



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 or Avenir Next 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: 202223-336.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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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]

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 **1m**

Which one of the following insolvency tools is not available in Singapore?

- (a) Judicial management.**
- (b) Administration.**
- (c) Court winding-up.**
- (d) Scheme of arrangement.**

Question 1.2 **1m**

Who may apply to court to place a debtor company into judicial management?

- (a) A contingent creditor.**
- (b) The debtor company.**
- (c) A prospective creditor.**
- (d) Any of the above.**

Question 1.3 **1m**

Which of the following factors may support a foreign debtor's case 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 centre of main interests of the debtor is located in Singapore.**

(c) *The debtor has a place of business in Singapore.*

(d) Any of the above.

Question 1.4 **1m**

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

(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 **1m**

Which of the following in respect of the automatic moratorium under section 64(1) of the Insolvency Restructuring and Dissolution Act (IRD Act) is incorrect?

(a) *The automatic moratorium lasts for 30 days.*

(b) *The automatic moratorium may be extended.*

(c) The automatic moratorium can be obtained without filing an application to court.

(d) *The debtor has to either propose or intend to propose a scheme of arrangement.*

Question 1.6 **0m**

Which of the following types of contracts are excluded from the *ipso facto* restriction in section 440 of the IRD Act?

(a) Any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed.

(b) *Any contract that is a licence, permit or approval issued by the Government or a statutory body.*

(c) *Any commercial charter of a ship.*

(d) *Any contract for a loan with a financial institution.*

Question 1.7 **1m**

Which of the following is one of the three statutory objectives of a judicial management?

- (a) To allow the directors to oversee the restructuring of the company.**
- (b) To preserve all or part of the company's business as a going concern.**
- (c) As a means for the secured creditors to realise their security.**
- (d) To liquidate the company in a fast-track and cost-efficient manner.**

Question 1.8 **1m**

Which one of the following is not a debtor who can apply for personal bankruptcy in Singapore?

- (a) An individual domiciled in Singapore.**
- (b) An individual who owns property in Singapore.**
- (c) An individual who has been carrying on business in Singapore for the last year.**
- (d) An individual whose parents live in Singapore.**

Question 1.9 **1m**

Which of the following in respect of rescue financing is incorrect?

- (a) Rescue financing is financing that is necessary for the survival of a debtor that obtains the financing.**
- (b) Rescue financing is financing that is necessary to achieve a more advantageous realisation of the assets of a debtor that obtains the financing, than on a winding-up of that debtor.**
- (c) Rescue financing enjoys preferential treatment automatically without the sanction of court.**
- (d) Rescue financing may be sought in a judicial management process.**

Question 1.10 **1m**

Who may apply to court to place a company into liquidation?

- (a) The company itself.**
- (b) A creditor of the company.**
- (c) A shareholder of the company.**
- (d) Any of the above.**

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 4 marks] **4m**

Explain the concept of a cross-class cram-down in a scheme of arrangement and what the requirements are before a court would order a cram-down.

Cross class cramdowns were introduced in the 2017 Amendment Act (now incorporated into the IRD Act) and allow a scheme of arrangement to be passed - binding all classes of creditors - even if some classes of creditors reject the proposed scheme. The intention of this new provision is to prevent a small/minority class of creditors from causing to fail a proposed scheme of arrangement of which the majority of creditors are in favour. A core difference between the new IRD Act and the previous regime under the Companies Act in respect of cram-down is that unsecured creditors may now be crammed down without a requisite divestment of the company's members' shares. Previously, under the Companies Act regime, the obtaining the requisite consent of members to the scheme was often difficult, given the absence of provisions for compulsory divestment.

In order to be successful, the application to enforce a cross class cramdown of a scheme must show to the Court that:

- 1. An ordinary majority of creditors in number, which majority must comprise at least 75% of creditors in value, are in favour of the scheme; and*
- 2. The scheme does not unfairly prejudice or discriminate against certain classes of creditors and is fair and equitable to any dissenting class.*

In assessing point 2, the court will be satisfied provided that:

- no creditor in a dissenting class is to receive less than what they are likely to receive if not for the scheme;*
- if unsecured creditors dissent, then provided that each creditor in the class receives property of value at least equal to the quantum of that creditor's claim,*

and provided that any creditor whose claim is subordinate to a creditor in the class receives or retains property due to their subordinate claim or interest.

[also discuss where dissenting class is secured creditors - s 70]

Question 2.2 [maximum 2 marks] **2m**

Name two objectives of the IRD Act.

- *Consolidation of Singapore's insolvency laws - spanning insolvency and restructuring legislation covering both corporate and personal matters - into a single, comprehensive piece of legislation*
- *Strengthen the legal framework of Singapore's insolvency and restructuring system (thus allowing promotion of Singapore as a global restructuring hub).*

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

State four factors that should be considered under the cash flow test in determining whether a company is "unable to pay its debts" under the IRD Act.

- *The value of any debts which are due and payable or which will be due and payable in the near future*
- *Whether a creditor in respect of any due or near-due debt is demanding payment or is likely to demand payment*
- *The length of the period, if any, in which the debtor has failed to pay its debts, and the quantum of any such debts.*
- *The value of current or quickly-realizable assets (i.e. what cash or other liquid assets does or did the debtor have available to it to meet debts which may be due, near-due and/or for which a creditor is demanding payment.*

It should be noted that these are non-exhaustive factors that courts have set out previously, and do not represent a set of statutory requirements for a company to be considered insolvent under the cash flow test.

QUESTION 3 (essay-type question) [15 marks]

Question 3.1 [maximum 8 marks] **8m**

Write a brief essay on

(i) rescue financing; and

(ii) wrongful trading

under the IRD Act.

Rescue Financing

Rescue financing is a type of financing provided for in the IRD Act that allows a debtor-in-possession to obtain business-critical incur liabilities at a time when it is insolvent or near-insolvent. More particularly, it is financing that is either (or both) necessary for ensuring the survival of the debtor, or necessary to achieve a better outcome from realising assets than would have been achieved in a liquidation scenario.

The purpose of carving out rescue financing in this respect is to allow a debtor to take action which is likely to avoid a winding up and allow the continuation of the business as a going-concern - thus potentially saving jobs, reducing avoidable liquidations and avoiding losses inherent to insolvency processes.

One example of a time that Rescue Financing would be crucial is when a debtor may have a long-term profitable business segment that is bleeding cash in the short term and which would achieve a significantly better as a going-concern than in a shut-down scenario that may occur in a liquidation.

In addition, the provisions of the IRD Act empower the Court to make certain orders with regard to rescue financing that allow an impecunious debtor to be more likely to obtain rescue financing - such as preferential treatment in a winding up if the debtor is subsequently liquidated, or attaching a security interest in respect of the finance to assets of the debtor to which a security interest would not ordinarily attach.

In summary, rescue financing provisions aim to reduce the number of avoidable windings-up by allowing debtors to obtain last-minute financing they would not ordinarily be able to obtain, thus resulting more favourable outcomes for creditors, employees and the public than would have been the case if the particular company was simply wound up.

Wrongful trading

Wrongful trading provisions are relatively new in Singapore, being introduced by Section 239 of the 2018 IRD Act (coming into force in 2020) for the purpose of making a person liable for certain debts incurred by a company which is, or as a result becomes, insolvent.

For the purpose of s239 of the IRD Act, wrongful trading is the incurrence of a debt or other liability at a time when the company is insolvent (or will become insolvent as a result of incurring such a debt) without reasonable prospects of that debt being paid in full. In this respect, the provisions carry some similarity insolvent trading or wrongful trading provisions in other countries such as Australia or England.

For a person to be found liable for wrongful trading, they must have (1) been a party to the trading in question and (a) known that the company was trading wrongfully, or

(b) ought to have known that it was trading wrongfully, as an officer of the company. In practice, any director, shadow director or other decision-maker in respect of the particular transaction or trading in question may be liable in this respect.

Critically, for section 239 of the IRD Act to be enlivened, it is not necessary for criminality to be established, reducing the extent of the burden of proof required on the part of the litigant. This reduced level of proof is favourable for insolvency practitioners and creditors alike.

Wrongful trading is a useful tool available to liquidators or judicial managers in order to recover from a company's officers and similar senior person debts wrongfully or carelessly incurred in order to reduce the impact of the company's insolvency on its creditors.

[also discuss that an interested person can seek a court declaration as to whether a transaction is wrongful trading]

Question 3.2 [maximum 7 marks] **5m**

Write a brief essay in which you discuss the differences between the judicial management and scheme of arrangement processes.

Schemes or arrangement and are each restructuring procedures available to distressed and/or insolvent companies provided for by the IRD Act in Singapore. The processes are vastly different, with some core differences being in the party which controls the debtor, the level of flexibility afforded to the debtor, and the way in which restructuring is approved under each procedure.

In a scheme of arrangement, control of the debtor remains entirely with the debtor's original officeholders, as appointed pursuant to its. Whilst the Court is necessarily involved in the process, full control remains with the company. This is in contrast to a judicial management procedure, in which the court will appoint a judicial manager to take over management of the debtor from its officers with, generally, a the judicial manager then inviting a creditors committee to form. In this respect, judicial management is more creditor-friendly and may be more favourable for creditors where they consider that management has made poor decisions or is acting wrongfully, negligently or fraudulently (although in that final case, other remedies may be more appropriate).

Whilst arguably being more debtor-friendly, schemes of arrangement are also generally more flexible than a judicial management procedure as there is a wider range of options - functionally limitless in number - available to how the debtor can restructure. Such options extend beyond simple cents in \$ distributions to creditors, and may alter rights of share capital. The particular terms of the scheme can be drawn up by management as seen fit and with the company still trading and in control of its directors, whereas in a judicial management less flexibility may be afforded to the debtor given the stigma associated with a court-appointed practitioner being in

control (i.e. an association with liquidation procedures). As a result, judicial managements have been criticised for a relatively low rate of debtors actually coming out of judicial management successfully.

Nonetheless, the flexibility available in a scheme of arrangement is more limited by the desires and interests of the creditors it is affecting. Whilst in a judicial management, only a simple majority of creditors in attendance at a creditors' meeting (or sitting on the creditors' committee) need to vote in favour of a restructuring plan for it to be approved, in a scheme of arrangement a simple majority in number and 75% in value of all affected creditors must vote in favour of the plan. Accordingly, a restructuring plan under judicial management is less likely to be knocked-back by dissenting creditors than one proposed in a scheme of arrangement.

Schemes or arrangement and judicial managements are both useful restructuring processes available in Singapore, at times each being more advantageous than the other, depending on the circumstances facing a particular debtor.

[discuss differences in moratoria, disclaimer of onerous property, avoidance transactions, and objectives]

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

ABC Limited (the Company) is incorporated in Singapore and is the ultimate holding company of a group of construction and property companies (the ABC Group). As at 31 December 2021, the ABC Group owns and operates 16 construction drilling rigs outside of Singapore in Australia and the United Kingdom. The Company's directors and major shareholders are Mr X and Mr Y, who collectively own 57% of the shares in the Company. Mr X and Mr Y are based in Singapore.

The ABC Group traditionally funds its business via bank lending, with project financing facilities advanced directly to the underlying project companies within the ABC Group.

As the ABC Group's ultimate holding company, the Company's assets comprise largely of its investments in its subsidiaries and intercompany receivables from its subsidiaries. The Company does not have fixed assets and operational cashflows and is dependent on dividends and receivables from its subsidiaries to meet its own financial obligations. The main operating subsidiaries of the ABC Group are Alpha Pte Ltd and Beta Pte Ltd (both incorporated in Singapore and wholly owned by the Company).

The ABC Group recently expanded its business into property ownership and owns property in Australia via another subsidiary, Charlie Pty Ltd, which is incorporated in Australia. The properties in Australia are mortgaged to a Singapore bank pursuant to a bank facility that is governed by Singapore law. Mr X and Mr Y are the majority directors of Charlie Pty Ltd.

To finance its growing operations, the Company issued a Multicurrency Medium Note Programme (MTN) under which the Company could raise unsecured debt financing of up to USD 600 million. Funds raised by the Company under the MTN were either advanced to its subsidiaries as intercompany loans, or injected as capital into its subsidiaries. As at 31 December 2021, the total unpaid amount under the MTN notes was approximately USD 267 million.

The Company also provided corporate guarantees to financial institutions to guarantee the performance of its subsidiaries under various facility agreements. As at 31 December 2021, the Company had provided seven guarantees to various lenders, for a total liability of approximately USD 160 million.

Besides the above liabilities, the Company has also obtained shareholders' loans of USD 120 million from Mr X and Mr Y. These shareholders' loans are repayable on demand.

In recent years, the ABC Group's business has been adversely impacted by an extremely challenging operating environment and instability, which has caused various entities in the ABC Group to default on their bank facilities, including entities whose debts are guaranteed by the Company.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 4 marks] **3m**

The bank lenders have come together to form a working group and the working group has asked its advisors to provide it with a written analysis covering the following critical issues for the Company. In particular, the bank lenders are considering the possibility of placing the Company into judicial management. Provide analysis on the following issues:

(a) Confirmation of the purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order. (2 marks)

(b) Assuming that the Company is placed under judicial management, what requirements must be satisfied in order for the Company to be able to access rescue financing under the IRD Act? (2 marks)

(a) The purpose of judicial management is, broadly, to allow a restructuring to take place without involvement of the debtor's former management but is more particularly set out in section 89 of the IRD Act, which states three objectives as follows:

- i. Survival of all or part of the company as a going concern**
- ii. Approval of a compromise between the company and a person named in section 210 of the Companies Act.**

iii. A more favourable realisation of the company's assets than would have taken place if it was wound up

In this sense, it is a creditor-friendly process that does not go as far as a full winding-up of the debtor, and is intended to allow the business to continue. The requirements for a judicial management order are:

- b. Company is or will shortly be unable to meet its debts*
- c. The judicial management is likely to achieve one or more of the objectives set out at (a) i - iii above.*

(b) To access Rescue Financing, the Company must show either that (1) such financing is necessary for its survival, or (2) is necessary to achieve a more favourable realisation of the company's assets than would have taken place if it was wound up.

[discuss also that a court application is required to obtain priority as set out in IRDA]

Question 4.2 [maximum 6 marks] **6m**

As things transpired, the Company was placed under judicial management.

The bank lenders are now considering whether Alpha Pte Ltd, Beta Pte Ltd and Charlie Pty Ltd should also be placed into judicial management. Provide analysis on the following issues:

(a) What are the steps that need to be taken in order to place Alpha Pte Ltd and Beta Pte Ltd under judicial management out of court? (3 marks)

Judicial management can be entered outside of court by resolution of creditors pursuant to Section 94 of the IRD Act. For brevity, given that this is a 3-mark question, and without repeating the entirety of the requirements in section 94, the process is, summarily:

- Show that the company is insolvent or*
- Obtain resolutions from the company's members/directors as appropriate*
- Nominate, and give notice to, a proposed judicial manager*
- Have the judicial manager give a statutory declaration (stating, summarily, that there are no conflicts, one or more section 89 objectives are likely to be met, and that the judicial admin consents) to the Official Receiver and Registrar of Companies*
- Publish certain notices*
- Have the directors give a statutory declaration stating that the company is (or is likely to become) unable to pay its debts, that a creditors meeting will be called within 30 days of the lodgement of this stat. dec, and that the directors believe at least one of the s89 objectives are likely to be achieved.*

- *Convene the creditors' meeting referred to above, giving at least 14 days notice and giving appropriate disclosure of the company's affairs in accordance with s 94*
- *Hold the meeting, at which creditors may resolve to place the company into judicial administration.*

(b) Is Charlie Pty Ltd eligible to be placed into judicial management in Singapore and, if so, what must be demonstrated for it to be so eligible? (3 marks)

It is possible for Charlie Pty Ltd ('CPL') to be eligible for judicial management in Singapore. The crucial element that must be demonstrated for a court to place CPL into judicial management is it must show that it has a 'substantial connection' to Singapore'. A number of factors are relevant in in this respect, but in the case of CPL the following will likely mean that it is eligible for judicial management as a foreign entity:

- *At least some of the property owned by CPL is mortgaged to Singaporean banks pursuant to facility agreements governed by Singapore law.*
- *The fact that Mr X and Mr Y, who are based in Singapore, are the 'majority directors' of CPL indicate that it likely has a place of business (e.g. an office) in Singapore.*

There is no evidence in the facts that the centre of main interests of CPL is in Singapore, that CPL is registered as a foreign company in Singapore, has substantial assets in Singapore, or has submitted to the jurisdiction of Singapore courts - other factors in determining a company's eligibility for winding up (and therefore judicial management) in Singapore under the IRD Act - but the two dot points above would in any case be sufficient to establish eligibility.

Question 4.3 [maximum 5 marks]

Assuming Alpha Pte Ltd, Beta Pte Ltd and Charlie Pty Ltd are also placed into judicial management in Singapore.

Please provide analysis on the following issue:

(a) Would the assets owned by the ABC Group in jurisdictions outside of Singapore be protected? If there is no automatic protection, what can be done to obtain such protection? (5 marks) 5m

Filing for Judicial management under the IRD imposes an automatic moratorium on all assets owned by the debtor; however, this moratorium does not automatically have extra-territorial effect - something which would need to be applied for.

To the extent an extraterritorial moratorium is obtained, its usefulness will still depend on the jurisdiction in which the assets are located and whether that jurisdiction respects the principle of comity. In this case, it appears that the extra-territorial assets of ABC Group are located in Australia in the UK, common-law jurisdictions which do recognise the principle of comity and which each practice a relatively high degree of interjurisdictional comity with Singapore. Accordingly, it is likely that the assets located in UK and Australia would be protected.

In order to gain additional protection and depending on the nature of the ABC Group's creditors and their claims, the judicial manager may consider it appropriate to formally seek recognition of the moratorium order in Australia. For the assets in Australia, the fact that the principle creditor appears to be a Singaporean bank holding a debt governed by Singaporean law is beneficial as the Singaporean bank would likely want to avoid being in breach of a moratorium imposed by a Singaporean court. Depending on the nature of the creditors which may attack the assets in the UK, it may be prudent for the judicial administrator to seek recognition of the extrajudicial moratorium in the UK in order to protect those assets.

*** End of Assessment ***

46m - well done!