



TOTAL: 15/50 = 30%
Two long questions both plagiarised

Commented [INS 11]: Various instances of serious plagiarism have been identified, and marks have been deducted accordingly. Please be reminded of the instructions pertaining to plagiarism contained in the Course Handbook as well as in the assessment itself.
Course Leader

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

This is the summative (formal) assessment for Module 7D ***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 7D. ***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 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.assessment7D]. An example would be something along the following lines: 202223-336.assessment7D. 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] [6/10 marks]

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

Choose the correct statement in relation to the insolvent debtor and rehabilitation (discharge):

- (a) If no claims have been received against the estate within six months of the date of sequestration, the debtor is automatically rehabilitated.**
- (b) Once a period of 10 years has lapsed after the sequestration of his estate, the debtor may apply to court for an order of rehabilitation.**
- (c) If the Master has approved a plan of distribution to repay all of the claims against the estate as well as all costs in full, the debtor may apply to the court for rehabilitation.**
- (d) None of the above are correct.**

Question 1.2

Choose the incorrect statement/s in relation to the recognition of a foreign officeholder:

- (i) The foreign officeholder must apply to the Magistrate's Court for recognition.**
- (ii) In the court order the court will include provisions to protect local creditors.**
- (iii) The court order must be published in the Government Gazette.**
- (iv) The foreign officeholder will only be required to provide appropriate security, and nothing more.**

Choose the correct answer:

- (a) Option (ii).**

(b) Options (ii) and (iv).

(c) Option (iii).

(d) Options (i) and (iv).

Question 1.3

Choose the correct statement:

(a) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds immovable property as security for his claim is required to give written notice of this fact before the first meeting of creditors to the Master and to the trustee.

(b) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds movable property as security for his claim is required to give written notice of this fact before the first meeting of creditors to the Master and to the trustee.

(c) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds immovable property as security for his claim is required to give written notice of this fact before the second meeting of creditors to the Master and to the trustee.

(d) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds movable property as security for his claim is required to give written notice of this fact before the second meeting of creditors to the Master and to the trustee.

Question 1.4

Which of the following factors may persuade the court in exercising its discretion whether to recognise foreign proceedings:

(i) That it is equitable and convenient if the insolvent is resident outside of South Africa.

(ii) Assets in South Africa are not a prerequisite for recognition.

(iii) Preference for single proceeding directed by court of domicile.

(iv) If the order was granted by the court of domicile and the insolvent has movables only it is a mere formality, but for immovable property the court will apply its discretion.

Choose the correct answer:

(a) Option (i).

(b) Options (ii) and (iii).

(c) Options (i), (ii) and (iii).

(d) All of the above.

Question 1.5

In March 2022 Company XYZ was placed in liquidation. The liquidator of Company XYZ became aware of the fact that Company XYZ disposed of property worth ZAR 22,000 to Company ABC for an amount of ZAR 15,000 during October 2021. Directly after the disposition, Company XYZ's liabilities exceeded its assets by ZAR 5,000. If the disposition is set aside -

(a) Company ABC will be required to return ZAR 22,000 to the liquidator of Company XYZ.

(b) Company ABC will be required to return ZAR 15,000 to the liquidator of Company XYZ.

(c) Company ABC will be required to return ZAR 5,000 to the liquidator of Company XYZ.

(d) Company ABC will be required to return ZAR 7,000 to the liquidator of Company XYZ.

Question 1.6

Choose the correct statement:

(a) In respect of a general notarial bond over the movable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

(b) In respect of a general notarial bond over the immovable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

(c) In respect of a special notarial bond over the movable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

(d) In respect of a special notarial bond over the immovable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

Question 1.7

A cause of action established by a foreign judgment can be enforced if certain common law requirements are met. Which of the following is not such a common law requirement:

- (a) The foreign court must have had international competence as determined by South African law.**
- (b) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice, but the judgment need not be final and conclusive.**
- (c) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice.**
- (d) The judgment must not have been obtained fraudulently.**

Question 1.8

Cluck Company Limited (the company) wishes to obtain funding in order to expand its poultry and egg enterprises. As part of the security package negotiated with the lender, the lender requires that the company provide its tractors and incubators to it as security. The company makes use of the tractors and incubators on a daily basis. This form of security required is a:

- (a) Pledge.**
- (b) Hypothec.**
- (c) Cession in security of a debt (*in securitatem debiti*).**
- (d) Special notarial bond.**

Question 1.9

Which of the following is / are incorrect in relation to the recognition of foreign judgments:

- (a) All foreign judgments are enforced in terms of the Enforcement of Foreign Civil Judgments Act 32 of 1988.**
- (b) All foreign judgments are enforced in terms of the common law.**
- (c) Foreign judgments are directly enforceable in South Africa.**
- (d) All of the above.**

Question 1.10

In accordance with the South African common law dealing with cross-border insolvency, the assets of an insolvent are governed as follows:

- (a) Movable property is governed by the law of the natural person's domicile (*lex domicilii*).**
- (b) Movable property is governed by the law of the natural person's domicile (*lex situs*).**
- (c) Immovable property is governed by the law of the place where the immovable property is situated (*lex domicilii*).**
- (d) Immovable property is governed by the law of law of the natural person's domicile (*lex situs*).**

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

Question 2.1 [maximum 3 marks] [3 marks]

List any three proceedings that are excluded from the moratorium under business rescue proceedings imposed by section 133 of the Companies Act 71 of 2008.

[The three proceedings that are excluded from the moratorium under business rescue are as follows:

1. Criminal proceedings against the company or any of its directors or officers.

2.Proceedings against the company by a regulatory authority in the execution of its duties (the authority may continue with the proceedings after written notification to the business rescue practitioner);

3.Proceedings concerning any property or right over which the company exercises the power of a trustee

Question 2.2 [maximum 5 marks] [5marks]

Rearrange the following costs/claims in the free residue account in order of preference:

- (a) **Costs of sequestration;**
- (b) **Funeral expenses;**
- (c) **Income tax;**
- (d) **Claim secured by a general bond;**
- (e) **Employee's claims.**

The rearrangement is as follows:

- [a.) Funeral expenses.
- (b) Costs of sequestration.
- (c) Employee's claims.
- (d) Income tax.
- (e) Claim secured by a general bond.

Question 2.3 [maximum 2 marks] [1]

Below is an extract from the business rescue plan of Mapochs Mine Proprietary Limited (Mapochs), a South African mining company that was placed under business rescue on 20 April 2015.

EVENT	DATE
Board Resolution to commence Business Rescue filed at the CIPC	20 April 2015
BRPs appointed	21 April 2015
First Employees' Meeting	28 April 2015
First Creditors' Meeting	6 May 2015
First Creditors' Committee Meeting	26 May 2015
First Employees' Committee Meeting	7 October 2015
Second Creditors' Committee Meeting	15 October 2015
Third Creditors' Committee Meeting	10 November 2015
Business Rescue Plan published	20 November 2015
Meeting to consider the Business Rescue Plan (in terms of section 151 of the Companies Act)	30 November 2015

With reference to the above extract, how and by whom would the joint business rescue practitioners (referred to in the extract above as “BRPs”) have been appointed?

[Mapochs, the company [1] would appoint the BRPs. Since it is a joint Practitioners, I assume that the Creditors might have an input i.e. it is a joint appointment. Such practitioners must satisfy the requirements for appointment as set out in S138 of the Companies Act 2008.and who has consented in writing to such appointment..

. Upon granting an order for compulsory business rescue, a court may appoint an interim business rescue practitioner nominated by the Mapochs, applicant, subject to ratification of the holders of the majority of independent creditors' voting rights at the first meeting of creditors.

- **Appointment in the board resolution placing the company under business rescue.**

Type your answer here]

QUESTION 3 (essay-type question) [15 marks] [0] [100% copy and paste from Guidance Text]

Chances are that when an insolvent company is placed under liquidation proceedings it is party to an executory contract. Write an essay on the treatment of executory contracts under liquidation proceedings, including any exceptions to the general rule. Your essay should include a brief discussion of any exceptions that may apply.

The treatment of executory contracts in insolvency is not set out in legislation but is regulated by common law principles of law of contract which have been

adjusted to insolvency. In common law, the sequestration of a debtor's estate does not suspend or terminate any contract to which he is a party.

If a debtor is a party to an executory contract upon the sequestration of his estate in terms whereof the other party's performance is still outstanding, the right to that performance is an asset of the estate which the trustee may enforce.

If the debtor's performance in terms of the contract is still outstanding, the trustee may generally elect whether to abide by, or reject, the contract. The trustee is afforded this power so that he may act in the best interests of the creditors. The trustee must thus obtain the instructions of the general body of creditors before exercising this election right. If the trustee elects to abide by the contract, he steps into the shoes of the insolvent and is entitled to receive any performance owed to the insolvent and is bound to render any reciprocal performance due to the other party. Should the trustee elect to reject the contract, the other party may not claim specific performance and may only rely on remedies for breach of contract (being damages and cancellation). Once the trustee has exercised this election right, he cannot change his mind.

The trustee's common law election right is limited by statute in certain instances. Legislation prescribes the treatment of the following executory contracts in insolvency:

Sale of immovable property

If the estate of the seller is sequestrated before transfer of the immovable property, the Alienation of Land Act 68 of 1981 grants some protection to the purchaser. When certain requirements are met, the trustee of the insolvent estate must authorise transfer of ownership to the purchaser and as such the trustee does not have the common law election right. The requirements to be met are that the purchase price is to be paid in two or more instalments; the land must be used for residential purposes; the land must be registrable in the Deeds Office; the contract must be recorded in the Deeds Office by means of an endorsement against the title deed of the land; and payment of the transfer costs and certain other cost must be made.

If the estate of the purchaser is sequestrated before transfer of the immovable property, the trustee may elect whether to enforce or reject the contract. If called upon in writing by the other party to do so, the trustee must exercise this right within six weeks and, if he fails to do so, the other party may approach the court for cancellation of the contract and further restitution.

Sale of movable property: cash sale

If the estate of the purchaser of movable property is sequestrated before he pays the purchase price but after he takes delivery of the property, the seller may reclaim the property if he gives written notice to the purchaser, or the trustee, or the Master, within 10 days of delivery thereof that he reclaims the property. The

purpose of this provision is to protect unsuspecting sellers who deliver goods to debtors shortly before bankruptcy, provided they act promptly.

If the estate of the seller is sequestrated the common law position will apply.

Sale of movable property: instalment agreement

When the estate of the purchaser is sequestrated when performance by the purchaser is still outstanding in terms of an instalment agreement, the seller will acquire a hypothec over the goods subject to this agreement. Sequestration will thus cause ownership of the goods to pass to the insolvent estate.

If the estate of the seller is sequestrated the common law position will apply.

Lease agreements

Lease agreements are not automatically terminated upon the sequestration of any of the parties' estates. When the estate of the lessee of movable or immovable property is sequestrated, the trustee may immediately cancel the lease by means of written notice. The lessor has a concurrent claim against the estate for damages sustained because of the cancellation, but he also obtains a hypothec over immovable property brought onto the premises for any rent in arrears due before sequestration (in the case of a lease of immovable property). If the trustee fails to cancel the lease within a three-month period after his appointment, the lease is deemed to be cancelled automatically.

Upon the sequestration of the estate of the lessor of immovable property, the sale of the property by the trustee will be bound to the lease agreement if the principle of *huur gaat voor koop* (lease goes before sale) applies. If a mortgage bond was registered over the property in question prior to the lease, then the rights of the lessee are subordinate to those of the mortgagee (mortgage bond holder) unless such rights have been waived. The leased property may only be sold free of the lease if an offer received for the property is inadequate to satisfy the mortgagee's claim in full and a better offer can be obtained if the property is sold free of the lease.

Employment Contracts

Upon the sequestration of an employer's estate, all employment contracts are suspended. In certain instances a trustee may terminate a contract of employment, but only after the trustee has entered into consultations with the relevant parties (such as registered trade unions of the employees themselves) with the view of receiving proposals in order to save or to rescue the business or a part thereof - for example to save the contracts of service when the business is sold and transferred to a new owner. Unless continued employment has been agreed upon, all employment contracts terminate 45 days from the date of the appointment of the trustee.

The exceptions to the general rule are:

The sequestration of an employee's estate has no effect on his employment contract with his employer.

The employee may enter into any employment during the period of sequestration he may not without written of the liquidator, either carry on or be employed in any capacity or have any direct or indirect the business of the company.

There are no statutory rules for the treatment of essential contracts.

Type your answer here]

QUESTION 4 (fact-based application-type question) [15 marks] [0] Plagiarism

The directors of ABC (Pty) Ltd (the company) foresee the reasonable likelihood that the company will, within the next six months, be unable to pay its debts as they become due in the ordinary course of business, and will most likely reach a situation where its liabilities exceed its assets. The directors therefore elect to initiate business rescue proceedings and adopt the relevant board resolution, which is subsequently filed with the Companies and Intellectual Property Commission (CIPC). Donovan Jones is appointed as the company's business rescue practitioner. Various parties are affected by the company's decision. The following parties approach you as a collective seeking legal advice:

- (a) Charlie White, a successful businessman, lent the company ZAR 500 000 which the company failed to repay. He initiated proceedings against the company in the High Court to reclaim his money, and at the time that the company was placed under business rescue proceedings, the court proceedings were almost finalised. Charlie is unsure what the effect of business rescue will be on the money owed to him.**
- (b) Rowena Gonzales has worked for the company for the last five years and she is concerned about the effect that business rescue will have on her employment contract.**
- (c) Mario Miles leases office space to the company and he is concerned about the effect of the business rescue proceedings on the lease agreement with the company.**
- (d) Trudy Pather is a shareholder of the company and is unsure whether she will lose her shareholding now that the company has been placed under business rescue.**
- (e) Henry Jean is a director of the company and is unsure as to his position and role now that business rescue proceedings have commenced.**

Write a single legal memorandum to all the above-mentioned persons wherein you explain their legal rights, and / or the potential outcome of their respective situations, taking into consideration that the company has been placed under business rescue. The memorandum should further make mention of any potential remedies at their

disposal; any practical implications of their respective situations; and also include any considerations in respect of the business rescue plan that the business rescue practitioner needs to take cognisance of.

MEMO

From: Olusola Oyetayo
To: Charles White
Rowesa Gonzales
Mario Miles
Trudy Pather
Henry Jean
Donovan Jones

SUBJECT: LEGAL MEMO ON BUSINESS RESCUE OF ABC (PTY) LIMITED

This memo is being addressed to you, the above, first to avail you the basics of business rescue proceedings and the legal implications of the decision of the company to be placed under business rescue proceedings as it affects you.

1.Introduction

The purpose of business rescue is to facilitate the rehabilitation of a financially distressed Company such as ABC (Pty) Limited.

The most important functions of the business rescue practitioner are to investigate the affairs of the Company and to develop and implement a business rescue plan. The business rescue practitioner is an officer of the court and is subject to the duties and liabilities of a director of a Company. Upon investigating the affairs of the Company, the business rescue practitioner is required to consider whether there is any reasonable prospect of the Company being rescued. If the business rescue practitioner is of the opinion that there is no reasonable prospect for the Company to be rescued, he should inform the court, the Company and all affected as such, and request the court for an order to discontinue the business rescue and place the Company under liquidation. If the business rescue practitioner is of the opinion that the Company is no longer under financial distress, he must inform the court, the Company and all affected persons and apply to court for an order to discontinue the business rescue proceedings (for compulsory business rescue) or file a notice of termination with the CIPC (for voluntary business rescue).

A company under business rescue may dispose of its property in the ordinary course of business. To dispose of property outside the ordinary course of business, the disposal must be a bonafide transaction at arm's length for fair value approved in writing in advance by the business rescue practitioner, or the disposal must be in accordance with the approved business rescue plan. If the property subject to the disposal has been given as security to a creditor, the prior consent of the creditor is required, except where the proceeds of the disposal will be sufficient to discharge the debt secured by the property.

Business rescue proceedings result in a moratorium on legal proceedings against the Company. The moratorium is inclusive of enforcement action against the Company, or in relation to any property belonging to the Company, or lawfully in its possession. The business rescue practitioner or the court may grant permission to lift the moratorium in appropriate cases. To the extent that the Company is liable as a debtor which includes its liability as a surety, the suretyship may not be enforced against the Company unless the court grants permission on the grounds that it is just and equitable to do so.

2. Charlie White

As you might be aware that ABC (Pty) Limited, the Company has been placed under business rescue.

As stated above, there is a moratorium in enforcing any action against the Company. This means that your proceedings against the Company in the High Court to reclaim money would likely be stepped down due to the moratorium.

In business rescue proceedings there is a clear distinction between pre- and post-commencement claims. The scope and ranking of post-commencement is set out in legislation and only pre-commencement claims are part of the business rescue plan. So your claims are part of the business rescue plan. The business rescue practitioner may receive proof of claims by creditors at the first meeting of creditors. There is an absence of guidelines for the administration of claims in business rescue proceedings, and this creates uncertainty. As the treatment of the claim does not seem to depend on whether or not a claim has been proved, it may be that it is simply beneficial to assist the business rescue practitioner in establishing a list of the Company's debts and resolve possible disputes regarding claims.

3. Rowenta Gonzales

You will continue to be in employment based on the same terms and conditions you had immediately before the proceedings, except that you note the changes that do occur in the ordinary course of having reduction or decrease in staff strength.

Also, in case of changes in terms and conditions, this will be done on the basis of Labour Relations Act 66 of 1995 and other applicable labour legislations.

4. Mario Miles Whole discussion below is copy and paste

[Executory contracts are not automatically terminated upon the commencement of business rescue proceedings. Except for certain contracts, the treatment whereof provided for in the Companies Act 2008 and the Insolvency Act, the business rescue practitioner may elect to either entirely, partially, or conditionally suspend obligations of the Company, or cancel the executory contract in question by means of obtaining a court order. The obligations which may be suspended by the business rescue practitioner for the duration of the proceedings relate to obligations of the Company that would become due during the business rescue proceedings. The Companies Act 2008 does not prescribe any time periods within which the business rescue practitioner should exercise this suspension right, but as an obligation must be suspended before it becomes due, a proactive approach is required.] 100% copy and paste from Guidance Text

[It has been submitted that this suspension right of the business rescue practitioner does not have much practical effect. Contract law is based on reciprocity and where the business rescue practitioner elects to withhold performance, the other contracting party may do the same. Before a business rescue practitioner elects to suspend obligations due under an executory contract, a creditor may also cancel such an agreement. Onerous contracts may only be cancelled by means of a court order.] 100% copy and paste from Guidance Text

[The treatment of the following contracts are specifically provided for and the business rescue practitioner may not elect to simply suspend obligations.] 100% copy and paste from Guidance Text, and does not even add any value here (blind copy and paste).

[There are no provisions for the treatment of essential contracts. It is interesting to note that the legislator has published the Companies Amendment Bill and has included a proposed amendment to section 135 of the Companies Act 2008, which will deal with the landlord's

claim for rent falling due in business rescue. The current position is that the Landlord's claim for rent falling due in business rescue (based on an executory lease agreement) is neither "financing" nor is it "costs of the business rescue proceedings" and is therefore not a preferential claim. The proposed amendment to the Companies Act will see such a landlord's claim dealt with as post-commencement financing, which will place a landlord in a better position than is currently the case. This may prove to be a positive step towards amendments needed for the treatment of essential contracts.] 100% copy and paste from Guidance Text

[It has recently been decided that the moratorium does not preclude a Creditor from cancelling an executory contract after the debtor Company have been placed under business rescue.] 100% copy and paste from Guidance Text

5. Trudy Pather

Trudy will continue as a shareholder. The business rescue proceedings did not have effect on her shareholding. Moreover transactions on exchanges and market agreements on informal markets are not affected by the opening of business rescue proceedings, and will continue to operate unless the agreement in question provides otherwise. These agreements may not be suspended by the business rescue practitioner and may further also not be cancelled by the court. = copy and paste

6. Henry Jean

If, in investigating the affairs of the company the business rescue practitioner finds evidence of failure by any director to perform any material obligation relating to the company, the business rescue practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps. It must be borne in mind that business rescue proceedings are regulated by the Companies Act 2008 and the liquidation of insolvent companies by the Companies Act 1973. Under business rescue proceedings the directors of a company are thus not subject to any of the provisions of the Companies Act 1973. Whilst the company is under business rescue, a director remains bound by the duty to disclose personal financial interests or those of a related person but is relieved from the duties of a director set out in section 76 and from most liabilities under section 77 of the Companies Act 2008, provided he acts under the authority and according to the instructions or direction of the business rescue practitioner. The liabilities for which a director remains liable under section 77 are in respect of loss sustained by the company as a result of:

- Acting on behalf of the company despite knowing that he lacks authority;
- Acquiescing in the carrying on of the company's business despite knowing that it is being conducted recklessly, with gross negligence or with intent to defraud or for a fraudulent purpose.
- Being a party to an act or omission knowing that it is calculated to defraud a creditor, employee or shareholder or the company or that it has another fraudulent purpose. = copy and paste

7. Donovan Jones

Business Rescue Plan

The business rescue practitioner must, after consulting the creditors, other affected persons, and the management of the Company, prepare a business rescue plan for consideration and possible adoption at a meeting convened for this purpose. The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding

whether or not to accept or reject the plan, and must be published within 25 days after the appointment of the business rescue practitioner. A business rescue plan is adopted on a preliminary basis by creditors (subject to approval by holders of securities if their interests are affected) if it is supported by 75% of voting interests and 50% of independent creditors' voting interest (if any). If the business rescue plan does not alter the rights of the holders of any class of the Company's securities, preliminary approval constitutes final approval. If the business rescue plan does not alter the rights of the holders of any class of the Company's securities, the holders of these securities are called to vote where the majority of the holders of the voting interest can approve the plan.

Any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined on the request of the practitioner to be a fair and reasonable estimate of the return to that person, or those persons, if the Company were to be liquidated.

The adopted business rescue plan is binding on the Company, on each creditor of the Company and every holder of the Company's securities, whether or not such a person was present at the meeting, voting in favour of the adoption of the plan, or in the case of creditors proven their claims against the Company. A so-called "cramdown" thus occurs where creditors are forced to accept the business rescue plan – even against their wishes. The business rescue may thus proceed despite objections by disgruntled creditors and the legislator did not deem it fit to provide a disgruntled party with a judicial remedy to seek to set aside the adoption of a business rescue plan. Creditors are not divided into, nor do they vote, in classes.

The Companies Act 2008 provides that the process of business rescue involves "a plan to rescue the Company by restructuring its affairs, business, property, debt and other liabilities, and equity ...". The business rescue plan may expressly include a proposal, including the extent to which the Company is to be released from the payment of its debts and the extent to which any debt is proposed to be converted to equity in the Company, or another Company.

copy and paste

During business rescue proceedings, a Company may obtain financing, secured if necessary by any of the Company's assets which are not otherwise encumbered. The claims of these creditors are payable after costs related to the business rescue proceedings and claims related to employment arising during the rescue proceedings, in the order of preference indicated in the Companies Act 2008. The order of preference is as follows:

- a) Business rescue practitioner's remuneration and other expenses.
- b) Remuneration, reimbursement for expenses or other amounts of money relating to employment which becomes due and payable by a Company to an employee during the Company's business rescue proceedings.
- c) Claims for financing obtained during business rescue (firstly secured claims in the order in which they were incurred, in preference over all unsecured claims against the Company).
- d) Employees for claims which became due before commencement of the business rescue proceedings.
- e) Preference provided for in the business rescue plan proposals.

copy and paste

I hope this explains the implications of business rescue proceedings to your respective positions.

*** End of Assessment ***