



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8E

SINGAPORE

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment8E]**. An example would be something along the following lines: 202122-336.assessment8E. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Which of the following **is not** one of the roles of a scheme manager?

- (a) To administer the scheme after it has been approved by the creditors.
- (b) To run the business of the debtor company.**
- (c) To prepare the scheme of arrangement proposal.
- (d) To adjudicate on the proofs of debt filed by the creditors.

Question 1.2

Which of the following forms of security **need not** be registered?

- (a) A fixed charge.
- (b) A mortgage.
- (c) A pledge.**
- (d) A floating charge.

Question 1.3

Which of the following factors may enable a foreign debtor to establish a “substantial connection” to Singapore?

- (a) The debtor has chosen Singapore law as the law governing a loan or other transaction.
- (b) The debtor is registered as a foreign company in Singapore.
- (c) The debtor is carrying on business in Singapore.
- (d) Any of the above.**

Question 1.4

What percentage of each class of creditors must approve a scheme of arrangement for it to be binding?

- (a) Over 50% in value.
- (b) 50% or more in value.
- (c) Over 75% in value.
- (d) 75% or more in value.

Question 1.5

Which of the following is **not** one of the statutory duties of a bankrupt?

- (a) To make discovery of and deliver all his property to the Official Assignee.
- (b) To attend any meeting of his creditors as may be convened by the Official Assignee.
- (c) To execute such powers of attorney, conveyances, deeds and instruments as may be required.
- (d) To not travel overseas under any circumstances whatsoever.

Question 1.6

Which of the following **is not true** of the Model Law as enacted in Singapore?

- (a) It allows foreign representatives to apply to court for the recognition of foreign proceedings.
- (b) The court can deny recognition only if recognition is "manifestly contrary" to public policy.
- (c) It provides for concurrent insolvency proceedings.
- (d) It provides for international co-operation and communication between courts and representatives.

Question 1.7

Which of the following new reforms **were not** introduced by way of the 2017 amendments to the Companies Act?

- (a) The automatic moratorium.
- (b) The cross-class cram down.
- (c) Restrictions on *ipso facto* clauses.
- (d) Pre-packaged scheme of arrangement.

Question 1.8

Who amongst the following **may not** bring a judicial management application?

- (a) The company by way of a members' resolution.
- (b) The liquidator by way of an application to court.**
- (c) The directors pursuant to a board resolution.
- (d) The creditors either together or separately.

Question 1.9

Which one of the following **is not** one of the statutory duties that a bankrupt is subject to?

- (a) Make discovery of and deliver all his property to the Official Assignee.
- (b) Disclose all property disposed of by gift or settlement without adequate valuable consideration within the five years immediately preceding his bankruptcy.
- (c) Not being able to travel overseas at all.**
- (d) Attend meetings with the Official Assignee and answer all relevant questions.

Question 1.10

Which of the following **is not** one of reasons for which the Court will appoint an interim judicial manager:

- (a) The preservation of the company's property or business from dissipation or deterioration.
- (b) The more advantageous realisation of the property than in a liquidation.**
- (c) To bridge the gap between the application for judicial management and the hearing of the judicial management application.
- (d) To safeguard the interests of the company as well as its creditors.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

What is the significance of the decision in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 and what did the Court of Appeal decide?

The decision in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd*¹ concerned the test to determine if a company is deemed to be unable to pay its debts under section 254(2)(c) of the Companies Act (Chapter 50) of Singapore ("Companies Act").

¹ [2021] SGCA 60

Section 254(2)(c) of the Companies Act provides that a company shall be deemed to be unable to pay its debts if 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 shall take into account the contingent and prospective liabilities of the company.

The High Court in the *Sun Electric* case held that section 254(2)(c) involves a holistic and commercial inquiry into whether it is expected that at some point, the company would be unable to meet a liability. On the facts of the case, the High Court Judge relied on both the cash flow and balance sheet tests in reaching his conclusion.² However, the Court of Appeal held that the cash flow test should be the sole and determinative test under section 254(2)(c) of the Companies Act³ based on the following grounds –

- (a) the plain words of section 254(2)(c) Companies Act do not envisage two or more different tests being applied but imply only a single test, namely, whether it is proved to the satisfaction of the Court that the company is unable to pay its debts;⁴
- (b) the Court of Appeal's interpretation of section 254(2)(c) Companies Act is supported by United Kingdom ("UK") case law on the UK equivalent of section 254(2)(c) of the Companies Act i.e. section 518(e) of the UK Companies Act 1985 (prior to the enactment of section 123 of the UK Insolvency Act 1986). The UK courts interpreted the provision as requiring a single test of commercial insolvency, which assesses the company's present capacity to meet its liabilities as and when they became due. Under this commercial insolvency test, the court is allowed to consider the company's contingent and prospective liabilities, and not merely current liabilities, as these would affect whether the company could pay its debts as and when they became due;⁵ and
- (c) the single test intended by section 254(2)(c) of the Companies Act is not the balance sheet test. This is because the balance sheet test compares a company's total assets with its total liabilities. However, this ratio has no direct correlation with whether a company is unable to pay its debts. The ability to pay its debts is determined by the liquidity of the company's assets and when the debts fall due.⁶

The Court of Appeal in *Sun Electric* went on to clarify that the cash flow test assesses whether the company's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due. Further, there should be a flexible timeframe for assessing the current assets and liabilities of the company that takes into account debt and income which would be due in the reasonably near future and the time needed for the company to liquidate its assets. This is consistent with the wording in section 254(2)(c) Companies Act which requires the court to consider contingent and prospective liabilities.⁷

The Court of Appeal in *Sun Electric* also went on to set out the following non-exhaustive list of factors which should be considered by the court under the cash flow test⁸ –

- (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;

² *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraph 52.

³ *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraph 56.

⁴ *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraphs 57 and 58.

⁵ *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraphs 59 to 61.

⁶ *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraph 62.

⁷ *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraphs 65 to 68.

⁸ *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraph 69.

- (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 which has passed since the commencement of the winding-up proceedings;
- (e) the value of the company's current assets and assets which 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;
- (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.

Since the winding-up proceeding in *Sun Electric* was filed before the winding-up provisions in the Companies Act were effectively re-enacted in the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"), by virtue of section 526(1)(f) IRDA, the relevant provisions of the Companies Act continued to apply to the application for winding-up in *Sun Electric*.⁹ However, it should be noted that section 254(2)(c) Companies Act has been re-enacted in section 125(2)(c) IRDA. Hence, the Court of Appeal's decision in *Sun Electric* would equally apply to section 125(2)(c) IRDA.

Detailed. 4 marks.

Question 2.2 [maximum 2 marks]

State **four (4)** new features that were only introduced in the IRDA **and were not in force** at the time of the 2017 amendments to the Companies Act.

Four (4) new features that were only introduced in the IRDA and were not in force at the time of the 2017 amendments to the Companies Act are –

- (a) restrictions on the application of *ipso facto* clauses by section 440 IRDA. Prior to the IRDA, there were no restrictions on the application of *ipso facto* clauses. This meant that creditors could rely on *ipso facto* clauses in a contract to terminate the contract upon insolvency of the company. With the introduction of section 440(1) IRDA, the counterpart in a contract would not be able to rely on *ipso facto* clauses to terminate a contract by reason only that certain proceedings are commenced against the company or that the company is insolvent. However, section 440(5) IRDA sets out a list of contracts that are excluded from this restriction;
- (b) the new concept of wrongful trading in section 239 IRDA. Pursuant to section 239(1) IRDA, the court may declare that any person who was a party to the company trading wrongfully is personally responsible for the debts of the company as the Court directs, if that person – (i) knew that the company was trading wrongfully; or (ii) as an

⁹ *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 at paragraph 16.

officer of the company, ought, in all circumstances, to have known that the company was trading wrongfully;

- (c) termination of winding-up in section 186(1) IRDA. Section 186(1) IRDA empowers the court, at any time during the winding-up of a company, to either stay or terminate the winding-up proceedings on the application of the liquidator, any creditor or contributory, if the court is satisfied that all proceedings in relation to the winding-up ought to be stayed or terminated. Prior to the IRDA, companies only had the option of applying for a stay of the winding-up proceedings; and
- (d) voluntary judicial management under section 94(1) IRDA. Where a company considers that it is or is likely to become unable to pay its debts and there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1) IRDA, section 94(1) IRDA provides that instead of applying to the court for a judicial management order, the company may obtain a resolution of the company's creditors for the company to be placed under the judicial management of a judicial manager.

2 marks

Question 2.3 [maximum 4 marks]

Describe the process involved in one of the alternatives to formal bankruptcy.

There are two (2) alternatives to formal bankruptcy in Singapore namely, voluntary arrangements and debt repayment schemes. For purposes of this discussion, we will delve into the process involved in voluntary arrangements.

Section 276(1) IRDA states that a voluntary arrangement is where an insolvent debtor makes a proposal to its creditors for a composition in satisfaction of the debtor's debts or a scheme of arrangement of the debtor's affairs. Voluntary arrangements do not apply to any individual debtor who is an undischarged bankrupt or to any firm against which a bankruptcy order has been made and from which bankruptcy the partners in the firm have not been discharged (section 275 IRDA).

Pursuant to section 277(1) IRDA, a debtor making a proposal for voluntary arrangement must appoint a nominee to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation. The nominee must be a licensed insolvency practitioner (section 277(2) IRDA).

The process involved in a voluntary arrangement is set out below –

- (a) interim moratorium order

Section 276 IRDA empowers the court to grant an interim moratorium order to an insolvent debtor who intends to make a proposal for voluntary arrangement provided that where the insolvent debtor is a firm, all or a majority of the partners in the firm join or intend to join in making the proposal for voluntary arrangement. During the interim moratorium order –

- (i) where the interim order is in respect of an individual debtor –
 - (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

- (ii) where the interim order is in respect of a firm –
 - (A) no bankruptcy application may be made or proceeded with against the firm or, except with the leave of the Court, any partner in the firm; and
 - (B) 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.

Section 279 IRDA stipulates that the court will only make an interim moratorium order under section 276 IRDA if it is satisfied that –

- (i) the debtor intends to make a proposal for a voluntary arrangement;
- (ii) no previous application for an interim order has been made by or in respect of the debtor during the period of twelve (12) months immediately before the date of the application;
- (iii) the nominee appointed by the debtor's proposal is qualified and willing to act in relation to the proposal; and
- (iv) it would be appropriate to make the interim order for the purpose of facilitating the consideration and implementation of the debtor's proposal.

An interim moratorium order ceases to have effect 42 days after the making of the order unless the court otherwise directs (section 276(4) IRDA).

Where an application for an interim order under section 276 IRDA is pending, the court may stay any action, execution or other legal process against the debtor or the property of the debtor (section 278 IRDA).

- (b) nominee's report on debtor's proposal

The debtor must submit to the nominee, a document setting out the terms of the voluntary arrangement which the debtor is proposing and a statement of the debtor's affairs containing details of assets, creditors, debts and other liabilities (section 280(2) IRDA).

Where an interim order has been made, the nominee must, before the order ceases to have effect and based on the information provided by the debtor under section 280(2) IRDA, submit a report to the court stating whether in the opinion of the nominee, a meeting of creditors should be summoned to consider the debtor's proposal and if a meeting should be summoned, the date, time and place for the meeting (section 280(1) IRDA).

- (c) summoning of creditors' meeting

Where the nominee has reported to the court that a creditors' meeting should be summoned, the nominee must, unless the court otherwise directs, summon the meeting in accordance with the nominee's report (section 281(1) IRDA). Every creditor whose claim and address the nominee is aware of must be summoned to the meeting (section 281(2) IRDA).

- (d) decision of creditors' meeting

The creditors' meeting may by special resolution approve the proposed voluntary arrangement, whether with or without modification (section 282(1) IRDA) subject to the following conditions –

- (i) any modification must be with the debtor's consent (section 282(2) IRDA);

- (ii) a proposal that affects the right of a secured creditor to enforce its security can only be approved by the creditors' meeting with the concurrence of the secured creditor (section 282(5) IRDA); and
 - (iii) a proposal that affects the priority of ranking of a preferential creditor is also subject to the concurrence of the preferential creditor (section 282(6) IRDA).
- (e) report of decisions to court

Upon conclusion of the creditors' meeting, the nominee must report the result of the meeting to the court and serve a copy of the report to such persons as prescribed (section 283(1) IRDA). Where the creditors' meeting has declined to approve the debtor's proposal, the court may discharge the interim moratorium order (section 283(2) IRDA).

Where the creditors' meeting has approved the proposed voluntary arrangement, the approved arrangement takes effect as if made by the debtor at the meeting and binds every person who had notice of and was entitled to vote at the creditors' meeting, whether or not the person was present or represented at the meeting, as if the person were a party to the arrangement (section 284(1) IRDA). The nominee must then supervise the implementation of the voluntary arrangement (section 286(1) IRDA).

Where the debtor fails to comply with its obligations under the voluntary arrangement, the nominee or any creditor bound by the voluntary arrangement may make a bankruptcy application against the debtor (section 287 IRDA).

4 marks

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

Question 3.1 [maximum 8 marks]

Write a brief essay in which you discuss some of the claims that a liquidator or judicial manager can bring and how the IRDA has enhanced their ability to do so.

The claims that a liquidator or judicial manager can bring include the following –

- (a) claims for transactions at an undervalue

Pursuant to section 224 IRDA, where a company is in judicial management or being wound-up and the company has, within three (3) years before the commencement of the judicial management or winding-up, entered into a transaction with any person at an undervalue, the judicial manager or liquidator may apply to the court for an order that restores the position to what it would have been if the company had not entered into that transaction.

In order for a transaction with a person to be deemed to be at an undervalue the following requirements must be satisfied –

- (i) the company makes a gift to the person or enters into a transaction with the person and receives no consideration; or the company enters into a transaction with the person for a consideration, the value of which is significantly less than the value of the consideration provided by the company (section 224(3) IRDA); and
- (ii) the company was unable to pay its debts at the relevant time or becomes unable to pay its debts in consequence of the transaction (section 226(2))

IRDA). This requirement becomes a rebuttable presumption where the transaction at any undervalue is with a person connected with the company, otherwise than by reason only of being the company's employee (section 226(3) IRDA).

The court will not make an order under section 224 IRDA in respect of a transaction at an undervalue if –

- (i) the company entered into the transaction in good faith and for the purpose of carrying on its business; and
- (ii) at the time of entering into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

(b) unfair preferences

Pursuant to section 225 IRDA, where a company is in judicial management or is being wound-up, and the company has at the relevant time, given an unfair preference to any person, the judicial manager or liquidator may apply to the court for an order that restores the position to what it would have been if the company had not given that unfair preference.

A company would be deemed to have given an unfair preference to a person if the following requirements are satisfied –

- (i) the person is a director, surety or guarantor for the company and the company does anything which has the effect, in the event of the company's winding-up, of putting the person in a position better than they would have been if the thing was not done (section 225(3) IRDA);
- (ii) in deciding to give the unfair preference, the company was influenced by the desire to put the person in a better position in the company's winding-up (section 225(4) IRDA). This requirement becomes a rebuttable presumption where the unfair preference was given to a person connected with the company, otherwise than by reason only of being the company's employee (section 225(5) IRDA); and
- (iii) the company was unable to pay its debts at the relevant time or becomes unable to pay its debts in consequence of the transaction (section 226(2) IRDA).

The relevant time for purposes of an unfair preference under section 225 IRDA is–

- (i) in the case of an unfair preference which is not a transaction at an undervalue and which is given to a person who is connected with the company (otherwise than by reason only of being the company's employee), within two (2) years before commencement of the judicial management or winding up; and
- (ii) in any other case of an unfair preference, within one (1) year before commencement of the judicial management or winding up (section 226(1) IRDA).

(c) extortionate credit transactions

Pursuant to section 228 IRDA, where a company is in judicial management or is being wound-up, and the company has been a party to a transaction for the provision of credit to the company which was extortionate and was entered into within three (3) years before commencement of the judicial management or winding-up, the judicial manager or liquidator may make an application to court for an order setting aside or varying the transaction, requiring repayment of any sums paid or surrender of security held for the transaction or directing accounts to be taken.

There would be a rebuttable presumption that a transaction is extortionate if, having regard to the risk accepted by the person providing the credit, the terms of the transaction require grossly exorbitant payments to be made in respect of the provision of the credit or the transaction is harsh and unconscionable or substantially unfair (section 228(3) IRDA).

(d) fraudulent trading

Pursuant to section 238(1) IRDA, if in the course of the judicial management or winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the judicial manager or liquidator may make an application to court to declare that any person who was knowingly a party to the carrying on of the business in that manner is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs.

The declaration under section 238(1) IRDA may be followed by further directions from the court to give effect to the declaration (section 238(2) IRDA).

(e) responsibility for wrongful trading

Pursuant to section 239(1) IRDA, if in the course of the judicial management or winding up of a company, it appears that the company has traded wrongfully, the judicial manager or liquidator may make an application to court to declare that any person who was a party to the company trading in that manner is personally responsible for the debts or other liabilities of the company as the court directs, if that person either knew that the company was trading wrongfully or as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

A company trades wrongfully if –

- (i) the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full; or
- (ii) the company incurs debts or other liabilities that it has no reasonable prospect of meeting in full and that results in the company becoming insolvent (section 239(12) IRDA).

The declaration under section 239(1) IRDA may be followed by further directions from the court to give effect to the declaration (section 239(3) IRDA).

(f) assessment of damages against delinquent officers

Pursuant to section 240(1) IRDA, if in the course of the judicial management or winding up of a company, it appears that any person who has taken part in the formation or promotion of the company or any past or present judicial manager, liquidator or officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the judicial manager or liquidator may apply to the court to –

- (i) examine into the conduct of such person, judicial manager, liquidator or officer; and
- (ii) compel such person, judicial manager, liquidator or officer to repay or restore the money or property or contribute such sum to the property of the company by way of compensation.

Section 240(1) applies to the receipt of any money or property by any officer of the company during the two (2) years preceding the commencement of the judicial management or winding up appearing to the court to be unfair or unjust to other members of the company (section 240(2) IRDA).

The claims stated above would add to the pool of assets of the company available for distribution to its creditors. However, the pursuit of the claims would require funds that may be lacking to the liquidator or judicial manager. Prior to the enactment of the IRDA, Singapore courts allowed third-party funding agreements for insolvent companies under appropriate circumstances (*Re Vanguard Energy Pte Ltd*¹⁰; *Trikomsel*¹¹; *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd*¹²).

The IRDA has enhanced the ability of liquidators or judicial managers to bring the claims stated in paragraphs (a) to (f) above by statutorily empowering liquidators with the authorisation of court or the committee of inspection (section 144(1)(g) IRDA) and judicial managers (section 99(4) read together with paragraph (f), First Schedule of IRDA) to enter into third party funding agreements to pursue claims against parties who had committed the wrongs stated in paragraphs (a) to (f) above against the company.

Well written answer! 8 marks.

Question 3.2 [maximum 7 marks]

Write a brief essay in which you discuss the process of commencing a voluntary judicial management application. In your answer you should also discuss how this differs from a judicial management application that is filed in court.

A voluntary judicial management application or judicial management by resolution of creditors may be made where a company considers that it is or is likely to become unable to pay its debts and there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1) IRDA (section 94(1) IRDA). On the other hand, a judicial management application to court is made where the company or any creditor of the company considers that the company is or is likely to become unable to pay its debts and there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern, or that the interests of creditors would be better served otherwise than by resorting to a winding-up (section 90 IRDA).

In a voluntary judicial management application, where the circumstances under section 94(1)(a) and (b) IRDA exists, the company may, instead of applying to the court for a judicial management order, obtain a resolution of the company's creditors for the company to be placed under the judicial management of a judicial manager (section 94(1) IRDA). On the other hand, where the circumstances in section 90(a) and (b) IRDA exists, the company, its directors or its creditors may make an application to court under section 91 IRDA for an order that the company be placed under judicial management. The court will only make a judicial management order if the court is satisfied that the company is or is likely to become unable to pay its debts and there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1) IRDA (section 91(1) IRDA).

In a voluntary judicial management application, the company must give at least seven (7) days written notice of its intention to appoint an interim judicial manager to the proposed

¹⁰ [2015] 4 SLR 597

¹¹ (HC/OS 989/2018) (unreported)

¹² [2018] 5 SLR 1337

judicial manager and any person who has appointed, or is or may be entitled to appoint, a receiver and manager of the whole or substantially the whole of the company's property under the terms of any debenture of the company (section 94(2) IRDA). The company can only appoint an interim judicial manager if all of the conditions in section 94(3) IRDA are met, including the requirement under section 94(3)(e) for the proposed interim judicial manager to lodge with the Official Receiver and Registrar of Companies, a statutory declaration of no conflict of interest, the purposes of judicial management in section 89(1) can be achieved and of consent to be appointed as interim judicial manager. In a judicial management application to court, while the court is empowered to appoint an interim judicial manager (section 92(1) IRDA), this is not a mandatory requirement.

Upon the appointment of an interim judicial manager in a voluntary judicial management application, the company must within three (3) days of the appointment, cause a written notice of the appointment to be lodged with the Official Receiver and Registrar of Companies and within seven (7) days of the lodgement, cause a notice of the appointment to be published in the Gazette and an English local daily newspaper (section 94(5) IRDA). The appointment of the interim judicial manager will end either at the expiry of thirty (30) days after the appointment (unless extended by the Official Receiver) or upon the appointment of a judicial manager or the rejection of the resolution to place the company under judicial management, whichever is earlier.

In a voluntary judicial management application, once the written notice of appointment of an interim judicial manager has been lodged under section 94(5)(a) IRDA, there will be an automatic moratorium against the winding-up of the company and except where leave of court has been obtained, the enforcement of any security over any property of the company or the commencement or continuation of any legal proceedings against the company or its property (section 95(1) IRDA). The automatic moratorium will be in place from the date of lodgement of the written notice under section 94(5)(a) IRDA until the earlier of either the date of appointment of a judicial manager, the end of the term of appointment of the interim judicial manager or the rejection by the creditors' meeting of the resolution to place the company in judicial management. The automatic moratorium will not apply if within a period of twelve (12) months immediately before the written notice under section 94(5)(a) IRDA is lodged, the company lodged an earlier written notice under section 94(5)(a) IRDA for which an automatic moratorium has already been granted. Similar provisions on automatic moratorium also apply in the case of a judicial management application to court.

In a voluntary judicial management application, within thirty (30) days of the lodgement of the statutory declaration under section 94(3)(e) IRDA, the company must convene a meeting of the creditors at a time and place convenient to the majority in value of the creditors, to consider the resolution for the company to be placed in judicial management (section 94(7) IRDA). In convening the creditors' meeting, the company must give creditors at least fourteen (14) days' notice of the meeting together with a statement showing the names of all creditors and the amounts of their claims and a full statement of the company's affairs (section 94(8)(a) IRDA). The notice must be published at least ten (10) days before the meeting in an English local daily newspaper (section 94(8)(b) IRDA).

The directors of the company must appoint at least one of the directors to attend the creditors' meeting (section 94(9) IRDA) and the appointed director together with the company secretary must attend the meeting and disclose to the meeting the company's affairs and the circumstances leading up to the proposed judicial management (section 94(10) IRDA).

The company will be placed under judicial management if a majority in number and value of the creditors present and voting at the creditors' meeting resolve to do so (section 94(11)(d) IRDA). Where the creditors' meeting passes a resolution to place the company under judicial

management, the meeting must approve, by a majority in number and value of the creditors of the company present and voting, the appointment of a person as judicial manager (section 94(11)(e) IRDA). While in a voluntary judicial management, the judicial manager is appointed by the resolution of the creditors' meeting, in a court judicial management, it is the court who appoints the judicial manager (section 91(2) IRDA).

The judicial manager for both a voluntary judicial management and a court judicial management must be a licensed insolvency practitioner (unless nominated by the Minister) who is not the auditor of the company (sections 94(12) and 91(3) IRDA). Judicial managers under both forms of judicial management are officers of the court (section 89(4) IRDA).

In a voluntary judicial management application, an interim judicial manager or a judicial manager must not be appointed if an application for a judicial management order has been made to court and that application has not been withdrawn or decided by the court, after the company has gone into liquidation or if the company is a banking corporation, a finance company, a licensed insurer or belongs to such class of companies as prescribed by the Minister (section 94(13) IRDA). While the other restrictions will also apply in the case of a judicial management application to court, the commencement of a voluntary judicial management will not prevent a judicial management application to court.

Answer could have been organised better (it was difficult to follow) but you covered the main points. 6 marks

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

PT Angostura Textiles Tbk (Angostura, and together with its subsidiaries, the Angostura Group) is an Indonesia-incorporated company listed on the Indonesia stock exchange. Angostura is a substantial market player in textile production in South East Asia and China. Its primary lines of business are:

- fibre production with assets and factories in Malaysia, Thailand and Cambodia;
- textile manufacturing with assets and factories in Indonesia, Vietnam and China; and
- garment manufacturing and distribution facilities with assets and factories in Indonesia, Vietnam and the United States.

The Angostura Group has two key Singapore incorporated subsidiaries:

- Juniperus Textiles Pte Ltd. (Juniperus) which is wholly owned by Angostura; and
- Casuarina Garments Pte Ltd (Casuarina) which is wholly owned by Juniperus.

Each entity in turn owns all, or substantially all, of the shares in the relevant entities incorporated in the local relevant overseas jurisdiction.

The Angostura Group had traditionally funded its business via bank lending, with a combination of bilateral and syndicated loan facilities advanced directly to Angostura. As at 2019, the group had raised SGD 2 billion in bank lending, all of which was guaranteed by Angostura Indonesian subsidiaries.

In late 2019, as COVID-19 started to spread around the world, the Angostura Group sought to take advantage of the situation by expanding its garment manufacturing business into

personal protective equipment. To fund this expansion, Juniperus issued SGD 200 million in retail bonds (the Juniperus SG Bonds) on the Singapore Stock Exchange (SGX) which were guaranteed by Angostura. The proceeds of the Juniperus Bonds were on-lent to Casuarina who lent them via an offshore intercompany loan to Angostura (the Casuarina Intra-Group Loan). To ensure bondholders had rights in connection with the Casuarina Intra-Group Loan, holders of the Angostura Bonds are given security over the shares of each of Juniperus and Casuarina. The Juniperus Bonds are governed by a New York law.

In late 2020, Angostura's business experienced significant supply-chain disruptions as a result of the COVID-19 pandemic. During this time, Angostura started informing some of its bank lenders that they may require waivers on certain terms in their loans and potentially further time to repay certain amounts owing. In early 2021, Angostura appointed legal and financial advisors to provide it with advice as to the best steps to take. Shortly thereafter, a trade creditor filed a PKPU petition in Indonesia against Angostura and its Indonesian subsidiaries. Further to this, Juniperus and Casuarina filed for protection, under sections 64(1) and 65(1) respectively, of the Insolvency Restructuring and Dissolution Act (Act No 40 of 2018) (the IRDA). Angostura then announced that Juniperus will launch a separate Singapore Scheme of Arrangement under section 210 of the Companies Act (Cap 50) to restructure the Juniperus Bonds after the conclusion of the Indonesian PKPU, which will largely mirror the terms in the PKPU.

The bondholders of the Juniperus Bonds are concerned the moratoria being sought will prevent them from participating in the PKPU proceedings in Indonesia and enforcing their security over the shares in Juniperus and Casuarina, respectively. They have therefore decided to object to the Singapore moratorium applications.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 6 marks]

The working group of the bondholders has asked its advisors to provide it with a written analysis covering the following critical issues for the Angostura Group. Please provide analysis on the following issues:

Question 4.1.1 (2 marks)

What must be presented to the court in order to obtain moratorium protection order under section 64(1) IRDA?

Pursuant to section 64(4) IRDA, the following must be presented to the court together with the application for a moratorium protection order under section 64(1) IRDA –

- (a) evidence of support from the company's creditors for the intended or proposed compromise or arrangement, together with an explanation of how such support would be important for the success of the intended or proposed compromise or arrangement;
- (b) in a case where the company has not proposed the compromise or arrangement to the creditors or class of creditors yet, a brief description of the intended compromise or arrangement, containing sufficient particulars to enable the court to assess whether the intended compromise or arrangement is feasible and merits consideration by the company's creditors when a statement mentioned in section 211(1)(a) of the Companies Act or section 71(3)(a) IRDA relating to the intended compromise or arrangement is placed before those creditors;

- (c) a list of every secured creditor of the company; and
- (d) a list of all unsecured creditors who are not related to the company or, if there are more than twenty (20) such unsecured creditors, a list of the twenty (20) such unsecured creditors whose claims against the company are the largest among all such unsecured creditors.

Further, as one of the conditions for making an application under section 64(1) IRDA, the company must make, or undertake to the court to make as soon as practicable –

- (a) an application under section 210(1) of the Companies Act for the court to order to be summoned a meeting of the creditors or class of creditors in relation to the proposed scheme of arrangement; or
- (b) an application under section 71(1) IRDA to approve the proposed scheme of arrangement

(section 64(2)(b) IRDA).

In addition, the Guide for the Conduct of Applications for Moratoria under Sections 64 and 65 of the Insolvency, Restructuring and Dissolution Act 2018 issued by the Supreme Court of Singapore via Registrar's Circular No. 1 of 2021 ("Guide") provides guidance on what must be presented to the court in order to obtain a moratorium protection order under section 64(1) IRDA. The Guide stipulates that the affidavit in support of an application under section 64(1) IRDA should contain certain information. The following are certain additional information that are not stated above but are stipulated in the Guide –

- (a) confirmation that the company is not excluded from the definition of "company" under section 63(3) IRDA and is entitled to apply for an order under section 64(1) IRDA;
- (b) if the company is a foreign company, the basis on which it is a "corporation liable to be wound up under this Act" mentioned in section 63(3) IRDA read together with section 246(1)(d) and section 246(3) IRDA;
- (c) whether any order has been made, or whether any resolution has been passed for the winding-up of the company;
- (d) whether the company has made an application under section 210(10) of the Companies Act;
- (e) whether the company made an earlier application under section 64(1) IRDA within the period of twelve (12) months immediately before the current application under section 64(1) IRDA;
- (f) the date the notice of the application under section 64(1) was sent to each creditor known to the company who is meant to be bound by the proposed scheme of arrangement;
- (g) where the company has proposed a scheme of arrangement to its creditors, evidence of support from the creditors on the proposed scheme and explanation of how the support would be important for the success of the proposed scheme;
- (h) where the company intends to propose a scheme of arrangement to its creditors, evidence of support from the creditors for the moratorium, an explanation on the importance of the support and a brief description of the intended scheme of

arrangement with sufficient particulars to enable the court to assess whether the intended scheme is feasible and merits consideration by creditors; and

- (i) if the company seeks a moratorium to be expressed to apply to any act of any person within the jurisdiction of the court where the act takes place outside Singapore, the basis on which such moratorium is sought.

Well written and good reference to the Guide. 2 marks.

Question 4.1.2 (2 marks)

What must be presented to the court in order to obtain moratorium protection order under section 65(1) IRDA?

The Guide for the Conduct of Applications for Moratoria under Sections 64 and 65 of the Insolvency, Restructuring and Dissolution Act 2018 issued by the Supreme Court of Singapore via Registrar's Circular No. 1 of 2021 ("Guide") provides guidance on what must be presented to the court in order to obtain a moratorium protection order under section 65(1) IRDA. The Guide stipulates that the affidavit in support of an application under section 65(1) IRDA should contain the following –

- (a) confirmation that the related company is not excluded from the definition of "company" under section 63(3) IRDA and is entitled to apply for an order under section 65(1) IRDA;
- (b) if an order has been made under section 64(1) IRDA in respect of the subject company, the date of the order and whether the order is still in force;
- (c) if an order has not been made in respect of the subject company under section 64(1) IRDA, the details of the subject company's application under section 64(1) IRDA;
- (d) whether any order has been made or resolution passed for the winding-up of the related company;
- (e) how the related company plays a necessary and integral role in the scheme of arrangement by the subject company;
- (f) how the scheme of arrangement of the subject company will be frustrated if the moratorium is not granted to the related company; and
- (g) whether the creditors of the related company will be unfairly prejudiced by the moratorium order.

In addition, the related company should also inform court of the date on which the notice of the related company's application for moratorium was sent to each creditor known to the related company who will be affected by the moratorium order.

2 marks.

Question 4.1.3 (2 marks)

Can the moratoria sought by Juniperus and Casuarina be ordered to have extra-territorial effect? If so, what acts and / or creditors will the moratoria apply to?

Yes, the moratoria sought by Juniperus and Casuarina can be ordered to have extra-territorial effect. Pursuant to sections 64(5)(b) and 65(4)(b) IRDA, a moratorium order under subsections 64(1) and 65(1) IRDA may be expressed to apply to any act of any person in Singapore or within the jurisdiction of the Singapore court, whether the act takes place in Singapore or elsewhere.

Hence, the High Court of Singapore can order the moratoria sought by Juniperus and Casuarina to have extraterritorial effect and apply to acts taking place in Singapore or elsewhere if the creditor is in Singapore or within the jurisdiction of the Singapore courts. The moratoria will therefore, if ordered by the court, apply to creditors of Juniperus and Casuarina if the creditors are either in Singapore or within the jurisdiction of the Singapore courts regardless of whether the acts of the creditors are taking place in Singapore or elsewhere.

What are the acts restrained? 1 mark.

Question 4.2 [maximum 9 marks in total]

As things transpired, Juniperus and Casuarina were granted moratorium protection for a period of three (3) months and are expected to apply for an extension to this moratorium period for an additional six (6) months upon expiry of the original three- (3) month period. The working group of bondholders intends to oppose any extension application.

The bondholders have instructed the Juniperus Bonds' trustee under the relevant indenture to be ready to enforce their security over the shares in Casuarina as soon as practicable. The Juniperus Bonds appear to be traded heavily in the market, with private equity funds looking to buy up significant stakes in order to enforce the security over shares in Casuarina.

To try and protect against this risk, Angostura also commenced local insolvency proceedings and emergency recognition proceedings in the United States.

Taking these additional facts above into consideration, answer the questions below.

Question 4.2.1 [maximum 5 marks]

What are the steps that need to be taken in order to launch a subsequent scheme of arrangement under section 210 of the Companies Act? How does the process for a scheme proposed under section 210 of the Companies Act differ from a prepack scheme proposed under section 71(1) of the IRDA?

In order to launch a scheme of arrangement under section 210 of the Companies Act, the company must first make an application to the court to order a meeting of the creditors of the company to be summoned (section 210(1) Companies Act).

A notice of the meeting must be sent to the creditors and the notice must include a statement explaining the effect of the scheme of arrangement, any material interests of the directors and the effect of the scheme of arrangement on those interests in so far as it is different from the effect on the like interests of other persons (section 211(1)(a) Companies Act).

The notice under section 211(1) Companies Act must also state the manner in which a creditor is to file a proof of debt and the period within which the proof is to be filed (section 68(1) IRDA). The chairperson appointed by the court to chair the creditors' meeting will

adjudicate every proof of debt that is filed and decide on which proofs of debt should be admitted (sections 68(5) and 68(7) IRDA).

The scheme of arrangement under section 210 of the Companies Act will be binding if more than 50% of the creditors or class of creditors present and voting at the meeting representing 75% in value of the creditors or respective class of creditors present and voting at the meeting agree to the scheme of arrangement and the scheme of arrangement is approved by order of the court (section 210(3AB) Companies Act). Once the aforementioned conditions are satisfied, the scheme of arrangement will be binding on the company and on all creditors or class of creditors of the company, as the case may be (section 210(3AB) Companies Act). The court order approving the scheme of arrangement will only be effective once lodged with the Registrar of Companies and takes effect from the date of lodgment or such earlier date as ordered by the court (section 210(5) Companies Act).

The process for a prepack scheme under section 71(1) IRDA differs from the process in a scheme of arrangement under section 210 Companies Act in that in a prepack scheme under section 71(1) IRDA, the company may make an application to court to approve the scheme even though no meeting of the creditors or class of creditors has been ordered under section 210(1) of the Companies Act or held. A scheme under section 71(1) IRDA will only be approved by the court if all of the following requirements in section 71(3) IRDA has been fulfilled –

- (a) the company has provided each creditor meant to be bound by the scheme of arrangement with a statement that explains the effect of the scheme of arrangement (in accordance with section 71(6) IRDA) and contains information concerning the company's assets and business, the manner in which the terms of the scheme will affect the rights of the creditor and such other information as is necessary to enable the creditor to make an informed decision whether to agree to the scheme;
- (b) the company has published a notice of the application under section 71(1) IRDA in the Gazette and in at least one English local daily newspaper, and has sent a copy of the notice published in the Gazette to the Registrar of Companies;
- (c) the company has sent a notice and a copy of the application under section 71(1) IRDA to each creditor meant to be bound by the scheme; and
- (d) the Court is satisfied that had a meeting of the creditors or class of creditors been summoned, the conditions in section 210(3AB)(a) and (b) of the Companies Act (insofar as they relate to the creditors or class of creditors) would have been satisfied.

Similar to a scheme of arrangement under section 210(1) of the Companies Act, the prepack scheme approved by the court under section 71(1) IRDA will be binding on the company and the creditors or class of creditors meant to be bound by the scheme (section 71(2) IRDA). The court order under section 71(1) IRDA will also only be effective once the order is lodged with the Registrar of Companies and takes effect from the date of lodgment.

Very detailed. 5 marks.

Question 4.2.2 [maximum 2 marks]

What requirements must be satisfied in order for the Angostura Group to be able to access rescue financing under the IRDA?

In order for the Angostura Group to be able to access rescue financing under the IRDA, the following requirements must be satisfied –

- (a) the company within the Angostura Group that is applying for the rescue financing must be a company within the meaning of section 63(3) IRDA, that is, a corporation that is liable to be wound-up under the IRDA, but excludes such company or class of companies as the Minister prescribed;
- (b) the financing the company proposes to access must fall within the definition of “rescue financing” under section 67(9) IRDA, that is, any financing that satisfies either or both of the following conditions –
 - (i) the financing is necessary for the survival of the company, or of the whole or any part of the undertaking of the company, as a going concern; and/or
 - (ii) the financing is necessary to achieve a more advantageous realisation of the assets of the company than on a winding up; and
- (c) where Angostura Group wants the rescue financing obtained to be given super priority, the relevant company in the Angostura Group must have made an application under section 210(1) of the Companies Act or section 64(1) IRDA. Further, the company must satisfy all other requirements under section 67 IRDA.

Sourcing for alternative financing etc? 1 mark.

Question 4.2.3 [maximum 2 marks]

Explain the key requirements in order for a Singapore court to recognise a foreign insolvency proceeding and what the effect will be if the court were to do so.

By section 252(1) IRDA, Singapore has adopted the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997 (“Model Law”), with certain modifications as set out in the Third Schedule of IRDA.

In order for a Singapore court to recognise a foreign insolvency proceeding under the Model Law, the following requirements under Article 17 of the Model Law must be satisfied –

- (a) the foreign insolvency proceeding must be a foreign proceeding within the meaning of Article 2(h) of the Model Law. Article 2(h) defines a “foreign proceeding” as a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
- (b) the person or body applying for the recognition must be a foreign representative within the meaning of Article 2(i) of the Model Law. Article 2(i) of the Model Law defines “foreign representative” as a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s property or affairs or to act as a representative of the foreign proceeding;
- (c) the application meets the requirements in Article 15(2) of the Model Law (which requires the application for recognition to be accompanied by certain supporting documents) and Article 15(3) of the Model Law (which requires the application for recognition to be accompanied by a statement identifying all foreign proceedings and

proceedings under Singapore insolvency law in respect of the debtor that are known to the foreign representative); and

- (d) the application for recognition must be submitted to the High Court of Singapore.

The effects of recognition of a foreign insolvency proceeding by the Singapore court will depend on whether the proceeding is recognised as a foreign main proceeding (a foreign proceeding taking place in the State where the debtor has its centre of main interests) or a foreign non-main proceeding (a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment).

Where the foreign insolvency proceeding is recognised as a foreign main proceeding, there will be a mandatory moratorium on legal actions against the debtor, save for those expressly excluded under Article 20 of the Model Law (Article 20(1) Model Law). The Singapore court also has the discretion to grant certain discretionary relief under Article 21 of the Model Law.

If the foreign insolvency proceeding is recognised as a foreign non-main proceeding, the Singapore court has the discretion to grant the discretionary relief as set out in Article 21 of the Model Law.

2 marks.

*** End of Assessment ***

47 out of 50