



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 **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.

Cross-class cram-down is the ability of the company, with court approval, to bind dissenting creditors to the terms of the scheme of arrangement ("SOA") where the majorities required under the voting rules have not been reached. For voting purposes the creditors are put into classes and each class must vote in favour by a majority in number and a majority of $\frac{3}{4}$ in value for the SOA to be binding. The cram-down avoids a SOA failing due to a minority of creditors not approving it.

The court will only approve the order to bind all creditors affected by the SOA if:

- A majority in number present & voting across all classes agreed to the SOA,*
- That majority represented $\frac{3}{4}$ in value of those present & voting, and*
- The SOA does not discriminate unfairly between classes of creditors and is fair & equitable to the dissenting creditors.*

To be fair & equitable to the dissenting creditors the SOA must propose that they are in the same or a better position than they would be if the SOA was not binding. Where the dissenting class are unsecured creditors the SOA must also provide for each creditor in that class to either be paid in full or to receive all available property or funds ahead of any subordinate claims or members interests.

[comment - also discuss where dissenting creditors are secured creditors. Make reference to s 70]

Question 2.2 [maximum 2 marks]

Name two objectives of the IRD Act. **2m**

Removing the need to cross-reference between various pieces of legislation by consolidating corporate and personal insolvency and restructuring into one Act.

To enhance the insolvency and restructuring laws in Singapore.

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.

*Four of the non-exhaustive list of factors set out by the Singapore Court of Appeal in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* to be considered under the cash flow test are:*

- *The amount of all debts due or becoming due in the near future*
- *Whether payment for these debts is being or likely to be demanded*
- *Whether to company has already failed to pay any debt, the value of the debt and how long it has been outstanding, and*
- *The value of current and other assets that will be realisable in the near future.*

QUESTION 3 (essay-type question) [15 marks]

Question 3.1 [maximum 8 marks]

Write a brief essay on

(i) rescue financing; and **4m**

(ii) wrongful trading **3m**

under the IRD Act.

Rescue financing

Rescue financing is defined by section 67(9) (“s67(9)”) of the IRD as financing that is necessary for the survival of the company as a going concern, in whole or in part, or that which is necessary to achieve a more advantageous realisation of the company’s assets than would be possible under a winding up.

Section 67 in general allows for a company, which has applied for a moratorium under s64 or proposes a compromise or arrangement under s210 of the Companies Act 1967, as amended, (the “Act”) to apply to court to request the approval of “super priority” of the financing. The judicial manager of a company may also apply to court to allow the super priority under s101 of the IRD.

Both sections have very similar wording and allows for the application that the debt arising from rescue financing:

- *Be treated as costs and expenses of the winding up,*
- *Have priority over preferential debts, or*
- *Be secured over property of the company if this is the only way the financing will be forthcoming.*

Within 14 days after an order has been made the company or judicial manager must file a copy of it with the Registrar of Companies (the "RoC").

Wrongful trading

Section 239 of the IRD is titled Responsibility for wrongful trading and allows the Court to declare that any person who was a party to the company trading wrongfully is personally responsible for the debts or liabilities of the company.

The company trades wrongfully (s239(12)) if, when insolvent it incurs debts it has no reasonable prospect of meeting in full or it incurs such debts and this results in the company's insolvency. The person who may become responsible for the debts must have been aware that the company was trading wrongfully, or should have been aware as an officer of the company and in the circumstances.

The application can be made by a liquidator, judicial manager, the Official Receiver, and, with permission, a creditor or contributory and when wrongful trading comes to light during a winding up, the judicial management of the company or any proceedings against the company.

Prior to the introduction of the IRD insolvent trading was

[comment - to discuss that it doesn't require imposition of criminal liability before civil liability can be imposed]

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

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

The main differences between judicial management ("JM") and scheme of arrangement ("SOA") processes are the commencement, the effect and duration of the moratorium, and roles of the officeholder and the Court.

A JM application may be submitted to court by the company, the directors, the creditors (either solely or as a group) and including prospective or contingent creditors. The company may also go into JM by the company appointing an interim

judicial manager (“an IJM” or “the IJM”) followed by the creditors approving a resolution to have the company placed under JM of a judicial manger (“a JM” or “the JM”).

As well as the company, directors and creditors, a JM or a liquidator may also propose a SOA. Implementing a SOA involves two court approvals, the first to call meetings of creditors, or classes of creditors, and the second to approve implementation of the SOA if approved by the creditors. The SOA can be managed by the parties proposing the scheme but most often they will appoint a scheme manager to do this.

Part 7 of the IRD governs JM and states in s89 that the JM must perform his functions to achieve one or more of the purposes of JM being the survival of the company as a going concern, in whole or part, the approval of a Companies Act s210 compromise with creditors and members, or it will allow a better outcome on the realisation of the company’s assets than under a liquidation.

The court will only approve a JM application if it is satisfied that the company is, or is likely to become, unable to pay its debts and that the making of the order is likely to achieve one of the purposes in s89 and will not make an order if the company is already in liquidation or is a bank, financial institution or insurance company as listed in s91(8).

Part 7 of the Act and Part 5 of the IRD governs SOAs. Under s210 of the Act upon application of the party proposing the SOA the Court may order meetings of creditors or classes of creditors as it sees fit. The SOA is binding if it is agreed by a majority in number, representing at least three-quarters in value of the creditors present and voting in each meeting.

Where the creditors have been placed into 2 or more classes and at least one class votes to approve the SOA and at least one class vote to oppose the SOA (the dissenting class) s70 of the IRD allows the Court, subject to certain conditions, to order the SOA to be binding on all classes of creditors affected by it. For the Court to order this cross-class cramdown a majority in number and representing three-quarters in value of all the creditors affected by the SOA and who voted at a meeting must have agreed the proposal.

Although both rehabilitation processes can obtain moratoria to protect the company’s position while proposals are being drawn up the moratorium under a JM is automatic upon the application for JM or the lodging of written notice of appointment of an IJM while the stay of proceedings for a SOA must be applied for by the company under s64 of the IRD. The term “automatic moratorium” is used for both.

For a JM the automatic moratorium comes into force upon the filing of the application or lodging of the notice of an IJM and applies to legal proceedings against the company with a more extensive protection coming into force upon the making of a JM order by the Court. The moratorium lasts for the duration of the JM under s96(4) of the

IRD. The company will be automatically discharged from JM after 180 days unless an extension is applied for.

If applied for, the SOA automatic moratorium period lasts for 30 days, which can be extended by the Court for as long as it sees fit, and during the moratorium period the company must make the application for a compromise under s210 of the Act or under s71 of the IRD (Court approval of a SOA without a meeting of creditors).

The functions and powers of the directors of the company pass to the JM once the JM order is made. The JM must then take control of all the company's assets and has extensive powers to deal with them in the same way directors may as well as those conferred by s100 and the First Schedule to the IRD. Under s107 the JM must draw up a statement of how he intends to achieve the JM purposes and hold a meeting, on 14 days' notice, for the creditors to decide whether to approve his proposals. Approval is passed by a majority in number and value of those present and voting. If the proposals are rejected the JM must report this to the Court who may order the company be discharged from JM, adjourn the hearing or make in interim order as it sees fit. If the proposals are approved the JM must manage the company in accordance with the proposals.

Under a SOA the functions and powers of the directors remain with them and they may appoint a scheme manager to help administer the scheme. Either way, the company's affairs must be managed as per the terms of the scheme, which will also lay out the conditions of the termination of the 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] **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)***

The purpose of judicial management ("JM") proceedings is one or more of:

- *The survival of the company or its business as a going concern,*
- *The approval of a scheme of arrangement,*
- *A more advantageous realisation of the assets than would be achieved in a winding up.*

The JM must also perform his functions in the interest of the creditors as a whole.

To obtain the JM order the applicants will need to file an originating summons supported by an affidavit stating the grounds for the application. The Court will only grant the order if, and only if, it is satisfied that the company is or is likely to become unable to pay its debts and that the making of the order will achieve one of the above purposes. The application must include the nomination of an insolvency practitioner to be the JM. He must not be the auditor of the company and must file a statutory declaration with the court stating he has no conflict of interest.

To access rescue financing while the company is under a JM s101(10) states that the financing must be necessary to satisfy one or more of the purposes of the JM. The IRD also allows for the super priority of the financing should the company be wound up. This must be provided for in the financing agreement and be sanctioned by the Court under s101.

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***

Each company will have to give the proposed IJM and any creditor who may appoint a receiver 7 days' notice of the company's intention to appoint. After the 7 days has elapsed and not more than 21 days since giving the notice the members (or directors resolution if the constitution allows) must pass a resolution to appoint the IJM, the creditors who could appoint a receiver must provide written consent, the proposed IJM and directors of the company must file statutory declarations that the JM purposes will be met, the IJM must consent to act and state he has no conflict, the directors must declare that the company cannot pay its debts and that they will call the creditors meeting within 30 days. The meeting must be convened on 14 days' notice and must be advertised not less than 10 days beforehand. One of the directors must attend the meeting and disclose the company's affairs and the circumstances leading up to the proposed appointment. To pass the resolution to place the company in to JM, the creditors must vote in favour by majority in number and value. If the JM is agreed the creditors must then resolve to approve the appointment of the JM.

(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

To be placed into JM, Charlie Pty Ltd must be eligible to be wound up under the IRD and have a substantial connection with Singapore. This connection can be demonstrated by the following factors:

- The company has its COMI in Singapore,*
- The company has a place of business or is carrying on business in Singapore,*
- The company is registered as a foreign company in Singapore,*
- There are substantial company assets in Singapore,*
- Singaporean law governs a loan or transaction or governs the resolution of a dispute regarding a loan or transaction, or*
- The company has submitted to the Singaporean Court's jurisdiction for the resolution of loan or transaction disputes.*

In the case of Charlie Pty Ltd the loan over the Australian assets is governed by Singapore Law and so Charlie would be eligible.

Question 4.3 [maximum 5 marks] 5m

Assuming Alpha Pte Ltd, Beta Pte Ltd and Charlie Pty Ltd are also placed into judicial management in Singapore.

Please provide analysis on the following issue:

(a) Would the assets owned by the ABC Group in jurisdictions outside of Singapore be protected? If there is no automatic protection, what can be done to obtain such protection? (5 marks)

The automatic moratorium that comes into effect during the IJM appointment and the moratorium under s96(4) that is in place while the company is in JM is not extraterritorial so the assets in other jurisdictions are not automatically protected.

The UNCITRAL Model Law definition of a foreign proceeding would apply to both the IJM and the JM (a judicial proceeding (including interim), governed by a law relating to insolvency and a collective proceeding for the purposes of reorganisation) and both the UK and Australia have adopted the Model Law so an application for recognition could be made to each jurisdiction.

If protection was urgently needed article 19 allows the foreign representative ("FR") to request a provisional stay while the recognition application is being decided. This relief includes a stay on execution against the assets, entrusting the administration or realisation of the assets to the FR and suspension of any kind of disposal of assets. Unless extended this relief will terminate upon the decision of the recognition application.

The relief after the decision is made will depend on whether each JM would be recognised as main or non-main proceedings.

For main proceedings article 20 will automatically stay the commencement, continuation or execution of actions against the assets and will suspend the right to transfer or dispose of the assets. For extension of the provisional relief or for other relief not covered by article 20 the FR in the main proceeding will need to apply to the enacting state's court for the relief sought as per article 21.

For non-main proceedings the FR will always need to apply to the enacting state's court for the relief under article 21.

*** End of Assessment ***

47m well done!