



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**

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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**

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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.

*First introduced in the 2017 Amendment Act with the rationale of minimising the overall influence of minority creditors, the concept of a cross-class cramdown was introduced and (subject to conditions) allows a scheme of arrangement with creditors to be approved notwithstanding one or more classes of creditor having rejected the proposed scheme. **1m***

Under the previous cross class cramdown regime contained in the Companies Act, to cram down a class of unsecured creditors, existing members were required to divest their shares. However, there was no set procedure for shareholders to be compulsorily divested of their shares as part of the scheme of arrangement and the cramdown was, therefore, dependent on the members voluntarily divesting their shares. Under the IRD Act, unsecured creditors can be crammed down without requiring that the members are divested of their shares.

*Under a scheme of arrangement, despite one or more classes of creditors having not approved the scheme in accordance with the prescribed voting mechanisms, a court can order that the scheme is still binding on the company and all classes of creditors (but not shareholders) if: **2m***

- a) a majority in numbers of creditors meant to be bound by the arrangement, and who were present and voting (either in person or by proxy) have agreed to the compromise or arrangement;*
- b) that majority in number of creditors represents 75% in value of the creditors is meant to be bound by the arrangement, and who were present and voting;*
- c) the court is satisfied that the arrangement does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class. A compromise or arrangement will not be fair and equitable to a dissenting class unless:*

- I. **no creditor in the dissenting class receives, under the terms of the scheme proposal, an amount that is lower than what the creditor is estimated by the court to receive in the most likely scenario if the scheme proposal does not become binding; and**
- II. **where the creditors in the dissenting class are unsecured creditors, the terms of the compromise or arrangement:**
 - i. **must provide for each creditor in that class to receive property of a value equal to the amount of the creditors claim; or**
 - ii. **must not provide for any creditor with a claim that is supported to the claim of a creditor in the dissenting class, or any member, to receive or retain any property on account of this important claim or numbers interest.**

[Make reference to requirements in s70(1) as well, apart from s70(3). Also identify the circumstances relating to secured creditors]

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

Name two objectives of the IRD Act.

- a) **establish a regulatory regime for insolvency practitioners; and**
- b) **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.

- a) **the quantum of all debts which are due, or will be reasonably due, in the 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 debt, and for how long the company has failed to pay it; and**
- d) **the length of time that has passed since the commencement of the winding up proceedings.**

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 financing that is either or both (i) necessary for the survival of the debtor obtaining the financing; (ii) necessary to achieve a more advantageous realisation of the assets of the debtor obtaining the financing, than on the winding up of that debtor. **1m****

Under both the scheme of arrangement and judicial management processes, a Singapore court may, on application by the debtor, make an order that any rescue financing obtained by a debtor will: **2m**

- a) be treated as part of the costs and expenses of the winding up if the debtor is later wound up;**
- b) enjoy priority over preferential debts if the debtor is later wound up;**
- c) be secured by any 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 that the debtor would not have been able to obtain unsecured rescue financing from any other person;**
- d) be secured by a security interest on property subject to an existing security interest, of the same or a higher priority on 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 interests.**

Largely taken from s.364 of the US Bankruptcy Code, these measures were introduced as part of the package of amendments set out in the 2017 Amendment Act, and which were designed to enhance Singapore's reputation as an international restructuring hub. **1m**

- II. In a new provision relating to wrongful trading, the court is empowered to make a declaration that any person who was a knowing party to the company treating wrongfully is personally responsible for the debts or liabilities of the company. A company trades wrongfully if the company incurs debts or**

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*liabilities without reasonable prospects of meeting them in full when the company is insolvent or becomes insolvent as a result of the incurrence such debt or liability. **1m***

*Adopted from English insolvency legislation, Section 239 of the IRD Act introduces the new concept of wrongful trading, which imposes personal liability for the company's debts on a person if: **2m***

- a) they knew the company was trading wrongfully; or*
- b) as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.*

[Add comparison with old regime which first required imposition of criminal liability]

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.

*A scheme of arrangement is a debtor-in-possession restructuring regime, which includes key features such as an automatic moratorium for 30 days upon the filing of an application with the court, the availability of US-style debtor-in-possession rescue financing, the availability of a cross-class cramdown and pre-packaged schemes, and moratoria having extra territorial effect. **2m***

*Unlike a scheme of arrangement, judicial management involves an insolvency practitioner taking over control of the debtor company. If the court grants an order (upon an application by the company or its creditors) for judicial management, then the judicial manager (an independent insolvency practitioner) will take control if the business and property of the company for a period of 180 days, subject to any further extensions granted by the court. **1m***

*In terms of conversion from corporate rescue to liquidation, there is no specific mechanism for a scheme of arrangement. **[Comment: scheme of arrangement is usually either used as a proceeding on its own, or as part of judicial management. It can also be proposed as part of a liquidation. It is not clear from this sentence what is intended to be said.]** If the moratorium granted under s.64 of the IRD Act comes to an end, creditors or the company would then be at liberty to apply for a winding up or any other process, including judicial management. A judicial management order will be discharged after 180 days unless extended by the court. There is no limit to the number of extensions that the court may grant.*

For a scheme of arrangement, there is no blanket prohibition on the sale of assets outside the ordinary course of business. However, the court can require (under s.64(6) of the IRD Act) that information relating to the acquisition, disposal of property or

grant of security be submitted to the court not later than 14 days of the date of the disposition, and may (on an application by a creditor under s.66 of the IRD Act) make an order restraining the company from disposing of property other than in good faith and in the ordinary course of business.

In judicial management, a judicial manager has the power to sell or otherwise dispose of the property of the company by public auction or private contract. A judicial manager may also dispose of property secured by a floating charge subject to satisfying certain conditions (s.100, IRD Act). 1m

[Comment: To also discuss the scheme of arrangement being a compromise with the creditors, and expand on the difference between a DIP process vs a judicial manager being an officer of the court]

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

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

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

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

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

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

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

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

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

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 4 marks]

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

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

2m

Judicial management is a corporate rehabilitative process whereby an insolvency practitioner takes over control of the debtor company. If applied here, then upon the application of ABC Limited or its creditors (i.e., banks), the court may appoint a judicial manager where it is shown that ABC Limited 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 (such as the survival of ABC Limited or whole or part of its business as a going concern or a more advantageous realisation of ABC Limited's assets than through a winding-up order).

An application for judicial management should only be made where a company, or where a creditor or creditors of the company, 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 interests of creditors would be better served than by resorting to a winding-up.**

(b) Assuming that the Company is placed under judicial management, what requirements must be satisfied in order for the Company to be able to access rescue financing under the IRD Act? (2 marks) 0.5m

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ABC Limited would need to prove that the rescue financing was:

- I. necessary for the survival of the company; and [Comment: this is and/or]**
- II. necessary to achieve a more advantageous realisation of its assets than on the winding-up of the company.**

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[Comment: apart from satisfying definition of rescue financing, also discuss that an application is required for priority to be granted in respect of the rescue financing]

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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) 3m

Instead of seeking a court order, Alpha Pte Ltd and Beta Pte Ltd may each obtain a resolution of their respective creditors under s.94 of the IRD Act for Alpha Pte Ltd and Beta Pte Ltd to be placed under the judicial management of a judicial manager.

Both Alpha Pte Ltd and Beta Pte Ltd must give at least 7 days' written notice in the prescribed form of their intention to appoint an interim judicial manager to the proposed interim judicial manager, and any person who has, or is or may be entitled to appoint, a receiver and manager of the whole (or substantially the whole) of Alpha and Beta' property under the terms of any debentures secured by a floating charge or by a floating charge and one or more fixed charges.

The proposed interim judicial manager should then lodge with the Official Receiver and the Registrar of Companies, a statutory declaration by the proposed interim judicial manager stating that (i) the proposed interim judicial manager is not in a position of conflict of interest; (ii) in the view of the proposed interim judicial manager, one or more purposes of judicial management mentioned in section 89(1), IRD Act can be achieved; and (iii) the proposed interim judicial manager consents to be appointed as interim judicial manager;

Alpha and Beta's directors should then lodge with the Registrar of Companies a statutory declaration stating that (i) the respective companies are or are likely to become unable to pay their debts; (ii) the respective companies will summon a meeting of the companies' creditors to be held on a date not later than 30 days after the date of lodgement of the statutory declaration; and (iii) the directors believe that one or more of the purposes of judicial management mentioned in section 89(1) is likely to be achieved.

At the respective creditors' meetings convened, Alpha and Beta are placed under the judicial management of a judicial manager if a majority in number and value of the creditors present and voting resolve to do so.

(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

Charlie Pty Ltd is eligible to be placed into judicial management since its assets - the properties in Australia - are mortgaged to a Singapore bank pursuant to a bank facility that is governed by Singapore law.

Under the IRD Act, foreign debtors such as Charlie Pty Ltd are eligible to be placed into judicial management if one or more of the following factors can be established:

- a) the centre of main interests of the debtor is in Singapore;**
- b) the debtor is carrying on business in Singapore or has a place of business in Singapore;**
- c) the debtor is registered as a foreign company in Singapore;**
- d) the debtor has substantial assets in Singapore;**
- e) the debtor has chosen Singapore 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; and/or**
- f) the debtor has submitted to the jurisdiction of the Singapore courts for the resolution of one or more disputes relating to a loan or other transaction.**

[Comment: To refer to the requirement of establishing a substantial connection with Singapore]

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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

There is no automatic protection.

To obtain such protection, the judicial manager(s) of Alpha, Beta and Charlie could make an application under s.118 of the IRD Act to wind up the respective companies. If such applications are successful, then a moratorium is imposed and any action against Alpha, Beta and Charlie (and their assets) would be restrained and would require leave of the court.

In 2017, Singapore adopted the UNCITRAL Model Law meaning that the pre-2017 legal (and practical) obstacles the proposed liquidator would face in seeking recognition of the liquidation order(s) from the Singapore court in the UK and Australia are greatly reduced, and its attempts at recovering and realising the assets of Alpha, Beta and Charlie located outside Singapore are greatly enhanced.

[Comment: there is a moratorium under s 96 which covers property outside of Singapore (read with s86), but an application for recognition of the judicial management order in the relevant jurisdiction would typically be required to enforce the moratorium in that jurisdiction.]

*** End of Assessment ***

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