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 1.3 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] 3m

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.***

A cross-class cramdown allows a scheme of arrangement to be approved whilst simultaneously having one or more classes of creditors having rejected the proposed scheme. This was brought into place to limit the influence of minority creditors.

The court can now order that a scheme is binding on a company and all creditors, if the following requirements are met:

1) *There is a majority (in numbers) in favour of the compromise or arrangement of the creditors who are to be bound by the compromise or arrangement and were present and voting.*
2) *The majority of creditors (in numbers) represents 75% of the value of the creditors that are to be bound by the compromise or arrangement and were present and voting.*
3) *The court has reviewed the scheme and is satisfied that it does not discriminate unfairly between two or more classes of creditors, whilst also being fair and equitable to the dissenting class. Should the following criteria be hit, the arrangement will not be fair and equitable:*
    a. *The creditors in the dissenting class receive an amount lower that what the court estimate they would receive if the scheme were to become binding.*
    b. *Where the dissenting class are unsecured, the scheme does not provide for each dissenting creditor to receive property of a value equal to the amount of the creditor's claim and does provide for a creditor with a claim that is subordinate to the claim of the claim of the dissenting creditor.*

[Comment – also discuss scenario where dissenting creditors are secured creditors]

Question 2.2 [maximum 2 marks] 2m

Name <u>two</u> objectives of the IRD Act.

The objectives of the IRD Act are to establish a regulatory regime for insolvency practitioners which consolidates the personal and corporate insolvency and restructuring laws. This is done with the goal of enhancing Singapore's insolvency and restructuring laws.

Question 2.3 [maximum 4 marks] 4m

State <u>four</u> 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.

The factors that should be considered under the cash flow test are:

1) ***If there is likely to be demands for payment of a debt or whether there are current payment demands;***
2) ***How long there has been since the commencement of the winding-up proceedings;***
3) ***The value of the debts which are due or will be due in the reasonably near future;***
4) ***Whether the company has failed to pay its debts as they fall due and if so, the quantum and time period of the non-payment.***
5) ***The value of the company's assets, particularly the current assets when they will be realisable in the near future.***

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

Question 3.1 [maximum 8 marks] 6m

Write a brief essay on

(i) rescue financing; and

(ii) wrongful trading

under the IRD Act.

Rescue financing is defined as financing that is:

a) *Necessary for the survival of a debtor that obtains the financing; and / or*
b) *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.*

Therefore, rescue financing is seen as an option to aid a struggling company to continue trading or formulate a more advantageous position for the creditors. The company will be financially struggling when rescue financing is deemed necessary and therefore the creditor supplying the financing will require some protection. This will come in the form of their debt being prioritised as a cost and expense if the debtor ends up being wound-up and being prioritised over preferential debts.

There will also be additional protection for the financer via security on property owned by the debtor but not otherwise securitised, or as a subordinate security on an already securitised property. This is subject to the debtor not being able to get security from another unsecured person. A subordinate security is more likely to be used as the company is expected to have given securitised loans in the lead up to its current financial issues. Alternatively, there may be a requirement to provide security over an already securitised property with a higher priority to the existing security.

The above rescue financing remedies have been inspired by section 364 of the US bankruptcy code and were introduced into Singapore through the 2017 Amendment Act.

Wrongful trading is part of the Singapore IRD Act and is defined as when "a company incurs debt or liabilities without reasonable prospect of meeting them in full when the company is insolvent or becomes insolvent as a result of the incurrence of such debt or liability. This is addressed by Section 239 of the IRD Act".

The court now has the power to make a declaration that any person who was knowingly party to the company trading wrongfully is personally responsible for the debts or liabilities of the company. Should a person be concerned that an act may be constituted as wrongful trading, they can apply to the court for a declaration that trading would not constitute wrongful trading.

Personal liability will be deemed whereby a person knew that the company was trading wrongfully or where they are an office of the company and in the circumstances ought to have known that the company was trading wrongfully.

[comment – make references to the provisions for rescue financing under IRDA applying in scheme proceedings or JM proceedings, and also that wrongful trading doesn't require an imposition of criminal liability first before imposition of civil liability]

Question 3.2 [maximum 7 marks] 4m

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

Judicial management is a corporate rescue tool that grants the court the power to appoint a judicial manager over the company which ceases the powers of the company's directors. The judicial manager is then responsible for the affairs, business, and property of the company. There will be some oversight from creditors (through a creditor committee), but any decisions which would impact the actions of the judicial manager will come from orders from the court.

The scheme of arrangement on the other hand is a more informal restructuring procedure and is aimed at finding an agreement between the creditors and the company to keep the company continuing as a going concern. ***[comment: It is not informal in that it is a court-sanctioned scheme, but there is less court oversight cf JM]***

The entry into both restructuring avenues differ, with the scheme of arrangement available should there have been no order to wind-up the company, the company undertakes to prepare an application to sanction a scheme of arrangement and the company has not applied for protection under section 210 (10) of the Companies Act. The company can therefore apply to enter the scheme. On the other hand, to enter a judicial management, this application can be brought to the court by the company, its directors, or a creditor.

A main difference between judicial management and schemes of arrangement is the appointing of officeholders. The scheme of arrangement will rely on the debtor appointing a scheme manager as it is a debtor led process. On the other hand, under a judicial management, the court will appoint a manager. This done where the assets of the company are at risk of being dissipated or deteriorating, to bridge a gap between the judicial management application and order, or to safeguard the interests of the company and its creditors. The result of this is that schemes of arrangements are often more successful due to having less stigma around a formal insolvency process.

Once the relevant officeholder is appointed, there will be different roles for both officeholders to fulfil. The scheme of arrangement manager will prepare the proposed scheme and once approved by the creditors, implement the scheme. ***[comment – the scheme of arrangement needs to be sanctioned by the court, after it has been approved by requisite majorities of creditors]*** *On the other hand, the judicial management manager will take all the responsibilities, functions and powers of the board of directors once appointed. In addition, the manager will have the powers outlined in the First Schedule of the IRD Act such as the power to sell property. These additional powers give the judicial management manager much more control over the company.*

Under a scheme of arrangement, a 30-day moratorium arises on the filing of an application (under section 64 of the IRD Act). This may be extended by the court upon application by the debtor. On the other hand, judicial management has a moratorium

in effect from the filing of the judicial management application and the moratorium will last the period of the judicial management once an order is made. ***[comment – a debtor can propose a scheme of arrangement without seeking a moratorium under s 64 IRDA – it depends on whether it needs the protection]***

During the scheme of arrangement, assets may be sold outside of the ordinary course of business. However, in line with section 64(6) of the IRD Act, the court can require the submission of information regarding the acquisition or disposal of property and the granting of security to the court within 14 days. On the other hand, only a judicial manager may sell or dispose property.

On the basis that a scheme of arrangement ends unsuccessfully and the moratorium comes to an end, the company can be wound up by the creditors through an application the court. However, to move from a judicial management to a liquidation, the judicial management would have to come to an end. This would be 180 days from the order but can be extended indefinitely by the court. The court may then decide whether to move the company into liquidation.

There are also several other less material difference between the two schemes. These include the fact that impeachable transactions do not apply to a scheme of arrangement but do apply to judicial management and that you may not disclaim onerous property under a scheme of arrangement, but the manager can under judicial management. Ultimately, the scheme of arrangement is a much more informal restructuring option, whilst a judicial management is a formal attempt to save the company before liquidation.

[comment – there are different objectives, and also in a JM there are liability provisions which allow investigation and claw back cf a debtor led restructuring in a scheme of arrangement proceeding]

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]

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)
2m

(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) 1.5m

(a) The purpose of judicial management is a tool to rescue businesses in financial difficulty. It also provides protection over the company's assets from dissipation, deterioration and generally safeguards the interests of the creditors. This is due to a court appointed manager taking the powers and duties from the directors, therefore protecting the interest of the creditors. Ultimately, the aim of judicial management is to bring the company out of management and able to settle its debts in full. However, it may lead to liquidation with the aim of maximising recoveries to creditors.

The court must be presented with an application from the company, or its creditors outlining that the company is likely to become unable to pay its debts. The application must also include that the appointment of a manager will achieve one of the purposes outlined in the IRD Act.

(b) To be able to access rescue financing under the IRD Act, the court will have to determine that the financing is:

- *Necessary for the survival of a debtor that obtains the financing; and / or*
- *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.*

The debtor (manager in this case) would then apply to the court and would be required to treat the finance as costs and expenses if the company subsequently moves to liquidation. It will also have priority the debt of preferential debtors.

[comment – the debtor can seek different types of priority – 4 levels; see s101 IRDA]

Question 4.2 [maximum 6 marks]

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) 1m

Alpha Pte Ltd and Beta Ltd are both incorporated in Singapore and are owned by ABC Group. Singapore law does not currently have provisions for insolvency proceedings for a group of company. Both Alpha and Beta will be treated as a separate legal entity and separate insolvency proceedings could be filed at court for both companies. Both

applications made be heard simultaneously, but ultimately the court will decide on each company it's merits. The creditors will also only be able to prove their debt against the legal entity they engaged with.

For the creditors to take steps out of court to move the companies into judicial management, they must outline in that the company is unable to pay its debts and that there is a reasonable probability of rehabilitating the company, rather than winding it up. They can then pass a resolution of the creditors to move the companies into judicial management. Following that, they can then select an interim manager, should the deem this to protect the assets.

[comment – see s94 IRDA for the steps]

(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) 2.5m

Charlie Pty Ltd is incorporated in Australia, but also has security in a Singaporean bank's favour. Singapore has adopted much of Australian law and therefore their insolvency systems are largely aligned. There is also the Reciprocal Enforcement of Commonwealth Judgments Act which enable judgment from Australia to be registered in Singapore High Court and vice versa.

From a Singaporean point of view, only a company eligible under the IRD Act may be placed into judicial management. This would include foreign debtors such as Charlie Pty Ltd, provided the company has a "substantial connection" with Singapore. For Charlie Pty Ltd to be eligible to be placed into judicial management in Singapore, it would have to demonstrate at least one of the following:

- *The COMI of the debtor is in Singapore;*
- *The debtors is carrying on business in Singapore, or has a place of business in Singapore;*
- *The debtor is a registered foreign company in Singapore;*
- *The debtor has substantial assets in Singapore;*
- *The debtor has chosen Singapore law to govern loans or transactions under dispute; or*
- *The debtor has submitted to the jurisdiction for the Singapore courts for the resolution of one of more disputes relating to a loan or other transaction.*

In Charlie Pty Ltd situation, the bank loans are from a Singapore bank and are governed by Singapore Law. This would make them eligible for judicial management.

[comment – to clarify that a company eligible is one that can be wound up under IRDA]

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) **3m**

The ABC Group has fixed assets in Australia and the United Kingdom. Once the Group is placed into judicial management, the directors of the companies would not have the powers to sell or dissipate the assets outside of the group. These powers would lie with the judicial manager, appointed by the court. This would provide an initial layer of security to protect the assets.

There is also the threat of personal liability for the directors of the company, should they dissipate assets whilst under judicial management. This means they could be made personally liable for the loss caused by any actions dissipating the assets of the company. This should dissuade them from removing assets from the Company.

To protect the foreign assets, the creditors could appoint a receiver where they have security. The assets of Charlie Pty Ltd appear securitised through the mortgages. This would give the powers in the foreign jurisdiction to take control of the assets should they prove that debt repayments have ceased, and they hold valid security.

Further protection could be sought by obtaining a judgment in Singapore against the debtor for outstanding debt. This judgment could then be enforced against the foreign assets of the company and based on the reciprocity of the UK and Australia (location of the assets), this should be effective to freeze the assets, if not seize them.

Finally, there may be local proception available to the creditors upon recognition of their debt.

[comment – looking at this question from perspective of debtor in terms of protection, there would be a moratorium that arises and whether it would be protected depends on whether recognition is available in that relevant jurisdiction. Otherwise to consider commencing parallel proceedings to obtain protection]

*** End of Assessment ***

38m