



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.

Answer: In 2016, a cross-class cram-down mechanism was introduced into the Singapore insolvency regime in the form of section 211H of the Companies Act (Cap 50), and subsequently, in section 70 of the Insolvency Restructuring and Dissolution Act 2018 (“IRDA”). The rationale for introducing the cram-down provision was, that a small minority of creditors in a dissenting class should not be able to veto a scheme simply because they belong in a separate class, so as not to hold the entire scheme “ransom”. Under a scheme of arrangement¹ provides that the Court has the power to approve a compromise or arrangement and order that it be binding on the company and all classes of creditors meant to be bound by the arrangement if the three conditions are satisfied. The statutory requirements are:

¹ Section 70(2) of the IRDA.

- A majority in number of creditors meant to be bound by the arrangement, who were present and voting at the relevant meeting approved the scheme;
- The majority above represents three-fourths in value of the creditors meant to be bound by the arrangement, who were present and voting at the relevant meeting; and
- The Court is satisfied that the arrangement does not discriminate unfairly between classes of creditors and is fair and equitable to each class of creditors.

The first two conditions exist to ensure that the applicant possesses the requisite majority in valuation and number of creditors across the classes of creditors such that they would have succeeded in the scheme but for the dissenting class(es) of creditor. Without meeting this minimum threshold, the Court does not have the jurisdiction to exercise its power to cram-down.

Substantively, the third condition of the subsection codifies the requirement that the proposed scheme be 'fair and equitable' between each class of creditors and provides that the scheme should not discriminate unfairly between classes. The former requirement is also known as the 'absolute priority' rule.

Question 2.2 [maximum 2 marks] 2m

Name **two** objectives of the IRD Act.

Answer: Major objectives² of the IRD Act³ are as follows:

(i) Consolidation of Insolvency and Restructuring Laws: Before the advent of the Insolvency, Restructuring and Dissolution Act 2018 (IRD Act), the legislative landscape of insolvency and restructuring in Singapore was fragmented, with key regulations dispersed across several laws such as the Companies Act and the Bankruptcy Act. This fragmentation posed navigational challenges and potential for legal inconsistencies or overlaps. The introduction of the IRD Act sought to rectify this by unifying the insolvency and restructuring laws under a single legislative framework, thereby enhancing legal clarity and coherence for stakeholders including companies, creditors, and insolvency practitioners. Moreover, the consolidation allowed for the identification and resolution of any previously existing gaps or discrepancies in the law, ensuring a comprehensive and encompassing coverage of all pertinent areas.

(ii) Regulation of Insolvency Practitioners: Insolvency practitioners hold a pivotal role in the insolvency and restructuring processes. They are entrusted with the responsibility of managing the affairs of insolvent companies, orchestrating arrangements between distressed companies and their creditors, and supervising the liquidation of companies. Given the critical nature of these duties, it is imperative that insolvency practitioners demonstrate high standards of competence, integrity, and accountability. To this end, the IRD Act aimed to establish a regulatory regime for insolvency practitioners, intended to ensure consistent professional standards and establish mechanisms for disciplinary recourse in cases of misconduct.

(iii) Summary dissolution procedure: Many companies facing financial trouble do not even have assets to pay for their liquidation costs. To address this problem, the new IRDA includes

² Long title of the Insolvency, Restructuring and Dissolution Act 2018 (IRD Act).

³ Gurrea-Martínez, A. (2020, July 23). Singapore's New Insolvency Restructuring and Dissolution Act. Retrieved from Centre for Commercial Law in Asia: <https://ccla.smu.edu.sg/sqri/blog/2020/07/23/singapores-new-insolvency-restructuring-and-dissolution-act>

a summary procedure to dissolve companies that have insufficient assets to pay for the administration of the winding up.

(iv) Avoidance actions: The new legislation amends the system of avoidance actions existing in insolvency proceedings. Among other aspects, the new regime reduces the 'twilight period' for transactions at an undervalue from 5 to 3 years, and it increases from 6 months to 1 year the avoidance period of unfair preferences given to non-related parties.

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.

Answer: The major reason to wind up a company on the grounds of insolvency is that the company is "unable to pay its debts"⁴. Under section 125(2) of the IRD Act, a company is deemed to be unable to pay its debts if:

(i) a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding \$15,000 then due has served on the company, by leaving at the registered office of the company, a written demand by the creditor or the creditor's lawfully authorised agent requiring the company to pay the sum so due, and the company has for 3 weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(ii) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court must take into account the contingent and prospective liabilities of the company.

In ***Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd [2021] SGCA 60***, the Court of Appeal clarified that the cash flow test is the only test for deemed insolvency under s 254(c) of the Companies Act (now re-enacted in s 125(2)(c) of IRDA). The Court of Appeal held that the cash flow test should be the "sole and determinative test" for deemed insolvency under s 254(c) of the Companies Act / s 125(2)(c) of IRDA and that the balance sheet test was inapplicable. In reaching its conclusion, the court favored the plain wording of the provision and comparative case law and found that Parliament could not have intended the balance sheet test to apply as it would not be a good indicator of the company's present ability to pay its debts. The court also gave guidance on factors that should be considered under the cash flow test:

- the quantum of all debts which are due or will be due in the reasonably near future;
- whether payment is being demanded or is likely to be demanded for those debts;
- whether the company has failed to pay any of its debts, the quantum of such debt and for how long the company has failed to pay it;

⁴ Allen & Gledhill. (2021, June 29). Singapore Court of Appeal clarifies test for inability to pay debt in winding up proceedings. Retrieved from Allen and Gledhill: <https://www.allenandgledhill.com/sg/publication/articles/18850/court-of-appeal-clarifies-test-for-inability-to-pay-debts-in-winding-up-proceedings>

- the length of time which has passed since the commencement of the winding-up proceedings;
- the value of the company's current assets and assets which will be realisable in the reasonably near future;
- 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;
- any other income or payment which the company may receive in the reasonably near future; and
- 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.

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.

Answer: The brief essay on each topic is as under:

(i) Rescue Financing

Introduction

Singapore introduced major reforms to its debt restructuring regime through the Companies (Amendment) Act 2017 which came into effect on 23 May 2017. These reforms, which were based on the US Chapter 11 regime, were introduced to support debtor-led restructurings through a “turbo charged” scheme of arrangement regime which included rescue financing provisions that allow for the grant of super priority status. The Insolvency, Restructuring and Dissolution Act 2018 (“IRDA”), which was passed by the Singapore Parliament on 1 October 2018 and came into effect on 30 July 2020, heralded a new era for insolvency and restructuring law in Singapore, introducing several key reforms. Among these, the concept of rescue financing stands out as a significant innovation aimed at promoting corporate recovery. Rescue financing, also known as debtor-in-possession financing, is a unique form of credit extended to companies undergoing financial distress. It is distinct from traditional forms of financing, primarily due to the financial circumstances of the recipient and the specific objectives that it seeks to achieve. It plays a critical role in maintaining operations, facilitating restructuring, and ultimately, aiding the recovery of the distressed company⁵.

⁵ Mokal, R.J. (2005). Corporate Insolvency Law: Theory and Application. Oxford: Oxford University Press, p. 126.

Function and Purpose

Rescue financing allows the debtor company to continue doing business, and pay suppliers and other trade debtors. Rescue financing is particularly important for debtor companies in financial trouble who often face higher costs of borrowing, as banks and financial institutions become more wary of advancing fresh funds to a distressed company without some form of protection or assurance that these fresh funds will be repaid.

The statutory scheme:

“Rescue financing” is defined as any financing that satisfies either or both of the following conditions⁶:

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

There are four levels of priority that the court can grant⁷:

- (a) to treat the debt as if it were a cost or expense of the winding up;
- (b) to elevate the debt in priority over all preferential debts and other unsecured debts if the company would not have been able to obtain such financing without it being granted such priority;
- (c) for the debt to be secured by a security interest not otherwise subject to any existing security or to confer a subordinate security interest on the debtor company’s property already subject to an existing interest; and
- (d) for the debt to be secured by a security interest of the same or higher priority than an existing security interest (also known as a “priming lien”).

Relevant case laws:

- **Asiatravel.com Holdings Ltd (SGX: 5AM) (“ATH”)**

On 8 April 2019, the Court granted ATH priority over all the preferential debts specified in Section 328(1)(a) to (g) of the Act (now Section 203(1)(a) to (i) of the IRDA) and all unsecured debts pursuant to Section 211E(1)(b) of the Act (now Section 67(1)(b) of the IRDA). This is the first successful application for super priority rescue financing under Section 211E of the Act (now Section 67 of the IRDA).

- **Design Studio Group Ltd (SGX:D11) (“Design Studio”)**

On 28 May 2020, the Court ordered that the proposed rescue financing be granted super priority over the preferential debts specified in Section 328(1)(a) to (g) of the Act (now section

⁶ Section 211E(9) of the Companies Act (Cap 50, 2006 Rev Ed) or s 67(9) of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018) (“IRDA”) for rescue financing in the context of schemes of arrangement, and s 227HA(10) of the Companies Act and s 101(10) of the IRDA for rescue financing in the context of judicial management.

⁷ Sections 211E(1) and 227HA(1) of the Companies Act (Cap 50, 2006 Rev Ed), or ss 67(1) and 101(1) of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018)

203(1)(a) to (i) of the IRDA) under Section 211E(1)(b) of the Act (now Section 67(1)(b) of the IRDA).

The S\$62 million rescue financing comprised two separate financing facilities as follows:

- A single-drawdown term loan facility of up to S\$12.08 million from an associate of Design Studio's controlling shareholder; and
- A multi-drawdown banking facility of up to S\$50 million from an existing lender of Design Studio and its subsidiaries.

This is the successful application for super priority rescue financing in Singapore and first case involving a "roll-up" of an existing lender's pre-filing debt.

Implications for Companies and Creditors

Rescue financing under the IRD Act has significant implications for both companies and their creditors. For distressed companies, it provides an additional lifeline at a critical juncture when traditional financing options may be unavailable or severely limited. This infusion of capital can provide the breathing space needed for these companies to devise and implement effective restructuring plans⁸.

For creditors, the super-priority status accorded to rescue financing may initially appear detrimental, as it could dilute their claims. However, it also increases the chances of the distressed company's survival, which could, in turn, enhance recoveries in the long run. Thus, rescue financing might represent a strategic compromise for creditors, trading immediate returns for potential future gains.

Conclusion

Rescue financing under the IRD Act underscores Singapore's commitment to developing a robust and effective insolvency regime. Rescue financing not only aids in the recovery of distressed companies but also has wider implications for creditors, employees, and the broader economy. For creditors, a successful restructuring facilitated by rescue financing can increase the likelihood of debt recovery. For employees, it can mean job preservation. In sum, rescue financing serves as an essential tool in the arsenal of insolvency and restructuring legislation, providing a lifeline to distressed companies and promoting their recovery. Its importance cannot be overstated, particularly in times of economic uncertainty when the number of companies experiencing financial distress can rise significantly.

(ii) Wrongful trading:

Introduction

Wrongful trading occurs when a company contracts debts or other liabilities while insolvent (or becomes insolvent as a result of contracting such debt or liability) without a reasonable prospect of meeting them in full. Where a company has traded wrongfully, an officer who was party to the wrongful trading and who knew that the company was trading wrongfully or, as an officer of the company, ought to have known, in all the circumstances, that the company was trading wrongfully, may be personally liable for the same offence.

⁸ Ho, L.C. (2019). The New Corporate Rescue Regime in Singapore. *Journal of Corporate Law Studies*, 19(2), 371-395.

It is a legal principle designed to guard against reckless or fraudulent continuation of business operations when a company is facing insolvency, protecting creditors and maintaining faith in the broader business ecosystem.

Wrongful Trading under the IRD Act

The IRDA under Section 239 of the IRDA introduces a new concept of "wrongful trading", where a company is deemed to "trade wrongfully" if it incurs debts or other liabilities, when insolvent (or becomes insolvent as a result of incurring such debts or other liabilities), without reasonable prospect of meeting them in full. Any director, company secretary or any executive officer of the company (an "Officer") does not need actual knowledge to be found liable for wrongful trading. An Officer may be found liable for wrongful trading if he or she ought to have known that the company was trading wrongfully. In addition, any person (this is wider than just an Officer) party to such wrongful trade, who knew that the company was trading wrongfully, may be liable for such wrongful trading.

The courts are empowered to declare that any person who was a knowing party to a company's wrongful trading be personally liable for its debts or liabilities if found guilty without the need to establish criminal liability. The previous regime was viewed as unsatisfactory as criminal liability had to be found as a prerequisite before the making of an application to impose civil liability against the officer of the company. The current regime under the IRDA makes it easier for liability to be established as the standard of proof for civil liabilities is lower than for criminal liabilities. As such, directors of distressed companies considering entering into contracts will have to exercise greater care. However, the courts may relieve the person from personal liability if the courts are satisfied that the person acted honestly, having regard to all the circumstances of the case, and ought fairly to be relieved from personal liability.

Section 239(10) of the IRDA provides that a company or any person party to, or interested in becoming a party to, the carrying on of business with a company, may apply to the courts for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading.

Implications for Directors

The provisions concerning wrongful trading under the IRD Act carry substantial implications for directors, necessitating vigilance and proactive engagement with the company's financial situation. Their role and responsibilities are not merely ceremonial; directors have a fiduciary duty towards the company and its stakeholders. They are expected to continuously monitor the financial health of the company and take necessary steps to mitigate risks associated with financial distress. Failure to do so could potentially lead to charges of wrongful trading.

Being found liable for wrongful trading under Section 239 can have severe consequences for directors. The most direct impact is the personal liability they might face for the company's debts incurred during the period of wrongful trading. This could be a significant financial burden, as it could involve personal assets being used to discharge the debts. Furthermore, directors found liable may also be disqualified from holding directorships in the future, constraining their career prospects. Beyond financial penalties and professional repercussions, a declaration of wrongful trading could also lead to reputational damage. Such a declaration sends a strong signal to the market about the director's decision-making abilities and adherence to fiduciary duties. The wrongful trading provisions under the IRD Act place significant responsibilities on directors of financially distressed companies. These provisions demand vigilance, proactive decision-making, and a strong understanding of the law from

directors, underlining the high standards expected of corporate leaders in the country's business environment⁹.

Conclusion

By imposing a duty on directors to take appropriate action when their company faces insolvency, these provisions encourage responsible corporate behavior and protect the interests of creditors. At the same time, the provisions also recognize that directors may face difficult decisions during times of financial distress, providing a defense for those who have taken reasonable steps to minimize losses to creditors. Wrongful trading under the IRD Act is a crucial aspect of Singapore's insolvency regime that emphasizes the need for responsible and proactive decision-making by directors.]

Question 3.2 [maximum 7 marks] 7m

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

Answer: Singapore's insolvency law provides two prominent procedures designed to assist companies in financial distress: Judicial Management and Scheme of Arrangement¹. The following presents a detailed comparative analysis of these two processes, focusing on their key distinctions and purposes:

(i) Introduction: Contextualizing Judicial Management and Scheme of Arrangement

Both Judicial Management and Scheme of Arrangement are targeted at corporate rescue¹⁰. They offer a lifeline to companies encountering financial difficulties, enabling them to potentially avoid winding up or liquidation. However, the mechanisms and conditions of these two processes are markedly different. These differences primarily lie in the realms of management control, initiation criteria, the concept and provisions of a moratorium, and the overall flexibility of the procedures.

(ii) Control Dynamics: The Contrast between Judicial Management and Scheme of Arrangement

In the Judicial Management procedure, the court appoints a judicial manager, generally an insolvency professional, to assume the control of the company's operations¹¹. This independent entity essentially replaces the existing management and directors of the distressed company. The primary purpose behind this substitution is to ensure that an experienced and neutral professional oversees the business affairs to optimally prevent liquidation and foster the company's turnaround¹².

On the other hand, the Scheme of Arrangement maintains the existing managerial structure¹³. Here, the incumbent directors of the company play a crucial role. They are charged with the responsibility of formulating and proposing the scheme of arrangement, which is designed to guide the company's restructuring process¹⁴.

⁹ Leong, W.K. (2019). Directors' Duties and Wrongful Trading. Singapore Journal of Legal Studies, 159-186.

¹⁰ Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.

¹¹ Ibid, section 94(1)(a).

¹² Ibid, section 94(2).

¹³ Ibid, section 111(3).

¹⁴ Ibid, section 107.

(iii) Initiation Criteria: The Divergence between Judicial Management and Scheme of Arrangement

The initiation of the Judicial Management process requires the company to be insolvent or in the vicinity of insolvency¹⁵. Moreover, the court needs to be persuaded that the judicial management will likely result in the achievement of one of the defined statutory purposes. These include the survival of the company as a going concern, or a better realization of its assets as compared to a scenario of winding up¹⁶.

In contrast, a Scheme of Arrangement can be launched in a broader range of situations. Its flexibility allows it to be initiated even before the company reaches the brink of insolvency. This process primarily entails proposing a compromise or arrangement to the company's creditors or shareholders¹⁷.

(iv) The Concept of Moratorium: Judicial Management versus Scheme of Arrangement

One of the most significant differences between these two processes lies in the provision of a moratorium. Judicial Management provides an automatic moratorium, which stays or restricts the commencement or continuation of legal proceedings against the company. This moratorium serves as a crucial breathing space for the distressed company, preventing it from being dragged into multiple litigation procedures during the rescue operation.

However, a Scheme of Arrangement does not come equipped with an automatic moratorium. Instead, the company has to actively seek a court order to restrain any legal actions while it is in the process of formulating the scheme⁹. This implies that a Scheme of Arrangement requires an additional legal step to achieve the same level of protection offered automatically under Judicial Management.

(v) Flexibility Index: Judicial Management versus Scheme of Arrangement

From the perspective of flexibility, a Scheme of Arrangement is considered more adaptable than Judicial Management. This procedure allows for a range of creative solutions tailored to meet the unique needs and circumstances of the company¹⁸. However, the scheme must receive approval from a majority representing 75% in value of each class of creditors, and then it must be sanctioned by the court.

In contrast, Judicial Management is less flexible, given its inherent statutory objectives. The Judicial Manager operates under court supervision and with a mandate to achieve specified goals defined under the IRD Act.

(vi) Nature of the Process: Proactive versus Reactive Mechanism

Judicial Management can be characterized as a reactive mechanism in the face of financial distress. It is initiated only when the company is insolvent or at the brink of insolvency. It is designed to act as a swift response to a crisis scenario and thus, leans towards a more urgent and serious situation. Its primary focus is to stave off the immediate threats of winding up and litigation and to allow for the possibility of rehabilitation under the watchful eye of a court-appointed manager.

On the other hand, a Scheme of Arrangement is generally considered a more proactive and preventive mechanism. It can be implemented at an earlier stage, even before the company

¹⁵ Ibid, section 94.

¹⁶ Ibid, section 94.

¹⁷ Ibid, section 107.

¹⁸ Ibid, Part 17 - Arrangements and Reconstructions.

becomes insolvent. This preemptive nature allows the company to deal with financial distress proactively, affording more time to negotiate and strategize an optimal rescue or restructuring plan. This process also enables the management to remain in control, facilitating a collaborative resolution with creditors or shareholders.

(vii) Restructuring Approach: Individual versus Collective Action

Judicial Management operates under the principle of collective action. The company's control is taken over by a judicial manager, who formulates and executes the restructuring plan with the aim of protecting the interests of all creditors uniformly. This collective approach ensures that all actions taken are in the best interests of the company and its stakeholders as a whole, not favoring any specific group of creditors.

In contrast, a Scheme of Arrangement allows for a more individual approach. It can be applied selectively to different classes of creditors, depending on the specific terms of the scheme. This means that different creditor groups can be treated differently based on the scheme's details. This allows for a more customized and flexible resolution, accommodating the distinct needs of various creditor classes.

Overall, the choice between Judicial Management and Scheme of Arrangement is not merely a question of preference, but a strategic decision based on the specific circumstances and needs of the company in distress. In conclusion, while both Judicial Management and Scheme of Arrangement share the primary objective of corporate rescue, they distinctly vary in terms of control dynamics, initiation criteria, provisions of a moratorium, and the overall flexibility of the procedures. Hence, depending on a company's specific circumstances, one process might be more appropriate than the other.

(viii) Court Involvement

In Judicial Management, a company may be put into judicial management by either (i) an application to the court; or (ii) a resolution of creditors. Once appointed, the judicial manager generally runs the judicial management, but the court retains supervisory powers (e.g., approval of super-priority rescue financing, control of the judicial manager's actions, and extension of the judicial management order). At the end of the judicial management process, the judicial manager will require an order of court to be discharged.

While in Scheme of Arrangement the typical process for implementing a compromise or arrangement involves two separate court approvals. The court's permission must first be sought to hold a meeting of the creditors or members of a company, or of a class of creditors or members, for the purpose of putting to those creditors or members a proposal to implement a compromise or arrangement between those creditors or members and the company. If the court grants approval to hold the meeting, and the meeting approves of the proposed compromise or arrangement with the requisite statutory majority, then the court's permission must be sought to implement the compromise or arrangement.

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] 4m

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)

Answer:

(a) Judicial management is a process designed to allow the rehabilitation of a financially distressed company, or to realise its assets in a more advantageous way than if the company were to be wound up. Under this method, an independent judicial manager is appointed to manage the affairs, business and property of a company under financial distress. The company is also temporarily shielded from legal proceedings by third parties, giving it the opportunity to rehabilitate. Accordingly, the purpose of judicial management proceedings is to rehabilitate a financially distressed company and provide an opportunity for it to restructure its affairs and operations with the objective of preserving its business as a going concern.

To obtain a judicial management order, the following must be presented to the court:

(i) Application: An application for judicial management must be made to the court by a creditor, the company itself, or its directors. In this case, it is likely that the bank lenders, as creditors, would initiate the application.

(ii) Grounds for Judicial Management: The applicant must demonstrate to the court that the company is unable to pay its debts, or that it is likely to become unable to pay its debts. Given the defaults on bank facilities and the challenging operating environment described in the scenario, the bank lenders can argue that the ABC Group's financial difficulties meet this requirement.

(iii) Reasonable probability of rehabilitating the company: The court need to be satisfied that judicial management would be likely to achieve at least one of the following purposes:

- The company's survival, or its undertaking as a going concern (whether in whole or in part);
- The approval of a scheme of arrangement; or
- The more effective use of the company's assets to satisfy creditors' claims, compared to if the company was wound up.

(iv) Proposed Judicial Manager: The application must propose a suitable person to be appointed as the judicial manager. The judicial manager is an independent professional who will take control of the company's affairs and formulate a restructuring plan.

(v) Public Interest: The court must be satisfied that it is in the public interest to place the company under judicial management. This criterion ensures that the rehabilitation process benefits not only the company and its creditors but also other stakeholders such as employees, customers, and the economy as a whole.

If the court is satisfied with the application and supporting evidence, it may grant a judicial management order, leading to the appointment of a judicial manager and the initiation of the judicial management process.

(b) If the Company is placed under judicial management, it may be able to access rescue financing under Section 67 of the IRDA (formerly Section 211E of the Companies Act ("Act")) The requirements for accessing rescue financing under the IRDA are as follows:

Proposal for Rescue Financing: The judicial manager must prepare a proposal for rescue financing, outlining the terms and conditions of the financing and how it will facilitate the company's rehabilitation. This proposal should include details such as the amount, purpose, security (if any), and repayment terms of the financing.

Approval by Creditors' Committee: The proposal for rescue financing must be approved by the creditors' committee. The creditors' committee is a representative body composed of creditors who are owed significant amounts by the company. Its approval ensures that the rescue financing is supported by the creditors and aligns with their interests.

Court Approval: The proposal for rescue financing, along with the creditors' committee's approval, must be presented to the court for its consideration and approval. The court will evaluate the proposal to ensure it is fair and reasonable and will contribute to the successful rehabilitation of the company.

The Court's approval for a rescue financing order is subject to the following core pre-conditions being met:

- Reasonable efforts made to secure rescue financing without super priority

The company would not have been able to obtain the rescue financing unless super priority was given – statutorily applies only to Section 67(1)(b) to (d) of the IRDA (formerly Section 211E(1)(b) to (d) of the Act) and is expected under Section 67(1)(a) of the IRDA (formerly Section 211E(1)(a));

- Adequate protection

There is adequate protection for the interests of the holder of the existing security interest (in the event the security is “primed”) – applies only to Section 67(1)(d) of the IRDA (formerly Section 211E(1)(d) of the Act); and

- Meets definition of rescue financing

The proposed financing must constitute “rescue financing” as defined in Section 67(9) of the IRDA (formerly Section 211E(9) of the Act) – (i) financing necessary for the survival of a company that obtains the financing and/or (ii) financing necessary to achieve a more advantageous realisation of the assets than on a winding up.

Once the court approves the rescue financing proposal, the Company can access the funds provided by the rescue financier, which will assist in funding its operations and restructuring efforts during the judicial management process.

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)
- (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)

Answer:

(a) Steps to Place Alpha Pte Ltd and Beta Pte Ltd Under Judicial Management Out of Court

Placing a company under judicial management outside the court is a systematic process defined under the Insolvency, Restructuring and Dissolution Act 2018 (IRD Act). This process for Alpha Pte Ltd and Beta Pte Ltd, both Singapore-incorporated entities, would involve several steps:

1. **Board Resolution:** The initial step would be for the directors of Alpha Pte Ltd and Beta Pte Ltd to pass a board resolution, acknowledging that the company is, or will be, unable to pay its debts and that it is in the company's best interest to undergo judicial management¹⁹. This is crucial because it underlines the board's acceptance of the company's financial situation and its willingness to initiate remedial actions.
2. **Creditors' Consent:** Subsequently, the directors must secure the agreement of the majority of the company's creditors, defined as a majority in number representing at least three-fourths in value²⁰. This step is important as it ensures that the major creditors are onboard with the proposed course of action, thereby ensuring a fair and collective approach in addressing the company's financial distress.
3. **Appointment of Judicial Manager:** If the directors are successful in obtaining the creditors' consent, the company can then appoint an insolvency practitioner as the judicial manager²¹. The appointed person should be someone who has the requisite qualifications, experience, and capacity to effectively manage the company's affairs during this period.
4. **Submission of Documents:** The final procedural step involves the submission of various documents to the Registrar and the Official Receiver. These documents include a copy of the resolution, a statement of affairs detailing the company's assets and liabilities, a list of creditors, and a statement of consent by the appointed judicial manager²².

Upon fulfillment of the above steps, Alpha Pte Ltd and Beta Pte Ltd can be placed under judicial management outside of the court process.]

(b) Eligibility of Charlie Pty Ltd for Judicial Management in Singapore

When it comes to a foreign company, such as Charlie Pty Ltd, seeking judicial management in Singapore, the process is complex and multi-faceted. Given Charlie Pty Ltd's Australian incorporation, it first and foremost needs to establish a "sufficient connection" with Singapore¹. This concept of a "sufficient connection" has evolved over the years through case law and legal interpretations. Essentially, it refers to substantial commercial or economic ties that link the foreign company to Singapore.

The sufficient connection may be derived from various aspects. A company might demonstrate sufficient connection by proving that its central management and control are exercised in Singapore, that it has significant assets in Singapore, or that it has significant liabilities owed to creditors based in Singapore. Legal contracts, such as those related to finance, that are

¹⁹ Section 94(1)(a), Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.

²⁰ Ibid, section 94.

²¹ Ibid, section 96.

²² Ibid, section 96(1).

governed by Singapore law, or the existence of legal proceedings in Singapore, can also be considered in establishing a sufficient connection.

In Charlie Pty Ltd's scenario, a few factors can be considered to demonstrate a sufficient connection with Singapore. For instance, the properties it owns in Australia are mortgaged to a Singapore bank under a facility governed by Singapore law. This establishes a substantial financial linkage with Singapore. Furthermore, Charlie Pty Ltd's majority directors, Mr X and Mr Y, are based in Singapore, which could be construed as exercising central management and control from Singapore.

However, establishing a sufficient connection is just one part of the equation. The Court, in deciding whether to make a judicial management order, would also need to consider if the making of the order would likely achieve one or more of the statutory objectives as set out under the IRD Act. These objectives could include, among others, the survival of the company as a going concern, the approval of a compromise or arrangement between the company and its creditors, or a more advantageous realization of the company's assets than would occur on a winding up.

For Charlie Pty Ltd, an argument could be made that putting it under judicial management could lead to a more advantageous realization of its assets. This is due to the fact that its properties in Australia, although mortgaged, could be managed and potentially sold more effectively under judicial management.

In conclusion, while the facts suggest a compelling argument for Charlie Pty Ltd's eligibility for judicial management in Singapore, the final decision would rest with the Singapore courts, taking into consideration the established connections and the likelihood of achieving the statutory objectives of judicial management.

[discuss also that a company needs to be liable to be wound up in SG to be able to be placed under JM – hence the substantial connection requirement]

Question 4.3 [maximum 5 marks] 4m

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)

Answer:

A. Introduction to Cross-Border Asset Protection in Judicial Management

In the context of multinational enterprises like ABC Group operating in various jurisdictions, the initiation of judicial management proceedings in Singapore may have implications for the preservation of the group's overseas assets²³. This scenario underlines the necessity of adopting strategies to protect the ABC Group's assets in jurisdictions beyond Singapore's borders.

B. Limitations of Singapore Insolvency Law on Overseas Assets Protection

²³ Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.

While Singapore's Insolvency, Restructuring and Dissolution Act (IRDA) 2018 provides a robust framework for judicial management locally, it does not explicitly cover protections for a company's overseas assets²⁴. Hence, without taking additional measures, the assets of ABC Group located in the UK and Australia are vulnerable to action by foreign creditors, undermining the effectiveness of the judicial management process. [see s96 read with s 88 for scope of moratorium - but this would be a court order that is enforceable in SG]

C. Seeking Foreign Court's Recognition: A Crucial Strategy

To secure the ABC Group's foreign assets, the judicial managers would typically need to obtain recognition of the Singapore judicial management proceedings in the foreign jurisdictions where these assets are located²⁵. The UNCITRAL Model Law on Cross-Border Insolvency, a legal framework adopted by many jurisdictions, including the UK and Australia, provides a means to accomplish this²⁶.

The recognition of Singapore's judicial management proceedings by a foreign court usually results in the issuance of a stay of proceedings against the company in the respective foreign jurisdiction²⁷. Such a stay prevents any unauthorised disposal of the company's assets and provides a temporary suspension of all legal actions against the company without the express approval of the foreign court.

D. Detailed Procedures for Securing Foreign Assets

For the ABC Group, the process would likely involve the judicial managers of Alpha Pte Ltd, Beta Pte Ltd, and Charlie Pty Ltd applying to the courts in the UK and Australia, providing evidence of the Singaporean judicial management order and demonstrating its equivalency to a process recognized under the local insolvency laws²⁸.

The foreign courts, upon review, may decide to recognise the Singaporean proceedings and extend protections that exist in their jurisdiction for such proceedings. For instance, in Australia, this may invoke the Australian Corporations Act 2001's provisions, which prevent unsecured creditors from enforcing their claims without the leave of the court²⁹.

E. Potential Challenges and Overall Implications

Obtaining foreign recognition can involve several challenges, such as the complexities of different legal systems, time pressures, and potential costs. Yet, given the ABC Group's significant assets in foreign jurisdictions, it is a crucial strategy for a comprehensive and coordinated restructuring process.

Furthermore, given the substantial financial exposure of the company due to its MTN programme and the corporate guarantees provided, the preservation of assets globally is a necessary step to maximise potential returns for the creditors of the ABC Group.

*** End of Assessment ***

47m – well done!

²⁴ Ibid, Part 16 - Judicial Management.

²⁵ UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.

²⁶ Ibid, Article 9 - Application for recognition of a foreign proceeding.

²⁷ Ibid, Article 20 - Relief that may be granted upon application for recognition of a foreign proceeding.

²⁸ Ibid, Article 15 - Application for recognition of a foreign proceeding and commencement of a case.

²⁹ Australian Corporations Act 2001, Section 440D.