



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

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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 .

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]

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.

[Two types of impeachable transactions under Singapore insolvency law are transactions at undervalue and unfair preferences. I will seek to outline the elements associated with a transaction at undervalue in terms of a personal bankruptcy and a unfair preference in a

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corporate liquidation (per the provisions of the Insolvency and Restructuring Dissolution Act 2018¹) ("IRDA") and the applicable defences for both.

Personal bankruptcy- Section 361 of the IRDA refers to transactions at undervalue initiated by an adjudged bankrupt and states the following as elements associated with this act:

1. the bankrupt makes a gift or engages in a transaction in exchange for no consideration;
2. the bankrupt promises something of value or transfers something of value to another party on the condition that they become or are married;
3. the bankrupt engages in a transaction with another for consideration of a value which is significantly less than the value or in money's worth.

Defence: Section 365(3)(a) states that if the transaction was conducted in good faith and for value, the transaction will stand. In the contrary, if the individual had notice of the bankruptcy circumstance, relevant proceedings, was an associate or connected to the bankrupt, the transaction will be deemed as not conducted in good faith.

Corporate liquidation- Pursuant to Section 225 (Unfair preference) of the IRDA, a company engages in an unfair preference transaction if:

1. the beneficiary of the transaction is a creditor, a surety or a guarantor of the company;
2. at the time of the transaction, the company was in a state of insolvency or became insolvent as a result of the transaction;
3. the result of the transaction has placed the benefactor in a better position than it would have if the transaction never occurred; or
4. if the benefactor was an 'associate' or was connected to the company² and the company was influenced by a desire to prefer this particular party over another.

Defence: The Court will not question a preference if the Court is satisfied that the company³:

1. entered into the transaction in good faith and for the purposes of carrying on its business; or
2. entered into the transaction on reasonable grounds that the transaction would benefit the company.

It should be noted that, the Court will not "require a person who received a benefit from the transaction or unfair preference in good faith and for value, to pay a sum to the company" except where the transaction was proven or the recipient was a creditor of the company⁴.]

This is good effort just that the answer is missing the relevant lookback periods. 3 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

[Objective of the JIN Guidelines: The guidelines were developed by a panel of specialized insolvency judges aimed at promoting judicial corporation and communication in cross-border insolvency matters. **Perhaps you could elaborate further.**

¹ INSOL International, Module 8E, Guidance Text, Singapore (2020/2021), Section 9.1, p.54. "The IRD Act 2018, then the Omnibus Bill, was submitted to Parliament for First Reading on 10 September 2018 and came into effect on 30 July 2020." Hereinafter, references to this source will be referred to as "the Guidance Text").

² IRDA, Section 217 (3) to (15) outlines the interpretation of an 'associate' of a company.

³ Idem, Section 227 (3).

⁴ Ibid.

Significance of the JIN Guidelines: On 1 February 2017, the Supreme Court of Singapore and the US Bankruptcy Court for the District of Delaware became the first two courts to adopt the JIN Guidelines. This marked the first time a judicial framework of this nature was adopted in Singapore and will further the objectives of the cross-border insolvency law modeled by the UNCITRAL Model law on Cross-Border Insolvency.]

1.5 marks. Answer could have covered slightly more.

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) **[How a bankrupt can obtain an annulment of their bankruptcy under the Singapore IRDA:** According to section 392(2) a bankrupt can obtain an annulment of their bankruptcy by an application to the Court within 12 months after the bankruptcy order is made.

As outlined in section 392(1) of the IRDA, the Court may annul the bankruptcy order if it appears to the Court that:

- (a) on any ground existing at the time the order was made, the order ought not to have been made;
- (b) to the extent required by the regulations, both the debts and the expenses of the bankruptcy have all, since the making of the order, either been paid or secured for to the satisfaction of the Court;
- (c) proceedings are pending in Malaysia for the distribution of the bankrupt's estate and effects amongst the creditors under the bankruptcy law of Malaysia and that the distribution ought to take place there; or
- (d) a majority of the creditors in number and value are resident in Malaysia, and that from the situation of the property of the bankrupt or for other causes the bankrupt's estate and effects ought to be distributed among the creditors under the bankruptcy law of Malaysia.

- (ii) **How a bankrupt can obtain a discharge of his bankruptcy under the Singapore IRDA:** According to section 394 of the IRDA, a bankrupt can obtain a discharge by the Court subject to:

- (a) the bankrupt paying a dividend to the bankrupt's creditors of not less than 25%;
- (b) the payment of any income or property acquired by the bankrupt after his discharge;
- (c) fulfilment of any condition as the court sees fit to impose.

Once the bankrupt has satisfied the requirements, an application for the discharge of a bankruptcy can be made by the Official Assignee, the bankrupt or any other person having an interest in the matter. After the application is served on each creditor (who has submitted a proof), the court has the discretion to:

- (a) refuse the application;
- (b) issue an order discharging the bankruptcy absolutely; or
- (c) issue an order on certain conditions.]

Covers all the key points. 4 marks. OA can also issue a certificate of discharge.

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

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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.

[(i) The restrictions on ipso facto clauses under the Singapore IRDA:

The Latin phrase “ipso facto”⁵ is translated to mean “by the fact itself”. The IRDA (which came into effect on 30 July 2020) includes provisions for restrictions on ipso facto clauses.

For context, prior to the assent of this legislation, there were no restrictions with respect to contractual agreements which contained ipso facto clauses upon the insolvency of a Singapore company. This meant that parties to the contractual agreement could rely on such clauses to terminate a contract. In fact, commercial agreements often contained such ipso facto clauses as a form of protection for the parties. However in the case of a company experiencing financial distress, ipso facto clauses pose challenges for companies attempting to restructure their debts by subjecting the company to further financial obligations during its period of distress. **Not really. This is incorrect. The fact is that the ipso facto clauses may allow the counterparty to terminate contracts which may be crucial to the company carrying on business.**

Pursuant to section 440 of the IRDA ipso facto clauses are considered inoperative clauses when triggered by the insolvency of a contracting party or the commencement of corporate rescue proceedings (namely, judicial management and schemes of arrangements).

The provision as outlined in section 440(a)(b) restricts parties from relying on ipso facto clauses to:

- a. terminate or amend the contract;
- b. claim an accelerated payment under the contract;
- c. claim forfeiture of the term under the contract; or
- d. terminate or modify any right or obligation under the contract.

However, section 440 does not prevent parties from exercising their rights to terminate or amend contracts in other scenarios involving default such as, the appointment of a receiver or the passing of a resolution to wind up the company. **Are you sure?**

Furthermore, the restriction provision excludes certain types of contracts. Pursuant to Section 440(5) these include⁶:

- (a) any eligible financial contract as may be prescribed;
- (b) a contract that is a licence, permit or approval issued by the Government or a statutory body;

⁵ Merriam-webster also defines this Latin phrase as “an inevitable result”, <https://www.merriam-webster.com/dictionary/ipso%20facto>

⁶ Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020, Section(3) also speaks to the excluded contracts.

- (c) any contract that is likely to affect the national or economical interest of Singapore, as may be prescribed;
- (d) any commercial charter of a ship;
- (e) 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
- (f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.

Section 440 of the IRDA does not have retroactive effect and only applies to contracts entered into on or after 30 July 2020, and for proceedings commenced on or after 30 July 2020⁷.

Based on the premises outlined above, directors of distressed companies who are involved in executing certain contracts will have to exercise care. However, in the defence of directors, it should be noted that the courts may relieve a director from personal liability if the courts are satisfied that the person acted honestly. **This conflates section 440 with wrongful trading.**

(ii) Wrongful trading under the Singapore IRDA:

The "wrongful trading" was introduced under section 239 of the IRDA. A company is deemed to have "traded wrongfully" if as a result of the trading:

- (a) it incurs debts or other liabilities, when insolvent; or
- (b) becomes insolvent as a result of incurring such debts or other liabilities), without reasonable prospect of meeting them in full.

A further consequence of wrongful trading is the personal liability that can be imposed on a director or officer of the company may be found liable for wrongful trading if he or she ought to have known that the company was trading wrongfully. Furthermore, any person party to such wrongful trade, who knew that the company was trading wrongfully, may be liable.

As a defence, "A company or any person party to, or interested in becoming party to, the carrying on of business with a company, may apply to the court for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading"⁸.]

There appears to a lack of comprehension as to the rationale of section 440. Also there is no analysis at all. The wrongful trading portion also lacks detail. 4 marks.

Question 3.2 [maximum 7 marks]

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

[Introduction:

The COVID-19 pandemic has touched almost every existing industry sector in the world and Singapore no doubt has had its share. Within the past year, the nation has experienced an increase in the number of insolvencies and restructurings, particularly in the oil and gas and marine-related industries⁹. The ripple effect of the number of failing businesses has resulted in the number of applications for judicial management, at one extreme, and liquidations at the

⁷ IRDA Section 526 Saving and transitional provisions relating to amendments to Companies Act

⁸ INSOL Guidance Text, Module Eight, Section 9.5 (New wrongful trading provision), p.55

⁹ Kiat, Sim Kwan and Zhu, Wilson, Chambers Law Firm, Section 1 (Market trends and developments), subsection 1.1 (State of the Restructuring Market), at <<https://practiceguides.chambers.com/practice-guides/comparison/513/5976/9343-9345-9352-9358-9362-9368-9385-9389-9394-9398-9401>>>, accessed 6 July, 2021.

other end of the spectrum. I will seek to examine the differences between both regimes under Singapore law.

Objective of the process:

A key difference between the two processes is the fact that a judicial management is a method of debt restructuring, whereas a liquidation is a winding-up insolvency process. The objective of a judicial management is designed to allow the rehabilitation of a financially distressed company- the goal being the survival of the company while preserving the business as a going concern. The main objective of a liquidation is to ensure a fair and orderly distribution of the company's assets among its creditors and contributories and to dissolve the company.

Officeholders:

In a judicial management an independent judicial manager is appointed to manage the affairs, business and property of the company- this appointment is generally made by the Court. Where the company or its creditors has applied to commence the judicial management, an interim judicial manager may also be appointed by the court. In a liquidation, a liquidator is appointed over the affairs of the company.

Powers of the Officeholder:

The First Schedule of the IRDA, outlines an extensive list of powers afforded to a judicial manager under Singapore law. Most notable are:

- The power to sell or dispose of or grant security over the company's property;
- The power to bring or defend any legal actions on behalf of the company;
- The power to borrow money and grant security over the property; and
- The power to carry on the company's business and appoint a qualified professional to assist with the performance of his functions.

Pursuant to section 144 of the IRDA, the powers of a liquidator include:

- The power to carry on the business of the company so far as is necessary for the beneficial winding-up;
- Recover and realise the company's assets;
- The power to apply to court to nullify any unfair preference transactions;
- Adjudicate the claims of creditors;

Application for commencement:

The application for a judicial management may be brought about by the company, its directors, or the creditors. A liquidation (in the case of a compulsory liquidation) may also be brought about by all of the above but the list of stakeholders in this case extends to shareholders, the liquidator, a judicial manager and various Ministers on certain grounds specified by law.

In Singapore, the commencement of a liquidation can be brought about in two ways; either by way of a resolution of the company's board of directors (voluntary liquidation) or by way of a court order in an involuntary liquidation (usually as a result of a petition by a judgement creditor of the company). In the case of a judicial management, section 94 of the IRDA allows a company to be put into judicial management without a court order and by way of a creditors' resolution (judicial management by creditors' resolution) or by court order (judicial management by order of the court).

Directors powers:

Upon the appointment of a judicial manager by the Court, the powers of the company's directors cease. While this is the same in a liquidation there are instances, where a liquidator may apply to the Court to appoint the directors as 'special managers'¹⁰ to assist, if the liquidator finds it necessary and in the best interest of the estate.

¹⁰ The Guidance Text, section 6.1.3.3 (Winding-up/liquidations), p.12.

Conversion of the proceeding:

If the judicial manager determines that the purposes specified in the judicial management order is unachievable, the judicial manager may apply to the court on these terms and the court has the discretion to order that the company be placed into liquidation. Although there is no specific procedure to convert a liquidation to any form of corporate rescue, there are certain circumstances where the liquidator may apply to court to convene meetings to consider a scheme of arrangement.]

This is a decent effort although there could have been more points covered such as the scope of the moratorium and the availability of rescue financing. **4 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)**

Confirmation of the purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order:

[PEC has debt of more than SGD 2billion and all indicators confirm that it is likely, the company is experiencing financial distress because it is unable to pay its debts as they fall due. The company has not declared insolvency, but the company has requested from its lenders, waivers on certain terms and further time to repay certain owing amounts.

The nature of PEC's business is lucrative and is 'of strategic importance' to the economy of Singapore. On this premise, a feasible plan for reorganization offers reasonable probability of rehabilitating the company to a stable financial position. Therefore, the survival of the business as a going concern is in the best interest of the company and its creditors.

Although PEC was incorporated in the Cayman Islands and its subsidiaries are incorporated in Singapore- it is eligible to be wound up under section 90 of the IRDA and therefore eligible as a foreign company to whom corporate rescue provisions apply. Among other factors, PEC has satisfied the requirement of a 'substantial connection' with Singapore by carrying on business in Singapore, having a place of business in Singapore and having substantial assets located in Singapore.

The IRDA allows companies to seek judicial management by way of a creditors' resolution. The creditors have elected to place PEC in judicial management, by way of a creditors' resolution and this can be done if the majority of creditors in number and value present and voting at a creditors' meeting to consider a resolution to place PEC under judicial management is approved.]

The answer would benefit from an explanation as to the purpose of JM and the requirements. 1 Mark.

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?

[Section 67 of the IRDA (Super priority for rescue financing), outlines the provisions for a company under judicial management to obtain post-commencement financing.

Super priority may be granted by the court upon the application of the company if it can establish that:

1. reasonable efforts were made to secure rescue financing without super priority and the person would not provide the financing without it;
2. there is adequate protection for the interests of the holder of the existing security in the event that security is "primed", i.e. where the rescue financing is secured by security over already secured property of the company; and
3. the financing constitutes "rescue financing"¹¹.

Rescue financing is critical for PEC on the basis¹² that:

- (a) It is necessary for the survival of PEC; and
- (b) Since the company is under judicial management, it is necessary to achieve a more advantageous realisation of assets of PEC as opposed to the winding-up of that debtor.]

A summary of the 4 types of rescue financing, with the different levels of priority, would have assisted. 1 Mark.

What are the steps that need to be taken in order to place PEC's subsidiaries under judicial management out of court?

[Foreign debtors may apply for judicial management if the debtor has a "substantial connection"¹³ with Singapore and it has already been established that this is the case with PEC.

Section 94 (Judicial management by resolution of creditors) of the IRDA also allows companies to seek judicial management by way of a creditors' resolution instead of applying to the Court for a judicial management order.

The steps outlined in this section specify what the requirements are to place PEC's subsidiaries under judicial management out of court. They are as follows:

- The issue of a notice of intention to propose PEC's subsidiaries be placed under judicial management (at least 7 days' in advance) to its proposed interim judicial manager and any person who holds a floating charge over any part of the company's assets.
- The members of PEC must resolve to appoint the interim judicial manager.
- Holders of any floating charges over PEC agrees to the appointment of the interim judicial manager.
- An interim judicial manager is appointed no later than 21 days from the date of the notice.

¹¹ As defined in Section 67(9)(a)(B) of the IRDA.

¹² Rescue financing satisfies either or both of these conditions.

¹³ Section 246(3)(Winding up of unregistered companies) outlines what constitutes as a 'substantial connection' with Singapore.

- A written notice of the appointment of the interim judicial manager must be filed with the Official Receiver and Registrar of Companies by the interim judicial manager and the board of directors within three days.
- Within seven days after filing with the authorities above, the notice of appointment should be published in the Gazette and local daily newspaper.
- PEC must give notice to all its creditors of a creditors' meeting to be held within 30 days by the interim judicial manager.

If the majority of creditors resolve to place the company under judicial management, it will enter judicial management otherwise the process will be terminated.]

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?

[Globalization has increased and so has the need for cross-border insolvencies. In the past insolvency laws were territorial in nature but given the expansive global connections of multinational companies, the need for jurisdictions to consider a more universalist approach to domestic insolvency laws has become vitally important to international business and trade commerce.

Section 64 of the IRDA gives the Court to issue a stay against certain actions or proceedings against the company. This is referred to as a moratorium and may be initiated by the court upon the company's application where it has proposed an arrangement with its creditors or intends to do so. The purpose behind a moratorium is to allow companies time to comfortably restructure their debts.

Pursuant to section 65 of the IRDA, the Court can grant a moratorium order relating to subsidiaries. However, section 66 of the IRDA (Restraint of disposition of property, etc., during moratorium period states:

The Court may, on an application made by any creditor of a relevant company at any time during a moratorium period, make either or both of the following orders, each of which is in force for such part of the moratorium period as the Court thinks fit:

- (a) an order restraining the relevant company from disposing of the property of the relevant company other than in good faith and in the ordinary course of the business of the relevant company;

an order restraining the relevant company from transferring any share in, or altering the rights of any member of, the relevant company.]

The question asked about the moratoria in JM which is different to section 64. They are different processes. **1 Mark.**

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.

[Part 11 of the IRD addresses 'Cross-Border Insolvency' and references to 'Model Law' in this section refers to the United Nations Commission of International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency¹⁴. Singapore adopted the 'Model Law' on 30 May 1997 and is among the many countries who have used this as a template (some with modifications and others without modifications).

The Third Schedule of the IRDA outlines the procedure for recognizing a foreign proceeding with respect to the Model Law:

- (i) **Articles 9 and 14 (Access of Foreign Representatives and Creditors to Courts in Singapore)** - allow foreign representatives and creditors to apply directly to the Singapore Courts for the recognition of a foreign insolvency proceeding upon satisfaction of simplified proof requirements.
- (ii) **Article 15 - 24 (Recognition of a Foreign Proceeding and Relief)** – allows a foreign representative to apply for recognition and provides that the Court can grant interim relief upon request by the foreign representative.
- (i) **Articles 25 to 27** - authorize the local courts and local insolvency representatives to co-operate and communicate directly with foreign courts and foreign insolvency representatives.

Apart from the Model Law, the JIN Guidelines are used by the judicial system in Singapore as a guide in dealing with concurrent proceedings in various jurisdictions.

Prior to the adoption of the Model Law, common law principles were used by the courts in Singapore to recognize foreign insolvencies that take place in the jurisdiction where the debtor company is registered or where the debtor company's centre of main interest is located.]

¹⁴ "The UNCITRAL Model Law on Cross-Border Insolvency (1997) is designed to assist States in developing a modern, harmonized and fair insolvency framework to more effectively address instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency." at <<
<https://uncitral.un.org › texts › insolvency>>> on 6 July 2021.

Further detail on the process and effect or recognition under Model Law would have enhanced the answer. **2 Marks.**

*** End of Assessment ***