



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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6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Answer is A

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.

Answer is C

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.

8 marks

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

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

Commented [DB2]: 10/10

Undervalue transactions, unfair preferences and extortionate credit transactions are some of the impeachable transactions identified in the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"). The elements and defences of Undervalue transactions and unfair preferences will be examined below. The elements of the 2 transactions will be examined separately and then the defences will be examined collectively. The transactions are considered in the context of an individual who is adjudged bankrupt and not a company who has initiated insolvency proceedings.

1. The elements

a. Undervalue transactions -361 of the IRDA

- i. Where an individual is adjudged bankrupt and the individual has at the relevant time (as defined in section 363(1)(a)) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the Court for an order under this section. (s. 361(1))
- ii. As per 363(1)(a) of the IRDA, the relevant period for transactions entered at an 'undervalue' is three years before either the date the bankruptcy application was made or the date upon which the bankruptcy order was made. In either case the three-year period ends on the day of the making of the bankruptcy order.
- iii. The Court may, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction (s. 361(2)).
- iv. An individual is said to have entered into a transaction at 'undervalue' if (s. 361(3)):
 1. the individual makes a gift to that person or the individual otherwise enters into a transaction with that person on terms that provide for the individual to receive no consideration;
 2. the individual enters into a transaction with that person in consideration of marriage; or
 3. the individual 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 provided by the individual.

b. Unfair preferences - 362 of the IRDA

- i. Where the individual is adjudged bankrupt and has within the relevant period (as defined in section 363(1)(b) and (c)) given an unfair preference to any person, the Official Assignee may apply to the Court to restore the position to what it would have been if the bankrupt had not given the unfair preference.
- ii. Where a bankrupt has given 'unfair treatment' to an associate, it should be presumed, unless the contrary is shown, that it was influenced by the desire to prefer. – 362(5) of the IRDA.
- iii. An associate has been defined in s. 364 of the IRDA and includes a spouse, relative, the spouse of a relative, a person with whom the bankrupt is in partnership, the spouse or a relative of an individual with whom he is in partnership, a person whom the bankrupt employs or by whom he is employed, a person who is a trustee of a trust if the bankrupt or an associate is a beneficiary of the trust.
- iv. As per 363(1)(b) and (c) of the IRDA, the relevant time period for an unfair preference,
 1. which is not a transaction at an undervalue and which is given to an associate, is two years before either the date of the application was made or the date the bankruptcy order was

- made, in either case ending on the day the bankruptcy order was made.
2. which is not a transaction at an undervalue, the relevant period is one year before either the date of making the bankruptcy application or the date the bankruptcy was made.
- v. It will be an unfair preference if:
1. the other person is one of the bankrupt's creditors or a surety or guarantor;
 2. the bankrupt has anything which has the effect of putting the person into a better position than they would otherwise have been upon the bankrupt's bankruptcy; and
 3. in giving the preference the bankrupt must be influenced by a desire to prefer the other party such they would be in a better position on bankruptcy.
2. Defences – s. 365(3)
- a. The transaction will stand if
 - i. the individual has acquired an interest in the bankrupt's property from a person other than the bankrupt, or
 - ii. where the bankrupt has received a benefit or their preference from the transaction, if this was done in good faith and for value.
 - b. Such a transaction or benefit will not be in good faith if the individual had notice of the surrounding circumstances and the relevant proceedings, or was an associate of the bankrupt, or was connected with the individual with whom has entered into the transaction

Detailed answer and good job in referring to relevant sections of the IRDA. 4 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

The significance of the JIN Guidelines is that this is the first instrument through which a judicial communication and co-operation framework for cross-border insolvency has been adopted in Singapore

They do not have any effect on the substantive laws and are meant only to supplement the procedural rules of the courts. There are 14 guidelines set out under four main headings¹

The objectives of the JIN Guidelines include:²

Addressing key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings.

The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.

Good explanation on what the JIN Guidelines do. 2 marks.

Question 2.3 [maximum 4 marks]

¹ An update on the restructuring and insolvency regime in Singapore: amendments to the Companies Act and adoption of JIN guidelines 03 Apr 2017<<https://www.shlegal.com/insights/an-update-on-the-restructuring-and-insolvency-regime-in-singapore-amendments-to-the-companies-act-and-adoption-of-jin-guidelines>>

² Judicial Insolvency Network, JIN Guidelines, <http://www.jin-global.org/jin-guidelines.html>

How can a bankrupt obtain

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

of his bankruptcy under the Singapore IRDA?

This is dealt with in Part 18 of the IRDA.

1. Annulment

- a. S. 392 of the IRDA provides instances where a bankruptcy can be annulled. There are if:
 - i. the order ought not to have been made on grounds existing at the time;
 - ii. debts and expenses of the bankruptcy have been paid or secured to the satisfaction of the Court;
 - iii. 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
 - iv. the majority of creditors are residents in Malaysia and the distribution ought to happen there.
- b. An application to annul a bankruptcy order under subsection (1)(a) 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)
- c. The Court may annul a bankruptcy order whether or not the bankrupt has been discharged from the bankruptcy – section 392(3)
- d. The court may make include in its order for annulment, other provisions as it may deem fit

2. Discharge (s. 394 of the IRDA)

- a. An application for an order of discharge:
 - i. Needs to be made by the Official Assignee, the bankrupt or any other person having an interest in the matter
 - ii. Can be made at any time after the making of a bankruptcy order
 - iii. Needs to be made to the relevant court
 - iv. must be served on each creditor who has filed a proof of debt and on the Official Assignee if the Official Assignee is not the applicant, and the Court must hear the Official Assignee and any creditor before making an order of discharge
- b. once the application is made the court may:
 - i. Grant the discharge
 - ii. Refuse the discharge; or
 - iii. Grant the discharge subject to certain conditions as the court may think fit
- c. Where the bankrupt has committed an offence, the court shall refuse the discharge or grant the discharge subject to certain conditions specified in s. 394(b).

Detailed answer and good reference to the relevant sections of the IRDA. 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.

1 The restrictions on ipso facto clauses

Ipso facto clauses are clauses in a contract that allow a party to terminate or modify the contract based on the counterparty's insolvency. This would hinder the insolvency/restructuring process and therefore some jurisdictions seek to restrict or prevent the operation of these clauses.

Under the previous insolvency law of Singapore, there were no restrictions on *ipso facto* clauses. So the parties could rely on such clauses to terminate/modify the contracts. However, the IRDA 2018 introduced a provision restricting the operation of *ipso facto* clauses in certain circumstances. The Singapore provision is based on the corresponding provisions in Canadian insolvency legislation.

Section 440 of the IRDA contains the position on Singapore insolvency law on the *ipso facto* clauses.

Section 440(1) states as follows:

No person may, at any time after the commencement, and before the conclusion, of any proceedings by a company —
(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,
by reason only that the proceedings are commenced or that the company is insolvent.

Therefore, this provision seeks to maintain the status quo of the distressed company while it undergoes restructuring.³

Especially in relation to key contracts of the company

However, the court may hold that s. 440(1) does not apply. Section 440(4) provides that:

On an application by a party to an agreement, the Court may declare that this section 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.

In any event, s. 440(1) above, would not apply to certain contracts specified in s. 440(5) such as any prescribed eligible financial contract, any contract that is a

³ < <https://journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Insolvency-and-Restructuring/ct/eFirstSALPDFJournalView/mid/596/ArticleId/1613/Citation/JournalsOnlinePDF#:~:text=When%20applied%20to%20the%20restructuring,solely%20based%20on%20the%20other> >

license, permit or approval issued by the government or a statutory body, any commercial charter of a ship; and any agreement that is the subject of a prescribed treaty to which Singapore is a party.

Theoretically, section 440 is viewed as a positive step, although its practical effects are yet to be seen.

Good commentary and analysis.

2 Wrongful trading

The concept of wrongful trading has been introduced as a new concept through the IRDA. The relevant section is s. 239.

A company is deemed to "trade wrongfully" if it incurs debts or other liabilities, when insolvent (or becomes insolvent as a result of incurring such debts or other liabilities), without reasonable prospect of meeting them in full.⁴ The court may, upon a party's application, declare that person who was a party to the company trading wrongfully is personally responsible 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.
- (section 239(1))

Therefore, actual knowledge of the wrongful trading is not required. Further, one does not need to prove criminal liability to establish wrongful trading (s. 239(8)). This is an improvement from the previous regime, under which criminal liability was a prerequisite to proving wrongful trading. This is intended to encourage directors of distressed companies considering entering into contracts to exercise greater care.

Not just entering into contracts but incurring liability in general.

However, under s. 239(2) of the IRDA, the Court may relieve a person who has been declared to have been engaged in wrongful trading under s. 239(1), in whole or in part if:

- (a) the person acted honestly; and
- (b) having regard to all the circumstances of the case, the person ought fairly to be relieved from the personal liability.

Under s. 239(3), the court may also issue further directions/orders in pursuance to its declaration under subsection (1).

Every person found to be party to wrongful trading shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 3 years or to both. (s. 239(6) of the IRDA)

s. 239(5) of the IRDA also specifies the parties that can apply to the court under subsection (1):

- (a) the judicial manager of the company;
- (b) the liquidator of the company;
- (c) the Official Receiver;
- (d) any creditor or contributory of the company, with the leave of —

⁴ <https://www.whitecase.com/publications/alert/singapores-omnibus-insolvency-legislation>

- (i) the judicial manager or the liquidator, as the case may be; or
- (ii) the Court.

This is an excellent essay with commentary and analysis. 7 marks.

Question 3.2 [maximum 7 marks]

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

Part 7 of the IRDA contains the provisions in relation to judicial management (“JM”), whereas Part 8 of the IRDA contains the provisions in relation to liquidation.

Objective of the Mechanism

The objective of JM is to provide viable companies in financial distress the opportunity to rehabilitate or restructure their debts so that they can resume business as a going concern. However, the objective of liquidation is to ensure that there is a fair distribution of the company’s assets among creditors and contributories, and to terminate the existence of the company.

Officer appointed to handle the administration of the mechanism

In a JM, a judicial manager is appointed to take control of a company and to propose a plan to restructure or compromise the company’s debts and obligations with its creditors. Under a JM, a super-priority status to be granted to lenders who provide rescue financing. Further the latest amendments to the IRDA extended the coverage of moratorium and widened the eligibility criteria for JM.

In the case of liquidation, the liquidators are appointed or where no liquidators are appointed official receivers are appointed. (ss. 134 – 149)

Initiation of the process

As for the initiation of the JM, a company, its directors or creditors can apply to the General Division of the High Court to place the company under JM (s. 91(1)). As a new development of the IRDA, a company can now be placed in JM by an ‘out of court’ process. This will involve the company calling a meeting of creditors at which a resolution is passed by a majority in number and value of the company’s creditors present and voting, that the company should be placed under JM (s. 94)

As for the liquidation, the manner in which the liquidation is initiated depends on the type of liquidation. Liquidation can be by a creditors’ voluntary liquidation or by compulsory liquidation (s. 119).

In the case of a creditors’ voluntary liquidation, the process is initiated by passing the required shareholders’ resolution and convening a creditors’ meeting to give the creditors an opportunity to elect or confirm a liquidator to proceed with the liquidation.

In the case of a compulsory liquidation, initiated against a company via an application to the High Court to wind up the debtor company by any of the following:

- The company, its members, directors or creditors (including contingent or prospective creditors).
- A liquidator.
- A judicial manager (for companies under JM).
- Various ministers on grounds specified under the law.

Eligibility for the mechanism

As for a JM, under the law enacted through the IRDA, before the court grants the JM it must be satisfied that one of the purposes of the JM, as listed below, are satisfied:

- The survival of the company, or the whole or part of its undertaking as a going concern.
- Approval of an SA
- A more advantageous realisation of the company's assets as compared to a liquidation.

(s. 89)

s. 125(1) of the IRDA contains several circumstances under which a company may be wound up by the court, including where:

- (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;
- (d) the company has no member;
- (e) the company is unable to pay its debts;

s. 160(1) of the IRDA contains the circumstances under which a company may be wound up voluntarily, that is -

- (a) when the period (if any) fixed for the duration of the company by the constitution of the company expires or, where the constitution of the company provides that the company is to be dissolved on the occurrence of an event, when that event happens, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; or
- (b) if the company so resolves by special resolution.

Supervision and control of the process

When a JM order is in force, the company is managed and controlled by a judicial manager.

Also subject to the Court's supervision.

In the case of liquidation, the liquidator or the official receiver will take control of the company and its assets. They will also administer the liquidation process. Appointed liquidators or official receivers are also subject to the courts' control and supervision.

Protection from creditors/ effect of the proceedings

Where a company is placed in JM, a moratorium comes into force to prohibit any legal proceedings against the company or secured creditors from enforcing any charge or security over the company's property (s. 95). This comes into effect automatically upon the application for a JM order and until the order is made or the application is dismissed.

Similarly in the case of liquidation, an automatic moratorium is put in place prohibiting any legal proceedings against the company when a company is placed under liquidation.

Length, duration and conclusion of the procedure

JM lasts for 180 days from the date of the relevant court order, although this can be extended upon the application of the judicial manager for a period allowed by court (s. 111 of the IRDA). If the JM does not terminate or expire automatically, then the judicial manager must apply to discharge the JM order earlier if he/she thinks that the purpose specified in the order has been achieved or cannot be achieved.

In the case of a liquidation, there is no fixed time for the process as it would depend on various factors including the amount of the company's assets to be realised and the time taken to adjudicate the proof of debts submitted by the company's creditors. The liquidation of the company is formally concluded after the liquidator realises all the company's property, distributes a final dividend and applies to the court for an order to dissolve the company.

(Source: Restructuring and insolvency in Singapore: overview, by Angelia Thng, Esther Lim and Crystal Tan, Braddell Brothers LLP, Practical Law)

Very detailed compare and contrast which covers the key elements of both. 7 marks.

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

Commented [DB4]: 11.5/15

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:

- 1 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)**
- 2 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)**
- 3 What are the steps that need to be taken in order to place PEC's subsidiaries under judicial management out of court? **(3 marks)**

(The questions above have been numbered for the ease of referring to them in the answer below)

With the commencement of the IRDA, the sections in the Companies Act dealing with Judicial Management were repealed and largely re-enacted in Part 7 of the IRDA.

Question 1

Purpose of the judicial management proceedings

- 1 This is contained in s. 89(1) of the IRDA. The purposes of judicial management are:
 - 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 the Companies Act or section 71 of a compromise or an arrangement between the company and any such persons as are mentioned in the applicable section;
 - c. a more advantageous realisation of the company's assets or property than on a winding up.

- 2 It is the judicial manager's duty to perform its functions to achieve one or more of the above purposes.

What must be presented to the court in order to obtain a judicial management order

According to s. 91(1), where a company or its directors (pursuant to a resolution of its members or the board of directors) or any creditor (including any contingent or prospective creditor), makes an application for an order that the company should be placed under the judicial management of a judicial manager, the Court may make a judicial management order.

The application referred to above, can be made to court where a company, or any creditor of the company, considers—

- (a) that the company is, or is likely to become, unable to pay its debts; and
 - (b) that 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.
- (s. 90 IRDA)

A Court may only make a judicial management order if the Court:

- (a) is satisfied that the company is or will be unable to pay its debts;
- (b) considers that the making of the order would be likely to achieve one or more of the purposes referred to in s. 89(1) (mentioned above)

Good answer. Note as the company is in moratorium protection it would need to apply for leave to apply for JM. 2 Marks.

Question 2

To be able to access rescue financing while in judicial management, the judicial manager has to apply to court for rescue financing (s. 101(1))

The company for whom the rescue financing is sought should meet the threshold requirement in s. 101 and more specifically should show that the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority. This was also confirmed in the case of the case of Asiatravel.com Holdings Ltd.

Good answer. Note the 4 possible rescue financings with different priorities. 1 Mark.

Question 3

Steps that need to be taken in order to place PEC's subsidiaries under judicial management out of court

Section 94(1) of the IRD Act 2018 states that a company may embark on the voluntary process for initiating judicial management without having to first apply to the Court if:

- (a) the company is, or is likely to become, unable to pay its debts;
- (b) there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1); and
- (c) a resolution of its creditors is obtained.

According to s. 94(11),

- the resolution must be passed at a meeting of creditors as per s. 94(7) and 94(11), which needs to be attended by at least one director and the company secretary

- a majority in number and value of the creditors present and voting at the meeting need to resolve that a company is placed under the judicial management of a judicial manager (s. 94 (11)(d))
- a majority in number and value of the creditors of the company present and voting, must approve the appointment of a person as judicial manager (s. 94 (11)(e))

A company that proposes to obtain a resolution of the company's creditors as mentioned above for the company to be placed under judicial management, must give at least 7 days' written notice in the prescribed form of its intention to appoint an interim judicial manager under subsection (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 and manager of the whole (or substantially the whole) 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

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?

On 10 March 2017, Singapore adopted the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) through its adoption of the 2017 Amendment Act. Singapore courts have been empowered to grant recognition for foreign main or non-main proceedings in accordance with the UNCITRAL Model Law.

A party intending to propose a scheme of arrangement or a compromise under s. 64 of the IRDA can be granted a moratoria which has extraterritorial effect (See s. 64(5)). Further, The moratorium also has some extraterritorial effect and allows the Singapore Courts to restrain the commencement of proceedings in foreign jurisdictions as long as the Singapore Court has *in personam* jurisdiction over the party seeking to be enjoined. This is because a judgment (which has an *in personam* effect) from a foreign court may be recognised in Singapore or enforced by an action at common law through the Singapore courts.

However, there does not appear to be equivalent provisions for 'judicial management'.

However, the Model Law may be of assistance here. It applies, inter alia, where "assistance is sought in a foreign State in connection with a proceeding under Singapore insolvency law" (Article 1(b))

Article 5(1) provides that "A Singapore insolvency officeholder is authorised to act in a foreign State on behalf of a proceeding under Singapore insolvency law, as permitted by the applicable foreign law."

Article 29(c) states that "in granting, extending or modifying relief granted to a foreign representative of a foreign non-main proceeding, the Court must be satisfied that the relief relates to property that, under the law of Singapore, should be administered in the foreign non-main proceeding or concerns information required in that proceeding."

In this case, since the proceedings in Malaysia, China and the United States are non-main proceedings (as they are "foreign proceedings, other than a foreign main proceeding, taking place in a State where the debtor has an establishment" – Article 2(g)), the Singapore court is empowered to extend the relief to the said non-main proceedings.

Notably, other jurisdictions have recognised the orders of the Singapore court. For instance, in the case of *Re Contel Corporation Ltd* [2011] SC (Bda) 14 Com, the Supreme Court of Bermuda recognised a scheme of arrangement sanctioned by the Singapore Courts.

Well done for identifying that JM is different to section 64. Model Law only relevant if it exists in other jurisdictions. 2.5 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.

Laws are available in Singapore to recognise foreign insolvency proceedings

1. The Reciprocal Enforcement of Commonwealth Judgments Act
 - a. This enables judgments from the United Kingdom and Australia, and certain specific Commonwealth countries to be registered in the Singapore High Court.
2. Reciprocal Enforcement of Foreign Judgments Act
 - a. Only Hong Kong SAR has been a gazetted country recognised for registration thus far
 - b. Once registered, the foreign judgment may be enforced against in Singapore as if it was a judgment issued from the Singapore High Court without fresh proceedings to be commenced.
3. Common law: A judgment (which has an *in personam* effect) from a foreign court may be recognised in Singapore or enforced by an action at common law through the Singapore courts.
4. UNCITRAL Model Law on Cross-Border Insolvency 1997 (UNCITRAL Model Insolvency Law)

General requirements in order for a Singapore court to recognise a foreign insolvency proceeding

1. An application for the recognition of foreign proceedings must be made in the manner set out in Article 15, that is:
 - a. By foreign representative
 - b. With the accompanying documents contained in Article 15(2) and (3).
2. A foreign proceeding is recognised as a foreign main proceeding if the foreign proceeding takes place at the debtor's centre of main interest (COMI), or as a foreign non-main proceeding where the debtor has an establishment.⁵

Effect of recognising the foreign insolvency proceeding

1. Article 20 of the Model Law contains the effects of recognition of a foreign main proceeding and Article 21 contains the effects of recognition of a foreign proceeding
2. As stated in Article 20(1), Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this Article —
 - a. commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities is stayed;
 - b. execution against the debtor's property is stayed; and
 - c. the right to transfer, encumber or otherwise dispose of any property of the debtor is suspended.
3. Therefore, the specific issue or the cause of action in Singapore is estopped.
4. The stay granted under Article 20 would have the same effect as if it the debtor had been subject to a winding up order in Singapore under the IRDA.
5. If a foreign proceeding is recognised as a foreign non-main proceeding, any orders in relation to the stay of actions/proceedings and suspension of rights will only be granted at the discretion of the court.

3 Marks

*** End of Assessment ***

⁵ *Restructuring and insolvency in Singapore: overview*, by Angelia Thng, Esther Lim and Crystal Tan, Braddell Brothers LLP, Practical Law