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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8G**

**JAPAN**

This is the **summative (formal) assessment** for **Module 8G** on this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 8G**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment8G]**. An example would be something along the following lines: 202223-336.assessment8G. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

How can immovable property be perfected?

1. By delivery of the property.
2. By notification to the administrative agency.
3. By registration in the relevant property registry.
4. By court decision.

**Question 1.2**

Choose the **correct** statement with regard to bankruptcy proceedings for corporations:

1. The directors of the insolvent corporations have an obligation to file for bankruptcy proceedings of the corporation.
2. The debtor can sell its assets to increase the bankruptcy estate during the bankruptcy proceeding.
3. The bankruptcy creditors cannot exercise their individual rights after the commencement of bankruptcy proceedings.
4. After the completion of the bankruptcy proceeding, the debtor can restart its business.

**Question 1.3**

In which of the following circumstances can the court **not** initiate a bankruptcy proceeding of a corporation?

1. When the debtor’s current assets, income and earnings are not sufficient to repay its debts and the debtor does not have sufficient credit to obtain a new loan or defer repayment.
2. When the debtor is unable to make payments due to a temporary cash flow impasse.
3. When the debtor’s liabilities exceed its assets.
4. When a debtor is generally and continuously unable to pay its debts as they become due.

**Question 1.4**

Choose the **correct** statement with regard to civil rehabilitation proceedings for corporations in order to complete the statement below:

The rehabilitation plan can be approved by a –

1. majority of the voting rights present.
2. two-third of the total voting rights.
3. majority of the voting right holders present.
4. majority of the voting right holders present and half or more of the total voting rights.

**Question 1.5**

Choose the **correct** statement in order to complete the statement below:

DIP financing after filing for civil rehabilitation proceedings –

1. enjoy super-priority even ahead of secured creditors.
2. qualify as common benefit claims.
3. rank as claims of ordinary rehabilitation creditors.
4. cannot be recognised in insolvency proceedings at all.

**Question 1.6**

Choose the **incorrect** statement with regard to corporate reorganisation proceedings:

1. Secured creditors can exercise their secured interests outside the corporate reorganisation proceeding.
2. A trustee is appointed in every case..
3. Shareholders who hold one-tenth or more of the voting rights of all shareholders can file for corporate reorganisation proceedings.
4. Corporate reorganisation proceedings are basically available only for stock corporations.

**Question 1.7**

Choose the **incorrect** statement with regard to rule-based out-of-court workouts in Japan:

1. Neutral experts would review the proceedings and the restructuring plan.
2. Creditors can obtain benefits from a tax perspective.
3. Turnaround ADR mainly targets medium-sized to large companies.
4. The restructuring plan can be approved by a majority voting of creditors.

**Question 1.8**

Which of the following **is not** a ground for non-exemption forthe discharge in consumer bankruptcy?

1. Concealment, destruction or adverse disposition of property.
2. Borrowing through fraudulent means that deceive creditors.
3. Gambling.
4. Obtaining a new job with a stable income after the commencement of the proceeding.

**Question 1.9**

Which one of the following **is not** a proceeding that can be used for consumer insolvency?

1. Special liquidation.
2. Special conciliation.
3. Bankruptcy.
4. Civil rehabilitation.

**Question 1.10**

Choose the **incorrect** statement with regard to recognition of the foreign insolvency proceedings:

1. The Tokyo District Court has exclusive jurisdiction over recognition cases.
2. The recognition is denied if foreign proceedings are manifestly subject to territoriality.
3. When an order of recognition is issued, the court must notify creditors of the recognition.
4. The right to petition for recognition belongs exclusively to the foreign trustee, or the debtor if there is no foreign trustee.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 4 marks]**

Name two in-court liquidation-type insolvency proceedings and two in-court restructuring-type insolvency proceedings.

In Japan, in-court liquidation-type proceedings involve the disposal and equal distribution of the debtor’s assets among creditors. The Restructuring - type procedures aim to re-organize the debtor’s business or financial affairs and the income generated from such restructurings goes towards repaying creditors.

Based on the Japanese insolvency laws, some of the in-court liquidation-type proceedings include the following: -

1. **Bankruptcy Proceedings under the** **Bankruptcy Act No. 75 of June 2, 2004** - **Article 15(1) of the Act** provides that when a debtor is unable to pay debts, the court, upon petition, commences bankruptcy proceedings by an order pursuant to the provisions of **Article 30, paragraph (1)**. A debtor is deemed “unable to pay debts" if the debtor, due to the lack of ability to pay, is generally and continuously unable to pay debts as they become due.[[1]](#footnote-1) When the debtor is a corporation, the term "unable to pay debts" is deemed to be replaced with "unable to pay debts or insolvent (meaning the condition in which a debtor is unable to pay its debts in full with its property).[[2]](#footnote-2)The Petition to Commence Bankruptcy proceedings may be commenced by a Creditor or a Debtor[[3]](#footnote-3) and must be filed by means of a document stating the particulars specified by the Rules of the Supreme Court.[[4]](#footnote-4) **Chapter VII on Realization of Bankruptcy Estates** specifies the general rules for the realization process, including how assets are to be handled, the extinguishment of security interests, and the specific procedures for liquidating assets to ensure creditors can be paid from the proceeds.
2. **Special Liquidation proceedings under the Companies Act No. 86 of 2005 –** based on **Article 511 (1) of the Act**, Creditors, liquidators, company auditors or shareholders may file a petition for the commencement of special liquidation. Special liquidation is only available to stock companies. **Section 510 of the Companies Act** states that if the Court finds the following grounds exist with respect to a liquidating stock company, it orders relevant liquidating stock company to commence special liquidation in response to the filing under the provisions of **Article 514 of the Act**: -
3. the existence of circumstances prejudicial to the implementation of the liquidation; or
4. the suspicion that the liquidating stock company is insolvent (meaning the status where the assets of the liquidating stock company is not sufficient to fully discharge its debts.

Some of the in-court restructuring-type insolvency proceedings include the following: -

1. **Civil Rehabilitation proceedings** – Under **Article 21 [1] of the Civil Rehabilitation Act,** **No. 225 of December 22, 1999**, if there is the risk that a fact constituting the grounds to commence bankruptcy proceedings would occur to a debtor, the debtor may file a petition to commence rehabilitation proceedings to the court. The same applies when a debtor is unable to pay debts that are due without causing significant hindrance to the continuation of business. Creditors also have a right to file a petition for rehabilitation proceedings.[[5]](#footnote-5) Civil Rehabilitation serves the purpose of restructuring the debtor’s finances to allow continuation of business operations. This process is debtor-in-possession type, meaning the existing management usually remains in control, albeit under the supervision of the court.
2. **Corporate Reorganisation Proceedings** – these proceedings are similar to civil rehabilitation but used for stock companies and typically involves the appointment of a trustee to manage the company during the reorganisation process. It focuses on appropriately coordinating the interests of creditors, shareholders, and other interested parties of stock companies in financial difficulty by specifying procedures concerning establishing and implementing reorganization plans, with the aim of enabling the stock companies to reorganize and remain in business.[[6]](#footnote-6) These proceedings may be commenced by the stock company itself, a creditor that has claims that account for one-tenth or more of the amount of the stated capital of the stock company; and a shareholder that has one-tenth or more of the voting rights of all shareholders of the stock company.[[7]](#footnote-7)

**Question 2.2 [maximum 3 marks]**

Name any three possible real security (security interests) that can be created over tangible movables.

In Japan, security interests are created based on statutory provisions or through security agreements setting down the contractual security interests. Some of the possible real security interests that can be created over tangible movables include but are not limited to: -

1. **Pledge (***shichi ken***)** – Based on **Article 344 of the** **Civil Code Act No. 89 of April 27, 1896,** the creation of a pledge becomes effective through delivery of the subject matter of the pledge to the obligee. A pledgee has the right to possess a thing received from an obligor or a third party as security for their claims and to have their own claims paid prior to other obligee out of that thing.[[8]](#footnote-8)
2. **Retention of title (***shoyuken ryuho***)** – Under **Article 295(1) of the Civil Code Act No. 89 of April 27, 1896,** if a possessor of a thing belonging to another person has a claim that has arisen in relation to that thing, that possessor may retain that thing until that claim is satisfied; provided, however, that this does not apply if the relevant claim has not yet fallen due. A holder of a right of retention may exercise that holder's rights against the whole of the thing retained until the relevant claim is satisfied in its entirety.[[9]](#footnote-9) However, the holder may not use, lease or provide as a security the thing retained unless that holder obtains the consent of the obligor. There in an exception, however, where such acts apply to uses necessary for the preservation of that thing.[[10]](#footnote-10)
3. **Mortgages (***teito ken***) -** This is a legal mechanism by which a debtor provides a creditor with a security interest in immovable property, such as land or buildings, as collateral for a loan. **Article 370A** **of the Civil Code Act No. 89 of April 27, 1896** provides that amortgage extends to the things that form an integral part of the immovables that are the subject matter of the mortgage except for buildings on the mortgaged land; provided, however, that this does not apply if the act establishing the mortgage provides otherwise or the rescission of fraudulent act may be demanded as prescribed in Article 424, paragraph (3) with regard to the act of the obligor. Unlike a pledge, the debtor remains in possession and use of the secured asset.
4. **Revolving Mortgages (***ne teito ken***)** - A revolving mortgage is designed to secure a line of credit up to a specified maximum amount, rather than a fixed loan amount. A revolving mortgagee may exercise the relevant revolving mortgage up to the maximum amount with respect to all of crystallized principal as well as periodic payments including interest and compensation for loss or damage resulting from failure to perform obligations.[[11]](#footnote-11)

These security interests are essential in commercial transactions as they provide creditors with mechanisms to secure payment, especially in scenarios where security is deemed necessary to mitigate financial risks.

**Question 2.3 [maximum 3 marks]**

What is the role of the trustee in bankruptcy proceedings?

The term "***bankruptcy trustee***" as used in the **Bankruptcy Act No. 75 of June 2, 2004** means a person who has a right to administer and dispose of property that belongs to the bankruptcy estate in bankruptcy proceedings.[[12]](#footnote-12) A bankruptcy trustee can be a natural person or a corporation.[[13]](#footnote-13)

The role of the trustee in bankruptcy proceedings under the Bankruptcy Act, 2004, is outlined primarily in Chapter III of the Act, which details the duties and powers of bankruptcy trustees as follows: -

1. **Right to administer and dispose of property of the bankruptcy estate** - If an order of commencement of bankruptcy proceedings is made, the right to administer and dispose of property that belongs to the bankruptcy estate is vested exclusively in a bankruptcy trustee appointed by the court.[[14]](#footnote-14)
2. **Right to bring an action or defend actions against** **the bankruptcy estate -** in an action relating to a bankruptcy estate, a bankruptcy trustee is to stand as a plaintiff or defendant.[[15]](#footnote-15)
3. **Duty to Request for explanation and inspect the books relating to the bankruptcy estate** – under **Article 83 of the Bankruptcy Act, 2004**, the bankruptcy trustee has the authority to request explanations or inspect books, documents, and other objects related to the bankruptcy estate from the bankrupt, the bankrupt’s agents or employees and other related parties to the bankrupt entity.
4. **Duty to seek assistance when facing resistance in performing their duties and to perform their duties with the due care of a prudent manager** - A bankruptcy trustee, when facing resistance in the process of performing their duties, may request for police assistance in order to eliminate such resistance, with permission of the court.[[16]](#footnote-16) A Bankruptcy trustee must also perform their duties with the due care of a prudent manager. If a bankruptcy trustee fails to take the due care, the bankruptcy trustee is jointly and severally liable to compensate damage to any interested person. [[17]](#footnote-17)
5. **A Bankruptcy Trustee's Duty to Strive to Provide Information** – a Trustee must strive to provide a person who has a claim for salary or claim for retirement allowance, both of which are bankruptcy claims, with information necessary for their participation in the bankruptcy proceedings.[[18]](#footnote-18)
6. **Approval of Bankruptcy Claims -** The bankruptcy trustee is responsible for the initial approval of claims filed by creditors.[[19]](#footnote-19)

In general, the trustee serves as the in-between between the debtor and the creditors, and ensures that the assets of the debtor are distributed fairly based on the orders of priority set out under the Act and ensures that the interests of all parties, as a whole, are respected throughout the bankruptcy proceedings.

**QUESTION 3 (essay-type questions) [15 marks]**

Explain the differences between civil rehabilitation proceedings and corporate reorganisation proceedings.

As explained in Question 2.1. above, **Civil Rehabilitation proceedings** are provided for under **Article 21 [1] of the Civil Rehabilitation Act, No. 225 of December 22, 1999**, which provides that: -

*“…if there is the risk that a fact constituting the grounds to commence bankruptcy proceedings would occur to a debtor, the debtor may file a petition to commence rehabilitation proceedings to the court.”*

**Corporate Reorganisation Proceedings**, on the other hand, while similar to civil rehabilitation proceedings are used for stock companies and typically involves the appointment of a trustee to manage the company during the reorganisation process.

The main differences between civil rehabilitation proceedings and corporate reorganisation proceedings are as follows: -

**Civil Rehabilitation proceedings** are governed by the **Civil Rehabilitation Act.** Based on Article 1, the purpose of the Act is to coordinate rights under civil law between debtors and creditors, with the aim of ensuring rehabilitation of the business or economic life of debtors in financial difficulty by formulating rehabilitation plans as consented to by their creditors and approved by the court.

On the other hand, **Corporate Reorganisation Proceedings** are governed by the Corporate Reorganization Act. Based on Article 1, the purpose of the Act is to coordinate the interests of creditors, shareholders, and other interested parties of stock companies in financial difficulty by specifying procedures concerning establishing and implementing reorganization plans, with the aim of enabling the stock companies to reorganize and remain in business.

Based on the Act, **Civil Rehabilitation Proceedings** (*Minji Saisei*) aim to rehabilitate a debtor to continue running its business and are suitable for individuals and small business entities. In civil rehabilitation, the debtor remains in control of their property under the supervision of the insolvency court. For **Corporate Reorganisation Proceedings**, the proceedings apply to larger corporations that have complex debt structures. The focus of the proceedings is to restructure the debtor company allowing it to remain viable and to protect the interests of all stakeholders, including creditors, employees, and shareholders. In these proceedings, the management of the company is vested in a Court appointed trustee who takes over the management and control of the debtor company and its assets.

**Civil Rehabilitation Proceedings** require less extensive renegotiations with creditors, depending on the business’s condition. **Corporate Reorganisation Proceedings,** however,involve all necessary stakeholders, including creditors, shareholders, and employees. This often requires more intensive negotiations given the complexity of the proceedings.

Procedurally, **Civil Rehabilitation Proceedings** are quicker and less costly compared to **Corporate Reorganisation Proceedings.** The process involves preparing drafting a rehabilitation plan for approval. This plan outlines and specifies clauses for modifying some or all of the rights of creditors in rehabilitation proceedings or any other provisions prescribed in **Article 154 of the Civil Rehabilitation Act**.

**Corporate Reorganisation Proceedings** on the other hand are more complex and longer in duration due to the complexities involved in reorganizing a large company. It involves the preparation and implementation of a detailed reorganization plan. This is a plan that establishes provisions for modifying the whole or part of the rights of reorganization creditors, etc. or of shareholders, and which establishes the other provisions prescribed in Article 167 of the Act, which must be approved by creditors and the court.

In conclusion to the above, while both processes aim to address financial distress, the choice between civil rehabilitation and corporate reorganization depends significantly on the size of the entity involved, the complexity of its debts, and the desired level of control during the restructuring process.

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

Debtor (D) had been financially distressed for the past several years. Additionally, due to a client’s bankruptcy filing in late August 2023, D was unable to receive orders from this client, and D’s cash flow quickly deteriorated. Although Representative Director (R) sold his own real estate and repaid the banks as a joint and several guarantee, D could not obtain sufficient cash to pay the debts against clients. Based on its possibility of rehabilitation, D filed for the civil rehabilitation proceedings on 30 September 2023.

Please indicate specific legal issues on the questions below and state possible arguments and your thoughts:

1. Indicate whether the proposed rehabilitation plan is allowed to provide as follows:
2. In principle, 70% of rehabilitation claims shall be discharged and the remaining amount shall be paid in instalments over three years;
3. Claims of 300,000 yen or less shall be paid in full on the first payment date one year after the confirmation order is finalised; and
4. Exemption of all interest and damages after the commencement of the proceedings.
5. The proposed plan stipulates to modify R’s right of indemnification arising from the performance of the joint and several guarantee obligations in the same manner as other rehabilitation claims. A creditor who questioned R’s management responsibility objected that R's right to indemnification should be treated in a subordinate manner, such as a complete waiver.
   1. If R does not agree to a waiver, is the proposed plan allowed to provide that R's right of indemnification should be treated in a subordinate manner?; and
   2. On the other hand, what about the case in which R agrees to such treatment?

Based on **Article** **176 of the Civil Rehabilitation Act (Act No. 225 of 1999)**, a rehabilitation plan becomes effective when an order of confirmation becomes final and binding. **Article** **179 of the Act** further states that: -

*“When an order of confirmation of the rehabilitation plan becomes final and binding, the rights of holders of filed rehabilitation claims and those of rehabilitation creditors who hold rehabilitation claims stated in a statement of approval or disapproval pursuant to the provision of Article 101 (3) shall be modified as provided for in the rehabilitation plan.”*

The upshot of the foregoing is that the rights of filed rehabilitation and self-approved claims are modified in accordance with the provisions of the rehabilitation plans and the debtor is discharged from liability from all rehabilitation claims save for those rights approved under the provisions of the rehabilitation plan. This discharge, however, does not apply to any claim for a fine, etc. arising before the commencement of rehabilitation proceedings.[[20]](#footnote-20)

Further, on the General Standards for Modification of Rights under **Article 156 of the Act**, the Act provides that clauses for modifying rights of rehabilitation creditors shall provide for general standards for the reduction and release of debts, extension of the term for debts, or any other modification of rights.

On Issue 1 on the specific Clauses provided for in the rehabilitation plan, we shall assess the proposed clauses of the plan based on the provisions of the Civil Rehabilitation Act (Act No. 225 of 1999) and other relevant laws as follows: -

1. **In principle, 70% of rehabilitation claims shall be discharged and the remaining amount shall be paid in installments over three years.**

Suppose the plan proposes a 70% discharge and is approved by the creditors and confirmed by the court. In that case, it is permissible under **Article 178 of the** **Civil Rehabilitation Act** which states that when an order of confirmation of the rehabilitation plan becomes final and binding, the rehabilitation debtor shall be discharged from his/her liabilities for all rehabilitation claims, except for those for the rights approved under the provisions of the rehabilitation plan or requirements of the Act.

However, it is important to take note of the provisions for the resolution of the proposed rehabilitation plan by creditors as follows. Under **Article 169 of the Act**, the proposed rehabilitation plan must be presented to and resolved upon by a creditor meeting, subject to the specified voting process. This step ensures that creditors have a voice in approving or rejecting the plan. Further, **Article 173 of the Act** outlines the necessary conditions for a rehabilitation plan to be adopted, such as gaining a majority vote from creditors holding claims entitled to vote. After gaining creditor approval, the rehabilitation plan is subject to court confirmation as per **Article 174 of the Act**.

On the payment of the remaining amount by way of installments over three years, **Article 229 [2] of** **the Civil Rehabilitation Act** provides that anextension of the term for debt under the clauses that modify the rights of rehabilitation creditors, unless otherwise provided for under the provisions of the Act, shall be prescribed as follows: -

* 1. Payment shall be made based on an installment payment plan wherein the due date comes more than once in three months.
  2. The final due date is set as a certain day in the month that includes the day on which three years elapse since the date of the order of confirmation of the rehabilitation plan becoming final and binding (in cases where there are special circumstances, a certain day which comes within five years since the date of the order of confirmation of the rehabilitation plan becoming final and binding and comes after the first day of the month following the month that includes the day on which three years elapse since said date).

The upshot of the foregoing is that the rehabilitation plan can provide for the payment in installments for 3 years. In special circumstances, the payment period can be up to 5 years from the date of the order of confirmation of the rehabilitation plan.

1. **Claims** **of 300,000 yen or less shall be paid in full on the first payment date one year after the confirmation order is finalised.**

Based on **Article 155 of** **the Civil Rehabilitation Act, a**ny modification of rights based on a rehabilitation plan shall be equal between rehabilitation creditors. However, this shall not apply where any rehabilitation creditor who will suffer detriment has given consent or where equity will not be undermined even if the plan otherwise provides for a small rehabilitation claim or any of the claims listed in Article 84 (2) or any other difference in the treatment of rehabilitation creditors.

The proposed clause to pay claims of 300,000 yen or less in full on the first payment date one year after the confirmation order is finalised would be permissible in circumstances where it would be possible to make rehabilitation proceedings progress smoothly by paying a minor rehabilitation claim promptly or significant hindrance would be caused to the continuation of the rehabilitation debtor's business unless a small rehabilitation claim is paid promptly, the court, even before an order of confirmation of the rehabilitation plan becomes final and binding, upon the petition of the rehabilitation debtor, etc., may permit payment of such claim. – **Article 85 [5] of the Act**.

1. **Exemption of all interest and damages after the commencement of the proceedings**

**Article 84 [2] of the Act** classifies a claim for interest arising after the commencement of rehabilitation proceedings, as a rehabilitation claim. Based on **Article 154 [1] of the Act**, a rehabilitation plan shall specify clauses concerning the modification of some or all of the rights of rehabilitation creditors, the payment of common benefit claims and claims with general priorities, etc. This Clause would be permissible if the exemption is necessary for rehabilitation and is confirmed as final under Article 178 of the Act.

1. **The treatment of R’s Indemnification Right with or without his agreement**

Having paid Debtor (D)’s debt under the joint and several guarantee, R, as a director has the right to seek indemnification from the Debtor (D). This right arises because the director, acting as guarantor, fulfill the company's obligation to a creditor in full and therefore, has a claim for reimbursement from the Debtor (D) thus creating a Creditor – Debtor relationship. The effect of a complete waiver of R’s indemnification right is that he cannot recover the reimbursement from Debtor [D].

Under **Article 155 of the Act**, modification of rights based on a rehabilitation plan shall be equal between rehabilitation creditors. However, this does not apply in instances where: -

1. any rehabilitation creditor who will suffer detriment has given consent; or
2. **where equity will not be undermined even if the plan otherwise provides for a small rehabilitation claim or any of the claims listed in Article 84 (2) or any other difference in treatment of rehabilitation creditors**.

In instances where directors are responsible for the insolvency of the Company, their rights can be subordinated to the other creditors. However, as a Creditor who might suffer detriment, R can give consent under Article 155 [1] of the Act.

Once R agrees to the subordination of his rights, the rehabilitation plan will outline the modification of rights based on general standards outlined in **Article 156** which provide for general standards for consensually subordinated rehabilitation claims. Once the plan is confirmed under **Article 178 of the Act,** the same will become final and binding.

If R does not agree to his right of indemnification being treated in a subordinate manner, then, R has a right to object to the waiver under **Article 226 of the Act** which states that: -

*“The rehabilitation debtor and a holder of the filed rehabilitation claim may make an objection in writing to the court within the ordinary period for making objections with regard to the amount of a filed rehabilitation claim or estimated amount of deficiency…”*

Further under **Article 227 of the Act**, if the rehabilitation debtor or a creditor file an objection to a rehabilitation claim, the creditor holding the disputed claim can petition the court for a valuation of the claim within three weeks of the objection period ending. Following the revaluation, the Court will grant an order confirming or modifying the claim under Article 227 [7] of the Act.

Even though R’s claim is classified as a home loan under **Article 197 of the Act**, if R's management conduct affected the company's solvency, the Court may allow the subordination of his rights.

Based on the foregoing, the rehabilitation plan hinges on creditors approval and confirmation by the Court for it to be final and binding. Each clause must balance the creditors' rights and interests as well as the debtor’s rehabilitation prospects.

**\* End of Assessment \***

1. Bankruptcy Act No. 75 of June 2, 2004, Article 1 [11]. [↑](#footnote-ref-1)
2. *Idem,* Article 16 [1]. [↑](#footnote-ref-2)
3. *Idem*, Article 18. [↑](#footnote-ref-3)
4. *Idem,* Article 20. [↑](#footnote-ref-4)
5. Civil Rehabilitation Act, No. 225 of December 22, 1999, Article 21 [2]. [↑](#footnote-ref-5)
6. Corporate Reorganisation Act, Act No. 154 of December 13, 2002, Article 1. [↑](#footnote-ref-6)
7. *Idem,* Article 17 [1] and [2]. [↑](#footnote-ref-7)
8. Civil Code Act No. 89 of April 27, 1896, Article 342. [↑](#footnote-ref-8)
9. *Idem,* Article 296. [↑](#footnote-ref-9)
10. *Idem,* Article 298 [2]. [↑](#footnote-ref-10)
11. *Idem,* Article 398-3 [1]. [↑](#footnote-ref-11)
12. Bankruptcy Act No. 75 of June 2, 2004, Article 1 [12]. [↑](#footnote-ref-12)
13. *Idem,* Article 74 [2]. [↑](#footnote-ref-13)
14. *Idem,* Article 78. [↑](#footnote-ref-14)
15. *Idem,* Article 80. [↑](#footnote-ref-15)
16. *Idem,* Article 84. [↑](#footnote-ref-16)
17. *Idem,* Article 85. [↑](#footnote-ref-17)
18. *Idem,* Article 86. [↑](#footnote-ref-18)
19. *Idem,* Article 124. [↑](#footnote-ref-19)
20. Civil Rehabilitation Act, No. 225 of December 22, 1999, Article 178. [↑](#footnote-ref-20)