



## **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]

References:

INSOL International, 2021, p.32

Allen & Gledhill. 2021. *Singapore Court of Appeal clarifies test for inability to pay debts in winding up proceedings*. [online] Available at: <<https://www.allenandgledhill.com/sg/publication/articles/18850/court-of-appeal-clarifies-test-for-inability-to-pay-debts-in-winding-up-proceedings>>.

Tan, M. and Han, K., 2021. *Singapore Court of Appeal holds that companies are now to be adjudged insolvent using only the cash flow test* | *Center for Commercial Law in Asia*. [online] Ccla.smu.edu.sg. Available at:

<<https://ccla.smu.edu.sg/sagri/blog/2021/06/17/singapore-court-appeal-holds-companies-are-now-be-adjudged-insolvent-using#:~:text=The%20Court%20held%20that%20the,and%20when%20they%20fall%20due>>.

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?

A creditor is “prima facie” entitled to wind up a company when it is deemed to be unable to pay its debts.

In the *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] SGCA 60 case, the Singapore court clarified that, the sole application to determine whether a company is unable to pay its debts under section 125(2) (c) of the IRDA or section 254(2)(c) of the company’s act should be the “cash flow test”.

The court has also given guidance on issues relating to the statutory demands under the section of 254(2)(a) of the company’s act (now 125(2)(c) of the IRDA) including partial payments on statutory demands and also on the control of the conduct of an appeal against a winding up order and who should bear the costs.

The courts in considering the “cash flow test” will take into account, if the company’s assets “were realizable within a timeframe that would allow each of the debts to be paid as and when it became payable”, and if such a liquidity issues “can be cured in the reasonably near future”. This includes debts which may not be due or have been demanded.

The list of factors given by the court, to consider the “cash flow test” include:

- a) the quantum of all debts which are due or will be due in the reasonably near future;
- b) whether payment is being demanded or is likely to be demanded for those debts;
- c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;
- d) the length of time that has passed since the commencement of the winding up proceedings;
- e) the value of the company’s current assets and assets that will be realisable in the reasonably near future;
- f) the state of the company’s business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;
- 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.

The court of appeal agreed that the cash flow test is the sole applicable test ,for three main reasons.

1. The wordings of the provision do not envisage two or more tests to be applied but only a single test, that is, whether “it is proved to the satisfaction of the court that the companies unable to pay its debts”. The Parliament if it intended to have two tests, it would have specified so. Section 100(4) of the bankruptcy act specifies clearly for two tests.
2. This case for single test is supported by caselaw in the UK, with respect to section 518 (e) of the companies act 1985 similar to section 254(2)(c) of the Singapore act where

in the UK courts have interpreted the requirement of only a single test of commercial Insolvency.

3. The test included under the section 254(2)(c) is not the balance sheet test as the balance sheet test compares the total assets of the company with the total liabilities. This is not a good indicator of the company's current ability to pay its debts. The balance sheet can only give an idea of the total quantum of debts which would be due and the total quantum of assets which can be realized in the future

The court of appeal also held that:

The court allowed the director of the appellant to continue the conduct of the appeal, and that a company has a right to appeal a winding up order regardless of whether a stay order is granted.

Directors to bear costs of appeal against winding up order:

The court opined that shareholder and/or director cannot deplete the company's funds in pursuing an unmeritorious appeal.

The court ruled that the directors / shareholders controlling the conduct of the appeal should pay any costs incurred from their own pockets. However, if the appeal is successful, they can claim it from the company's funds. They should be expected to be personally responsible for the payment of any party or party costs in favour of the respondents, if the appeal fails.

Company no longer deemed insolvent under section 254(2)(a) if it makes partial payment within the prescribed three-week period such that the outstanding debt falls below \$10,000:

The court expressed its view in orbiter, that a company which makes a partial payment of debt demanded, in a statutory demand, within the three weeks stipulated three-week period such that the remaining amount payable falls under \$10,000, it should not be deemed to be unable to pay his debts.

The term "to the reasonable satisfaction of the creditor" applied to "secure or compound for it" only and not to "pay the sum".

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.

References:

INSOL International, 2021, pp.36, 44, 53, 62-63

Allen & Gledhill. 2020. *New Insolvency, Restructuring and Dissolution Act 2018 effective from 30 July 2020*. [online] Available at: <<https://www.allenandgledhill.com/sg/publication/articles/16678/new-insolvency-restructuring-and-dissolution-act-2018-effective-from-30-july-2020>>.

McConnell, C., Ho, J. and Quake, W., 2020. *Ipsa facto clauses under the Insolvency, Restructuring and Dissolution Act | White & Case LLP*. [online] Whitecase.com. Available at: <<https://www.whitecase.com/publications/alert/ipsa-facto-clauses-under-insolvency-restructuring-and-dissolution-act>>.

*Overview of Singapore's New Restructuring Framework*. n.d.1st ed. [ebook] REDD Intelligence. Available at:

<<https://www.wongpartnership.com/upload/medias/KnowledgeInsight/document/8821/2019OverviewofSGNewRestructuringFramework.pdf>>.

Pillai, S. and Eio, S., 2020. *Wrongful trading under the Insolvency, Restructuring and Dissolution Act 2018*. [online] CNPLaw LLP. Available at: <<https://www.cnplaw.com/wrongful-trading-under-the-insolvency-restructuring-and-dissolution-act-2018-cnpupdate-sept2020>>.

Seah, M., 2020. *The Insolvency, Restructuring and Dissolution Act 2018 – A New Chapter in Singapore's Insolvency Laws*. [online] Dentons.rodyk.com. Available at: <<https://dentons.rodyk.com/en/insights/alerts/2020/august/21/the-insolvency-restructuring-and-dissolution-act-2018-a-new-chapter-in-singapores-insolvency-laws>>.

SingaporeLegalAdvice.com. 2022. *Schemes of Arrangement: How They Work and How to Apply* - SingaporeLegalAdvice.com. [online] Available at: <<https://singaporelegaladvice.com/law-articles/scheme-of-arrangement>>.

Sso.agc.gov.sg. 2018. *Insolvency, Restructuring and Dissolution Act 2018 - Singapore Statutes Online*. [online] Available at: <<https://sso.agc.gov.sg/Acts-Supp/40-2018/?ProvIds=pr65-,pr71-,pr239-,pr440->>>.

Four new features in the IRDA are as below:

- A. The cross-class cram down **No**
- B. Restrictions on *ipso facto* clauses
- C. Pre-packaged scheme of arrangement **No**
- D. New wrongful trading provision

**1 mark**

A. The cross-class cram down: Section 70 of IRDA.

This is 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. With this new development, a scheme of arrangement under Singapore law no longer requires the approval of all classes of creditors. The plan can be imposed on all classes notwithstanding classes that comprise a majority of dissenting creditors.

*Majority requirement* 70(3)(a) and (b) IRDA

Sections 70(3)(a) and (b) IRDA introduces a majority requirement. For the court to exercise its powers of cramdown on dissenting classes, more than 50% of the total number of creditors who were present and voting must have agreed to the plan and such majority in number must represent at least 75% in value of total claims.

*Non-discrimination rule* Section 70(3)(c) IRDA.

The plan cannot discriminate unfairly between two or more classes of creditors.

*Fair and equitable* s 70(3)(c) IRDA



The plan also needs to be 'fair and equitable'

#### B. Restrictions on *ipso facto* clauses: Section 440 of the IRDA

*Ipso facto* clauses entitle a party to trigger contractual rights upon certain contractually stipulated events occurring and seek remedy. Generally these clauses are related to restructuring proceedings. These clauses may hurt the company's restructuring plans when it is already in a vulnerable situation. The new restrictions under Section 440(1) of the IRDA complement the existing laws, to give companies in distress the necessary breathing space needed, to restructure their debts.

In particular, the restrictions would allow certain ongoing projects or contracts to continue, so that the distressed company is not deprived of the benefits of the contract especially in these situations

Section 440(1) of the IRDA prohibits a party contractual rights and terminating a contract or from taking actions by the reason of the company's insolvency or restructuring proceedings like scheme of arrangement or judicial management.

Section 440 of the IRDA restricts a party from:

- (a) terminating, amending, or claiming an accelerated payment or forfeiture of a term under any agreement; or
- (b) terminating or modifying any right or obligation under any agreement (including a security agreement)

However, there are some exclusions included like financial contracts, charter of ships, contracts affecting national interest etc.

#### C. Pre-packaged scheme of arrangement – Section 71 of IRDA

The term "pre pack scheme" is used in the insolvency and restructuring framework adopted in Singapore for a Scheme of Arrangement approved without a creditors' meeting.

The requirements of such a "pre-packed" scheme are:

- (a) The company has provided each creditor meant to be bound by the compromise with a statement setting out the details of the compromise.
- (b) The company has publicised the application for court approval of the pre-pack scheme.
- (c) The company has sent a copy of the application to each creditor that will be bound under the pre-pack scheme.
- (d) The pre-packaged Scheme can only be approved by the court, if the court is satisfied that the agreement would have been approved by creditors, representing a majority in number and 75% in value had a meeting been conducted.

This tool can be a desirable option to reduce costs of negotiation and facilitate a quick resolution of the debtor's financial issues for the benefit of the company and the creditors as a whole.

#### D. New wrongful trading provision : Section 239 of IRDA

Section 239(12)) of the IRDA provides that a company "*trades wrongfully*" :

If it incurs debts or other liabilities when insolvent or the company incurs debts or liabilities that result in the company becoming insolvent, without reasonable prospect of meeting them in full.

Where a company has traded wrongfully, any person who was a party to the wrongful trading can be made personally liable for all or part of the debt or liability of the company, if that person knew that the company was trading wrongfully or, as an officer of the company, ought to have known that the company was trading wrongfully without criminal liability first being established.

An alleged person said to have breached the “wrongful trading” provisions, can avail of the statutory defence enshrined in section 239(2)). Under this section, the Singapore Court may 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.

Other new clauses include:

*Termination of winding up : Section 186(1) of IRDA*

The court can terminate the winding up of a company on application by the liquidator, creditor or a contributory on proof that the winding up must be stayed or terminated. 186(3) allows the court to direct the resumption of management by the officers of the company.

Voluntary judicial management

Availability of third-party funding to judicial managers and liquidators

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

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

References:

INSOL International, 2021, pp. 20-21

Gardner J. *Bankruptcy Reforms in Singapore: What Can We Learn? – Research Policy Report*, Centre for Banking & Finance Law, Faculty of Law, National University of Singapore, September 2016, report number CBFL-Rep-JG2  
URL: <http://law.nus.edu.sg/cbfl/pdfs/reports/CBFL-Rep-JG2.pdf>

io.mlaw.gov.sg. n.d. *About Debt Repayment Scheme*. [online] Available at: <https://io.mlaw.gov.sg/debt-repayment-scheme/about-debt-repayment-scheme/>.

SingaporeLegalAdvice.com. 2020. *Guide to the Debt Repayment Scheme in Singapore - SingaporeLegalAdvice.com*. [online] Available at: <https://singaporelegaladvice.com/law-articles/debt-repayment-scheme-guide-drs-singapore/>.

IRDA 2018 Part 15 (Debt Repayment Scheme)

There are alternatives to formal bankruptcy:

- Voluntary Arrangement
- Debt repayment Scheme

The Debt repayment scheme and the process is discussed as below:

The aims of the debt repayment scheme as outlined in the second reading speech for the bankruptcy amendment Bill 2009 by Professor Ho Peng Kee:

“Where a debtor has a regular income and his debts are not large, a better alternative would be to have a non court-based approach that gives him a reasonable opportunity to pay off all or some of his debts through a repayment plan over a period of time. By avoiding bankruptcy through this debtor-driven scheme, the intention is that the debtor will keep his job and apportion part of his monthly income towards repaying his debts. The aim is that creditors will receive no less than what they would have otherwise received had the debtor gone into bankruptcy. The benefit for the debtor is that if he successfully meets his financial obligations under the repayment plan, he will avoid the stigma and restrictions of bankruptcy. But the point is: he has to do his part; for example, adjust his lifestyle or spending habits so that repayments are made.”

A debt repayment scheme is a pre-bankruptcy scheme administered by the Official Assignee which allows a debtor to enter into a debt repayment plan with its creditors and avoid bankruptcy where the unsecured debts do not exceed \$150,000.

The court may refer the debtor to the official assignee for the suitability and eligibility of the debtor to enter into a debt repayment scheme, which will be subject to the following requirements:

1. The debt or all the aggregated depths owed, in respect of which the bankruptcy application need to be below the prescribed amount.
2. In the preceding 5 years the debtor is not an undischarged bankrupt or must not have been a bankrupt or on a voluntary arrangement or any debt repayment scheme should not be in effect and was not in effect within the period of 5 years immediately preceding the date on which the bankruptcy application is made.
3. The debtor was not a sole proprietor or a partner in a business partnership (cap 391) or a partner in a limited liability partnership

If the debtor is a suitable candidate for the debt repayment scheme, the court will adjourn the bankruptcy proceedings for 6 months to determine the debtors' eligibility for the scheme. The case will be referred to the official assignee and the debtor will submit:

1. A statement of affairs; and
2. A debt repayment plan with its terms and with a period of debt repayment not exceeding 5 years

If the Official Assignee approves of the plan, he will then convene a meeting of the creditors to review the plan. If the plan is approved by the Official Assignee, then it will be binding on all creditors. A moratorium will come into effect for the duration of the debt payment scheme.

There are 3 possible outcomes after the scheme is approved:

- A. The debtor completes his obligations: He will be issued a “certificate of completion” by the Official Assignee
- B. If the debtor does not complete his obligations and/or fails to make repayments: The Official Assignee will issue a “certificate of failure”. The creditors can then resume fresh bankruptcy proceedings against him.
- C. If after the debt repayment scheme is approved, the individual debts get to exceed \$150,000: The Official Assignee will issue a “certificate of inapplicability”. This allows the creditors to recommence fresh bankruptcy proceedings against the debtor.

## Moratorium under a debt repayment scheme

An automatic moratorium begins when a debt repayment scheme is in effect. This helps to prevent:

- a. any creditor to whom the debtor is indebted under the scheme from having any remedy against the person or property of the debtor in respect of that debt; and
- b. any action or proceedings being proceeded with or commenced against the debtor in respect of that debt.

Any action can only be commenced by leave of the court and in accordance with the terms, the court may impose.

However, the above provisions do not affect the right of any secured creditor to realise or otherwise deal with his security.

## Proving of debts under debt repayment scheme:

The following debts are provable under the scheme:

- a. Any debt and interest that the debtor is subject to for the period prior to the effective date.
- b. Any debt and interest that the debtor is subject to after the effective date but incurred because of an obligation before the effective date for any period prior but before cessation of the scheme.
- c. Balance due from the debtor after the security in respect of secured debt as at the effective date is realised in the period before cessation of the scheme.

The creditors must file a proof of debt with the Official Assignee for admittance. The Official Assignee may accept or reject the debt filed.

## Modification of debt repayment plan:

The Official Assignee may at any time after the effective date modify the plans as appropriate. This modification can be done by (a) Official Assignee, (b) debtor (c) creditor bound by the scheme (d) creditor not bound by the scheme but has proven the debts under the scheme.

The Official Assignee must notify all creditors and the debtor and convene a meeting.

Any such modification can be appealed.

## Payment and distribution of moneys under debt repayment scheme:

The following debts are to be paid in priority to all other debts and must be included in the plan:

- a. Costs and expenses of the Official Assignee
- b. Costs of the applicant creditor who brought the bankruptcy application.
- c. Employees: wages including retrenchment benefits, work injury compensation, contributions for last 12 months, leaves, insurance premium.

All payments under the debt repayment scheme by the debtor must be paid to the Official assignee. The Official assignee may declare dividends among the creditors who have proven their debt after deduction of the administration costs.

## Discharge:

Once the debts have been successfully repaid in accordance with the terms of the Debt Repayment Plan, the Official Assignee will issue a Certificate of Completion.

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.

References:

INSOL International, 2021, pp.37-38

*Insolvency, Restructuring and Dissolution Act - Key Changes from the Financiers' Perspective*. 2021. [ebook] Wong Partnership. Available at: <[https://www.theworldlawgroup.com/writable/documents/news/LegisWatch\\_InsolvencyRestructuringandDissolutionAct\\_KeyChangesfromtheFinanciersPerspective.PDF](https://www.theworldlawgroup.com/writable/documents/news/LegisWatch_InsolvencyRestructuringandDissolutionAct_KeyChangesfromtheFinanciersPerspective.PDF)>.

Conventus Law. 2018. *Singapore's New Insolvency, Restructuring And Dissolution Bill 2018 – Impact On Banking Transactions*. - Conventus Law. [online] Available at: <<https://conventuslaw.com/report/singapores-new-insolvency-restructuring-and/>>.

Ong, W. and Kwek, K., n.d. *Voidable Transactions in the Context of Insolvency*. [online] V1.lawgazette.com.sg. Available at: <<https://v1.lawgazette.com.sg/2009-4/feature1.htm>>.

Practical Law. n.d. *Restructuring and insolvency in Singapore: overview* | Practical Law. [online] Available at: <[https://uk.practicallaw.thomsonreuters.com/w-010-9476?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co\\_anchor\\_a351221](https://uk.practicallaw.thomsonreuters.com/w-010-9476?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a351221)>.

Resourcehub.bakermckenzie.com. n.d. *Other Factors | Singapore | Global Restructuring and Insolvency Guide* | Baker McKenzie Resource Hub. [online] Available at: <<https://resourcehub.bakermckenzie.com/en/resources/global-restructuring-and-insolvency-guide/asia-pacific/singapore/topics/other-factors>>.

Upon the liquidation of a company, a liquidator or a judicial manager can apply to the Court to seek to claw back assets and void transactions previously done in the following situations:

- a. Unfair or undue preference was given
  - b. An undervalue transaction was done
  - c. Floating Charges for past value given
  - d. Registrable but unregistered charges
  - e. Post application disposition of assets
  - f. Liquidator exercises right to recover excess consideration paid or shortfall in consideration received
  - g. Transactions defrauding creditors (Voidable under sec 73B of CLPA)
  - h. Extortionate Credit Transactions
  - i. Disclaimer of Onerous Property
  - j. Liability of directors
  - k. Wrongful Trading
- a. Unfair preference transaction,: (Section 99 of the BA Read with Section 329 / Section 227T of the CA 1967) (Section 225 of IRDA 2018)

The liquidator or judicial manager must show the following elements for an unfair preference transaction:

- i. the beneficiary of the transaction is a creditor or surety or guarantor for any of the company's debts or liabilities.
- ii. the company was insolvent or becomes insolvent in consequence of the preferred transaction, at the time of giving the preference.
- iii. the company does anything which places that party in a position which is better than that the preferred party would have been, if the transaction had not been entered into, in the event the company goes into liquidation or judicial management. (d) the act done by the company was influenced by a desire to prefer the preferred party. If the preferred party is an associate of the company, the company's desire to prefer is presumed.
- iv. The preference was given at the relevant time.

Relevant time:

The time period to claw back the transaction for an unfair preference where the preferred party is an associate, is two years from the date of the winding-up application or the date of the judicial management application.

It is one year for unrelated parties.

- b. Undervalue Transactions: (Section 98 of the Bankruptcy Act, Cap. 20 ('BA') Read with Section 329 / Section 227T of the Companies Act, Cap. 50 ('CA')) (Section 224 of IRDA 2018)

The liquidator must show the following elements to satisfy the criteria for an undervalue transaction:

- i. the company has given a gift to the recipient or where the company enters into a transaction and receives the value of consideration which is significantly less than the value of the consideration provided;
  - ii. the company was or became insolvent as a result of that transaction.
  - iii. The company is in liquidation or judicial management;
  - iv. There was a transaction in which the company was a party;
  - v. The transaction was entered into at the relevant time;
  - vi. The company was insolvent at the time of the said transaction or became insolvent as a consequence of it.
- The company is presumed to have undertaken a transaction at an undervalue if the preferred party is an associate of the company.

Relevant Time:

The relevant time period during which assets may be clawed back is three years from the date of the winding-up application or the judicial management application, regardless of whether the undervalue transaction was with an associate or not.

- c. Floating Charges for past value: (Section 330 / Section 227X of the CA 1967) (Section 229 of IRDA 2018)

On application to the court, a floating charge on the undertaking or property of a company can be invalidated, if it is created within one year of the commencement of winding-up, unless the company or the floating charge holder can prove that the company was solvent immediately after the creation of the floating charge.

This invalidation does not affect the amount of any monies paid to the company or discharge or reduction of any debt to the company at the time of or subsequent to the creation of and in consideration for the charge, including the amount of interest

payable on that amount, pursuant to any agreement under which the money was so paid or the debt was so discharged or reduced.

d. Registrable but unregistered charges: (Section 131 of the CA 1967)

As per Section 131 of the CA, where a charge, which has been created, by a company, falls into any of the categories as outlined below and is not registered within 30 days from its creation, it will be void against the liquidator or any creditor of the company.

Charges which are registrable include:

- A charge to secure any issue of debentures;
- A charge on uncalled share capital of a company;
- A charge on shares of a subsidiary of a company which are owned by the company;
- A charge or an assignment created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;
- A charge on land wherever situate or any interest therein;
- A charge on book debts of the company;
- A floating charge on the undertaking or property of a company;
- A charge on calls made but not paid;
- A charge on a ship or aircraft or any share in a ship or aircraft; and
- A charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

e. Post application disposition (section 259 of CA) (Section 130 of IRDA 2018)

The liquidator can apply to court to set aside any disposition of a company's property or any transfer of shares or alteration in the status of the company's members made after the commencement of the liquidation.

However, disposition of a company's property made in the enforcement of a pre-existing equitable interest held by a secured creditor or under a contract of sale concluded before the commencement of the liquidation will not be affected.

f. Liquidator exercises right recover excess consideration paid or shortfall in consideration received (Section 331 / Section 227X of the CA)

Where any property, business or undertaking has been acquired by a company for a cash consideration within a period of two years before the commencement of the winding up of the company from:

- i. A person who was at the time of the acquisition, a director of the company;  
or
- ii. A company of which at the time of the acquisition, a person was a director who was also a director of the first-mentioned company;

The liquidator may recover from the person or company from which the property, business or undertaking was acquired, any amount by which the cash consideration for the acquisition exceeded the value of the property, business or undertaking at the time of its acquisition.

Also, in the case, where any property, business or undertaking has been sold by a company for a cash consideration within a period of two years before the commencement of the winding up of the company to:

- i. A person who was at the time of the acquisition, a director of the company;  
or
- ii. A company of which at the time of the acquisition, a person was a director who was also a director of the first-mentioned company;  
The liquidator may recover from the person or company to which the property, business or undertaking was sold, any amount by which the value of the property, business or undertaking at the time of the sale exceeded the cash consideration.

It is to be noted that the value of the property, business or undertaking mentioned above includes the value of any goodwill or profits which might have been gained or made from the sale or purchase of the business or undertaking.

- g. Transactions defrauding creditors (Voidable under sec 73B of CLPA) (Section 438 of IRDA 2018)

Where a transaction is a conveyance of property (whether real or personal) which was made with intent to defraud creditors, a person who is prejudiced by the transaction can apply to court to have the transaction avoided provided the conveyance was not made to a person for valuable consideration and in good faith. For such a claim, in principle, the standard limitation period is six years (which would, in the case of fraud, run from the time the fraud is discovered).

- h. Extortionate Credit Transactions (Section 103 of the BA Read with Section 329 / Section 227T of the CA) (Section 228 of IRDA 2018)

Credit transactions are extortionate if, after having given regard to the risk accepted by the creditor, either the terms are such as to require grossly exorbitant payments to be made in respect of the provision of the credit or it is harsh and unconscionable or substantially unfair.



Any such transactions, if they are entered into within a period of three years before the commencement of winding up / judicial management may be set aside or varied by the Court.

In order to invalidate such transactions, it is to be proven that, not only were the transactions unfair, but were oppressive and reflected an imbalance in bargaining power of which the other party took improper advantage.

**The provisions relating to the power of the liquidator to set aside transactions at an undervalue, preferences and extortionate credit also apply to judicial managers.**

- i. Disclaimer of Onerous Property (Section 332 / Section 227X of the CA) (Section 230 of IRDA 2018)

Where the property of a company consists of either an estate or interest in land which is burdened with onerous covenants, shares in corporations, or any other property that is unsaleable by reason of its binding the company to the performance of any onerous act or payment, the liquidator may, with the leave of the Court (or a committee of inspection), at any time within 12 months after the commencement of the winding up (or such extended period as is allowed), disclaim the said property.

The liquidator can also disclaim unprofitable contracts under the CA, Generally, a liquidator can only disclaim a contract as unprofitable, if the company has liabilities in the contract.

An unprofitable contract for the purposes of a disclaimer would include a contract with onerous obligations yet to be performed or a contract which could not be satisfactorily performed by the company.

A contract is not considered unprofitable, just by the fact that a better commercial bargain could have been made by the company, before it went into liquidation. If the liquidator disclaims the contracts, any person who suffers loss because of the disclaimer shall be a creditor of the company to the amount of the injury suffered, and may accordingly prove the amount as a debt in the winding up of the company.

**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.**

- j. Liability of directors: ( Section 340 of the CA)

When a company has become insolvent, a director may be liable:

- 1) if he or she is knowingly a party to the contracting of a debt when, at the time the debt was contracted, he or she had no reasonable or probable ground of

expectation of the company being able to pay the debt. A director can be prosecuted for this offence; and

- 2) Fraudulent trading, if it is proved that any business of the company had been carried on with intent to defraud creditors of the company, or there has been a prosecution under section 237(1), a director can be personally liable.

k. Wrongful trading provision introduced under IRDA: (Section 239 of IRDA)

Under a new provision relating to wrongful trading under IRDA, the court is now empowered to make a declaration that any person who was a knowingly party to the company trading wrongfully, is personally responsible for the debts or liabilities of the company.

A company or any person party to, or interested in becoming party to, the carrying on of business with a company, may apply to the court for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading.

A company trades wrongfully, if the company incurs debt or liabilities without reasonable prospect of meeting them in full, when the company is insolvent, or becomes insolvent as a result of the incurrence of such debt or liability.

Section 239 (Responsibility for wrongful trading) of the IRD Act 2018 imposes personal liability for the company's debts on a person if:

- i. they knew that the company was trading wrongfully; or
- ii. as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

This provision does not require criminal liability before taking effect.

**The IRDA 2018 has made certain changes to the statutory provisions on the voidable transaction clauses which have enhanced the provisions, as below:**

a. Transactions at undervalue

The time period has been reduced from five years to three years, for undervalue transactions of a company, before the commencement of judicial management or winding up.

A new "good faith" defence has also been introduced. This is where a company has entered into the transaction in good faith, and, for the purpose of carrying on its business. At the time the transaction was entered into, there were reasonable grounds to believe that the transaction would benefit the company.

b. Unfair preference

The time period for transactions to be set aside as an unfair preference, has been increased from six months to one year, before the commencement of judicial management or winding up, where the preferred party, is not connected to the company.

In the case of the preferred party being connected to the company, the claw-back time period remains unchanged at two years before the commencement of judicial management or winding up.

**c. Floating charges for past value**

As per the Companies Act, floating charges granted by a company may be voidable if the company became insolvent after granting the floating charge and new monies or fresh “cash” was not provided, at the time of or after the creation of the floating charge, by the person to whom the floating charge was created in favour of.

Under the IRDA this claw-back provision has been amended to recognise other forms of value (not only cash), that the chargee may provide, to avoid such floating charges from being invalidated. Such value may be furnished in the form of a discharge or reduction of an existing debt.

This is more relevant In the case of financing, where additional security in the form of a floating charge is granted by a borrower and no new credit lines have been provided to the company. However, if the transaction reduces the existing debt, such “value” can prevent the floating charge from being set aside as a floating charge for past value.

**d. Overlap of the claw-back time period with the moratorium period for a scheme of arrangement**

Where the following time periods under a “Scheme Moratorium Period” overlap with the statutorily prescribed time periods for unwinding transactions, (unfair preferences, transactions at undervalue or floating charges for past value, the Bill provides that such Scheme Moratorium Periods will be added on to extend the statutory claw-back time periods:

- i. the automatic moratorium period when a company proposes, or intends to propose, a scheme of arrangement;
- ii. the period when a company proposes, or intends to propose, a scheme of arrangement and an order restraining the passing of a resolution for the winding up of the company is in force;
- iii. where the company is a subsidiary or holding company of a company that is proposing a scheme of arrangement, the moratorium period which is extended to the company; and
- iv. the period when a court order restraining proceedings against the company proposing a scheme of arrangement is in force,

This is to prevent insolvent parties from proposing a scheme of arrangement to evade the avoidance provisions in hope that the statutory claw-back time periods would have expired by the time judicial management or liquidation proceedings formally set in.

e. Power to disclaim contracts extended to judicial managers

The Bill has extended the power to disclaim contracts to judicial managers. Under the Companies Act, only liquidators have the power to discard onerous property under their powers to disclaim. This allows liquidators to terminate executory contracts, such as, leases or ongoing supply contracts. In addition to extending the power to disclaim to judicial managers, the scope has been further extended with the introduction of a wider definition of “onerous property”.

“Onerous property” has now been defined as any unprofitable contract or any other property which is unsaleable, not readily saleable or may give rise to a liability of the company to pay money or perform any other onerous act.

How about wrongful trading and third party funding? 5 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.

References:

INSOL International, 2021, p.65

*REPORT OF THE INSOLVENCY LAW REVIEW COMMITTEE*. 2013. [ebook] Available at: <<https://app.mlaw.gov.sg/files/news/announcements/2013/10/ReportoftheInsolvencyLawReviewCommittee.pdf>>.

Gurrea-Martínez, A., 2020. *Singapore’s New Insolvency Restructuring and Dissolution Act* | *Center for Commercial Law in Asia*. [online] Ccla.smu.edu.sg. Available at: <<https://ccla.smu.edu.sg/sgri/blog/2020/07/23/singapores-new-insolvency-restructuring-and-dissolution-act>>.

McConell, C., Ho, J. and Quek, W., 2020. *Singapore’s omnibus insolvency legislation* | *White & Case LLP*. [online] Whitecase.com. Available at: <<https://www.whitecase.com/publications/alert/singapores-omnibus-insolvency-legislation>>.

Practical Law. n.d. *Restructuring and insolvency in Singapore: overview* | *Practical Law*. [online] Available at: <[https://uk.practicallaw.thomsonreuters.com/w-010-9476?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co\\_anchor\\_a351221](https://uk.practicallaw.thomsonreuters.com/w-010-9476?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a351221)>.

Sso.agc.gov.sg. 2018. *Insolvency, Restructuring and Dissolution Act 2018 - Singapore Statutes Online*. [online] Available at: <<https://sso.agc.gov.sg/Acts-Supp/40-2018/?Provlds=pr94-#pr94->>>.

The IRDA now provides an out-of-court procedure for a company to place itself into judicial management with the approval of the company’s creditors. Prior to the IRDA, a company could be put in judicial management only through an order of court.

Section 94(1) (Power of Court to make judicial management order and appoint judicial manager) of the IRDA 2018 introduces a new voluntary process for initiating judicial management without having to first apply to the Court if:

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

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

- a. the manner creditor meetings should be conducted;
- b. Notice requirements; and
- c. relevant timelines.

A company that proposes to obtain under a resolution of the company's creditors for the company to be placed under judicial management must give at least 7 days' written notice in the prescribed form of its intention to appoint an interim judicial manager—

- a. to the proposed interim judicial manager; and
- b. 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 charges.

The company may appoint an interim judicial manager, if all the below conditions are met:

1. The appointment is authorised by way of a resolution:

Of members of the company or, where it is authorised by the constitution of the company, by a resolution of its board of directors.

2. The charge holder after being notified, has consented to the appointment of the interim judicial manager and the proposed interim judicial manager has consented to his appointment.
3. The interim judicial manager must be appointed no later than 21 days from the date of the notice.
4. the proposed interim judicial manager has lodged a statutory declaration, with the Official Receiver and the Registrar of Companies, stating that —
  - i. There is no 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.
  - iii. The proposed interim judicial manager consents to be appointed as interim judicial manager;
5. 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 notify the creditors and summon a meeting of the company's creditors to be held on a date within 30 days after the date of lodgement of the statutory declaration.
  - iii. The directors believe that one or more of the purposes of judicial management mentioned in section 89(1) is likely to be achieved.

6. The proposed interim judicial manager is a licensed insolvency practitioner, and is not the auditor of the company.
7. The interim judicial manager and the board of directors will then lodge the necessary documents and declarations pursuant to IRDA 2018 with the Official Receiver and Registrar of Companies.

At the meeting of the creditors, if the majority in numbers and value of the creditors present and voting, resolve to place the company under judicial management, the company shall be placed under judicial management. If the requisite majority is not obtained, then the judicial management application process ends.

It should however be noted that a company cannot be put into judicial management via creditor's resolution if there is already a pending court application for a judicial management order which has not yet been withdrawn or decided by the court.

This out-of-court process has been introduced as a way to minimise the expense, formality and delay in such cases where creditors are supportive of the company entering into judicial management.

The ability for a company to enter into judicial management through an out-of-court process may encourage companies and their lenders to view this process as a more consensual, rather than an adversarial process and as a tool for facilitation of rehabilitations.

In the Insolvency Law Review Committee's 2013 report, it was observed that the judicial management regime in Singapore, was not a highly successful rehabilitation regime. This was, amongst other reasons, due to the negative publicity that is attached to the making of a judicial management order and the likely concerns among the management that a court application for judicial management could be seen as an admission that the management had not been managing the company properly.

The introduction of this more informal out-of-court process can facilitate consensual rehabilitation efforts through the use of judicial management:

- a) Companies in financial difficulties may be more acceptable to judicial management if they can avoid the publicity or tedious court proceedings. The out-of-court process brings about open commercial discussions between a company and its lenders, and promote the view of judicial management as an avenue for a consensual restructuring, along with the availability of a moratorium and an independent supervisor (who is an officer of the Court) for the rehabilitation process.

The continuing support of existing management also helps to overcome a common supposed drawback of judicial management processes:

This is the inability to carry out operations effectively given the lack of industry expertise of the judicial manager.

- b) Commencement of the out-of-court process can minimise the negative publicity and disruptions to the business, by avoiding any disputes that could be litigated in open court. This can also help the relationships of the company with its customers and suppliers, and on the ongoing operations of a company which may be impacted in formal judicial management. In turn, the potential for rehabilitation and returns to lenders may be enhanced.
- c) The out-of-court process can help to fasten the restructuring efforts, especially when used alongside other tools such as a pre-pack scheme of arrangement to expedite

the process for achieving a restructuring with the support of major lenders.

Differences between the court appointment and voluntary procedure for judicial management:

1. The difference between the court appointment and the voluntary process is that an interim judicial manager must be appointed in the voluntary process before the creditors meet to vote on the resolution for a formal judicial manager.
2. In the voluntary process only a creditors resolution is required to put the company in Judicial management.
3. The new creditors' resolution process requires the consent of a holder of a floating charge over the whole (or substantially the whole) of the company's asset for the appointment of the interim judicial manager to proceed. This is different from the court ordered process where the floating charge holder's opposition can only block the judicial management if the court is of the view that the prejudice that would be caused to it if the order were made is disproportionately greater than the prejudice that would be caused to unsecured creditors if the application were dismissed.
4. Interim moratorium:

To protect the company from creditors in the period before formal judicial management begins, the Insolvency, Restructuring and Dissolution Act 2018 provides for an interim moratorium to restrain certain actions from being taken against the company.

These actions include the commencement of any lawsuit against the company or proceedings to wind up the company, and the enforcement of charges on, or security over, the company's property.

An interim moratorium will operate during the following periods:

- **For 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.
  - **For 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.
5. 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.

### **During Judicial Management**

Even though the appointment of the judicial manager is made out-of-court, once the company goes into judicial management, the judicial management process remains under the supervision of the Court and will further continue similar to a judicial management, commenced by way of a court order.

Once judicial management has commenced, the judicial manager has 90 days to prepare a statement of his proposals on how he intends to achieve the purpose(s) of the judicial management order.

The judicial manager then summons a creditor's meeting for the creditors to decide on the approval of the proposals. If more than 50% in number and value of creditors approve, the judicial manager will then manage the company's affairs, business and property in accordance with the proposals.

The judicial manager will take control of the company's property and during judicial management period, all the powers exercised by the company's directors will be exercised instead by the judicial manager, to manage the company's business and affairs.

#### **Moratorium:**

During judicial management, there will be a temporary moratorium on :

- Winding up of the company;
- Appointment of receivers and/or managers over any company property or undertaking;
- Starting or continuing of any lawsuits against the company, enforcement of any security over the company's property and re-entry of, or forfeiture of the company's leases over, any premises (except with the judicial manager's consent, or with the court's permission ).

#### **Conclusion of Judicial Management:**

Judicial management will automatically end after 180 days from the date of the judicial management court order, or of the approval of the judicial management's appointment by creditors by way of a creditors' resolution, unless that order or resolution provides otherwise.

It can also end if the Judicial Manager applies for discharge to court because he has achieved the purposes or he believes that said purpose cannot be achieved.

However, the judicial manager may apply for an extension of time from the court or creditors where necessary.

**Very detailed. 7 marks. Good comparison. Shows understanding of the concepts.**

#### **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?

References:

Sso.agc.gov.sg. 2018. *Judicial management by resolution of creditors*. [online] Available at: <<https://sso.agc.gov.sg/Acts-Supp/40-2018/?ProvlDs=pr64-#pr64->>>.

Section 64 IRDA, Insol page 46

For the company to obtain moratorium under section 64(1) IRDA;  
It must file the following with the Court, together with the application, under subsection (1):

- (a) evidence of support from the company's creditors for the proposed compromise or arrangement, together with an explanation of how such support would be important for the success of the 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?

References:

Section 64, 65 IRDA

Sso.agc.gov.sg. 2018. *Power of Court to restrain proceedings, etc., against company*. [online] Available at: <<https://sso.agc.gov.sg/Acts-Supp/40-2018/?ProvlDs=pr64-#pr64->>>.

The order obtained under 64(1) must be presented to the court to obtain the moratorium order.  
For the company to obtain moratorium under section 64(1) IRDA;

The following must be filed with the Court , together with the application under subsection (1):

- a. Evidence of support from the company's creditors for the proposed compromise or arrangement, together with an explanation of how such support would be important for the success of the 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. List of every secured creditor of the company;
- d. 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.

The following orders under sub section (1) can be sought by the company from the court, where the company is proposing or intends to propose an arrangement or compromise::

- a. restraining the passing of a resolution for the winding up of the company;
- b. the appointment of a receiver or manager over any property or undertaking of the company. These are in force for a duration as per the court deems fit.

The court can restrain the following actions subject to leave of court being granted to take the following actions:

- a. commencement or continuation of any proceedings against the company,
- b. the commencement, continuation or levying of any execution, distress or other legal process against any property of the company,
- c. 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,
- d. 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.

**You have not answered on section 65. 0 mark.**

#### **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?

References:

INSOL International, 2021, p.45 and 56

Section 64 IRDA

Dentons.rodyk.com. 2021. *Singapore's new insolvency law: a status report on the progress of the new regime.* [online] Available at: <<https://dentons.rodyk.com/en/insights/alerts/2021/june/23/singapore-new-insolvency-law-a-status-report-on-the-progress-of-the-new-regime>>.

Sso.agc.gov.sg. 2018. *Power of Court to restrain proceedings, etc., against company*. [online] Available at: <<https://sso.agc.gov.sg/Acts-Supp/40-2018/?Provlds=pr64-#pr64->>.

A foreign company may seek to rely on Section 64 of the IRDA if it can demonstrate a “substantial connection” with Singapore. Section 65 allows for the related companies to seek moratorium. Foreign entities of a group may also potentially seek bankruptcy protection from the Singapore Courts if they form part of the group’s restructuring plan. **Not what the question is looking for. Please explain in personam jurisdiction over creditors.** The following moratoria will apply to the creditors to prevent them from:

- a) the passing of a resolution for the winding up of the company;
- b) the appointment of a receiver or manager over any property or undertaking of the company;  
The court can restrain the following actions subject to leave of court being granted to take the following actions:
- c) commencement or continuation of any proceedings against the company,
- d) the commencement, continuation or levying of any execution, distress or other legal process against any property of the company,
- e) 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,
- f) the enforcement of any right of re-entry or forfeiture under any lease in respect of any premises occupied by the company.

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?

Companies Act 1967

References:

*Global Restructuring & Insolvency Guide*. 2022. [ebook] Singapore. Available at: <<https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Singapore.pdf>>.

SingaporeLegalAdvice.com. 2022. *Schemes of Arrangement: How They Work and How to Apply*. [online] Available at: <<https://singaporelegaladvice.com/law-articles/scheme-of-arrangement>>.

Sso.agc.gov.sg. 2018. *Power to compromise with creditors, members and holders of units of shares*. [online] Available at: <<https://sso.agc.gov.sg/Act/CoA1967?ProvlDs=pr210-#pr210->>>.

The steps to be taken for a scheme of arrangement to be proposed are dealt with in section 210 of the Companies Act;

### **Power to compromise with creditors and members- Sec 210 of CA**

On the application by the:

- (a) company
- (b) any creditor
- (c) member of the company
- (d) where the company is being wound up, of the liquidator
- (e) Judicial Manager

to the court, where a compromise or arrangement is proposed, between a company and its creditors/ members or any class of them, the Court may, order a meeting of the creditors or class of creditors or of the members of the company or class of members, holders of units of shares or class of holders of units of shares of the company, as the Court directs.

Notice of meeting:

Company will send out the notices of meeting and statements explaining the proposed scheme to the creditors.

The members may direct accountants and solicitors to put forward their report on the proposals and forward the same to the directors. These reports must be available for inspection by shareholders/ creditors at least 7 days before the Court ordered meeting.

A scheme manager may also need to be appointed by the company or court to administer and manage the scheme or facilitate negotiations.

Proof of Debts:

The chairman of the creditors' meetings reviews the proof of debts sent in by the scheme creditors after they have received the proposed scheme documents and decides on which to admit for voting.

Meeting:

The scheduled meeting may be adjourned, if the resolution for adjournment is approved by a majority in number representing three fourths in value of the creditors or class of creditors or members or class of members present and voting (including proxies).

At these meetings, the scheme proposal(s) must be put forward, and if at least 50% in number and representing three fourths in value of the creditors or class of creditors or members or class of members, holders of units of shares or class of holders of units of shares, present and voting (in person and proxy) at the meeting or the adjourned meeting, agrees to any proposed compromise or arrangement, the compromise or arrangement shall, be binding on all, and also on the company or, in the case of a company which is being wound up, on the liquidator and contributories of the company and if approved by order of the Court.

Approval of Court:

The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just, after the meeting of the creditors has approved the scheme or arrangement and this is put forward to the court for approval.

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.

An order so granted by the court, shall come into effect after a copy of the order is lodged with the Registrar (ACRA), and after the lodgement, the order shall take effect on and from the date of lodgement or such earlier date as the Court may determine and as may be specified in the order.

A copy of every order made shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

Power of Court to restrain proceedings

Where a compromise or arrangement has been proposed between the company and its creditors or any class of such creditors and no resolution has been passed or any order has been made to wind up a company, the Court may, on the application of the company or of any member or creditor restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

Difference with Pre-pack scheme:

The process for a scheme proposed under section 210 of the Companies Act differs from a prepack scheme under the provisions of sec 71 of IRDA by the provision, that the scheme may be approved by the court without holding a creditors' meeting.

Under section 210 a court appointed meeting must be held for seeking the approval of the creditors/ members before the court sanctions the scheme. However, for a pre-pack scheme

under sec 71 of IRDA, the court can approve the scheme without a meeting of creditors being ordered or held if the court is satisfied that had the meeting been summoned the conditions for approval would have been met.

Power of Court to approve compromise or arrangement without meeting of creditors - section 71 of IRDA:

Where a compromise or an arrangement is proposed between a company and its creditors or any class of those creditors, the Court may, on an application made by the company, make an order approving the compromise or arrangement, even **though no meeting of the creditors** or class of creditors has been ordered under section 210(1) of the Act or has been held.

On the approval of the court, the compromise or arrangement is binding on the company and the creditors or class of creditors meant to be bound by the compromise or arrangement. The Court may grant its approval of a compromise or an arrangement subject to such alterations or conditions as the Court thinks just.

The Court must be 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. The order has no effect until a copy of the order is lodged with the Registrar of Companies and the date of lodgement is the effective date.

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?

References:

INSOL International, 2021, p.51

*Super priority for rescue financing - Insolvency Restructuring and Dissolution Act 2018*. 2018. [online] Available at: <<https://sso.agc.gov.sg/Acts-Supp/40-2018/?ProvIds=P15-#pr67->>>.

*Singapore Court Grants Rare Instance of Super Priority Rescue Financing*. 2020. [ebook] Singapore: Rajah & Tann Asia. Available at: <[https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-03\\_SG-Court-Grants-Rare-Instance-Rescue-Financing.pdf](https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-03_SG-Court-Grants-Rare-Instance-Rescue-Financing.pdf)>.

Yin, M., 2017. *Super-Priority for Rescue Financing: Show Attempts to Get Financing Without Super-Priority First*. [online] Allen Overy. Available at: <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/super-priority-for-rescue-financing---show-attempts-to-get-financing-without-super-priority-first>>.

Rescue financing, is necessary financing, that is either or both:

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

To obtain financing under this route, the company has to show that the company would not have been able to obtain rescue financing from any person without the grant of a super-priority(security).

The Court in deciding whether to exercise its discretion to grant super-priority, would factor in whether the applicant had shown some evidence of reasonable attempts at trying to secure financing on a normal basis, i.e., without any super-priority.

The Court will consider also factors such as:

- i. The creditor's interests: whether the other creditors would be unfairly prejudiced from the arrangement or beneficial to them.
- ii. The viability of the restructuring: how the rescue financing will be used, whether it would create new value for the company.
- iii. Alternative financing: whether better financing proposals are available, in particular, whether there were proposals that did not require super-priority.
- iv. Terms of the proposed financing: whether the terms were reasonable and in the exercise of sound business judgment.

A company that makes an application under section 67 (1) IRDA must, send a notice of the application to each creditor of the company and within 14 days after the date of the order, lodge a copy of the order with the Registrar of Companies.

Detailed answer. Well done. 2 marks.

#### **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.

INSOL International, 2021, p.63-64

*UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY - Insolvency, Restructuring and Dissolution Act 2018*. 2018. [online] Available at: <<https://sso.agc.gov.sg/Acts-Supp/40-2018/Published/20211231?DocDate=20181107&ProvIds=Sc3-#Sc3->>>.

Singapore adopted the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) through its adoption of the 2017 Amendment Act. The law has been adopted but notably, there is no requirement of reciprocity. The court can deny recognition if the recognition is contrary to public policy. The relevant articles of the UNCITRAL model law are incorporated in the third schedule of the IRDA. The following articles will be applicable for recognition of foreign proceedings:

Application for recognition of a foreign proceeding - Article 15:

1. A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition must be accompanied by —
  - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
  - (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
  - (c) in the absence of evidence mentioned above, any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.



3. It should also be accompanied by a statement identifying all foreign proceedings and proceedings under Singapore insolvency law with regards to the debtor that are known to the foreign representative.
4. Provide the Court with a translation into English of documents supplied in support of the application for recognition if they are in another language.

#### Presumptions concerning recognition - Article 16:

As given in Article 15(2), if the decision or certificate submitted indicates that the proceeding for which the application for recognition is made, is a foreign proceeding as per Article 2(h) and that the person or body making that application is a foreign representative as per Article 2(i) (UNCITRAL Model Law), the Court is entitled to so presume.

The Court is entitled to presume that documents submitted in support of the application for recognition are authentic, even if they have been not legalised and that the debtor's registered office is presumed to be the debtor's centre of main interests unless proven otherwise.

#### Decision to recognise a foreign proceeding - Article 17.

1. Subject to Article 6, a proceeding must be recognised if —
  - a. it is a foreign proceeding within the meaning of Article 2(h) (a collective judicial or administrative proceeding in a foreign State, 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 recognition is a foreign representative as per Article 2(i) (means a person or body, 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 of Article 15(2) and (3).
  - d. the application has been submitted to the Court mentioned in Article 4 ( High court of Singapore)
2. 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.
3. An application for recognition of a foreign proceeding must be decided upon as soon as possible.
4. The provisions of Articles 15 to 16, this Article and Article 18 do not prevent modification or termination of recognition if the grounds for granting it were fully or partially lacking or have fully or partially ceased to exist;

#### Effects of recognition of a foreign proceeding - Article 20

1. Once a foreign proceeding has been recognised, and if it is a foreign main proceeding, there is a stay on—

- a. commencement or continuation of individual actions or proceedings concerning the debtor's property, rights and liabilities;
  - b. execution against the debtor's property; and
  - c. the right to transfer, encumber or dispose of any of the debtor's property.
2. The stay and suspension mentioned in paragraph above —
- a. Have the same effect, as in a winding up order passed on the debtor; and
  - b. Would be subject to the same powers of the Court, prohibitions, limitations, exceptions and any conditions that apply for such cases under laws of Singapore
3. The stay and suspension mentioned in paragraph 1 of this Article do not affect any right ( with prejudice to paragraph 2)
- to enforce security over the debtor's property including repossession of goods in under a hire-purchase agreement;
  - exercisable under or by virtue of or in connection with any written law mentioned in Article 1(3)(a) to (i); or
  - for 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 necessary to preserve a claim against the debtor; or
  - b. commence or continue any action or proceedings
    - criminal
    - by a person or public body having regulatory, supervisory or investigative functions, brought in the exercise of those functions.
5. The right to initiate the commencement of a proceeding under Singapore insolvency law or the right to file claims in such a proceeding are not affected by Paragraph 1 of this Article.
6. On the application of the foreign representative or a person affected by the stay and suspension mentioned in paragraph 1 of this Article, or on its own, the Court may, modify or terminate such stay and suspension or any part of it

**2 marks.**

**\* End of Assessment \***

**40 out of 50**