



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8E

SINGAPORE

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1 **1m**

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

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

Question 1.2 **1m**

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

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

Question 1.3 **1m**

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

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

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

(d) *Any of the above.*

Question 1.4 **0m**

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

(a) *Over 50% in value.*

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

(c) *Over 75% in value.*

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

Question 1.5 **1m**

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

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

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

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

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

Question 1.6 **1m**

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

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

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

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

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

Question 1.7 **1m**

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

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

Question 1.8 **1m**

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

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

Question 1.9 **1m**

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

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

Question 1.10 **1m**

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

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

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

Question 2.1 [maximum 4 marks] **2m**

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.

Cross-class cram down in schemes of arrangement involves the court's ability to impose a scheme to all classes of creditors if the requirements are met.¹ Some classes of creditors may vote not to be bound by the scheme, but the effect of the cross-class cram down is those classes of creditors will be bound. For the cross-class cram-down to be applied by the courts there are certain requirements which must be fulfilled:²

- a) More than 50% of the total number of creditors who were present, and voting must agree to the scheme;*
- b) The present and voting creditors must represent 75% in value of the total claim by the creditors; and*
- c) Classes of creditors cannot be unfairly discriminated against by the scheme. For example, the scheme should not offer less than what the creditors are entitled to or could have received if the scheme does not work.*

[comment: discuss what is fair and equitable - s 70(4)]

Question 2.2 [maximum 2 marks] **1m**

Name two objectives of the IRD Act.

¹ Insolvency, Restructuring and Dissolution Act 2018, s 70.

² Insolvency, Restructuring and Dissolution Act 2018, s 70 (3); Terry Xu Hongli, 'Cramdown Powers Under Singapore's Scheme Of Arrangement' (2021) Centre for Commercial Law in Asia <<https://ccla.smu.edu.sg/sgri/blog/2021/02/26/cramdown-powers-under-singapores-scheme>> accessed 10 July 2023.

To repeal and replace prior existing legislative regimes (for example Bankruptcy Act and the Companies Act) and consolidate personal and corporate insolvency laws and laws relating to debt restructuring by individuals and companies.

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.

*The case of **Sun Electric Power Pte Ltd v RCMA**³ gave examples of factors that can be considered under the cash flow test in s.125(2)(c) IDR Act:*

- 1. Whether the payment is being demanded or is likely to be demanded for those debts.*
- 2. Any other income or payment which the company may receive in the reasonably near future.*
- 3. The length of time that has passed since the commencement of the winding up proceedings.*
- 4. 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.

The IRD Act⁴ which came into force on 30 July 2020 consolidated various acts dealing with corporate insolvency and restructuring laws. The IRD Act also introduced new changes to the law, such as rescue financing.⁵ The following short essay will look at rescue financing and wrongful trading under IRD Act.

Rescue financing

³ [2021] SGCA 60.

⁴ Insolvency, Restructuring and Dissolution Act 2018.

⁵ Insolvency, Restructuring and Dissolution Act 2018, s 67 (9).

Rescue financing is also referred to as debtor-in-possession financing (DIP financing).⁶ The IRD Act describes rescue financing in two ways and both meanings can be applied together or separately. One is rescue financing is the financing that is essential for a company to survive either as a whole or the survival of part of the business of the company as an ongoing concern.⁷ The other meaning of rescue finance is financing which is essential in achieving a better realisation of the company's assets than would have been achieved if the company was wound up.⁸ The essence of rescue financing is to allow the company to continue trading, pay for services rendered and other essential services in order to give the company a chance and that is why it is used together with the two rescue procedures, schemes of arrangement and judicial management.⁹

Rescue financing requires permission from the court for the debtor to obtain it.¹⁰ Once the rescue financing order is obtained the financing acquires certain priorities under the IRD Act.¹¹ In the event that the debtor is wound up the repayment of the rescue financing is treated as part of the costs and expenses and has a priority over preferential debts.¹² Creditor who provide rescue financing obtain security over the assets of the debtor.¹³ There are various ways that security can be obtained. One security is by secured interest over the debtor's assets with no other secured interest.¹⁴ If the security of the rescue financing is achieved over assets with already existing security interests, the rescue financing secured interest can be a subordinate subject to the other interests.¹⁵ The above mentioned methods of securing the rescue financing are dependent on the facts that the only way that the company would have obtained further financing was to ask for rescue financing order hence the security.¹⁶ There are instances where the rescue finance can be secured over assets with pre-existing secured interest at the same priority or higher than the pre-existing secured interests.¹⁷ This is subject to two conditions.¹⁸ One condition is that the company would not have acquired the financing unless the debt is secured in the manner described above.¹⁹ The second condition is that there is adequate protection of other the secured interests.²⁰ The IRD Act provides for the courts to approve application for rescue financing and creditors who provide rescue financing to struggling debtors are afforded protection under the IRD Act.

⁶ Ajinderpal Singh and Adriel Chioh, 'Rescue Financing in Singapore Navigating Uncharted Waters' (2020) SAL Prac 1.

⁷ Insolvency, Restructuring and Dissolution Act 2018, s 67 (9)(a).

⁸ Insolvency, Restructuring and Dissolution Act 2018, s 67 (9)(b).

⁹ Insolvency, Restructuring and Dissolution Act 2018, ss 67 and 101.

¹⁰ Insolvency, Restructuring and Dissolution Act 2018, ss 67(1) and 101(1).

¹¹ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1).

¹² Insolvency, Restructuring and Dissolution Act 2018, ss 67 (1)(a) and (b).

¹³ Insolvency, Restructuring and Dissolution Act 2018, ss 67 (1)(c) and (d).

¹⁴ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1) (c)(i).

¹⁵ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1) (c)(ii).

¹⁶ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1)(c).

¹⁷ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1) (d).

¹⁸ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1).

¹⁹ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1)(d)(i).

²⁰ Insolvency, Restructuring and Dissolution Act 2018, s 67 (1) (d)(ii).

Wrongful trading

In the event that a company trades wrongly, the IRD Act makes provisions for the parties that were party to those transactions.²¹ Wrongful trading is describes as where the company incurs debt which it would not reasonably be expected to pay or incurs more debt which the company has no reasonable prospect of paying. Wrongful trading places liability against persons who participated in the wrongful trading.²² Not all participants of wrongful trading are liable. For the courts to find a person is liable for wrongful trading the person either knew or ought to have known the company was trading wrongly.²³ Ought to have known is mostly associated with the officers of the company, that is, directors as they are they carry out the day-to-day running of the company.²⁴

Individuals who are knew or ought to have know the company is wrongfully trading are personally liable.²⁵ The person can be relieved from liability if the show they acted honestly and looking at all the circumstances it is fair for the courts to relieve the person from liability.²⁶ The person can show that the transactions, conduct or other actions should not be considered as wrongful trading in the defence. The courts will make the final judgement to relieve them of liability. If the person is not able to apply the defence, they are personally liable for the debt or the liability of the company during the wrongful trading.²⁷

[Comment: to also discuss that there is no requirement for criminal liability to be first imposed.]

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 schemes of arrangement are rescue procedures available to companies in Singapore. This brief essay will provide brief discussions of the differences between the two procedures.

One of the differences is scheme of arrangement and judicial management is who is in charge of the company during the two insolvency procedures. In a scheme of arrangement, which is a debtor-in-possession procedure, the pre-existing management of the debtor continue to manage the company.²⁸ However, a judicial manager is appointed by the courts to control the company during the judicial

²¹Insolvency, Restructuring and Dissolution Act 2018, 239.

²²Insolvency, Restructuring and Dissolution Act 2018, 239(1).

²³Insolvency, Restructuring and Dissolution Act 2018, s 239(1).

²⁴ Insolvency, Restructuring and Dissolution Act 2018, s 239(1)(b).

²⁵ Insolvency, Restructuring and Dissolution Act 2018, s 239 (1).

²⁶ Insolvency, Restructuring and Dissolution Act 2018. 239(2).

²⁷ Insolvency, Restructuring and Dissolution Act 2018. 239 (1) and (3).

²⁸ Insolvency, Restructuring and Dissolution Act 2018, s 64(1)

management.²⁹ The judicial manager is an independent party who will control the company for 180 days subject to further extensions.³⁰

Another difference between schemes of arrangement and judicial management is in relation to who can commence the procedures. In schemes of arrangement the company applies to the court to sanction the proposal of its compromise with the creditors.³¹ The debtor may apply to the court to appoint a judicial manager similar to a scheme of arrangement.³² However, the creditors can apply to the court for a judicial manager to be appointed where they would not be able to do so in schemes of arrangement.³³

The third difference between schemes of arrangement and judicial management relates to the requirements to commence either of the procedures. To commence judicial management, it must be shown that the debtor is unable to pay its debt or likely to become unable to pay its debt.³⁴ A similar requirement is not considered under the schemes of arrangement.

The fourth difference relates to the procedures of approving the schemes of arrangement and judicial management. An advertisement must be made in the Government Gazette and at least on English local daily newspaper regarding the proposed scheme.³⁵ There is no publishing requirement for judicial management.

In conclusion, though schemes of arrangement and judicial management are rescue procedures they differ in effect and procedure. 0

[comment: there is also difference in objectives - a scheme need not be proposed in a JM. To also discuss moratorium differences, and restrictions on disposal of assets as well as liability provisions applying in JM and not a scheme proceeding.]

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.

²⁹ Insolvency, Restructuring and Dissolution Act 2018, s 94(1)

³⁰ Insolvency, Restructuring and Dissolution Act 2018, s 94.

³¹ Insolvency, Restructuring and Dissolution Act 2018, 64(1).

³² Insolvency, Restructuring and Dissolution Act 2018, 94.

³³ Insolvency, Restructuring and Dissolution Act 2018, s 94.

³⁴ Insolvency, Restructuring and Dissolution Act 2018, s 94(1).

³⁵ Insolvency, Restructuring and Dissolution Act 2018, s 64 (3).

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)

1m

The purpose of the judicial management order is for a judicial manager to be appointed over the affairs, business and property of the Company. The aim of the order is to facilitate debt restructuring.

The bank lenders, who are creditors of the Company, are able together via the working group to apply for a judicial management order.³⁶ The working group will require to show that the Company is or will be unable to pay its debt. There is no concrete evidence to show the Company currently is unable to pay its debt as they have fallen due. However, the bank lender can show that the business activities of the subsidiaries under ABC Group, which the Company is the holding company from, is affected by recent extremely challenging operating environment and stability. The impact on the ABC Group affects the Company because it relies on the return on investment and receivable from the subsidiaries hence likely to be unable to pay its debt. The bank lenders of the Company must show that it is possible to rescue the Company or the business of the Company as an on-going concern or show that the interest of the Company's creditors is better via judicial management order than winding up.

Additionally, there has been a resolution of the creditors. This will include the holders of the various guarantees and the majority shareholders (Mr X and Mr Y, as they have provided a loan).

[comment: see requirements under 89 - 91 IRDA]

(b) Assuming that the Company is placed under judicial management, what requirements must be satisfied in order for the Company to be able to access rescue financing under the IRD Act? (2 marks) 1m

Under s.101(10) IRD Act, the courts must be satisfied that the rescue financing is necessary for the survival of the Company and/or necessary to achieve a more advantageous realisation of the assets of the Company than winding-up the Company.

[comment: also discuss that an application needs to be made for priority to be granted]

Question 4.2 [maximum 6 marks]

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

³⁶ Insolvency, Restructuring and Dissolution Act 2018, s 91.

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**

The bank lenders as creditors of Alpha Pte Ltd and Beta Pte Ltd must fulfil the following conditions:

- 1. Show that both Companies are unable to pay their debt. More information is required on whether both of companies are part of ABC Group subsidiaries that have defaulted on loans or affected by the economic climate;*
- 2. The court must be shown there is a reasonable probability of achieving one or more of the purposes of judicial management under s 89(1); and*
- 3. The creditors of both companies have made a resolution to utilise judicial management.*

[comment - see s94 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) 3m**

Since Charlie Pty Ltd is incorporated in Australia it is considered a foreign company. As a foreign company, Charlie Pty Ltd can be placed into judicial management as a foreign company if it among the companies that can be wound up in Singapore.³⁷ There is no evidence that Charlie Pty Ltd is registered as a foreign company in Singapore hence will be considered an unregistered company. Since, Charlie Pty is an unregistered company it must be shown that Charlie Pty Ltd has 'a substantial connection' connection to Singapore.³⁸ The assets, function and place of incorporation is in Australia, and these cannot be used to so show substantial connection to Singapore. However, the mortgage of the assets of Charlie Pty Ltd are with a Singapore Bank and governed by Singapore law which can be used to establish substantial connection to Singapore for the purposes of judicial management.

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**

³⁷ Insolvency, Restructuring and Dissolution Act 2018, s 88.

³⁸ Insolvency, Restructuring and Dissolution Act 2018, s 246.

The assets are not automatically protected. A judgement from UK and Australian law where the assets are located must be registered under RECJA with Singapore High Court. Once the order of protection is registered in Singapore it will be enforced as if it was made in Singapore.

[Comment: this is regarding recognition of a Singapore insolvency proceeding overseas.]

*** End of Assessment ***

33m