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).***

4. ***You must save this document using the following format:*** [studentID.assessment8E]***. An example would be something along the following lines: 202223-336.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 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 1m

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 1.31m

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.***

Usually, a scheme of arrangement would have to be passed by each class of creditors (in a creditors' scheme of arrangement). However, a cross-class cram-down mechanism was introduced in the 2017 Amendment Act, which allows for a creditors' scheme of arrangement to be approved even if one or more classes did not agree to the proposed scheme. In other words, dissenting classes of creditors would still be bound by the scheme, even if they did not approve it.

The requirements for a cross-class cram down are set out in section 70 of the Insolvency, Restructuring and Dissolution Act 2018 (the "IRD Act***"). Namely, the Court may, on the application of the company or of a creditor (who has obtained the requisite leave), approve the compromise or arrangement if:***

1. ***A majority of creditors meant to be bound by the compromise or arrangement, who were present and voting (either in person or by proxy) at the relevant meeting, have agreed to the compromise or arrangement;***

2. ***The majority in number of creditors in (1) above represents three-fourths in value of the creditors meant to be bound by the compromise or arrangement, and who were present and voting (either in person or by proxy) at the relevant meeting; and***

3. ***The Court is satisfied that the compromise or arrangement does not discriminate unfairly between 2 or more classes of creditors, and is fair and equitable to each dissenting class.***

4. *As to (3) above, a compromise or arrangement is not fair and equitable to a dissenting class unless:*

    a. *no creditor in the dissenting class receives, under the terms of the compromise or arrangement, an amount that is lower than what the creditor is estimated by the Court to receive in the most likely scenario if the compromise or arrangement does not become binding on the company and all classes of creditors meant to be bound by the compromise or arrangement;*

    b. *either of the following applies:*

        i. *where the creditors in the dissenting class are secured creditors, the terms of the compromise or arrangement must provide:*

            1. *for each creditor in the dissenting class to receive deferred cash payments totalling the amount of the creditor's claim that is secured;*

            2. *that the creditor has a charge over proceeds of any realisation to satisfy the creditor's claim that is secured by that security; or*

            3. *each creditor in the dissenting class is entitled to realise the indubitable equivalent of the security held, to satisfy the creditor's claim that is secured by that security;*

        ii. *where the creditors in the dissenting class are unsecured creditors, the terms of the compromise or arrangement:*

            1. *must provide for each creditor in that class to receive property of a value equal to the amount of the creditor's claim; or*

            2. *must not provide for any creditor with a subordinate claim, or any member, to receive or retain any property of the company on account of the subordinate claim or the member's interest.*

The requirements in (4) above effectively espouse the absolute priority rule in the United States, i.e. no class can receive a distribution under a scheme unless all classes senior to that class are paid in full.

Question 2.2 [maximum 2 marks] 2m

Name* two *objectives of the IRD Act.

Two objectives of the IRD Act are:

1. *to introduce a new omnibus legislation consolidating personal and corporate bankruptcy; and*

2. *to establish a regulatory regime for 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.

Four factors that should be considered under the cash flow test are in determining whether a company is "unable to pay its debts" under the IRD Act are:

1. *the quantum of all debts which are due or will be due in the reasonably near future;*

2. *whether payment is being, or is likely to be, demanded for those debts;*

3. *the value of the company's assets and assets that will be realisable in the reasonably near future; and*

4. *the state of the company's business (to determine its expected new cash flow from the business).*

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

Question 3.1 [maximum 8 marks] 7m

Write a brief essay on

(i) rescue financing; and

(ii) wrongful trading

under the IRD Act.

Rescue financing

*Rescue financing is a form of financing that companies can enter into *after* entering into a form of corporate rescue (i.e. scheme of arrangement or judicial management)*

process in Singapore. It mirrors the debtor-in-possession (DIP) financing in United States' Chapter 11 bankruptcies. Accordingly, rescue financing must be either (or both):

1. ***necessary for the survival of the debtor company; and/or***

2. ***necessary to achieve a more advantageous realisation of the assets of the debtor company, compared with the counterfactual circumstance of the debtor company being wound up.***

A debtor company must apply for rescue financing in order for the rescue financing to:

1. ***be treated as part of the costs and expenses of the winding up of the debtor company (in the event of a winding up);***

2. ***be paid in priority to preferential debts (in the event of a winding up);***

3. ***be secured by a security interest of assets of the debtor company, whether on an unencumbered asset, or as subordinate security on an already encumbered asset, which the Court will only grant if (i) the debtor company was unable to obtain rescue financing from any other person unless secured in this manner; and (ii) there is adequate protection of the existing secured interests;***

4. ***be secured by a security interest at the same or higher priority of existing security interests on an already encumbered asset, which the Court will only grant if (i) the debtor company was unable to obtain rescue financing from any other person unless secured in this manner; and (ii) there is adequate protection of the existing secured interests.***

Wrongful trading

Wrongful trading is set out in section 239 of the IRD Act.

In the course of the judicial management or winding up of a company, or in any proceedings against the company, if it appears that the company had traded wrongfully, then the Court, on application of a person with sufficient standing (a "Relevant Person***" as described below), may declare that any person who was a party to the company trading in that manner is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs, if that person:***

a. ***knew that the company was trading wrongful; or***
b. ***as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.***

This declaration can be set aside by the person declared responsible pursuant to section 239(2).

A Relevant Person are those referred to in section 239(5) of the IRD Act, namely:

a. *the judicial manager of the company;*
b. *the liquidator of the company;*
c. *the Official Receiver;*
d. *any creditor or contributory of the company, with leave of:*
    (i) *the judicial manager or the liquidator (as the case may be); or*
    (ii) *the Court.*

Section 239(12) states that a company trades wrongfully if:

a. *the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full; or*
b. *the company incurs debts or other liabilities:*
    (i) *that it has no reasonable prospect of meeting in full; and*
    (ii) *that result in the company becoming insolvent.*

Where a company has traded wrongfully, every person who was a party to the wrongful trading and who:

a. *knew that the company was trading wrongfully; or*
b. *as an officer of the company, ought, in all circumstances, to have known that the company was trading wrongfully,*

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years, or to both (see section 239(6) of the IRD Act).

[discuss also that a declaration can be sought as to whether a transaction is wrongful trading, and that it doesn't require imposition of criminal liability]

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.***

There are two statutory rehabilitative / rescue procedures in Singapore, being (1) judicial management; and (2) scheme of arrangement. The key differences between these two are set out below.

Moratorium

The debtor company benefits from an automatic moratorium upon filing a judicial management application. If (and once) a judicial appointment order is made, a more extensive moratorium will come into effect for the period of the judicial management.

Whilst the debtor company also benefits from an automatic moratorium upon filing an application for a scheme of arrangement, that automatic moratorium only lasts for 30 days but can be further extended by the Court.

Control

In a judicial management process, an independent insolvency practitioner takes control of the debtor company; all responsibilities, functions and powers of the directors cease and are transferred to the insolvency practitioner.

In contrast, in a scheme of arrangement, the debtor remains in possession of the company. However, it is envisioned that the company will appoint a proposed scheme manager to facilitate the restructuring process.

Role of office holder

As mentioned above, both rescue processes contemplate the appointment of an office holder.

In a judicial management process, the judicial manager has the powers of the directors, as well as additional statutory powers to:

1. ***sell or dispose of the company's property by public auction or private contract;***
2. ***borrow money or grant security over the company's property;***
3. ***appoint solicitors, accountants and other professionally qualified persons to assist in the performance of functions;***
4. ***bring and defend any action or other legal proceedings in the name and on behalf of the company.***

A proposed scheme manager has more light-touch roles/powers. In particularly, the proposed scheme manager would prepare the scheme proposal, chair scheme meetings and adjudicate proofs of debt.

Onerous contracts

Schemes of arrangement processes cannot disclaim onerous contracts, whilst they can be done in a judicial management process in relation to onerous contracts entered into by the company prior to the judicial management or liquidation.

[also discuss differences regarding avoidance provisions, and objectives]

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)

Judicial management is a rehabilitation / rescue process in Singapore. One of the purposes of judicial management is to 'rescue' the Company from a winding up, i.e. to ensure the survival of the Company (in whole or in part) as a going concern (see section 89(1) of the IRD Act).

In order to obtain a judicial management order, an application must be made (relevantly) by the Company's creditors (including contingent or prospective creditors). The IRD Act allows the application to be made by a group of creditors, such as the working group. The application must establish that:

1. *The Company is or will be unable to pay its debts; and*
2. *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.*

Assuming that the Company is placed under judicial management, in order for the Company to access rescue financing, the Company (acting by its judicial manager) may make an application pursuant to section 101 of the IRD Act for any super priority of rescue financing. In particular, the Company (Acting by its judicial manager) can seek orders from that Court that the rescue financing will:

1. *be treated as part of the costs and expenses of the winding up of the Company (in the event of a winding up);*
2. *be paid in priority to preferential debts (in the event of a winding up);*
3. *be secured by a security interest of assets of the Company (whether on an unencumbered asset, or as subordinate security on an already encumbered asset), which the Court will only grant if (i) the Company was unable to obtain*

rescue financing from any other person unless secured in this manner; and (ii) there is adequate protection of the existing secured interests;

4. *be secured by a security interest at the same or higher priority of existing security interests on an already encumbered asset, which the Court will only grant if (i) the Company was unable to obtain rescue financing from any other person unless secured in this manner; and (ii) there is adequate protection of the existing secured interests.*

[discuss what constitutes rescue financing as defined in IRDA]

Question 4.2 [maximum 6 marks] 6m

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)

Because Alpha Pte Ltd ("Alpha") and Beta Pte Ltd ("Beta") are both wholly owned Singapore-incorporated subsidiaries of the Company, the Judicial Manager of the Company can effectively control those companies. On this basis, it would be possible for Alpha and Beta to be placed into voluntary judicial management pursuant to section 94 of the IRD Act. This can be achieved if Alpha and Beta each consider that:

1. *They are, or are likely to become, unable to pay their respective debts; and*
2. *There is a reasonable probability of achieving one or more of the purposes of judicial management set out in section 89(1).*

If so, Alpha and Beta may, instead of applying to the Court for judicial management, obtain a resolution of their creditors for Alpha and Beta to be placed under the judicial management of a judicial manager.

(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)

Even though Charlie Pty Ltd ("Charlie") is not incorporated in Singapore, it is arguable that Charlie can still be placed into judicial management in Singapore.

In order for a foreign company (such as Charlie) to be placed into judicial management, it must first be a company eligible to be wound up under the IRD Act. The statutory prerequisite for this is set out in section 246 of the IRD Act, namely whether one or more of the following matters are present:

1. *Singapore is Charlie's centre of main interest;*
2. *Charlie is carrying on business in Singapore or has a place of business in Singapore;*
3. *Charlie is a foreign company that is registered under Division 2 o Part XI of the Companies Act;*
4. *Charlie has substantial assets in Singapore;*
5. *Charlie has chosen Singapore law as the law governing a loan or other transaction; or*
6. *Charlie has submitted to the jurisdiction of the Singapore Court for the resolution of disputes relating to a loan or other transaction.*

Of the above, factors (1) and (5) are applicable. As to (1), the majority directors are Mr X and Mr Y (both of whom are based in Singapore) and Charlie is financed by Singaporean entities (either the Singapore bank or Alpha). As to (5), it is apparent that the loan with the Singapore bank is governed by Singapore law, such that there is sufficient nexus.

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) 4m

Assuming that ABC comprises of Alpha, Beta and Charlie, then there are steps that the judicial manager for each entity can take to protect the assets owned by the ABC Group in jurisdictions outside of Singapore.

It is apparent from the facts that:

1. *ABC Group owns and operates 16 construction drilling rigs outside of Singapore in Australia and the United Kingdom; and*

2. *Charlie owns property in Australia.*

In order to have the moratorium apply in Australia and the United Kingdom, the judicial administrator for each of the Alpha, Beta and Charlie will need to be recognised in those countries. Both Australia and the United Kingdom (along with Singapore) have adopted the UNCITRAL Model Law on Cross-Border Insolvency, allowing foreign representatives to apply in the respective jurisdictions for recognition of the Singapore proceedings as foreign proceedings. To the extent that such

recognition would not be manifestly contrary to the laws of either Australia or the United Kingdom, the recognition should ordinarily be made.

Singapore and Australia also have reciprocal enforcement legislation, being:

1. ***the Reciprocal Enforcement of Commonwealth Judgments Act in Singapore (which recognises both judgment of the United Kingdom and Australia, amongst others); and***
2. ***the Foreign Judgments Act 1991 in Australia.***

Whilst a matter of Australian law, it could be possible for Singapore judgments to be enforced in Australia pursuant to the Foreign Judgments Act 1991.

Furthermore, both the United Kingdom and Singapore are signatories to the HCCH Convention on Choice of Court Agreements 2005. This meant that in circumstances where the Singapore Court was the chosen court designated in an exclusive choice of court agreement in a civil or commercial matter, then the other courts would stay matters brought in their jurisdiction. To the extent any such contracts relating to the foreign assets conferred exclusive jurisdiction to the Singapore Courts and not the United Kingdom Courts, then any such proceedings in the United Kingdom would be stayed.

[make mention of the moratoria in SG, and that it covers property outside of SG (s88)]

*** End of Assessment ***

45m – well done!