



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 **1m**

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] **3.5m**

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.

In order for a scheme of arrangement to be approved, each class of creditor needs to approve the scheme. A cross-class cram down allows for the scheme to be approved, even where there is dissenting class or classes of creditors. The cross-class cram down can be approved by the Court where:

- *A majority of creditors present and voting approved the proposal;*
- *That majority represents 75% or more of the value of creditors voting on the proposal; and*
- *The proposal does not unfairly discriminate between two or more classes of creditors and is fair and equitable to the creditors who have rejected the proposal.*

Further details around what constitutes fair and equitable treatment of creditors is contained in the IRD Act.

[could have described what is fair and equitable - s 70]

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

Name two objectives of the IRD Act.

One of the key objectives of the IRD Act was to consolidate the existing personal and corporate insolvency and restructuring laws, which were previously contained in the Bankruptcy Act and Companies Act, into one place. Another key objective was to establish a regulatory regime for insolvency practitioners. The regulatory regime establishes qualification requirements, licensing and a disciplinary framework.

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.

In Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd [2021] SGCA 60, the Court set out a list of factors that would need to be considered when evaluating whether a company was unable to pay its debts, which included the following:

- 1. The quantum of debts that are due or will be due in the near future;*
- 2. Whether payment has been or will be demanded;*
- 3. Whether the debtor has failed to pay any of its debts, the quantum of these debts, and the length of time the debt had remained unpaid; and*
- 4. The value of the debtor’s current assets and other assets that can be readily realisable in the future.*

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

Question 3.1 [maximum 8 marks] **5m**

Write a brief essay on

- (i) rescue financing; and**
- (ii) wrongful trading**

under the IRD Act.

Rescue financing is a tool that is available in scheme of arrangement and judicial management proceedings to improve the prospect of rehabilitating the debtor or otherwise improving the returns to stakeholders. In an insolvency process, the debtor will typically not have access to the funding to fund ongoing trading to support the business remain a going concern and to fund the insolvency process by virtue of its financial position.

New funders will often be unwilling to provide additional funding, given the risk of non-payment, and existing creditors will be unwilling to risk additional exposure beyond their existing funds at risk. Rescue financing provides a means for the funders to elevate their priority for the funding or to take a security interest, to provide a greater prospect of them recovering their funding and in doing so support the rehabilitation or returns to creditors.

Under the IRD Act, the Court will review the rescue financing arrangements and may consider approving an elevated priority or the granting of security interests, when the rescue financing would not otherwise have been available. If the applicant is also seeking a senior security interest, they will need to prove there is adequate protection for existing security interests.

[discuss what is definition of rescue financing under IRDA, and what are the types of priority that can be granted pursuant to an application to court]

Under s 239 of the IRD Act, a person may become liable for the debts of the company if they knew the company was trading wrongfully, or as an officer knew or ought to have known the company was trading wrongfully. Trading wrongfully is where a company incurs debts, without a reasonable prospect of meeting those debts, in situations where the company is insolvent or becomes insolvent due to the debt incurred.

Judicial managers and liquidators can seek third party funding to progress wrongful trading claims against parties, but the court or committee of inspection need to approve the third-party funding arrangements.

It is worth noting that directors may face wrongful trading claims for incurring liabilities during corporate rescue proceedings, if the corporate rescue is unsuccessful. Accordingly, this supports the role of rescue financing in corporate rescue situations, as it mitigates the risk for directors of non-payment of any liabilities incurred, provided the rescue financing is structured appropriately.

[discuss that an interested person can apply to court for declaration whether a transaction is wrongful trading; and that imposition of civil liability doesn't require criminal liability first]

Question 3.2 [maximum 7 marks] **4m**

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

Judicial management and the scheme of arrangement are both corporate rescue proceedings available under the IRD Act. The scheme of arrangement is a debtor in possession process whereas judicial management involves the appointment of an independent insolvency practitioner is appointed to take control over the company. Under both rescue proceedings, rescue finance can be obtained subject to court order.

The scheme of arrangement is designed for companies that are seeking to be rehabilitated but needs to make arrangements with its creditors to continue. The benefits of the scheme of arrangement, is that it provides for a moratorium on creditors enforcing their rights and allows for the existing directors and management to remain in control of the company. The company can only apply to enter a scheme of

arrangement when it proposes or intends to propose a compromise or arrangement with its creditors.

The scheme of arrangement will involve a scheme meeting, where creditors will vote on the proposed scheme. This can only pass if a majority in number of each class of creditors vote for the scheme, and those voting in favour represent 75% in value or more of each of the respective classes of creditors. If the scheme is not approved, there is no automatic conversion and creditors will need to apply for the winding-up via other processes.

Judicial management involves the appointment of an independent insolvency practitioner, with all powers and functions of the board being assumed by the judicial manager. The judicial manager will put forward a proposal to creditors that will best meet the objectives under the IRD Act, which may involve making an arrangement with creditors to try and rehabilitate the company. The judicial management can sell or dispose of assets, take or defend legal proceedings, and continue to operate the company's business. Similar to a scheme of arrangement, there is a temporary moratorium on some actions being taken against the company.

The benefit of judicial management over a scheme is that it enables an independent party to take over the company and recommend a path that they consider will be best for creditors. This is particularly useful where there are any concerns around the existing board of directors.

[discuss differences in moratoria, duration, disclaimer of onerous property, avoidance provisions]

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] **2m**

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)**

In order to obtain a judicial management order, the bank lenders as creditors of the Company can apply to Court to appoint a Judicial Manager on the basis:

- *The company is unable, or will become unable to pay its debts. In this regard, given the Company is reliant on dividends and receivables from its operating subsidiaries, which are in default of their own bank obligations, it appears likely this will be proven;*
- *One of the purposes for Judicial Management outlined in the IRD Act will be met by the appointment of a Judicial Manager. This requires the bank lenders to demonstrate that there is a reasonable probability of rehabilitating the Company; preserving all or part of the business as a going concern; or the interests of creditors would be better served through Judicial Management, as opposed to winding-up the Company.*
- *The bank lenders will need to nominate a party to be the Judicial Manager.*

The Court may at its discretion approve of rescue financing arrangements under s101 of the IRD Act, which allows for the rescue financing to be treated as a cost and expense of the winding-up or to be given priority, or a security interest over the Company's property where no prior security interests exist or to grant a subordinated security interest. Where the Judicial Manager seeks to obtain priority or security for the rescue financing they need to demonstrate they could not have obtained the debt without the priority or security interest granted. If the Judicial Manager seeks to have rescue financing obtain a senior security interest, they need to demonstrate they could not have obtained the debt without the security interest granted and there is adequate protection for the holder(s) of the existing security interest.

[discuss what is purpose of JM proceedings - see s 89 to 91; discuss definition of rescue financing under IRDA]

Question 4.2 [maximum 6 marks] **5m**

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)***

While Alpha Pte Ltd and Beta Pte Ltd are subsidiaries of the Company, under Singapore law they are treated as separate legal entities and insolvency proceedings need to be initiated for each entity. These companies may enter judicial management out of Court through resolution of the companies' creditors. This requires a majority in number and value to approve the resolution to appoint the judicial manager. Given these are overseas companies that are operating businesses, and therefore assumed to have a larger body of creditors, this may be challenging.

[see s 94 for the steps]

(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)

Only companies that are eligible to be wound up under the IRD Act, can be placed into Judicial Management. Under s246 of the IRD Act, this includes foreign debtors, where there is a proven substantial connection with Singapore. This can be proven by meeting one or more of six factors listed in the IRD Act. This includes debtors where the COMI is in Singapore and where the debtor has chosen Singapore as the governing law for a loan transaction. In this regard, the directors of Charlie Pty Ltd are both based in Singapore and the loan is with a Singaporean bank and governed by Singapore law. On this basis, it would appear Charlie Pty Ltd is eligible to be placed into judicial management.

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) 3m

There is an automatic moratorium on filing the application to enter judicial management. The judicial manager is able to take steps to protect the assets of the company. However, they may need to seek judicial recognition and seek appropriate relief in the overseas jurisdiction in order to obtain necessary protection. Singapore has enacted the UNCITRAL Model Law on Cross-Border Insolvency, which allows for co-operation between courts and representatives and for concurrent insolvency proceedings.

[whilst SG has adopted the model law, the relevant question is whether that relevant jurisdiction has adopted the model law or has recognition available under its laws]

*** End of Assessment ***

38.5