



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] **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.

Subject to certain conditions, cross-class cram-down allows a scheme of arrangement with creditors of the debtor company to be approved even though one or more classes of creditors have rejected the proposed scheme. This means that even if one or more classes of creditors have not approved the proposed scheme in accordance to the percentage required, the court can still order that the proposed scheme is binding on the debtor company and all classes of creditors (but not shareholders) provided that:

- (i) A majority in number of creditors to be bound by the proposed scheme, and who were present and voting (either in person or by proxy) have agreed/voted in favour of the proposed scheme;*
- (ii) That majority in number of creditors representing three-fourths in value of the creditors meant to be bound by the proposed scheme, and who were present and voting (either in person or by proxy); and*
- (iii) The Court is satisfied that the proposed scheme does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class. In this regard, a proposed scheme will not be considered fair and equitable to a dissenting class unless the following requirements/factors are met:*
 - (a) No creditor in the dissenting class receives, under the terms of the proposed scheme, an amount that is lower than what the creditor is estimated by the court to receive in the most likely scenario if the proposed scheme does not become binding; and*
 - (b) Where the creditors in the dissenting class are unsecured creditors, the terms of the proposed scheme:*

- *Must provide for each creditor in that class to receive property of a value equal to the amount of the creditor's claim; or*
- *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.*

[comment - see s74 IRDA. To also discuss briefly where dissenting creditors are secured creditors]

Question 2.2 [maximum 2 marks]

Name two objectives of the IRD Act. 2m

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

- (i) *The quantum of all debts which are due or will be due in the reasonably near future;*
- (ii) *Whether payment is being demanded or is likely to be demanded for those debts;*
- (iii) *Whether the company has failed to pay for any of its debts, the quantum of such debt, and for how long the company has failed to pay it;*
- (iv) *The value of the company's current assets and assets that will be realised in the reasonably near future;*
- (v) *The length of time that has passed since the commencement of the winding-up proceedings;*
- (vi) *Any other income or payment which the company may receive 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.

Rescue financing

First of all, rescue financing is a form of financing that is necessary for the survival of a debtor that obtains the financing and/or necessary to achieve a more advantageous realisation of the asset of a debtor that obtains the financing, as compared to a winding-up of the debtor.

Pursuant to sections 67 and 101 of the IRD Act, rescue financing is available under both the judicial management as well scheme of arrangement processes. In this regard, a Singapore court may, on an application by the debtor company, make an order that any rescue financing obtained by the debtor will:

- (i) Be treated as part of the costs and expenses of the winding-up if the debtor is later wound up;***
- (ii) Enjoy priority over preferential debts if the debtor is later wound up;***
- (iii) Be secured by a security interest on property of the debtor not otherwise subject to any security interest, or be secured by a subordinate security interest on property of the debtor that is subject to an existing security interest if the debtor would not have been able to obtain unsecured rescue financing from any other person; or***
- (iv) 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 insufficient protection for the interests of existing secured creditors.***

Wrongful Trading

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

There is now a new provision in the IRD Act (section 239) which relates to wrongful trading. This new provision allows the court to make a declaration that any person who was knowingly a party to the company trading wrongfully, to be personal responsible for the company's debts or liabilities.

A company is deemed to have traded wrongfully if it incurs debts or liabilities 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.

Pursuant to section 239 of the IRD Act, personal liability is imposed on a person vis-à-vis the company's debts/liabilities if:

- (i) *They knew that the company was trading wrongfully; or*
- (ii) *As an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.*

[comment – to mention that it doesn't require imposition of criminal liability first, and that an interested party can seek a declaration that any transaction 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 is a process which entails the appointment of an insolvency practitioner as the judicial manager, which appointment is pursuant to an order made by the Court. The judicial manager replaces the powers of the company's directors and management, and runs the company. This essentially means that once the judicial manager is appointed, the powers of the company's directors cease and the judicial managers takes over the affairs, business and properties of the company, for a period of 180 days, subject to any further extensions granted by the court. The fact that judicial management is creditor led would often result in stigma for the company.

This is unlike the scheme of arrangement process where the management of the company which is essentially a debtor-in possession process as compared to judicial management which is creditor-led. In a scheme of arrangement, the directors of the company continue to run the business. This results in less stigma which could be important for a public listed company.

In a scheme of arrangement, it is the company who is responsible for putting forward the restructuring proposal, with the aid of financial advisors. In the case of judicial management, this responsibility falls on the judicial manager.

Unlike in the case of scheme of arrangement, only a company eligible to be wound up under the IRD Act may be placed into a judicial management.

Under judicial management, both judicial managers and liquidators have the power to disclaim onerous contracts entered into by the company prior to the judicial management order or liquidation. This is provided for under section 230 of the IRD Act. However, under scheme of arrangement, onerous contracts may not be disclaimed.

[comment - differences in the moratorium, liability provisions in context of JM, objectives of JM v SOA]

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)

0m

(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

(a) As only a company eligible to be wound up under the IRD Act may be placed under judicial management, this requirement is fulfilled if it can be shown, among others, that (i) the loan/facility agreements are governed by Singapore law and (ii) that the Company is incorporated in Singapore - this would show that the Company's centre of main interest is in Singapore.

(b) Rescue financing under the IRD Act is only available if one or both of the following requirements are met:

(i) that is necessary for the survival of the Company; and/or

(ii) that it is necessary to achieve a more advantageous realisation of the assets of the Company that obtains the financing, as compared to a winding-up of the Company.

[comment - see s 89 and 90 of IRDA re JM; also refer to court application required for priority in respect of rescue financing]

Question 4.2 [maximum 6 marks]

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

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

(a) What are the steps that need to be taken in order to place Alpha Pte Ltd and Beta Pte Ltd under judicial management out of court? (3 marks) 0m

Firstly, the concept of insolvency proceedings for a group of companies is not recognised under Singapore law. This is because under Singapore law, each company is treated as a separate legal entity on its own. On that basis the bank lenders must file separate insolvency proceedings for Alpha Pte Ltd and Beta Pte Ltd respectively. Because of this, the bank lenders must also show that Alpha Pte Ltd and Beta Pte Ltd each has debts owed to the bank lenders. The bank lenders cannot rely on the Company's debts as grounds to place its subsidiaries under judicial management.

[comment - see s 94 IRDA]

(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) 2m

Under the IRD Act, Charlies Pty Ltd, a foreign entity, can be placed into judicial management in Singapore provided it can be shown that Charlies Pty Ltd has a "substantial connection" with Singapore. In the present case, "substantial connection" to Singapore can be established based on the following factors:

- (i) That the centre of main interests of the debtor is located in Singapore by reason of Mr X and Y who are both Singaporeans residing in Singapore, are the majority directors of Charlie Pty Ltd;*
- (ii) That Charlie Pty Ltd's properties in Australia are mortgaged to a Singapore bank pursuant to a bank facility that is governed by Singapore law.*

[comment - to also say that it has to be a company liable to be wound up in SG]

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) 1m

For the assets outside of Singapore to be protected, ABC group must apply for the judicial management orders obtained in Singapore to be recognised in the foreign jurisdiction where the properties are to be protected.

[comment - can discuss further the moratorium scope (s88 IRDA), how recognition could be sought, and if not available to consider commencing parallel proceedings]

*** End of Assessment ***

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