INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

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 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: **[studentnumber.assessment8E]**. An example would be something along the following lines: 202021IFU-314.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 "studentnumber" 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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 **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 41.5/50 – well done!

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

Which of the following **is not** one of the objectives of the IRDA?

(a) To establish a regulatory regime for insolvency practitioners.

(b) To introduce a new omnibus legislation that consolidates the personal and corporate insolvency and restructuring laws.

(c) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

(d) To enhance Singapore's insolvency and restructuring laws .

Question 1.2

Who may apply to court to stay or terminate the winding up of a Company?

(a) A creditor.

(b) A contributory.

(c) The liquidator.

(d) Any of the above.

Question 1.3

Which of the following factors may enable a foreign debtor 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 substantial assets in Singapore.

(d) Any of the above.

Question 1.4

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

(a) Over 50% in number.

(b) 50% or more in number.

(c) Over 75% in number.

(d) 75% or more in number.

Question 1.5

Which of the following in respect of the automatic moratorium under Section 64(1) of the IRDA **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

Which of the following **does not** lead to the discharge of a judicial management order?

(a) A receiver is appointed over the assets of the company.

(b) The creditors decline to approve the judicial manager's proposals.

(c) The judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved.

(d) The judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

Question 1.7

Which of the following **is one of the three** aims of a judicial management?

(a) To allow the directors to oversee the restructuring of the company.

(b) Preserving 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

Which one of the following **is not** a corporate rescue mechanism in Singapore?:

(a) Informal creditor workouts.

(b) Judicial Management.

(c) Receivership.

(d) Scheme of arrangement.

Question 1.9

Which one of the following countries **is not** one of the jurisdictions that Singapore has modelled its insolvency laws on?

(a) England and Wales.

(b) Brunei.

(c) The USA.

(d) Australia.

Question 1.10

Which one of the following points regarding the landmark decision of *Re Zetta Jet Pte Ltd* is **not correct**?

(a) The High Court did not grant full recognition of the US Chapter 7 proceedings.

(b) The US bankruptcy proceedings continued in breach of the Singapore injunction.

(c) This is the first reported decision where a Singapore court has been faced with the question of public policy in an application for recognition of a foreign insolvency proceeding.

(d) The Court held that the omission of the word "manifestly" from Article 6 of the Singapore Model Law meant that the standard of exclusion on public policy grounds was higher than in jurisdictions where the Model Law had been enacted unmodified.

10 marks

QUESTION 2 (direct questions) [10 marks]

Commented [DB2]: 9.5/10

Question 2.1 [maximum 4 marks]

Explain the elements of **two** types of impeachable transactions under Singapore insolvency law and what defences there may be to the two you have identified.

There are two types of impeachable transactions under Singapore insolvency law. The impeachable transactions are applicable to bankruptcy of individuals & firms, and liquidation of companies. The powers that a liquidator has vis-à-vis companies is also available under judicial management.

The two impeachable transactions are:

1. Undervalued transactions: An individual who has been adjudged bankrupt and has within the relevant period entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court to restore the position. The transaction is at an undervalue if the bankrupt makes a gift, or transaction is for no consideration or consideration is marriage or is for consideration which is at a significantly less sum than originally provided by bankrupt. The relevant period is 3 years before either the date the bankruptcy application was made or the date upon which the bankruptcy order was made.

   In case of a company the liquidator can ask for restoration of position too. A transaction is at undervalue if the company makes a gift to the recipient or enters into transaction where the value of consideration is significantly less, and the company has become insolvent as a result of the transaction. The company is presumed to have undertaken a transaction at an undervalue if the preferred party is an associate. The relevant period of clawback is 5 years in all cases. It is to be noted that claw back is available only after the company is placed into liquidation.

2. Unfair preferences: An individual, adjudged bankrupt, if has given an unfair preference to any person, within the relevant period, the Official Assignee may apply to the court to restore the position. An unfair preference exists if other person is one of bankrupt's creditors, surety or guarantor and the act of the bankrupt puts any of the aforesaid persons in a better position to what they would have been otherwise. Also, the bankrupt must be influenced by desire to prefer the other party. In case an associate (related party of bankrupt as defined) is beneficiary of such treatment it is presumed that it was on account of bankrupt's desire unless the contrary is shown. The relevant period for associate is 2 years and for others 1 year, before either the date of the application was made or the date the bankruptcy order was made, and the transaction is not an undervalue.

   In case of a company, as mentioned under undervalued transaction, the liquidator can claw back the assets. Liquidator must show four elements for an unfair preference i.e., preferred party is a creditor or guarantor of company's debts or liabilities, company was insolvent or became insolvent as a consequence, company's act puts preferred party in better position than it would have been, and the company was influenced in deciding to enter the transaction by a desire to prefer the preferred party. The relevant period for associate remains 2 years but for unrelated parties is 6 months from the date of winding-up application. Should be 1 year for unrelated parties.

Defences: If an individual has acquired an interest in the bankrupt's property from a person other than the bankrupt or has received a benefit or preference from the transaction, in good faith and for value, the transaction will stand. It will not be in good faith if the individual had notice of the surrounding circumstances, was an associate of the bankrupt or was connected with the individual with whom the transaction was entered.

One missing element is that the individual/company became insolvent as a result of the transaction or was insolvent when the transaction took place. **3.5 marks.**

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

JIN Guidelines are the protocol for communication and cooperation between courts in cross border insolvency matters. The objective is to improve the efficiency and effectiveness of parallel proceedings in an international insolvency by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted. On 1st February 2017 Supreme Court of Singapore adopted these Guidelines; amongst the first couple of jurisdictions to do so. The Guidelines were drafted in the first meeting of Judicial Insolvency Network held in Singapore in October 2016. The Guidelines also provide a structure for joint hearings enabling two or more courts to simultaneously record evidence and hear arguments thus saving cost and time.

2 marks

Question 2.3 [maximum 4 marks]

How can a bankrupt obtain

(i) an annulment; and

(ii) a discharge

of his bankruptcy under the Singapore IRDA?

The court may annul a bankruptcy under the Singapore IRDA if:

1. the order ought not to have been made on grounds existing at the time,
2. debts and expenses of the bankruptcy have been paid or secured to the satisfaction of the court,
3. distribution of the estate will take place in Malaysia or the majority of creditors are residents in Malaysia and the distribution ought to happen there.

An application to annul must be made within 12 months of the bankruptcy order being made unless leave is given for the application to be made later.

The Official Assignee, the bankrupt or any other person having an interest may apply to the Court for an order of discharge any time after the bankruptcy order is made. Any application must be served on each creditor who has filed a proof of debt in the bankruptcy and the Court will hear any creditor before making an order for discharge. Upon application the court may refuse to discharge; make an unconditional / conditional order for discharge including conditions with future income or property.

4 marks. Also OA can issue a certificate of discharge.

QUESTION 3 (essay-type questions) [15 marks in total]

Commented [DB3]: 9/15

Question 3.1 [maximum 8 marks]

Write a brief essay on

(i) the restrictions on *ipso facto* clauses; and

(ii) wrongful trading

under the Singapore IRDA.

Ipso facto clause is a contractual provision that allows one party to terminate or modify the operation of the contract, either automatically or by a positive action, by reference to counterparty's insolvency. The exercise of contractual termination clauses can make it difficult for companies to be restructured or rescued within a formal insolvency regime. Consequently, exercise of clause is restricted in many jurisdictions.

Prior to IRD Act 2018, there were no restrictions on the exercise of ipso facto clauses upon the formal insolvency of a Singapore company. The IRD Act 2018 introduced a new provision, i.e., section 440, that restricts enforcement of ipso facto clauses once proceedings under judicial management or supercharged scheme commence. However, contractual rights on other grounds can be exercised for example non-payment of money and specific exceptions detailed in regulations. The Singaporean law is modelled on Canadian insolvency legislation. However, a list of contracts that are specifically excluded as detailed below:

- prescribed eligible financial contract,
- any contract that is a license, permit or approval issued by government or statutory body,
- commercial charter of ship,
- agreement subject to treaty to which Singapore is party,
- contract that is in national interest of Singapore,
- agreement within the meaning of International Interests in Aircraft Equipment Act.

However, counterparties are not required to continue to advance new money or credit to insolvent company. Finally, section 440(4) provides Singapore courts with overriding power to rule on the applicability of the restrictions and their extent if the applicant can demonstrate that it will suffer significant hardship as a result.

Wrongful Trading – Any person who was knowingly party to the company trading wrongfully, is personally responsible for the debts or liabilities of the company. A company trades wrongfully if the company incurs debts or liabilities without reasonable prospect of meeting them in full when the company is insolvent or becomes insolvent as a result of the incurrence of such debt or liability. A company or any person may apply to the court for a declaration that a particular course of conduct, transaction/s would not constitute wrongful trading.

Section 239 of IRD Act 2018 introduces the concept of wrongful trading which imposes personal liability for the company's debt on a person if:

- they knew company was trading wrongfully,
- as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

The provision is adopted from English insolvency legislation and does not require criminal liability before taking effect. How is this different from insolvent trading?

This is a decent effort. However there could be more analysis and commentary on the wrongful trading portion**. 5.5 marks.**

Question 3.2 [maximum 7 marks]

Write a brief essay in which you discuss the differences between a judicial management and liquidation.

Judicial management is one of the rehabilitative procedures in contrast to liquidation which as the name implies is not for rehabilitation but for fair and orderly distribution of company's assets among creditors and contributories and to terminate the existence of the company by its eventual dissolution.

Judicial management is a creditor in possession rehabilitative procedure. On the application of company

- thru a member's resolution,
- or its directors thru a board resolution,
- or its creditors including contingent and prospective, together, or separately,

the court appoints a judicial manager.

An application should only be made where it is shown that the company is, or is likely to become unable to pay its debt and one or more purposes outlined in the Act will be achieved by the appointment i.e., rehabilitation of the company, survival of company – whole or part as a going concern or a more advantageous realisation of the company's assets than through a liquidation / winding-up order.

Is this application for JM filed in Court or can it be out of court?

Liquidation of a company is initiated in a similar manner as judicial management with a few changes as detailed. It may be either voluntary or ordered by court. The three modes are member's voluntary liquidation (MVL), creditors voluntary liquidation (CVL) and compulsory liquidation (CL). A voluntary winding-up is conducted outside of court process, usually initiated by passing a special resolution by members or both members and creditors. An MVL is only available when company is solvent wherein directors under section 293 declare to pay company's debts in full within a period not exceeding 12 months after the commencement of winding-up. In case the directors are unable to produce declaration of solvency the company is wound up as CVL. The company must convene meeting of creditors to approve the proposal and appoint a liquidator. The creditors can replace the liquidator. A compulsory liquidation is initiated by making an application to court to wind-up on specific grounds including that the company is unable to pay its debts i.e., the most common ground. Under section 254(2) of the companies act a company is deemed to be unable to pay its debt if company has neglected to pay for three weeks on a demand by creditor a sum exceeding SGD 10,000, or execution or other process of any court in favour of creditor is returned unsatisfied, or it is proved to satisfaction of court that company is unable to pay its debt i.e., a situation where creditor is prima facie entitled to liquidation. The application can be made by company, creditor, shareholder, liquidator, judicial manager or various Ministers on grounds specified under law.

Under judicial management, the court will consider whether there is a real prospect, that the appointment of judicial managers will achieve one or more purposes stated

in section 91 of the IRD Act 2018. A court may only make a judicial management order if the court:

- is satisfied that the company is or will be unable to pay its debt,
- considers that the making of the order would be likely to achieve one or more of the following purposes,
    - survival of the company – whole or part as a going concern
    - approval under section 210 of the Companies Act of a compromise or arrangement.
- more advantageous realisation of the company's assets than would occur in winding-up.

The court will not make a judicial management order:

- after the company has already gone into liquidation
- where the company is bank under Banking Act, finance company under Finance Companies Act, insurance company under Insurance Act or such class of company as the Minister may announce in the Gazette.

On court's order the judicial manager an independent insolvency practitioner will take control of business and property of the company for a period of 180 days. An interim judicial manager may be appointed if assets or business of the company are at risk of being dissipated or deterioration, to bridge the gap between judicial management and hearing of its application and to safeguard interests of the company and creditors.

In case of liquidation when filing winding up application, the petitioning creditor may nominate a person to be appointed as the liquidator after getting a written consent from the liquidator. If no liquidator is nominated, the Official Receiver is the default liquidator.

An automatic moratorium on legal proceedings against the company comes into effect upon filing of judicial management application. If successful a more extensive moratorium is enforced. The court or judicial manager has a discretion to allow otherwise prohibited proceedings or enforcement actions to be commenced or continued. In a voluntary liquidation the moratorium is imposed from commencement of liquidation. For court ordered liquidation, during the period until an order is made the company or creditor or contributory can apply to court to restrain proceedings. Once an order is made any action against company requires leave of court. How about the scope of the moratorium when it comes to the enforcement of security?

All responsibilities of board of directors are transferred to judicial manager. Judicial manager also takes custody of company's properties. He also assumes powers specified in First Schedule of IRD Act 2018, including but not limited to:

- power to sell/dispose property by public auction or private contract,
- power to borrow money and grant security over the property of the company,
- power to appoint solicitor, accountant or other professionals for assistance,
- power to bring, defend any action or legal proceeding on behalf of company,
- power to dispose secured assets in accordance with section 100 of IRD Act,
- discretion to dispose assets with floating charge subject to same priority of charge holders as would have existed before disposal.

In case of liquidation the role of liquidator includes

- to investigate the affairs of company, the conduct of its officers, claims of creditors and third parties,
- to recover & realize company's assets in most advantageous manner,
- to adjudicate claims of creditors and ensure equitable distribution.

How are the roles similar or different?

The power of liquidator in compulsory winding up are subject to control of court and in brief include:

- carry on the business of the company for beneficial winding up,
- make any compromise or arrangement with creditors, of calls, liabilities and debts, between company and a contributory or other debtor or person apprehending liability,
- appoint a solicitor or an agent to assist him,
- bring or defend any action or other legal proceeding in the name and behalf of company and do all acts and execute in name of company,
- sell the immovable and movable property by public auction, public tender or private contract,
- prove, rank and claim in the bankruptcy of any contributory or debtor,
- raise on security of assets of company any money required.

The judicial manager must also within 60 days of appointment present a statement of proposals to the creditors at creditors meeting. When judicial manager convenes creditors meeting the notice will specify requirements for filing a proof of debt. At any creditors meeting the chairman has the power to admit or reject a creditors proof for the purpose of voting. Any rejection can be appealed in the court. Judicial managers have no power to disclaim onerous contracts. In liquidation creditors may file their proof of debt with the liquidator.

The power of judicial manager and liquidator to set aside transactions at an undervalue, preferences and extortionate credit and power to apply to court for transactions defrauding creditors are same

A judicial management binding proposal under section 117 of the IRD Act 2018 has to be approved by:

- a majority in number of each class of creditors present and voting, in person or proxy, at the meeting convened by the court and
- such majority in number must represent three quarters in value of the respective class of creditors present and voting.

Under the concept of cross-class cramdown notwithstanding the fact that one or more classes have not approved the scheme, a court can order that the scheme is still binding if:

- a majority in number of creditors have agreed to the compromise or arrangement,
- that majority represent three-fourth value of creditors,
- the court is satisfied that the compromise or arrangement does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class i.e., no class can receive a distribution under a scheme proposal unless all classes senior to such class are paid in full and the amount is not lower than what creditor will receive in most likely scenario if the scheme proposal does not become binding.

The judicial management order will be discharged after 180 days unless extended by the court; there is no limit on extensions. The order may also be discharged if:

- the creditors decline to approve the judicial manager's proposal,
- the judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved,

- the judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

A discharge does not mean automatic liquidation, but the court has a discretion to order that the company be placed into liquidation.

In liquidation the secured creditors will generally be paid out of the assets that have been charged or mortgaged in their favour while the remainder of the assets will be distributed among the other creditors. The order of priority is:

- costs and expenses of liquidation,
- wages and salaries up to maximum of 5 months salary or SGD 12,500 whichever is lower,
- certain retirement and termination benefits as prescribed,
- workers injury compensation,
- contribution to provident fund,
- remuneration for vacation leave,
- taxes,
- unsecured creditors.

Although secured creditors will generally be paid ahead of preferred debts, the costs of liquidation and labour/staff payments in nature of remuneration will be paid ahead of debt secured by floating charge.

Once affairs of the company are fully wound up the liquidator must prepare an account, way property of company is disposed of, call a meeting of shareholders and thereafter lodge a return with Registrar and Official Receiver.

The compare and contrast of the two mechanisms is lacking. **3.5 marks.**

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

Commented [DB4]: 13/15

Paladin Energy Corporation Ltd (PEC) is a Cayman-incorporated company listed on the Singapore stock exchange. PEC was formed to become the dominant market player in all aspects of energy in South East Asia and China. Its primary lines of business are:

- oil and gas exploration and production with assets and fields in Malaysia, Thailand and Cambodia;
- Renewable energy, specifically solar and wind, with projects in Malaysia, Vietnam and the United States; and
- Water and waste to energy with plants in Singapore and China.

PEC has three wholly-owned Singapore incorporated subsidiaries that run each of the three lines of business:

- PEC Oil and Gas Pte Ltd;
- PEC Renewables Pte Ltd; and
- PEC WWE Pte Ltd.

Each entity in turn owns all, or substantially all, of the shares in the relevant entities incorporated in the local relevant overseas jurisdiction.

PEC had traditionally funded its business via bank lending, with project financing facilities advanced directly to a combination of the three Singapore subsidiaries referenced above and directly to the underlying project companies. As at 2016, the group had raised SGD 2 billion in bank lending, all of which was guaranteed by PEC.

In 2018, PEC wanted to take advantage of an opportunity to expand their water and waste to energy business and raised an additional SGD 1 billion in retail bonds for working capital purposes. Water (and energy needs in general) is of strategic importance to Singapore given its geographical position and many retail investors took up the bond issue. The retail bonds were stated to be specifically subordinated to all other debt of the PEC group.

PEC traded positively throughout 2018 and 2019. However, in late 2019 it started informing some of its bank lenders that they may require waivers on certain terms in the loan and potentially further time to repay certain amounts owing. In early 2020, PEC appointed legal and financial advisors to provide it with advice as to the best steps to take. Shortly thereafter, PEC announced that it had filed for protection under section 211B of the Companies (Amendment) Act 2017. Further to this, PEC Oil and Gas Pte Ltd, PEC Renewables Pte Ltd and PEC WWE Pte Ltd filed for protection under section 211C of the Companies (Amendment) Act 2017.

Into the first six (6) months' extension of the moratorium, the bank lenders decide that they have lost their patience and no longer have confidence in PEC's management. They have therefore decided to apply to court to place PEC under judicial management.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 7 marks]

The working group of the bank lenders has asked its advisors to provide it with a written analysis covering the following critical issues for PEC. Please provide analysis on the following issues:

- 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)**

- Assuming that PEC is placed under judicial management, what requirements must be satisfied in order for PEC to be able to access rescue financing under the IRDA?; **(2 marks)**

- What are the steps that need to be taken in order to place PEC's subsidiaries under judicial management out of court? **(3 marks)**

    - PEC has filed for protection under section 211B of the Companies (Amendment) Act 2017. Subsection 10 of Section 211B provides that the company, any creditor of the company, or any receiver and manager of the whole (or substantially the whole) of the property or undertaking of the company, may apply to the Court for the discharge or variation of any order made under subsection (1). Thus, a provision exists for creditors to move the application. The creditors in their application need to highlight that appointment of judicial manager will help in either survival of the company or whole or part of its business as going concern. Also, since PEC has filed under section 211B it is not required but if required the application may reiterate the fact that the COMI is in Singapore. The court will also consider whether there is a real prospect that the appointment of the judicial manager will achieve one or more purposes stated in section 91 of the IRD Act 2018. The section also provides that where a nomination is made by the company, a majority in number and value of the

creditors may be heard in opposition to the nomination and the Court may, if satisfied as to the number and value of the creditors' claims and as to the grounds of opposition, invite the creditors to nominate another person in place of the applicant's nominee and, if the Court sees fit, adopt their nomination.

Well done for spotting the need to apply specifically given the 211B / section 64 protection. A good answer. **2 Marks.**

- PEC should apply to the court for rescue financing. Rescue financing in Singapore is either or both
  - Necessary for the survival of debtor
  - 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

  The court's order will state that rescue financing will:
  - be treated as part of the costs and expenses of the winding-up if the debtor is later wound up,
  - enjoy priority over preferential debts,
  - be secured by security interest on property of debtor not otherwise subject to any security interest,
  - secured by subordinate security interest on property of the debtor that is subject to an existing security interest if the debtor is unable to obtain unsecured rescue financing from any other person,
  - secured by security interest on property subject to an existing security interest, of the same or a higher priority, if the debtor is unable to obtain financing from any other person unless it was secured in such a manner.

Good answer but addressing adequate protection as a concept would have assisted. **1 Mark.**

- Section 94 of IRD Act 2018 provides for judicial management by resolution of creditors out of court. Where a company considers that the company is, or is likely to become, unable to pay its debts and there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1), the company may, instead of applying to the Court for a judicial management order, rely on a resolution of the company's creditors for the company to be placed under the judicial management of a judicial manager. Section 94 also sets out the procedure for this judicial management process which is initiated voluntarily. This includes but is not limited to the manner creditor meetings should be conducted, notice requirements and timelines that need to be adhered to.

3 Marks

Question 4.2 [maximum 8 marks in total]

As things transpired, PEC was placed under judicial management. Private equity funds are actively talking to PEC's Judicial Managers in order to determine whether or not they might make an investment in PEC, or acquire its assets. One particular private equity fund, Forty Thieves Capital, is particularly interested in acquiring debt relating to the various projects across the oil and gas, renewables and water lines of business with a view to either enforcing over the security of the assets to realise value, or to see if a loan-to-own-type structure can be successfully implemented. Ideally, they would like to do this outside of the judicial management proceedings.

To try and protect against this risk, PEC has commenced local insolvency proceedings in Malaysia, China and the United States to seek protection for the companies that own assets in each of those jurisdictions.

Taking these additional facts above into consideration, answer the questions below.

Question 4.2.1 [maximum 4 marks]

Do the judicial management moratoria obtained by PEC and its subsidiaries have extra-territorial effect such that assets owned by the group in jurisdictions outside of Singapore will also be protected?

Basis the provisions of the law the judicial management moratoria obtained by PEC will not have an extra territorial effect, as the Companies Amendment Act 2017 / IRD Act 2018, grant extra-territorial effect only to a supercharged scheme.

However, the substantial connection test will imply that the creditors who are subject to Singapore laws (*in personam* extraterritoriality), i.e., some of the banks and all the retail bond holders as well as the fact that PEC's COMI is in Singapore will enable the moratoria to be extended to jurisdictions outside of Singapore. Nevertheless, in case any creditors exist, that have lent directly to the underlying project subsidiaries, the moratoria will not have effect on them.

Another aspect is that Singapore has adopted the UNCITRAL Model Law on insolvency. Amongst Malaysia, Thailand, Cambodia, Vietnam, China and United States, United States too has adopted the Model Law under Chapter 15. Thus, even if a creditor has directly lent to a project in United States, PEC will be entitled to a moratorium by the US Courts under the Model Law.

A good answer which identifies the key issues of the JM moratorium v the section 64 moratorium. **4 Marks.**

Question 4.2.2 [maximum 4 marks]

What cross-border insolvency laws are available in Singapore to recognise foreign insolvency proceedings? Explain the general requirements in order for a Singapore court to recognise a foreign insolvency proceeding and what the effect will be if the court were to do so.

Singapore has adopted the UNCITRAL Model Law on cross border insolvency through the 2017 Amendment Act. Prior to Model Law Singapore Courts depended on common law doctrines to address cross border insolvency issues. Under common law principles courts can recognise foreign insolvencies when they take place in jurisdictions where the debtor company is registered. Singapore courts had extended this to where the debtor's COMI is located. Similarly, courts extended the common law to enable interim orders and recognition of voluntary rehabilitation. Furthermore, common law was extended to address inadequacies in domestic insolvency laws, for example case of directors' liability in *Living the Link Pte Ltd (in creditors voluntary liquidation) and others vs Tan Lay Tin Tina and others*

Singapore courts revealed a strong impetus towards universalism in its judicial philosophy even in the pre–Model Law period. Adoption of Model Law allows foreign representatives to apply to High Court of Singapore for recognition of foreign proceedings. The Model Law has no requirement of reciprocity. However, contrary to

Model Law that denies recognition if anything is “manifestly contrary” to public policy, the Singapore adoption drops the word “manifestly” and has been discussed in the first reported decision of Singapore High Court in Zetta Jet Pte Ltd.

Apart from Model Law, The Reciprocal Enforcement of Commonwealth Judgements Act (RECJA) enables the judgements from the United Kingdom, Australia and certain commonwealth countries to be registered in Singapore High Court. RECJA establishes a statutory scheme for the recognition and enforcement of judgements of superior courts from aforesaid jurisdictions. A judgement creditor can apply to Singapore High Court for the registration of a judgement and the Court in-turn may order it to be registered if it is just and convenient to be enforced.

Another regime in Singapore is that under the Reciprocal Enforcement of Foreign Judgements Act where so far only Hong Kong SAR has been a recognised country for registration.

Once registered the foreign judgement may be enforced in Singapore as if it was a judgement issued by Singapore Court. A foreign judgement has an estoppel effect on a specific issue or on a cause of action. A judgement for a fixed sum of money is capable of recognition if it is final and conclusive and the court had international jurisdiction, as defined by Singapore law, over the parties.

A good analysis of the relevant legislation. Some further explanation of the effect of recognition would have assisted but a good effort. **3 Marks.**

*** End of Assessment ***