent in the voluntary route. By bypassing court proceedings, the voluntary process reduces the expense, formality, and potential delays in obtaining a judicial management order. Additionally, given the voluntary route requires creditors' resolution, the voluntary route is only possible where the company is able to engage, negotiate with, and obtain the necessary supports from its creditors from the outset. On the other hand, the normal court-ordered judicial management application can be brought by either the company (pursuant to a member's resolution), the company's directors (pursuant to board resolution), or the company's creditors either acting together or separately. As such, in a normal court-ordered judicial management, it is possible that the negotiation and haggling with the creditors happen after the judicial management is put in place.

**What other differences are there? Essay would have been improved with some elaboration. 4.5 marks.**

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

PT Angostura Textiles Tbk (Angostura, and together with its subsidiaries, the Angostura Group) is an Indonesia-incorporated company listed on the Indonesia stock exchange. Angostura is a substantial market player in textile production in South East Asia and China. Its primary lines of business are:

- fibre production with assets and factories in Malaysia, Thailand and Cambodia;
- textile manufacturing with assets and factories in Indonesia, Vietnam and China; and
- garment manufacturing and distribution facilities with assets and factories in Indonesia, Vietnam and the United States.

The Angostura Group has two key Singapore incorporated subsidiaries:

- Juniperus Textiles Pte Ltd. (Juniperus) which is wholly owned by Angostura; and
- Casuarina Garments Pte Ltd (Casuarina) which is wholly owned by Juniperus.

Each entity in turn owns all, or substantially all, of the shares in the relevant entities incorporated in the local relevant overseas jurisdiction.

The Angostura Group had traditionally funded its business via bank lending, with a combination of bilateral and syndicated loan facilities advanced directly to Angostura. As at 2019, the group had raised SGD 2 billion in bank lending, all of which was guaranteed by Angostura Indonesian subsidiaries.

In late 2019, as COVID-19 started to spread around the world, the Angostura Group sought to take advantage of the situation by expanding its garment manufacturing business into personal protective equipment. To fund this expansion, Juniperus issued SGD 200 million in retail bonds (the Juniperus SG Bonds) on the Singapore Stock Exchange (SGX) which were

guaranteed by Angostura. The proceeds of the Juniperus Bonds were on-lent to Casuarina who lent them via an offshore intercompany loan to Angostura (the Casuarina Intra-Group Loan). To ensure bondholders had rights in connection with the Casuarina Intra-Group Loan, holders of the Angostura Bonds are given security over the shares of each of Juniperus and Casuarina. The Juniperus Bonds are governed by a New York law.

In late 2020, Angostura's business experienced significant supply-chain disruptions as a result of the COVID-19 pandemic. During this time, Angostura started informing some of its bank lenders that they may require waivers on certain terms in their loans and potentially further time to repay certain amounts owing. In early 2021, Angostura appointed legal and financial advisors to provide it with advice as to the best steps to take. Shortly thereafter, a trade creditor filed a PKPU petition in Indonesia against Angostura and its Indonesian subsidiaries. Further to this, Juniperus and Casuarina filed for protection, under sections 64(1) and 65(1) respectively, of the Insolvency Restructuring and Dissolution Act (Act No 40 of 2018) (the IRDA). Angostura then announced that Juniperus will launch a separate Singapore Scheme of Arrangement under section 210 of the Companies Act (Cap 50) to restructure the Juniperus Bonds after the conclusion of the Indonesian PKPU, which will largely mirror the terms in the PKPU.

The bondholders of the Juniperus Bonds are concerned the moratoria being sought will prevent them from participating in the PKPU proceedings in Indonesia and enforcing their security over the shares in Juniperus and Casuarina, respectively. They have therefore decided to object to the Singapore moratorium applications.

**Using the facts above, answer the questions that follow.**

**Question 4.1 [maximum 6 marks]**

The working group of the bondholders has asked its advisors to provide it with a written analysis covering the following critical issues for the Angostura Group. Please provide analysis on the following issues:

**Question 4.1.1 (2 marks)**

What must be presented to the court in order to obtain moratorium protection order under section 64(1) IRDA?

Section 64 of IRDA provides that a company that is proposing or intending to propose an arrangement or compromise with its creditors (the "Subject Company"), will be able to obtain a moratorium protection following the application to the Court in accordance with Section 64 of IRDA.

The application pursuant to Section 64(1) of IRDA is to be made by filing to the Court *ex-parte* originating summons accompanied with supporting information and affidavit covering the following;

- Confirmation that the Subject Company is not excluded from the definition of "company" under Section 63(3) of IRDA and is entitled to apply for an order under Section 64(1) of IRDA;
- In case the Subject Company is a foreign company, the basis on which it may be liable to be wound up under IRDA;
- Confirmation that there is no order made or resolution passed for the winding up of the Subject Company;
- Undertaking that the Subject Company will as soon as possible file (if it has not already filed) an application to sanction a scheme of arrangement;

- Confirmation that the Subject Company has not applied for moratorium protection under Section 210(10) of the Companies Act;
- Confirmation whether the Subject Company has made an earlier application pursuant to Section 64(1) of IRDA within 12 months period preceding the current application;
- The date on which notice of application under Section 64(1) of IRDA was sent (or to be sent) to each of the Subject Company's creditors meant to be bound by the scheme of arrangement (this notice of application shall also be published in the Gazette and one English local daily newspaper);
- Where no scheme has been proposed by the Subject Company, a brief description of the intended compromise or arrangement, with sufficient particulars to enable the Court to assess whether the such intended compromise or arrangement is feasible, and merits consideration by the Subject Company's creditors;
- Evidence of support from its creditors and explanation of how such support will be important to the success of the proposed compromise;
- List of all secured creditors and all unsecured creditors not related to the Subject Company (or where there are more than 20 such unsecured creditors, the list of 20 largest unsecured creditors); and
- Where the Subject Company seeks for the moratorium to apply to acts taking place outside Singapore (such as in the case of Singaporean based creditors taking part in Angostura's Indonesian PKPU process), the basis on which such moratorium is sought.

Very detailed and comprehensive. 2 marks.

#### Question 4.1.2 (2 marks)

What must be presented to the court in order to obtain moratorium protection order under section 65(1) IRDA?

While Section 64 of IRDA is for the scheme of arrangement that is proposed (or intended to be proposed) by a Subject Company, Section 65(1) of IRDA provides the Subject Company's holding or subsidiary(ies) (the "Related Company") with the similar benefit of moratorium. The Related Company's application for moratorium should be filed concurrently with the Subject Company's application for moratorium.

The application pursuant to Section 65(1) of IRDA is to be made by filing to the Court *ex-parte* originating summons accompanied with supporting information and affidavit covering the following;

- Confirmation that the Related Company is not excluded from the definition of "company" under Section 63(3) of IRDA and is entitled to apply for an order under Section 64(1) of IRDA;
- Whether an order pursuant to Section 64(1) of IRDA has been made on the Subject Company (and if so, whether such order is still in force), and if not, the date and case number of the application by the Subject Company under Section 64(1) of IRDA;
- Confirmation that there is no order made or resolution passed for the winding up of the Related Company;
- Explanation on how the Related Company plays a necessary and integral role in the compromise or arrangement that has been (or to be) proposed by the Subject Company under Section 64(1) of IRDA;
- Explanation on how the Subject Company's proposed compromise or arrangement will be frustrated if one or more actions that may be restrained by an order sought under Section 65(1) of IRDA, are taken against the Related Company;
- Explanation on whether the Related Company's creditors will be unfairly prejudiced if the Related Company's moratorium is ordered; and

- The date on which notice of application under Section 65(1) of IRDA was sent (or will be sent) to each of the Related Company's creditors meant to be bound by the order sought under Section 65(1) of IRDA (this notice of application shall also be published in the Gazette and one English local daily newspaper).

2 marks. Thorough response.

#### Question 4.1.3 (2 marks)

Can the moratoria sought by Juniperus and Casuarina be ordered to have extra-territorial effect? If so, what acts and / or creditors will the moratoria apply to?

Yes, the moratoria sought by Juniperus and Casuarina may have extra-territorial effects as the moratoria under IRDA may be applied to "*any act of any person in Singapore or within the jurisdiction of the Court, whether the act takes place in Singapore or elsewhere*" (Section 64(5) and 65(4) of IRDA). The extra-territorial effect would be applicable to creditors that are based in Singapore or within the jurisdiction of Singapore Court, and to the acts of these creditors taking place outside of Singapore.

As such, the moratoria would restrain Singapore based creditors or those creditors that are subjected to the jurisdiction of the Court, including the Juniperus bondholders, from commencing or continuing any proceedings against, or enforcing any security over property of, Juniperus as a Subject Company (under Section 64(1) of IRDA) or Casuarina as a Related Company (under Section 65(1) of IRDA). Enforcement of the bondholders' security over the shares in Juniperus and Casuarina, will be stayed pursuant to the moratoria ordered under Sections 64(1) or 65(1) of IRDA.

On the other hand, the Indonesian PKPU proceedings against Angostura and its Indonesian subsidiaries should not be subjected to the moratoria as the Indonesian entities did not file for protection under IRDA as either a Subject Company or a Related Company, and therefore the Juniperus bondholders shall be able to participate in the Indonesian PKPU proceedings based on their claims against the guarantor of the bonds (ie Angostura).

Detailed and good application to the facts.

#### Question 4.2 [maximum 9 marks in total]

As things transpired, Juniperus and Casuarina were granted moratorium protection for a period of three (3) months and are expected to apply for an extension to this moratorium period for an additional six (6) months upon expiry of the original three- (3) month period. The working group of bondholders intends to oppose any extension application.

The bondholders have instructed the Juniperus Bonds' trustee under the relevant indenture to be ready to enforce their security over the shares in Casuarina as soon as practicable. The Juniperus Bonds appear to be traded heavily in the market, with private equity funds looking to buy up significant stakes in order to enforce the security over shares in Casuarina.

To try and protect against this risk, Angostura also commenced local insolvency proceedings and emergency recognition proceedings in the United States.

**Taking these additional facts above into consideration, answer the questions below.**

#### Question 4.2.1 [maximum 5 marks]

What are the steps that need to be taken in order to launch a subsequent scheme of arrangement under section 210 of the Companies Act? How does the process for a scheme

proposed under section 210 of the Companies Act differ from a prepack scheme proposed under section 71(1) of the IRDA?

Scheme of arrangement is a debtor-in-possession mechanism to secure a restructuring agreement between a company (the debtor) with its creditors. The company (ie the debtor) is responsible, with possibly the help of a financial advisor and/or a scheme manager, to prepare and propose a restructuring proposal to be implemented (and possibly administered by the scheme manager). The company's proposal would then be negotiated and voted on, by the creditors, and if approved, it would be sanctioned by the Court. The company's management will also remain in control of the company, throughout the implementation of the scheme. While the role of the Court is mostly supervisory and directed at ensuring the required disclosure of information is satisfied and other due process is followed.

Juniperus (and/or Causarina) may launch a scheme of arrangement under Section 210 of the Companies Act by following these steps;

- The company must apply to the Court for leave to convene a creditors' meeting, to consider and approve the proposed scheme. In its application, the company need to disclose and submit all necessary relevant information that is required; (i) for the Court's consideration in determining whether and how a creditors' meeting is to be concluded, and (ii) for the creditors' consideration, to make informed decision to support (or otherwise disapprove) the proposed scheme.
- The company must send out notices and explanation of the proposed scheme (and the relevant accompanying information), to the creditors, summoning scheme meetings and elaborating on;
  - (i) How the proof of claims can be submitted by the creditors; and
  - (ii) The period to submit and file such proof of claims.
- The scheme manager or the chairman of the scheme meetings would then review proof of claims submitted by prospective scheme creditors, and decides which claims to admit.
- The proposed scheme would then be voted by the creditors, with the following approval threshold;
  - (i) Majority (ie more than 50%) in number of each class of creditors voting (in person or through proxy); and
  - (ii) These favourable votes represent not less than 75% of claims value of the respective class voting (in person or through proxy).
- Once approved, the Court will sanction the scheme and a copy of the scheme must be lodged with the official registrar of companies, ACRA.

A 'prepack' scheme proposed under Section 71 of IRDA, on the other hand, allows the Court to make an order approving a creditor scheme of arrangement even though no meeting of creditors has been ordered or held. As such, in a prepack route, the discussion and negotiation with the creditors would have been completed before the application to approve the scheme is made to the Court (as opposed to the Section 210 application, where the scheme meetings are part of the process under the supervision of the Court, and there would be two applications to the Court – one to summon creditors' meeting and another one to sanction the scheme).

Section 71(3) of IRDA stipulates the following conditions before a prepack scheme can be approved;

- (1) The company has provided the creditors with relevant information necessary for the creditors to make an informed decision about the scheme
- (2) The company has published in the Gazette and one English newspaper, its application to the court, and has sent a copy of this publication to ACRA;
- (3) The company has also sent notices and copies of the application to each creditor that is meant to be bound by the scheme;

(4) The Court is satisfied that had a meeting of creditors been convened, the statutory threshold of creditors' support would have been obtained.

Good answer. Well done. 5 marks.

**Question 4.2.2 [maximum 2 marks]**

What requirements must be satisfied in order for the Angostura Group to be able to access rescue financing under the IRDA?

Under Section 67 of IRDA, the Court may grant an order that a rescue financing be given super priority status where a company has made an application for the purposes of a scheme of arrangement under Section 210 of the Companies Act or for a moratorium under Section 64(1) of IRDA. As such, the first prerequisite for accessing the rescue financing under IRDA would be for the Angostura Group to submit application for the scheme of arrangement, or for a moratorium protection. As both Juniperus and Casuarina have filed for and obtained moratorium protection, they would qualify to be considered access to rescue financing under IRDA.

Additionally, to qualify as a rescue financing under IRDA, the financing must meet the definition of a rescue financing as stipulated in Section 67(9) of IRDA, which defines rescue financing as financing that is both;

- (i) Required for the survival or the going-concern of the debtor obtaining it; and
- (ii) Required to achieve better realization of assets than from a winding up.

Furthermore, the stronger type of super priority status that the Court may grant, would come with further requirements to be satisfied by the applicant (the debtor);

- For the rescue financing to have priority over all other preferential and unsecured claims if the debtor is eventually wound up (Section 67(1)(b) of IRDA), the debtor shall have made reasonable effort to obtain financing without such super priority status so it can be demonstrated that the debtor would not be able to secure such rescue financing without this type of super priority;
- For the rescue financing to be secured with either (i) the debtor's property that is not otherwise subject to any other security interest, or (ii) junior ranking security over debtor's property that is already under other security interest (Section 67(1)(c) of IRDA), the debtor shall have made reasonable effort to obtain financing without such super priority status so it can be demonstrated that the debtor would not be able to secure such rescue financing without this type of super priority;
- For the rescue financing to be secured with either the same ranking or higher priority over debtor's property that already has other security interest (Section 67(1)(d) of IRDA), the debtor shall have made reasonable effort to obtain financing without such super priority status so it can be demonstrated that the debtor would not be able to secure such rescue financing without this type of super priority, and additionally there should be adequate protection for the interests of the holder of the existing security interest that is primed or superseded by the rescue financing.

2 marks.

**Question 4.2.3 [maximum 2 marks]**

Explain the key requirements in order for a Singapore court to recognise a foreign insolvency proceeding and what the effect will be if the court were to do so.

Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "MLCBI"), initially through the Amendment Act of 2017, and later adopted into IRDA (the "SG

Model Law”), in substantially the same form as the original MLCBI. As such, foreign insolvency proceedings can be recognized in Singapore, pursuant to the MLCBI / SG Model Law, as either a foreign main or foreign non-main proceeding.

The provisions in the MLCBI (and as such, the SG Model Law) are intended to expedite and simplify process for recognition of foreign insolvency proceedings, and the MLCBI prescribes straight-forward and easy-to-meet requirements for the recognition of foreign insolvency proceedings in Singapore as an enacting State.

The key judicial scrutiny for recognition under the MLCBI is in the qualifications set out by the definitions of ‘foreign proceeding’ (Article 2(a) of the MLCBI) and ‘foreign representative’ (Article 2(d) of the MLCBI). The application for recognition shall be submitted to the Singapore Court by a party that qualifies as a ‘foreign representative’ as prescribed by the MLCBI (and therefore by the SG Model Law), and the foreign proceeding shall meet the criteria of a ‘foreign proceeding’ as prescribed by the MLCBI (and therefore by the SG Model Law).

Article 2(d) of the MLCBI (and the SG Model Law) defines a foreign representative under the MLCBI (and the SG Model Law) as either a ‘person’ or a ‘body’, authorized to administer the reorganization or the liquidation of the debtor’s assets or affairs, or to act as a representative of the foreign proceeding.

The Singapore Court of Appeal has also clarified that, in interpreting the provisions of the MLCBI, due considerations shall be accorded to complementary texts and guidance developed and published by UNCITRAL, as well as case laws from other jurisdictions in applying the MLCBI, as required by Article 8 of the MLCBI / SG Model Law<sup>1</sup>.

With regards to a ‘foreign proceeding’ under the MLCBI / SG Model Law, the Singapore Court of Appeal has clarified that the following four attributes shall be met cumulatively<sup>2</sup>;

- The foreign proceeding involves creditors collectively;
- The foreign proceeding has its basis in a law related to insolvency;
- There is control or supervision by a court over the affairs and assets of the debtor; and
- The proceeding’s objective must be for the debtor’s reorganisation or liquidation.

Upon satisfying the judicial scrutiny set out by the definitions of ‘foreign representative’ and ‘foreign proceeding’, the foreign proceeding is likely to be granted recognition unless doing so would be contrary to public policy in Singapore (Article 6 of SG Model Law). Following the recognition by the Court in Singapore, the foreign proceeding (and the foreign representative) would benefit from available reliefs to protect the debtor’s assets or interests of creditors (Article 21 of the MLCBI / SG Model Law). Additionally, if the foreign proceeding is recognized as a foreign main proceeding, Article 20 of SG Model Law provides an automatic stay that is same in scope and effect as if the debtor had been made the subject of a winding up order under IRDA (Article 20(2) of the SG Model Law).

The foreign representative(s) of Angostura’s foreign proceedings may thus apply for recognition in Singapore, of the Indonesian PKPU proceeding (which will likely be recognized as a foreign main proceeding), or the other insolvency proceeding in the US, and if such foreign proceeding has been recognized and relevant relief has been granted, enforcement of security over Juniperus shares could be stayed.

### Detailed and good application of the facts.

<sup>1</sup> Sheila Ng, “The Singapore Court of Appeal’s First Reported Decision on the Model Law on Cross-Border Insolvency” [2022] SAL PRAC 6, at [10] and [11].

<sup>2</sup> Ibid, at [25].

**\* End of Assessment \***

**40.5 out of 50**