



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).**
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- 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 **0m**

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?

Rescue financing is financing that is necessary for the survival of a debtor that obtains the financing.

- (a) **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.**
- (b) **Rescue financing enjoys preferential treatment automatically without the sanction of court.**
- (c) **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.

The concept of a cross-class cramdown was first introduced in the 2017 Amendment Act (which is now contained in the IRD Act). Subject to certain conditions, it allows a scheme of arrangement with creditors to be approved notwithstanding one or more classes of creditor having rejected the proposed scheme. The rationale for introducing the provision was to minimise the overall influence of minority creditors.

Under the previous cross-class cramdown regime contained in the Companies Act, to cram down a class of unsecured creditors, existing members were required to divest their shares. However, there was no set procedure for shareholders to be compulsorily divested of their shares as part of the scheme of arrangement and the cramdown was therefore dependent on the members voluntarily divesting their shares. Under the IRD Act, unsecured creditors can be crammed down without requiring that the members are divested of their shares.

Under a scheme of arrangement, 38 notwithstanding the fact that one or more classes of creditors have not approved the scheme in accordance with the voting mechanisms detailed above, a court can order that the scheme is still binding on the company and all classes of creditors (but not shareholders) if:

- (a) a majority in number of creditors meant to be bound by the compromise or arrangement, and who were present and voting (either in person or by proxy) have agreed to the compromise or arrangement;

(b) that majority in number of creditors represents three-fourths in value of the creditors meant to be bound by the compromise or arrangement, and who were present and voting (either in person or by proxy); and

(c) the court is satisfied that the compromise or arrangement does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class. A compromise or arrangement will not be fair and equitable to a dissenting class unless:

(i) no creditor in the dissenting class receives, under the terms of the scheme proposal, an amount that is lower than what the creditor is estimated by the court to receive in the most likely scenario if the scheme proposal does not become binding; and

(ii) where the creditors in the dissenting class are unsecured creditors, the terms of the compromise or arrangement:

- I. must provide for each creditor in that class to receive property of a value equal to the amount of the creditor's claim; or
- II. must not provide for any creditor with a claim that is subordinate to the claim of a creditor in the dissenting class, or any member, to receive or retain any property on account of the subordinate claim or the member's interest. 139

The requirements in sub-paragraph (c) have been adopted from the "absolute priority rule" in Chapter 11 of the Bankruptcy Code. Stated plainly it provides that no class can receive a distribution under a scheme proposal unless all classes senior to such class are paid in

There is no mechanism to cramdown, exclude or bind equity holders without their vote on approval. If the rescue plan involves granting equity to creditors or other stakeholders, thereby diluting existing equity, this needs to be approved either via the passing of a resolution at an EGM or via a members' scheme of arrangement.

[also discuss scenario where the dissenting class are secured creditors - s 70 IRDA]

Question 2.2 [maximum 2 marks] 2m

Name two objectives of the IRD Act.

The objectives of the IRD Act are to:

(i) introduce a new omnibus legislation that consolidates the personal and corporate insolvency and restructuring law.

(ii) establish a regulatory regime for Insolvency practitioners.

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 four factors are:

- (a) the quantum of all debts which are due or will be due in the reasonably near future.
- (b) whether payment is being demanded or is likely to be demanded for those debts.
- © 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 and
- (d) the value of the company's current assets and assets that will be realisable in the reasonably near future.

[Type your answer here]

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.

(i) Rescue financing

Rescue financing is financing that is either or both:

- (a) necessary for the survival of a debtor that obtains the financing.
- (b) 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.

Under both the scheme of arrangement and judicial management processes, a Singapore court may, on application by the debtor, make an order that any rescue financing obtained by a debtor will.

- (a) be treated as part of the costs and expenses of the winding-up if the debtor is later wound up.
- (b) enjoy priority over preferential debts if the debtor is later wound up.
- (c) be secured by a security interest on property of the debtor not otherwise subject to any security interest, or be secured by a subordinate security interest on property of the debtor that is subject to an existing security interest if the debtor would not have been able to obtain unsecured rescue financing from any other person; or
- (d) be secured by a security interest on property subject to an existing security interest, of the same or a higher priority than the existing security interest, if the debtor would not have been

able to obtain rescue financing from any other person unless it was secured in such a manner and there is adequate protection for the interests of the existing security interest.

These are extraordinary remedies / measures which have been taken largely from section 364 of the US Bankruptcy code. They were designed to enhance Singapore's reputation as an international restructuring hub.

Post-commencement lenders are only entitled to be treated preferentially if same is provided for in the DIP / rescue loan itself and sanctioned by the court pursuant to section 67 or 101 of the IRD Act, as the case may be.

(ii) Wrongful trading

Wrongful trading is defined as the incurrence of debt or other liabilities without a reasonable prospect of meeting them in full when the company is insolvent or becomes insolvent as a result of such debt.

The directors risk potential personal liability under insolvency laws for wrongful trading, if the corporate rescue proceedings are unsuccessful and the company is liquidated

The court is empowered to make a declaration that any person who was a knowingly party to the company trading wrongfully, is personally responsible for the debts or liabilities of the company. A company or any person party to, or interested in becoming party to, the carrying on of business with a company, may apply to the court for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading.

Section 239 of the IRD Act introduces the new concept of wrongful trading, which imposes personal liability for the company's debts on a person if

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

This provision is adopted from English insolvency legislation and no longer requires criminal liability to be established (as was the position previously before the enactment of this new wrongful trading provisions) before taking effect.

Type your answer here]

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.

The key rehabilitative procedures in Singapore are schemes of arrangement and judicial management.

Schemes of arrangement

The major change implemented in the 2017 Amendment Act was to introduce debtor-in-possession style features to the scheme of arrangement procedures with certain tools such as the availability of debtor in possession financing, an automatic moratorium, and the availability of cross class clam down. These features, combined with the existing scheme of arrangement provisions, give debtors the time and space to restructure their affairs and for proposals to creditors to be agreed and implemented via a scheme of arrangement.

The process can be initiated where a company intends on proposing a compromise to its creditors via a scheme of arrangement. As part of the process, the company can seek (from the court) moratorium protection from creditors and remain in control as a debtor-in-possession while it proposes the restructuring plan to be implemented via a scheme of arrangement. The management of the company also stays in control throughout the moratorium period and the period of implementation of the scheme of arrangement. It is the company who is responsible for putting forward the restructuring proposal, with the aid of financial advisors.

The restructuring proposal is implemented through the relevant scheme of arrangement. Accordingly, the role of the creditors is to liaise and negotiate the restructuring plan with the debtor company, vote on the proposed restructuring plan / scheme and, where necessary, challenge the company's classification of creditor classes within the scheme if the scheme is passed by the requisite majority.

The role of the courts is largely supervisory and is generally limited to overseeing the restructuring process, ensuring due disclosure of information to creditors, obtaining regular updates from the debtor company as to the progress of the restructuring, overseeing hearings relating to any applications brought by parties to extend or terminate the moratorium and other issues related to restructuring process and ultimately to convene scheme meetings and sanction of the scheme.

Judicial management

Judicial management is another one of Singapore's corporate rescue tools. A key difference between judicial management and schemes of arrangement is that judicial management entails the appointment of an insolvency practitioner as the judicial manager, which appointment is made by the court.

The judicial manager replaces the company's directors and management and takes over responsibility for the running of the company. A criticism of judicial management is that it is more of an insolvency process than corporate rescue and insufficient enough percentage of companies have been "rescued" given the stigma associated with an insolvency appointment and proceeding.

Upon the appointment of a judicial manager by the court, the powers of the company's directors cease, and the judicial manager takes over the affairs, business, and property of the company.?

Creditors play a limited role in the management and direction of the company, as this is the task of the judicial manager. However, creditors will generally form a creditors committee. ® This can be done where a meeting of creditors is summoned to consider the judicial managers proposals and such proposals have been approved (with or without modification). The creditors committee (once appointed) can be granted the power to require the judicial manager to attend before it and furnish it with such information relating to the carrying out of his functions as the committee may reasonably require.?

Where the creditors committee is dissatisfied with the extent or the nature of information being furnished to it by the judicial manager, it can apply to the court and the court, if satisfied that the representations are well founded, may give such directions to the judicial manager as it considers appropriate.

The advantages of a scheme of arrangement stem from the fact that it is a debtor-driven process as compared to a judicial management which is creditor-led. The directors continue to run the business in a scheme of arrangement. They would have more familiarity with the business compared to a court-appointed judicial manager. Also, there is less stigma involved in a scheme of arrangement. This could be especially important for a public listed company

Major differences between Scheme of arrangement and judicial management are detailed below:

Scheme of arrangement - moratorium for insolvent debtor companies

Section 64 of the IRD Act, as first introduced by section 211 of the Companies (Amendment) Act 2017, introduces a debtor-in-possession restructuring regime which has the following key features:

- (a) an automatic moratorium for 30 days upon the filing of an application with the court. The moratorium can be further extended by order of the court;
- (b) the availability of US-style debtor-in-possession finance (DIP) or rescue financing;
- (c) the availability of a cross-class cramdown in schemes of arrangement;
- (d) the availability of pre-packaged schemes of arrangement; and
- (e) moratoria having extra territorial effect.

Judicial management

Unlike the scheme of arrangement, this is a process where an insolvency practitioner takes over control of the debtor company. Upon the application of a company or its creditors the court may appoint a judicial manager where it is shown that the company is or is likely to become unable to pay its debts and one or more of the purposes outlined in the IRD Act will be achieved by the appointment (such as the survival of the company or whole or part of its business as a going concern or a more advantageous realisation of the company's assets than through a winding-up order).

If the court grants an order for judicial management, then the judicial manager, an independent insolvency practitioner, will take control of the business and property of the company for a period of 180 days, subject to any further extensions granted by the court.

Debtors to whom the corporate rescue provisions apply

Only a company eligible to be wound up under the IRD Act may be placed into judicial management. 10 This includes foreign debtors, provided the foreign debtor has a "substantial connection" with Singapore.¹¹¹ This can be established by the demonstration of one or more of the following factors:

- (a) the centre of main interests of the debtor is located in Singapore;
- (b) the debtor is carrying on business in Singapore or has a place of business in Singapore;
- (c) the debtor is registered as a foreign company in Singapore;
- (d) the debtor has substantial assets in Singapore;
- (e) the debtor has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction: and / or
- (f) the debtor has submitted to the jurisdiction of the Singapore courts for the resolution of one or more disputes relating to a loan or other transaction.

System for entering corporate rescue

Entry into moratorium protection in relation to a scheme of arrangement

Section 64 of the IRD Act, as first introduced by Section 211B of the Companies (Amendment) Act 2017, provides that upon filing an application in accordance with section 64, there will be an automatic moratorium period for 30 days after the date on which the application is made.

The application can only be made where the company proposes, or intends to propose, a compromise or an arrangement between the Company and its creditors, or any class of them.

The company may only make the application if:

- (a) no order has been made and no resolution passed for the winding-up of the company.
- (b) the company makes or undertakes to do so as soon as practicable an application to sanction a scheme of arrangement.
- (c) the company has not applied for protection under section 210(10) of the Companies Act (a provision that also provides for moratorium protection).

When making an application, the company must publish a notice in the Government Gazette and in at least one English local daily newspaper and send notice to the creditors. The application must also include:

- (a) evidence of support from the company's creditors.

- (b) (b) where no scheme has been proposed, a brief description of the intended compromise or arrangement containing sufficient details to enable the court to determine if it is feasible and merits consideration by creditors; and
- (c) a list of every secured creditor and the largest unsecured creditors.

When making an order, the court can continue the moratorium for such period as the court thinks fit. The court must also order the company to submit to the court sufficient information relating to the company's financial affairs to enable creditors to assess the feasibility of the compromise or arrangement, including the valuation of significant assets, details of any disposal of property, financial reports and profitability documents.

Entry into judicial management

A judicial management application may be brought by:

- (a) the company (pursuant to a members' resolution);
- (b) its directors (pursuant to a board resolution); or
- (c) its creditors (including contingent and prospective creditors), either together or separately.¹¹²

An application for judicial management should only be made where a company, or where a creditor or creditors of the company, consider that:

- (a) the company is or will be unable to pay its debts; and
- (b) there is a reasonable probability of rehabilitating the company, or of preserving all or part of its business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding-up.

A company can also enter into judicial management by resolution of its creditors.¹¹⁴

Mechanisms for conversion from corporate rescue to liquidation

Scheme of arrangement

There is no specific conversion mechanism. If the moratorium granted under section 64 of the IRD Act comes to an end, either by creditor application or otherwise, with no scheme sanctioned, creditors or the company would then be at liberty to apply for winding-up or any other process, including judicial management.

Judicial management

A judicial management order will be discharged after 180 days unless extended by the court.
¹¹⁵ There is no limit to the number of extensions that may be granted by the court. A judicial management order may also be discharged if:

- (a) the creditors decline to approve the judicial manager's proposals;
- (b) the judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved;
- (c) the judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

A discharge does not mean automatic liquidation, but the court has a discretion to order that the company be placed into liquidation.

Threshold for entering corporate rescue

Scheme of arrangement moratorium proceedings

Judicial management

A court may only make a judicial management order if the court:

- (a) is satisfied that the company is or will be unable to pay its debts;
- (b) considers that the making of the order would be likely to achieve one or more of the following purposes, namely:
 - (i) the survival of the company, or the whole or part of its undertaking as a going concern;
 - (ii) the approval under section 210 of the Companies Act of a compromise or arrangement between the company and any such persons as are mentioned in that section; or
 - (iii) the more advantageous realisation of the company's assets than would occur in a winding-up.

The court will consider whether there is a "real prospect that the appointment of the judicial managers will achieve one or more of the purposes stated in [section 91 of the IRD Act]

The court will not make a judicial management order:

- (a) after the company has already gone into liquidation;
- (b) where the company is:
 - (i) a bank licensed under the Banking Act (Cap 19);
 - (ii) a finance company licensed under the Finance Companies Act (Cap 108);
 - (iii) an insurance company licensed under the Insurance Act (Cap 142); or
 - (iv) where the company belongs to such class of companies as the Minister may by order in the Government Gazette prescribe.

Moratoria

Scheme of arrangement

An automatic 30-day moratorium arises upon the filing of an application for a moratorium under section 64 of the IRD Act with the court where the debtor proposes or intends to propose a scheme of arrangement with its creditors.¹²² The court may extend the moratorium upon the application of the debtor. ¹²³

Judicial management

An automatic moratorium on legal proceedings against the company comes into effect upon the filing of the judicial management application.¹²⁴ If a judicial management order is made, a more extensive moratorium will come into effect for the period of the judicial management. ¹²⁵ The court, or the judicial manager, has a discretion to allow otherwise prohibited proceedings or enforcement actions to be commenced or continued. ¹²⁶

Process of appointing officeholders

Scheme of arrangement

While this is a debtor-in-possession type regime, it envisages the debtor company appointing a proposed scheme manager to facilitate the restructuring process.

Judicial management

Upon the making of a judicial management order, the court will appoint a judicial manager. An interim judicial manager can be appointed by the court, on application of the company or any of its creditors. This is generally done for one of the following reasons:

- (a) the assets or business of the company are at risk of being dissipated or deteriorating.
- (b) to "bridge the gap" between the application for judicial management and the hearing of the judicial management application; and
- (c) to safeguard the interests of the company as well as its creditors.

Role of the officeholder in corporate rescue proceedings

Scheme of arrangement

The role of the proposed scheme manager is to administer the scheme after it has been approved by the creditors. Typically, the proposed scheme manager will prepare the scheme proposal and adjudicate on the creditors' proofs of debt. The proposed scheme manager will also usually be the chairman of the scheme meeting(s).

Judicial management

Once a judicial management order has been made, all the responsibilities, functions and powers of the board of directors are transferred to the judicial manager. The judicial manager also takes custody of all the company's property. ²⁸ In addition to all the powers and duties of

the directors, he assumes the powers specified in the First Schedule of the IRD Act. These powers include, but are not limited to:

- (a) the power to sell or otherwise dispose of the property of the company by public auction or private contract;
- (b) the power to borrow money and grant security therefor over the property of the company;
- (c) the power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions; and (a) the power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

The judicial manager also has the power to dispose of secured assets in accordance with section 100 of the IRD Act. Assets secured by a floating charge may be disposed of at the judicial manager's discretion. However, the floating charge holder must be accorded the same priority in respect of the proceeds.

The judicial manager must also, within 60 days of appointment, present a statement of proposals to the creditors at a creditors meeting.

Rules that apply to the sale of assets outside the ordinary course of business

Scheme of arrangement

There is no blanket prohibition on the sale of assets outside the ordinary course of business.

However:

- (a) pursuant to section 64(6) of the IRD Act, the court can require that information relating to the acquisition, disposal of property or grant of security be submitted to the court not later than 14 days of the disposition; and
- (b) pursuant to section 66 of the IRD Act, the court may, upon an application made by a creditor, make an order restraining the company from disposing of property other than in good faith and in the ordinary course of business and/or an order restraining the transfer of shares in or altering the rights of any member of the company

Judicial management

Pursuant to the list of specific powers extended to Judicial Managers set out in the First Schedule to the IRD Act, a judicial manager has power to sell or otherwise dispose of the property of the company by public auction or private contract. A judicial manager may also dispose of property secured by a floating charge subject to satisfying certain conditions. 131 These are extraordinary remedies / measures which have been taken largely from section 364 of the US Bankruptcy code.

Which creditors vote on the adoption of the plan

A scheme of arrangement does not need to be proposed to all creditors of the company. It is open to a company to deal with certain creditors outside of a scheme of arrangement.

Netting and set-off in financial contracts

Scheme of arrangement

The moratorium does not affect the exercise of any legal right under any set-off or netting arrangements.¹⁴¹

Judicial management

It has been held that the moratorium does not include self-help remedies such as self-help in judicial management.

Disclaiming onerous contracts

Scheme of arrangement

Onerous contracts may not be disclaimed.

Judicial management

Both judicial managers and liquidators, have the power to disclaim onerous contracts ¹⁴³ entered into by the company prior to the judicial management order or the liquidation.

Impeachable transactions

Scheme of arrangement

The provisions relating to impeachable transactions do not apply.

Judicial management and liquidation

Officer liability

Scheme of arrangement

Not applicable.

Judicial management and liquidation

Type your answer here]

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)***

4.1 (a) The purpose of Judicial Management Process

- (1) To ensure the survival of the company or the whole part of its undertakings, as a going concern
- (2) The approval under S210 of the Companies Act or Section 71 of a compromise or arrangement between the company and any such persons as are mentioned in the applicable Section.
- (3) A more advantageous realization of the company's assets or property than on a winding up.

The court may make an order for judicial management if:

It is satisfied that the company is or is likely to become unable to pay its debts; and It considers that placing the company under judicial management would be likely to achieve at least one of the three purposes of a judicial management **Type your answer here]**

4.1(b) The Rescue financing is financing that is either or both:

- (a) necessary for the survival of a debtor that obtains the financing.
- (b) 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.

A Singapore court may, on application by the company make an order that any rescue financing obtained by the company will.

- (a) be treated as part of the costs and expenses of the winding-up if the debtor is later wound up.
- (b) enjoy priority over preferential debts if the company is later wound up.
- (c) be secured by a security interest on property of the company not otherwise subject to any security interest, or be secured by a subordinate security interest on property of the company

that is subject to an existing security interest if the company would not have been able to obtain unsecured rescue financing from any other person; or

(d) be secured by a security interest on property subject to an existing security interest, of the same or a higher priority than the existing security interest, if the company would not have been able to obtain rescue financing from any other person unless it was secured in such a manner and there is adequate protection for the interests of the existing security interest.

Question 4.2 [maximum 6 marks]

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) 0m

A judicial management order will be discharged after 180 days unless extended by the court.

115 There is no limit to the number of extensions that may be granted by the court. A judicial management order may also be discharged if:

(a) the creditors decline to approve the judicial manager's proposals.

(b) the judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved:

(c) the judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

A discharge does not mean automatic liquidation, but the court has a discretion to order that the company be placed into liquidation.

[see s 94 for voluntary JM]

(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) 3m

Only a company eligible to be wound up under the IRD Act may be placed into judicial management. This includes foreign debtors, provided the foreign debtor has a "substantial connection" with Singapore. This can be established by the demonstration of one or more of the following factors:

(a) the centre of main interests of the debtor is located in Singapore;

- (b) the debtor is carrying on business in Singapore or has a place of business in Singapore.
- (c) the debtor is registered as a foreign company in Singapore.
- (d) the debtor has substantial assets in Singapore.
- (e) the debtor has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction: and / or
- (f) the debtor has submitted to the jurisdiction of the Singapore courts for the resolution of one or more disputes relating to a loan or other transaction.

Does Charlie Pty Ltd qualified? Yes. It does.

Charlie Pty is having a place of business in Singapore.

Charlie Pty has chosen Singapore law as the law governing the loan.

Singapore may be described as its Centre of Main interests since the two directors that make decision are residing in Singapore.

Based on the above, Charlie Pty is eligible to be placed into judicial management in Singapore

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) 0m

[Type your answer here]

The assets owned by the ABC Group would not be protected outside of Singapore.

This can only be done through Cross Border Insolvency proceedings.

Singapore is one of few Asian countries to have adopted the Model Law, as well as Australia

The Model Law as enacted in Singapore has no requirement of reciprocity with the State in which the foreign proceeding is occurring.

The Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) enables judgments from the United Kingdom and Australia (and certain specific Commonwealth countries) to be registered in the Singapore High Court.

Prior to the adoption of the Model Law, the courts in Singapore depended on common law principles of recognition. Under those principles, it was long held that courts can recognise foreign insolvencies when they take place in the jurisdiction where the debtor company is registered. The Singapore courts had also further extended this, confirming that in Singapore

the courts can also recognize foreign insolvencies commenced where the debtor company's Centre of main interest is located, even if that is different to where the company is registered.

The Singapore courts had similarly extended the common law to enable interim orders in aid of foreign rehabilitation proceedings (as opposed to just foreign formal insolvency proceedings).

In addition, in a departure from earlier English case law, the Singapore courts have confirmed that recognition is also possible for voluntary rehabilitation or insolvency proceedings. The

[there is a moratorium in SG that arises, as such contempt of course is a possible form of recourse in SG. But whether there is protection overseas depends on whether there is recognition available in that relevant jurisdiction.]

*** End of Assessment ***

40.5m