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 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 0m

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] 0.5m

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.

[The cross-class cram-down mechanism is found in Section 211H of the Companies Act (Cap. 50), which has been incorporated into the Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018) ("IRDA").

The key provisions in the IRDA relating to the cross-class cram-down include the following:

Section 71: This section outlines the procedure for a company to propose a scheme of arrangement to its creditors or members. The court may order a meeting of the creditors or members to be summoned to consider the proposed scheme.

Section 73: This section states that if the scheme is approved by a majority in number, representing at least 75% in value of the creditors or members present and voting at the meeting, the court may sanction the scheme if it deems it fair and reasonable. The scheme, once sanctioned, is binding on all parties, including dissenting creditors or members.

Section 74: This section sets out the requirements for the scheme to be approved, including the submission of a copy of the court order and the scheme to the Registrar of Companies.

Section 211E: This section states that the court may order a stay of proceedings against the company or restrain further proceedings against it while the scheme is being considered.

Section 211F: This section provides that the company may obtain a moratorium on legal proceedings while the scheme is being considered.

Section 211H: This is the key provision that deals with cross-class cram-down. As mentioned earlier, it allows the court to sanction a scheme even if it has not been approved by the required majority of one or more classes of creditors. The conditions for a cram-down, as mentioned in the previous response, are as follows:

a. The scheme has been approved by a majority in number representing at least 75% in value of each class of creditors that have voted, and 50% in total value of all creditors (including those who did not vote or voted against the scheme).

b. The court must be satisfied that the scheme would not unfairly prejudice the interests of any dissenting class of creditors.

c. The court must be satisfied that the dissenting class of creditors would be no worse off under the scheme than they would be in the most likely alternative scenario if the scheme were not sanctioned (the "no worse off" test).

In conclusion, the cross-class cram-down mechanism in a scheme of arrangement under Singapore law is facilitated through various provisions in the IRDA, with Section 211H being the key provision. The court has the discretion to approve a restructuring plan even if one or more classes of creditors do not meet the required voting threshold, provided the conditions set out in Section 211H are met.]

[Comment: The cross class cram down requirements are in s 70 IRDA. The old provisions in the Companies Act have been repealed]

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

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

[Two objectives of the IRD Act are as follows:

(a) **Consolidation of Insolvency and Restructuring Laws**: Before the advent of the Insolvency, Restructuring and Dissolution Act 2018 (IRD Act), the legislative landscape of insolvency and restructuring in Singapore was fragmented, with key regulations dispersed across several laws such as the Companies Act and the Bankruptcy Act. This fragmentation posed navigational challenges and potential for legal inconsistencies or overlaps. The introduction of the IRD Act sought to rectify this by unifying the insolvency and restructuring laws under a single legislative framework, thereby enhancing legal clarity and coherence for stakeholders including companies, creditors, and insolvency practitioners. Moreover, the consolidation allowed for the identification and resolution of any previously existing gaps or

discrepancies in the law, ensuring a comprehensive and encompassing coverage of all pertinent areas.

(b) **Regulation of Insolvency Practitioners**: Insolvency practitioners hold a pivotal role in the insolvency and restructuring processes. They are entrusted with the responsibility of managing the affairs of insolvent companies, orchestrating arrangements between distressed companies and their creditors, and supervising the liquidation of companies. Given the critical nature of these duties, it is imperative that insolvency practitioners demonstrate high standards of competence, integrity, and accountability. To this end, the IRD Act aimed to establish a regulatory regime for insolvency practitioners, intended to ensure consistent professional standards and establish mechanisms for disciplinary recourse in cases of misconduct.]

Question 2.3 [maximum 4 marks] 2m

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.

[The Insolvency, Restructuring and Dissolution Act 2018 (IRD Act) provides a comprehensive framework for determining insolvency of a company. Specifically, the cash flow test, which considers a company insolvent if it is unable to pay its debts as they fall due, is a critical component in this determination[1]. The following discussion delves into the four pivotal factors under the cash flow test:

1. **Current Liabilities and Cash Balances**

The initial factor to consider in the cash flow test is the juxtaposition of a company's current liabilities against its available cash balances. This assessment essentially involves an evaluation of whether the company's cash resources are sufficient to satisfy its current liabilities as and when they fall due. The cash flow test thereby takes into account the firm's immediate liquidity position, making it a real-time snapshot of the company's ability to meet its obligations.

2. **Future Cash Flows**

Beyond the company's current financial position, the cash flow test extends to consider the company's projected future cash flows. This forward-looking perspective ensures that the test is not myopically restricted to the present financial circumstances but also captures prospective liquidity challenges. Consequently, a company with seemingly adequate current cash resources may still be deemed unable to pay its debts if future cash flows, considering the company's operational and financial projections, are expected to be inadequate to meet forthcoming liabilities.

3. **Availability of External Financing**

The cash flow test also considers the availability of external financing to the company. A company's ability to secure additional funds, either through debt or equity financing, is integral to its potential to meet its debt obligations, especially in situations where current cash resources or anticipated cash flows are insufficient. The availability of such financing, however, hinges on a myriad of factors, including the company's creditworthiness, prevailing market conditions, and potential investor confidence. Consequently, if a company fails to secure

[1] Insolvency, Restructuring and Dissolution Act 2018, section 94(1)(a).

additional financing on reasonable terms or entirely, it might be deemed unable to pay its debts.

4. **Ability to Realize Assets**

The final factor in the cash flow test is the company's capability to realize its assets. This involves assessing whether the company can liquidate assets to generate cash, thereby enabling it to meet its debt obligations. While this could provide a potential avenue for debt repayment, it is imperative to consider the nature of the assets, their liquidity and realizable value, and the possible impact of such asset liquidation on the company's ongoing business operations. Asset realization might be infeasible or detrimental if the assets are illiquid, of little value, or critical to the company's business operations.[2]

In conclusion, the cash flow test under the IRD Act is not a simplistic measure of current cash insufficiency. Instead, it is a complex and multifaceted evaluation of the company's ability to meet its debts as they fall due, encompassing a broad spectrum of financial circumstances, both present and prospective.]

[Comment: the non exhuastive factors are set out in Sun Electric v RCMA. “unable to pay” is a circumstance for winding up – s125 IRDA. But yes, it pertains to ability to pay and would include analysis of assets and liabilities]

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

Question 3.1 [maximum 8 marks]

Write a brief essay on

(i) rescue financing; and 2m

(ii) wrongful trading 3m

under the IRD Act.

[**(i) Rescue Financing**

Introduction

The Insolvency, Restructuring and Dissolution Act 2018 (IRD Act) heralded a new era for insolvency and restructuring law in Singapore, introducing several key reforms. Among these, the concept of rescue financing stands out as a significant innovation aimed at promoting corporate recovery. Rescue financing, also known as debtor-in-possession financing, is a unique form of credit extended to companies undergoing financial distress. It is distinct from traditional forms of financing, primarily due to the financial circumstances of the recipient and the specific objectives that it seeks to achieve. It plays a critical role in maintaining operations, facilitating restructuring, and ultimately, aiding the recovery of the distressed company[3]. [Comment: rescue financing is also available in the judicial management process]

Function and Purpose

[2] Finch, V. (2009). Corporate Insolvency Law: Perspectives and Principles. Cambridge: Cambridge University Press, p. 43.
[3] Mokal, R.J. (2005). Corporate Insolvency Law: Theory and Application. Oxford: Oxford University Press, p. 126.

The primary purpose of rescue financing is to enable the distressed company to maintain its operations, despite its financial difficulties. Traditional sources of funding are often unavailable to a business in financial distress, as lenders are usually hesitant to extend credit to companies that are insolvent or on the brink of insolvency. This is where rescue financing steps in, providing the necessary capital that allows the business to continue operating, thereby protecting jobs, preserving business relationships, and preventing a fire sale of assets.

Moreover, rescue financing plays a critical role in facilitating the restructuring of a distressed company. Restructuring often involves significant operational and financial changes, which can require substantial funding. This could be for the purposes of implementing new business strategies, restructuring debts, meeting critical payments, or investing in necessary areas for the business to pivot and recover. By providing this much-needed capital, rescue financing enables the distressed company to carry out a restructuring plan that could ultimately lead to its recovery.

Legal Framework for Rescue Financing under the IRD Act

The IRD Act, in its Part 5, provides for rescue financing under the ambit of judicial management and scheme of arrangement. The relevant Section 211E empowers the court to assign a 'super-priority' status to rescue financing[4]. Such status ensures that these debts are accorded priority over other unsecured claims in the event of the company's liquidation, thus reducing the risk for rescue financiers. [Comment: s211E was under the Companies Act, which has since been repealed. See ss67 and 101 of IRDA]

However, this super-priority status is not granted unconditionally. The court must be satisfied that the company cannot secure adequate financing elsewhere and that the rescue financing is essential for the company's survival or the preservation or enhancement of its total asset value (Section 211E(1)).

The IRD Act also addresses the rights of existing secured creditors in the context of rescue financing. Section 211E(2) allows the court to subordinate the rights of secured creditors to the rescue financing, but only with the creditor's consent or if the court is satisfied that the secured creditor's interest is adequately protected[5].

Implications for Companies and Creditors

Rescue financing under the IRD Act has significant implications for both companies and their creditors. For distressed companies, it provides an additional lifeline at a critical juncture when traditional financing options may be unavailable or severely limited. This infusion of capital can provide the breathing space needed for these companies to devise and implement effective restructuring plans[6].

For creditors, the super-priority status accorded to rescue financing may initially appear detrimental, as it could dilute their claims. However, it also increases the chances of the distressed company's survival, which could, in turn, enhance recoveries in the long run. Thus, rescue financing might represent a strategic compromise for creditors, trading immediate returns for potential future gains[7].

Conclusion

[4] Insolvency, Restructuring and Dissolution Act 2018, section 211E(1).
[5] Insolvency, Restructuring and Dissolution Act 2018, section 211E(2).
[6] Ho, L.C. (2019). The New Corporate Rescue Regime in Singapore. Journal of Corporate Law Studies, 19(2), 371-395.
[7] Ibid

Rescue financing under the IRD Act underscores Singapore's commitment to developing a robust and effective insolvency regime. Rescue financing not only aids in the recovery of distressed companies but also has wider implications for creditors, employees, and the broader economy. For creditors, a successful restructuring facilitated by rescue financing can increase the likelihood of debt recovery. For employees, it can mean job preservation. In sum, rescue financing serves as an essential tool in the arsenal of insolvency and restructuring legislation, providing a lifeline to distressed companies and promoting their recovery. Its importance cannot be overstated, particularly in times of economic uncertainty when the number of companies experiencing financial distress can rise significantly.

(ii) Wrongful Trading

Introduction

Wrongful trading occurs when directors continue trading or incurring liabilities on behalf of a company, despite knowing or ought to have known that the company cannot avoid insolvency. It is a legal principle designed to guard against reckless or fraudulent continuation of business operations when a company is facing insolvency, protecting creditors and maintaining faith in the broader business ecosystem.

Wrongful Trading under the IRD Act

The wrongful trading provisions under the IRD Act are set out in Section 239. This Section aims to strike a balance between protecting creditors from irresponsible actions by directors and encouraging directors to take appropriate measures to address a company's financial distress[8].

According to Section 239(1), if a company goes into liquidation and it is found that a director knew or ought to have known that there was no reasonable prospect of avoiding the company's insolvency, the court may declare that the director is personally responsible for the debts incurred by the company during the period of wrongful trading[9].

In determining whether a director ought to have known about the company's insolvency prospects, the court considers the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the same functions as the director, as well as the general knowledge, skill, and experience that the director actually possesses[10]. However, it is important to note that Section 239(3) provides a defense for directors who can demonstrate that they took every reasonable step to minimize the potential loss to the company's creditors[11].

Implications for Directors

The provisions concerning wrongful trading under the IRD Act carry substantial implications for directors, necessitating vigilance and proactive engagement with the company's financial situation. Their role and responsibilities are not merely ceremonial; directors have a fiduciary duty towards the company and its stakeholders. They are expected to continuously monitor the financial health of the company and take necessary steps to mitigate risks associated with financial distress. Failure to do so could potentially lead to charges of wrongful trading.

[8] Leong, W.K. (2019). Directors' Duties and Wrongful Trading. Singapore Journal of Legal Studies, 159-186.
[9] Insolvency, Restructuring and Dissolution Act 2018, section 239(1).
[10] Ibid., section 239(2).
[11] Ibid., section 239(3).

[Comment: this is civil liability – and there is no need for imposition of criminal liability first before civil liability can be found]

Being found liable for wrongful trading under Section 239 can have severe consequences for directors. The most direct impact is the personal liability they might face for the company's debts incurred during the period of wrongful trading. This could be a significant financial burden, as it could involve personal assets being used to discharge the debts. Furthermore, directors found liable may also be disqualified from holding directorships in the future, constraining their career prospects. Beyond financial penalties and professional repercussions, a declaration of wrongful trading could also lead to reputational damage. Such a declaration sends a strong signal to the market about the director's decision-making abilities and adherence to fiduciary duties. The wrongful trading provisions under the IRD Act place significant responsibilities on directors of financially distressed companies. These provisions demand vigilance, proactive decision-making, and a strong understanding of the law from directors, underlining the high standards expected of corporate leaders in the country's business environment[12].

Conclusion

By imposing a duty on directors to take appropriate action when their company faces insolvency, these provisions encourage responsible corporate behavior and protect the interests of creditors. At the same time, the provisions also recognize that directors may face difficult decisions during times of financial distress, providing a defense for those who have taken reasonable steps to minimize losses to creditors. Wrongful trading under the IRD Act is a crucial aspect of Singapore's insolvency regime that emphasizes the need for responsible and proactive decision-making by directors.]

Question 3.2 [maximum 7 marks] 7m

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

[Singapore's insolvency law provides two prominent procedures designed to assist companies in financial distress: Judicial Management and Scheme of Arrangement[1]. The following presents a detailed comparative analysis of these two processes, focusing on their key distinctions and purposes:

1. Introduction: Contextualizing Judicial Management and Scheme of Arrangement

Both Judicial Management and Scheme of Arrangement are targeted at corporate rescue[13]. They offer a lifeline to companies encountering financial difficulties, enabling them to potentially avoid winding up or liquidation. However, the mechanisms and conditions of these two processes are markedly different. These differences primarily lie in the realms of management control, initiation criteria, the concept and provisions of a moratorium, and the overall flexibility of the procedures.

2. Control Dynamics: The Contrast between Judicial Management and Scheme of Arrangement

[12] Leong, W.K. (2019). Directors' Duties and Wrongful Trading. Singapore Journal of Legal Studies, 159-186.
[13] Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.

In the Judicial Management procedure, the court appoints a judicial manager, generally an insolvency professional, to assume the control of the company's operations [14]. This independent entity essentially replaces the existing management and directors of the distressed company. The primary purpose behind this substitution is to ensure that an experienced and neutral professional oversees the business affairs to optimally prevent liquidation and foster the company's turnaround[15].

On the other hand, the Scheme of Arrangement maintains the existing managerial structure[16]. Here, the incumbent directors of the company play a crucial role. They are charged with the responsibility of formulating and proposing the scheme of arrangement, which is designed to guide the company's restructuring process[17].

3. Initiation Criteria: The Divergence between Judicial Management and Scheme of Arrangement

The initiation of the Judicial Management process requires the company to be insolvent or in the vicinity of insolvency[18]. Moreover, the court needs to be persuaded that the judicial management will likely result in the achievement of one of the defined statutory purposes. These include the survival of the company as a going concern, or a better realization of its assets as compared to a scenario of winding up[19].

In contrast, a Scheme of Arrangement can be launched in a broader range of situations. Its flexibility allows it to be initiated even before the company reaches the brink of insolvency. This process primarily entails proposing a compromise or arrangement to the company's creditors or shareholders[20].

4. The Concept of Moratorium: Judicial Management versus Scheme of Arrangement

One of the most significant differences between these two processes lies in the provision of a moratorium. Judicial Management provides an automatic moratorium, which stays or restricts the commencement or continuation of legal proceedings against the company. This moratorium serves as a crucial breathing space for the distressed company, preventing it from being dragged into multiple litigation procedures during the rescue operation.

However, a Scheme of Arrangement does not come equipped with an automatic moratorium. Instead, the company has to actively seek a court order to restrain any legal actions while it is in the process of formulating the scheme[9]. This implies that a Scheme of Arrangement requires an additional legal step to achieve the same level of protection offered automatically under Judicial Management.

5. Flexibility Index: Judicial Management versus Scheme of Arrangement

From the perspective of flexibility, a Scheme of Arrangement is considered more adaptable than Judicial Management. This procedure allows for a range of creative solutions tailored to meet the unique needs and circumstances of the company[21]. However, the scheme must

[14] Ibid, section 94(1)(a).
[15] Ibid, section 94(2).
[16] Ibid, section 111(3).
[17] Ibid, section 107.
[18] Ibid, section 94.
[19] Ibid, section 94.
[20] Ibid, section 107.
[21] Ibid, Part 17 - Arrangements and Reconstructions.

receive approval from a majority representing 75% in value of each class of creditors, and then it must be sanctioned by the court.

In contrast, Judicial Management is less flexible, given its inherent statutory objectives. The Judicial Manager operates under court supervision and with a mandate to achieve specified goals defined under the IRD Act.

6. Nature of the Process: Proactive versus Reactive Mechanism

Judicial Management can be characterized as a reactive mechanism in the face of financial distress. It is initiated only when the company is insolvent or at the brink of insolvency. It is designed to act as a swift response to a crisis scenario and thus, leans towards a more urgent and serious situation. Its primary focus is to stave off the immediate threats of winding up and litigation and to allow for the possibility of rehabilitation under the watchful eye of a court-appointed manager.

On the other hand, a Scheme of Arrangement is generally considered a more proactive and preventive mechanism. It can be implemented at an earlier stage, even before the company becomes insolvent. This preemptive nature allows the company to deal with financial distress proactively, affording more time to negotiate and strategize an optimal rescue or restructuring plan. This process also enables the management to remain in control, facilitating a collaborative resolution with creditors or shareholders.

7. Restructuring Approach: Individual versus Collective Action

Judicial Management operates under the principle of collective action. The company's control is taken over by a judicial manager, who formulates and executes the restructuring plan with the aim of protecting the interests of all creditors uniformly. This collective approach ensures that all actions taken are in the best interests of the company and its stakeholders as a whole, not favoring any specific group of creditors.

In contrast, a Scheme of Arrangement allows for a more individual approach. It can be applied selectively to different classes of creditors, depending on the specific terms of the scheme. This means that different creditor groups can be treated differently based on the scheme's details. This allows for a more customized and flexible resolution, accommodating the distinct needs of various creditor classes.

Overall, the choice between Judicial Management and Scheme of Arrangement is not merely a question of preference, but a strategic decision based on the specific circumstances and needs of the company in distress. In conclusion, while both Judicial Management and Scheme of Arrangement share the primary objective of corporate rescue, they distinctly vary in terms of control dynamics, initiation criteria, provisions of a moratorium, and the overall flexibility of the procedures. Hence, depending on a company's specific circumstances, one process might be more appropriate than the other.]

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) 0m

(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) 0m

(a) [Steps to Place Alpha Pte Ltd and Beta Pte Ltd Under Judicial Management Out of Court [question is about purpose of JM]

Placing a company under judicial management outside the court is a systematic process defined under the Insolvency, Restructuring and Dissolution Act 2018 (IRD Act)[22]. This process for Alpha Pte Ltd and Beta Pte Ltd, both Singapore-incorporated entities, would involve several steps:

1. **Board Resolution:** The initial step would be for the directors of Alpha Pte Ltd and Beta Pte Ltd to pass a board resolution, acknowledging that the company is, or will be, unable to pay its debts and that it is in the company's best interest to undergo judicial management[23]. This is crucial because it underlines the board's acceptance of the company's financial situation and its willingness to initiate remedial actions.

2. **Creditors' Consent:** Subsequently, the directors must secure the agreement of the majority of the company's creditors, defined as a majority in number representing at least three-fourths in value[24]. This step is important as it ensures that the major creditors are onboard with the proposed course of action, thereby ensuring a fair and collective approach in addressing the company's financial distress.

3. **Appointment of Judicial Manager:** If the directors are successful in obtaining the creditors' consent, the company can then appoint an insolvency practitioner as the judicial manager[25]. The appointed person should be someone who has the requisite qualifications, experience, and capacity to effectively manage the company's affairs during this period.

4. **Submission of Documents:** The final procedural step involves the submission of various documents to the Registrar and the Official Receiver. These documents include a copy of the resolution, a statement of affairs detailing the company's assets and liabilities, a list of creditors, and a statement of consent by the appointed judicial manager[26].

Upon fulfillment of the above steps, Alpha Pte Ltd and Beta Pte Ltd can be placed under judicial management outside of the court process.

(b) Eligibility of Charlie Pty Ltd for Judicial Management in Singapore [Question is regarding rescue financing]

When it comes to a foreign company, such as Charlie Pty Ltd, seeking judicial management in Singapore, the process is complex and multi-faceted. Given Charlie Pty Ltd's Australian incorporation, it first and foremost needs to establish a "sufficient connection" with Singapore[27]. This concept of a "sufficient connection" has evolved over the years through case law and legal interpretations. Essentially, it refers to substantial commercial or economic ties that link the foreign company to Singapore.

[22] Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.
[23] Ibid, section 94(1)(a).
[24] Ibid, section 94.
[25] Ibid, section 96.
[26] Ibid, section 96(1).
[27] Ibid, section 227B.

The sufficient connection may be derived from various aspects. A company might demonstrate sufficient connection by proving that its central management and control are exercised in Singapore, that it has significant assets in Singapore, or that it has significant liabilities owed to creditors based in Singapore. Legal contracts, such as those related to finance, that are governed by Singapore law, or the existence of legal proceedings in Singapore, can also be considered in establishing a sufficient connection.

In Charlie Pty Ltd's scenario, a few factors can be considered to demonstrate a sufficient connection with Singapore. For instance, the properties it owns in Australia are mortgaged to a Singapore bank under a facility governed by Singapore law. This establishes a substantial financial linkage with Singapore. Furthermore, Charlie Pty Ltd's majority directors, Mr X and Mr Y, are based in Singapore, which could be construed as exercising central management and control from Singapore.

However, establishing a sufficient connection is just one part of the equation. The Court, in deciding whether to make a judicial management order, would also need to consider if the making of the order would likely achieve one or more of the statutory objectives as set out under the IRD Act[28]. These objectives could include, among others, the survival of the company as a going concern, the approval of a compromise or arrangement between the company and its creditors, or a more advantageous realization of the company's assets than would occur on a winding up.

For Charlie Pty Ltd, an argument could be made that putting it under judicial management could lead to a more advantageous realization of its assets. This is due to the fact that its properties in Australia, although mortgaged, could be managed and potentially sold more effectively under judicial management.

In conclusion, while the facts suggest a compelling argument for Charlie Pty Ltd's eligibility for judicial management in Singapore, the final decision would rest with the Singapore courts, taking into consideration the established connections and the likelihood of achieving the statutory objectives of judicial management.]

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) 3m

[**(a) Steps to Place Alpha Pte Ltd and Beta Pte Ltd Under Judicial Management Out of Court**

Placing a company under judicial management outside the court is a systematic process defined under the Insolvency, Restructuring and Dissolution Act 2018 (IRD Act). This process for Alpha Pte Ltd and Beta Pte Ltd, both Singapore-incorporated entities, would involve several steps:

1. **Board Resolution:** The initial step would be for the directors of Alpha Pte Ltd and Beta Pte Ltd to pass a board resolution, acknowledging that the company is, or will be,

[28] Ibid, section 94(2).

unable to pay its debts and that it is in the company's best interest to undergo judicial management[29]. This is crucial because it underlines the board's acceptance of the company's financial situation and its willingness to initiate remedial actions.

2. **Creditors' Consent:** Subsequently, the directors must secure the agreement of the majority of the company's creditors, defined as a majority in number representing at least three-fourths in value[30]. This step is important as it ensures that the major creditors are onboard with the proposed course of action, thereby ensuring a fair and collective approach in addressing the company's financial distress.

3. **Appointment of Judicial Manager:** If the directors are successful in obtaining the creditors' consent, the company can then appoint an insolvency practitioner as the judicial manager[31]. The appointed person should be someone who has the requisite qualifications, experience, and capacity to effectively manage the company's affairs during this period.

4. **Submission of Documents:** The final procedural step involves the submission of various documents to the Registrar and the Official Receiver. These documents include a copy of the resolution, a statement of affairs detailing the company's assets and liabilities, a list of creditors, and a statement of consent by the appointed judicial manager[32].

Upon fulfillment of the above steps, Alpha Pte Ltd and Beta Pte Ltd can be placed under judicial management outside of the court process.]

(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) 3m

[**(b) Eligibility of Charlie Pty Ltd for Judicial Management in Singapore**

When it comes to a foreign company, such as Charlie Pty Ltd, seeking judicial management in Singapore, the process is complex and multi-faceted. Given Charlie Pty Ltd's Australian incorporation, it first and foremost needs to establish a "sufficient connection" with Singapore[1]. This concept of a "sufficient connection" has evolved over the years through case law and legal interpretations. Essentially, it refers to substantial commercial or economic ties that link the foreign company to Singapore.

The sufficient connection may be derived from various aspects. A company might demonstrate sufficient connection by proving that its central management and control are exercised in Singapore, that it has significant assets in Singapore, or that it has significant liabilities owed to creditors based in Singapore. Legal contracts, such as those related to finance, that are governed by Singapore law, or the existence of legal proceedings in Singapore, can also be considered in establishing a sufficient connection.

In Charlie Pty Ltd's scenario, a few factors can be considered to demonstrate a sufficient connection with Singapore. For instance, the properties it owns in Australia are mortgaged to a Singapore bank under a facility governed by Singapore law. This establishes a substantial financial linkage with Singapore. Furthermore, Charlie Pty Ltd's majority directors, Mr X and

[29] Section 94(1)(a), Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.
[30] Ibid, section 94.
[31] Ibid, section 96.
[32] Ibid, section 96(1).

Mr Y, are based in Singapore, which could be construed as exercising central management and control from Singapore.

However, establishing a sufficient connection is just one part of the equation. The Court, in deciding whether to make a judicial management order, would also need to consider if the making of the order would likely achieve one or more of the statutory objectives as set out under the IRD Act. These objectives could include, among others, the survival of the company as a going concern, the approval of a compromise or arrangement between the company and its creditors, or a more advantageous realization of the company's assets than would occur on a winding up.

For Charlie Pty Ltd, an argument could be made that putting it under judicial management could lead to a more advantageous realization of its assets. This is due to the fact that its properties in Australia, although mortgaged, could be managed and potentially sold more effectively under judicial management.

In conclusion, while the facts suggest a compelling argument for Charlie Pty Ltd's eligibility for judicial management in Singapore, the final decision would rest with the Singapore courts, taking into consideration the established connections and the likelihood of achieving the statutory objectives of judicial management.]

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

[**A. Introduction to Cross-Border Asset Protection in Judicial Management**

In the context of multinational enterprises like ABC Group operating in various jurisdictions, the initiation of judicial management proceedings in Singapore may have implications for the preservation of the group's overseas assets[33]. This scenario underlines the necessity of adopting strategies to protect the ABC Group's assets in jurisdictions beyond Singapore's borders.

B. Limitations of Singapore Insolvency Law on Overseas Assets Protection

While Singapore's Insolvency, Restructuring and Dissolution Act (IRDA) 2018 provides a robust framework for judicial management locally, it does not explicitly cover protections for a company's overseas assets[34]. Hence, without taking additional measures, the assets of ABC Group located in the UK and Australia are vulnerable to action by foreign creditors, undermining the effectiveness of the judicial management process.

[comment: s88 IRDA defines property to include that outside of Singapore, but the moratorium wouldnt provide protection in the relevant jurisdiction if there is no recognition available.]

C. Seeking Foreign Court's Recognition: A Crucial Strategy

[33] Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.
[34] Ibid, Part 16 - Judicial Management.

To secure the ABC Group's foreign assets, the judicial managers would typically need to obtain recognition of the Singapore judicial management proceedings in the foreign jurisdictions where these assets are located[35]. The UNCITRAL Model Law on Cross-Border Insolvency, a legal framework adopted by many jurisdictions, including the UK and Australia, provides a means to accomplish this[36].

The recognition of Singapore's judicial management proceedings by a foreign court usually results in the issuance of a stay of proceedings against the company in the respective foreign jurisdiction[37]. Such a stay prevents any unauthorised disposal of the company's assets and provides a temporary suspension of all legal actions against the company without the express approval of the foreign court.

D. Detailed Procedures for Securing Foreign Assets

For the ABC Group, the process would likely involve the judicial managers of Alpha Pte Ltd, Beta Pte Ltd, and Charlie Pty Ltd applying to the courts in the UK and Australia, providing evidence of the Singaporean judicial management order and demonstrating its equivalency to a process recognized under the local insolvency laws[38].

The foreign courts, upon review, may decide to recognise the Singaporean proceedings and extend protections that exist in their jurisdiction for such proceedings. For instance, in Australia, this may invoke the Australian Corporations Act 2001's provisions, which prevent unsecured creditors from enforcing their claims without the leave of the court[39].

E. Potential Challenges and Overall Implications

Obtaining foreign recognition can involve several challenges, such as the complexities of different legal systems, time pressures, and potential costs. Yet, given the ABC Group's significant assets in foreign jurisdictions, it is a crucial strategy for a comprehensive and coordinated restructuring process.

Furthermore, given the substantial financial exposure of the company due to its MTN programme and the corporate guarantees provided, the preservation of assets globally is a necessary step to maximise potential returns for the creditors of the ABC Group.]

*** End of Assessment ***

35.5m

[35] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.
[36] Ibid, Article 9 - Application for recognition of a foreign proceeding.
[37] Ibid, Article 20 - Relief that may be granted upon application for recognition of a foreign proceeding.
[38] Ibid, Article 15 - Application for recognition of a foreign proceeding and commencement of a case.
[39] Australian Corporations Act 2001, Section 440D.