INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 8E Guidance Text

Singapore

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CONTENTS

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN SINGAPORE

Welcome to **Module 8E**, dealing with the insolvency system of **Singapore**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of Singapore's insolvency laws;
- a relatively detailed overview of Singapore's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Singapore.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2024**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2024 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module, you should have a good understanding of the following aspects of insolvency law in Singapore:

- the background and historical development of insolvency law in Singapore;
- the various pieces of primary and secondary legislation governing insolvency law in Singapore;
- the operation of the primary legislation with regard to liquidation and corporate rescue;
- the operation of the primary and other legislation with regard to corporate debtors;

- the rules of international insolvency law as they apply in Singapore; and
- the rules relating to the recognition of foreign judgments in Singapore.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of insolvency law in Singapore; and
- be able to answer questions based on a set of facts relating to insolvency law in Singapore.

Throughout the guidance text, you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO SINGAPORE

3.1 History

A Malay trading port known as Temasek existed on the island of Singapore by the 14th century. The settlement changed hands several times in the ensuing centuries and was eventually burned in the 17th century and fell into obscurity. The British founded Singapore as a trading colony on the site in 1819. It joined the Malaysian Federation in 1963 but was ousted two years later and became independent.

Singapore has since become one of the world's most prosperous countries with strong international trading links (its port is one of the world's busiest in terms of tonnage handled) and with per capita gross domestic product (GDP) equal to that of the leading nations of Western Europe.[1]

3.2 Economy

Singapore has a highly developed and successful free-market economy. It enjoys an open and corruption-free environment, stable prices, and a *per capita* GDP of USD 72,794, which is higher than that of most developed countries.[2] Unemployment is very low. As a small open economy, Singapore is highly dependent on trade. The economy depends heavily on export of goods and services such as electronics, petroleum products, and chemicals;[3] and on Singapore's vibrant transportation, business, and financial services sectors.

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1 See https://www.cia.gov/the-world-factbook/.
2 See https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=SG.
3 See https://oec.world/en/profile/country/sgp.

3.3 Major financial centre

Singapore is regularly regarded as one of the main financial centres in the world. The 32nd Edition of the Global Financial Centre Index ranks Singapore as the third leading financial centre in the world, behind New York and London. Given that Singapore is only just over 50 years old as a country, this is a remarkable feat.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

Singapore's legal system is based on the English common law system under which the most authoritative law is statutory legislation. Under the common law system, law is also created incrementally by the decisions of judges. This system is characterised by the doctrine of *stare decisis*, which requires that every court must follow the *ratio decidendi* (the operative reason for the decision) of all courts which are higher than it in the court hierarchy. This means that each of the Singapore High Court, District Court and Magistrate's Court are bound to follow the decisions of the Court of Appeal. The decisions of other common law countries, while not binding, are persuasive. There is no codification as would be seen in civil jurisdictions.

Singapore has also historically modelled its insolvency laws on other Commonwealth jurisdictions such as Malaysia, Australia and England. For example, the Companies Act (Chapter 50) (the Companies Act), which set out the framework for Singapore's corporate insolvency law (before it was consolidated together with Singapore's personal bankruptcy law in the Insolvency Restructuring and Dissolution Act (IRD Act), which took effect on 30 July 2020) is largely based on the Malaysian Companies Act 1965. The reason for this is that when the Singapore Companies Act 1967 was enacted, Singapore was still a part of Malaysia and the Act was therefore identical to the Malaysian Companies Act 1965, which was in turn based on the Companies Act 1961 of Victoria, Australia.

Recently, as part of the efforts to enhance Singapore's debt restructuring framework and improve its capability to deal with cross-border insolvencies and restructurings, Singapore sought to model part of its restructuring and insolvency law on the United States of America (US) by adding a number of concepts taken from the US Bankruptcy Code. These changes were implemented by the Singapore Companies Act (Amendment) Act 2017 (the 2017 Amendment Act) in 2017.

4.2 Institutional framework

4.2.1 Court system

In Singapore the court system consists of the:

(a) the Supreme Court (comprising of the High Court which in turn has the General and Appellate Divisions and the Court of Appeal);

(b) the State Courts (including the District Court, Magistrate's Court, Coroner's Court and Small Claims Tribunal); and

(c) the Family Justice Courts.

4.2.2 Supreme Court

The Supreme Court is made up the High Court and the Court of Appeal. It has both criminal and civil jurisdiction.

4.2.2.1 High Court

The High Court has both original and appellate jurisdiction and may hear appeals from the state courts. Corporate insolvency proceedings and bankruptcy proceedings may only be heard before the Singapore High Court. Recently, the High Court has introduced specialist commercial lists of judges, including one for each of company-, insolvency- and trust-related matters. The lists identify judges who are able to bring their considerable experience and expertise in specialist areas of law to bear on complex commercial cases.

The High Court has jurisdiction for:

(a) civil cases where the claim exceeds SGD 250,000;

(b) probate matters if the estate exceeds SGD 5,000,000;

(c) ancillary matters in family proceedings where assets equal SGD 1,500,000 or more; and

(d) all criminal cases, although in general the High Court only hears cases where the offences are punishable by death or with imprisonment terms exceeding 10 years.

4.2.2.2 Court of Appeal

The Court of Appeal is the final court of appeal in Singapore and is presided over by the Chief Justice. The Court of Appeal only has appellate jurisdiction.

4.2.3 State Courts

The State Courts consist of the various District Courts, Magistrate Courts, Coroner's Courts, Community Court, Youth Courts, Juvenile Courts and the Small Claims Tribunal. These courts are all subordinate to the Supreme Court.

4.2.4 Family Justice Courts

The Family Justice Court has jurisdiction to hear cases involving issues such as adoptions, divorce, division of matrimonial property, personal protection orders, spousal and child

maintenance and family violence. As with the State Courts, the Family Justice Courts are subordinate to the Supreme Court.

4.3 Enforcement of rights

Singapore has a modern and sophisticated legal system to support the enforcement of legal rights inside and outside of insolvency. Singapore's legal system is generally perceived to be the most reliable, transparent and efficient in South East Asia. Enforcement issues generally only arise in relation to cross-border matters where other South and South East Asian jurisdictions are involved, such jurisdictions often include civil law legal systems not easily compatible with common law principles and have more complex and time consuming enforcement procedures.

4.4 System of enforcement

While self-help remedies are available in certain instances, for example the private appointment of a receiver (see the section on Receivership below), the main avenue for enforcement is court litigation. Judges can grant orders such as monetary orders, injunctions and proprietary orders. There are also other dispute resolutions methods available such as arbitration and mediation.

4.5 Insolvency regulator

Singapore has an Official Receiver and Official Assignee.

The Official Receiver is a public officer who acts as a:

(a) liquidator in compulsory winding-up (if appointed by the High Court) although generally a private liquidator will be appointed as liquidator;

(b) regulator in compulsory and voluntary winding-up;

(c) representative in defunct cases (a company that is dissolved); and

(d) liquidator for unincorporated entities.

The Official Assignee is a public servant and an officer of the court who can be appointed by the High Court as the trustee of a bankruptcy estate. If appointed, the Official Assignee is responsible for, amongst other things:

(a) consulting creditors with respect to the management of the bankrupt's estate;

(b) investigating the conduct and affairs of the bankrupt;

(c) recovering and realising the assets of the bankrupt for distribution to creditors; and

(d) assisting in obtaining a discharge from bankruptcy.

The Official Assignee is assisted by officers at the Insolvency Office.

Self-Assessment Exercise 1

Question 1

What is the role of the insolvency regulator in Singapore?

Question 2

Singapore has modelled its insolvency laws after the laws of which countries?

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

5.1 General

Singapore law adopts the traditional common law forms of security interest, that is, the mortgage, charge, pledge and lien.

A security over property means "some real or proprietary interest, legal or equitable, in the property as distinguished from a personal right or claim thereon".

A company may give security for money that it borrows and may give any type of security that a natural person may give. Such security may take the form of a charge or mortgage of some sort or a pledge of chattels.

The most common forms of security over immovable and movable property are mortgages and fixed charges. Other forms of security include floating charges, pledges and liens and quasi-securities.

5.2 Mortgage

A legal mortgage is a conveyance or assignment of legal title in property subject to an equity of redemption. An equitable mortgage is the assignment of equitable title as security.

Mortgages are taken as security only and do not operate as a transfer of the ownership in the land or other property mortgaged. The mortgagee has the power to exercise its right to sell the property if the mortgagor fails to repay the debt or discharge its obligation. The mortgagor has the right of redemption and the mortgagee must discharge the mortgage once the debt or the obligation is repaid.

A mortgage over movable property is created by an absolute assignment of legal title to the mortgagee with a right of redemption given to the mortgagor. A duly executed transfer form is required to create a legal mortgage over certificated shares.

A key aspect of the law of mortgages is the mortgagor's equitable right of redemption. A mortgagor redeems his property when he pays off the debt with interest, thereby cancelling the mortgage and obtaining unencumbered title to the mortgaged property, typically land. As long as the mortgagee has not exercised its power to foreclose the mortgage or sell the property, the mortgagor retains his right to redeem the property. This is so even if the due date for repayment has passed and the mortgagor has lost his contractual right of redemption.

In equity, the mortgagor will be allowed to recover his property if he repays the outstanding debt to the mortgagee. Under Singapore law, if the mortgagor wishes to exercise his equitable right of redemption, he must give the mortgagee three months' notice or pay the mortgagee three months' interest in lieu of notice.[4]

5.3 Charge

A charge is a security interest in property that is created by contract; it transfers neither title nor possession. The creditor has a right of realisation against the charged property in case of non-payment of the debt.

Charges are often taken as security over a debtor company's valuable assets, including land. Title and possession of the charged property remain with the debtor. The terms of the charge usually limit the debtor's right to dispose or deal with the charged property without the creditor's permission.

A charge is created by agreement, where the debtor agrees to appropriate certain assets as security for repayment of the debt. However, a charge does not involve the transfer of either ownership or possession of the assets. Where the debtor defaults in repayment of the loan, the assets in question are said to be charged with the debt, entitling the creditor to seize the assets and sell it in satisfaction of the debt.

There are two kinds of charges: fixed and floating.

A fixed charge is a security interest that attaches itself to a particular charged asset with no transfer of legal ownership. The fixed charge follows an asset if transferred, that is, the transferee will take the asset subject to the fixed charge.

A floating charge is usually taken over a class of assets, present or future. Floating charges can be taken over the whole or substantially the whole of the debtor's assets, including intangible property such as account receivables and book debts. Unlike the fixed charge, it does not attach itself to a particular asset within the class and the debtor can usually deal with the charged assets in the ordinary course of business. A floating charge may crystallise into a fixed charge over the

[4] Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), s 22(1).

charged assets when certain events stated in the agreement creating the charge occur. An example of such an event would be the insolvency of the debtor The debtor is usually then prevented from dealing or disposing of the charged assets without the lender's permission.

5.4 Pledge

A pledge is a form of security interest where the debtor delivers an asset to a creditor who holds it until the outstanding loan is repaid or the obligation is discharged. The debtor maintains ownership of the pledged asset; however, the creditor has the right to sell the pledged asset if the debtor fails to perform its obligation.

In the case of a pledge, the debtor transfers possession of the asset to the creditor as security. Title to the asset, however, is retained by the debtor. If the debtor repays the loan (and interest) within the agreed period of time, the creditor is obliged to return the security to the debtor. However, in the event that a default occurs, the creditor has an implied authority to realise the security and apply the proceeds in satisfaction of the debt after giving the debtor reasonable notice.

Transfer of possession under a pledge can be actual or constructive. Actual possession occurs when the debtor delivers the goods themselves to the creditor. For bulky goods, or goods that require actual storage, the creditor may choose to take security over the premises where the goods are stored and have the key to the premises delivered to it. Alternatively, where the documents delivered represent the goods themselves, as with bills of lading, the constructive possession requirement is fulfilled.

5.5 Lien

A lien is the creditor's common law right to retain possession of another person's property until a debt is repaid. In Singapore, liens can arise by operation of law in certain specific relationships, for example solicitor-client or through contract. The creditor has no right to deal with property under a lien even if the debtor does not repay the outstanding debt owed.

A lien differs from a pledge in two ways. First, transfer of possession from the debtor to the creditor occurs under a pledge, for the specific purpose of creating security. In the case of a lien, the creditor obtains possession of the asset for purposes other than security. The lien only arises when the owner of the assets fails to pay the lienor amounts due and owing, and the lienor then has a right to retain possession of the goods until the debt is paid. Second, the lienor does not have powers of sale, unlike a pledgee. The lienor merely has a right to possession of the asset until the debt is paid.

5.6 Other

Quasi-securities are other ways creditors obtain protection against default from debtors. Some types of quasi-security include retention of title clauses in sale of goods contracts, sale and leaseback structures in asset finance transactions, and factoring and negative pledges in finance

transactions. It is common to see quasi-security in the form of third-party support, such as guarantees as indemnities.

Security over book-entry securities, such as publicly traded shares in the Singapore stock exchange, must be in the prescribed form and registered with the Central Depository.

Security over other assets such as intellectual property rights, ships, aircrafts and so on, may require registration in a specialist register.

5.7 Registration

Pledges and liens need not be registered.

Mortgages and charges over real property must follow prescribed forms and be registered with the relevant statutory authority to be effective (such as the Singapore Land Authority). Transfers of property by a mortgagee exercising its power or sale or any discharge of the mortgage or charge must similarly be registered with the relevant statutory authority.

5.8 Effects of non-compliance

In the case of security over land, third parties who acquire registered land hold the land free from any encumbrances or interests that are not registered under the relevant provisions. An instrument cannot transfer any estate or interest in land until that instrument is registered.

Registrable charges that are not registered in accordance with the Companies Act make the security void as against the liquidator and other creditors of the company in a liquidation.

Failure to register mortgages or charges may also subject the company and its officers to a fine.

5.9 Secured creditors may enforce their security outside the insolvency process

The rights of a secured creditor to deal or realise security over company assets are not affected by a winding-up or personal bankruptcy order. However, the secured creditor is not entitled to interest on the debt if the security is not realised within 12 months of winding-up or such further period as allowed by the Official Receiver.

Secured creditors can generally enforce their security outside the liquidation process. Secured creditors with claims exceeding the realised security are treated as unsecured creditors for the excess part of the claim.

5.10 No central collateral registry

Registration of security in Singapore is asset specific – there is no central registry.

All charges, fixed or floating, must be registered with the Accounting and Corporate Regulatory Authority. Charges commonly secure debentures, shares, assignments, land and other property.

Regulations governing the registration of charges can be found in sections 131 to 141 of the Companies Act.

Security interests involving registered land and real estate are normally registered via the Torrens System, which is maintained by the Singapore Land Authority. However, if the interest is not registrable, as in the case of an equitable mortgage, it may then only be registered in the form of a caveat on the land register.

Registration of ships is handled by the Singapore Registry of Ships, which is maintained by the Maritime and Port Authority of Singapore.

5.11 Forms of personal security available

Security over all forms of assets is known as real security. In contrast to real security, personal security does not involve any assets but refers to an individual's or corporation's personal undertaking to pay on behalf of the debtor upon the debtor's failure to make payment. Examples include:

(a) guarantees;

(b) indemnities; and

(c) performance bonds.

Self-Assessment Exercise 2

You are asked to supply materials to ABC Limited, a relatively new company with a short trading history. You are cautious and wish to ensure that you are paid in full for the goods that you supply, but you acknowledge that the full purchase price cannot realistically be paid up front. How can you protect yourself should ABC limited become unable to pay its debts?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

6.1.1 Legislative framework

Prior to the IRD Act, the statutory provisions that govern the administration of the affairs of insolvent individuals and firms were predominately contained in the Bankruptcy Act (Cap 20,

2009 Ed) (the Bankruptcy Act), read together with all relevant subsidiary legalisation and practice directions.

And prior to the IRD Act, the legislative provisions governing the practice and procedure of corporate insolvency in Singapore were found in the Companies Act and 2017 Amendment Act, read together with all relevant subsidiary legalisation and practice directions. A number of provisions of the Bankruptcy Act were also imported subject to certain prescribed modifications[5] to the judicial management and winding-up regimes under the Companies Act. These include certain provisions relating to antecedent transactions, proof of debts, set-off rights and the valuation of annuities.

The IRD Act, discussed in further detail below, came into effect on 30 July 2020 and is a new omnibus legislation which repeals and replaces the existing legislative regime and consolidates all personal and corporate insolvency and restructuring laws into one piece of legislation. This removed the need to cross-reference between these legislative acts.

Provisions contained in other sources of legislation can also apply to both the corporate and individual insolvency regimes. For example, provisions contained in the Work Injury Compensation Act (Cap 354), the Income Tax Act (Cap 134), the Employment Act (Cap 91), the Banking Act (Cap 19) and the Insurance Act (Cap 142) confer priority on certain types of claims against a company in liquidation and an individual in bankruptcy.

6.1.2 Creditor or debtor bias

As the Singapore legal system is based on the English common law system, creditor rights have historically been favoured in insolvency and restructuring proceedings.

The English based system is largely creditor in possession such that when an insolvency occurs or is approaching, the creditor or its appointee is entitled to displace the directors and take over the running of the company with a view to recovery. These are the aims of receivership and liquidation. However, as part of Singapore's efforts to establish the jurisdiction as a hub for international restructurings, new debtor-in-possession features have been incorporated into the existing scheme of arrangement process (which is discussed in greater detail below). This has shifted the bias toward debtors and focuses on rehabilitating the company, albeit with in-built creditor protections. These new features have been adapted from Chapter 11 of the US Bankruptcy Code and are therefore unique in so far as commonwealth legal systems are concerned. This sets Singapore apart in offering debtors a choice of greater control when financial difficulty arises.

[5] The Companies (Application of Bankruptcy Act Provisions) Regulations (CABAR) sets out the relevant modifications.

6.1.3 Role of stakeholders during insolvency proceedings

6.1.3.1 Schemes of arrangement

The major change implemented in the 2017 Amendment Act was to introduce debtor-in-possession style features to the scheme of arrangement procedures with certain tools such as the availability of debtor in possession financing, an automatic moratorium, and the availability of cross class clam down. These features, combined with the existing scheme of arrangement provisions, give debtors the time and space to restructure their affairs and for proposals to creditors to be agreed and implemented via a scheme of arrangement.

The process can be initiated where a company intends on proposing a compromise to its creditors via a scheme of arrangement. As part of the process, the company can seek (from the court) moratorium protection from creditors and remain in control as a debtor-in-possession while it proposes the restructuring plan to be implemented via a scheme of arrangement.[6] The management of the company also stays in control throughout the moratorium period and the period of implementation of the scheme of arrangement. It is the company who is responsible for putting forward the restructuring proposal, with the aid of financial advisors. The restructuring proposal is implemented through the relevant scheme of arrangement. Accordingly, the role of the creditors is to liaise and negotiate the restructuring plan with the debtor company, vote on the proposed restructuring plan / scheme and, where necessary, challenge the company's classification of creditor classes within the scheme if the scheme is passed by the requisite majority. The role of the courts is largely supervisory and is generally limited to overseeing the restructuring process, ensuring due disclosure of information to creditors, obtaining regular updates from the debtor company as to the progress of the restructuring, overseeing hearings relating to any applications brought by parties to extend or terminate the moratorium and other issues related to restructuring process and ultimately to convene scheme meetings and sanction of the scheme.

6.1.3.2 Judicial management

Judicial management is another one of Singapore's corporate rescue tools. A key difference between judicial management and schemes of arrangement is that judicial management entails the appointment of an insolvency practitioner as the judicial manager, which appointment is made by the court. The judicial manager replaces the company's directors and management and takes over responsibility for the running of the company. A criticism of judicial management is that it is more of an insolvency process than corporate rescue and insufficient enough percentage of companies have been "rescued" given the stigma associated with an insolvency appointment and proceeding.

Upon the appointment of a judicial manager by the court, the powers of the company's directors cease and the judicial manager takes over the affairs, business and property of the company.[7]

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6 IRD Act, s 64(1).
7 *Idem*, s 99.

Creditors play a limited role in the management and direction of the company, as this is the task of the judicial manager. However, creditors will generally form a creditors committee.[8] This can be done where a meeting of creditors is summoned to consider the judicial manager's proposals and such proposals have been approved (with or without modification). The creditors committee (once appointed) can be granted the power to require the judicial manager to attend before it and furnish it with such information relating to the carrying out of his functions as the committee may reasonably require.[9] Where the creditors committee is dissatisfied with the extent or the nature of information being furnished to it by the judicial manager, it can apply to the court and the court, if satisfied that the representations are well founded, may give such directions to the judicial manager as it considers appropriate.[10]

6.1.3.3 Winding-up / liquidation

On the appointment of a liquidator, all the powers of the company's directors cease, except so far as the liquidator or the members of the company with the liquidator's consent approve the continuance of such powers or duties.[11] The powers of directors also cease when the court orders that a company be compulsorily wound up.[12]

A liquidator may, however, apply to the court to appoint the directors as special managers to assist the liquidator, if the liquidator is satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require such appointment.[13]

Creditors file proofs of debt to verify their claims and voting rights and may also form a committee of inspection.

6.1.3.4 Receivership

The terms of the relevant security document or other document which provides for the receiver's appointment, will dictate the extent to which managerial functions and responsibilities are transferred from the directors of the company to the receiver. Where the receiver is only given limited powers over specific assets, the directors of the company retain all other managerial function.

6.1.3.5 Bankruptcy

Where a firm or individual is declared bankrupt, all property of the firm or individual is vested in the Official Assignee or the Trustee in Bankruptcy, as the case maybe. In the case of a firm / partnership, the partners are then no longer in control of the affairs, business and property. The

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8 *Idem*, s 109.
9 *Idem*, s 109.
10 Companies Regulations, reg 86(3).
11 IRD Act, ss 164, 167.
12 *Re Country Traders Distributors Ltd* [1974] 2 NSWLR 135 at 138, SC (NSW), per Mahoney J and *Halsbury's Laws of Singapore* Vol 13 (2016), s 15(A), Commencement of Liquidation, para 150.483.
13 IRD Act, s 154.

court plays a limited role in the process. However, the court is required to adjourn a bankruptcy application, where certain criteria are met, for a period of six months (or such other period as the court may direct) and refer the matter to the Official Assignee for the purpose of enabling the Official Assignee to determine whether the debtor is suitable for a debt repayment scheme.[14]

6.2 Personal / consumer bankruptcy

6.2.1 Who qualifies as "debtor"?

An individual cannot make an application under the IRD Act, unless he can satisfy one or more of the following conditions, namely that he:[15]

(a) is domiciled in Singapore;

(b) has property in Singapore; or

(c) has, at any time within the period of one year immediately preceding the date of the making of the application –

(i) been ordinarily resident or has had a place of residence in Singapore; or

(ii) carried on business in Singapore.

A firm cannot make an application under the IRD Act, unless it satisfies one or more of the following conditions:[16]

(a) at least one of the partners in the firm

(i) is domiciled in Singapore;

(ii) has property in Singapore; or

(iii) has, at any time within the period of one year immediately preceding the date of the making of the application, been ordinarily resident or has had a place of residence in Singapore; or

(b) the firm has at any time within the period of one year immediately preceding the date of the making of the application, carried on business in Singapore.

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[14] *Idem*, ss 316(9) and s 318(3).
[15] *Idem*, s 310.
[16] *Idem*, s 310.

6.2.2 Process for entering bankruptcy

A bankruptcy application may be made by either a creditor[17] or a debtor.[18] The requirements for each application are set out in further detail below, together with the grounds for the making of these applications. Upon hearing a bankruptcy application, the court may make a Bankruptcy Order pursuant to which the relevant firm or individual will be declared bankrupt. A court date will generally be fixed for the hearing of a bankruptcy application within four to six weeks of it being filed.

A Bankruptcy Order will only be made if there are no successful objections raised and / or if the application is not suitable for referral to the alternatives to formal bankruptcy.

The Bankruptcy Order is then published in the Government Gazette and an Official Assignee or the Private Trustee (if one is appointed) will then administer the bankrupt's affairs in bankruptcy. Institutional creditors must nominate a Private Trustee to administer the bankrupt's estate in their application for a bankruptcy order.

6.2.3 Requirements for creditor application

A creditor's bankruptcy application may be made against an individual by:[19]

(a) one of the individual's creditors or jointly by more than one of them; or

(b) the nominee supervising the implementation of, or any person (other than the individual) who is for the time being bound by, a voluntary arrangement proposed by that individual and approved.

A creditor's bankruptcy application may be made against a firm by:[20]

(a) one of the firm's creditors or jointly by more than one of them, if such creditor or creditors are entitled to make a creditor's bankruptcy application against any one of the partners in the firm in respect of a partnership debt; or

(b) the nominee supervising the implementation of, or any person (other than the partners in the firm) who is for the time being bound by, a voluntary arrangement proposed by the firm and approved.

Provided that the grounds for a bankruptcy application are satisfied,[21] the creditor may file an application to the High Court and a hearing date for the case will be set.

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17 *Idem*, s 307.
18 *Idem*, s 308.
19 *Idem*, s 307(1).
20 *Ibid*.
21 *Idem*, s 311.

6.2.4 Secured creditor application

Where the creditor making the application is a secured creditor, he must either:

(a) state that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of the other creditors of the bankrupt; or

(b) give an estimate of the value of his security, in which case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a creditor in the same manner as if he were an unsecured creditor.[22]

6.2.5 Debtor application

If the applicant is an individual, then they must file a bankruptcy application together with a statement of affairs which sets out their assets, creditors, debts and other liabilities.

If the applicant is a firm, then the bankruptcy application must be made by either:

(a) all the partners of the firm; or

(b) a majority of partners who are residing in Singapore at the time of the making of the application. The application must be made together with a statement of affairs of the firm and each of the partners by whom the application is made.[23]

6.2.6 Consolidation of bankruptcy applications

Where two or more bankruptcy applications are made against the same debtor, the court may consolidate the proceedings or any of them on such terms as the court thinks fit.[24]

6.2.7 Obligation to enter formal bankruptcy proceedings

There is no formal requirement for a debtor to enter into bankruptcy. However, failure to do so may result in the debtor breaching one or more of the bankruptcy offences set out in Part 20 of the IRD Act. For example, it is an offence for an individual to incur any debt provable in bankruptcy within the 12 months before the making of a bankruptcy application by or against him without any reasonable grounds of expectation of being able to pay.[25]

Similarly, there is no requirement that a creditor file a bankruptcy application against a defaulting debtor.

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22 *Idem*, s 313(1).
23 *Idem*, s 308(2)(b).
24 *Idem*, s 319.
25 *Idem*, s 415.

6.2.8 The threshold for entering bankruptcy

Subject to an expedited bankruptcy application being made under section 314 of the IRD Act, a bankruptcy application may not be made unless at the time of the application:[26]

(a) the amount of the debt, or the aggregate amount of the debts, is not less than SGD 15,000;

(b) the debt or each of the debts is for a liquidated sum payable to the applicant creditor immediately;

(c) the debtor is unable to pay the debt or each of the debts; and

(d) where the debt or each of the debts is incurred outside Singapore, such debt is payable by the debtor to the applicant creditor by virtue of a judgment or an award which is enforceable by an enforcement order in Singapore.

A debtor will be presumed to be unable to pay his debts where the debt is immediately due and payable and:[27]

(a) the applicant creditor to whom the debt is owed has served on him in the prescribed manner a statutory demand, at least 21 days have elapsed since the statutory demand was served and the debtor has neither complied with it nor applied to the court to set it aside;

(b) an enforcement order issued against him in respect of a judgment debt owed to the applicant creditor has been returned unsatisfied in whole or in part;

(c) he has departed from or remained outside Singapore with the intention of defeating, delaying or obstructing a creditor in the recovery of the debt; or

(d) the Official Assignee has:

(i) issued a:

I. certificate of inapplicability of a debt repayment scheme;

II. certificate of failure of a debt repayment scheme; or

(ii) revoked a certificate of completion of a debt repayment scheme,
in respect of the debtor within the 90 days immediately preceding the making of the application.[28]

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[26] *Idem*, s 311.
[27] *Idem*, s 312.
[28] *Ibid*.

Pursuant to section 314 of the IRD Act, a creditor's bankruptcy application, which relies on a statutory demand, may be made on an expedited basis before the end of the period of 21 days after the service of the statutory demand provided that:

(a) there is a serious possibility that the debtor's property, or the value of all or any of the debtor's property, will be significantly diminished during that period; and

(b) the application contains a statement to that effect.

6.2.9 Moratorium upon a bankruptcy order

A moratorium on enforcement is imposed upon the debtor being declared bankrupt by the court.[29] As a result of the moratorium, creditors are prevented from commencing proceedings for debts incurred prior to bankruptcy without the leave of the court. Secured creditors are not, however, prevented from enforcing their security.[30]

An insolvent debtor may apply for an interim moratorium where he intends to make a proposal to his creditors for a composition in satisfaction of his debts, or a scheme of arrangement of his affairs (Voluntary Arrangement).[31]

6.2.10 Moratorium under a debt repayment scheme

An automatic moratorium also arises whilst a debt repayment scheme is in effect, which prevents:[32]

(a) any creditor to whom the debtor is indebted under the scheme from having any remedy against the person or property of the debtor in respect of that debt; and

(b) any action or proceedings being proceeded with or commenced against the debtor in respect of that debt,

except by leave of the court and in accordance with such terms as the court may impose. The above provisions do not affect the right of any secured creditor to realise or otherwise deal with his security.[33]

6.2.11 Status of the debtor upon entering formal insolvency

Upon the making of a Bankruptcy Order, all property belonging to the bankrupt vests in the Official Assignee or Trustee in Bankruptcy as the case maybe.

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29 *Idem*, s 327(1)(c).
30 *Idem*, s 327(3).
31 *Idem*, s 276(2) provides that a partner in an insolvent firm cannot apply to the court for an interim order in respect of the firm unless all or a majority of the partners in the firm join or intend to join in the making of the proposal for a voluntary arrangement.
32 *Idem*, s 293(1).
33 *Idem*, s 293(2).

The bankrupt can no longer deal with his own property and any purported transfer of such property will be void (unless made with permission of the court).[34] The bankrupt also becomes subject to various statutory duties,[35] including the duty to:

(a) make discovery of and deliver all his property to the Official Assignee;

(b) deliver all relevant information and documents relating to his property or affairs;

(c) attend meetings with the Official Assignee and answer all relevant questions;

(d) make or give all the assistance to the Official Assignee in making an inventory of his assets;

(e) disclose all property disposed of within such time preceding his bankruptcy as the Official Assignee may require, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

(f) disclose all property disposed of by gift or settlement without adequate valuable consideration within the five years immediately preceding his bankruptcy;

(g) attend any meeting of his creditors as may be convened by the Official Assignee;

(h) aid the Official Assignee in the realisation of the bankrupt's property and the distribution of the proceeds among the bankrupt's creditors;

(i) execute such powers of attorney, conveyances, deeds and instruments as may be required;

(j) examine the correctness of all proofs of claims filed, if required by the Official Assignee;

(k) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the Official Assignee;

(l) disclose any matter in respect of which the bankrupt is or may become a defendant or respondent in proceedings (including criminal proceedings), to such extent as the Official Assignee may require;

(m) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the Official Assignee or prescribed by the rules or directed by the court by any order on any application by the Official Assignee or by any of his creditors; and

(n) until he has been discharged from bankruptcy, keep the Official Assignee advised at all times of his place of residence or address.

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[34] *Idem*, s 328(1).
[35] *Idem*, s 303.

The Official Assignee may apply for a court order to force the bankrupt to comply with the Official Assignee's directions and the bankrupt's own duties.[36]

The bankrupt is also subject to various statutory restrictions, including being unable to:

(a) leave Singapore without the Official Assignee's permission;[37]

(b) be appointed as:

(i) a director or trustee director of a company, without the permission of the Official Assignee;[38] or

(ii) a trustee or personal representative in respect of any trust estate or settlement, except with the leave of the court.[39]

After the court grants the application, the bankrupt must submit a statement of his assets, liabilities and creditors within 21 days from the making of the Bankruptcy Order.[40] Failure to do so can result in imprisonment or a fine.[41] The Official Assignee will then sell off the bankrupt's assets and the dividends will be paid by the Official Assignee to the creditors who have provided proof of their debts.

6.2.12 Alternatives to formal bankruptcy

6.2.12.1 Voluntary arrangements

A Voluntary Arrangement is a formal arrangement made between a debtor and his creditors for the satisfaction of its debts overseen by a nominee.[42]

A debtor must appoint a nominee as part of any proposal for a Voluntary Arrangement.[43] A person cannot be appointed as a nominee unless he is a licensed insolvency practitioner.

Where a debtor intends to make such a proposal to its creditors, the court may grant an interim moratorium order pursuant to which:

(a) no bankruptcy application may be made or proceeded with against the debtor; and

(b) no other proceedings, execution or other legal process may be commenced or continued against the person or property of the debtor without the leave of the court; and

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36 *Idem*, s 6(3).
37 *Idem*, s 401(1)(b).
38 *Idem*, s 400.
39 *Ibid*.
40 *Idem*, s 332(1).
41 *Idem*, s 332(6).
42 *Idem*, s 276(1).
43 *Idem*, s 277.

(c) where the interim order is in respect of a firm –

(i) no bankruptcy application may be made or proceeded with against the firm or, except with the leave of the court, any partner therein; and

(ii) no other proceedings, execution or other legal process may be commenced or continued against the firm or its property or against the person or property of any partner in the firm, without the leave of the court.[44]

Where an interim order has been made, the nominee must submit a report to the court which states whether in his opinion, a meeting of the debtor's creditors should be summoned and if so, the date, time and place which the meeting should take place.[45] Then, unless otherwise directed by the court, the nominee will summon a creditors meeting.[46]

The Voluntary Arrangement must then be approved by special resolution by the creditors at the creditors meeting. The Voluntary Arrangement, if approved by the requisite majority, will then bind all creditors who have had notice of and were entitled to vote at the meeting.[47]

If, however, the debtor fails to comply with any of the obligations under the Voluntary Arrangement, the nominee or any creditor bound by the Voluntary Arrangement may bring a bankruptcy application against the debtor.[48]

6.2.12.2 Debt repayment scheme

A debt repayment scheme is a pre-bankruptcy scheme administered by the Official Assignee which allows a debtor to enter into a debt repayment plan with its creditors and avoid bankruptcy.

The court may refer the debtor to the Official Assignee for an assessment of the debtor's eligibility and suitability to enter into the debt repayment scheme if the following criteria are satisfied:

(a) the debt or the aggregate of the debts in respect of which the bankruptcy application does not exceed the prescribed amount;

(b) the debtor is not an undischarged bankrupt and has not been a bankrupt at any time within the period of five years immediately preceding the date on which the bankruptcy application is made;

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44 *Idem*, s 276(3).
45 *Idem*, s 280(1).
46 *Idem*, s 281(1).
47 *Idem*, s 282(1).
48 *Idem*, s 287.

(c) a Voluntary Arrangement or a Debt Repayment Scheme in respect of the debtor is not in effect, and was not in effect at any time within the period of five years immediately preceding the date on which the bankruptcy application is made; and

(d) the debtor is not a sole proprietor, a partner of a firm within the meaning of the Partnership Act (Cap 391) or a partner in a limited liability partnership.[49]

If the debtor satisfies the abovementioned criteria and the case is referred to the Official Assignee, then the debtor will be required to submit a statement of his affairs and a debt repayment plan with a repayment period not exceeding five years.[50] If the Official Assignee approves, he will then convene a meeting of creditors to review the plan. If the plan is approved by the Official Assignee then it will be binding on all creditors.[51] A moratorium will be in effect for the period of the debt repayment scheme.[52]

If the debtor fails to comply with the conditions of the scheme then the Official Assignee may issue a certificate of failure of the scheme which will bring the scheme to an end.[53] Creditors may then bring a bankruptcy application against the debtor.

6.2.13 Process of appointing officeholders

The Official Assignee or the Trustee in Bankruptcy, as the case may be, is appointed by the court in the relevant Bankruptcy Order.

Where the applicant is an institutional creditor or its subsidiary, they must apply for the appointment of a private Trustee in Bankruptcy (usually an insolvency practitioner) instead of the Official Assignee[54]. An institutional creditor means a creditor which is:

(a) a bank licensed under the Banking Act (Cap 19);

(b) a finance company licensed under the Finance Companies Act (Cap 108); or

(c) an undertaking that:

(i) in the relevant period, has an annual sales turnover of more than SGD 100 million; and

(ii) at the date of the application for the bankruptcy order has more than 200 employees.[55]

An interim receiver may be appointed by the court, upon application by a debtor, where the court thinks that it is necessary or expedient to do so. Before an order appointing the Official

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[49] *Idem*, s 316(9).
[50] *Idem*, s 290(1).
[51] *Idem*, s 291(8).
[52] *Idem*, s 293.
[53] *Idem*, ss 300(1) and 298(1)(b).
[54] *Idem, s 36(2).*
[55] *Idem*, s 36(4).

Assignee as interim receiver is made, the applicant must deposit with the Official Assignee the prescribed amount and such further sum as the Official Assignee requires for the fees and expenses which may be incurred by him.[56]

6.2.14 Role of the officeholders in bankruptcy proceedings and their powers and obligations

The Official Assignee has the following duties as regards the estate of a bankrupt administered by him:[57]

(a) to act as the receiver of the bankrupt's estate and where a special manager has not been appointed, as the manager thereof;

(b) to raise money or make advances for the purposes of the estate and to authorise the special manager (if any) to raise money or make advances for the like purposes in any case where in the interests of the creditors it appears necessary to do so;

(c) to summon and preside at all meetings of creditors held under the IRD Act;

(d) to issue forms of proxy for use at the meetings of creditors;

(e) to report to the creditors as to any proposal which he makes with respect to the mode of liquidating the bankrupt's affairs; and

(f) to advertise the bankruptcy order, the date of any public examination and such other matters as may be necessary to advertise.

The Official Assignee must, as far as practicable, consult the creditors with respect to the management of the bankrupt's estate and may, for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors.

The Official Assignee must account to the court and pay over all monies and deal with all securities in such manner as the court may, subject to the IRD Act, direct.

6.2.15 Process for the proof of claims by creditors

Subject to certain exceptions, the following debts are provable in bankruptcy:

(a) any debt or liability to which the bankrupt:

(i) is subject at the date of the bankruptcy order; or

(ii) may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy order;[58]

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[56] *Idem*, s 324.
[57] *Idem*, s 23(1).
[58] *Idem*, s 345(1)(a).

(b) any interest on such debt or liability which is payable by the bankrupt in respect of any period before the commencement of his bankruptcy;[59] and

(c) an amount payable under any order made by a court under any written law relating to the confiscation of the proceeds of crime.[60]

The Official Assignee must, not later than 30 days after the administration date for a bankruptcy, notify all creditors who are either named in the statement of affairs or who may have a claim against the debtor of the bankruptcy order and the time within which creditors are required under to file their proof of debt.[61] A creditor cannot prove a debt in bankruptcy unless the creditor files a proof in respect of the debt not later than four months after the administration date of the bankruptcy.[62]

Creditors file a Proof of Debt (Form 23) to the Official Assignee. This can now be done online.

6.2.16 General rule for the treatment of executory contracts upon insolvency

Where a contract has been made with a person who has subsequently been declared bankrupt, the court may, on the application of any other party to the contract, make an order discharging obligations under the contract on such terms as to payment by the applicant or the bankrupt of damages for non-performance or otherwise as appear to the court to be equitable.[63]

Any damages payable by the bankrupt by virtue of an order of the court, will be considered a debt provable in bankruptcy.[64]

Where an undischarged bankrupt is a contractor in respect of any contract jointly with any person, that person may sue or be sued in respect of the contract without the joinder of the bankrupt.[65]

6.2.17 Netting and set-off in financial contracts

Where there have been any mutual credits, mutual debts or other mutual dealings between a bankrupt and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings will be set-off against each other such that only the balance may be provided by the relevant creditor in bankruptcy.[66] More expansive forms of contractual set-off and netting are not permitted upon bankruptcy. Only insolvency set-off as described in this paragraph is permitted.

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[59] *Idem*, s 345(1)(b).
[60] *Idem*, s 345(9).
[61] *Idem*, s 347(1).
[62] *Idem*, s 347(2).
[63] *Idem*, s 355(2)
[64] *Idem*, s 355(3).
[65] *Idem*, s 355(4).
[66] *Idem*, s 346(1).

The following debts are however are excluded from being setoff:

(a) any debt or liability of the bankrupt which is not a debt provable in bankruptcy; or

(b) any debt or liability of the bankrupt which arises by reason of an obligation incurred at a time when the creditor had notice that a bankruptcy application relating to the bankrupt was pending.[67]

6.2.18 Impeachable transactions

6.2.18.1 Undervalue transactions

Where an individual is adjudged bankrupt and has within the relevant period entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court to restore the position to what it would have been if the individual had not entered into the transaction.[68]

The transaction will constitute a transaction at an undervalue if:

(a) the bankrupt makes a gift or otherwise enters into a transaction for no consideration;

(b) the bankrupt enters into a transaction where the consideration is marriage; or

(c) the bankrupt enters into a transaction for consideration which is significantly less, in money's worth, of the consideration originally provided by the bankrupt.[69]

The relevant period for transactions at an undervalue is three years before either the date the bankruptcy application was made or the date upon which the bankruptcy order was made. In either case the three-year period ends on the day of the making of the bankruptcy order.

6.2.18.2 Unfair preferences

Where the individual is adjudged bankrupt and has within the relevant period given an unfair preference to any person, the Official Assignee may apply to the court to restore the position to what it would have been if the bankrupt had not given the unfair preference.[70]

It will be an unfair preference if:

(a) the other person is one of the bankrupt's creditors or a surety or guarantor;

(b) the bankrupt has anything which has the effect of putting the person into a better position than they would otherwise have been upon the bankrupt's bankruptcy; and

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[67] *Idem*, s 346(2).
[68] *Idem*, s 361.
[69] *Ibid*.
[70] *Idem*, s 362.

(c) in giving the preference the bankrupt must be influenced by a desire to prefer the other party such they would be in a better position on bankruptcy.[71]

A bankrupt who has given an unfair treatment to an associate should be presumed, unless the contrary is shown, to have been influenced by the desire to prefer.

The relevant period for an unfair preference, which is not a transaction at an undervalue and which is given to an associate, is two years before either the date of the application was made or the date the bankruptcy order was made, in either case ending on the day the bankruptcy order was made.

In the case of an unfair preference which is not a transaction at an undervalue, the relevant period is one year before either the date of making the bankruptcy application or the date the bankruptcy was made.

6.2.18.3 Associate

For the above purposes a person is an associate if:

(a) they are a spouse, relative, or the spouse of a relative or his spouse;

(b) a person with whom the bankrupt is in partnership, or the spouse or a relative of an individual with whom he is in partnership;

(c) a person whom the bankrupt employs or by whom he is employed, including companies and the directors and officers of those companies;

(d) a person who is a trustee of a trust if the bankrupt or an associate is a beneficiary of the trust;

(e) a company if the bankrupt or associates have control over the company.[72]

6.2.18.4 Extortionate credit transactions

Where an individual is adjudged bankrupt and has been a party to a transaction for, or involving the provision of, credit to him, the Official Assignee may seek an order setting aside or seeking other relief in regard to such credit transaction.[73] A transaction shall be extortionate if, having regard to the risk accepted by the credit provider:

(a) the terms required grossly exorbitant payments to be made; or

(b) it is harsh and unconscionable or substantially unfair.[74]

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71 *Ibid*.
72 *Idem*, s 364.
73 *Idem*, s 366.
74 *Ibid*.

6.2.18.5 Defences

Where an individual has acquired an interest in the bankrupt's property from a person other than the bankrupt, or has received a benefit or their preference from the transaction, if this was done in good faith and for value, the transaction will stand.[75] Such a transaction or benefit will not be in good faith if the individual had notice of the surrounding circumstances and the relevant proceedings, or was an associate of the bankrupt, or was connected with the individual with whom has entered into the transaction.[76]

6.2.19 Exempt property

The following property is deemed not to be divisible amongst creditors:

(a) property held by the bankrupt on trust for any other person;

(b) such tools, books, vehicles and other items of equipment as are needed by the bankrupt for the bankrupt's personal use in the bankrupt's employment, business or vocation;

(c) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family;

(d) property of the bankrupt which is excluded under any other written law;

(e) the remainder of the bankrupt's monthly income after deducting the bankrupt's monthly contribution; and

(f) any annual bonus or annual wage supplement paid as part of the bankrupt's income.[77]

Examples of property which are excluded under other written laws and are thus excluded from the bankruptcy's estate, include the following:

(a) a flat or house governed by the Housing and Development Act;[78]

(b) monies in the Central Provident Fund;[79] and

(c) insurance policies protected under the Conveyancing and Law of Property Act.[80]

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75 *Ibid*.
76 *Idem*, s 365(3A).
77 *Idem*, s 329(2).
78 Housing and Development Act (Cap 129), s 51.
79 Central Provident Fund Act (Cap 36), s 24.
80 Conveyancing and Law of Property Act (Cap 61), s 73.

6.2.20 Statutory preferential / priority claims that apply in bankruptcy

Subject to the IRD Act, in the distribution of the property of a bankrupt, the following must be paid in priority to all other debts:[81]

(a) the cost and expenses of administration or otherwise incurred by the Official Assignee;

(b) the costs of the applicant for the bankruptcy order (whether taxed or agreed) and the costs and expenses properly incurred by a nominee in respect of the administration of any Voluntary Arrangement;

(c) all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating the conditions of employment of any employee;

(d) the amount due to an employee as a retrenchment benefit or an *ex gratia* payment under any contract of employment or award or agreement that regulates the conditions of employment, whether such amount becomes payable before, on or after the date of the bankruptcy order;

(e) all amounts due in respect of any work injury compensation under the Work Injury Compensation Act (Cap 354) accrued before, on or after the date of the bankruptcy order;

(f) all amounts due in respect of contributions payable during the 12 months immediately before, on or after the date of the bankruptcy order by the bankrupt as the employer of any person under any written law relating to employees' superannuation or provident funds or under any scheme of superannuation which is an approved scheme under the Income Tax Act;

(g) all remuneration payable to any employee in respect of vacation leave or, in the case of his death, to any other person in his right, accrued in respect of any period before, on or after the date of the bankruptcy order;

(h) the amount of all taxes assessed and any goods and services tax due under any written law on or before the date of the bankruptcy order or assessed at any time before the time fixed for the proving of debts has expired; and

(i) all premiums (including interest and penalties for late payment) and other sums payable in respect of the bankrupt's insurance cover under the MediShield Life Scheme referred to in section 3 of the MediShield Life Scheme Act 2015 before the time fixed for the proving of debts has expired.

[81] IRD Act, s 90.

6.2.21 Annulment and discharge

6.2.21.1 Annulment

The court may annul a bankruptcy if:

(a) the order ought not to have been made on grounds existing at the time;

(b) debts and expenses of the bankruptcy have been paid or secured to the satisfaction of the court;
(c) distribution of the estate will take place in Malaysia or the majority of creditors are residents in Malaysia and the distribution ought to happen there.[82]

An application to annul must be made within 12 months of the bankruptcy order being made, unless leave is given for the application to be made later.[83]

6.2.21.2 Discharge by court

The Official Assignee, the bankrupt or any other person having an interest may apply to the court for an order of discharge any time after the bankruptcy order is made.[84]

Any application must be served on each creditor who has filed a proof of debt in the bankruptcy and the court will hear any creditor before making an order for discharge.[85] Upon application the court may:

(a) refuse to discharge;

(b) make an order discharging the bankruptcy absolutely; or

(c) make an order discharging on conditions as it thinks fit, including conditions with respect to future income or property.[86]

6.2.21.3 Discharge by the Official Assignee

The Official Assignee may, in his discretion, issue a certificate of discharge but is prohibited from doing so in certain prescribed circumstances.[87]

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82 *Idem*, s 392.
83 *Ibid*.
84 *Idem*, s 394.
85 *Ibid*.
86 *Ibid*.
87 *Idem*, s 395.

Self-Assessment Exercise 3

Describe how the alternatives to bankruptcy work.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6.3 Corporate liquidation

6.3.1 Who qualifies as a "debtor"?

In Singapore, the main legislation applicable to liquidation of and winding-up of companies as well as reorganisations (schemes of arrangements and judicial management) is the IRD Act, read with its related subsidiary legislation.

The insolvency of limited liability partnerships,[88] real estate investment trusts[89] and banks[90] are dealt with under their respective legislation and its related subsidiary legislation.

6.3.2 The formal system for entering liquidation

The objective of liquidation in Singapore is to ensure a fair and orderly distribution of the company's assets among creditors and contributories and to terminate the existence of the company by its eventual dissolution. The winding-up or liquidation of a company may be either voluntary or ordered by the court.[91] The three modes of winding-up are:

(a) members' voluntary liquidation (MVL);

(b) creditors' voluntary liquidation (CVL); or

(c) compulsory liquidation (CL).

6.3.2.1 Voluntary winding-up[92]

A voluntary winding-up is conducted outside of a court process. Usually, a voluntary winding-up is effected by the passing of a special resolution[93] by the members, or both members and creditors, of the company (depending upon the solvency of the company). This is elaborated on below. The winding-up commences at the time of passing the special resolution.

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88 Limited Liability Partnerships Act, Chap 163A.
89 0Business Trusts Act, Chap 31A.
90 Banking Act, Chap 19.
91 IRD Act, Pt 8, Div 1, s 119.
92 *Idem*, Pt 8, Div 3.
93 Companies Act, s 290(1) provides for a special resolution passed by the company (more than 75% of members present and voting).

Members' voluntary liquidation. An MVL is only available if a company is solvent. In addition to a members' resolution for winding-up, if the directors are of the opinion that the company is solvent, directors must provide a declaration of solvency in accordance with section 163 of the IRD Act, stating that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding-up. If these conditions are satisfied, the winding-up will proceed as a members' voluntary winding-up.

Creditors' voluntary liquidation. Where a company is unable to pay its debts and directors are unable to provide the declaration of solvency accordingly, the company may be voluntarily wound up by way of a creditors' voluntary winding-up. In addition to the requirement of a members' resolution to wind up the company, the company must also convene a meeting of its creditors to consider and approve the proposal for a voluntary winding-up. The company will appoint a liquidator of its nomination but if creditors wish to replace that liquidator, the creditors' nomination will prevail.

6.3.2.2 Compulsory winding-up[94]

A compulsory winding-up or liquidation is initiated by making an application to the court to wind up the company on specific grounds, including that the company is unable to pay its debts. If an inability to pay debts is shown, or other grounds are established, the court will usually:

(a) make a winding-up order; and

(b) appoint a liquidator as nominated by the petitioning creditor.

The following parties can file an application to wind up a company compulsorily:

(a) the company itself;

(b) a creditor of the company;

(c) a shareholder of the company;

(d) a liquidator;

(e) a judicial manager; or

(f) various Ministers on grounds specified under the law.

6.3.3 Obligation to file for liquidation

There are no prescribed circumstances for which a company must file for liquidation. However, where directors do not have a genuine belief of a company's ability to pay its debts as they fall due, for so long as the company keeps trading, the directors risk potential personal liability

[94] IRD Act, Pt 8, Div 2.

under insolvency laws and the law relating to directors' duties. This risk is usually the trigger for a company to initiate liquidation or other proceedings, if a creditor has not already done so.

6.3.4 Threshold for entering a liquidation procedure and grounds of liquidation

The most common ground to wind up a company on the grounds of insolvency is that the company is "unable to pay its debts". Under section 125(2) of the IRD Act, a company is deemed to be unable to pay its debts if:

(a) a creditor to whom the company is indebted in a sum exceeding SGD 15,000 then due has served on the company a demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum to, or to secure or compound to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the court must take into account the contingent and prospective liabilities of the company.

Where a company is deemed "unable to pay its debts", the creditor is *prima facie* entitled to a winding-up order. In *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd*,[95] the Singapore Court of Appeal clarified that the cash flow test should be the sole and determinative test under section 125(2)(c) of the IRD Act. The court also set out a non-exhaustive list of factors which should be considered under the cash flow test:

(a) the quantum of all debts which are due or will be due in the reasonably near future;

(b) whether payment is being demanded or is likely to be demanded for those debts;

(c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;

(d) the length of time that has passed since the commencement of the winding-up proceedings;

(e) the value of the company's current assets and assets that will be realisable in the reasonably near future;

(f) the state of the company's business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;

[95] [2021] SGCA 60.

(g) any other income or payment which the company may receive in the reasonably near future; and

(h) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

6.3.5 Conversion from liquidation to corporate rescue

There is no specific procedure to convert a liquidation to any form of corporate rescue. While it is possible for a liquidator to apply to the court to convene meetings to consider a scheme of arrangement (which is not in itself a corporate rescue mechanism but often used to implement restructuring plans or distribution of proceeds), the scheme will generally be for distribution and related purposes.

The winding-up proceedings can however be stayed or terminated by the court on the application of the liquidator, or of any creditor or contributory.[96]

6.3.6 Moratorium (stay)

In a voluntary creditors' winding-up (that is, CVL), the moratorium is imposed from the commencement of winding-up.

For a court-ordered winding-up (that is, compulsory liquidation), during the period until a winding-up order is made, the company or any creditor or contributory can apply to court to restrain proceedings. Once a winding-up order is made, a moratorium is imposed and any action against the company requires the leave of the court.

6.3.7 Alternatives to formal liquidation

Alternatives to formal liquidation include proceedings for:

(a) schemes of arrangement; or

(b) judicial management.

These are discussed under the heading "Corporate rescue" below.

6.3.8 Appointment of officeholders

When filing the winding-up application, the petitioning creditor may nominate a person to be appointed as the liquidator in the event that the court grants the winding-up order. Before the hearing of the winding-up application, the petitioning creditor must obtain and file the written

[96] IRD Act, s 186.

consent of the nominated liquidator. If no liquidator is nominated, the Official Receiver is the default liquidator.

The winding-up application must be served on the company, the Official Receiver and the nominated liquidator (if any). In addition, the plaintiff or applicant needs to pay a deposit of SGD 10,400 to the Official Receiver.

An advertisement of the winding-up application is required to be placed in an English and a Chinese local daily newspaper, as well as in the Government Gazette.

6.3.9 The role of the officeholder in liquidation proceedings

Amongst other things, the role of the liquidator includes the following:

(a) to investigate the affairs and assets of the company, the conduct of its officers and the claims of creditors and third parties;

(b) to recover and realise the company's assets in the most advantageous manner to the company; and

(c) to adjudicate the claims of the creditors and ensure an equitable distribution of the company's assets in accordance with the provisions of the IRD Act.

6.3.10 Powers of the liquidator in a compulsory winding-up

In terms of section 144 of the IRD Act, the liquidator may with the authority either of the court or of the committee of inspection –

(a) carry on the business of the company so far as is necessary for the beneficial winding-up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding-up order;

(b) pay any class of creditors in full subject to section 203 which sets out the preferential claims and their respective priorities;

(c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims present or future, certain or contingent, ascertained or sounding only in damages subsisting, or supposed to subsist, between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding-up of the company, on such terms as are

agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

(e) appoint a solicitor to assist him in his duties.

The liquidator may –

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) compromise any debt due to the company, other than calls and liabilities to calls and other than a debt where the amount claimed by the company to be due to it exceeds SGD 1,500;

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal, if any;

(e) prove, rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt, and rateably with the other separate creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) raise on the security of the assets of the company any money required;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purposes of enabling the liquidator to take out the letters of administration or recover the money, be deemed due to the liquidator himself;

(i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding-up the affairs of the company and distributing its assets.

The exercise by the liquidator of the powers conferred by this section are subject to the control of the court and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

6.3.11 Proof of claims by creditors

Creditors may file their Proofs of Debt with the liquidator once the company is in liquidation. The Proof of Debt form is available on the Ministry of Law's website.

Where the Official Receiver has been appointed as the liquidator of the wound-up company, it will inform creditors when there are sufficient funds to declare a dividend. A "Notice to file Proof of Debt" will be sent to all creditors who have not filed their claims against the company but were disclosed in the Statement of Affairs.

6.3.12 Treatment of executory contracts

An executory contract is traditionally defined as a contract in which obligations remain to be performed on both sides. The essential point of an executory contract is that each party's right to future performance is linked to and dependent upon that party's own willingness and ability to perform.

The legal regime in Singapore does not contain any specific statutory provisions as regards executory contract provisions.

If a liquidator wishes to secure performance by the other party of obligations to be performed in the future, he must procure the company to carry out its own future obligations. However, unless the other party has acquired proprietary rights under the contract, the liquidator is not obliged to procure performance by the company. The liquidator can either disclaim the contract if it is unprofitable or simply decline to procure its performance by the company, in which case the other party can exercise any right he may have to terminate the contract for non-performance. In either case, the contract comes to an end and the solvent party is left to prove for damages for the loss resulting from the company's breach of contract and for any debt accrued due from the company up to the time of termination or rescission.

If the contract continues in force, the winding-up does not produce an acceleration of liability in the case of executory contracts. Where the liquidator accepts the benefit of continued performance by the solvent party, the liability of the company in respect of that performance is an expense of the liquidation.

6.3.13 Treatment of specific contracts

In the insolvency context, an *ipso facto* clause is a contractual provision that allows one party to terminate or modify the operation of the contract (or provides for this to occur automatically) by reference to the counterparty's insolvency. The exercise of contractual termination clauses can make it difficult for companies to be restructured or rescued within a formal insolvency regime. Accordingly, some insolvency regimes seek to restrict the operation of *ipso facto* clauses.

Previously under Singapore law, there were no restrictions on the exercise of *ipso facto* clauses upon the formal insolvency of a Singapore company. The IRD Act introduced a new provision

restricting the operation of *ipso facto* clauses in certain circumstances. The Singapore provision is based on the corresponding provisions in Canadian insolvency legislation.

In Singapore, section 440 of the IRD Act restricts the enforcement of *ipso facto* clauses once any proceedings relating to any applications under judicial management or a scheme of arrangement process are commenced by a company.

However, a list of contracts is expressly excluded from the restrictions. These include: (i) any prescribed eligible financial contract, (ii) any contract that is a license, permit or approval issued by the government or a statutory body, (iii) any commercial charter of a ship; and (iv) any agreement that is the subject of a prescribed treaty to which Singapore is a party.

Although contracts will remain on foot, counterparties are not required to continue to advance new money or credit to an insolvent company.

Finally, section 440(4) provides Singapore courts with an overriding power to rule on the applicability of the restrictions and their extent if the applicant can demonstrate that it will suffer "significant financial hardship" as a result.

See "Insolvency law reforms" below for further details.

6.3.14 Rules for the regulation of netting and set-off in financial contracts

In Singapore, in an insolvent winding-up or judicial management, debts or dealings may be set off against each other where there have been mutual credits, debts or other dealings between the company and any creditor.[97] This is commonly referred to as insolvency set-off. Set-off is not possible in respect of any debt that is not provable, or which arises by reason of an obligation incurred at a time when the creditor had notice that a winding-up application was pending. Insolvency set-off overrides all other forms of set-off, including contractual set-off and contractual netting provisions.

6.3.15 Impeachable transactions[98]

Upon the liquidation of a company or where a company is in judicial management, a liquidator or judicial manager can apply to the court to seek to claw back assets previously transferred in transactions where:

(a) an unfair preference was given; or

(b) the transaction was conducted at an undervalue.

For an unfair preference transaction, the liquidator or judicial manager must show four elements:

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97 *Idem*, s 219.
98 *Idem*, ss 224 to 229.

(a) the preferred party (the beneficiary of the transaction) is a creditor or guarantor for any of the company's debts or liabilities;

(b) the company was insolvent (or became insolvent as a consequence of the transaction) at the time of giving the preference;

(c) the company has done anything which puts the preferred party in a better position than the preferred party would otherwise have been had the transaction not been entered in the event of the company's liquidation or judicial management; and

(d) the company was influenced in deciding to enter the transaction by a desire to prefer the preferred party, noting that the company is presumed to have been influenced by a desire to prefer if the preferred party is an associate of the company.

The relevant time period during which assets may be clawed back for an unfair preference is two years from the date of the winding-up application or the date of the judicial management application where the preferred party is an associate and one year for unrelated parties[99].

For a transaction at an undervalue, the liquidator must show two elements:

(a) the company makes a gift to the recipient or the company enters into a transaction where the value of consideration received is significantly less than the value of the consideration provided; and

(b) the company was or became insolvent as a result of that transaction.

The company is presumed to have undertaken a transaction at an undervalue if the preferred party is an associate of the company. The relevant time period during which assets may be clawed back is three years from the date of the winding-up application or the judicial management application, regardless of whether the undervalue transaction was with an associate or not[100].

It should be remembered that clawback provisions are only available to a liquidator or judicial manager once the company is placed into liquidation or judicial management. Accordingly, directors should be alive to the fact that creditors might seek to place the company into liquidation or judicial management to have the liquidator or judicial manager avail themselves of such actions.

6.3.16 Liability of directors

When a company has become insolvent (and is under judicial management or in liquidation), a director may be liable:

[99] *Idem*, ss 217 and 226.
[100] *Idem*, s 226

(a) if he or she is knowingly a party to the contracting of a debt when, at the time the debt was contracted, he or she had no reasonable or probable ground of expectation of the company being able to pay the debt. A director can be prosecuted for this offence; and

(b) fraudulent trading, if it is proved that any business of the company had been carried on with intent to defraud creditors of the company, or there has been a prosecution under section 237(1)[101] of the IRD Act, a director can be personally liable.

6.3.17 Preferential / priority claims

In distributing the assets of a company on liquidation, its secured creditors will generally first be paid out of the assets that have been charged or mortgaged in their favour, while the remainder of the assets will be distributed among the other creditors.

The order of priority in insolvency proceedings of a Singapore company is as follows:[102]

(a) cost and expenses of the winding-up incurred by the liquidator of the company;

(b) wages and salary and certain other employee benefits (up to a maximum amount of five months' salary or SGD 12,500, whichever is the lesser);

(c) certain retirement and termination benefits provided under contracts of employment, collective agreements or awards made by the Industrial Arbitration Court (up to a maximum amount of five months' salary or SGD 12,500, whichever is the lesser);

(d) workers' injury compensation;

(e) contributions to provident funds;

(f) remuneration for vacation leave;

(g) taxes (including claims that are deemed to rank equally with taxes); and

(h) unsecured creditors.

The debts above are usually referred to as "preferred debts" as they rank ahead of unsecured debts.

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[101] *Idem*, s 237(1) states the following:
"If, on an investigation under this Act or where a company is in judicial management or is being wound up, it is shown that proper books of account were not kept by the company throughout the shorter of –
(a) the period of 2 years immediately preceding the commencement of the investigation, judicial management or winding-up, as the case may be; or
(b) the period between incorporation of the company and the commencement of the investigation, judicial management or winding-up, as the case may be,
every officer who is in default 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 12 months."

[102] *Idem*, s 203.

Although secured creditors will generally be paid ahead of the preferred debts, the preferred debts referred to in a), b), c), e) and f) above will be paid ahead of the debts secured by a floating charge. Debts secured by a fixed charge are paid ahead of unsecured debts.

6.3.18 Provisions dealing with groups of companies in a domestic context

Singapore law does not recognise the concept of insolvency proceedings for a family or group of companies. Each company is treated as a separate legal entity and separate insolvency proceedings must be filed for each company. With very limited exceptions, the creditors of a company can only claim against that particular company in its insolvency proceedings. It is extremely rare for the Singapore courts to lift the corporate veil and it has never before been done in the context of a restructuring.

However, the law does permit each separate application to be heard in court together before the same insolvency judge. In this way, the related proceedings for each company in the family can be dealt with by the same judge.

There is no requirement for members of a corporate family to proceed under the same type of insolvency or other proceeding. Each corporate entity is legally entitled to decide what is in its best interest and can proceed to file its own insolvency or other proceedings without regard for other corporate entities within the same group. In the same way, creditors of each separate legal entity within a group of companies can decide to file different insolvency or other processes for each entity.

6.3.19 Dissolution

6.3.19.1 Accounting by the liquidator

As soon as the affairs of the company are fully wound up, the liquidator must:

(a) prepare an account setting out how the winding-up has been conducted and the manner in which the property of the company has been disposed of; and

(b) call a general meeting of the shareholders of the company for the purposes of presenting the account referred to in a) above. The meeting must be called by publishing an advertisement in at least four local daily newspapers. Such advertisement must be published at least one month before the proposed meeting date and specify the time, place and object of the meeting.

6.3.19.2 Final meeting of the shareholders of the company

The quorum for the final meeting is two shareholders. If a quorum is not present at the meeting, the liquidator must lodge a return with the Registrar and the Official Receiver stating that the meeting was duly summoned but that no quorum was present at this meeting.

Within seven days of the meeting, the liquidator must lodge with the Registrar and the Official Receiver, a return stating that the meeting had been held and attach a copy of the Account.

6.3.19.3 Dissolution of the company

In a voluntary winding-up, the company will be deemed to have been dissolved upon the expiration of three months after lodging of the above-mentioned return.

In a court winding-up, the liquidator will have to apply for a release and an order that the company be dissolved.

6.3.20 Simplified procedures for small or assetless estates

Previously, there was no summary procedure under the statutory framework that catered to cases where companies had insufficient assets to pay for the administration of their own winding-up.

Sections 209 to 211 of the IRD Act introduced a new procedure for the early dissolution of a company in liquidation. The impetus for introducing these new provisions was to streamline the use of public resources and funds in administering cases where there are insufficient assets to fund even the administration of the liquidation. There are a sizeable number of such cases that fit this description – as of 31 August 2018, there were more than 100 companies undergoing winding-up by the Official Receiver with estimated realisable assets of less than SGD 1,000 in each case.

See the heading "Insolvency law reforms" below for further details.

Self-Assessment Exercise 4

Question 1

Who can make an application for a compulsory winding-up and in what circumstances can the court grant the order?

Question 2

Outline the procedure for making an application for a compulsory winding-up.

Question 3

What is the difference between a creditors' voluntary liquidation and a members' voluntary liquidation?

Question 4

You are the appointed liquidator of XYZ Co Limited, which has just entered into compulsory liquidation. You determine that the company has realisable assets of SGD 100,000, with the following debts:
- Liquidator's fees: SGD 25,000
- Lawyers and accountants' fees: SGD 20,000
- Unpaid employee wages: SGD 25,000
- Trade creditors: SGD 40,000
- Unpaid rent: SGD 10,000

Explain how the respective creditors rank and how much each category of creditors will receive from the available funds.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Receivership

6.4.1 Appointment of a receiver

A receiver may be appointed pursuant to a contractual right under a debt instrument. This can be done without applying to the court and is generally the fastest way for a secured creditor to realise under their security if the security documents allow and provide for the appointment of a receiver.

Alternatively, a receiver may, upon application by a creditor, be appointed by the court. While not common, this is generally done to:

(a) protect the enabled persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realisation, where ordinary legal remedies may not be available or effective; or

(b) preserve the property from some type of threat or jeopardy. This includes where such an appointment is required to protect the property pending the outcome of ligation in relation to the property.

The court may also appoint a liquidator as a receiver on behalf of the debenture holders or other creditors of a company which is being wound up by the court.[103]

Although the courts have a wider power to appoint a receiver than creditors do pursuant to a contractual right, such appointments are not as common.

[103] *Idem*, Pt 6, s 74.

6.4.2 Selection of the receiver or manager

Parties are free to choose who they wish to appoint as a receiver, however to be eligible to take such appointments, the candidate must be an approved liquidator in Singapore.

The following are not qualified to be appointed nor act as receiver of the property of a company:

(a) a corporation;

(b) an undischarged bankrupt;

(c) mortgagee of any property of the company; an auditor of the company or a director, secretary or employee of the company or of any corporation which is a mortgagee of the property of the company; or

(d) any person who is neither an approved liquidator nor the Official Receiver.[104]

There is also a common law duty for the security holder not to appoint a person who is not competent, or has any potential or existing conflicts of interest.

6.4.3 Powers and obligations

The powers and obligations of a receiver are entirely dependent on the scope of his appointment pursuant to the relevant contract, or the court order (as the case may be).

6.4.4 Receivers' duties

6.4.4.1 Statutory Duties

The Receiver has the following duties under the IRD Act:

(a) to lodge notice of appointment;[105]

(b) to lodge statement of affairs;[106]

(c) to lodge periodic accounts of receipts and payments;[107]

(d) to account to the company;

(e) to furnish information for audit of accounts;[108] and

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[104] *Idem*, s 79.
[105] *Idem*, s 81.
[106] *Idem*, s 83(1).
[107] *Idem*, s 85(1).
[108] *Idem*, s 85(2).

(f) to pay preferential debts.[109]

6.4.4.2 Other duties – common law and equity

The receiver owes a primary duty to the security holder who has appointed him for the purpose of realising the security. However, the receiver will also owe a duty (albeit a lessor or secondary duty) to the company to act reasonably and professionally, in particular in relation to the sale of the assets over which he is appointed (being property owned by the company). In this regard, a receiver owes only a duty in equity to obtain the best price reasonably obtainable when selling the charged assets.

6.4.4.3 Liability of receiver

A receiver who has entered into possession of any assets of a company for the purpose of enforcing any charge, is liable for debts incurred by him in the course of the receivership or possession for services rendered, goods purchased or property hired, leased, used or occupied.[110] This does not, however, prejudice any claim the receiver may have against the company.

If the receiver sells the charged assets for less than market value assessed in the relevant circumstances, the receiver may face liability for breach of duty to the company by reason of loss caused by sale at an undervalue. This is a practical driver in all receiver sale processes.

6.4.4.4 Statutory liability of receiver and manager as "officer"

Receivers and managers come within the statutory definition of an officer of the corporation[111] and as such must comply with all the relevant statutory duties under the Companies Act and the IRD Act.

6.5 Corporate rescue

6.5.1 Informal creditor workouts

In Singapore, companies can seek to enter into an informal arrangement with its creditors without the assistance of the court. To assist in this regard, the Association of Banks released the "*Principles and Guidelines for Restructuring of Corporate Debt – the Singapore Approach*". However, the court assisted rehabilitative procedures set out below are more commonly used.

6.5.2 Rehabilitative procedures

The key rehabilitative procedures in Singapore are schemes of arrangement and judicial management.

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[109] *Idem*, s 86(1).
[110] *Idem*, s 75.
[111] Companies Act, s 4(1).

6.5.2.1 Schemes of arrangement – moratorium for insolvent debtor companies

Section 64 of the IRD Act, as first introduced by section 211 of the Companies (Amendment) Act 2017, introduces a debtor-in-possession restructuring regime which has the following key features:

(a) an automatic moratorium for 30 days upon the filing of an application with the court. The moratorium can be further extended by order of the court;

(b) the availability of US-style debtor-in-possession finance (DIP) or rescue financing;

(c) the availability of a cross-class cramdown in schemes of arrangement;

(d) the availability of pre-packaged schemes of arrangement; and

(e) moratoria having extra territorial effect.

6.5.2.2 Judicial management

Unlike the scheme of arrangement, this is a process where an insolvency practitioner takes over control of the debtor company. Upon the application of a company or its creditors the court may appoint a judicial manager where it is shown that the company is or is likely to become unable to pay its debts and one or more of the purposes outlined in the IRD Act will be achieved by the appointment (such as the survival of the company or whole or part of its business as a going concern or a more advantageous realisation of the company's assets than through a winding-up order).

If the court grants an order for judicial management, then the judicial manager, an independent insolvency practitioner, will take control of the business and property of the company for a period of 180 days, subject to any further extensions granted by the court.

6.5.3 Debtors to whom the corporate rescue provisions apply

Only a company eligible to be wound up under the IRD Act may be placed into judicial management.[112] This includes foreign debtors, provided the foreign debtor has a "substantial connection" with Singapore.[113] This can be established by the demonstration of one or more of the following factors:

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

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

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

[112] IRD Act, Pt 7, s 88.
[113] *Idem*, Pt 10, s 246.

(d) the debtor has substantial assets in Singapore;

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

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

6.5.4 System for entering corporate rescue

6.5.4.1 Entry into moratorium protection in relation to a scheme of arrangement

Section 64 of the IRD Act, as first introduced by Section 211B of the Companies (Amendment) Act 2017, provides that upon filing an application in accordance with section 64, there will be an automatic moratorium period for 30 days after the date on which the application is made.

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

(a) no order has been made and no resolution passed for the winding-up of the company;

(b) the company makes or undertakes to do so as soon as practicable an application to sanction a scheme of arrangement;

(c) the company has not applied for protection under section 210(10) of the Companies Act (a provision that also provides for moratorium protection).

When making an application, the company must publish a notice in the Government Gazette and in at least one English local daily newspaper and send notice to the creditors. The application must also include:

(a) evidence of support from the company's creditors;

(b) where no scheme has been proposed, a brief description of the intended compromise or arrangement containing sufficient details to enable the court to determine if it is feasible and merits consideration by creditors; and

(c) a list of every secured creditor and the largest unsecured creditors.

When making an order, the court can continue the moratorium for such period as the court thinks fit. The court must also order the company to submit to the court sufficient information relating to the company's financial affairs to enable creditors to assess the feasibility of the compromise or arrangement, including the valuation of significant assets, details of any disposal of property, financial reports and profitability documents.

6.5.4.2 Entry into judicial management

A judicial management application may be brought by:

(a) the company (pursuant to a members' resolution);

(b) its directors (pursuant to a board resolution); or

(c) its creditors (including contingent and prospective creditors), either together or separately.[114]

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

(a) the company is or will be unable to pay its debts; and

(b) there is a reasonable probability of rehabilitating the company, or of preserving all or part of its business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding-up.[115]

A company can also enter into judicial management by resolution of its creditors.[116]

6.5.5 Mechanisms for conversion from corporate rescue to liquidation

6.5.5.1 Scheme of arrangement

There is no specific conversion mechanism. If the moratorium granted under section 64 of the IRD Act comes to an end, either by creditor application or otherwise, with no scheme sanctioned, creditors or the company would then be at liberty to apply for winding-up or any other process, including judicial management.

6.5.5.2 Judicial management

A judicial management order will be discharged after 180 days unless extended by the court.[117] There is no limit to the number of extensions that may be granted by the court. A judicial management order may also be discharged if:

(a) the creditors decline to approve the judicial manager's proposals;[118]

(b) the judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved;[119] or

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[114] *Idem*, Pt 7, s 91.
[115] *Idem*, s 90.
[116] *Idem*, s 94.
[117] *Idem*, s 111.
[118] *Idem*, s 8(4).
[119] *Idem*, s 112.

(c) the judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.[120]

A discharge does not mean automatic liquidation, but the court has a discretion to order that the company be placed into liquidation.

6.5.6 Threshold for entering corporate rescue

6.5.6.1 Scheme of arrangement moratorium proceedings

See paragraph 6.5.4.1 above.

6.5.6.2 Judicial management

A court may only make a judicial management order if the court:

(a) is satisfied that the company is or will be unable to pay its debts;

(b) considers that the making of the order would be likely to achieve one or more of the following purposes, namely:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

(ii) the approval under section 210 of the Companies Act of a compromise or arrangement between the company and any such persons as are mentioned in that section; or

(iii) the more advantageous realisation of the company´s assets than would occur in a winding-up.[121]

The court will consider whether there is a "real prospect that the appointment of the judicial managers will achieve one or more of the purposes stated in [section 91 of the IRD Act]".[122]

The court will not make a judicial management order:

(a) after the company has already gone into liquidation;

(b) where the company is:

(i) a bank licensed under the Banking Act (Cap 19);

(ii) a finance company licensed under the Finance Companies Act (Cap 108);

(iii) an insurance company licensed under the Insurance Act (Cap 142); or

[120] *Idem*, s 115.
[121] *Idem*, s 9(1).
[122] *Deutsche Bank AG v Asia Pulp & Paper Co Ltd* [2003] 2 SLR 320.

(iv) where the company belongs to such class of companies as the Minister may by order in the Government Gazette prescribe.[123]

6.5.7 Obligation to file for corporate rescue in specified circumstances

There is no requirement for any party to file for corporate recue in any specified circumstances.

6.5.8 Moratoria

6.5.8.1 Scheme of arrangement

An automatic 30-day moratorium arises upon the filing of an application for a moratorium under section 64 of the IRD Act with the court where the debtor proposes or intends to propose a scheme of arrangement with its creditors.[124] The court may extend the moratorium upon the application of the debtor.[125]

6.5.8.1 Judicial management

An automatic moratorium on legal proceedings against the company comes into effect upon the filing of the judicial management application.[126] If a judicial management order is made, a more extensive moratorium will come into effect for the period of the judicial management.[127] The court, or the judicial manager, has a discretion to allow otherwise prohibited proceedings or enforcement actions to be commenced or continued.[128]

6.5.9 Process of appointing officeholders

6.5.9.1 Scheme of arrangement

While this is a debtor-in-possession type regime, it envisages the debtor company appointing a proposed scheme manager to facilitate the restructuring process. A scheme manager need not be a licensed insolvency practitioner.

6.5.9.2 Judicial management

Upon the making of a judicial management order, the court will appoint a judicial manager. An interim judicial manager can be appointed by the court, on application of the company or any of its creditors. This is generally done for one of the following reasons:

(a) the assets or business of the company are at risk of being dissipated or deteriorating;

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[123] IRD Act, Pt 7, s 91(8).
[124] *Idem*, Pt 5, s 64(1).
[125] *Idem*, s 64(7).
[126] *Idem*, Pt 7, s 95.
[127] *Idem*, s 96(4).
[128] *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd* [2001] 4 SLR 154.

(b) to "bridge the gap" between the application for judicial management and the hearing of the judicial management application; and

(c) to safeguard the interests of the company as well as its creditors.[129]

6.5.10 Role of the officeholder in corporate rescue proceedings

6.5.10.1 Scheme of arrangement

The role of the proposed scheme manager is to administer the scheme after it has been approved by the creditors. Typically, the proposed scheme manager will prepare the scheme proposal and adjudicate on the creditors' proofs of debt. The proposed scheme manager will also usually be the chairman of the scheme meeting(s).

6.5.10.2 Judicial management

Once a judicial management order has been made, all the responsibilities, functions and powers of the board of directors are transferred to the judicial manager. The judicial manager also takes custody of all the company's property.[130] In addition to all the powers and duties of the directors, he assumes the powers specified in the First Schedule of the IRD Act. These powers include, but are not limited to:

(a) the power to sell or otherwise dispose of the property of the company by public auction or private contract;

(b) the power to borrow money and grant security therefor over the property of the company;

(c) the power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions; and

(d) the power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

The judicial manager also has the power to dispose of secured assets in accordance with section 100 of the IRD Act. Assets secured by a floating charge may be disposed of at the judicial manager's discretion. However, the floating charge holder must be accorded the same priority in respect of the proceeds.

The judicial manager must also, within 60 days of appointment, present a statement of proposals to the creditors at a creditors meeting.[131]

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[129] The Report of the Select Committee on the Companies (Amendment) Bill [Bill No 9/86].
[130] IRD Act, Pt 7, s 99.
[131] *Idem*, s 107.

6.5.11 Rules that apply to the sale of assets outside the ordinary course of business

6.5.11.1 Scheme of arrangement

There is no blanket prohibition on the sale of assets outside the ordinary course of business.

However:

(a) pursuant to section 64(6) of the IRD Act, the court can require that information relating to the acquisition, disposal of property or grant of security be submitted to the court not later than 14 days of the disposition; and

(b) pursuant to section 66 of the IRD Act, the court may, upon an application made by a creditor, make an order restraining the company from disposing of property other than in good faith and in the ordinary course of business and/or an order restraining the transfer of shares in or altering the rights of any member of the company.

6.5.11.2 Judicial management[132]

Pursuant to the list of specific powers extended to Judicial Managers set out in the First Schedule to the IRD Act, a judicial manager has power to sell or otherwise dispose of the property of the company by public auction or private contract. A judicial manager may also dispose of property secured by a floating charge subject to satisfying certain conditions.[133]

6.5.12 Provisions relating to the ability to obtain post-commencement financing (DIP financing)

Rescue financing is financing that is either or both:

(a) necessary for the survival of a debtor that obtains the financing;

(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.

Under both the scheme of arrangement[134] and judicial management[135] processes, a Singapore court may, on application by the debtor, make an order that any rescue financing obtained by a debtor will:

(a) be treated as part of the costs and expenses of the winding-up if the debtor is later wound up;

(b) enjoy priority over preferential debts if the debtor is later wound up;

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[132] *Idem*, First Sch, para (a).
[133] *Idem*, s 100.
[134] *Idem*, s 67.
[135] *Idem*, s 101.

(c) be secured by a security interest on property of the debtor not otherwise subject to any security interest, or be secured by a subordinate security interest on property of the debtor that is subject to an existing security interest if the debtor would not have been able to obtain unsecured rescue financing from any other person; or

(d) be secured by a security interest on property subject to an existing security interest, of the same or a higher priority than the existing security interest, if the debtor would not have been able to obtain rescue financing from any other person unless it was secured in such a manner and there is adequate protection for the interests of the existing security interest.

These are extraordinary remedies / measures which have been taken largely from section 364 of the US Bankruptcy code. These measures were introduced as part of the package of amendments set out in the 2017 Amendment Act (prior to the IRD Act coming into effect in 2020), and which were designed to enhance Singapore's reputation as an international restructuring hub. The Courts have required for all types of super priority sought for rescue financing (even (a) and (b) above) that the debtor needs to show that it would not have been able to obtain rescue financing from any other person unless in the manner sought.

6.5.13 Preferential treatment of post-commencement finance

Post-commencement lenders are only entitled to be treated preferentially if same is provided for in the DIP / rescue loan itself and sanctioned by the court pursuant to section 67 or 101 of the IRD Act, as the case may be.

6.5.14 Brief description of the process for the proof of claims by creditors

6.5.14.1 Scheme of arrangement

Where the court orders a creditor meeting to be summoned, the company must state in every notice summoning the meeting:

(a) the manner in which a creditor is to file a proof of debt with the company; and

(b) the period within which the proof is to be filed.[136]

If a creditor does not file its proof of debt in the manner and within the period stated in the relevant notice summoning the meeting, the creditor will not allowed to vote at the meeting.[137] The proofs of claims are adjudicated by the court-appointed chairman of the creditors' meeting.[138]

[136] *Idem*, s 68(1).
[137] *Idem*, s 68(3).
[138] *Idem*, s 68(6).

6.5.14.2 Judicial management

Similarly, where the Judicial Manager convenes a creditors' meeting, the notice will specify requirements for filing a proof of debt. At any creditors' meeting, the chairman has the power to admit or reject a creditor's proof for the purpose of voting. Any rejection can be appealed to the court.

6.5.15 Corporate rescue mechanism provisions for the development and execution of a rescue plan

6.5.15.1 Scheme of arrangement

For the scheme of arrangement itself to be passed, it has to be approved by:

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

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

Votes are taken at the meeting(s) of each class.

However, before the scheme of arrangement can be binding and effective, the scheme of arrangement needs to be sanctioned by the Court, and the Court order sanctioning the scheme is lodged with the Registrar of Companies.

6.5.15.2 Judicial management

Pursuant to section 117 of the IRD Act, for a proposal to be binding on the company, the judicial manager and the creditors or class of creditors, it has to be approved by:

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

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

Votes are taken at the meeting(s) of each class.

6.5.16 Enforcement of a rescue plan against minority dissenting creditors

The concept of a cross-class cramdown was first introduced in the 2017 Amendment Act (which is now contained in the IRD Act). Subject to certain conditions, it allows a scheme of arrangement with creditors to be approved notwithstanding one or more classes of creditor having rejected the proposed scheme. The rationale for introducing the provision was to minimise the overall influence of minority creditors.

Under the previous cross-class cramdown regime contained in the Companies Act, to cram down a class of unsecured creditors, existing members were required to divest their shares. However, there was no set procedure for shareholders to be compulsorily divested of their shares as part of the scheme of arrangement and the cramdown was therefore dependent on the members voluntarily divesting their shares. Under the IRD Act, unsecured creditors can be crammed down without requiring that the members are divested of their shares.

In judicial management[139] and under a scheme of arrangement,[140] notwithstanding the fact that one or more classes of creditors have not approved the scheme in accordance with the voting mechanisms detailed above, a court can order that the scheme is still binding on the company and all classes of creditors (but not shareholders) if:

(a) a majority in number of creditors meant to be bound by the compromise or arrangement, and who were present and voting (either in person or by proxy) have agreed to the compromise or arrangement;

(b) that majority in number of creditors 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); and

(c) the court is satisfied that the compromise or arrangement does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class. A compromise or arrangement will not be fair and equitable to a dissenting class unless:

    (i) no creditor in the dissenting class receives, under the terms of the scheme proposal, an amount that is lower than what the creditor is estimated by the court to receive in the most likely scenario if the scheme proposal does not become binding; and

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

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

        II. must not provide for any creditor with a claim that is subordinate to the claim of a creditor in the dissenting class, or any member, to receive or retain any property on account of the subordinate claim or the member's interest.[141]

The requirements in sub-paragraph (c) have been adopted from the "absolute priority rule" in Chapter 11 of the Bankruptcy Code. Stated plainly it provides that no class can receive a distribution under a scheme proposal unless all classes senior to such class are paid in full.

[139] *Idem*, s 117(d).
[140] *Idem*, Pt 5, s 70.
[141] *Idem*, s 70 and Pt 7, s 117.

6.5.17 Role of equity in corporate rescue proceedings

For both schemes of arrangement and judicial management, there is no mechanism to cramdown, exclude or bind equity holders without their vote on approval. If the rescue plan involves granting equity to creditors or other stakeholders, thereby diluting existing equity, this needs to be approved either via the passing of a resolution at an EGM or via a members' scheme of arrangement.

6.5.18 Which creditors vote on the adoption of the plan

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

6.5.19 Treatment of executory contracts

See paragraph 6.3.12 above. The IRD Act introduced new provisions limiting the operation of *ipso facto* clauses.

6.5.20 Treatment of specific types of contract

There are no specific legislative provisions dealing with specific types of contracts during corporate rescue proceedings.

6.5.21 Treatment of essential contracts

There are no specific legislative provisions dealing with essential contracts during corporate rescue proceedings.

6.5.22 Treatment of the continued provision of supplies essential to the continuation of the business

There are no specific legislative provisions dealing with the continued provision of supplies essential to the continuation of the business. However, the directors risk potential personal liability under insolvency laws for wrongful trading[142] if the corporate rescue proceedings are unsuccessful and the company is liquidated.

6.5.23 Netting and set-off in financial contracts

6.5.23.1 Scheme of arrangement

The moratorium does not affect the exercise of any legal right under any set-off or netting arrangements.[143]

[142] IRD Act, s 239.
[143] *Idem*, s 64(12).

6.5.23.2 Judicial management

It has been held that the moratorium does not include self-help remedies such as self-help in judicial management.[144]

6.5.24 Disclaiming onerous contracts

6.5.24.1 Scheme of arrangement

Onerous contracts may not be disclaimed.

6.5.24.2 Judicial management

Both judicial managers and liquidators, have the power to disclaim onerous contracts[145] entered into by the company prior to the judicial management order or the liquidation.

6.5.25 Impeachable transactions

6.5.25.1 Scheme of arrangement

The provisions relating to impeachable transactions do not apply.

6.5.25.2 Judicial management and liquidation

See paragraph 6.3.15 above.

6.5.26 Officer liability

6.5.26.1 Scheme of arrangement

Not applicable.

6.5.26.2 Judicial management and liquidation

See paragraph 6.3.16 above.

6.5.27 Preferential / priority claims

There are no statutory preferential or priority claims that apply to corporate rescue proceedings.

[144] *Electro Magnetic CSS Ltd (under judicial management) Development Bank of Singapore* [1994] I SLR 734.
[145] IRD Act, s 230.

6.5.28 Provisions dealing with groups of companies in a domestic context

There are no provisions dealing with groups of companies, but under section 65 the court can grant moratorium orders relating to subsidiaries or related companies which play a necessary and integral role in the compromise or arrangement to be proposed the company under the section 64 moratorium.

6.5.29 Specialised corporate rescue procedures for MSMEs

There are no specialised corporate rescue procedures for MSMEs. However, since Covid-19, Singapore has introduced a simplified debt restructuring programme and simplified winding-up programme, which will be in place for a period of three years (beginning on 29 January 2021). These simplified programmes aim to provide simpler, faster, and lower-cost proceedings for eligible micro and small businesses to restructure their debts or wind up the company in an orderly manner. In 2018, across the enterprise landscape in Singapore, there were over 251,000 micro and small businesses, comprising approximately 207,000 micro enterprises and 44,000 small enterprises.[146]

Self-Assessment Exercise 5

Question 1

In what circumstances is the court able to grant a judicial management order?

Question 2

What are the advantages to a debtor in undergoing a scheme of arrangement, as opposed to being placed under judicial management?

Question 3

How is a receiver appointed and what are some of his duties?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

[146] https://www.mlaw.gov.sg/news/press-releases/simplified-insolvency-programme.

7. CROSS-BORDER INSOLVENCY LAW

On 10 March 2017, Singapore adopted the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) through its adoption of the 2017 Amendment Act.[147] Through this, Singapore became the 42nd State in the world to have enacted legislation based on the Model Law.[148] Prior to the adoption of the Model Law, the Singapore courts depended on common law doctrines to address cross-border insolvency issues. During the recent years prior to the adoption of the Model Law, a series of decisions in the Singapore courts revealed the strong impetus toward universalism in its judicial philosophy and illustrated how the Singapore courts were working out, through the incremental development of the common law, modifications that universalism required.

Singapore is one of few Asian countries to have adopted the Model Law, which was enacted in the US, the United Kingdom and Australia more than 10 years ago. To date, a total of 53 States in 56 jurisdictions have adopted the Model Law.

In a related development, on 1 February 2017, the Supreme Court of Singapore adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the JIN Guidelines). The Guidelines have also been adopted by the US Bankruptcy Courts for the District of Delaware and the Southern District of New York, two of the leading jurisdictions for cross-border insolvency. This is the first time that a judicial communication and co-operation framework for cross-border insolvency has been adopted in Singapore.[149]

Adoption of the Model Law now allows foreign representatives to apply to the High Court of Singapore for the recognition of foreign proceedings. The Model Law as adopted in Singapore is mostly in the same form as the original Model Law[150] and provides for international co-operation and communication between courts and representatives, and for concurrent insolvency proceedings.

Notably, the Model Law as enacted in Singapore has no requirement of reciprocity with the State in which the foreign proceeding is occurring.

However, notwithstanding what has been said above, it should be noted that under the Model Law, the court can deny recognition only if recognition is "manifestly contrary" to public policy. The Model Law as enacted in Singapore omits the word "manifestly". This has been explored in the case of *Re Zetta Jet Pte Ltd*[151] and is discussed in further detail in paragraph 8 below.

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147 2017 Amendment Act, ss 354A, 354B, 354C and Fourteenth Sch.
148 http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl243.html.
149 https://www.supremecourt.gov.sg/news/media-releases/paving-the-way-for-improved-coordination-of-cross-border-insolvency-proceedings--adoption-of-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters.
150 IRD Act, Third Sch.
151 [2018] SGHC 16.

The Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) enables judgments from the United Kingdom and Australia (and certain specific Commonwealth countries) to be registered in the Singapore High Court.

In Singapore, the RECJA establishes a statutory scheme for the recognition and enforcement of judgments of superior courts from the abovenamed jurisdictions to be registered. Under section 3(1), a judgment creditor is allowed to apply to the Singapore High Court for the registration of a judgment. The Singapore High Court may order such judgment to be registered if it thinks, in all the circumstances of the case, that it is just and convenient for the judgment to be enforced in Singapore.[152]

Another applicable regime in Singapore is that under the Reciprocal Enforcement of Foreign Judgments Act (REFJA), where so far only Hong Kong SAR has been a gazetted country recognised for registration.

The third applicable regime is the Choice of Courts Agreement 2016. The REFJA and RECJA do not apply to any judgment which may be recognised or enforced in Singapore under the Choice of Courts Agreement 2016. Singapore is a party to the HCCH Convention on Choice of Court Agreements 2005 (Hague Choice of Court Convention) (HCCH Convention). This was enacted into Singapore law via the Choice of Courts Agreement Act 2016, which came into force on 1 October 2016. Part 3 of the Choice of Courts Agreement Act 2016 applies to a foreign judgment from a court of a contracting state to the HCCH Convention, where the court was the chosen court designated in an exclusive choice of court agreement concluded in a civil or commercial matter, if the choice of court agreement is concluded after the HCCH Convention enters into force in that contracting state.

The first reported decision from the Singapore High Court on the recognition of foreign insolvency proceedings after adoption of the Model Law is *Re Zetta Jet Pte* Ltd.[153] See the discussion in paragraph 8 below.

Prior to the adoption of the Model Law, the courts in Singapore depended on common law principles of recognition. Under those principles, it was long held that courts can recognise foreign insolvencies when they take place in the jurisdiction where the debtor company is registered. The Singapore courts had also further extended this, confirming that in Singapore the courts can also recognise foreign insolvencies commenced where the debtor company's centre of main interest is located, even if that is different to where the company is registered.[154]

The Singapore courts had similarly extended the common law to enable interim orders in aid of foreign rehabilitation proceedings (as opposed to just foreign formal insolvency proceedings).[155]

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[152] K Ramesh, "The Gibbs Principle: A Tether on Feet of Good Forum Shopping" (10 March 2017), Singapore Academy of Law, at p 66.
[153] [2018] SGHC 16.
[154] See *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108.
[155] See *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195.

In addition, in a departure from earlier English case law, the Singapore courts have confirmed that recognition is also possible for voluntary rehabilitation or insolvency proceedings.[156]

Further, the Singapore courts have also extended the common law to address inadequacies in domestic insolvency laws. *In Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others*,[157] the Singapore High Court held that a director who made preferred payments to related entities of a company on the verge of insolvency was in breach of her fiduciary duties to protect the interests of the company's creditors. In a significant extension of the law, the director was held personally liable for such payments. This protects creditors' interests in situations where they may otherwise have no recourse.

Self-Assessment Exercise 6

Question 1

Prior to Singapore's adoption of the UNCITRAL Model Law, how did the Singapore courts go about recognising foreign insolvencies?

Question 2

Consider the decision of the Singapore High Court in *Re Zetta Jet Pte Ltd* and explain how the court approached the question of public policy in an application for recognition of a foreign insolvency proceeding.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

A judgment (which has an *in personam* effect) from a foreign court may be recognised in Singapore or enforced by an action at common law through the Singapore courts.

Some foreign judgments may be registered in Singapore to be enforced. As discussed above, there are three statutory registration regimes. The first regime is that under the RECJA which enables judgments from the United Kingdom and Australia, and certain specific Commonwealth countries to be registered in the Singapore High Court. The second regime is that under the REFJA, where so far, only Hong Kong SAR has been a gazetted country recognised for registration. The third applicable regime is the Choice of Courts Agreement 2016. The REFJA and RECJA do not apply to any judgment which may be recognised or enforced in Singapore under the Choice of Courts Agreement 2016.

[156] See *Re Gulf Pacific Shipping* [2016] SGHC 287.
[157] [2016] SGHC 67.

Once registered, the foreign judgment may be enforced against in Singapore as if it was a judgment issued from the Singapore High Court without fresh proceedings to be commenced.

A foreign judgment that is recognised potentially has an estoppel effect on a specific issue or on a cause of action. Singapore common law recognises certain foreign judgments if certain conditions are met.

A judgment for a fixed sum of money from a foreign court of law is capable of recognition if it is (i) final and conclusive by the law of that country, and (ii) where that court had international jurisdiction (as defined by Singapore law) over the parties.

Certain limited defences are available to resist recognition and enforcement of a final foreign judgment.

In the landmark decision of *Re Zetta Jet Pte Ltd*[158] the Singapore High Court considered the question of public policy under the Model Law, as adopted by Singapore in the Third Schedule to the IRD Act (the Singapore Model Law). This is the first reported decision where a Singapore court has been faced with the question of public policy in an application for recognition of a foreign insolvency proceeding.

Briefly, the case involved two companies, Zetta Jet Pte Limited (Zetta Singapore) and Zetta Jet USA Incorporated (Zetta US), incorporated in Singapore and the US respectively. The shareholders of Zetta Singapore included one Asia Aviation Holdings Pte Limited (AAH), and the relationship between the shareholders was governed by a shareholders' agreement.

On 15 September 2017, Zetta Singapore and Zetta US filed voluntary Chapter 11 bankruptcy proceedings in the US. On 18 September 2017, AAH (and another shareholder) commenced proceedings in Singapore against Zetta Singapore and its other shareholders for commencing the Chapter 11 proceedings in alleged breach of the shareholders' agreement. On 19 September 2017, AAH obtained an injunction order (the Singapore injunction) prohibiting the carrying out of any further steps in and relating to the US bankruptcy filings of Zetta Singapore and Zetta US.

However, in breach of the Singapore injunction, the US bankruptcy proceedings continued. The Chapter 11 proceedings were converted to Chapter 7 proceedings (basically from reorganisation to liquidation), and one Jonathan King (King) was appointed the Chapter 7 trustee of the Zetta entities. The Zetta entities and King then applied for recognition of the Chapter 7 proceedings in Singapore.

The High Court declined to grant full recognition of the Chapter 7 proceedings, but allowed King limited recognition as a foreign insolvency representative. The court held that the omission of the word "manifestly" from Article 6 of the Singapore Model Law meant that the standard of exclusion on public policy grounds was lower than in jurisdictions where the Model Law had been enacted unmodified.

[158] [2018] SGHC 16.

While the court declined to lay out specifically what would trigger the public policy bar in Singapore, it held that the standard would at least require the denial of an application for recognition of foreign proceedings by a foreign insolvency representative appointed under proceedings restrained by the Singapore court. Since King was appointed in US proceedings conducted in breach of the Singapore injunction, the public policy exception was invoked, as to allow recognition would undermine the administration of justice in Singapore.

To strike a balance between protecting the administration of justice in Singapore and affording fairness to the foreign insolvency representative, the court granted King limited recognition only for the purposes of applying to set aside or appeal the Singapore injunction.

More recently, in *Re Tantleff, Alan* [2022] SGHC 147[159] the Singapore courts determined for the first time that recognition of a US Bankruptcy Court order confirming a Chapter 11 plan could be granted under the Model Law, in addition to recognition of the Chapter 11 proceedings themselves.

9. INSOLVENCY LAW REFORM

9.1 Introduction and objectives of the Bill

The IRD Act, then the Omnibus Bill, was submitted to Parliament for First Reading on 10 September 2018 and came into effect on 30 July 2020.

The IRD Act takes into consideration and implements various recommendations of the Insolvency Law Review Committee and subsequently, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring.

The objectives of the IRD Act, as stated by the Ministry of Law, are to:

(a) introduce a new omnibus legislation that consolidates the personal and corporate insolvency and restructuring laws;

(b) establish a regulatory regime for insolvency practitioners; and

(c) enhance Singapore's insolvency and restructuring laws.

The IRD Act repeals the Bankruptcy Act and deletes relevant provisions of the Companies Act.

9.2 New omnibus legislation

IRD Act consolidates the personal and corporate insolvency and restructuring laws, which were previously set out in the Bankruptcy Act and Companies Act respectively. This removes the need to cross-reference between these Acts.

[159] [2022] SGHC 147.

9.3 Regulatory regime for insolvency practitioners

Division 3 of the IRD Act introduces minimum qualifications, conditions for the grant and renewal of licences and a disciplinary framework for insolvency practitioners.

The regime is administered by the Ministry of Law's Insolvency and Public Trustee's Office.

9.4 Limitation on certain contractual rights / ipso facto clauses in debt restructuring

Previously, there was no restriction on the application of *ipso facto* clauses.

Under section 440 of the IRD Act, there is a new provision that limits the exercise of certain contractual rights by reason only that certain proceedings in respect of a company have commenced, or that the company is insolvent. This does not prevent those contractual rights from being exercised by reason of other grounds provided in the contract, such as non-payment of money owed by the company. There are also carve-outs to be worked out subsequently in regulations.

This means it may no longer be possible to rely on *ipso facto* clauses to terminate a contract with an insolvent company. It may also allow companies to continue key contracts and provide a measure of relief in restructuring efforts.

Section 440(5) however sets out a list of contracts that are excluded from this exception. These include:

(a) any eligible financial contract as may be prescribed;

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

(c) any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed;

(d) any commercial charter of a ship;

(e) any agreement within the meaning of the Convention as defined in section 2(1) of the International Interests in Aircraft Equipment Act (Cap 144B); or

(f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.

The scope of "eligible financial contracts" in paragraph a) above will be very important for financiers contracting with Singapore companies.

Section 440 does not prevent the termination of contracts on grounds other than the *ipso facto* clause.

9.5 New wrongful trading provision

In a new provision relating to wrongful trading, the court is empowered to make a declaration that any person who was a knowingly party to the company trading wrongfully, is personally responsible for the debts or liabilities of the company. A company or any person party to, or interested in becoming party to, the carrying on of business with a company, may apply to the court for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading. A company trades wrongfully if the 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.

Section 239 of the IRD Act introduces the new concept of wrongful trading, which imposes personal liability for the company's debts on a person if:

(a) they knew that the company was trading wrongfully; or

(b) as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

This provision is adopted from English insolvency legislation and no longer requires criminal liability to be established (as was the position previously before the enactment of this new wrongful trading provisions) before taking effect.

Wrongful trading is defined as the incurrence of debt or other liabilities without a reasonable prospect of meeting them in full when the company is insolvent or becomes insolvent as a result of such debt.

9.6 Termination of winding-up

Section 186(1) of the IRD Act gives the court the power to stay or terminate the winding-up of a company at any time upon the application of any of:

(a) the liquidator;

(b) a creditor; or

(c) a contributory; and

on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed or terminated.

Section 186(3) allows the court to give directions for the resumption of the management and control of the company by the officers of the company. This includes, but is not limited to, directions for the convening of a general meeting of members of the company to elect directors to take office upon the termination of the winding-up.

Previously, the court only had the power to stay winding-up proceedings. This could be for a limited time or permanently.

This amendment:

(a) makes it clear whether parties wishing to re-initiate winding-up proceedings should either:

(i) present a fresh petition (that is, where the winding-up has previously been terminated); or

(ii) apply to set aside the stay order (that is, where the winding-up has been stayed); and

(b) provides a mechanism for the court to arrange for the resumption of management and business after the termination of a winding-up.

This also gives companies the option of applying for the termination of a winding-up if they have become solvent, instead of applying for a stay.

9.7 Proof of debt

Section 223(1) of the IRD Act provides that in the insolvent winding-up of a company a secured creditor is not entitled to interest on the secured debt after the commencement of the winding-up, if the security is not realised within 12 months.

Section 223(2) of the IRD Act similarly provides that where a company is in judicial management and a secured creditor has obtained the leave of the court or consent of the judicial manager to enforce any security, the secured creditor is not entitled to interest on the secured debt if the security is not realised within 12 months.

Section 327 provides that in the context of bankruptcy a secured creditor is not entitled to interest on the secured debt if he does not notify the Official Assignee of this intention within 30 days of the bankruptcy order, or if he fails to realise the security within 12 months (or any further period determined by the Official Assignee).

9.8 Voluntary judicial management

Section 94(1) of the IRD Act introduces a new voluntary process for initiating judicial management without having to first apply to the court if:

(a) the company is, or is likely to become, unable to pay its debts;

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

(c) a resolution of its creditors is obtained.

Section 94 also sets out the procedure for this judicial management process which is initiated voluntarily. This includes but is not limited to:

(a) the manner creditor meetings should be conducted;

(b) notice requirements; and

(c) relevant timelines.

9.9 Summary procedure for the dissolution of a company

Section 209 provides for the early dissolution of a company administered by Official Receiver when:

(a) the company is being wound up;

(b) the Official Receiver is liquidator; and

(c) the Official Receiver has reasonable cause to believe that:

(i) the realisable assets of the company are insufficient to cover the expenses of the winding-up; and

(ii) the affairs of the company do not require any further investigation.

Section 210 provides for the early dissolution of company administered by liquidator other than Official Receiver on the same grounds, namely that the liquidator has reasonable cause to believe that:

(a) the realisable assets of the company are insufficient to cover the expenses of the winding-up; and

(b) the affairs of the company do not require any further investigation.

9.10 Appointment of a liquidator in Singapore over foreign companies

Section 250 of the IRD Act permits the court to appoint a liquidator of the foreign company for Singapore, provided that:

(a) the foreign company goes into liquidation or is dissolved in its place of incorporation or origin; and

(b) the person, who is the liquidator appointed by the foreign company's place of incorporation, or the Official Receiver, makes an application.

This applies to a foreign company which establishes a place of business or carries on business in Singapore, whether or not the foreign company is registered in Singapore.

Section 250(5) however requires that the Singapore liquidator must be satisfied that the interests of creditors in Singapore are adequately protected before making payments to the foreign liquidator.

9.11 UNCITRAL Model Law

Section 252 gives legal effect in Singapore to the Model Law as set out in the Third Schedule of the IRD Act.

Section 253 states that Singapore insolvency law applies with such modifications as the context requires for the purpose of giving effect to Part 11 (*Cross-Border Insolvency*) of the IRD Act and the Third Schedule.

9.12 Availability of third-party funding to judicial managers and liquidators

Distressed companies often do not have sufficient funds to pursue claims. Third-party funding will enable them to pursue such claims and provide a potential avenue of recovery for their creditors. Prior to the IRD Act, courts had permitted litigation funding in Singapore in the context of insolvency under the appropriate circumstances. However, a liquidator was only able to assign the proceeds of the company's claims to third parties and not the right to pursue actions that are personal to the judicial manager or liquidator.

Under the IRD Act, both judicial managers and liquidators are statutorily empowered to seek third-party funding for certain of causes of action, including those which are personal to them.[160] However, authorisation by the court or the committee of inspection is required. These are in respect to claims in relation to transactions that are deemed undervalued or have unfair preference transactions, extortionate credit transactions, fraudulent trading, wrongful trading, and assessment of damages against delinquent officers of the company.

United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd [2021] SGCA 78 was the first Court of Appeal decision in Singapore on the Model Law and clarifies the ambit of certain Model Law provisions as implemented in Singapore. Most notably, the Court of Appeal set out the requisite attributes for what constitutes a "foreign proceeding" under Article 17 read with Article 2(h) of the Model Law and clarified the limited scope of stays in relation to foreign insolvency under Article 20 of the Model Law, in that the Court will only grant such a stay or suspension if a stay would have been available under Singapore law had the debtor company been wound up in Singapore.

[160] IRD Act, s 144(1)(g) and First Sch, para (f).

10. USEFUL INFORMATION

- https://www.singaporelawwatch.sg/About-Singapore-Law/Commercial-Law/ch-30-bankruptcy-and-insolvency;

- *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring*, 20 April 2016;

- *Law and practice of corporate insolvency* / general editor, Andrew Chan Chee Yin, Singapore:LexisNexis, 2014;

- *Woon's Corporations Law*, Walter Woon, SC, 2019 Desk Edition; and

- *Insolvency, Restructuring and Dissolution Act Compendium,* Ajinderpal Singh, Adriel Chioh Wen Qiang, Alexander Lee Wei (LexisNexis, 2020).

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Question 1

What is the role of the insolvency regulator in Singapore?

Question 2

Singapore has modelled its insolvency laws after the laws of which countries?

Commentary and Feedback on Self-Assessment Exercise 1

Question 1

You should have described the role of the Official Receiver and Official Assignee and the difference between each role.

Question 2

The aim of this question is to understand how Singapore's insolvency legislation is derived. This is useful from a comparative perspective and in locating relevant case law from other jurisdictions. This approach assists in providing some clarity as to how the Singapore courts will approach a particular issue, as a much broader library of case law is likely to contain similar or analogous facts and legal issues. For instance, in more recent times Singapore has incorporated a number of concepts taken from the US Bankruptcy Code. This will mean that there will be salient US decisions relating to Singapore's own legislation.

Self-Assessment Exercise 2

You are asked to supply materials to ABC Limited, a relatively new company with a short trading history. You are cautious and wish to ensure that you are paid in full for the goods that you supply, but you acknowledge that the full purchase price cannot realistically be paid up front. How can you protect yourself should ABC limited become unable to pay its debts?

Commentary and Feedback on Self-Assessment 2

You should consider the various forms of security available and the types of clauses that might be included in any agreement entered into with ABC Limited (such as a retention of title clause so that the goods supplied can be returned to you in the event of non-payment / insolvency). You should also think about how you can enforce your security and where you will rank in an insolvency process.

Self-Assessment Exercise 3

Describe how the alternatives to bankruptcy work.

Commentary and Feedback on Self-Assessment Exercise 3

It is important for both the debtor and creditors to understand the alternatives to bankruptcy due to the draconian consequences of bankruptcy. For creditors, commencing bankruptcy proceedings will not guarantee the full recovery of the debts owed. Ideally, creditors should only commence bankruptcy proceedings against the debtor when all other debt recovery options have been exhausted.

Self-Assessment Exercise 4

Question 1

Who can make an application for a compulsory winding-up and in what circumstances can the court grant the order?

Question 2

Outline the procedure for making an application for a compulsory winding-up.

Question 3

What is the difference between a creditors' voluntary liquidation and a members' voluntary liquidation?

Question 4

You are the appointed liquidator of XYZ Co Limited, which has just entered into compulsory liquidation. You determine that the company has realisable assets of SGD 100,000, with the following debts:
- Liquidator's fees: SGD 25,000
- Lawyers and accountants' fees: SGD 20,000
- Unpaid employee wages: SGD 25,000
- Trade creditors: SGD 40,000
- Unpaid rent: SGD 10,000

Explain how the respective creditors rank and how much each category of creditors will receive from the available funds.

Commentary and Feedback on Self-Assessment 4

Question 1

You should explain which parties can initiate a winding-up application and what the court will consider in deciding whether to grant a winding-up order, that is, what the substantive requirements are.

Question 2

You should outline the procedure in a step-by-step manner, starting with the filing of the application, followed by the hearing and the post-hearing steps.

Question 3

The key difference is that for a members' voluntary winding-up, the directors are required to file a declaration of solvency. For a creditors' voluntary winding-up, there is a creditors' meeting to consider the proposal for voluntary winding-up in addition to a members' meeting.

Question 4

The creditors will rank as follows and receive the amounts indicated:
- Liquidator ($25,000) and lawyers and accountants' fees ($20,000);
- Employees ($25,000); and
- Trade creditors and unpaid rent ($0.60 per dollar owing).

Self-Assessment Exercise 5

Question 1

In what circumstances is the court able to grant a judicial management order?

Question 2

What are the advantages to a debtor in undergoing a scheme of arrangement, as opposed to being placed under judicial management?

Question 3

How is a receiver appointed and what are some of his duties?

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

The court may make an order for judicial management if:

It is satisfied that the company is or is likely to become unable to pay its debts; and
It considers that placing the company under judicial management would be likely to achieve at least one of the three purposes of a judicial management.

Question 2

The advantages of a scheme of arrangement stem from the fact that it is a debtor-driven process as compared to a judicial management which is creditor-led. The directors continue to run the business in a scheme of arrangement. They would have more familiarity with the business compared to a court-appointed judicial manager. Also, there is less stigma involved in a scheme of arrangement. This could be especially important for a public listed company.

Question 3

Receivership is a mode of enforcement of a secured creditor's right. Receivers may be appointed privately pursuant to a right contractually provided for in security documentation, or by the court through invoking certain statutory provisions. It is important to understand the receiver's statutory and common law duties.

Self-Assessment Exercise 6

Question 1

Prior to Singapore's adoption of the UNCITRAL Model Law, how did the Singapore courts go about recognising foreign insolvencies?

Question 2

Consider the decision of the Singapore High Court in *Re Zetta Jet Pte Ltd* and explain how the court approached the question of public policy in an application for recognition of a foreign insolvency proceeding.

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

Prior to the adoption of the Model Law on Cross-Border Insolvency, the Singapore courts used common law doctrines to address cross-border insolvency issues.

Question 2

It is important to note that the Singapore version of Article 6 differs from Article 6 of the UNCITRAL Model Law on Cross-Border Insolvency. The Singapore version omits the word "manifestly" deliberately. This is important as it means that the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where the Model Law has been enacted unmodified.

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