INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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 or Avenir Next 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).

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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 **9 pages**.

ANSWER ALL THE QUESTIONS

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 1m

Which one of the following insolvency tools **is not** available in Singapore?

(a) Judicial management.

(b) Administration.

(c) Court winding-up.

(d) Scheme of arrangement.

Question 1.2 0m

Who may apply to court to place a debtor company into judicial management?

(a) A contingent creditor.

(b) The debtor company.

(c) A prospective creditor.

(d) Any of the above.

Question 1.3 1m

Which of the following factors may **support** a foreign debtor's case 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 centre of main interests of the debtor is located in Singapore.

(c) The debtor has a place of business in Singapore.

(d) Any of the above.

Question 1.4 1m

What percentage of each class of creditors must **approve** a scheme of arrangement for it to pass?

(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 1m

Which of the following in respect of the automatic moratorium under section 64(1) of the Insolvency Restructuring and Dissolution Act (IRD Act) is **incorrect**?

(a) The automatic moratorium lasts for 30 days.

(b) The automatic moratorium may be extended.

(c) The automatic moratorium can be obtained without filing an application to court.

(d) The debtor has to either propose or intend to propose a scheme of arrangement.

Question 1.6 1m

Which of the following types of contracts are **excluded** from the *ipso facto* restriction in section 440 of the IRD Act?

(a) Any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed.

(b) Any contract that is a licence, permit or approval issued by the Government or a statutory body.

(c) Any commercial charter of a ship.

(d) Any contract for a loan with a financial institution.

Question 1.7 1m

Which of the following is one of the three **statutory objectives** of a judicial management?

(a) To allow the directors to oversee the restructuring of the company.

(b) To preserve all or part of the company's business as a going concern.

(c) As a means for the secured creditors to realise their security.

(d) To liquidate the company in a fast-track and cost-efficient manner.

Question 1.8 1m

Which one of the following is **not a debtor who can apply** for personal bankruptcy in Singapore?

(a) An individual domiciled in Singapore.

(b) An individual who owns property in Singapore.

(c) An individual who has been carrying on business in Singapore for the last year.

(d) An individual whose parents live in Singapore.

Question 1.9 1m

Which of the following in respect of rescue financing is **incorrect**?

(a) Rescue financing is financing that is necessary for the survival of a debtor that obtains the financing.

(b) Rescue financing is financing that is necessary to achieve a more advantageous realisation of the assets of a debtor that obtains the financing, than on a winding-up of that debtor.

(c) Rescue financing enjoys preferential treatment automatically without the sanction of court.

(d) Rescue financing may be sought in a judicial management process.

Question 1.10 1m

Who may apply to court to place a company into **liquidation**?

(a) The company itself.

(b) A creditor of the company.

(c) A shareholder of the company.

(d) Any of the above.

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 4 marks] 4m

Explain the concept of a cross-class cram-down in a scheme of arrangement and what the requirements are before a court would order a cram-down.

[Answer:

Cross-class cramdown is a concept introduced in 2017 which gives power to the court to impose an arrangement on dissenting classes of creditors. Under cross-class cramdown, a scheme of arrangement will not require the approval of all classes of creditors. Instead, where the requirements as discussed below are satisfied, the plan can be imposed on all classes including classes that comprise a majority of dissenting creditors. The reason behind the concept of cross-class cramdown was to reduce the influence of minority creditors.

Cross-class cramdown can only be imposed on dissenting classes of creditors if all the following requirements are met:

1- The plan needs to be approved by a qualified majority which means more than 50% of the total number of creditors present and voting must agree to the plan and such majority in number must represent at least 75% in value of total claims.

2- The plan cannot discriminate unfairly between different classes of creditors. The court should be satisfied that the plan does not unfairly discriminate between different classes of creditors. It should also be equitable and fair to each class of creditors.

3- The plan needs to be fair and equitable, and the priority rule as mentioned in s 70 should be satisfied. The value of security held by the secured creditors must be safeguarded in the plan.

In order to meet the "fair and equitable" criteria, the plan imposed on the dissident class of secured creditors must provide for repayment in one of three statutorily authorised forms. Deferred cash payments in the amount secured, a charge against the sale proceeds of the realised security, or the undeniable equivalent of that security are all acceptable forms of payment. Furthermore, if the dissenting class consists of unsecured creditors, no creditor with a claim that is inferior to a creditor in the dissenting class is allowed to receive any money or keep any assets unless a plan has been made for the full repayment of each creditor's claim in the dissenting class.

Therefore, to exercise the power of cramdown by any court on dissenting classes of creditors, it must be ensured that the plan satisfies all the above requirements.]

Question 2.2 [maximum 2 marks] 2m

Name **two** objectives of the IRD Act.

[Answer:

Following are the two main objectives of the IRD Act:

1- To consolidate the corporate and personal insolvency and restructuring laws

2- To establish a regulatory body and guidelines for insolvency practitioners

To combine all of the current rules governing individual and corporate insolvency into a single act, the IRD Act was introduced. Therefore, the IRD Act serves as a valuable tool to support the real economy by facilitating the reorganization of viable companies in financial distress, the liquidation of non-viable businesses in a fair and efficient manner, and the maximization of returns to creditors.

It also seeks to facilitate the understanding and practice of insolvency law in Singapore and to regulate the insolvency practitioners.]

Question 2.3 [maximum 4 marks] 4m

State **four** factors that should be considered under the cash flow test in determining whether a company is “unable to pay its debts” under the IRD Act.

[Answer:

The Cash Flow test is the sole test in determining insolvency

The cash flow test determines if the company has enough current assets to cover its current liabilities and pay all debts as they become due. According to the accepted accounting definition, "current assets" and "current liabilities" are assets that can be realised and debts that will become due within a year, respectively.

The Court will consider both whether the liquidity issue "can be cured in the reasonably near future" and whether the company's assets "were realisable within a timeframe that would allow each of the debts to be paid as and when it became payable" when evaluating the cash flow test. The Court will also take into account debts that may not have been demanded or even be due.

There is a non-exhaustive list of factors as set out by the court which should be considered under the cash flow test. These include:

a. the value of all debts which are due or which will be due in the near future;
b. whether payments are being asked for or are likely to be asked for these debts;
c. whether the company has failed to pay any of its debts. If yes, the value of such debts, and since when it has failed to pay.
d. the time since when the commencement occurred for the winding up proceedings;
e. the value of the company's current assets which will be realisable in the near future;
f. the state of the company's business, and the expected net cash inflow from the business after deducting expenses from sales.
g. any other income which the company is likely to receive in the near future; and
h. arrangements between the company and its lenders/bankers. This is done in order to know that in case of any shortfall in liquid and realisable assets, the cash inflow could be increased by borrowings from them which would be repayable later after repaying the debts.

For three key reasons, the Court determined that the cash flow test is the only one that applies under Section 254(2)(c) of the Companies Act.

First, the phrase "it is proved to the satisfaction of the Court that the Company is unable to pay its debts" only refers to one test, and the simple wording of the provision do not contemplate the application of two or more separate tests.

The UK courts have construed section 518(e) of the Companies Act 1985, which has language identical to section 254(2)(c), as requiring only a single test of commercial insolvency, and the Court determined that this argument for a single test is supported by UK case law.

Third, the balance sheet test is not the sole test that section 254(2)(c) of the Companies Act intends. The balance sheet exam contrasts the total assets and total liabilities of a business. The Court concluded that the sum of the company's assets and liabilities is not a reliable indicator of the company's current ability to pay its debt and is only relevant insofar as it reveals the amount of debts that will soon be due and the amount of assets that may be realised in the near future.

The Court also emphasised that where the legislature intended to include a balance sheet test, it did so explicitly (see s. 123(2) of the UK Insolvency Act 1986 and s. 100(4)(b) of the Bankruptcy Act (Cap 20, 1996 Rev Ed), which has since been repealed by the Insolvency,

Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA")). The absence of this in § 254(2)(c) indicates that it was not meant to be done.].

QUESTION 3 (essay-type question) [15 marks]

Question 3.1 [maximum 8 marks] 8m

Write a brief essay on

(i) rescue financing; and

(ii) wrongful trading

under the IRD Act.

[Answer:

(i) Rescue Financing:

Rescue financing is a type of financing which includes either or both of the following:

1- It is required by a debtor who obtains funding to survive.

2- necessary to realize the assets of a debtor who gets the finance in a more favorable manner than on the debtor's winding up.

A court may, on the debtor's request, issue an order requiring that any rescue finance acquired by a debtor comply with the following requirements under the scheme of arrangement and judicial management processes:

If the debtor is later wound up,

1- be considered as part of the costs and expenses of the winding-up.

2- be given preference over preferential debts in the event that the debtor is later wound up.

3- if the debtor would not have been able to obtain unsecured rescue financing from any other party, be secured by a security interest on debtor property that is not otherwise subject to any security interest or be secured by a subordinate security interest on debtor property that is subject to an existing security interest.

4- if the debtor would not have been able to obtain rescue financing from any other party without it being secured in this way and there is adequate protection for the interests of the existing security interest, be secured by a security interest on property subject to an existing security interest, of the same or higher priority than the existing security interest.

In other words, rescue financing consists of new loans aimed at providing a company with working capital during a restructuring. These funds may be used by the debtor company to continue doing business, as well as pay its suppliers and trade creditors even while in the midst of distress, administration, or restructuring. "Super-priority status" is given to loans made

under such rescue financing packages in order to entice and reward financers, normally called as "white knights", to step forward and take up such rescue financing.

The loans provided for the rescue financing will be repaid ahead of all other claims in the company's winding up, including possibly all other secured and unsecured debts in certain appropriate cases, if the company is wound up. This is true even if the scheme of arrangement or judicial management should ultimately fail to rescue the company from distress.

The grant of such super-priority status for rescue financing is significant because it ensures the lender that, should the restructuring fail, the rescue financing will be paid out of the borrower company's unsecured assets first, ahead of all unsecured claims and other administrative costs, and possibly even rank equal to or in priority with existing secured debts in some appropriate cases.

This will encourage lenders to provide more money to struggling businesses and give viable ones a second chance at restructuring and recovery.

(ii) Wrongful Trading:

The IRDA 2018 introduced the concept of wrongful trading, which provides that a company will trade wrongfully if:

- The company, when insolvent, incurs debts or liabilities without reasonable prospect of meeting them in full; or

- The company incurs debts or liabilities that it has no reasonable prospect of meeting in full and it results in the company becoming insolvent.

Persons who are party to the wrongful trading may attract both civil personal liability and criminal liability.

If a company has traded incorrectly, any person who was a party to the wrongful trading can be held personally liable for all or part of the company's debts or liabilities if that person knew or should have known that the company was trading wrongfully as an officer of the company.

An “officer”, in relation to a corporation, includes –

- any director or secretary of the corporation or a person employed in an executive capacity by the corporation.
- a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; and
- any liquidator of a company appointed in a voluntary winding up,

but it does not include –

- any receiver who is not also a manager.
- any receiver and manager appointed by the Court.
- any liquidator appointed by the Court or by the creditors; or
- a judicial manager appointed under Part 7 of the IRDA.

A person guilty of wrongful trading may also be guilty of a criminal offence and shall be liable on conviction to a fine not exceeding S$10,000 or to imprisonment for a term not exceeding 3 years, or both.

Personal liability is a statutory defense under the IRDA. The Court may release a person from personal liability if the person acted honestly and, in light of all the facts of the case, the person should be released from personal liability.

The wrongful trading laws do not require that criminal liability be established before civil liability can be established. It is easier to hold those who participate in wrongful trading for civil liability.

Any person who was a party to the wrongful trading can be held liable under Wrongful Trading provisions, regardless of whether they are a director and/or officer of the corporation. It follows that culpability may extend to those individuals involved in managing a distressed company and entering into contracts on its behalf.

The Court may absolve the responsible person of personal liability if the person acted honestly and, in light of all the facts, that person should be absolved of personal liability fairly.

Persons participating in a company's activities must be extremely cautious when the company is insolvent or on the verge of collapse. Decisions on whether a firm is solvent or on the verge of insolvency should be thoroughly documented in case the directors are later called upon to justify their decisions and actions. Directors and executives should also make certain that they receive regular financial reports on the company in order to be informed of its financial status and cash flow. If the firm is on the verge of insolvency, directors should be wary of incurring debts and liabilities that could trigger wrongful trading clauses.]

Question 3.2 [maximum 7 marks] 5m

Write a **brief essay** in which you discuss the differences between the judicial management and scheme of arrangement processes.

[Answer:

Judicial Management and Scheme of Arrangements are different forms to rescue a company under the Companies Act of Singapore. The objective of both of these rehabilitating procedures is to rescue an economically viable debtor company. However, the approach and the procedures are different in these two methods. They are explained as follows:

1- In a scheme of arrangement, only the debtor company can make an application to enter into a scheme of arrangements.

In the case of judicial management, the application can be made by:

- the company by passing a members' resolution;
- its directors by passing a resolution by the board of directors;
- its creditors either separately or along with other creditors

2- An application in accordance with section 211B is required to be filed for entering into a scheme of arrangements.

An Application in accordance with section 227B is required to be filed for obtaining an order for judicial management.

3- The application can be made where the company proposes or intends to propose, a compromise or an arrangement between the Company and its creditors, or any class of them.

An application for judicial management should only be made where a company, or where a creditor or creditors of the company, consider that:

a) the company is or will be unable to pay its debts; and
b) there is a reasonable probability of rehabilitating the company, or of preserving all or part of its business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding-up

4- The company can enter a scheme of arrangements if it proposes to make a compromise or arrangement with its creditors or any class of them.

A Judicial management order can be made by the Court if it:
a) is satisfied that the company is or will be unable to pay its debts;
b) considers that the making of the order would be likely to achieve one or more of the following purposes:

i) the survival of the company or the whole or part of its undertaking as a going concern;
ii) the approval under section 210 of the Companies Act of a compromise or arrangement between the company and any such persons as are mentioned in that section; or
iii) the more advantageous realisation of the company´s assets than would occur in a winding-up

5- In a scheme of arrangements, the debtor company appoints a scheme manager to facilitate the restructuring process.

Under the judicial management order, the Court appoints a judicial manager.

6- There is no provision for the appointment of an interim scheme manager under a scheme of arrangement process.

Under Judicial management, an interim judicial manager can be appointed by the Court, on an application of the company or any of its creditors to;

a) protect the assets or business of the company which are at risk of being dissipated or deteriorating;
b) bridge the gap between the application for judicial management and the hearing of the judicial management application; and
c) safeguard the interests of the company as well as its creditors.

7- The role of the proposed scheme manager is to prepare the scheme proposal and to adjudicate on the creditors' proofs of debt. The scheme manager usually acts as chairman of the scheme meeting(s). Typically, the scheme manager generally administers the scheme after it has been approved by the creditors.

Upon making the judicial management order, all the responsibilities, functions and powers of the board of directors are transferred to the judicial manager. The judicial manager takes custody of all assets of the company. The Judicial manager also assumes the powers specified in the Eleventh Schedule of the Companies Act.

8- Under the process of scheme or arrangements, there is no blanket prohibition on the sale of assets outside the ordinary course of business. However such power of sale is subject to provisions of section 211B (6) and 211D of the Act.

Judicial Managers has the power to sell or otherwise dispose of the property of the company by public auction or private contract as set out in the Eleventh Schedule to the Companies Act, a judicial manager A judicial manager may also dispose of property secured by a floating charge subject to satisfying certain conditions.

9- Under a scheme of arrangements, the creditors are informed about the manner and time limit for filing the proof of debt. If a creditor does not file its claim within the prescribed time it is not allowed to vote in the meeting.

Under the Judicial Management, the Judicial Manager convenes a creditors' meeting, and the notice of the meeting specifies the requirements for filing a proof of debt.

10- Under the scheme of arrangement process, the proofs of claims are adjudicated by the court-appointed chairman of the creditors' meeting.

Under Judicial Management the chairman, the judicial manager, has the power to admit or reject a creditor's proof for voting. Any rejection of the claim can be appealed to the Court.

11- Under a scheme of arrangements to pass and make it binding, the scheme of arrangement is required to be approved by:

a) a majority in number of each class of creditors present and voting (either in person, or by proxy) at the meetings .; and

b) the majority in number must represent three-quarters in value of the respective class of creditor present and voting.

Under Judicial Management, for a proposal to be binding on the company, the judicial manager and the creditors or class of creditors, it is required to be approved by:

a) a majority in number of each class of creditors present and voting (either in person or by proxy) at the meetings convened by the Court; and
b) such majority in number must represent three-quarters in value of the respective class of creditors present and voting.

12- A scheme of arrangement does not need to be proposed to all creditors of the Company. It is open to a company to deal with certain creditors outside of a scheme of arrangement.

There is no provision for dealing outside the proposal under the Judicial Management process.

13- Under the scheme of arrangement, the onerous contracts may not be disclaimed.

Judicial managers, unlike liquidators, have no power to disclaim onerous contracts entered into by the company prior to the judicial manager's order.

14- Under the scheme of the provisions relating to impeachable transactions do not apply.

The Judicial Manager has the power to set aside transactions at an undervalue, preferences and extortionate credit as that of a liquidator.

15- Under the scheme of arrangement, the provisions relating to the Officer's liability do not apply to the scheme manager. The scheme manager is not required to make an application for fixing any liability of officers of the company.

The Judicial manager has power and is required to apply to the court for an order in relation to transactions defrauding creditors, by the officers of the company.

16- On making the application for compromise or arrangements with the creditor or class of them under provisions relating to scheme or arrangements Receiver, manager do not vacate the office

On the making of a judicial management order —
(a) any receiver or receiver and manager vacates the office; and
(b) any application for the winding up of the company is dismissed.]
[the provisions under the CA have been repealed and replaced by IRDA – eg s211B CA has been repealed and replaced with s64 IRDA]

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

ABC Limited (the Company) is incorporated in Singapore and is the ultimate holding company of a group of construction and property companies (the ABC Group). As at 31 December 2021, the ABC Group owns and operates 16 construction drilling rigs outside of Singapore in Australia and the United Kingdom. The Company's directors and major shareholders are Mr X and Mr Y, who collectively own 57% of the shares in the Company. Mr X and Mr Y are based in Singapore.

The ABC Group traditionally funds its business via bank lending, with project financing facilities advanced directly to the underlying project companies within the ABC Group.

As the ABC Group's ultimate holding company, the Company's assets comprise largely of its investments in its subsidiaries and intercompany receivables from its subsidiaries. The Company does not have fixed assets and operational cashflows and is dependent on dividends and receivables from its subsidiaries to meet its own financial obligations. The main operating subsidiaries of the ABC Group are Alpha Pte Ltd and Beta Pte Ltd (both incorporated in Singapore and wholly owned by the Company).

The ABC Group recently expanded its business into property ownership and owns property in Australia via another subsidiary, Charlie Pty Ltd, which is incorporated in Australia. The properties in Australia are mortgaged to a Singapore bank pursuant to a bank facility that is governed by Singapore law. Mr X and Mr Y are the majority directors of Charlie Pty Ltd.

To finance its growing operations, the Company issued a Multicurrency Medium Note Programme (MTN) under which the Company could raise unsecured debt financing of up to USD 600 million. Funds raised by the Company under the MTN were either advanced to its subsidiaries as intercompany loans, or injected as capital into its subsidiaries. As at 31 December 2021, the total unpaid amount under the MTN notes was approximately USD 267 million.

The Company also provided corporate guarantees to financial institutions to guarantee the performance of its subsidiaries under various facility agreements. As at 31 December 2021, the Company had provided seven guarantees to various lenders, for a total liability of approximately USD 160 million.

Besides the above liabilities, the Company has also obtained shareholders' loans of USD 120 million from Mr X and Mr Y. These shareholders' loans are repayable on demand.

In recent years, the ABC Group's business has been adversely impacted by an extremely challenging operating environment and instability, which has caused various entities in the

ABC Group to default on their bank facilities, including entities whose debts are guaranteed by the Company.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 4 marks] 3m

The bank lenders have come together to form a working group and the working group has asked its advisors to provide it with a written analysis covering the following critical issues for the Company. In particular, the bank lenders are considering the possibility of placing the Company into judicial management. Provide analysis on the following issues:

(a) Confirmation of the purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order. (2 marks)

(b) Assuming that the Company is placed under judicial management, what requirements must be satisfied in order for the Company to be able to access rescue financing under the IRD Act? (2 marks)

[Answer:

(a) Confirmation of the purpose of judicial management proceedings:

In this case, the ABC Group's business has been adversely impacted by an extremely challenging operating environment and instability, which has caused various entities in the ABC Group to default on their bank facilities, including entities whose debts are guaranteed by the Company. In view of this, the bank lenders (creditors) have come together to form a working group also.

This is a fit case for making an application for judicial management as an application for judicial management can be made if the creditors of the company consider that:

a) the company is or will be unable to pay its debts; and
b) there is a reasonable probability of rehabilitating the company, or of preserving all or part of its business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding-up.

[see s89 for purpose of JM]

What must be presented to the court in order to obtain a judicial management order:

It is to be proved to the satisfaction of the court that:

a) the company ABC is or will be unable to pay its debts;
b) passing of the order by the court would be likely to achieve one or more of the following purposes:

i) the survival of the company or the whole or part of its undertaking as a going concern;
ii) the approval under section 210 of the Companies Act of a compromise or arrangement between the company and creditors as mentioned in that section; or
iii) the more advantageous realisation of the company´s assets will happen than would occur in a winding-up

(b) Assuming that the Company is placed under judicial management, what requirements must be satisfied in order for the Company to be able to access rescue financing under the IRD Act?

Following requirements must be satisfied by the company to obtain rescue financing:

1- It is to be proved that it is required by the company to survive.

2- It is necessary to realize the assets of a debtor company who gets the finance in a more favorable manner than on the debtor's winding up.

[comment: requirements above are either or – see s 67 and 101]

A court may, on the debtor company's request, issue an order requiring that any rescue finance acquired by a debtor comply with the following requirements under the scheme of arrangement:

If the debtor company is later wound up,

- Rescue Financing to be considered as part of the costs and expenses of the winding-up.
- Rescue Financing to be given preference over preferential debts in the event that the debtor is later wound up.
- if the debtor would not have been able to obtain unsecured rescue financing from any other party, be secured by a security interest on debtor property that is not otherwise subject to any security interest or be secured by a subordinate security interest on debtor property that is subject to an existing security interest.
- if the debtor would not have been able to obtain rescue financing from any other party without it being secured in this way and there is adequate protection for the interests of the existing security interest, be secured by a security interest on property subject to an existing security interest, of the same or higher priority than the existing security interest.]

Question 4.2 [maximum 6 marks] **4m**

As things transpired, the Company was placed under judicial management.

The bank lenders are now considering whether Alpha Pte Ltd, Beta Pte Ltd and Charlie Pty Ltd should also be placed into judicial management. Provide analysis on the following issues:

(a) What are the steps that need to be taken in order to place Alpha Pte Ltd and Beta Pte Ltd under judicial management out of court? (3 marks)

[Answer:

Companies Alpha Pte Ltd and Beta Pte Ltd can be put under judicial management out of court under the provisions of Section 94 of the IRD Act **(Judicial Management by Resolution of Creditors)**.

As per the provisions of Section 94, if a company considers that —

- the company is, or is likely to become, unable to pay its debts; and

- there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1),

the company may, instead of applying to the Court for a judicial management order, obtain a resolution of the company's creditors under Section 94(11) for it to be placed under the judicial management of a judicial manager.

The company then has to give at least 7 days' of written notice its intention to appoint an interim judicial manager.

(i) to the interim judicial manager who is proposed to be; and
(ii) to any person who has been appointed as a receiver and manager of all (or substantially the whole) of the company's property, or who is otherwise qualified to do so under the provisions of any debentures issued by the business and secured by a floating charge or by a floating charge and one or more fixed charges.]

(b) Is Charlie Pty Ltd eligible to be placed into judicial management in Singapore and, if so, what must be demonstrated for it to be so eligible? (3 marks)

[Answer:

Yes, Charlie Pty Ltd is eligible to be placed into judicial management in Singapore.

Before the amendments on 2017, only companies which were incorporated in Singapore could undergo Judicial Management in Singapore. The 2017 Amendments gave foreign companies doing business in Singapore access to judicial management.

Under the amendments, a foreign company wishing to enter into Judicial Management in Singapore, Charlie Pty Ltd in this case, should demonstrate that it had a strong connection with Singapore. [dicuss that it needs to be a company liable to be wound up in SG and that it has to have a substantial connection with SG – s88 and s264]

The company Charlie Pty Ltd must satisfy any one of the following conditions:

(a) the center of main interests of the debtor is located in Singapore;

(b) the debtor is carrying on business in Singapore or has a place of business in Singapore;

(c) the debtor is registered as a foreign company in Singapore;

(d) the debtor has substantial assets in Singapore;

(e) the debtor has chosen Singapore law as the law governing a loan or other transaction, orthe law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction; or

(f) the debtor has submitted to the jurisdiction of the Singapore courts for the resolution of oneor more disputes relating to a loan or other transaction.

As Charlie Pty Ltd satisfies the conditions (a) and (e) conditions, it is eligible to b eplaced under judicial management in Singapore.]

Question 4.3 [maximum 5 marks]

Assuming Alpha Pte Ltd, Beta Pte Ltd and Charlie Pty Ltd are also placed into judicial management in Singapore.

Please provide analysis on the following issue:

(a) Would the assets owned by the ABC Group in jurisdictions outside of Singapore be protected? If there is no automatic protection, what can be done to obtain such protection? (5 marks) 0m

[Answer:

The assets owned by the group in countries other than Singapore will be protected by the extraterritorial application of the moratorium under sections 211B and 211C. According to section 211B(5)(b), the court order may provide that the moratorium applies to any act committed by any person in Singapore or within the court's jurisdiction, whether the act is committed in Singapore or overseas.

The ABC is a Singapore-based business, and two of its three subsidiaries are registered there. In the event that a foreign debtor has a significant relationship to Singapore, Section 211 still applies to them.

The following factors are provided under section 351 (2A) to determine whether a connection is substantial;

(a) Singapore is the centre of main interests of the company;
(b) the company is carrying on business in Singapore or has a place of business in Singapore;
(c) the company is a foreign company that is registered under Division 2 of Part XI;
(d) the company has substantial assets in Singapore;
(e) the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising
out of or in connection with a loan or other transaction;
(f) the company has submitted to the jurisdiction of the Court for the resolution of one or more disputes relating to a loan or other transaction.

The aforementioned companies are in personam for Singapore Courts since subsidiaries of the ABC Group namely Alpha Pte Ltd and Beta Pte Ltd are both incorporated in Singapore and are wholly owned by the Company ABC The third company Charlie Pty Ltd no doubt is registered in Australia but it's an subsidiary of ABC .

[s211B etc of CA repealed. Relevant legislation is now IRDA. Discuss that a moratorium arises after JM order is made and it covers property outside of SG (s88), but protection overseas is not immediate as it depends on whether the relevant foreign jurisdiction recognizes the JM and would give a moratorium – eg whether it adopted Model law or has recognition regime]

The moratorium under sections 211B and 211C will apply to the assets of the companies, wherever they may be located, because the holding companies and the ultimate holding company are subject to the jurisdiction of the Courts of Singapore.]

*** End of Assessment ***

39m