



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8E

SINGAPORE

This is the **summative (formal) assessment** for **Module 8E** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 8E. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentnumber.assessment8E]**. An example would be something along the following lines: 202021IFU-314.assessment8E. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 48/50 = 96% - excellent result!

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.

[Type your answer here]

ANSWER: -

Impeachable transactions under Singapore Insolvency law are transactions made at an undervalue, by giving preferences and by acceptance of extortionate credit before the commencement of winding up or judicial management in case of insolvent companies and bankruptcy in case of individual or firm are made. The provisions of impeachable transactions do not apply to supercharged schemes of arrangements. The liquidator or the judicial manager and the official assignee or the bankruptcy trustee have the power under the insolvency law to get the impeachable transactions set aside by the court in their respective domain of assignments.

In keeping with the requirement of the question, we will confine our discussion to two types of impeachable transactions namely transactions at undervalue and unfair preferences.

1. Undervalued Transactions:

I) Relating to companies being wound up or under judicial Management:

The relevant provision applicable to the transactions at under value in respect of a company under judicial management or being wound up is section 224 of Insolvency, Restructuring and Dissolution Act 2018 (IRDA 2018). The Judicial Manager or the liquidator may apply to the court for an order under the section 224 showing the following elements of undervalued transactions subject to the provisions of section 226 and 227 of the IRDA 2018 as provided under 224(3) of IRDA 2018:

- a) the company makes a gift to the person or otherwise enters into 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, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration originally provided by the company;
- c) the company was or became insolvent as a result of that undervalued transaction.

The section 226(1)(a) provides that the relevant time at which the company enters into a transaction at undervalue is 3 years before the commencement of the judicial management or winding up (as the case may be) and ending on the date of commencement of the judicial management or winding up, as the case may be. The relevant time for an undervalued transaction with a connected person of the company is the same. But the time will not be relevant for the purpose of section 224 unless the company is unable to pay its debts at that time within the meaning of section 125(2) or becomes unable to pay its debts within the meaning of the section 125(2) in consequence of the undervalued transaction in accordance with the provisions of section 226(2)(a) and (b) of IRD Act 2018. As provided in section 226(3) of IRDA 2018, the requirement of the state of being unable to pay the debt is presumed if the beneficiary person of the undervalued transaction is connected with the company other than by reason only of being the company's employee.

The defenses available to the beneficiary of the undervalued transactions against the action of the liquidator or the judicial manager are provided under section 224(4) and 227 of IRDA 2018. Under section 224(4), it is provided that the court must not make an order under section 224 if the company entered into the transaction in good faith for the purpose of carrying on its business and at the time of transaction there were reasonable grounds to believe that the transactions would benefit the company. Section 227 (3) requires that an order under section 224 in respect of an undervalued transaction does not prejudice any interest in property which was acquired in from a person other than the company in good faith and for a value and does not require a person who received a benefit from the transaction in good faith and for a value to pay a sum to the judicial manager or liquidator unless the person was a party to the transaction. Section 227(4) stipulates that unless contrary is shown, a person who received the benefit of an undervalued transaction is presumed to have received the benefit otherwise than in good faith if at the time of receipt of

the benefit the relevant person had notice of the relevant surrounding circumstances and of the relevant proceedings or the relevant person was connected to the company in question or the person with whom the company in question entered into the transaction. Section 227(5)(a) explains that the "relevant surrounding circumstances" are that the fact that the company in question entered into transaction at an undervalue and section 227(6) explains that "the relevant person has notice of the proceedings" if the relevant person has notice of the making of an application for winding up or for a judicial management order in respect of the company or the appointment of an interim judicial manager or provisional liquidator.

II) Relating Bankruptcy of Individual:

Similarly, the relevant provisions applicable in respect of individual adjudged bankrupt is 361 of Insolvency, Restructuring and Dissolution Act 2018 (IRDA 2018). The official assignee in case of an individual may apply under section 361 subject to section 363 and 365 showing the following elements:

- a) the individual makes a gift or otherwise enters into a transaction for no consideration[361(3)(a)];
- b) the individual enters into a transaction where the consideration is marriage[361(3)(b)];
- c) the individual enters into a transaction for consideration which is significantly less, in money's worth, of the consideration originally provided by the individual [361(3)(c)];
- d) At the time of entering the undervalued transaction the individual is either insolvent or became insolvent as a consequence of the transaction[363(2)(a) & (b)].

Section 363(1) provides that the relevant time for transactions at undervalue is three years before either the date of bankruptcy application was made or the date on which the bankruptcy order was made. The three- year period ends on the date of passing of the bankruptcy order in either case. In case of a transaction at under value with an associate of the individual (otherwise than by reason of being the individual employee), the requirement of subsection (2) of section 363 are presumed to be satisfied as per the provisions of section 363(3) unless contrary is shown. Section 363(4) explains that an individual is an insolvent, if the individual is unable to pay his or her debts as they fall due; or the value of individual's assets is less than the amount of his or her liabilities, taking into account his or her contingent or prospective liabilities. Section 364 explains the meaning of an associate.

The defenses available to the beneficiary of the undervalued transactions against the action of the official assignee are provided under section 365 of IRDA 2018. Section 365 (3) requires that an order under section 361 in respect of an undervalued transaction does not prejudice any interest in property which was acquired from a person other than the that individual in good faith and for a value and does not require a person who received a benefit from the transaction in good faith and for a value to pay a sum to the Official assignee unless the person was a party to the transaction. Section 365(4) stipulates that unless contrary is shown, a person who received the benefit of an undervalued transaction is presumed to have received the benefit otherwise than in good faith, if at the time of receipt of the benefit the relevant person had notice of the relevant surrounding circumstances and of the relevant proceedings or the relevant person was an associate of or was connected with the individual in question or the person with whom the individual in question entered into the transaction. Section 365(6)(a) explains that the "relevant surrounding circumstances" are the fact that the individual in question entered into transaction at an undervalue. Section 365(7) explains that "the relevant person has notice of the proceedings" if the relevant person has notice of the making of the bankruptcy application on which the individual in question is adjudged bankrupt or the fact that the individual in question has been adjudged bankrupt.

2. Unfair Preferences:

I) Relating to winding up and judicial Management

The relevant provisions of law applicable are available in Insolvency, Restructuring, Dissolution Act (IRDA)2018 which commenced from 30th July 2020. The liquidator or the judicial manager is required to show the following four elements to obtain an order setting aside the transaction of unfair preference from the court:

- a) the beneficiary of the transaction of unfair preference is a creditor or a surety or guarantor for any of the company's debts or liabilities [225(3) (a)];
- b) the company was either insolvent or became insolvent as a consequence of the transaction of unfair preference at the time of giving preference[226(2)(a) &(b)];
- c) the company has done anything to put the preferred party in a better position than the preferred party would otherwise have been had the transaction not been entered in the event of the company's liquidation or company's coming under judicial management order[225(3)(b)];
- d) the company was influenced in deciding to enter the transaction by a desire to prefer the preferred party; and noting that the company is presumed to have been influenced by a desire to prefer if the preferred party is an associate of a company [225(4) & 225(5)].

The relevant time period for clawing back an unfair preference is 2 years[226(1)(b)] from the date of the date of commencement of judicial management or winding up where the preferred party is connected to the company (otherwise than by reason only of being the company's employee) and 1 year[226(1)(c)] for unrelated parties.

The defenses available to the beneficiary of the unfair preferences against the action of the liquidator or the judicial manager are provided under and 227 of IRDA 2018. Section 227 (3) requires that an order under section 225 in respect of an unfair preference does not prejudice any interest in property which was acquired in from a person other than the company in good faith and for a value and does not require a person who received a benefit from the transaction in good faith and for a value to pay a sum to the judicial manager or liquidator unless the person was a party to the transaction. Section 227(4) stipulates that unless contrary is shown, a person who received the benefit of an unfair preference is presumed to have received the benefit otherwise than in good faith if at the time of receipt of the benefit the relevant person had notice of the relevant surrounding circumstances and of the relevant proceedings or the relevant person was connected to the company in question or the person with whom the company in question entered into the transaction. Section 227(5)(b) explains that the "relevant surrounding circumstances" are the circumstances which amounted to the giving of the unfair preference by the company in question and section 227(6) explains that "the relevant person has notice of the proceedings" if the relevant person has notice of the making of an application for winding up or for a judicial management order in respect of the company or the appointment of an interim judicial manager or provisional liquidator or the fact that the company has entered judicial management or is being wound up.

II) Relating to Bankruptcy of individual:

The Official Assignee is required to show the following four elements to obtain an order setting aside the transaction of unfair preference from the court:

- (a) the other person is one the bankrupt's creditor, a surety or guarantor of the individual's debts or other liabilities[362(3)(a)];
- (b) the bankrupt does anything or suffers anything which has the effect of putting the person into a better position than they would otherwise have been upon the bankrupt's bankruptcy[362(3)(b)];

- (c) in giving preference the bankrupt must be influenced by a desire to prefer the other party such that they would be in a better position in bankruptcy [362(4)];
- (d) the individual is insolvent or became insolvent in consequence of the unfair preference[363(2)(a) &(b)].

The relevant time period for clawing back an unfair preference is 2 years[363(1)(b)] before the date of application was made or the date the bankruptcy order was made, in either case ending on the day bankruptcy order was made where the preference was given to an associate and 1 year [363(1)(c)] where unfair preference was given to unrelated parties.

The defenses available to the beneficiary of the unfair preferences against the action of the official assignee are provided under section 365 of IRDA 2018. Section 365 (3) requires that an order under section 362 in respect of an unfair preference does not prejudice any interest in property which was acquired from a person other than the that individual in good faith and for a value and does not require a person who received a benefit from the unfair preference in good faith and for a value to pay a sum to the Official assignee unless the person was a party to the transaction. Section 365(4) stipulates that unless contrary is shown, a person who received the benefit of an unfair preference is presumed to have received the benefit otherwise than in good faith if at the time of receipt of the benefit the relevant person had notice of the relevant surrounding circumstances and of the relevant proceedings or the relevant person was an associate of or was connected with the individual in question or the person with whom the individual in question entered into the transaction. Section 365(6)(a) explains that the "relevant surrounding circumstances" are the circumstances which amounted to the giving of the unfair preference by the individual in question. Section 365(7) explains that "the relevant person has notice of the proceedings" if the relevant person has notice of the making of the bankruptcy application on which the individual in question is adjudged bankrupt or the fact that the individual in question has been adjudged bankrupt.

Good job. Detailed response. 4 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

[Type your answer here]

ANSWER: -

The Judicial Insolvency Network (JIN) was established in a meeting of insolvency judges from eight jurisdictions from round the world in October 2016 hosted by the Supreme Court of Singapore. During the meeting deliberation was made on encouraging communication and cooperation amongst national courts by pulling together the best practices in cross-border restructuring and insolvency. On exchange of views a set of guidelines was developed. The JIN guidelines provide a framework for parties in cross-border restructuring and insolvency to customise protocols to facilitate court-to-court communication and cooperation in in each case.

The significance of JIN guidelines is very important because cross-court communication and cooperation have become critically essential for smooth conduct of cross-border insolvency cases in the increasingly globalised economy of present-day world. On February 1 the Singapore Supreme Court issued the JIN Guidelines and has already been adopted by the

US Bankruptcy Court of Delaware and Southern District of New York, High Court of England and Wales and Commercial Court of Bermuda.

2 marks. Excellent detailed answer.

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?

[Type your answer here]

ANSWER: -

2.3(i)

A bankrupt can obtain an annulment of his bankruptcy under the Singapore IRDA 2018 on submission of an application to the Court or the Official Assignee depending on the circumstances existing after the passing of the bankruptcy order. The court may annul a bankruptcy under section 392(1) if:

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

An application to get the bankruptcy order annulled under section 392(1)(a) must be made by the bankrupt within 12 months [392(2)] after the making of the bankruptcy order, unless the Court allows the application to be made later.

Under section 393(2), the bankrupt may obtain a copy of the certificate of annulment upon payment of prescribed fees, if the Official assignee decides to issue a certificate of annulling a bankruptcy order after being convinced that the debts which have been proved and the expenses of the bankruptcy have all, been paid to the extent required under the regulations as the provisions of 393(1) of IRDA 2018.

The bankrupt may also obtain a copy of the annulment under section 358(3), if the Official Assignee annuls the bankruptcy order by issuing a certificate of annulment on the ground of acceptance of a composition by all the creditors in satisfaction of the debts due to them under the bankruptcy or scheme of arrangements by a special resolution [Section 357] in accordance with the provisions of section 358(1)(b) of IRDA.

2.3(ii)

A bankrupt can obtain a discharge of his bankruptcy under the Singapore IRDA by applying to the Court under section 394(1). The Court after hearing the Official Assignee and the creditors who has filed proof of debt may –

- (a) refuse to discharge the bankrupt from bankruptcy;
- (b) make an order discharging the bankrupt absolutely;
- (c) make an order discharging the bankrupt subject to such conditions as the court thinks fit to impose, including conditions with respect to –
 - i. any income which may be subsequently due to the bankrupt; or any property devolving upon the bankrupt, or
 - ii. acquired by the bankrupt, or acquired by the bankrupt, after the bankrupt's discharge, as may be specified in the order.

The bankrupt can obtain a copy of certificate of discharge under section 395(4) of IRDA from the Official Assignee, if the Official Assignee issues a certificate discharging the bankrupt using his /her discretion under section 395(1) subject to proving opportunity to creditors for filing objections under section 396 and certain other conditions.

There is also scope for the bankrupt to obtain a copy of the certificate of discharge under section 358(3) of IRDA, if the Official Assignee discharges the bankrupt by issuing a certificate of discharge on the ground of acceptance of a composition by all the creditors in satisfaction of the debts due to them under the bankruptcy or scheme of arrangements by a special resolution [Section 357] in accordance with the provisions of section 358(1)(b) of IRDA.

Detailed answer! Good job. 4 marks.

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

Commented [DB3]: 14/15

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.

[Type your answer here]

ANSWER: -

3.1(i)

Broadly speaking, *ipso facto* clause permits one party to terminate a contract and/or exercise certain remedies upon the occurrence of certain contractually stipulated events. In the context of insolvency, such clause is a contractual provision that allows one party to terminate or modify the operation of contract or provides for this to happen automatically in the event of occurrence of counterparty's insolvency. There were no restrictions on the

exercise of *ipso facto* clauses upon the formal insolvency of a Singapore company previously under the Singapore law. It was, therefore, difficult for companies to be restructured or rescued within the formal insolvency regime of Singapore. The restrictions on operation of *ipso facto* clauses were introduced in the IRD Act 2018 based on the corresponding provisions in Canadian insolvency legislation.

Under section 440(1) of IRD Act 2018, there is a new provision that limits the exercise of certain contractual rights by reason that certain insolvency proceedings have commenced against the debtor company or that the company is insolvent. This does not prevent those contractual rights from being exercised by reason of other grounds provided in the contract such as non-payment of money owed by the company [440(2)]. It means insolvent companies are allowed to continue key contracts for easier facilitation of restructuring efforts. Section 440(4) provides overriding powers to Singapore courts to rule on the applications of the restrictions and their extent if the applicant can show that it will suffer "significant financial hardship" as a result. Section 440(5) provides that subsection (1) of section 440 does not apply in respect of any legal right under-

- (a) any eligible financial contracts as may be prescribed;
- (b) any contract that is a license, 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); or
- (f) any agreement that is subject of treaty to which Singapore is party, as may be prescribed.

Further details are set out in the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020. Companies excluded from the application of section 440 are also prescribed in the Insolvency, Restructuring and Dissolution (Prescribed Companies under Section 440) order 2020.

The scope of "eligible financial contracts" in 440(5)(a) will be very important for financiers contracting with Singapore companies. Section 440 of IRD Act 2018 applies prospectively to contracts entered into on or after 30 July 2020.

3.1(ii)

The Singapore Insolvency, Restructuring and Dissolution Act 2018 (IRDA) which came into effect from 30 July 2020, introduces a new "Wrongful trading" trading provision to replace the existing trading regime. Under the earlier trading framework, an officer of the company would only be personally liable to pay the whole or the part of the debt of the company, if there were criminal conviction under the Companies Act. The wrongful trading provisions now introduced under the IRDA dispense with the requirement of criminal liability before civil liability can be found. Thus, it has become easier to impose civil liability on those who are party to wrongful trading.

Section 239(5) provides that the judicial manager, the liquidator, the Official Receiver and any creditor or contributory of the company (with the leave of the Court or the judicial manager or the liquidator as the case may be), may make an application to the court under section 239(1).

The IRDA introduces the concept of wrongful trading under section 239(12), which provides that the company trades wrongfully if:

- (a) the company, when insolvent, incurs debts or liabilities without reasonable prospect of meeting them in full; or

- (b) the company incurs debts or liabilities that it has no reasonable prospect of meeting in full and that result in the company becoming insolvent.

Persons who are party to the wrongful trading can attract civil personal liability and can be made personally responsible for all or part of the debt under subsection (1) of the Section 239 and can be made criminally liable under subsection (6) of Section 239, if that person knew that the company was trading wrongfully or as an officer of the company ought to have known that the company was trading wrongfully. A statutory defense to the to the civil personal liability is provided under IRDA in subsection (2) of Section 239, but no such defense is provided for imposing criminal liability. Section 239(2) provides that the court may relieve the responsible person from being personally liable, if the person acted honestly and having regard to the circumstances, that person ought fairly to be relieved from personal liability.

These provisions require greater accountability, not just of the directors and officers of the company but of any person who was a party to the wrongful trading, regardless of whether they a director or an officer. It means that liability could extend to other persons involved in managing a distressed company and entering into contracts on its behalf.

The essay could have been clearer as to when can a debtor avail itself of Section 440. Nonetheless this is a very good effort. The section on wrongful trading is very detailed. **7 marks.**

Question 3.2 [maximum 7 marks]

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

[Type your answer here]

ANSWER: -

Judicial Management is one of the Singapore's corporate rescue tools whereas winding up or liquidation is a tool for the termination of the existence of the company by its eventual dissolution. The applicable laws to judicial management and winding up or liquidation are provided under the Part 7 and Part 8 respectively of the new omnibus Insolvency legislation of Singapore i.e., Insolvency, Restructuring and Dissolution Act 2018 (IRDA). The Companies Act of Singapore also contains certain applicable provisions of law.

The purpose of judicial management as provided under section 89 of IRDA is (a) the survival of the company, or the whole or part of its undertaking as a going concern; (b) the approval under Section 210 of Company's Act or Section 71 of IRDA of a compromise or an arrangement between the company and any such person as are mentioned in the applicable section; (c) a more advantageous realisation of company's assets or property than on winding up. The objective of liquidation under the Singapore insolvency law, however, is to ensure orderly distribution of company's assets among creditors and contributories and dissolution of the company.

Where a company is or likely to become, unable to pay its debts and which has a reasonable probability of preserving all or part of its business as a going concern or the interests of the creditors of which would be better served otherwise than by resorting to winding up in the consideration of the directors of the company or any of the creditors of the company, an application may be made to the court under Section 90 and 91 of IRDA for entry into Judicial management.

But winding up can be either voluntary by special resolution of members or approval of creditors or by order of the court directing compulsory liquidation. The member's voluntary liquidation is only available if accompany is solvent through declaration in accordance with section 293 of Companies Act stating that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up without any apprehension of insolvency. The company may be voluntarily wound up by way of creditor's winding up where a company is unable to pay its debt and the directors are unable to provide declaration of solvency. A compulsory winding up can be initiated on specific grounds including the company is unable to pay its debts.

Beside the afore-mentioned general differences, the differences in the procedural and substantive aspects in brief are as under:

- 1) The circumstances of entry into judicial management and liquidation are not the same. Judicial management can be initiated by when the company is unable to pay its debt or is likely to become unable to pay its debts [Section 90 of IRDA]. This means the process of judicial management can be started in apprehension of the company being unable to pay its debts before the company becomes insolvent. But initiation of liquidation proceedings is not permissible in apprehension of the company being unable to pay its debts.
- 2) The compulsory liquidation by court is permissible on several other grounds [Section 125(1) (a) to (n) of IRDA] other than being unable to pay its debts. The compulsory placement under judicial management is not permissible under the provisions of law on other such grounds.
- 3) The judicial management application may be brought by resolution of its directors unlike like members' voluntary liquidation which can only be brought by resolution of members of the company but not by its directors alone.
- 4) The process of member's voluntary liquidation can be started when the company is solvent through a declaration under 293 of Companies Act stating that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up. But the process of judicial management cannot be started when the company is solvent. **Good point here.**
- 5) In judicial management a judicial manager [Section 91 of IRDA] takes control of the business and the company for a period of 180 days [section 111of IRDA], subject to any further extension granted by the court. But in winding up proceedings liquidator or official Receiver is appointed under section 134 of IRDA 2018.
- 6) Automatic moratorium comes into effect [Section 95(1) of IRDA] where a company makes an application for judicial management u/s 91 of IRDA or files a written notice of appointment of the interim judicial manager U/S 94(5) (a) of IRDA from the date of filing of application or the filing of notice as the case may be. But in case of voluntary winding up, the moratorium is imposed from the date of commencement of winding up i.e., from the date of resolution by members for winding up by the company. In case of court winding up, during the period until winding up order is made, the company, or any creditor or contributory can apply to the court to restrain proceedings. There is no automatic moratorium in court ordered wining up proceedings.
- 7) The liquidators have the power of disclaiming onerous contracts. But the judicial managers have no power to disclaim onerous contracts entered into by the company prior to the order of judicial management. **How can a judicial manager deal with existing contracts of the company?**

Excellent and detailed answered. 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)**

[Type your answer here]

ANSWER: -

- As per the given facts of the case study PEC traded positively throughout 2018 and 2019. In late 2019 it started informing some of its bank lenders that they may require further time for repayment of certain amounts of debt. In early 2020, it appointed legal and financial advisors to provide it with advice as to the best steps to take. Shortly thereafter it filed for protection under section 211B of the Companies (Amendment) Act 2017. Further to filing of application under section 211B, the three subsidiaries of PEC filed for protection under section 211C. The period of moratorium originally granted by the court in response to filing of the application under section 211B and 211C is not mentioned in the text of the case study. During the first 6 month's extension of moratorium the bank lenders decided to apply to the court to place PEC under judicial management.

The sections 211B and 211C were introduced into the statute by Companies (Amendment) Act 2017. The corresponding provisions of 211B and 211C which were repealed on enactment of IRDA 2018, are section 64 and 65 of the IRDA act 2018. Since the Insolvency, Reconstitution and Dissolution Act (IRDA) 2018 came into force with effect from 30 July 2020, the bank lenders must have filed the application after IRDA came into force as evident of facts of the case.

The purposes judicial management to be found in section 89(1)(a) (b) and (c) of IRDA 2018 are (a) survival of the company, or whole or part of its undertaking, as a going concern; (b) the approval under section 210 of the Companies Act or section 71 of IRDA 2018 of a compromise between the company and any such person as are mentioned in the applicable section (c) a more advantageous realisation of the company's assets or property than on a winding up.

In accordance with section 90 of IRDA 2018, an application is required to be made for an order of judicial management [Section 91 of IRDA 2018] presenting to the court by the company or any of its creditors that (a) the company is, or is likely to become, unable to pay its debt; and (b) 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 interest of creditors would be better served otherwise than by winding up.

Section 88(2) (f) provides that a company is deemed to be unable to pay its debts if any of the paragraphs in section 125(2) is satisfied. Under section 125(2) accompany is deemed to be unable to pay its debt if (a) a creditor to whom the

company is indebted in a sum exceeding \$ 15,000 has served a demand notice requiring the company to pay the sum due and the company 3 weeks after service of notice has failed to respond to the satisfaction of the creditor; (b) execution or other process issued on a judgement, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or 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.

Thus, the provisions of section 88(2)(f) and section 125 (2) are relevant for adducing proof before the Court that a company is or likely to be unable to pay its debts.

A good answer but note that as company already in moratorium protection that would need to be varied to apply for JM. 1.5 Marks.

- The placement under the judicial management of PEC is assumed in the given question. The satisfaction of requirements for accessing rescue financing by PEC is provided under Section 101 of IRDA 2018. Sub section (10) of section 101 provides "rescue financing" means any financing that satisfies one or more of the following conditions: (a) the financing is necessary for the survival of the 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 court's approval under section 210(4) of the Companies Act or section 71(5) of IRDA of a compromise or an arrangement mentioned in 210(1) of the Companies Act or section 71(1)(as the case may be) involving a company that obtains the financing; (c) the financing is necessary to achieve a more advantageous realisation of the assets of accompany that obtains the financing, than on a winding up of that company.

On satisfaction of the above-mentioned requirements the Singapore Court may on application filed by the Judicial Manager, any time when the company is in judicial management, pass one or more of orders under section 101(1)(a), (b), (c) and (d) granting super priority to rescue financing. These provisions are largely adopted from section 364 of US Bankruptcy Code.

Explaining the different types of rescue financing would have enhanced the answer. 1.5 Marks

- The IRDA 2018 does not have provisions for dealing with group of companies becoming insolvent. Only the section 65 of IRDA which was the corresponding section of the repealed 211C of Companies Act, provides for grant of moratorium orders relating to subsidiaries for facilitating compromise or arrangement to be proposed by the company under the section 64 moratorium. As per given facts three subsidiaries of PEC are incorporated in Singapore. Being incorporated in Singapore, three subsidiaries are liable to be wound up under IRDA. According to the definition of "company" under section 88(1), any corporation liable to be wound up under IRDA will be a company covered under Part 7 of IRDA for the purpose of judicial management

The IRDA 2018 provides judicial management by resolution of creditors under section 94 without applying to the Court for a judicial management order. The steps that are required to be taken to place PEC's subsidiaries under judicial management are as under:

1. Section 94(1) provides for the voluntary process of initiating judicial management by obtaining a resolution of creditors if: (a) the company is, or likely to become,

- unable to pay its debts; and (b) there is reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1).
2. For obtaining resolution of creditors, the company must give at least 7 days written notice in the prescribed format of its intention to appoint an interim judicial manager under section 94(3) – (a) to the proposed interim judicial manager; and (b) to any person who has appointed, or is or may be entitled to appoint, a receiver or manager of the company's property under the terms of any debentures of the company secured by a floating charge or by a floating charge and one or more fixed charges[section 94(2)];
 3. Appointment of an interim judicial manager in accordance with sub- section (3) of section 94;
 4. Adjudication of the proof of debts filed by creditors for the purpose of voting by at the meeting of creditors to be convened under section 94(7) by the interim judicial manager [94(4) (c)];
 5. Lodgment of notice of appointment of the interim manager with the Official Receiver and the Registrar of companies within 3 days of appointment and publication in the *Gazette* and an English daily news- paper within 7days after lodgment [94(5)(a)&(b)];
 6. Giving at least 14 days' notice to creditor and causing the notice of meeting to be published in newspaper 10 days before the meeting in accordance with section 94(8);
 7. Convening a meeting of the creditors of the company in accordance with section 94(7);
 8. Resolution in the meeting of the creditors regarding placing the company under the judicial management and appointing a person as judicial manager in accordance with section 94(11).

PEC's subsidiaries in the given case study can be placed under judicial management out of court in the above-mentioned manner.

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?

[Type your answer here]

ANSWER: -

The judicial management moratoria obtained by PEC and its subsidiaries are governed by the provisions of section 95 and 96 of IRDA 2018. As provided under section 95(4) the automatic period of moratorium starts when the company makes an application for judicial management U/S 91 and ends on the date the application is decided by the Court; or when the company lodges a written notice of appointment of an interim judicial manager U/S 94(5)(a) with the Official Receiver or Registrar of Companies in case of judicial management by resolution of creditors and ends on the earliest of the following dates: (i) the date of the appointment of a judicial manager; (ii) the date on which the term of appointment of judicial manager ends under section 94(6); (iii) the rejection of the resolution to place the company under judicial management at a meeting convened under section 94(7). During the automatic moratorium the actions, proceedings and execution or other legal processes listed in Sub-section(1)(a), (1)(b), (1)(c) and (1)(d) of section 95 are prohibited.

If the company enters into judicial management when an order is made under section 91(1) or when a resolution by committee of creditors is passed under section 94(11)(d), a more extensive moratorium comes into effect under section 96(4) of IRDA 2018. The actions proceedings prohibited are provided under Sub-section 4(a) to (f) of section 96 of IRDA 2018. The prohibited proceedings and enforcement actions can be commenced or continued at the discretion of the Court or the judicial manager.

The provisions contained section 95 and 96 of IRDA 2018 do not provide for extraterritorial effects unlike the Chapter 11 proceedings of reorganisation and restructuring of USA in which the moratoria has worldwide effect. The moratoria under section 95 and 96 is also slightly different in its applicability from the restraint of proceedings, etc., by the Court as it is provided under section 64(5)(b) and 65(4)(b) of IRDA 2018 [Part 5 Scheme of Arrangement]. Section 64(5)(b) and 65(4)(b) provide that the order of restraint, etc., "may be expressed to apply to any person in Singapore or within the jurisdiction of the Court, whether the act takes place in Singapore or elsewhere."

In the present case study, it is not revealed whether the Private equity fund Forty Thieves Capital belongs to Singapore or any other country. If it is a private equity fund of Singapore, then the order of restraint under section 64 and 65 will apply to its action within Singapore or elsewhere (other country) as it is an equity fund functioning under the jurisdiction of Singapore Court. But such provision of applicability of Moratoria is not available in section 95 and 96 of IRDA 2018. It is perhaps for the same reason PEC commenced local insolvency proceedings in Malaysia, China and United states to protect the assets of the companies in those jurisdictions.

Well considered and explained. 4 Marks.

Question 4.2.2 [maximum 4 marks]

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

[Type your answer here]

ANSWER: -

The UNCITRAL Model law on cross-border Insolvency (the Model Law) was adopted by Singapore on 10 March 2017 through the Companies (Amendment) Act 2017 by the

parliament. The amendment of the Companies Act [Section 41 of the Companies (Amendment Act) 2017] inserting a new Division 6 of Part X - Adoption of UNCITRAL Model Law on Cross-Border Insolvency with section 354A, 354B and 354C immediately after section 354 and a new Tenth Schedule [Section 50 of the Companies (Amendment Act) 2017] commenced with effect from 23 May 2017. After Insolvency, restructuring and Dissolution Act (IRDA) 2018 came into effect on 30 July 2020, the aforesaid sections of the Companies Act were repealed and new sections 252, 253 and Third Schedule to IRDA 2018(UNCITRAL Model Law on Cross-Border Insolvency) were introduced.

Prior to adoption of Model law, the Singapore courts addressed the cross-border insolvency issues by application of common law doctrines. The common law principles were also applied for recognition of foreign insolvency proceedings. On application of those principles, it was long held that courts can recognise foreign insolvencies when they take place in the jurisdiction where company is registered. The Singapore Courts also further extended this, confirming that recognition of foreign insolvencies by Singapore Courts is permissible in case where the foreign proceedings commenced in debtor company's centre of main interest, even if that is different from the place where the company is registered.

The Reciprocal Enforcement of Foreign Judgements Act (RECJA) allows judgement creditors from United Kingdom, Australia and certain specific Commonwealth countries to apply to Singapore High Court to register for recognition and enforcement of judgements of superior courts of above-mentioned jurisdictions. The second applicable regime in Singapore is Reciprocal Enforcement of Foreign Judgements Act, under which only Hong Kong SAR has been gazetted country for registration of its judgements in Singapore High Court for recognition and enforcement. It is possible to use the above-mentioned laws for recognition of insolvency related foreign judgements of superior courts of such countries and avail relief as may be granted by the Court.

At present UNCITRAL Model Law is the primary means of recognition of foreign insolvency proceedings. After adoption of the Model Law, the foreign representatives are now allowed to apply to High Court of Singapore for recognition of foreign insolvency proceedings. Model Law as adopted by Singapore has no requirement of reciprocity with the State in which the foreign insolvency proceeding is occurring. Under Article 6 of UNCITRAL Model Law the courts of the enacting State may refuse recognition of a foreign proceeding if such recognition is manifestly contrary to the to the public policy of the State. The Model Law as enacted in Singapore, however, omits the word "manifestly" for denying action on foreign insolvency proceedings on the ground of public policy exceptions. In the landmark decision of *Re Zetta jet Pte Ltd* reported in [2018] SGHC 16, the High Court of Singapore declined to grant full recognition of the Chapter 7 proceeding of US for breach of Singapore injunction, but allowed limited recognition of the foreign insolvency representative. It was held that omission of the word "manifestly" from Article 6 of Singapore model Law meant that the standard of exclusion on public policy grounds was lower in Singapore than in jurisdictions where Model law had been enacted unmodified.

The general requirements for obtaining recognition of foreign insolvency proceedings of Singapore Courts are now available in the Chapter 3 of Third Schedule of IRDA 2018 i.e., UNCITRAL Model Law on Cross- Border Insolvency. Article 15(2) of the Model Law adopted require that appointed foreign representative of the foreign proceedings may apply to the Singapore Court for recognition. The application for recognition will be accompanied by (a) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative;(b) a certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of foreign representative; or (c) in the absence of evidence mentioned in sub-paragraph (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceedings and of the appointment of the foreign representative. The application is further required to be accompanied by 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)]. The foreign representative is also required to provide the court with a translation into English of documents supplied in support of the application for recognition [Article 15(4)]. Under Article 16(2), the Singapore Court is entitled to presume that documents submitted in support of the application are authentic even without legalisation. The debtor's centre of main interests is presumed to be located at the place of registered debtor's registered office if evidence to the contrary is not produced [Article 16(3)]. Recognition can be allowed or denied in accordance with the provisions of Article 17. The decision to recognise a foreign proceeding is subject to Article 6, if it is contrary to public policy of Singapore. The foreign proceeding is to be recognised as foreign main proceeding if it is taking place in the State where the debtor has his centre of main interest and as a foreign non-main proceeding if the debtor has an "establishment" [Article 2(d)] in the State where the debtor has property, or place of operations where he carries on a non-transitory economic activity with human means or property or services.

The applicable provisions to determine the effect of recognition are available in Article 20 and 21 of the Model Law adopted. Under Article 20(1) it is provided that upon recognition of the foreign proceeding as a foreign main proceeding, the following actions against the debtor will be stayed subject to paragraph (2) of Article 20: (a) commencement, continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities; (b) execution against debtor's property; (c) the right to transfer, encumber or otherwise dispose of any property of the debtor. Article 21 of the Model Law adopted provides for grant of certain relief by the Court at the request of the foreign representative upon recognition of foreign proceeding as a foreign main proceeding or foreign non-main proceeding. The relief under Article 21 includes stay of commencement or continuation of individual actions and proceedings not granted under article 20 in case of recognition of foreign main proceedings, extension of pre-recognition relief granted under article 19(1), scope for examination of witnesses, entrusting 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 and granting any additional relief as may be available to Singapore insolvency Officeholder.

Detailed answer. Well done. 4 Marks.

*** End of Assessment ***