



**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**

Commented [DB1]: 47/50

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

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

- (a) To establish a regulatory regime for insolvency practitioners.
- (b) To introduce a new omnibus legislation that consolidates the personal and corporate insolvency and restructuring laws.
- (c) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency.**
- (d) To enhance Singapore's insolvency and restructuring laws .

**Question 1.2**

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

- (a) A creditor.
- (b) A contributory.
- (c) The liquidator.
- (d) Any of the above.**

**Question 1.3**

Which of the following factors may enable a foreign debtor to establish a "substantial connection" to Singapore?

- (a) The debtor has chosen Singapore law as the law governing a loan or other transaction.
- (b) The centre of main interests of the debtor is located in Singapore.
- (c) The debtor has substantial assets in Singapore.
- (d) Any of the above.**

**Question 1.4**

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

- (a) Over 50% in number.
- (b) 50% or more in number.
- (c) Over 75% in number.
- (d) 75% or more in number.

**Question 1.5**

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

- (a) The automatic moratorium lasts for 30 days.
- (b) The automatic moratorium may be extended.
- (c) The automatic moratorium can be obtained without filing an application to Court.
- (d) The debtor has to either propose or intend to propose a scheme of arrangement.

**Question 1.6**

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

- (a) A receiver is appointed over the assets of the company.
- (b) The creditors decline to approve the judicial manager's proposals.
- (c) The judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved.
- (d) The judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

**Question 1.7**

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

- (a) To allow the directors to oversee the restructuring of the company.
- (b) Preserving all or part of the company's business as a going concern.
- (c) As a means for the secured creditors to realise their security.
- (d) To liquidate the company in a fast-track and cost-efficient manner.

**Question 1.8**

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

- (a) Informal creditor workouts.
- (b) Judicial Management.
- (c) Receivership.**
- (d) Scheme of arrangement.

**Question 1.9**

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

- (a) England and Wales.
- (b) Brunei.**
- (c) The USA.
- (d) Australia.

**Question 1.10**

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

- (a) The High Court did not grant full recognition of the US Chapter 7 proceedings.
- (b) The US bankruptcy proceedings continued in breach of the Singapore injunction.
- (c) This is the first reported decision where a Singapore court has been faced with the question of public policy in an application for recognition of a foreign insolvency proceeding.
- (d) The Court held that the omission of the word "manifestly" from Article 6 of the Singapore Model Law meant that the standard of exclusion on public policy grounds was higher than in jurisdictions where the Model Law had been enacted unmodified.**

**10 marks**

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

Commented [DB2]: 10/10

**Question 2.1 [maximum 4 marks]**

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

The two types of impeachable transactions under Singapore insolvency law are:

- (1) transactions where an unfair preference was given (pursuant to section 362, Singapore IRDA for individual bankrupts and section 225, Singapore IRDA, for corporates under judicial management or in liquidation); and

(2) transactions which were conducted/entered into at an undervalue (pursuant to section 361, Singapore IRDA for individual bankrupts and section 224, Singapore IRDA for corporates under judicial management or in liquidation).

#### (1) Unfair preferences

Where a company is in judicial management or is being wound up, a company will have given an unfair preference to a person if (section 225(3), Singapore IRDA):

- (a) that person is one of the company's creditors or a surety or a guarantor for any of the company's debts or other liabilities; and
- (b) the company does anything or suffers anything to be done which has the effect of putting that person into a position which, in the event of the company's winding up, will be better than the position that person would have been in if that thing had not been done.

In addition, the company must:

- (a) have been influenced in deciding to give the unfair preference by a desire to produce the effect mentioned in (b) above (section 225(4), Singapore IRDA) (note, this will be the company's main defence to the impeachable transaction) - this will be presumed if the person to whom the unfair preference was given was connected with the company at the time the preference was given (section 225(5), Singapore IRDA);
- (b) have given the unfair preference at the "relevant time", which will be as follows (section 226(1), Singapore IRDA):
  - (i) if the preference is given during the period starting on the date of the commencement of the judicial management of the company and ending on the date the company entered judicial management (section 226(4), Singapore IRDA);
  - (ii) within the period starting 3 years before the commencement of the judicial management or winding up, where the unfair preference was also a transaction at an undervalue (section 226(1)(a), Singapore IRDA);
  - (iii) within the period starting 2 years before the commencement of the judicial management or winding up, where the person to whom the unfair preference was given was connected with the company and where the unfair preference was not a transaction at an undervalue (section 226(1)(b), Singapore IRDA); and
  - (iv) within the period starting 1 year before the commencement of the judicial management or winding up, for all other cases (section 226(1)(c), Singapore IRDA); and
- (c) be unable to pay its debts at the relevant time or become unable to pay its debts in consequence of the preference (section 226(2), Singapore IRDA).

If the above elements are satisfied, the Court may, on application of the judicial manager or liquidator, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that unfair preference (section 225(2), Singapore IRDA).

The summary above considers the elements of an unfair preference for corporates in judicial management or being wound up; however, the requirements for individuals are very similar (*mutadis mutandis*), where an individual is adjudged bankrupt pursuant to sections 362-365, Singapore IRDA.

#### (2) Transactions at an undervalue

Where a company is in judicial management or is being wound up, a company will have entered into a transaction at an undervalue if (section 224(3), Singapore IRDA):

- (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or

- (b) the company enters into a transaction with that person for a consideration the value of which is significantly less than the value of the consideration provided by the company.

An individual adjudged bankrupt will have entered into a transaction with a person at an undervalue in either of the above two circumstances (*mutatis mutandis*) or where the individual enters into a transaction with that person in consideration of marriage (section 361(3), Singapore IRDA).

In addition, the company must:

- (a) have entered into the transaction at an undervalue at the “relevant time”, which will be as follows (section 226(1), Singapore IRDA):
  - (i) within the period starting 3 years before the commencement of the judicial management or winding up (section 226(1)(a), Singapore IRDA); and
  - (ii) if the transaction is entered into during the period starting on the date of the commencement of the judicial management of the company and ending on the date the company entered judicial management (section 226(4), Singapore IRDA); and
- (b) be unable to pay its debts at the relevant time or become unable to pay its debts in consequence of the transaction (section 226(2), Singapore IRDA) – this element will be presumed where a transaction is entered into at an undervalue by a company with a person who is connected with the company (section 226(3), Singapore IRDA).

If the above elements are satisfied, the Court may, on application of the judicial manager or liquidator, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction (section 224(2), Singapore IRDA). However, the Court must not make an order if (Section 224(4), Singapore IRDA):

- x) the company entered into the transaction in good faith and for the purpose of carrying on its business; and
- y) at the time the company entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

There are no equivalent defenses to (x) and (y) above for individuals who enter into transactions at an undervalue.

The summary above mainly focuses on the elements of a transaction at an undervalue for corporates; however, except as stated otherwise, the requirements for individuals who are adjudged bankrupt are very similar (*mutatis mutandis*) and are set out in sections 361 and 363-365, Singapore IRDA.

**Very detailed answer. 4 marks.**

#### **Question 2.2 [maximum 2 marks]**

What is the objective and significance of the JIN Guidelines?

Recital A of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the **JIN Guidelines**) describes the objective of the JIN Guidelines as: “to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction...by enhancing coordination and cooperation amongst courts under

whose supervision such proceedings are being conducted"<sup>1</sup>. The JIN Guidelines provide "a general road map" for how courts in different jurisdictions can and should communicate<sup>2</sup>.

The adoption of the JIN Guidelines by the US Bankruptcy Court for the District of Delaware and the Supreme Court of Singapore was of particular significance due to it being, as the Supreme Court of Singapore explained, "the first time that a common framework has been adopted for courts to communicate and coordinate with each other in cross-border insolvency matters on a global level"<sup>3</sup>, which in turn enables cross-border insolvency matters to be better managed and structured, saving costs and time.

**2 marks.**

**Question 2.3 [maximum 4 marks]**

How can a bankrupt obtain

- (i) an annulment; and
- (ii) a discharge

of his bankruptcy under the Singapore IRDA?

- (i) **Annulment**

A bankrupt can obtain an annulment of their bankruptcy order from the Court pursuant to section 392(1) of the Singapore IRDA 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.

An application to annul a bankruptcy order under subsection (a) above must be made to the Court within 12 months after the making of the bankruptcy order, unless the Court gives leave for the application to be made later (section 392(2), Singapore IRDA).

The Court may annul a bankruptcy order whether or not the bankrupt has been discharged from the bankruptcy (section 392(3), Singapore IRDA).

In addition, the Official Assignee may issue a certificate annulling a bankruptcy order if it appears to the Official Assignee that, to the extent required by the regulations, the debts

<sup>1</sup> Judicial Insolvency Network, "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" available at: [https://www.insol.org/emailer/January\\_2017\\_downloads/doc1a.pdf](https://www.insol.org/emailer/January_2017_downloads/doc1a.pdf)

<sup>2</sup> <https://www.supremecourt.gov.sg/news/media-releases/paving-the-way-for-improved-coordination-of-cross-border-insolvency-proceedings--adoption-of-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters>

<sup>3</sup> Ibid.



which have been proved and the expenses of the bankruptcy have all, since the making of the order, been paid (section 393(1), Singapore IRDA).

(ii) **Discharge**

A bankrupt can obtain a discharge of their bankruptcy order from either the Court of the Official Assignee.

**Discharge by the Court**

To obtain discharge of their bankruptcy order from the Court, the bankrupt may, pursuant to section 394(1), Singapore IRDA, at any time after the making of a bankruptcy order, apply to the Court for an order of discharge. Every such application must be served on each creditor who has filed a proof of debt and on the Official Assignee and the Court must hear the Official Assignee and any creditor before making an order of discharge (section 394(2), Singapore IRDA). Where this application is made, the Court may refuse to discharge the bankrupt from bankruptcy, make an order discharging the bankrupt absolutely or make an order discharging the bankrupt subject to such conditions as the Court thinks fit to impose, including conditions with respect to any income which may be subsequently due to the bankrupt or any property devolving upon the bankrupt, or acquired by the bankrupt, after the bankrupt's discharge (section 394(3), Singapore IRDA). The Official Assignee or any other person having an interest in the matter may also make this application.

**Discharge by the Official Assignee**

Pursuant to section 395(1), Singapore IRDA, the Official Assignee may, in their discretion, issue a certificate discharging a bankrupt from bankruptcy. The Official Assignee is prohibited from issuing this certificate in certain circumstances listed in section 395(2), Singapore IRDA.

Pursuant to section 396(1), Singapore IRDA, before issuing a certificate of discharge in respect of any bankruptcy administered by the Official Assignee, the Official Assignee must serve on each creditor who has filed a proof of debt a notice of the Official Assignee's intention to discharge the bankrupt, together with a statement of the Official Assignee's reasons for wanting to do so. A creditor who has been served with this notice and who wishes to enter an objection to the Official Assignee issuing a certificate discharging the bankrupt may, within 21 days after the date of the Official Assignee's notice, furnish the Official Assignee a statement of the grounds of the creditor's objection (section 396(2), Singapore IRDA).

Very detailed answer. 4 marks.

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

Commented [DB3]: 13/15

**Question 3.1 [maximum 8 marks]**

Write a brief essay on

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

under the Singapore IRDA.

The Singapore IRDA introduced a restriction on the application of *ipso facto* clauses and a new provision regarding wrongful trading.

#### Restrictions on *ipso facto* clauses

*Ipso facto* clauses are clauses that provide a party with the right to terminate the contract upon the occurrence of a specified triggering event, such as the appointment of an insolvency practitioner, the filing of an application for winding up or the commencement of a formal restructuring process. Prior to the introduction of the Singapore IRDA, there were no restrictions on *ipso facto* clauses in statute and so debtors seeking to undergo a corporate restructuring, could end up committing a triggering event enabling the counterparty to terminate the contract. **Good introduction and summary on what are *ipso facto* clauses.**

Section 440(1) of the Singapore IRDA introduced a restriction on *ipso facto* clauses: no person may, at any time after the commencement, and before the conclusion, of any proceedings by a company, by reason only that the proceedings are commenced or that the company is insolvent:

- a) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company; or
- b) terminate or modify any right or obligation under any agreement (including a security agreement) with the company.

#### **When can a debtor avail itself of section 440?**

The scope of this provision is limited by sections 440(2) and 440(5) of the Singapore IRDA. Section 440(2) expressly states that section 440(1) does not prohibit a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of the proceedings or requiring the further advance of money or credit. Section 440(5) excludes the application of section 440(1) in respect of any legal right arising under the following types of contracts:

- a) any eligible financial contract as may be prescribed;
- b) any contract that is a licence, permit or approval issued by the Government or a statutory body;
- c) any contract that is likely to affect the national interest, or economic 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) (i.e. aircraft and engine finance and operating leases and aircraft and engine mortgages, which are subject to the Cape Town Convention); or
- f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.

There are three important practical points to note here in terms of the interpretation and application of this restriction:

- 1) Section 440(1) does not prevent a party from terminating the contract by relying on triggering events other than those in respect of commencement of insolvency/restructuring proceedings and the company's insolvency, which are contained in the *ipso facto* clause (e.g. the failure to make a particular payment or perform a certain obligation), entitling the non-defaulting party to then terminate the contract.
- 2) There are a significant amount of excluded contracts to this restriction, which should provide parties with comfort, especially in the current climate where more borrowers are experiencing financial difficulty and defaulting on agreements.

- 3) Pursuant to section 440(4), on an application by a party to an agreement, the Court may declare that this restriction either does not apply or applies only to the extent declared by the Court, if the applicant satisfies the Court that the operation of this section would likely cause the applicant significant financial hardship.

#### Wrongful trading

Section 239 of the Singapore IRDA introduced a new provision on wrongful trading, adopted from English insolvency legislation. For the purposes of this section, a company trades wrongfully if:

- a) the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full; or
- b) the company incurs debts or other liabilities that it has no reasonable prospect of meeting in full and that result in the company becoming insolvent (section 239(12), Singapore IRDA).

Section 239(1) provides that in the course of the judicial management or winding up of a company or in any proceedings against a company, the Court may declare that any person who was a party to the company which has traded wrongfully is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs, if that person:

- a) knew that the company was trading wrongfully; or
- b) as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

A person found guilty of an offence of wrongful trading shall be liable on conviction to a fine not exceeding SGD10,000 or to imprisonment for a term not exceeding 3 years or to both (section 239(6), Singapore IRDA).

A wrongful trading application may be made by the judicial manager or liquidator of the company, the Official Receiver or any creditor or contributory of the company, with the leave of the judicial manager or the liquidator, as the case may be, or the Court (section 239(3), Singapore IRDA).

The defences to the declaration in respect of wrongful trading are contained in section 239(2) and allow the Court to relieve the person against whom the declaration of personal liability has been made, in whole or in part, if the person acted honestly and having regard to all the circumstances of the case, the person ought fairly to be relieved.

A key change to the previous legislation made by Singapore IRDA is the removal of the prerequisite of having to establish criminal liability before the director could be made personally liable. **As compared to insolvent trading?**

**Some good discussion on section 440. Answer could have been enhanced by more analysis on wrongful trading. Overall a good effort. 6 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 and liquidation are fundamentally different concepts with different objectives. Judicial management aims to rehabilitate the company through a creditor-in-possession corporate rescue and restructuring of the company's debts. This is in contrast to the objective of liquidation, which is to terminate the company's existence through the fair

and orderly distribution of the company's assets among creditors and contributories and the company's subsequent dissolution. Judicial management can be the precursor to winding up and the transition procedures are set out in section 118, Singapore IRDA.

### **Statute**

The key provisions of legislation in respect of the judicial management procedure are set out in Part 7 of the Singapore IRDA and those in respect of the liquidation (or winding up) procedure are set out in Part 8 of the Singapore IRDA.

### **Procedure and Entry**

There are two ways to enter into judicial management: (1) the directors or creditors of the company or the company itself (following obtaining a resolution of its members or the board of directors) make an application to the Court for a judicial management order (section 90, Singapore IRDA); (2) instead of applying to the Court, the company may obtain a resolution of the company's creditors for the company to be placed under judicial management (section 94, Singapore IRDA).

Similarly, the winding up of a company can be initiated either by the Court or be voluntary (section 119, Singapore IRDA); however, there are more entities who can make an application to Court to wind up a company than those who can make an application to the Court to place a company into judicial management. They include the company, any director of the company, a contributory, the liquidator of the company, various ministers and the judicial manager (section 124, Singapore IRDA).

### **Eligibility and "Unable to Pay its Debts" Threshold**

Where a company, or any creditor of the company, considers that (i) the company is or is likely to become unable to pay its debts and (ii) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that the interests of creditors would be better served otherwise than by resorting to a winding up, an application may be made to the Court for an order that the company should be placed under judicial management (section 90, Singapore IRDA). The Court may only grant a judicial management order, where it is satisfied that the company is or is likely to become unable to pay its debts and considers that judicial management will achieve the survival of the company as a going concern, a more advantageous realisation of the assets as compared to a liquidation or where placing the company in judicial management has been approved in a creditors' meeting (section 91(1), Singapore IRDA).

The judicial management eligibility provisions can be contrasted with the winding up eligibility provisions in two key ways:

1. There are a much broader range of circumstances in which a company can be wound up (compared to the circumstances in which a judicial management may be made, as listed above). These circumstances are listed in section 125, Singapore IRDA, and include the following cases (amongst others):
  - a) the company has by special resolution resolved that it be wound up by the Court;
  - b) default is made by the company in lodging the statutory report or in holding the statutory meeting;
  - c) the company does not commence business within a year after its incorporation, or suspends its business for a whole year, or has no member;
  - d) the company is unable to pay its debts;

- e) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner which appears to be unfair or unjust to other members; and
- f) the Court is of the opinion that it is just and equitable that the company be wound up.

2. The circumstance whereby the company can be wound up because it's "unable to pay its debts" pursuant to section 125(1)(e), Singapore IRDA is more limited than the equivalent circumstance for judicial management. The Court will only grant a winding up order where it is satisfied that the company is unable to pay its debts (rather than likely to become unable to pay its debts as for judicial management) and will be deemed to be the case pursuant to section 125(2) if:

- a) a creditor to whom the company is indebted in a sum exceeding \$15,000 then due has served on the company a written demand by the creditor or the creditor's lawfully authorised agent requiring the company to pay the sum so due, and the company has for 3 weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;
- b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court must take into account the contingent and prospective liabilities of the company.

#### **Officeholder**

Pursuant to the judicial management order in respect of the company, the Court will appoint a judicial manager, who will manage and control the company and its affairs, business and property (sections 91(2) and 99, Singapore IRDA). The judicial manager must perform its functions to achieve one or more of the following purposes, in the interests of the creditors as a whole and as quickly and efficiently as is reasonably practicable (section 89, Singapore IRDA):

- a) survival of the company, or the whole or part of its undertaking as a going concern;
- b) the approval of a compromise or an arrangement under section 210 of the Companies Act or section 71 of the Singapore IRDA;
- c) a more advantageous realisation of the company's assets or property than on a winding up.

Upon the judicial manager's appointment, all of the powers, functions and responsibilities of the directors of the company and the custody of the company's property, will transfer to the judicial manager (section 99, Singapore IRDA).

Similarly to judicial management, once the liquidator (or official receiver if no liquidator is appointed) is appointed, they will manage and control the company and its assets but the liquidator's role will of course be different to the judicial manager's role in that they will be administering the liquidation process and their objective will ultimately be the dissolution of the company.

#### **Timeline**

The judicial manager must present a statement of proposals to the creditors at a creditors' meeting within 90 days of the company entering into judicial management (unless extended by order of the court or by obtaining the necessary approval at a creditors' meeting) (section

107, Singapore IRDA). The process of judicial management will last for 180 days from the date of the court order, following which, the company will be discharged from judicial management (section 111(1), Singapore IRDA) – this 180 day time period may be extended by the judicial manager making an extension application to the Court or by obtaining the approval of the necessary number of creditors (section 111(3), Singapore IRDA). A judicial manager has a duty to apply to the Court to discharge the judicial management order before expiry, where they think the purpose either has been achieved or can no longer be achieved (section 112(1), Singapore IRDA).

In contrast, in liquidations, there is no fixed time period for submitting an equivalent statement and discharging a company from liquidation. The liquidator will be required to submit a preliminary report to the Court, after receipt of the statements of affairs, as soon as possible (section 143(1), Singapore IRDA). In general, the length of the liquidation process will vary between companies depending on the amount of assets to be released, the complexity of the company's business and the number of proofs of debt submitted by creditors (amongst other factors) and so in order to conclude a liquidation process following realisation of the company's assets and distribution of the final dividend, the liquidator will need to make an application to the Court for an order that the liquidator be released and the company be dissolved under section 147(d), Singapore IRDA.

#### **Moratorium**

During the period of judicial management and during a liquidation, a moratorium against legal proceedings will be automatically put in place under the Singapore IRDA. These moratoriums differ in that, during the period of judicial management, secured creditors will also be prohibited from enforcing any security over the company's property (without the consent of the judicial manager or with leave of the court – section 96(4)(e), Singapore IRDA); whereas, during liquidation, the moratorium does not affect a secured creditor's enforcement of its security over the company, except with respect to the restrictions on exercising *ipso facto* clauses in certain contracts (as discussed in Question 3.1 above). **This is a good point on the difference between the scope of the moratorium.**

#### **Rescue financing**

Whilst the company is under judicial management, it may seek "rescue financing", which is financing that is necessary to achieve one or more of the purposes of the judicial management. Super priority status may be granted to lenders who provide rescue financing to companies under judicial management (section 101, Singapore IRDA). In liquidations, there is no rescue financing available (unsurprisingly, given the overall objective of the process).

**Very detailed answer. Excellent work. 7 marks.**

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

Commented [DB4]: 14/15

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

- oil and gas exploration and production with assets and fields in Malaysia, Thailand and Cambodia;
- Renewable energy, specifically solar and wind, with projects in Malaysia, Vietnam and the United States; and

- Water and waste to energy with plants in Singapore and China.

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

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

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

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

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

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

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

**Using the facts above, answer the questions that follow.**

**Question 4.1 [maximum 7 marks]**

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

- Confirmation of the purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order; **(2 marks)**
- Assuming that PEC is placed under judicial management, what requirements must be satisfied in order for PEC to be able to access rescue financing under the IRDA?; **(2 marks)**

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

**(A) Judicial Management – Purpose and Court Application**

The purpose of judicial management is to achieve one or more of the following objectives (section 89, Singapore IRDA):

- a) the survival of the company, or the whole or part of its undertaking, as a going concern;
- b) the approval of a compromise or an arrangement between the company and its creditors either under the Companies Act or the Singapore IRDA; and/or
- c) a more advantageous realisation of the company's assets or property than on a winding up.

The bank lenders can (as creditors of PEC) pursue a court application for judicial management, pursuant to section 91, Singapore IRDA, by presenting the following to the Court in order to obtain a judicial management order:

- a) judicial management application;
- b) resolution of members or board of directors (if applicable); and
- c) the name of the person who is a licensed insolvency practitioner and is nominated to act as judicial manager along with a statutory declaration that this person is not in a position of conflict of interest in accepting the appointment and performing the role of judicial manager.

The Court will only make the order pursuant to section 91(1) if:

- a) the Court is satisfied that PEC is or is likely to become unable to pay its debts; and
- b) the Court considers that the making of the order would be likely to achieve one or more of the purposes of judicial management mentioned above,

and so the bank lenders should also submit supporting evidence to this effect in respect of PEC.

Lastly, the judicial management provisions only apply to companies capable of being wound up under the Singapore IRDA (section 88(1), Singapore IRDA). This includes foreign companies, provided that the foreign debtor has a "substantial connection" with Singapore (section 246, Singapore IRDA), which can be satisfied by the following (amongst others): the debtor is a registered foreign company in Singapore, has substantial assets in Singapore or has a place of business in Singapore. It seems likely that PEC (a Cayman incorporated company) would satisfy this given its listing on the Singapore stock exchange and its subsidiaries and assets in Singapore - evidence would need to be submitted along with the application to the Court to show that the judicial management provisions apply to PEC.

**Solid answer. Bear in mind the company is still in section 211 / 64 protection so a carve out will be required. 2 Marks.**

**(B) Judicial Management – Rescue Financing**

In order to obtain rescue financing for PEC, the judicial manager will need to make an application to the Court to make an order pursuant to section 101(1), Singapore IRDA. The application for rescue financing must satisfy one or more of the following conditions (section 101(10)), Singapore IRDA:

- a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;



- b) the financing is necessary for the Court's approval under the specified sections of the Companies Act involving a company that obtains the financing; and/or
- c) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company.

Where PEC's judicial manager makes this application a notice of the application will need to be sent to the PEC's creditors, each of whom may oppose the application (section 101(2)-(3), Singapore IRDA).

The Court may then make one or more of the following orders, set out in section 101(1):

- a) if the company is wound up, the debt arising from any rescue financing be treated as if it were part of the costs and expenses of the winding up;
- b) if the company is wound up, the debt arising from any rescue financing will have priority over all the preferential debts and all other unsecured debts;
- c) the debt arising from any rescue financing is to be secured by a security interest on property of the company not already charged or a subordinate security interest on property of the company that is already charged, if the company would not have been able to obtain unsecured rescue financing from any other person;
- d) the debt arising from any rescue financing is to be secured by a security interest, on property of the company that is already charged with the same priority as or a higher priority than that existing security interest, if:
  - a. the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is secured in the manner mentioned in this paragraph; and
  - b. there is adequate protection for the interests of the holder of that existing security interest.

Finally, after an order is made, the judicial manager must lodge a copy of the order with the Registrar of Companies within 14 days (section 101(9), Singapore IRDA).

## **2 Marks**

### **(C) Out of Court Judicial Management - Process**

In order to place PEC's subsidiaries under judicial management out of court, the creditors of each subsidiary will need to pass a resolution, resolving to place each subsidiary into judicial management and appointing a judicial manager in accordance with the requirements of section 94, Singapore IRDA. This route may be pursued where a company considers that 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 judicial management (section 94(1), Singapore IRDA). The key procedural steps which need to be taken to pursue this route are as follows:

1. Each company must give at least 7 days' written notice of its intention to appoint an interim judicial manager to the proposed interim judicial manager and to those creditors holding fixed or floating charges in respect of the company's property under a debenture and that debenture entitles them to appoint a receiver/manager of the whole of the company's property (section 94(2), Singapore IRDA).
2. Each person to whom notice is given under (1) above must consent in writing to the appointment of the interim judicial manager (section 94(3)(d), Singapore IRDA).
3. The proposed interim judicial manager must lodge, with the Official Receiver and the Registrar of Companies, a statutory declaration by the proposed interim judicial manager pursuant to section 94(3)(e), which states that:
  - a. the proposed interim judicial manager is not in a position of conflict of interest;
  - b. in the view of the proposed interim judicial manager, one or more purposes of judicial management can be achieved; and

- c. the proposed interim judicial manager consents to be appointed as interim judicial manager.
4. Each of the companies' directors must lodge with the Registrar of Companies a statutory declaration pursuant to section 94(3)(f), which states that:
  - a. the company is or is likely to become unable to pay its debts;
  - b. the company will summon a meeting of the company's creditors to be held on a date not later than 30 days after the date of lodgment of the proposed interim judicial manager's statutory declaration; and
  - c. the directors believe that one or more of the purposes of judicial management is likely to be achieved.
5. The company must, under section 94(5):
  - a. within 3 days after the appointment of the interim judicial manager, cause a written notice of the appointment to be lodged in the prescribed form with the Official Receiver and the Registrar of Companies; and
  - b. within 7 days after the lodgment of the notice under paragraph (a), cause a notice of the appointment to be published in the Gazette and in an English local daily newspaper.
6. The company will then convene a meeting of the creditors, no later than 30 days after the lodgment of the statutory declaration referred to in 3 above, at a time and place convenient to the majority in value of the creditors, to consider a resolution for the company to be placed under judicial management (section 94(7)). Each creditor must have been given at least 14 days' written notice of the meeting, along with a statement of the creditors' claims and the company's affairs and a notice must be published in an English local daily newspaper at least 10 days before the creditors' meeting (section 94(8)).
7. In order to place the company into judicial management of a judicial manager, a majority in number of the creditors of the company present and voting must resolve to place the company into judicial management and appoint a person as a judicial manager (section 94(11)).

Very detailed. 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?

Pursuant to section 96(4), Singapore IRDA, during the period in which PEC is in judicial management, the following automatic moratorium will be granted to PEC and its subsidiaries, under judicial management:

- a) no order may be made, and no resolution may be passed, for the winding up of the company;
- b) no receiver or manager may be appointed over any property or undertaking of the company; and
- c) except with the consent of the judicial manager or with the leave of the Court (and subject to such terms as the Court may impose:
  - (i) no other proceedings may be commenced or continued against the company;
  - (ii) no execution or other legal process may be commenced or continued, and no distress may be levied against the company or its property;
  - (iii) no step may be taken to enforce any security over any property of the company, or to repossess any goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement; and
  - (iv) no right of re-entry or forfeiture under any lease in respect of any premises occupied by the company may be enforced.

Although the judicial management moratorium provisions do not expressly include the extra-territorial effect provision that has been included for the supercharged scheme of arrangement moratorium order provisions (i.e. "...may be expressed to apply to any act of any person in Singapore or within the jurisdiction of the Court, whether the act takes place in Singapore or elsewhere" (section 211B(5)(b), Companies (Amendment) Act 2017)), the definition of "property" for the purposes of the judicial management provisions, includes "money, goods, things in action and every description of property, whether real or personal, and whether in Singapore or elsewhere" (section 88(1), Singapore IRDA). This means that those parts of the moratorium stated above which include each of PEC and its subsidiaries' "property" will have extraterritorial effect, meaning that the assets outside of Singapore will also be protected.

**A good analysis. The legislation has not been construed this way and the key difference is that section 64 and 65 have an express provision dealing with extra territoriality but the JM provisions (which have been in place for some time and were not changed on this aspect when IRDA came in) do not. 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.

Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency (the **Model Law**) through the Companies (Amendment) Act 2017, in the form set out in the Tenth Schedule. Pursuant to the Model Law, foreign representatives may apply directly to the High Court of Singapore for recognition of foreign insolvency proceedings (Article 15(1)<sup>4</sup>). The application must be accompanied by:

- a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative, and in the absence of either of these types of evidence then any

<sup>4</sup> References to "Articles" within this answer are references to Articles of the Model Law as set out in the Tenth Schedule of the Companies Act (as amended by the Companies (Amendment) Act 2017).

- other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative is required (Article 15(2));
- b) a statement identifying all foreign proceedings and proceedings under Singapore insolvency law in respect of the debtor that are known to the foreign representative (Article 15(3)); and
  - c) a translation into English of documents supplied in support of the application for recognition (Article 15(4)).

Pursuant to Article 17(1), a proceeding must be recognised by the Court if:

- 1) it is a foreign proceeding within the meaning of Article 2(h) and the person or body applying for recognition is a foreign representative within the meaning of Article 2(i) – this will be presumed if the decision or certificate mentioned in (a) above indicates this (Article 16(1));
- 2) the application meets the requirements of (a) and (b) stated above; and
- 3) the application has been submitted to the High Court of Singapore and the Court has jurisdiction either because the debtor is or has been carrying on business within Singapore or has property situated in Singapore or because the Court considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested (Article 4). This requirement would be satisfied given the location of some of PEC's water and waste to energy plants in Singapore.

There is no requirement of reciprocity (i.e. the State in which the judgment was made does not need to have adopted the Model Law) so it does not matter whether China, Malaysia and the US (where judgments are likely to be made, given the ongoing local insolvency proceedings) have adopted the Model Law; however, recognition of foreign insolvency proceedings may be denied if recognition would be contrary to public policy (Article 6).

Upon recognition of a foreign proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief pursuant to Article 21(1), including:

- a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities;
- b) staying execution against the debtor's property;
- c) suspending the right to transfer, encumber or otherwise dispose of any property of the debtor;
- d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities;
- e) entrusting the administration or realisation of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court;
- f) extending relief granted whilst the application was being determined; and
- g) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 227D(4) of the Companies Act.

If the proceedings have been recognised as foreign main proceedings then the relief listed in (a)-(c) above will occur automatically pursuant to Article 20 and there is no need for the foreign representative to request such relief.

In addition, the Court may at the request of the foreign representative entrust the distribution of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in Singapore are adequately protected (Article 21(2)).

Separately, the Reciprocal Enforcement of Commonwealth Judgments Act (**RECJA**) enables judgments from superior courts of certain commonwealth countries to be recognised,

enforced and registered in Singapore. Pursuant to the Reciprocal Enforcement of Commonwealth Judgments (Extension) (Consolidation) Notification, this includes Malaysia, which may be relevant for these purposes given that insolvency proceedings have been commenced in Malaysia. Under section 4(1) of RECJA, a judgment creditor may apply to the Singapore High Court for the registration of a judgment within 6 years after the date of the judgment or where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings. The Singapore High Court may only register a non-money judgment if, having regard to the circumstances of the case and the nature of the relief contained in the judgment, it is satisfied that enforcement of the judgment would be just and convenient and if it is of the opinion that such enforcement would not be just and convenient, may make an order for the registration of such amount as it considers to be the monetary equivalent of the relief (section 4(3A), RECJA). A judgment shall not be registration if it has been wholly satisfied, discharged, or it could not be enforced by execution in the country of the original court (section 4(3), RECJA) and if it falls within those cases in which registered judgments must or may be set aside under section 5, RECJA. Once registered, the judgment creditor may pursue the enforcement of the judgment in Singapore.

Singapore has adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, which some of the Courts in the US have also adopted and which provide guidelines as to how these Courts should communicate and cooperate with one another – this may be useful if the Court in the US in which insolvency proceedings are taking place has adopted the Guidelines.

**Excellent answer. 4 Marks.**

**\* End of Assessment \***