



**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] 9 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 Court of Appeal in Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 have clarified the following three issues:

- a- who should control the conduct of an appeal against a winding up order and at whose cost
- b- which test applies for the purpose of determining insolvency under s 254(2)(c) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act")

- c- whether a company may still be deemed to be unable to pay its debts under s 254(2)(a) of the Companies Act if it pays part of the statutory demand such that the remaining debt falls below the prescribed minimum quantum needed to serve the demand.

The significant issues clarified in this case is issue (b) as stated above. When a company “unable to pay its debt” it will be categories as Insolvent and this is the most common ground to wind up a company. A company will be deemed to be unable pay its debt if:

- A) a creditor to whom the company is indebted in a sum exceeding SGD 15,000 then due has served on the company a demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum to, or to secure or compound to the reasonable satisfaction of the creditor
- B) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;
- C) it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court must take into account the contingent and prospective liabilities of the company

In *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* case the court has clarified that the cash flow test should be the sole test applicable under section 124(2)(c). 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.

It also clarifies that the single test intended by s 254(2)(c) of the Companies Act is not the balance sheet test. 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 case law also quoted that “ For example, a company may have total liabilities that exceed its total assets by ten times, but these liabilities may only materialise in a hundred years, which means that the company will be able to pay its debts for the next hundred years (if nothing changes). Conversely, a company may have total assets which are ten times the total liabilities but these assets may all be illiquid and only realisable in a hundred years, whereas the liabilities may all be current. This means that the company may not be able to pay its debts for the next hundred years. As can be seen from these two contrasting examples, it is not the total asset to total liability ratio which determines a company’s present ability to pay its debt. “

The court also set out a non-exhaustive list of factors which should be considered under the cash flow test:

1. (a) the quantum of all debts which are due or will be due in the reasonably near future;
2. (b) whether payment is being demanded or is likely to be demanded for those debts;
3. (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;
4. (d) the length of time that has passed since the commencement of the winding up proceedings;
5. (e) the value of the company’s current assets and assets that will be realisable in the reasonably near future;
6. (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;

7. (g) any other income or payment which the company may receive in the reasonably near future; and
8. (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.

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.

- (a) The cross-class cram down.

Inspired by the US Chapter 11 reorganisation procedure, the new restructuring framework in Singapore allows debtors to impose a reorganisation plan on dissenting classes of creditors. At the same time, the new legislation has provided creditors with several safeguards against the opportunistic use of this provision by the debtor. Therefore, the system is expected to facilitate a debt restructuring without undermining the interests of creditors.

Not new

- (b) New licensing and regulatory regime for all insolvency practitioners

Prior to the IRDA, there was no dedicated regime for the licensing and regulation of insolvency practitioners, such as accountants appointed to act as liquidators, judicial managers or receivers. Section 50 of the IRDA now expressly provides that solicitors can act as liquidators, judicial managers or receivers as well, a move which is in line with the practice in other jurisdictions

- (c) Restrictions on *ipso facto* clauses.

Prior to the IRDA, there were no statutory restrictions on *ipso facto* clauses. This left much to be desired as struggling companies seeking to restructure their liabilities would be put in an unenviable position of having their counterparties terminate contracts, thus potentially losing valuable assets and incurring liabilities. To address this situation, Section 440(1) of the IRDA restricts parties from terminating contracts due to the sole reason or fact that the company has commenced restructuring efforts.

The practical effect of Section 440(1) remains to be seen as Section 440(1) does not prevent a party from terminating the contract by relying on other triggering events contained in the *ipso facto* clause, such as the failure to meet a performance deadline.

- (D) New wrongful trading provision

The IRDA has largely kept the provision on fraudulent trading but has also introduced a new concept of "wrongful trading" which replaces the old concept of "insolvent trading". Under the new regime, a company "trades wrongfully" if it incurs debts or

other liabilities, when insolvent (or becomes insolvent as a result of incurring such debts or other liabilities), without reasonable prospect of meeting them in full (Section 239(12)) of the IRDA).

The "wrongful trading" regime also abolishes the pre-requisite (present under the insolvent trading regime) of having to establish criminal liability first before the director could be made personally liable for the debt. Section 239(1) of the IRDA simply provides that in the course of the judicial management or winding up of a company or in any proceedings against the company, the Singapore Court may, on the application of a judicial manager, liquidator or creditor or contributory of the company, declare that any person who was a party to the company trading wrongfully is personally responsible for any or all of the debts or other liabilities of the company if that person: (a) knew the company was trading wrongfully; or (b) as an officer of the company ought, in all the circumstances, to have known that the company was trading wrongfully.

The IRDA also introduces a new statutory defence (Section 239(2)) which allows the Singapore Court to relieve the person declared responsible from the personal liability if: (a) the person acted honestly; and (b) having regard to all the circumstances of the case, the person ought fairly to be relieved from personal liability.

**1.5 mark**

### **Question 2.3 [maximum 4 marks]**

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

The alternative to formal bankruptcy are Voluntary Arrangements and Debt Repayment Scheme.

The Voluntary Arrangements is a negotiated formal debt settlement under Part 13 of the Insolvency, Restructuring and Dissolution Act 208. The debtor discloses his assets and liabilities, and makes a proposal on how he intends to settle his debts with various creditors. If the proposal is accepted by the creditors and implemented successfully, it will benefit both the debtor and his creditors.

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

#### **Nominees**

The Voluntary Arrangements is overseen by a nominee appointed by the as part of any proposal for a Voluntary Arrangement. The nominee must be a licensed insolvency practitioner.

#### **Interim order of Court**

The insolvent debtor may make an application to court if they intends to make such a proposal to its creditors, for an interim moratorium order pursuant to which:



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

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

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

1. (i) no bankruptcy application may be made or proceeded with against the firm or, except with the leave of the court, any partner therein; and
2. (ii) no other proceedings, execution or other legal process may be commenced or continued against the firm or its property or against the person or property of any partner in the firm, without the leave of the court.<sup>40</sup>

The interim order is in effect for 42 days from the making of the order.

### **Nominee's report on debtor's proposal**

The debtor must submit to the nominee the following document to enable the nominee prepare the report to the court pursuant to section 280:

- a) a document setting out the terms of the voluntary arrangement which the debtor is proposing; and
- b) a statement of the debtor's affairs containing
  - where the debtor is an individual, such particulars of his or her assets, creditors, debts and other liabilities as may be prescribed
  - where the debtor is a firm, such particulars of the assets, creditors, debts and other liabilities of the firm and of each partner in the firm, as may be prescribed; and
  - such other information as may be prescribed

The nominee upon pursuing the documents provided by the debtors, must submit a report to the Court before the expiry of the 42 days stating whether in his opinion, a meeting of the debtor's creditors should be summoned and if so, the date, time and place which the meeting should take place.

Once the court satisfied of the nominee's report, the court shall direct the expended period of the interim order which the interim order has effect for the purposes of enabling the debtor's proposal to be considered by the debtor's creditors, and the nominee to report to the Court the results of the meeting of the debtor's creditors, in accordance with sections 281 to 283.

### **Summoning of creditors' meeting**

The nominees must summoned the debtor's creditors meeting in accordance with the nominee's report to the court.

### **Decision of creditors meeting**

The proposal at the creditors meeting shall be approved by a special resolution by the creditors at the creditors meeting. The proposal shall not bind the secured creditors without the secured creditors consent.

The creditors must not approve any proposal which affects the right of a secured creditor of the debtor to enforce the secured creditor's security, except with the concurrence of the secured creditor

The creditors also must not approve any proposal or any modification to the proposal which affects the right of a secured creditor of the debtor to enforce the secured creditor's security, except with the concurrence of the secured

The creditors' meeting must not, without the concurrence of the preferential creditor in question, approve any proposal or any modification of the proposal under which —

- a) any debt of the debtor, not being a preferential debt, is to be paid in priority to any preferential debt of the debtor;
- b) the priority of payment of any preferential debt of the debtor, in relation to any other preferential debt of the debtor, is not in accordance with section 352

### **Report of decisions to Court**

The result of meeting must be reported to the court and where the proposal is rejected at the meeting of creditors, the court may discharge the interim order.

### **Effect of the approval**

The proposed Voluntary Arrangement, if approved by the requisite majority, will be bind on all creditors who have had notice of and were entitled to vote at the meeting and takes effect as if made by the debtor at the meeting.

### **Review of decision of creditors meeting**

Any debtor, nominee or the creditors entitled to vote at the creditors meeting may apply to court to review the decision of the meeting if the the voluntary arrangement approved by the meeting unfairly prejudices the interests of the debtor or any of the debtor's creditors; or there has been some material irregularity at or in relation to the meeting

### **Implementation and supervision of approved voluntary arrangement**

The nominee must supervise the implementation of the voluntary arrangement once the voluntary arrangement is approved by the creditors meeting.

### **Consequence of failure by debtor to comply with voluntary arrangement**

If, however, the debtor fails to comply with any of the obligations under the voluntary arrangement, the nominee or any creditor bound by the Voluntary Arrangement may make a bankruptcy application against the debtor in accordance with Part 16.

**Detailed. Well done. 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.

## 1. Impeachable transactions

The liquidator or Judicial manager can set aside the insolvent debtor's pre-insolvency transactions by applying to court to claw back assets previously transferred in transactions where:

- (a) an unfair or undue preference was given; or
- (b) the transaction was conducted at an undervalue.

a) the liquidator or judicial manager must show the following four elements in order to claim unfair preference transaction:

- the preferred party (the beneficiary of the transaction) is a creditor or guarantor for any of the company's debts or liabilities;
- the company was insolvent (or became insolvent as a consequence of the transaction) at the time of giving the preference;
- the company has done anything which puts the preferred party in a better position than the preferred party would otherwise have been had the transaction not been entered in the event of the company's liquidation or judicial management; and
- the company was influenced in deciding to enter the transaction by a desire to prefer the preferred party, noting that the company is presumed to have been influenced by a desire to prefer if the preferred party is an associate of the company.

b) the liquidator or judicial manager must show the following four elements in order to claim for a transaction at an undervalue

- the company makes a gift to the recipient or the company enters into a transaction where the value of consideration received is significantly less than the value of the consideration provided; and
- the company was or became insolvent as a result of that transaction.

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

As for the undervalue the relevant time period is 3 years from the date of the winding-up application or the judicial management application

## 2. Disclaimer of onerous contract

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

## 3. New wrongful trading provision

Under the old Act, an officer of the company would only be personally liable to pay the whole or part of the debt incurred by the company, if there was a criminal conviction under the Companies Act. Consequently, the earlier insolvent trading provisions were seldom relied on

to hold company officers accountable. These new provisions in IRDA herald a shift towards greater accountability, not just of directors and officers of the company.

The IRDA has largely kept the provision on fraudulent trading but has also introduced a new concept of "wrongful trading" which replaces the old concept of "insolvent trading". Under the new regime, a company "trades wrongfully" if it incurs debts or other liabilities, when insolvent (or becomes insolvent as a result of incurring such debts or other liabilities), without reasonable prospect of meeting them in full (Section 239(12)) of the IRDA).

The "wrongful trading" regime also abolishes the pre-requisite (present under the insolvent trading regime) of having to establish criminal liability first before the director could be made personally liable for the debt. The upshot of this is that it may be easier to impose civil liability on those who are party to wrongful trading. Prior to the IRDA, it would have been necessary to satisfy the higher criminal standard of proof (of proving beyond reasonable doubt) before civil liability could be found, since criminal liability was a prerequisite. Now, under the IRDA, the only applicable standard of proof would be the civil standard of proof (of proving on a balance of probabilities) since there is no longer a prerequisite for criminal liability.

Section 239(1) of the IRDA simply provides that in the course of the judicial management or winding up of a company or in any proceedings against the company, the Singapore Court may, on the application of a judicial manager, liquidator or creditor or contributory of the company, declare that any person who was a party to the company trading wrongfully is personally responsible for any or all of the debts or other liabilities of the company if that person: (a) knew the company was trading wrongfully; or (b) as an officer of the company ought, in all the circumstances, to have known that the company was trading wrongfully. The liability can apply to any person who was a party to the wrongful trading, regardless of whether they are a director and/or officer of the company. What this means is that liability could therefore extend to other persons involved in managing a distressed company and entering into contracts on its behalf.

The IRDA also introduces a new statutory defence (Section 239(2)) which allows the Singapore Court to relieve the person declared responsible from the personal liability if: (a) the person acted honestly; and (b) having regard to all the circumstances of the case, the person ought fairly to be relieved from personal liability.

This provision is adopted from English insolvency legislation and does not require criminal liability before taking effect.

#### **4. Avoidance of floating charge**

Under Section 330 of the Companies Act, a floating charge which was created on a company's property within 6 months of the commencement of the company's winding up would generally be considered invalid. Now, under Section 229 of the IRDA, the 6 month period has been extended and a floating charge will generally be invalid if:

- a. Such a floating charge was created in favour of a person who is connected with the company, within the period of 2 years ending on the commencement winding up, as the case may be;
- b. Such a floating charge was created in favour of any other person, within the period of 1 year ending on the commencement of the winding up; or

- c. Such a floating charge was created within the period starting on the commencement of the judicial management of the company and ending on the date the company enters judicial management.

How about third party funding? Detailed response nonetheless. Good effort. 6 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 company can be put in Judicial Management via 2 method;

1. Application to Court; or
2. Creditors resolution

Appointment of judicial manager via a creditors' resolution is also known as voluntary judicial management. Section 94(1) of the IRDA introduced this new voluntary process for initiating judicial management without having to first apply to the Court. The company may obtain a resolution of the company's creditors for the company to be placed under judicial management instead of applying to the court if:

1. the company is, or is likely to become, unable to pay its debts;
2. (b) there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1); and
3. (c) a resolution of its creditors is obtained.

The process by which a company may enter judicial management without a court order is set out in the IRDA under section 94, the key steps of which include the following:

1. The company must give at least seven days' notice of its intention to propose to be placed under judicial management to its proposed interim judicial manager and a to 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 debentures of the company secured by a floating charge or by a floating charge and one or more fixed charge.
2. The company may appoint an interim judicial manager only if all the following conditions are met:
  - The members of the company resolve to appoint the interim judicial manager or where so authorised by the constitution of the company by resolution of its board directors.
  - The above seven days notice has expired
  - The interim judicial manager is appointed no later than 21 days from the date of the notice.
  - The interim judicial manager and holder of floating charge given to whom the 7 days notice was served has consented in writing to the appointment of the interim judicial manager
  - the proposed interim judicial manager has lodged, with the Official Receiver and the Registrar of Companies, a statutory declaration by the proposed interim judicial manager stating that —

(i) the proposed interim judicial manager is not in a position of conflict of interest;

(ii) in the view of the proposed interim judicial manager, one or more purposes of judicial management mentioned in section 89(1) can be achieved; and

(iii) the proposed interim judicial manager consents to be appointed as interim judicial manager;

- The company's directors have lodged with the Registrar of Companies a statutory declaration stating that —

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

(ii) the company will summon a meeting of the company's creditors to be held on a date not later than 30 days after the date of lodgment of the statutory declaration mentioned in paragraph (e); and

(iii) the directors believe that one or more of the purposes of judicial management mentioned in section 89(1) is likely to be achieved

3. Upon the appointment of the interim judicial manager under subsection (3), the company must —

(a) within 3 days after the appointment of the interim judicial manager, cause a written notice of the appointment to be lodged in the prescribed form with the Official Receiver and the Registrar of Companies; and

(b) within 7 days after the lodgment of the notice under paragraph (a), cause a notice of the appointment to be published in the Gazette and in an English local daily newspaper.

4. After the lodgment of the statutory declaration mentioned in subsection 94(3)(e), the company must convene a meeting of the creditors of the company to be held not later than 30 days after the date of lodgment of the statutory declaration, at a time and place convenient to the majority in value of the creditors, to consider a resolution for the company to be placed under judicial management.

The company must, in convening the above meeting —

(a) give to the creditors at least 14 days' written notice of the meeting, together with —

(i) a statement showing the names of all creditors and the amounts of their claims; and

(ii) a full statement of the company's affairs showing in respect of the company's assets or property the method and manner in which the valuation of the assets or property was arrived at; and

(b) cause notice of the meeting of the creditors to be published at least 10 days before the date of the meeting in an English local daily newspaper.

The directors of the company must appoint at least one of their number to attend the meeting above. Each director appointed to attend the meeting, and the secretary of the company, must attend the meeting and disclose to the meeting the company's affairs and the circumstances leading up to the proposed judicial management.

5. At the meeting of creditors—

(a) the creditors may appoint one of their number, the interim judicial manager, or any director appointed under subsection (9), to be chairperson of the meeting (called in this section the chairperson);

(b) the chairperson must determine whether the meeting is being held at a time and place convenient to the majority in value of the creditors, and the chairperson's decision is final;

(c) if the chairperson decides that the meeting is not being held at a time and place convenient to that majority, the meeting lapses and a further meeting must be summoned by the company as soon as is practicable;

(d) the company is placed under the judicial management of a judicial manager if a majority in number and value of the creditors present and voting resolve to do so; and

(e) where the meeting passes a resolution to place the company under the judicial management of a judicial manager, 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.

6. If the requisite majority of creditors resolve to place the company under judicial management, it will enter judicial management. If the requisite majority is not obtained, the process ends

### **Different between Voluntary Judicial Management and Court appointed Judicial Management**

1. Commencement of Judicial Management

- judicial management commenced by creditors' resolution: judicial management is commenced through a creditors' resolution by a majority in value (of the total amount of the creditors' claims) and in number of creditors present and voting
- judicial management commenced by court order: can be commenced by a single creditor

2. Appointment of Interim Judicial Manager

- **judicial management commenced by creditors' resolution:** an interim judicial manager must be appointed before the creditors meet to vote on the resolution for a formal judicial manager.
- **judicial management commenced by court order:** Not compulsory to appoint an interim judicial manager

3. Interim Moratorium/automatic moratorium period is provided to the company before the formal judicial management begins which restrain certain action being taken against the company.

These actions include no commencing or continuing legal proceeding, no resolution may be passed, for the winding up of the company, no enforcement of charges over the company's assets. The interim moratorium will operator for the following period:

- **judicial management commenced by creditors' resolution:** starting once a written notice of appointment for an interim judicial manager has been lodged and ending when either a formal judicial manager has been appointed, the interim judicial manager's term has ended or when the creditors reject the resolution for judicial management.
- **Judicial management commenced by court order:** from the making of the application to the time when the court makes its decision on whether to grant the order.

In the case of judicial management by court order, any creditor of the company can also apply to court whilst the application is still pending for an order to restrain the company from disposing of its property or altering shareholdings or shareholder rights

4. Result of creditors meeting after the company placed in Judicial Management.
  - judicial management commenced by creditors' resolution: the result of the meeting is not required to be filed in the court
  - Judicial management commenced by court order: the result should be recorded in court.

**Impressive answer. 7 marks. Well done!**

#### **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(1) Where a company proposes, or intends to propose, a compromise or an arrangement between the company and its creditors, the court may grant the following order:

- (a) an order restraining the passing of a resolution for the winding up of the

- company;
- (b) an order restraining the appointment of a receiver or manager over any property or undertaking of the company;
  - (c) an order restraining the commencement or continuation of any proceedings (other than proceedings under section 210 or 212 of the Companies Act, or this section or section 66, 69 or 70) against the company, except with the leave of the Court and subject to such terms as the Court imposes;
  - (d) an order restraining the commencement, continuation or levying of any execution, distress or other legal process against any property of the company, except with the leave of the Court and subject to such terms as the Court imposes;
  - (e) an order restraining the taking of any step to enforce any security over any property of the company, or to repossess any goods held by the company under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, except with the leave of the Court and subject to such terms as the Court imposes;
  - (f) an order restraining the enforcement of any right of re-entry or forfeiture under any lease in respect of any premises occupied by the company (including any enforcement pursuant to section 18 or 18A of the Conveyancing and Law of Property Act (Cap. 61)), except with the leave of the Court and subject to such terms as the Court imposes.

The following must be presented to the court in order to obtain 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) relating to the intended compromise or arrangement is placed before those creditors;
- (c) a list of every secured creditor of the company;
- (d) a list of all unsecured creditors who are not related to the company or, if there are more than 20 such unsecured creditors, a list of the 20 such unsecured creditors whose claims against the company are the largest among all such unsecured creditors.

**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?

In order to obtain moratorium protection order under section 65(1) IRDA the applicant must present to the court that:

- (a) no order has been made and no resolution has been passed for the winding up of the related company;
- (b) the order under section 64(1) made in relation to the subject company is in force;
- (c) the related company plays a necessary and integral role in the compromise or arrangement relied on by the subject company to make the application for the order under section 64(1);
- (d) the compromise or arrangement mentioned in paragraph (c) will be frustrated if one or more of the actions that may be restrained by an order under subsection (1) are taken against the related company;
- (e) the Court is satisfied that the creditors of the related company will not be unfairly prejudiced by the making of an order under subsection (1)

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 Article 4 explained the competent court. The functions mentioned in this Article relating to recognition of foreign proceedings and cooperation with foreign courts are to be performed by the High Court in Singapore. The court has jurisdiction in relation to the function mentioned in the paragraph if

- A) The debtor
  - 1. Been carrying on business within the meaning of section 366 of the Company act in Singapore or
  - 2. As property situated in Singapore
- B) The court considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested

Not correct. Explain in personam jurisdiction over certain parties and what acts are enjoined.  
0 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?

**The following steps are to be taken to apply for scheme of arrangement under section 210 of the Companies Act:**

### **1. Apply to Court for a scheme**

When applying for a scheme, the applicant has to unreservedly disclose all material information to the court. This is to assist the court as it decides how the creditors' meeting would be conducted.

Such material information includes any issues relating to a possible need to hold separate meetings for different classes of creditors. For example, where certain creditors have such different rights and interests from others that it will be inappropriate for them to consult each other on whether to vote for or against the proposed scheme.

### **2. Notice of Meeting and (if needed) appointment of scheme manager**

If the court approves the creditors' meeting, the company will send notice(s) summoning the meeting, as well as statement(s) explaining the effects of the proposed scheme to all creditors. A scheme manager may also need to be appointed by the company or court to administer and manage the scheme or facilitate negotiations.

Upon receiving these documents, prospective scheme creditors can submit their proofs of debt (together with any supporting documents) to the chairman of the creditors' meeting. The chairman will then decide which debts to admit or reject.

The chairman's list of approved creditors and the corresponding amounts of their admitted claims will be posted at the meeting venue before the meeting.

### **3. Approval via creditors' voting**

During the meeting, the scheme creditors will cast their votes. As mentioned earlier, scheme creditors may be classified differently for voting purposes if they have differing interests.

This classification is aimed at protecting minority creditors whose rights may be crammed down upon (i.e. forced into being bound by the scheme, also known as cross-class cram down) should they be outvoted.

At the same time however, the court has to ensure that not too many classes of creditors are created, or this could possibly lead to minority creditors being able to veto the scheme for no good reason.

After voting, the chairman will tabulate the votes and announce the results. If at least 50% of the creditors or class of creditors (present and voting) holding at least 75% in value of debt claims agree to the proposed scheme, the court will then decide whether to approve it.

### **4. Sanction by the court**

For the court to approve the scheme, it must be satisfied that:

- All statutory requirements for the scheme have been complied with;

- The creditors present at the meeting were fairly representative of the class of creditors;
- The statutory majority did not coerce the minority at the meeting in order to promote interests detrimental to them; and
- The scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in his interest, would reasonably approve.

Where necessary, the court has the power to call for a new creditors' meeting and order a re-vote before it decides whether or not to approve the scheme.

The court may call for a re-vote where, for example, there are objections to the approval process or terms of the scheme, but the court does not want to restart the entire scheme process and incur additional costs.

The court also has the power to approve a scheme, notwithstanding objections from dissenting classes of creditors, if:

- A majority in number of creditors, who were present at the meeting and are to be bound by the scheme, voted in favour of it;
- These creditors represented 75% in value of the debt claims; and
- The court is satisfied that the scheme does not discriminate unfairly between 2 or more classes of creditors, and is fair and equitable to each dissenting class.

Once the court has approved of the proposed scheme, a copy of the court's order must be lodged with the Accounting and Corporate Regulatory Authority (ACRA). The scheme will then be binding on all creditors.

Under the Insolvency, Restructuring and Dissolution Act 2018 (IRDA), there is also a faster and less costly method of implementing a scheme of arrangement.

A pre-pack scheme of arrangement allows for a court to sanction a scheme of arrangement even though no meeting of creditors has been ordered by the court. This means that instead of making two applications to the court (i.e., once for the court to hold a creditors' meeting and another for the court to sanction the scheme), the company will only need to make one application to the court (i.e., once for the court to sanction the scheme). This is also a faster and less costly method of implementing a scheme of arrangement.

However, the court will only sanction the scheme of arrangement if

(1) the company has provided the creditors that are meant to be bound by the arrangement with the relevant information necessary for the creditors to make an informed decision (e.g., information about the company's property, assets and business; how the scheme of arrangement will affect the rights of the creditors; and any material interests of the directors in the scheme);

(2) the notice of the company's application to the court has been published to the public and sent to each creditor meant to be bound by the scheme; and

(3) the court is satisfied that had a meeting of creditors been summoned, the company would have obtained the requisite level of support from its creditors as would be required in

a normal scheme of arrangement (i.e., a majority in number representing three-quarters in value of the creditors or class of creditors).

To maintain some degree of protection of the creditors, the cram-down provision that is available under an ordinary scheme of arrangement is not available in a pre-pack scheme of arrangement

**Detailed. Well done. 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 Angostura Group to be able to access rescue financing under the IRDA it must be able to satisfies either or both of the following conditions:

- (a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;
- (b) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company.

**What other requirements? 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.

Article 17 set out the key requirement in order for Singapore court to recognise a foreign insolvency proceeding

- The foreign insolvency proceeding order is made by a court of competent jurisdiction
- That court have jurisdiction on the basis of:
  - . The debtor's domicile or residence; or
  - a. Submission by the debtor to the jurisdiction of the court
- The foreign insolvency proceeding order must be final and conclusive; and
- No defence to recognise apply

The foreign proceeding must be recognised —

- (a) as a foreign main proceeding if it is taking place in the State where the debtor has its centre of main interests; or
- (b) as a foreign non-main proceeding, if the debtor has an establishment within the meaning of Article 2(d) in the foreign State.

**Article 20 set out the effects of recognition of a foreign main proceeding**

1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this Article —

- (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities is stayed;

- (b) execution against the debtor's property is stayed; and
- (c) the right to transfer, encumber or otherwise dispose of any property of the debtor is suspended.

2. The stay and suspension mentioned in paragraph 1 of this Article are —

- (a) the same in scope and effect as if the debtor had been made the subject of a winding up order under this Act; and
- (b) subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore in such a case,

and the provisions of paragraph 1 of this Article are to be interpreted accordingly.

3. Without prejudice to paragraph 2 of this Article, the stay and suspension mentioned in paragraph 1 of this Article do not affect any right —

- (a) to take any steps to enforce security over the debtor's property;
- (b) to take any steps to repossess goods in the debtor's possession under a hire-purchase agreement (as defined in section 88(1) of this Act);
- (c) exercisable under or by virtue of or in connection with any written law mentioned in Article 1(3)(a) to (i); or
- (d) of a creditor to set off its claim against a claim of the debtor,

being a right which would have been exercisable if the debtor had been made the subject of a winding up order under this Act.

4. Paragraph 1(a) of this Article does not affect the right to —

- (a) commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor; or
- (b) commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature, being an action or proceedings brought in the exercise of those functions.

5. Paragraph 1 of this Article does not affect the right to request or otherwise initiate the commencement of a proceeding under Singapore insolvency law or the right to file claims in such a proceeding.

6. In addition to and without prejudice to any powers of the Court under or by virtue of paragraph 2 of this Article, the Court may, on the application of the foreign representative or a person affected by the stay and suspension mentioned in paragraph 1 of this Article, or of its own motion, modify or terminate such stay and suspension or any part of it, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

**2 marks**

**\* End of Assessment \***

**43.5 out of 50**