



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] **3m**

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 cram-down allows for the approval of a scheme of arrangement with creditors regardless of one or more class of creditors having rejected the proposal. The reason for the change in the law, introduced in the 2017 Amendment Act, was to reduce the overall influence of minority creditors.

A court can order that the scheme is still binding on all classes of creditors (but not shareholders) if:

- A majority in number of creditors meant to be bound by the arrangement, and who were present and voting, have agreed to the arrangement;*
- That majority in number of creditors also represents three quarters in value of the creditors meant to be bound by the arrangement who were present and voting; and*
- The court is satisfied that the arrangement does not discriminate unfairly between 2 or more classes of creditors and is fair and equitable to each dissenting class.*

The final requirement ensures that no class of creditor can receive a distribution under a scheme proposal unless all superior classes are paid in full. This is also known as the "absolute priority rule" as enshrined in Chapter 11 of the US Bankruptcy Code.

[discuss what is fair and equitable]

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

Name two objectives of the IRD Act.

Two of the objectives of the IRD Act, that came into effect on 30 July 2020 are:

- 1) To introduce a new omnibus legislation that consolidates the personal and corporate insolvency and restructuring laws; and*
- 2) To enhance Singapore's laws in this regard.*

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.

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 are:

- The value of the company's current assets and assets that will be realisable in the near future;*
- Any other income or payment which the company may receive in the near future;*
- The quantum of all debts which are due or will be due in the near future; and*
- 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.*

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.

The IRD Act introduced various new concepts including rules pertaining to the protections afforded to rescue financing and wrongful trading.

Rescue financing is financing that is either or both necessary for the survival of the debtor, or necessary to achieve a better outcome than would be available were the debtor to be wound up in terms of asset realisations. The IRD Act introduced a package

of remedies designed to enhance Singapore's reputation as a commercial restructuring centre largely copied from s364 of the US Bankruptcy Code.

The remedies under both a scheme of arrangement and judicial management are available by order of the Court on application of the debtor, as follows:

- *That rescue financing obtained by a debtor will be treated as an expense of the winding up if the debtor is later wound up;*
- *That said rescue financing will enjoy priority over preferential debts should the company be later wound up;*
- *That the rescue financing be secured on unencumbered property belonging to the debtor or subordinated to existing security arrangements if the debtor would not be able to secure unsecured financing from another source; or*
- *That the rescue financing be secured in the same or higher priority to existing security interests if the debtor would not have been able to obtain the financing without such security being offered providing the existing secured creditors were offered sufficient protection.*

The IRD Act innovation with regards to wrongful trading is also key to bolstering Singapore's reputation internationally as a restructuring haven. Wrongful trading is defined as the incurrence of debts or liabilities without the reasonable prospect of repaying them in full when the debtor was insolvent or became insolvent as a result of the transaction.

Under the previous legislative regime prior to the IRD Act, a claim of wrongful trading could only be successfully brought if criminal liability could be established. The set a prohibitively high bar for wrongful trading. Again, Singapore has borrowed from another jurisdiction known for its rescue procedures for these new provisions, in this case the English and Welsh insolvency legislation.

Under the new provisions, the Court is allowed to make a declaration that any person who was knowingly a party to the company trading wrongfully is personally responsible for the debts of the company. The legislation also provides that the company or any person party to, or potentially becoming party to the carrying on of business with a company may apply to the Court for a declaration that a particular transaction, series of transactions or course of conduct would not constitute wrongful trading. This naturally adds a lot more certainty in a rescue situation but also supports attempts to restructure a failing business.

Those guilty of wrongful trading will be personally liable for the company's debts if:

- *They knew that the company was trading wrongfully; or*
- *They ought to have known in the circumstances as an officer of the company that it was trading wrongfully.*

These provisions will add to commercial confidence in the insolvency regime in Singapore where the previous provisions required a very high threshold to be met.

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.

Judicial Management and Schemes of Arrangement are the key rehabilitative procedures in Singapore. The key differences between the two processes are outlined below:

- *Schemes of Arrangement are a debtor-in-possession process whereby existing management will usually continue in situ, however in a Judicial Management an independent insolvency practitioner will be appointed by the Court upon application by the debtor or its creditors.*
- *Therefore a Scheme of Arrangement is a debtor driven process as opposed to the creditor-led Judicial Management. Accordingly there could be said to be less stigma attached to companies entering a Scheme of Arrangement as opposed to Judicial Management.*
- *In a Scheme of Arrangement a moratorium is granted automatically upon the filing of the application for a moratorium where the debtor proposes (or intends to propose) a scheme to its creditors. The moratorium lasts for 30 days and may be extended at the discretion of the Court. In a Judicial Management the moratorium is also granted automatically upon the filing of the application but it lasts for the duration of the process and is not limited to a set number of days.*
- *In Schedule 1 of the IRD Act a Judicial Manager has the power to sell or otherwise dispose of the property of the company by private contract or public auction. They may also dispose of property secured by a floating charge subject to certain conditions. However, in a Scheme of Arrangement the Court may require that information relating to the acquisition or disposal of property or the grant of security be submitted to the Court not later than 14 days from the action taken (section 64(6) of the IRD Act). Further, pursuant to section 66 of the IRD Act a creditor may apply to the Court for a restraining order preventing the company from disposing of property (other than in good faith and in the ordinary course of business) and/or to prevent the transfer of shares or alteration of any shareholder rights.*
- *In a Scheme of Arrangement the company is not able to disclaim onerous contracts, however Judicial Managers (as well as Liquidators) are able to disclaim such contracts (Electro Magnetic [1994]).*
- *In a Scheme of Arrangement the provisions in the law relating to impeachable transactions do not apply. However in a Judicial Management the Judicial Manager may apply to the Court to seek to claw back assets previously transferred where the recipient benefitted from a preference; or the transaction was conducted at an undervalue.*

- *Similarly, director liability is not applicable in a Scheme of Arrangement but in a Judicial Management (where the company is insolvent) a director can be held liable:*
 - *If they were knowingly a party to the contracting of debt at a time when they had no reasonable grounds to expect that the company could repay the debt; and*
 - *If it can be proved that the business of the company was conducted with the intent to defraud creditors (fraudulent trading).*

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]

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)**
2m

The purposes of Judicial Management proceedings are outlined in the IRD Act and include the survival of the company as a whole or in part as a going concern or a more advantageous realisation of the company's assets that would be achieved via a winding-up procedure.

An application for Judicial Management may be brought by the company (pursuant to a shareholders' resolution), its directors (pursuant to a Board resolution) or its creditors (including contingent and prospective creditors - together or separately). The application where it is considered that:

- The company is (or will be) unable to pay its debts; and*
- There is a reasonable prospect of rehabilitating the company - preserving all or part of its business or providing a better outcome to creditors than would be available if it were to be wound up.*

- (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) 1m**

Certain remedies and/or measures were introduced by the 2017 Amendment Act must be met in order to secure rescue financing. There require that require that any rescue financing obtained will:

- *Be treated as part of the costs and expenses of the winding up (if the debtor is later wound up);*
- *Enjoy priority over preferential debts if the debtor is later wound up;*
- *Be secured on property of the debtor not otherwise subject to any security, or be subordinate to any existing security of unsecured rescue financing was not available; or*
- *Be secured on property already subject to secured interest of the same or higher priority if the debtor would not otherwise have been able to secure the financing providing the existing secured lender has sufficient protection.*

It is worth noting that preferential treatment is only available if the same is provided for in the DIP / loan agreement itself and is sanctioned by the Court (section 67 or 101 of the IRD Act respectively).

[discuss definition of rescue financing under IRDA]

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

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

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

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

Per Section 94 of the IRD Act, the out of court procedure to place Alpha Pte and Beta Pte into judicial management involves the passing of a resolution of the creditors of each company. In passing the resolution the creditors must consider that:

- *The company is or will be unable to pay its debts; and*
- *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 the creditors would be better served than by resorting to a winding up. (Section 90 IRD Act)*

- (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)***

Charlie Pty is incorporated in Australia, therefore it can only enter judicial management if a 'substantial connection' with Singapore can be established pre section 246 of the

IRD Act. A substantial connection can be established by demonstrating one or more of the following factors:

- *The centre of main interests of the debtor is located in Singapore;*
- *The debtor is carrying on a business in Singapore or has a place of business in Singapore;*
- *The debtor is registered as a foreign company in Singapore;*
- *The debtor has substantial assets in Singapore;*
- *The debtor has chosen Singapore law as the law governing a loan or other transaction; and/or*
- *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.*

Based on the information received about Charlie Pty, it can be shown that the company is eligible to be placed into judicial management in Singapore because the assets held by the company are mortgaged to a Singapore bank under a bank facility that is governed by Singapore law. Whilst Charlie Pty does not have substantial assets in Singapore (the properties it owns are in Australia), the centre of main interests could be argued to be in Singapore because of the following:

- *The principle creditors of the company reside in Singapore (the bank and ABC Group via intercompany loans);*
- *The majority of directors are Singapore based; and*
- *The public perception of the company is likely to be one with a substantial connection to Singapore given the corporate structure and surrounding loan agreements and banking connections.*

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) 2m**

The ABC Group companies' assets reside in Singapore, Australia and the UK. If a judicial management order is made an automatic moratorium comes into effect to prevent legal proceedings or enforcement actions from being commenced or continued (it is not clear whether this has extraterritorial effect but following the law reforms of the IRD Act and the adoption of the UNCITRAL Model Law, Singapore has taken a decidedly universal approach to cross border restructuring). However the banks with secured interests may still be able to enforce their security under the terms

of their loan facilities against the properties or assets over which they have an interest. One way the judicial managers could obtain protection is by securing post-commencement financing (section 101 IRD Act) to repay some or all of the secured interests. Rescue financing can, by order of the court, be the subject of extraordinary remedies that make it attractive to new lenders such as being treated as part of the costs of a winding up should the companies be wound up later and enjoying preferential treatment - if it is so provided for in the loan agreement itself.

It is also worth noting that per section 440 of the IRD Act creditors of the Group may not be able to rely on any ipso facto clauses in their agreements.

[discuss whether recognition is available in the relevant jurisdictions]

*** End of Assessment ***

44m