



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? [Please note that this question appears to be phrased incorrectly. Maybe option (d) was meant to read "All of the above"? Options (a)-(c) are all listed in section 440(5) as being excluded, (d) is not.]

- (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]

PLEASE NOTE: As a source in completing this assessment, I utilized the guidance book on Singapore, unless otherwise indicated throughout this examination.

Question 2.1 [maximum 4 marks] 4m

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.

A Scheme of Arrangement under Singapore law has many features of a US chapter 11 proceeding, some of them have fairly recently been adopted (e.g., the availability of debtor-in-possession financing, among other things). The ability to cram down a class of creditors is also available under the US Bankruptcy Code and aids in the passing of a chapter 11 plan in the event a class or classes of creditors have not approved the plan. In Singapore, the feature

of cram down has first been introduced in the 2017 Amendment Act and is now included in s. 70 of the IRD Act.

Pursuant to s. 70(2) and (3) of the IRD Act (titled “Power of the Court to Cram Down”), the Singapore Court may, “on the application of the company, or of a creditor of the company who has obtained the leave of the Court to make an application,” cram down a class or classes of dissenting creditors, and therefore, approve a compromise despite the dissent of a class or classes, if: “(3) (a) a majority in number of the creditors meant to be bound by the compromise or arrangement, and who were present and voting (either in person or by proxy) at the relevant meeting, have agreed to the compromise or arrangement; (b) the majority in number of creditors mentioned in paragraph (a) represents three-fourths in value of the creditors meant to be bound by the compromise or arrangement, and who were present and voting (either in person or by proxy) at the relevant meeting; and (c) the Court is satisfied that the compromise or arrangement does not discriminate unfairly between 2 or more classes of creditors, and is fair and equitable to each dissenting class.”

Further, as set forth in subsection (4) of section 70 of the IRD Act “a compromise or an arrangement is not fair and equitable to a dissenting class unless — (a) no creditor in the dissenting class receives, under the terms of the compromise or arrangement, an amount that is lower than what the creditor is estimated by the Court to receive in the most likely scenario if the compromise or arrangement does not become binding on the company and all classes of creditors meant to be bound by the compromise or arrangement; and (b) either of the following applies: (i) where the creditors in the dissenting class are secured creditors, the terms of the compromise or arrangement — (A) must provide for each creditor in the dissenting class to receive deferred cash payments totalling the amount of the creditor’s claim that is secured by the security held by the creditor, and preserve that security and the extent of that claim (whether or not the property subject to that security is to be retained by the company or transferred to another entity under the terms of the compromise or arrangement); (B) must provide that where the security held by any creditor in the dissenting class to secure the creditor’s claim is to be realised by the company free of encumbrances, the creditor has a charge over the proceeds of the realisation to satisfy the creditor’s claim that is secured by that security; or (C) must provide that each creditor in the dissenting class is entitled to realise the indubitable equivalent of the security held by the creditor in order to satisfy the creditor’s claim that is secured by that security; (ii) where the creditors in the dissenting class are unsecured creditors, the terms of the compromise or arrangement — (A) must provide for each creditor in that class to receive property of a value equal to the amount of the creditor’s claim; or (B) 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 of the company on account of the subordinate claim or the member’s interest.”

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

Cramming down a class or classes of dissenting creditors is an important tool that aims at minimizing the ability of minority creditors to prevent a compromise from being approved by the Court.

Question 2.2 [maximum 2 marks] 2m

Name two objectives of the IRD Act.

As stated in the IRD Act itself, the President of the Singapore Parliament, in assenting to the IRD Act summarized the goals as follows on October 31, 2018:

“An Act to amend and consolidate the written laws relating to the making and approval of a compromise or an arrangement with the creditors of a company or an individual, receivership, corporate insolvency and winding up, individual insolvency and bankruptcy, and the public administration of insolvency, to provide for the regulation of insolvency practitioners, to provide for connected matters, to repeal the Bankruptcy Act (Chapter 20 of the 2009 Revised Edition) and to make consequential and related amendments to certain other Acts.”

Source: [Insolvency, Restructuring and Dissolution Act 2018 - Singapore Statutes Online \(agc.gov.sg\)](https://www.agc.gov.sg/Insolvency/Restructuring%20and%20Dissolution%20Act%202018)

The IRD Act, among other things, therefore (i) provides consolidated laws related to insolvency of individuals and companies; (ii) provides a regulatory regime for practitioners; and (iii) overall improves the Singapore insolvency regime by repealing various other insolvency laws, including certain provisions of the Companies Act.

Question 2.3 [maximum 4 marks] 4m

State **four** factors that should be considered under the cash flow test in determining whether a company is “unable to pay its debts” under the IRD Act.

In 2021, the Singapore Court of Appeal (the “Court”) in *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd*, clarified that the applicable test to be utilized in determining whether a company is “unable to pay its debts” should be the cash flow test. The court below “found that the appellant was unable to pay its debts pursuant to s 254(2)(c) of the Companies Act as the appellant was cash flow insolvent . . . and balance sheet insolvent.” In agreeing with the respondent on that point, the Court noted that “the cash flow test should be the sole and determinative test under s 254(2)(c) of the Companies Act.”

In clarifying that the “cash flow test” is the “sole and determinative test,” the Court also noted that “the cash flow test assesses whether the company’s current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due.”

The Court then listed a variety of factors that should be considered in applying the cash flow test. More specifically, the Court listed the following non-exhaustive factors:

- “(a) the quantum of all debts which are due or will be due in the reasonably near future;
- (b) whether payment is being demanded or is likely to be demanded for those debts;
- (c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;
- (d) the length of time which has passed since the commencement of the winding up proceedings;
- (e) the value of the company’s current assets and assets which will be realisable in the reasonably near future;
- (f) the state of the company’s business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;
- (g) any other income or payment which the company may receive in the reasonably near future; and

(h) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.”

Source: [\[2021\] SGCA 60 \(elitigation.sg\)](#).

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:

As at least two authors noted in 2020 that “[r]escue financing is a relatively novel concept to Singaporean insolvency practitioners. . . . However, Singaporean insolvency practitioners can look to the Americans’ history and experience with debtor-in-possession (“DIP”) financing for guidance and illumination.” Ajinderpal Singh and Adriel Chioh, *Rescue Financing in Singapore: Navigating Uncharted Waters* [2020] available at: [9866 \[2020\] SAL Prac 1 Rescue Financing in Singapore \(Published on 18 February 2020\).pdf \(SECURED\) \(academypublishing.org.sg\)](#)

The applicable provisions for a scheme of arrangement is s. 67 of the IRD Act (“Superpriority for Rescue Financing”) and s. 101 for judicial management (titled the same). Both contain subsections that define “rescue financing” as provided below.

s. 67(9) of the IRD Act provides:

“(9) In this section — “rescue financing” means any financing that satisfies either or both of the following conditions: (a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern; (b) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company;”

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

s. 101(10) of the IRD Act provides:

“In this section — “rescue financing” means any financing that satisfies one or more of the following conditions: (a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern; (b) the financing is necessary for the Court’s approval under section 210(4) of the Companies Act or section 71(5) of a compromise or an arrangement mentioned in section 210(1) of the Companies Act or section

71(1) (as the case may be) involving a company that obtains the financing; (c) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company; . .

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

Rescue financing is therefore available under both proceedings – scheme of arrangement and judicial management. In order for rescue financing to be approved, as the statute states, it must be (i) necessary for the survival of the debtor that applied and obtained the funds, and/or (ii) more advantageous to the debtor in attempting to realise on the assets than in a liquidation/winding-up.

On application of the debtor, and if these requirements are satisfied, the Court may issue an order that will provide super priority status to the DIP lender similar to section 364 of the United States Bankruptcy Code. For example s. 64(7) provides:

“(4) Where a company that has any super priority debt or debts is wound up, the super priority debt or debts constitute one class of debts and, despite section 203 — (a) the super priority debt or debts are to be paid in priority to all the preferential debts specified in section 203(1)(a) to (i) and all other unsecured debts; and (b) if the property of the company available for the payment of the super priority debt or debts is insufficient to meet the super priority debt or debts, the super priority debt or debts — (i) have priority over the claims of the holders of any debentures of the company secured by a floating charge (which, as created, was a floating charge); and (ii) are to be paid out of any property comprised in or subject to that floating charge.”

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

Wrongful Trading:

The applicable provision in the IRD Act is s. 239. This relatively new provisions empowers the Court to declare that any person “who was a party to the company trading in that manner is personally responsible . . . for all or any of the debts or other liabilities of the company as the Court directs” More specifically, s. 239 provides, in pertinent part:

Responsibility for wrongful trading

239.—

(1) If, in the course of the judicial management or winding up of a company or in any proceedings against a company, it appears that the company has traded wrongfully, the Court, on the application of any person mentioned in subsection (5), may, if it thinks proper to do so, declare that any person who was a party to the company trading in that manner is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs, if that person — (a) knew that 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.

(2) Where the Court makes any declaration under subsection (1), the Court may relieve, in whole or in part and on such terms as the Court thinks fit, the person declared responsible under that declaration from the personal liability for which he or she is declared responsible, if — (a) the person acted honestly; and

- (b) having regard to all the circumstances of the case, the person ought fairly to be relieved from the personal liability.
- (3) Where the Court makes any declaration under subsection (1), it may give such further directions as the Court thinks proper for the purpose of giving effect to that declaration, and in particular — (a) may make provision for making the liability of any person under the declaration a charge —

Pursuant to s. 239(5), the following person might apply for a declaration under subsection (1): “(a) the judicial manager of the company; (b) the liquidator of the company; (c) the Official Receiver; (d) any creditor or contributory of the company, with the leave of — (i) the judicial manager or the liquidator, as the case may be; or (ii) the Court.”

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

Importantly, the IDR Act also defines what conduct constitutes wrongful trading in s. 239(12) of the IDR, namely: “ a company trades wrongfully if — (a) the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full; or (b) the company incurs debts or other liabilities — (i) that it has no reasonable prospect of meeting in full; and (ii) that result in the company becoming insolvent.”

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

[Comment: To also discuss that this now does not require the imposition of criminal liability first]

Question 3.2 [maximum 7 marks] 5m

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

Judicial Management and Scheme of Arrangement are both the primary rehabilitative procedures available under Singapore insolvency law.

Unlike in a scheme of arrangement, an insolvency practitioner takes control over the company in a judicial management proceeding upon the application of the company or its creditors. If the Court grants an order for the proceeding, the insolvency practitioner (the judicial manager), will be in charge of the company and its assets for a period of 180 days. In contrast, in a scheme of arrangement, the debtor-in-possession remains in control of the company.

There are further differences in how a company can enter either proceeding. With respect to a scheme of arrangement, the company proposes a compromise or settlement with its creditors and must apply with the Court for approval of the same upon the satisfaction of certain factors. If the application is approved, a 30-day moratorium is in place automatically. See s. 64 of the IRD Act. [Comment: These are 2 different applications – application for moratorium vs application for sanction of a scheme. If a debtor does not require a moratorium, it can go ahead and seek leave to call a meeting to propose a scheme of arrangement without making an application for a moratorium. In contrast, a moratorium arises automatically when a judicial management order is made]

Both proceedings may be converted to liquidation if certain requirements are met which differ between the two proceedings. For a scheme of arrangement to be converted to liquidation, the following must apply: if no scheme has been sanctioned by the Court after the 30 day moratorium (and the same has not been extended), creditors may then apply for the liquidation procedures or judicial management. In contrast, for a judicial management to be converted to liquidation, the following factors are relevant: have creditors declined to approve the judicial manager’s proposal; the conduct of the judicial manager might have been prejudicial to the creditor body or the company; and the judicial manager is of the opinion that the goals of a judicial management proceeding cannot be achieved.

The roles of the officeholders in both proceedings also differ. In a judicial management, the judicial manager takes over the control of the company and its assets and is generally in charge to safeguard the debtor's assets. In a scheme of arrangement, management remains in control; however a proposed scheme manager is usually appointed to facilitate the process (this concept is not known in a regular chapter 11 proceeding in the USA).

Asset Sales outside the ordinary course of business

There are also different rules that apply with respect to asset sales outside the ordinary course of business. In a Scheme of Arrangement, although such sales are not generally prohibited, under sections 64(6) and 66 of the IRD Act, the court may restrict or prohibit such sales outside the ordinary course under certain circumstances. Pursuant to s. 64(6) of the IRD Act, the court may require that certain information be submitted with respect to such sales not later than 14 days of the transaction at issue "to enable the company's creditors to assess the feasibility of the intended or proposed compromise or arrangement." See s. 64(6) of the IRD Act. Under s. 66 of the IRD Act, upon application of a creditor, the court has the ability to prohibit such sale or transaction or transfer of shares "at any time during a moratorium period," See s. 66 of the IRD Act (titled "Restraint of disposition of property, etc., during moratorium period").

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

In contrast, in a Judicial Management, the Judicial Manager may conduct public or private auctions to sell or dispose of property, including property secured by a floating charge pursuant to s. 100 of the IRD Act (titled "Power to deal with charged property, etc.") if certain requirements are met. Among other things, the proposed transaction must "be likely to promote one or more of the purposes of judicial management under section 89(1)" See s. 100(2) of the IRD Act. If it does, the Judicial Manager may dispose of the property "as if the property were not subject to the security, or to dispose of the goods, as if all rights of the owner of the goods under the hire-purchase agreement, chattels leasing agreement or retention of title agreement were vested in the company." *Id.* This power to dispose of property under these circumstances is set forth in the First Schedule of the IRD Act that provides as follows, among other things, that the Judicial Manager has "(b) power to sell or otherwise dispose of the property of the company by public auction or private contract; . . ." See First Schedule to IRD Act titled "POWERS OF JUDICIAL MANAGER."

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

DIP Financing

DIP financing/rescue financing is available under both processes upon application of the debtor (in a scheme of arrangement – "Where a company has made an application") or judicial manager in a judicial management proceeding – "on an application by the judicial manager"). s. 67 of the IRD Act sets forth the requirements applicable to a Scheme of Arrangement and s. 101 of the IRD Act for the Judicial Management. Both sections are phrased similarly.

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

Preferential treatment of post-commencement finance/ proof of claims processes/rescue plan/cram-down

With respect to the preferential treatment of post-commencement lenders, the proof of claims process, the development and execution of a rescue plan, and cramming down a dissenting class, similar rules apply in both proceedings.

[Comment: to also discuss the objectives of a JM, which includes proposing a scheme. Vs a scheme which is just for achieving a compromise arrangement]

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**

(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) **2m**

- a. In short, in order to be placed under judicial management, the bank lenders as a creditor group must apply with the Court to enter a judicial management proceeding. If the Court finds that the company is eligible to be placed into such a proceeding, it will grant an order to that effect pursuant to s. 91 of the IRD Act. Upon the granting of the order, an insolvency practitioner (the judicial manager), will be appointed who will be in charge of the company and its assets for a period of 180 days. The application must satisfy the following criteria in order for the court to grant the application. More specifically, the Court must be satisfied that the purpose of a judicial management proceeding is satisfied which are set forth in s. 89(1) of the IRD Act. The judicial manager must be satisfied that one or more of the following purposes can be satisfied, namely “(a) the survival of the company, or the whole or part of its undertaking, as a going concern; (b) the approval under section 210 of the Companies Act or section 71 of a compromise or an arrangement between the company and any such persons as are mentioned in the applicable section; (c) a more advantageous realisation of the company’s assets or property than on a winding up.”

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

Here, the following purpose could be evident: Because not all of the wholly owned subsidiaries are unable to pay its debts, the Company as a whole may be saved as a going concern through a judicial management proceeding. Further, under the facts and for the reasons just mentioned, the realisation of the Company’s assets might be more advantageous than a liquidation.

For its application, the lenders must show “(a) that the company is, or is likely to become, unable to pay its debts; and (b) that there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern, or that the interests of creditors would be better served otherwise than by resorting to a winding up” s. 90 of the IRD Act. Here, the Company should be able to make such a showing in its application, because: (i) various subsidiaries have defaulted on their loans; however not all of them indicating that there might be a chance to rehabilitate the Company as a whole.

- b. Companies under judicial management are generally eligible for rescue financing in Singapore. **s. 101(10) of the IRD Act provides:**

In this section — “rescue financing” means any financing that satisfies one or more of the following conditions: (a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern; (b) the financing is necessary for the Court’s approval under section 210(4) of the Companies Act or section 71(5) of a compromise or an arrangement mentioned in section 210(1) of the Companies Act or section 71(1) (as the case may be) involving a company that obtains the financing; (c) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company; . .

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

In order for rescue financing to be approved, as the statute states, it must be (i) necessary for the survival of the debtor that applied and obtained the funds, and/or (ii) more advantageous to the debtor in attempting to realise on the assets than in a liquidation/winding-up.

On application of the debtor, and if these requirements are satisfied, the Court may issue an order that will provide super priority status to the DIP lender similar to section 364 of the United States Bankruptcy Code.

Here, the Company should be eligible for rescue financing as it appears that only a few of the Company's wholly owned subsidiaries are under default and that the Company as a whole might be rehabilitated as a going concern. As such rescue financing might be necessary under the current situation to provide the Company with necessary funds during the pendency of the judicial management proceeding.

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**

The IDR Act now includes a procedure for the voluntary judicial management which does not require an application with the Court. The requirements and procedures are set forth in section 94 of the IRD Act (titled "Judicial management by resolution of creditor"). The procedure is available if "(a) the company is, or is likely to become, unable to pay its debts; and (b) there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1 . . .)". If these requirements are met, a company may, "instead of applying to the Court for a judicial management order, obtain under subsection (11) a resolution of the company's creditors for the company to be placed under the judicial management of a judicial manager in accordance with the requirements in this section [94]." Section 94 contains details as to such a resolution may be obtained, including, among other things, the appointment of an interim judicial manager, the creditor meeting and the time frames under which they need to be held, and various notice requirements. For example, subsection (8) specifically lists a few meeting and notice requirements as follows:

"(8) The company must, in convening the meeting under subsection (7) — (a) give to the creditors at least 14 days' written notice of the meeting, together with — (i) a statement showing the names of all creditors and the amounts of their claims; and (ii) a full statement of the company's affairs showing in respect of the company's assets or property the method and manner in which the valuation of the assets or property was arrived at; and (b) cause notice of the meeting of the creditors to be published at least 10 days before the date of the meeting in an English local daily newspaper."

Another requirement is that the directors of the company have to lodge a statutory declaration with the Registrar of Companies setting forth "that — (i) the company is or is likely to become

unable to pay its debts; (ii) the company will summon a meeting of the company's creditors to be held on a date not later than 30 days after the date of lodgment of the statutory declaration mentioned in paragraph (e); 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" See s. 94(3)(f) of the IRD Act.

Source: [Insolvency, Restructuring and Dissolution Act 2018.pdf](#)

In addition, it is generally possible, although not often utilized, for a company to informally work out or enter into an informal arrangement with its creditors without court oversight and court assistance. I would advise the clients to consult the "*Principles and Guidelines for Restructuring of Corporate Debt – the Singapore Approach*." The guidelines were released by the Association of Banks and provide a "non-statutory framework for Lenders . . . to assist . . . a Company/Group in financial difficulties whilst the feasibility of a restructuring is considered . . . and "to promote a "Rescue Culture." Source: [principles-amp-guidelines-for-restructuring-of-corporate-debtf1eea89f299c69658b7dff00006ed795.pdf](#) (abs.org.sg).
[Comment: agreed, but this is not voluntary 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**

For a company to be eligible to be placed into a judicial management proceeding under Singapore law, it must be eligible to be wound up under the IRD Act. A "foreign debtor" may also be eligible if it has a "substantial connection" with Singapore. Although Charlie Pty Ltd ("Charlie") is incorporated in Australia and carries on its business there (owns property there), it might still be eligible to be placed into judicial management in Singapore for the following two reasons: (1) Charlie's loan is governed by Singapore law; (2) the majority shareholder (Mr. X and Mr. Y) of Charlie are both based in Singapore and are also the Company's (Charlie's parent) directors and major shareholders. The fact pattern is devoid of any information as to whether Charlie is also registered in Singapore as a foreign company or whether it is also a wholly owned subsidiary of the Company. Assuming it is for purposes of this questions, these factors would also weigh in favour of Charlie's eligibility to be placed into judicial management in Singapore.

Question 4.3 [maximum 5 marks]

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

Please provide analysis on the following issue:

(a) Would the assets owned by the ABC Group in jurisdictions outside of Singapore be protected? If there is no automatic protection, what can be done to obtain such protection? (5 marks) **4m**

There would not be an automatic protection; however, the Company could seek a foreign recognition order from the Australian court. The proceedings in Singapore should qualify as a foreign main proceeding and Charlie should be found to have an establishment in Australia. Upon the application for the recognition of the foreign main proceeding pursuant to Article 20 of the Model Act, mandatory relief will be automatic which includes, among other things, "a stay of commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, See Art. 20 of Model Law. Singapore adopted the UNCITRAL Model Law and Australia has too more than 10 years ago.

[comment: the moratorium under s96 covers property outside of Singapore (s88) but whether there is protection in the relevant jurisdiction depends on whether there is recognition]

*** End of Assessment ***

46m well done!