



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 **0m**

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.

[First of all, for a Scheme of arrangement to be passed, it must be approved by a majority in number (representing at least 75% in value) of each class of creditors present and voting at a meeting summoned by the court. This is in fact an intra-class cram down or cram down within each class of creditors, since it does not require 100% of creditors approval in each class. Nevertheless, this is still a stringent condition designed to protect the creditors' rights so that when these majority creditors approved the Scheme proposed by the debtor company, these majority creditors opined that it is better for them to accept the Scheme than to face the next alternative, which is likely the liquidation of the debtor company.]

The concept of cross-class cram down or inter-class cram down is that the scheme of arrangement will be passed and binding on all classes of creditors even when one or more classes of creditors rejected the proposed scheme as long as the scheme has been approved by a majority of all creditors in number which represent at least 75% in value. It does not required approval from all classes of creditors. The rationale for this cross-class cram down is to minimise the overall influence of minority creditors.

The court would order a cram-down when the debtor company managed to obtain the approval of majority creditors representing at least 75% in value and the court is satisfied that the scheme does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class.]

[Comment - discuss what is fair and equitable - s70]

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

Name two objectives of the IRD Act.

[IRD Act consolidates the personal and corporate insolvency laws, and the laws relating to debt restructuring by individual and companies, into a single piece of new omnibus legislation, which removed the need to cross-reference between all the legislative acts.]

The second objective of IRD Act is to enhance and refine Singapore's insolvency and restructuring laws, improving Singapore's capability to deal with cross-border insolvencies and restructurings.]

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, the Singapore Court of Appeal clarified the cash flow test in determining whether a company is “unable to pay its debts” and set out a non-exhaustive list of factors. Among the list, 4 of the 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;*
- (c) Whether the company has failed to pay any of its debts, the quantum of such debts, and for how long the company has failed to pay it;*
- (d) The value of the company’s current assets and assets that will be realisable in the reasonably near future.]*

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 is also called Post-Commencement Finance (PCF) or Debtor in Possession (DIP) financing.

Rescue financing is financing that is necessary for (a) the survival of a debtor that obtains the financing and/or (b) to achieve a better realisation of the assets of a debtor that obtains the financing, than having the debtor placed in liquidation.

When a company is met with financial distress and planning to propose a rescue plan (eg. scheme of arrangement or judicial management), it may obtain some form of rescue financing from other creditors. It is little doubt that, without the rescue financing, no matter how good the rescue plan is, it is difficult to succeed.

In order for the debtor company to be able to obtain rescue financing, it is important to grant rescue financiers a higher ranking or “super-priority” and assured that its debts be repaid ahead of preferential claim, in the event the rescue plan failed and the debtor company is being wound up.

A debtor company may apply for a Court order with proper justifications, for the Court to grant these “super-priority” and there are 4 levels of priority that the Court can grant based on its discretion:

- i. To treat the debt as if it were a cost or expense of the winding-up;
- ii. To elevate the debt in priority over all preferential debts and other unsecured debts if the company would not have been able to obtain such financing without it being granted such priority;
- iii. For the debt to be secured by a security interest not otherwise subject to any existing security or to confer a subordinate security interest on the debtor company's property already subject to an existing interest; and,
- iv. For the debt to be secured by a security interest of the same or higher priority than an existing security interest.

(ii) Wrongful trading occurs if

- a. the company, when insolvent, incurs debts or liabilities without reasonable prospect of meeting them in full; or
- b. the company incurs debts or liabilities that it has no reasonable prospect of meeting in full and that result in the company becoming insolvent.

This new provision is more flexible than the previous "insolvent trading" provision as it no longer requires criminal offence to be established. Wrongful trading is a civil offence because the officer/directors failed to minimise losses to company creditors, subsequent to realising that the company is insolvent.

Further, under Section 239 of the IRD Act, personal liability is imposed on party found guilty of wrongful trading. This new provision does not merely target officers/directors of the company, but also other employees, contractors or counterparties of the company if they were a knowingly party to the company trading wrongfully. They are personally responsible for the debts or liabilities of the company.]

[comment - also discuss that an interested party can seek a declaration that it is not 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.

[Judicial Management and Scheme of arrangements are 2 key rehabilitative procedures in Singapore.

There are two main differences between these 2 options are:

(a) Management and control of the company

Scheme of arrangement is a debtor-in-possession process meaning the directors/management are still in full control of the debtor company. The responsibilities, functions and powers of the board of directors stay the same. The company usually appoint a scheme manager/advisor to draw up a proposal, send out notices to creditors for a creditors' meeting to vote for the scheme, explain the scheme to the creditors and obtain their vote in favour of the scheme by majority

creditors presence & voting, approval representing at least 75% in value, and then apply to court to approve the scheme so that it is binding on all creditors, finally the scheme manager carry out the scheme in accordance to the court order.

Judicial Management is external administration process, where an application is made to the court for an insolvency practitioner to take over the control of the debtor company for a period of 180 days, subject to any further extensions granted by the court. The judicial manager after studying the company, draw up a proposal to the creditors on whether the company can (i) survive as a going concern either in part or in full or (ii) enter a scheme of arrangement or (iii) a more advantageous realisation of the company's assets that would be better than on a winding up. All responsibilities, functions and powers of the board of directors are transferred to the judicial manager.

(b) Pre-requisition - Proof of actual or impending insolvency

For the debtor company to propose a Scheme of arrangement, there is no requirement for it to be insolvent or likely to becoming insolvent. This scheme is an agreement between the debtor company and its creditors under which the creditors agree to forgo all or part of their claim against the debtor company, or simply to reschedule their debts, while allowing the debtor company to continue to trade. It is available for all companies, however, most of the time, the debtor company is likely to be financially stressed/distressed but not necessary insolvent.

Proof of actual or impending insolvency is a pre-requisite for a debtor company to apply for Judicial management. This is a rescue mechanism over insolvent company, where it can be shown that there is a reasonable ground to believe that the company may be rehabilitated instead of being liquidated immediately.

Other possible differences are that there is probably less stigma for the company to opt for scheme of arrangement as compared to judicial management which has a stigma associated to insolvency appointment and proceeding.

In terms of cost and efficiency, it might be better under scheme of arrangement than judicial management because the directors are more familiar with the company than the external administrator in reviving the company and or disposing the assets. Time is of the essence and crucial for the company, provided creditors can trust the management to continue running the operation.]

[comment - discuss difference in objectives, and moratorium, and liability provisions]

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)

[(a) In view that various entities in the ABC Group had defaulted on their bank facilities, including entities whose debts are guaranteed by ABC Limited, the bank has reason and grounds to believe that ABC Limited is or will be unable to pay its debts. As creditors, the banks may apply to the court for a Judicial Management order over the company or it may request the company or directors to apply for the same, for the purpose of preserving the company's assets and value while the judicial manager analyse the company and make a proposal to the creditors, on whether the company in part or in whole, is still viable as a going concerns, whether it should enter a scheme of arrangement or whether there is any other option better than liquidation to determine what is best for the creditors.

The judicial management application to be presented to the court must be supported by an affidavit stating the grounds for the application which consider (i) the company is or will be unable to pay its debts; and (ii) 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 interest of creditors would be better served than by resorting to a winding-up.

Other requirements include document to show that ABC Limited has not gone into liquidation, is not a company licensed under Banking Act, Finance Companies Act, Insurance Act or belongs to such class of companies as the Minister may by order in the Government Gazette prescribe.

It must also be eligible to be wound up under IRD Act, i.e. ABC Limited is incorporated in Singapore or having its COMI located in Singapore etc.. before a judicial management order can be applied.

(b) Rescue financing is financing that is (i) necessary for the survival of the ABC Limited (in Judicial Management) and/or (ii) necessary for it to achieve a more advantageous realisation of its assets than in liquidation.

Assuming that ABC Limited had been placed under judicial management, to access rescue financing or borrow new money, the company must first show that reasonable efforts had been made and that it was unable to obtain any other rescue financing from any other person unless it grants the preferential terms like super priority ranking to the rescue financier. The company also must provide sufficient protection for the interest of the secured creditors. This is because usually rescue financier would demand for security over the company assets be granted and be given assurance that its rescue financing be granted super priority ranking in the event the company failed in its rescue attempt and entered liquidation.

The company must then apply to court for the rescue financier's loan be treated preferentially and sanctioned by the court pursuant to section 67 or 101 of the IRD act, as the case may be.]

Question 4.2 [maximum 6 marks] **5.5m**

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

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

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

[To place both companies into judicial management out of court meaning voluntary process to initiate judicial management, without the assistance of the court, the company must follow the "Principles and Guidelines for Restructuring of Corporate Debt - the Singapore Approach" issued by the Association of Banks.

The 2 companies must be or likely to be unable to pay its debts. There is reasonable probability of achieving one or more of the purposes of judicial management and a creditors' resolution must be obtained.

The steps for out of court judicial management that is by creditors' resolution, are:

- The company is to first appoint an interim judicial manager by passing members' resolution or board resolution. The appointment of the interim judicial manager is to be lodged with the Official Receiver and ACRA and published in the Government Gazette and in an English local daily newspaper.*
- The interim judicial manager then sends out notice to call for a creditors' meeting seeking creditors' resolution to appoint a formal judicial manager. It must be passed by majority of creditors presence in voting and in value.*

However, both Alpha Pte Ltd and Beta Pte Ltd must not have any pending court application for a judicial management order which has not yet been withdrawn or decided by the court.]

(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 Ltd is incorporated in Australia. For it to be eligible to apply for judicial management in Singapore, there must be a nexus or connection with Singapore.]

In this case, Charlie Pty Ltd is eligible to be placed into judicial management in Singapore because, firstly, the properties in Australia are mortgaged to a Singapore bank pursuant to a bank facility that is governed by Singapore law. Secondly, both directors of Charlie Pty Ltd are based in Singapore.

It will be a stronger case if it can be established and demonstrated with any one or more of the following:

- *Charlie Pty Ltd's COMI is located in Singapore;*
- *ABC Limited had given loan to Charlie Pty Ltd and provided corporate guarantees to the Singapore financier to guarantee the performance of Charlie Pty Ltd;*
- *Charlie Pty Ltd is registered as a foreign company in Singapore;*
- *Charlie Pty Ltd has substantial assets in Singapore;*
- *Charlie Pty Ltd has chosen Singapore law as the law governing its loan or other transaction;*
- *Charlie Pty Ltd has submitted to Singapore court for resolution of its dispute relating to a loan or other transaction.]*

[comment - refer to "substantial connection" with 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) *Om*

[Yes, ABC Group's assets outside Singapore will be protected because Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency through its adoption of the 2017 Amendment Act. The Supreme Court of Singapore has also on 1 February 2017 adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. Singapore's court order therefore can be recognised in other jurisdiction that also adopted the UNCITRAL Model law. The tools and techniques in other jurisdictions will be available for the use of the Singapore judicial

manager and there is no need to waste time and money for the legal process to apply for recognition of the order issued by the Singapore court, etc..

Although there is no provision dealing with the restructuring of group of companies but for protection of the group assets, under section 65, the court can grant moratorium orders relating to subsidiaries or related companies which play a necessary and integral role in the group restructuring rescue plan.

Both Alpha Pte Ltd and Beta Pte Ltd are key subsidiaries to the operations of ABC Group hence the 2 entities surely play a necessary and integral role in the group restructuring rescue plan. The assets outside Singapore in Australia and United Kingdom are likely financed by the MTN issued by ABC Limited and shareholders' loan of which these loans are based in Singapore under Singapore's law. In view of the above connections to Singapore, moratorium orders should be granted to preserve ABC Group's assets including those outside Singapore. The moratorium also prohibits any legal proceedings against ABC Group and its secured creditors from enforcing any charge or security over its assets. Winding up petition and other execution proceedings such as writs of seizure and same would also be stopped by the moratorium. The moratorium is intended to provide as much protection as possible to the companies while it is being rescued and restructured by the judicial manager. This is to ensure that the judicial manager will have the best chance possible of rescuing the group of companies and ensuring that the assets are realised as best as possible to repay the creditors.]

[comment - whether there is protection in a relevant jurisdiction outside of Singapore depends on whether that jurisdiction has a recognition regime. There is a moratorium under the judicial management regime, but question is whether it is recognised overseas]

*** End of Assessment ***

37.5m