



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).
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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

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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 .

Answer is C

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? (answer (a) but also 75% or more in value)

- (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.**

9 marks

QUESTION 2 (direct questions) [10 marks]**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.

The following are the elements that a liquidator must show when he applies to the Court to seek claw back assets previously transferred in an impeachable transaction:

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Unfair preference transaction:

1. The beneficiary of the transaction, which is the preferred party, is a creditor or guarantor of any of the company's debts or liabilities;
2. The company was insolvent (or became insolvent as a consequence of the transaction) at the time of giving the preference;
3. The company does anything which puts the preferred party in a better position than the preferred party would have been had the transaction not been entered in the event of the company's liquidation; and
4. The company was influenced in deciding to enter the transaction by a desire to prefer the preferred party. The IRDA provides a statutory presumption of a desire to prefer- as long as the preferred party is an associate of the company, the company is presumed to have been influenced by a desire to prefer.

The relevant time period during which assets may be clawed back is two years from the date of the winding up application for associates and 6 months for unrelated parties. **Incorrect lookback period.**

Undervalue transactions:

1. Any one of the following 2 situations:
 1. The company makes a gift to the recipient; or
 2. The company enters into a transaction where the value of consideration received is significantly less than the value of the consideration provided; and
2. The company was or became insolvent as a result of that transaction.

As long as the transaction is with an associate, the transaction is presumed to be at an undervalue. The relevant time period during which assets may be clawed back is 5 years from the date of the winding up application regardless of whether the undervalue transaction was with an associate or not. **Incorrect lookback period.**

It is noted that the above types of impeachable transactions can also be claimed under sections 361 and 362 in a case of bankrupt individual. In an undervalue transactions where an individual is adjudged bankrupt has, at the relevant time (three years before the date of the bankruptcy application/order was made), entered into a transaction with any person at an undervalue, the Official Assignee may apply to the Court to restore the position to what it would have been if that individual had not entered into that transaction. The elements are as follows- the bankrupt:

1. makes a gift or otherwise enters into a transaction for no consideration;
2. enters into a transaction with that person in consideration of marriage; or
3. enters into a transaction for a consideration which is significantly less in money or money's worth, of the consideration provided by the bankrupt.

In an unfair preference transaction where an individual is adjudged bankrupt has, at the relevant time (two years before the date of the bankruptcy application/order was made in in the case of an unfair preference which is not a transaction at an undervalue and which is given to a person who is an associate of the individual , or one year if it is not an associate of the bankrupt), gave an unfair preference to any person at an, the Official Assignee can apply to the Court to restore the position to what it would have been if that individual had not given the unfair preference. The elements are as follows- the bankrupt:

1. that person is one of the bankrupt's creditors or a surety or guarantor for any of the individual's debts or other liabilities; and
2. the bankrupt does anything which has the effect of putting that person into a position which, in the event of the bankrupt's bankruptcy, will be better than the position that person would have been in if that thing had not been done.
3. the bankrupt was influenced in deciding to give the preference by a desire to prefer the other person in a way that produce a better position to that person in the bankruptcy.

Defences: if the Court is satisfied that the bankrupt entered into the undervalue transaction in good faith and for the purpose of carrying on its business and at that time it did so there were reasonable ground to believe that the transaction would benefit the bankrupt, the Court will not make an order to set aside a transaction at an undervalue.

To prove that, the bankrupt can, for instance, obtain advice on the benefits of the transaction to the company. Pursuant to section 365(3), the Court will not give the order if (a) the interest in property was acquired from a person other than the bankrupt and was acquired in good faith and for value, or prejudice any interest deriving from such an interest; or (b) the benefit from the transaction or unfair preference was received in good faith and for value to pay a sum to the Official Assignee, except where the person was a party to the transaction or the payment is to be in respect of an unfair preference given to that person at a time when that person was a creditor of that individual

Very detailed answer. Save for the incorrect lookback periods, this is almost a perfect response. 3.5 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

On 1 February 2017, the Supreme Court of Singapore adopted the JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. This was the first time that a judicial communication and co-operation framework for cross-border insolvency has been adopted in Singapore. The JIN Guidelines have also been adopted by two leading jurisdictions for cross border insolvency, being the US Bankruptcy Courts for the District of Delaware and the Southern District of New York.

The JIN Guidelines address key issues of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings. The overarching aim of the JIN Guidelines is the preservation of estate value and the minimisation of legal costs. Matters related to cross-border insolvency can be better managed for the benefit of debtor companies, creditors and other stakeholders, for instance, communication between courts to coordinate how the cases in each jurisdiction should proceed so that issues are heard in the most logical and efficient way. The JIN Guidelines also provide a structure for joint hearings, which can save costs and time and ultimately leads to better financial returns for all parties involved.

The Guidelines provide a common framework on how courts in different jurisdictions should communicate and cooperate with each other, whereas before the Guidelines came into effect, there was uncertainty as to the way courts can communicate with each other in a cross-border insolvency cases which led to different courts not being fully aware of what was happening in other jurisdictions.

Due to the adoption of Guidelines, the interests of stakeholders are now better protected and considered, and on a broader level, this will help cement Singapore's position as a financial and legal hub, both regionally and globally. On 19 June 2020, the Supreme Court of Singapore adopted the Modalities of Court-to-Court Communication through its Registrar's Circular No. 7 of 2020 to supplement the JIN Guidelines which it earlier adopted on 1 February 2017.

Very detailed response. Good job. 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?

- (i) Pursuant to section 392 of the IRDA, a bankrupt can obtain an annulment by an application to the Court to annul within 12 months of date the bankruptcy order has been made, or if unless the Court gives leave for the application to be made later.

The Court may annul a bankruptcy order if:

1. the order ought not to have been made on any ground existing at the time the order was made;
2. both the debts and the expenses of the bankruptcy have been paid or secured for to the satisfaction of the Court, since the making of the order,
3. there are pending proceedings in Malaysia for the distribution of the estate and that the distribution ought to take place there; or
4. the majority of the creditors are resident in Malaysia and distribution ought to be made there under the bankruptcy law of Malaysia.

Pursuant to section 393, the Official Assignee can issue a certificate annulling a bankruptcy order if it appears to him that, to the extent required by the regulations, the debts which have been proved and the expenses of the bankruptcy have all, since the making of the order, been paid.

In the above circumstance, the bankrupt's name will then be immediately removed from the bankruptcy register on the date of annulment.

(ii) Pursuant to sections 394 of the IRDA, a bankrupt can obtain a discharge by way of application the Court by the Official Assignee, the bankrupt or any other person with an interest in the matter, at any time after the making of a bankruptcy order. The application to discharge needs to be served to any creditor who filed a proof of debt (and the Official Assignee if he is on the applicant) and the Court will hear any creditor before making the discharge order. The Court can refuse to discharge, absolutely discharge the bankruptcy or discharge on conditions on its discretion. An application for discharge needs to be accompanied by an affidavit stating, inter alia, that the bankrupt have filed a statement of affairs, the number of creditors and whether they have proven their debts and the reasons for the application

Pursuant to section 395, the Official Assignee can, in his discretion, issue a certificate discharging a bankrupt from bankruptcy. However pursuant to section 395(2) a certificate may not be issued in certain prescribed circumstances.

Very detailed response and the references to the relevant section are very helpful. 4 marks.

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

Question 3.1 [maximum 8 marks]

Write a brief essay on

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

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(ii) wrongful trading

under the Singapore IRDA.

An *ipso facto* clause is used, in the insolvency context, as a contractual provision which provides one side of the contract the option to terminate or modify the contract once the other side is insolvent. Due to the difficulties to perform a rescue plan or restructuring once the clause comes into effect, some insolvency regimes set restrictions in the use of the *ipso facto* clause. Prior to the insolvency law reform, under Singapore law, there were no restrictions on the application of the *ipso facto* clause, in particular once company commenced a formal insolvency proceeding. However, as part of the insolvency law reform, pursuant to section 404 of the IRD Act 2018 there are specific circumstances where the use of the *ipso facto* clause is restricted. Under section 404 it is no longer an option to terminate, amend or modify any agreement only due to the reason that proceeding such as, *inter alia*, compromise or an arrangement between the company and its creditors/ members, scheme of arrangement, involving supercharged scheme process or judicial management have commenced or the company is insolvent. The IRD does not prevent the clause to be exercised on other grounds that are in the contract, for instance, non-payment of money owed by the company¹. It is noted that even though contracts will continue, the other side is not obligated to continue inject new cash to the insolvent entity. The new reform means that parties to a contract can no longer rely on the *ipso facto* clause as a way to exit or terminate the commitment with an insolvent entity. Notwithstanding the above, pursuant to section 440(4) if side to the contract assert that the exercise of section 440 would likely cause him significant financial suffering, the Court has the discretion to determine that section 440 does not apply or applies only to the extent declared by it.

It is noted that the IRD provides a list of circumstances which are excluded from the restrictions, means that the contract can be terminated, such as, *inter alia*: any eligible financial contract as may be prescribed; any contract that is a licence, permit or approval issued by the Government or a statutory body; any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed; any commercial charter of a ship; any agreement within the meaning of the Convention as defined in section 2(1) of the International Interests in Aircraft Equipment Act (Cap. 144B); or any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.

Wrongful trading- section 239 of the IRDA introduces the new notion of wrongful trading and states that a company trades wrongfully if the insolvent company incurs debts or liabilities without reasonable prospect of meeting them in full; or the company incurs debts or liabilities that it has no reasonable prospect of meeting in full and that result in the company becoming insolvent. In a circumstance, where the company has traded wrongfully, the IRDA forces personal responsibility for all or part of the debts or liabilities of the company, on any person who was a party to the wrongful trading, if that person knew that the company was trading wrongfully or, as an officer of the company, ought to have known that the company was trading wrongfully. Such a person shall also be guilty of a criminal offence and liable on conviction to a fine not exceeding S\$10,000 or to imprisonment for a term not exceeding 3 years, or both.

Prior to the reform, only in a case where there was a criminal conviction under the Companies Act, an officer of the company would be personally liable to pay the whole or part of the debt incurred by the company. The new provision has been adopted from English insolvency legislation and provide that criminal liability is not necessary before the provision

¹ IRD Act section 440 (2)

can be enforced. Prior to the IRDA, criminal liability was a prerequisite before civil liability could be found. **So is this insolvent trading?**

Pursuant to the IRDA the Court, on the application of for instance the judicial manager or the liquidator of the company, can determine that any person who was a party to the company trading wrongfully is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company. The IRDA provides a statutory defence for personal liability whereby the Court may relieve the person of personal liability if he acted honestly and having regard to all the circumstances of the case, he ought fairly to be relieved from personal liability.

It is noted that that the company or any person party to or interested in becoming party to the carrying on of the business of the company, can make an application for a particular course of conduct, a particular transaction or a particular series of transactions of the company, to not constitute wrongful trading.

Good answer that would have been perfect if there is slightly more commentary on the significance of these provisions. 7 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 (JM) is fundamentally a rehabilitation process and is one of Singapore's corporate rescues tools, which differentiates it from liquidation. Prior to the IRDA, the procedures for a JM were set out in sections 227AA to 227X of the Companies Act (Cap. 50). Liquidation or winding up, is a formal process and its objectives is to ensure a fair and orderly distribution of the company assets to its creditors and contributories and afterwards to dissolve the company. Prior to the IRDA, the procedures for liquidation were set out in Part X and various subsidiary legislations such as the Companies (Winding Up) Rules. A JM is an alternative to a formal liquidation.

Entry requirements: JM is a creditor in possession procedure and before the court makes a JM order and appoint a judicial manager it will consider if the company is or likely to become unable to pay its debt and whether it will achieve one or more purposes, namely the survival of the company, or the whole or part of its undertaking as a going concern; the approval of a compromise or an arrangement between the company and any persons as stated in section 210 of the Companies Act or whether it will lead to a more advantageous realisations than with a winding up. However, the court will not make a JM order if the company has already gone into liquidation; where the company is a bank, a finance or insurance company or where the company belongs to such a class of companies as the Minister may prescribe by order in the Gazette. Prior to the IRDA, company could only be placed into JM by way of a Court order. Pursuant to the IRDA, a company can enter into a JM by way of a resolution of creditors (voluntary JM, section 94) if the above condition for JM met with the addition of obtaining a resolution of creditors.

The JM application can be brought by the company through a member's resolution, its directors through board resolution or by its creditors either together or separately. JM application can only be made where a company or creditors of the company consider that the entity is or will be unable to pay its debts and there is reasonable prospect of rehabilitating the company or preserving all or part of its operations as going concern or that the interests of the creditors would be better served than by a liquidation.

As opposed to JM where a financially distressed company can consider JM at an earlier stage, when it is not yet technically insolvent, in a compulsory liquidation (CL) the company

must be insolvent. Insolvent company can be wound up by an order of Court through a CL or voluntarily, through a creditors' voluntary liquidation (CVL). A solvent company can voluntarily be wound up through a members' voluntary liquidation (MVL) whereby the directors of the solvent company must file a statutory declaration stating that the company is able to pay its debts in full within 12 months after the commencement of the liquidation. In a CVL, the company cannot pay its debts and the directors cannot provide the declaration of solvency. In a creditors' meeting the creditors will consider and approve the proposal to voluntarily wind up the company. The company will appoint a liquidator, but creditors have the power to replace him. A CL is initiated by an application to Court by the company itself, a creditor of the company, a member of the company or a judicial manager or provisional liquidator, for the company to be wound up, based on any of the following grounds² the company is unable to pay its debts³ has ceased business activities; there are no members; the directors have not acted in the interests of the company, the company has breached statutory provisions such as lodging statutory reports or holding meetings, and/or committed offences committed.

The court will consider both (only one need to be met) balance sheet test and the cash flow test before granting the winding up order in order to determine whether the company is insolvent. The winding up application must be served on the company, the OR and the nominated liquidator, and a deposit of SGD 10.4K is paid to the OR. An advert of the application needs to be published in an English and Chinese local daily newspaper and in the Government Gazette.

When an application for a JM order is made to the Court the notice of the application must be published in the Gazette and in an English local daily newspaper, and a copy of the notice must be sent to the Registrar of Companies; and be given to the company, in a case where a creditor is the applicant and a person who appointed a receiver (section 91(4)).

Role of the officeholder: JM requires the appointment of an insolvency practitioner as the judicial manager and its appointment is made by the court once the court grants an order for JM. The judicial manager replaces the company's directors (whose powers are ceased), and management and takes over responsibilities for the running of the company including its affairs, business and property⁴ for 180 days, after that the order will be discharged unless extended by the Court. During this period, a moratorium is placed on proceedings against the company, which gives the company breathing space to try and restructure. In a CL, until the order is made the company/creditor can apply to Court to restrain proceedings (stay/moratorium). Only after the order is granted an action against the company requires the leave of the Court.

Other ways to discharge the JM order is if the creditors decline to approve the judicial manager's proposals; the judicial manager believes that he cannot achieve the purpose of the JM order or when the judicial manager acts in an unfairly prejudicial way in respect to the interest of creditors or members. It is for the Court discretion to place the company into liquidation following the discharge of the JM order.

The judicial manager takes custody of all the company's property while having also the powers specified in the First Schedule of the IRD Act 2018. Examples of such powers are the power to sell or dispose the property of the company by private contract or a public auction, to borrow money and grant security over the company's assets, to appoint qualified professionals to assist him with his duties and to bring or defend any action or legal proceeding on behalf of the company. Pursuant to section 100 of the IRDA, the judicial

² Section 254 of the Companies Act (now Section 125 of the IRDA).

³ The requirements for a company to be deemed as not to be unable to pay its debts are in section 125 (2) IRDA

⁴ Section 227B(2) Companies Act (Cap 50) (now section 99 of the IRDA)

manager has also the power to dispose of secured assets. It is for the judicial manager's discretion to dispose assets secured by a floating charge. Pursuant to section 107, within 60 days of his appointment, the judicial manager needs to present to the creditors at the creditors meeting, a statement of proposal. The proposal is binding if it has been approved by a majority in number if each class of creditors present and voting at the meeting convened by the Court and their number must represent 75% in value of creditors present and voting.

An interim judicial manager can also be appointed for reasons such as safeguard of the interest of the company and its creditors, protecting the assets from being dissipated.

Since an insolvency practitioner is being appointed, there is a stigma over the JM that it is actually more of an insolvency process than a rescue tool. **How has this stigma been addressed under the IRDA? Through voluntary JM?**

In a liquidation, a liquidator who is an independent officer of the court is appointed (as nominated by the petitioning creditor and consent is granted by the nominated liquidator before the winding up hearing, otherwise an Official Receiver is appointed) to take over and investigate the affairs and assets of a company, realise its assets in the most advantageous manner for the purpose of distributing the assets to the company's creditors/ contributories, to adjudicate creditors' claims and subsequently, upon completion, he dissolves the company. Further powers are detailed in section 14 of the IRDA.

In Voluntary liquidation, all the powers of the directors cease, except to powers which the liquidator or the members of the company with the liquidator's consent approve the continuance of such powers/ duties. In a CL the powers of the directors cease when the court grants the winding up order. As opposed to JM, in liquidation, the liquidator can seek the court approval to appoint the directors as special managers to assist him if he thinks that the appointment is required. In liquidation creditor can form a creditor committee and file their proof of debt to verify their claim and for voting rights.

Creditors and proof of claims: In JM creditors roll is limited. **But don't they vote on the statement of proposals?** Creditors can form a creditors committee. The committee can be granted the power to require the judicial manager to attend before it and provide information in relation to his functions. The committee can also apply to court for directions if it is dissatisfied with the information received by the judicial manager.

When a judicial manager convenes a creditors' meeting, he should notify the same by a notice which specifies the requirements for creditors to file a proof of debt. The chairperson has the power to adjudicate a proof of debt for the purpose of voting at the creditors' meeting. Creditors can appeal the rejection of their proof to the Court.

Realisation of security is similar for both JM and liquidation with respect to the interest on a secured claim after the commencement of the winding up/ or when the company is in JM. In JM the secured creditor needs the court approval to enforce his security. In liquidation the secured creditor can enforce its security outside the liquidation process. In JM the judicial manager can realise security **(depending on the type of security he may need to apply to Court)**

Treatment of specific contract: in a JM, section 440 of the IRDA restricts the enforcement of ipso facto clauses once any proceedings relating to any application under JM are commenced by the debtor company. **Set-off:** In liquidation a set-off may apply if it meets the conditions of mutual dealings, in a JM a creditor's right to set off continues to be applicable and it is not affected by the stay on civil proceedings against the company. **Impeachable transactions** and officer liabilities - upon the liquidation of a company, the liquidator can

seek the court approval to a claw back assets previously transferred in unfair transaction or undervalue transaction pursuant to certain elements. the provision relating to the powers of the liquidator also apply to judicial manager. **Disclaiming onerous contracts:** judicial managers, as opposed to liquidator has no powers to disclaim onerous contracts entered into by the company before the judicial manager's order has been granted. **Preferential /priority claims:** there are no statutory preferential /priority claims in JM. In winding up the order for payment of the assets of the company is as follows: the liquidators' costs, employee's salary, collective agreement, worker injuries compensation, contributions to provident funds, remuneration for vacation, taxes, unsecured creditors.

Very detailed answer. 7 marks.

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

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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)**

Upon the appointment of a judicial manager (by the order of the court or the creditors) a judicial manager will be appointed and replace PEC's directors (whose powers are ceased), and management and takes over responsibilities for the running of PEC including its affairs, business and property⁵ for 180 days, after that the JM court order will be discharged unless extended by the court. During this period, a moratorium is placed on proceedings against PEC, which gives it breathing space to try and restructure. In a JM the creditors will be able to meet in a creditors' meeting and consider the judicial manager's proposal which must be presented in a form of a statement of proposals within 60 days of his appointments.

In order to obtain a judicial management order and appoint a judicial manager **the court will consider** if PEC is or likely to become unable to pay its debt and whether the judicial manager's appointment will achieve one or more **purposes of JM**⁶, namely the survival of the company, or the whole or part of its undertaking as a going concern; 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; or whether it will lead to a more advantageous realisations of PEC's assets or property than through a winding up. However, the court will not make a JM order if PEC has already gone into liquidation (which is not the case in our scenario).

Only if PEC is eligible to be wound up under the IRDA, it may apply for a JM. In this case PEC was incorporated in Cayman however is it listed in Singapore and has three wholly owned Singapore incorporated subsidiaries with assets and plants in Singapore.

The JM application can be brought by the company through a member's resolution, its directors through board resolution or by its creditors either together or separately. JM

⁵ Section 227B(2) Companies Act (Cap 50) (now section 99 of the IRDA)

⁶ Section 89(1) of the IRDA

application can only be made where a company or creditors of the company consider that the entity is or will be unable to pay its debts and there is reasonable prospect of rehabilitating the company or preserving all or part of its operations as going concern or that the interests of the creditors would be better served than by a liquidation.

When an application for a JM order is made to the Court, PEC must publish the notice of the in the Gazette and in an English local daily newspaper, and a copy of the notice must be sent to the Registrar of Companies; and be given to the company, in a case where the working group of the bank lenders is the applicant and to a person who appointed a receiver (section 91(4)). In addition, the application must include the nominated person to act as the judicial manager and his consent with no conflict in interest by way of statutory declaration.

The judicial manager takes custody of all the company's property while having also the powers specified in the First Schedule of the IRD Act 2018. Examples of such powers are the power to sell or dispose the property of the company by private contract or a public auction, to borrow money and grant security over the company's assets, to appoint qualified professionals to assist him with his duties and to bring or defend any action or legal proceeding on behalf of the company. Pursuant to section 100 of the IRDA, the judicial manager has also the power to dispose of secured assets. It is for the judicial manger's discretion to dispose assets secured by a floating charge.

It should be noted that notwithstanding the fact that PEC was placed under the protections of 211B as well as the extension provided by the court in relation to the moratorium, the main purpose of the 211B proceedings is to provide PEC with protections of the moratorium so it can propose a compromise with its various creditors. A proposal of a scheme of arrangement must be obtained, voted and accepted by its creditors otherwise the requirements of 211B would not be meet and the moratorium will not be continue.

Detailed answer. 2 Marks.

Rescue Financing is defined in section 101(10) in the IRDA as financing that satisfies one or more of the following requirements: is necessary for the survival of the company, or the whole or any part of the undertaking of that company, as a going concern; financing that is required to achieve a more advantageous realisation of the assets of a company than in a winding up of that company; the financing is necessary for the Court's approval 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. The above condition is satisfied by PEC since cash injection is needed to enable its debts to be restructured in order to ensure its survival. In addition, PEC is viable given water and energy needs in general, is of strategic importance to Singapore given its geographical location.

Pursuant to Section 101 a company that is in JM can apply to the court to grant super priority for rescue financing as part of the JM. The following are the four levels of priority that the court can grant by order: (1) the debt arising from the rescue financing takes priority together with the costs and expenses of the winding up; (2) the debt takes priority above all preferential and unsecured debts, behind only secured creditors; (3) the debt is secured by a security interest over the property of the company that is not otherwise subject to any security interest or a subordinate security interest that is subject to an existing security if the company would not have been able to obtain the rescue financing from any other person; (4) the debt is secured by a security interest over an already secured property of the company and takes the same or higher priority over the existing security. The court needs to be satisfied the unavailability of all other forms of rescue financing and that the interests of the pre-existing secured lenders are protected. With rescue financing PEC can continue with its business without the need of borrowing. For a distressed company such as PEC, fresh new

funding can often be necessary to ensure continued operations and commencing potential recovery actions. However, lenders are generally reluctant to extend credit to financially distressed company given the uncertainty of repayment. The Judicial manager that makes an application for Super priority for rescue financing must send a notice of the application to each creditor of the company which may oppose the application.

2 Marks.

Out of court Judicial Management- prior to the IRDA, company could only be placed into JM by way of a Court order, which meant that valuable time and resources had to be spent by a distressed company in making an application to the court, instead of attempting to rehabilitate the company. Pursuant to section 94 of the IRDA (voluntary JM), instead of applying to court for a JM order, a company can be placed under JM if it is, or is likely to become, unable to pay its debts; there is a reasonable probability of achieving one or more of the purposes of JM as discussed above and mentioned in section 89(1); and a resolution of creditors is obtained. The resolution if from the majority of the creditors (in number and value) so approve after required notices and documents have been filed and a creditors' meeting has been called. Once the company is placed into JM it is under the supervision of the court in the same manner as a JM ordered by the court in order to ensure that there is no abuse. The written notice must be given at least 7 days' and be in the prescribed form of its intention to appoint an interim judicial manager. The notice will also propose an interim judicial manager which will be appointed only if it is authorised by way of a resolution of the members of the company or by the constitution of the company, by a resolution of its board of directors; the 7 days' notice expired but not after 21 days of the notice; a consent in writing to the appointment of the interim judicial manager has been given; the proposed interim judicial manager has lodged with the OR and the ROC a statutory declaration and he is licensed; and the directors filed a declaration of solvency as well as a date for a creditors meeting.

It is noted that Singapore law does not recognise the concept of insolvency proceedings for a group of companies and each company in the structure is treated as a separate legal entity and separate insolvency proceeding must be filed for each company. Under sections 65 the court can grant moratorium orders relating to subsidiaries or related companies which play an integral role in the arrangement proposed.

Detailed answer. Well done. 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?

JM, unlike supercharged scheme of arrangement, is a creditor-in-possession procedure. One of the key features of supercharged scheme of arrangement is the moratoria having extra territorial effect. A Singapore moratorium can have extra territorial effect only against creditors within Singapore or within the jurisdiction of the Singapore court and therefore a consideration whether as to the jurisdiction of Forty Thieves Capital is essential. In our scenario, PEC was placed under JM and therefore an automatic moratorium on legal proceedings against it is in place. With regards to its subsidiaries, if the subsidiaries which are considered to be foreign debtors, prove a substantial connection with Singapore, a JM and the automatic moratorium apply to them as well.

Section 96(4) provides that during the period in which a company is in JM no receiver or manager may be appointed over any property or undertaking of the company; and property, defined as in relation to a company, includes money, goods, things in action and every description of property, whether real or personal, and whether in Singapore or elsewhere, and also obligations and every description of interest whether present or future or vested or contingent arising out of, or incidental to, property.

substantial connection can be established by demonstrating one or more of the following factors: a COMI being located in Singapore; carrying on business or having a place of business in Singapore; the subsidiaries are registered as a foreign companies in Singapore; having substantial assets in Singapore; chosen Singapore law as the law governing loans, transactions, disputes, resolutions; submitted to Singapore Courts for the resolution of the dispute in relation to the transactions mentioned above.

Although PEC was incorporated in Cayman it has a substantial connection with Singapore, given it is listed on the Singapore stock exchange, its wholly owned subsidiaries were incorporated in Singapore, it is a dominant market player in all aspects of energy in South East Asia and China and its primary line of business is through its subsidiaries that have assets, projects, and plants in Asia in USA.

A good answer although it doesn't directly address the question – the JM moratorium does not apply extra-territorially in the way that a section 64 moratorium can because of the express wording in section 64. **3 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.

The primary method to recognize foreign insolvency proceedings in Singapore is the UNCITRAL Model Law on Cross Border Insolvency, which was adopted in March 2017 via the Amendment Act and allows a foreign representative to apply to the Singapore High Court for recognition of foreign insolvency proceedings. Notably, the Model Law as incorporated in the Act has no requirement of reciprocity with the State in which the foreign proceeding is

occurring. The Model Law as adopted, is substantially in the same form as the Model Law, and also provides for international cooperation and communication between courts and representatives, and for concurrent insolvency proceedings.

Notwithstanding the above, pursuant to the UNCITRAL Model Law, the court can reject the application for the recognition of the foreign proceedings, if the recognition is manifestly contrary to public policy, however, the enacted Model Law in Singapore omitted the word manifestly, which makes it easier for the Singapore court to reject a recognition application. In *Re Zetta Jet Pte* the High Court declined to grant full recognition of the US Chapter 7 proceedings, due to the trustee's breach of the Singapore injunction order. The court allowed limited recognition to the foreign insolvency representative, due to the trigger of the public policy exemption, as allowing the recognition would undermine the administration of justice in Singapore.

In addition to the Model Law, there are other applicable regimes in relation to recognition of foreign insolvency proceedings/ judgement, such as: The Reciprocal Enforcement of Commonwealth Judgements Act (RECJA), which enables judgements from Australia, United Kingdom and certain Commonwealth countries to be registered in Singapore High Court. Pursuant to section 3(1), a judgement creditor can apply for registration of its judgement in the high court of Singapore. The court will consider if it just and convenient for the judgment to be enforced in Singapore; the Reciprocal Enforcement of Foreign Judgements Act (REFJA) which has only gazetted in Hong Kong SAR, being the only country recognised for registration; and the common law regime which Singapore courts were depended on prior to the adoption of the Model Law. Pursuant to the common law principles of recognition, the court can recognise foreign proceedings if the take place if the place of registration of the debtor of where the debtor COMI is located.

It is noted that recognition of a foreign judgment is different from recognition of foreign insolvency proceedings. Singapore common law recognises certain foreign judgements provided certain conditions are met, i.e the judgment for a fixed amount of money from a foreign court when the judgment is final and conclusive by the law of that country and the court having international jurisdiction over the parties as stated in Singapore law. Once the foreign judgement has been recognised, it has an estoppel effect on certain causes of action or issues and when registered it can be enforced in Singapore as if the judgement was issued in Singapore High Court.

Pursuant to Article 15 the application for recognition must be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; certificate from the foreign court affirming the existence of the foreign proceeding and of its appointment; or any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative. It also needs to include a statement which identifies all foreign proceedings and proceedings under Singapore insolvency law in respect of the debtor that are known to the foreign representative, in English.

The court will also consider whether the definitions of foreign proceedings and foreign representatives is in accordance with Article 2. Once the court recognize the foreign proceedings as a foreign main proceeding, (The relevant considerations for the determination of the COMI are the location of the debtor's headquarters, managers and officers, assets and creditors, and the jurisdiction whose law would apply to most of the debtor's disputes.) there is an automatic stay on the commencement or continuation of any actions or proceedings concerning the debtor's property, rights, obligations or liabilities, execution against the debtor's property. As opposed to the main proceedings, when a foreign insolvency proceedings are recognised as a non- main proceeding, where the debtor

has an establishment rather than COMI then an applications for relief must be made to a Singapore court. the court must be satisfied that the interests of the creditors are adequately protected, before granting the requested relief

Pursuant tot Article 28, after a foreign main proceeding has been recognised, the effects of a proceeding under Singapore insolvency law in relation to the same debtor are to, be restricted to property that is located in Singapore and, to the extent necessary to implement cooperation and coordination between courts, to other property of the debtor that, under the law of Singapore, should be administered in that proceeding.

Good analysis. Well done. **4 Marks.**

*** End of Assessment ***