



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8E

SINGAPORE

This is the summative (formal) assessment for Module 8E ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 8E. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment8E]. An example would be something along the following lines: 202223-336.assessment8E. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 9 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1 **1m**

Which one of the following insolvency tools is not available in Singapore?

- (a) Judicial management.**
- (b) Administration.**
- (c) Court winding-up.**
- (d) Scheme of arrangement.**

Question 1.2 **1m**

Who may apply to court to place a debtor company into judicial management?

- (a) A contingent creditor.**
- (b) The debtor company.**
- (c) A prospective creditor.**
- (d) Any of the above.**

Question 1.3 **1m**

Which of the following factors may support a foreign debtor's case to establish a "substantial connection" to Singapore?

- (a) The debtor has chosen Singapore law as the law governing a loan or other transaction.**
- (b) The centre of main interests of the debtor is located in Singapore.**

(c) The debtor has a place of business in Singapore.

(d) Any of the above.

Question 1.4 **1m**

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

(a) Over 50% in value.

(b) 50% or more in value.

(c) Over 75% in value.

(d) 75% or more in value.

Question 1.5 **1m**

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

(a) The automatic moratorium lasts for 30 days.

(b) The automatic moratorium may be extended.

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

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

Question 1.6 **1m**

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

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

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

(c) Any commercial charter of a ship.

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

Question 1.7 1m

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

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

Question 1.8 1m

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

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

Question 1.9 1m

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

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

Question 1.10 **1m**

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

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

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

Question 2.1 [maximum 4 marks] **3.5m**

Explain the concept of a cross-class cram-down in a scheme of arrangement and what the requirements are before a court would order a cram-down.

To approve a scheme of arrangement is necessary to obtain the approval of all affected class of creditors. However, if certain conditions are met, a scheme of arrangement with creditors can be approved despite one or more classes of creditors have reject the proposed scheme. The idea is to reduce the overall influence of minority creditors to avoid them to have a kind of veto on the proposed scheme.

Unlike the cross-class cramdown regime contained in the Companies Act, under IRD Act, the unsecured creditors can be crammed down without requiring that the members are divested of their shares. Thus, even without selling their shares, the unsecured creditors could be crammed down, despite the fact that they did not vote favourably for the proposed schemed.

So, although one or more classes of creditors have not approved the scheme, a court can decide 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 voted in favour of the compromise or arrangement;*
- (b) the above-mentioned majority represents, at least, 75% in value of the creditors; and*

(c) compromise or arrangement must not discriminate unfairly the dissenting classes. In other words, the dissenting classes must be treated fair and equitable.

To be considered fair and equitable to a dissenting class, any creditor of said class must not receive, under the terms of the scheme proposal, less than what the creditor would receive in the most likely scenario if the scheme proposal does not become binding (which may be the liquidation).

Also, where the creditors in the dissenting class are unsecured creditors, the terms of the compromise or arrangement, must provide for each creditor in that class to receive property of a value equal to the amount of the creditor's claim. Alternatively, it "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".

The requirements in sub-paragraph (c) reflects the "absolute priority rule" in Chapter 11 of the Bankruptcy Code. This means that a certain class shall not be paid unless all the senior class are totally paid.

[also discuss where dissenting creditors are secured creditors]

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

Name two objectives of the IRD Act.

Among the objectives of the IRD Act, as stated by the Ministry of Law, we could name:

- (i) introduce a new omnibus legislation that consolidates the personal and corporate insolvency and restructuring laws; and*
- (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.

In Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd, 95 the Singapore Court of Appeal decided that the cash flow test should be the only test under section 125(2)(c) of the IRD Act. The Court of Appeal also set an exemplificative list of factors which should be considered under the cash flow test, which includes, among others:

- (a) the amount of all debts which are due or will be due in the reasonably near future;*

*(b) the value of the assets of the company and the assets that will be sold in near future;
(c) whether payment is being required or is likely to be required for those debts;
(d) any payment or income the company may receive in the near future; and
(e) if the company is late in paying its debts, the amount 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] 6m

Write a brief essay on

(i) rescue financing; and

(ii) wrongful trading

under the IRD Act.

(i) Under the IRD Act, rescue financing may be necessary for the survival of the debtor or to achieve a more profitable realisation of the assets (using the financing) comparing to a sale of the assets through a simple liquidation. This is a special kind of financing in a debtor-in-possession proceeding (DIP financing).

Since the rescue financing involves a borrow of money to a debtor in financial distress, this borrow should have priority in relation to other creditors. Thus, the debtor may ask the court to issue an order to allow the rescue financing to be treated as part of the costs and expenses of the winding-up if the debtor is later wound up and to have priority over preferential debts if the debtor is later wound up.

The court could also allow the DIP financing to be secured by a security interest on property of the debtor not otherwise subject to any security interest. The court could also allow the financing to "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".

The above-mentioned rules were inspired in Section 364 of the US Bankruptcy Code and intend to help to transform Singapore in an international restructuring hub.

(ii) Under the IRD Act, wrongful trading is a way to hold responsible any person who was a knowingly party to the company trading wrongfully. In the case, the person is personally responsible for the debts/liabilities that are related the operation that has been considered wrongful trading. The wrongful trading is declared by a court order.

On the other hand, the company or any interest party of the business may apply to the court for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading. A wrongful trade is when a company incurs debt without reasonable prospect of meeting them in full when the company is insolvent, or becomes insolvent as a result of the incurrence of such debt or liability. In other words, the company won't be capable of paying the debt due to its insolvency or the company will become insolvent considering that transaction.

It's important to point out that Section 239 of the IRD Act has introduced the new concept of wrongful trading. According to this concept, the "wrongful trader" is personally liable for the company's debts if he or she "knew that the company was trading wrongfully; or as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully".

Nowadays, wrongful trading doesn't depend on the criminal liability. In other words, the court can consider a certain transaction as a wrongful trading, even if the offender doesn't go to jail. Thus, the civil liability doesn't depend on the criminal liability.

[discuss definition of rescue financing and the orders for priority that can be sought. Also discuss that an interested person can seek a declaration from court as to whether a transaction is wrongful trading]

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

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

The scheme of arrangement is a debtor-in-possession proceeding which aims to give the debtor time and space to restructure their affairs and for proposals to creditors. This agreement between debtor and creditor is implemented by a scheme of arrangement.

The company may seek a moratorium protection from creditors, so that the debtor has breathing space while it can negotiate a scheme of arrangement with its creditors. The debtor is kept in control of the company. The creditors can negotiate and vote the restructuring plan, which has to be approved by, at least, a majority of 75% of the creditors of each class. The role of the court is to oversee the restructuring process and sanctioned the scheme if no irregularity is found and the scheme has been approved by the creditors.

The judicial management is also a rescue tool foreseen in Singapore's legislation. While the scheme of arrangement is a debtor-in-possession proceeding, in the judicial management proceeding, there is the appointment, by court order, of an insolvency practitioner as the judicial manager. The role of the judicial manager is to replace the

company's ordinary management so that the judicial manager takes control of the running of the company. So, once the judicial manager is appointed, the powers of the directors of the company cease and the judicial manager takes control of the affairs, business and property of the debtor.

Creditors have a limited role on the management of the company since this is a task of the judicial manager. On the other hand, the creditors may create a creditors committee. In such committee, the creditors will analyse and approve (or not) the judicial managers' proposals. The committee may require the judicial manager to provide any information related to its functions and, if the committee is not satisfied with the work of the judicial manager, it may make a complaint to the court that chose the judicial manager.

[discuss difference in moratoria, avoidance provisions, disclaimer of onerous property, objectives]

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)**
- (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)**

(a) The purpose of the judicial management is to rescue the company, enabling the survival of the company or part of its business as a going concern or even a more advantageous realisation of the company's assets than through a winding-up order. While the scheme of arrangement is a debtor-in-possession proceeding, in the judicial management proceeding, there is the appointment, by court order, of an insolvency practitioner as the judicial manager. The role of the judicial manager is to replace the company's ordinary management so that the judicial manager takes control of the running of the company. So, once the judicial manager is appointed, the powers of the directors of the company cease and the judicial manager takes control of the affairs, business and property of the debtor.

To obtain a judicial management order, the company or its creditors must show 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. Among the purposes, there are the survival of the company or part of its business as a going concern or even a more advantageous realisation of the company's assets than through a winding-up order. It is also a purpose 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.

The court will check if 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]".

In addition, there are some factors that prevent the court from making a judicial management order. Among these factors, there are (i) the company has already gone into liquidation or (ii) where the company is "a bank licensed under the Banking Act (Cap 19)", "a finance company licensed under the Finance Companies Act (Cap 108)", "an insurance company licensed under the Insurance Act (Cap 142); or "where the company belongs to such class of companies as the Minister may by order in the Government Gazette prescribe". The bank lenders should demonstrate that these elements are not applicable since they prevent the court from making a judicial management order.

- (b) Under the IRD Act, rescue financing may be necessary for the survival of the debtor or to achieve a more profitable realisation of the assets (using the financing) comparing to a sale of the assets through a simple liquidation. This is a special kind of financing in a debtor-in-possession proceeding (DIP financing).*

Since the rescue financing involves a borrow of money to a debtor in financial distress, this borrow should have priority in relation to other creditors. Thus, the debtor may ask the court to issue an order to allow the rescue financing to be treated as part of the costs and expenses of the winding-up if the debtor is later wound up and to have priority over preferential debts if the debtor is later wound up.

The court could also allow the DIP financing to be secured by a security interest on property of the debtor not otherwise subject to any security interest. The court could also allow "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”.

[discuss definition of rescue financing and what priority orders can be sought]

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)**

In order to the bank lenders to place Alpha Pte Ltd and Beta Pte Ltd under judicial management out of court they must comply with section 94(1) of the IRD Act that has introduced a new voluntary process for initiating judicial management without having to first apply to the court. For this voluntary judicial management to be possible, the Bank must demonstrate that:

- “(a) the company is, or is likely to become, unable to pay its debts;
(b) there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1); and
(c) a resolution of its creditors is obtained”.*

The procedure for this judicial management is foreseen in section 94 of the IRD and includes:

- “(a) the manner creditor meetings should be conducted;
(b) notice requirements; and
(c) relevant timelines”.*

- (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)**

To be eligible to be placed into judicial management, the company should be also eligible for liquidation proceeding in Singapore (IRD Act, Pt 7, s 88.). This includes foreign debtors that demonstrate a “substantial connection” with Singapore (IRD Act, Pt 10, s 246).

There are several elements that characterize a substantive connection with Singapore, like the debtor's centre of main interest is located in Singapore or the debtor has substantial assets in Singapore. Among other factors, there is also substantial connection with Singapore if "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".

In the above-mentioned example, although Charlie Pty Ltd is an Australian company, the properties in Australia are mortgaged to a Singapore bank pursuant to a bank facility that is governed by Singapore law. Thus, the choice of Singapore law to govern the contract characterize substantive connection with Singapore. Hence, Charlie Pty Ltd is eligible to be placed into judicial management in Singapore.

Question 4.3 [maximum 5 marks] **5m**

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)**

In the judicial management, there is an automatic moratorium on legal proceedings against the company that comes into effect upon the filing of the judicial management application (IRD Act, Pt 7, s 95). Besides, if a judicial management order is made, a more extensive moratorium will come into effect for the period of the judicial management (IRD Act, s 96(4)).

Singapore's legislation doesn't limit the protection of the debtors' assets to those located inside Singapore. However, there is a problem of enforcement, since judicial decisions of a certain country are not, as a rule, enforceable in a different country. So, to guaranty such enforcement, there are two different ways.

The first way is directly to Singapore's court if any creditor violates the stay order. Singapore Court may consider that a breach of its order may characterize as a contempt of court. Thus, Singapore court may, for instance, impose a fine against such creditor. However, to be effective this solution, the creditor must have some connection with Singapore, like have assets in Singapore that can be seized for the contempt of court. This solution is very common in the United States of America. In the

USA this is a very effective way of dealing with this problem, since the major players in the international trade have assets in the USA. This first solution doesn't depend on international cooperation between courts.

The second way is by international cooperation between courts so that a foreign country recognizes Singapore's decision and make it enforceable in that country. As a rule, this a not an automatic process and depends on the other countries' internal law or the existence of an international agreement with Singapore. For example, there are some countries that have international agreements with Singapore, like Australia and, thus, the RECJA is applicable.

If there is no international agreement, it should be checked if the other Country has adopted the Model Law on Cross-Border Insolvency (MLCBI). If there is the case, the MLCBI provide certain effects on the recognition of a foreign insolvency proceeding. For instance, if it is a foreign main proceeding (which is the case of ABG Group), article 20 of the MLCBI provides that the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed, as well as the execution against the debtor assets. So, the protection in Singapore is extended to the foreign country.

On the other hand, if there is no international agreement and neither has the other country enacted the MLCBI, the enforcement of the stay granted by Singapore's courts will depend on the general rules of civil cooperation existing in that specific country.

*** End of Assessment ***

43.5m - well done!