



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 0m

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

(a) *Over 50% in value.*

(b) *50% or more in value.*

(c) **Over 75% in value.**

(d) *75% or more in value.*

Question 1.5 1m

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

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

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

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

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

Question 1.6 1m

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

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

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

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

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

Question 1.7 **1m**

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

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

Question 1.8 **1m**

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

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

Question 1.9 **1m**

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

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

Question 1.10 **1m**

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

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

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

Question 2.1 [maximum 4 marks] **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.

It is not uncommon that a certain group / class of creditors does not approve the terms of a scheme, either because they want to alter the terms of the scheme in their favour (while disregarding the preference of the majority of other creditors), or out of genuine belief that the amounts due should be repaid in full. In such circumstances, assuming that 100% creditor approvals was necessary, a restructuring can be held-up for a prolonged period of time, thereby destroying overall value of the estate, and as a result making all of the creditors worse off. In order to avoid this type of Mexican standoff, a number of common law jurisdictions have introduced the concept of a cross-class cram-down to avoid minority creditors holding the others hostage.

In Singapore, cross-class cramdown was first introduced in 2017 (through the Amendment Act and now incorporated in the Insolvency, Restructuring and Dissolution (IRD) Act). Even with the dissenting creditors, a court can order the scheme to still be binding on the company and all classes of creditors, providing:

- a) Majority of creditors bound by the agreement (both present and voting) approve of the scheme;*
- b) The majority of creditors supporting the scheme (both present and voting), represents 75% in value of creditors meant to be bound by the scheme;*
- c) The compromise arrangement does not discriminate unfairly between two different classes of creditors, and is fair and equitable to each dissenting class.*

Nevertheless, equity holders cannot be crammed down, and any scheme would require the vote/support of equity, either by virtue of passing a resolution at an EGM or through a members' scheme of arrangement.

[discuss what is fair and equitable]

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

Name two objectives of the IRD Act.

The IRD Act came into effect on 30 July 2020. Its main objectives are to:

- a) Consolidate personal and corporate insolvency and restructuring laws;*
- b) Establish a regulatory regime for insolvency practitioners; and*
- c) Enhance Singapore's insolvency and restructuring laws.*

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.

It is interesting that the Singapore Court of Appeal clarified that the cash flow test is the sole and determinative test to determine under section 125(2) of the IRD Act to assess a company's ability to pay its debts. The Court also provided a list of factors that should be considered in this assessment (amongst others):

- a) The quantum of all debts which are due or will be due in a reasonable future (and whether these debts exceed SGD15,000 in relation to any single creditor);*
- b) Whether there is an immediate (or likely) demand for repayment of those debts;*
- c) Whether the company has failed to meet any of its debt obligations, the quantum of such missed payments, and the length of time that the payments have been outstanding; and*
- d) The value of the company's current assets and whether those assets can be realized in the near future to repay its outstanding indebtedness.*

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

Question 3.1 [maximum 8 marks] **7m**

Write a brief essay on

- (i) rescue financing; and**

(ii) wrongful trading

under the IRD Act.

(i) Rescue financing

Rescue (DIP) financing is a concept largely adopted from the bankruptcy code in the US (section 364). Purpose of rescue financing is to achieve a more favourable outcome for the estate by either allowing the debtor to continue to operate (and overcome short-term liquidity issues) or to buy some more time to wind-up its operations and realize assets in a non-distressed scenario (i.e., in a situation where asset values are likely to be higher on disposal).

In order to entice parties to offer financing to a distressed entity, typically an enhanced security package needs to be offered. Therefore, a Singapore court may, on application by the debtor (looking for DIP financing), may make an order that this rescue funding:

- a) Is treated as a cost of the winding-up if the rescue attempt fails;*
- b) Enjoys super-priority over preferential debts;*
- c) Is secured against an asset of the company, providing the asset is not already fully secured to another creditor, and only in circumstances where alternative forms of financing were not available; or*
- d) Is secured against an asset that is already fully secured to another creditor, but the interests of the existing secured creditor are protected, and only in circumstances where other sources of funding were not available to the debtor.*

Furthermore, it would be expected that only existing creditors would be allowed to offer DIP financing, which would also help them enhance their overall recovery on total outstanding debt.

[discuss what is definition of rescue financing]

(ii) Wrongful trading

Wrongful trading could possibly be viewed as a company living beyond its means (in layman's terms), although the more precise definition suggests incurring liabilities that cannot reasonably be expected to be repaid in full. Although difficult to establish (in practice), if it can be proven, a director (or another person knowingly party to such an arrangement) can be held personally liable for the company's debts incurred as a result of wrongful trading without the need to establish criminal liability (as was previously the case). This is covered under Section 239 of the IRD Act.

The court would typically impose personal liability on an individual in relation to wrongful trading, in circumstances where the person involved / trading with the company:

- a) Knew that the company was trading wrongfully; or*
- b) As an officer of the company ought to have known that the company was trading wrongfully.*

Conversely, if an individual (or an officer) legitimately trading with a distressed company was concerned about potentially incurring personal liability as a result of a wrongful trading claim, they could approach the court for approval of a transaction (or series of transactions).

This is a major risk on a company's directors if they try to trade out of a distressed situation, hoping to improve the fortunes of the company and return it to a solvent position.

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.

Main difference between the two procedures is that judicial management (as the name suggests) is a court supervised process with an insolvency practitioner appointed over the debtor, thereby displacing existing directors. In comparison, a scheme allows existing directors and management to stay in control, even though a scheme manager may be appointed by the debtor to both facilitate the restructuring process and supervise the scheme implementation. This is an important distinction since judicial management resembles liquidation in a number of aspects, which in itself has negative connotations and therefore a potentially damaging impact on the market's perception of the debtor. However, one could argue that creditors would not opt for the appointment of a judicial manager if they had faith in debtor's management. It is therefore most likely that as a result of loss of trust (and consequently access to capital), judicial management is step towards a company losing its going-concern status.

Level of creditor involvement also varies between the two procedures. In the case of judicial management, all creditors are subject to the process, although there may be creditor committees formed to represent different groups of creditors. In turn, these committees may request the judicial manager to provide them with information both in terms of its ongoing activities and most certainly in relation to the proposed restructuring plan that the creditors will need to vote on. With a scheme of arrangement, the debtor has the optionality to include only a certain set of creditors, who (either because of the nature of their security package, credit terms or tenure) are most relevant to the debtor. Both recovery procedures (judicial manager and the

scheme of arrangement) provide for a creditor vote on the proposed plan / scheme and allow for cross-class cram down in order to deal with ransom creditors.

One important consideration for any rehabilitative procedure is the moratorium, specifically when it takes effect and how long it lasts for. Upon filing of an application for judicial management, there is an automatic moratorium on legal proceedings, which can subsequently be extended to a much broader scope if the application is approved. There seems to be a gap between the application and the approval process, and depending on the aggressiveness of the creditor pool, this time period could be used by creditors to seize company assets, especially if they are located outside of Singapore. In contrast, with a scheme of arrangement, the debtor would be granted an automatic 30-day moratorium (with an extra-territorial effect) upon application to the court.

Finally, given that judicial management resembles a liquidation, a judicial manager has the ability to disclaim onerous contracts, use set-offs where needed, apply for claw-back of transactions deemed to have been done at preference or undervalue and pursue former directors for wrongful or fraudulent trading. Presumably, if the scheme fails to get approved (or does not get implemented properly) and the debtor subsequently enters judicial management (or liquidation), former directors would be subject to actions by the insolvency practitioner to recover value for the creditors. Therefore, the debtor must be sure that at the time the scheme is applied for (or being proposed), it is indeed in the best interest of creditors and is likely to be implemented. Potentially de-risking this path is the involvement of a scheme manager who would provide their independent opinion on the scheme.

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

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

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

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

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

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

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

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

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

Using the facts above, answer the questions that follow.

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

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

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

Assuming that the bank lenders believe that a better recovery of their credit exposure to the Company may be achieved through a rescue rather than a terminal procedure (i.e., liquidation), they can apply to the Singapore Court to put the Company under the control of a judicial manager, along with a creditor resolution to support that decision. Depending on the situation it may be the case that:

- *The Company nominates a licensed insolvency professional (IP) that the creditors' support in which case no other information would be required;*
- *The Minister may nominate a person (not necessarily an IP) to act as a judicial manager if this is in the best interest of the public;*
- *An interim judicial manager is appointed by the Company, until the creditors have their vote; or*
- *The Court rejects the IP of the applicant and appoints another person altogether.*

In any event, given that we are looking for ways that banks can initiate the process and appoint the judicial manager of their choosing, the banks would have to demonstrate the number and value of their claims.

In order for the Singapore Court to approve the initiation of the judicial management process, it would have to be satisfied that:

- *The Company is or will be unable to settle its debts; and*
- *That it is either likely that the Company (or parts of it) can be rescued or that in the alternative scenario overall returns to creditors are going to be higher relative to a winding up / liquidation.*

Presumably to demonstrate both of these points the petitioning party would have to submit a cash-flow/balance sheet test for the Company, along with an estimated outcome statement under different scenarios.

[see s 89 of IRDA]

(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)

The judicial manager appointed over the Company would have to demonstrate either or both of the following:

- *Financing is necessary for the rescue / survival of the business;*
- *With the financing in place, a debtor would be in a better position to realise assets and maximize the value of the estate relative to a winding-up scenario.*

In addition, if the rescue financing is provided against any of the debtor's existing assets, the Court would then have to be satisfied that:

- *If the assets used to raise financing were previously unsecured, there was no other way to access financing in the market without offering that particular security;*
- *If the assets were previously secured to a legacy creditor, that the economic position of the secured creditor is not made worse off by the financing being raised and accessing any other form of financing in the market was not possible without providing security.*

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)***

Under section 94(1) of the IRD Act, there is the option for the creditor to initiate judicial management on a voluntary basis, providing the following conditions are met and can be demonstrated by the bank lenders:

- *The Company is unable, or is likely to become unable, to pay its debts;*
- *There is a reasonable probability that the Company (or parts of it) will either be rescued or in the alternative scenario, the Company's assets will be realised in such a fashion that the overall benefit to the creditors will be maximised relative to a winding-up procedure; and*
- *A creditor resolution has been passed by the requisite majority.*

As far as procedural steps are concerned, the Company must first give creditors minimum seven days' written notice to appoint an interim judicial manager, following which a creditors' meeting will be convened where the vote will be held along with a presentation of the Company's statement of affairs.

- (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)***

In order for Charlie Pty Ltd to be eligible to be placed into judicial management, it would need to be able to be wound up under the IRD Act. Charlie Pty Ltd is incorporate in Australia, however it has substantial connections with Singapore for the following reasons:

- *It is a direct subsidiary of ABC Limited - a Singapore incorporated company. It is not entirely clear (without going further into statute or case law) whether this would qualify as a "place of business" or as Charlie Pty Ltd "carrying on business" in Singapore but it does not seem unreasonable to assume that this would be the case.*
- *The properties are mortgaged to a bank in Singapore, under documentation governed by Singapore law.*
- *It could be argued that the COMI of Charlie Pty Ltd is in Singapore given that's where its majority directors (and decision makers) reside.*

Therefore, Charlie Pty Ltd would qualify for judicial management in Singapore, based on information provided in the text.

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) 4m**

Considering that some of the assets owned by ABC Group are outside of Singapore, and that under judicial management, the moratorium would be local (i.e., only relevant to actions of creditors taken within Singapore), additional measures would have to be taken by the IP in order to get extraterritorial recognition and protection. Fortunately, as of 2017 Singapore adopted UNCITRAL Model Law on Cross-Border Insolvency and would therefore be able to use it to claim relief on that basis in any of the 56 jurisdictions that have also adopted the Model Law.

As a first step, the IP would have to submit an application for recognition, supported by relevant documentation from the Singapore Court, confirming the initiation of the rehabilitative procedure (Article 15 of the Model Law). The intention would be for the Singapore proceedings to be classified as foreign-main proceedings, and by doing so, extend the moratorium to all the other jurisdictions where the assets may be located (including Australia).

Until the Singapore proceeding is formally recognized in foreign jurisdictions (and mandatory relief granted under Article 20 of the Model Law), the IP would at the time of the application also submit a request for urgent interim relief under Article 19 of the Model Law. Finally, to the extent that certain actions

have already been initiated outside of Singapore, and assuming that the IP has obtained standing locally, they would be able to take actions to either prevent or render ineffective any acts detrimental to the creditors (Article 23), and even intervene in foreign proceedings where necessary (Article 24).

[it doesn't matter whether SG adopted the model law, it is whether the relevant jurisdiction where protection is sought has recognition available.]

* End of Assessment *

45m - well done!