



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]: 44.5/50 = 89% Well done!

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. **Should be (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.

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. Answer is (c)**

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.

1. An 'undervalue transaction' is one type of impeachable transaction under Singapore insolvency law. A transaction will fall into this category where it:

Commented [DB2]: 10/10

- a. occurred within three years before the date of either a bankruptcy application or the date upon which the bankruptcy order was made, AND
 - b. Where the transaction is a gift, or a transaction for no consideration, or, the consideration for the transaction is marriage, or, the consideration for the transaction is considerably less in money's worth, than the consideration originally provided by the bankrupt.
2. An 'unfair preference' is a second type of impeachable transaction under Singapore insolvency law and arises where an individual is adjudged bankrupt and has within the relevant period of time (being within the preceding two years from either the date of the bankruptcy application or the date of the bankruptcy order), given an unfair preference to any person. A transaction will amount to an unfair preference if:
- a. The other person is one of the bankrupt's creditors, a surety or a guarantor.
 - b. the bankrupt has anything which has the effect of putting the person into a better position than they would have been upon the bankrupt's bankruptcy; and
 - c. in giving the preference, the bankrupt must be influenced by a desire to prefer the other party such that they would be in a better position on bankruptcy.

In the case of an unfair preference which is not a transaction at an undervalue (as described above), the relevant period is one year before either the date of the making of the bankruptcy application, or the granting of the order.

A defence available to a person who has acquired an interest in the bankrupt's property is to demonstrate that the transaction was made in good faith and for value. If this can be properly evidenced, then the transaction will stand. Such a transaction will not be considered to have been made in "good faith" if the individual who benefited from the transaction, had notice of the surrounding circumstances and the relevant proceedings, or was an associate of the bankrupt.

Answer covers the key points. 4 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

The Supreme Court of Singapore adopted the JIN Guidelines ("Guidelines for Communication and Co-operation between Courts in Cross-border Insolvency Matters") on 1 February 2017. The adoption of these guidelines was significant because it is the first time that a judicial communication and co-operation framework for cross-border insolvency has been adopted in Singapore. The objective of these guidelines is to both compliment the UNCITRAL Model Law, which was previously adopted by Singapore in March 2017, and to promote cooperation and communication between the different courts in cross border insolvency matters. For example, the US Bankruptcy Courts for the District of Delaware and the Southern District of New York, two leading cross-border insolvency courts, with whom the Singapore Court will regularly have to co-operate with on cross-border insolvency matters, have also adopted the JIN Guidelines. The adoption of the guidelines by Singapore, therefore, will allow for a more cohesive, cost effective and consistent approach to addressing cross-border insolvency matters, particularly when it is operating with other jurisdictions that have also adopted the same guidelines.

Concise answer 2 marks

Question 2.3 [maximum 4 marks]

How can a bankrupt obtain

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

of his bankruptcy under the Singapore IRDA?

- (i) Firstly (pursuant to section 392 of the IRDA), an application to annul a bankruptcy must be made within twelve (12) months of the bankruptcy order being made, otherwise the bankrupt will need to apply for the leave of the court for the application to be made. In order to obtain an annulment, the bankrupt must demonstrate to the court that either:
 - a. The bankrupt order ought not have been made on grounds existing at the time;
 - b. Debts and expenses of the bankruptcy have been paid or secured to the satisfaction of the court; or
 - c. That distribution of the estate will take place in Malaysia or the majority of the creditors are residents in Malaysia, and the distribution ought to happen there.
- (ii) Alternatively, a discharge may be obtained by the bankrupt (or the Official Assignee, or any other person having an interest) by applying to the Court for an order of discharge any time after the bankruptcy order is made (section 394, IRDA). If the bankrupt makes an application, it must also be served on each of the creditors who have filed a proof of debt in the bankruptcy, and the Court will hear from the creditors before making the order for discharge. In response to the application for discharge, the Court may either **i)** refuse the discharge, **ii)** make an order discharging the bankruptcy absolutely, or **iii)** make an order discharging on conditions as it thinks fit, including conditions with respect to future income or property.

Answer covers the key points. Also the Official Assignee can issue a discharge. **4 marks.**

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

Commented [DB3]: 13/15

Question 3.1 [maximum 8 marks]

Write a brief essay on

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

under the Singapore IRDA.

The IRD Act 2018 has introduced two new provisions which are of some significance to the insolvency and restructuring legal framework of Singapore. These are (i) a new provision in respect of wrongful trading and (ii) new restrictions on the application and operation of *ipso facto* clauses in contracts. Each of these new legislated areas are dealt with in turn below.

Wrongful Trading

The new provisions in respect of wrongful trading impose personal liability for the company's debts on an individual in circumstances where they have knowingly allowed the company to

continue trading and in circumstances where they knew, or ought to have known, that the company was insolvent, or should not have been trading due to the fact that it was unable to pay its debts. "Wrongful Trading" is defined as an incurrence of debt or other liabilities without a reasonable prospect of meeting them in full, when the company is insolvent or becomes insolvent as a result of such debt.

This new provision is an example of the influence that the English Insolvency provisions have had on the development of insolvency practice in Singapore, with this new provision adopted from English insolvency legislation, which also does not require criminal liability in order for wrongful trading to be recognised.

The relevant rules are found at Section 239 ("Responsibility for Wrongful Trading") of the IRD Act, and impose personal liability for the company's debts on a person if:

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

This new section therefore, empowers the Court to make a declaration that any person who was knowingly a party to the company trading wrongfully, is personally responsible for the debts or liabilities of that company. Notably, this section does not just apply to the company's directors and officers, but also any other person who has been involved with the running of the company and who has had knowledge and influence over the company trading wrongfully.

A company is found to have "traded wrongfully" if the company incurs debt or liabilities without reasonable prospect of meeting them in full, or when the company is insolvent, or becomes insolvent because of the incurrence of such debt or liability.

Finally, and to mitigate the risk of being penalised under this section, a company, or any person party to, or interested in becoming a party to, the carrying on of business with a company, may apply to the court for a declaration that a particular course of conduct, a transaction or a series of transactions would not constitute wrongful trading.

Ipsa Facto Clauses

The second new provision in the IRD Act 2018 that is significant to insolvency practice in Singapore, (and in particular, to restructuring) is section 440 of the Act which limits the exercise of ipso facto clauses under a contract when certain proceedings in respect of a company have been commenced, or when the company is insolvent.

An ipso facto clause is a provision under a contract which empowers either party to terminate or modify the contract on the occurrence of the counterparty's insolvency. The effect of this can make it difficult for companies that are attempting to restructure, because often it is the contracts with various suppliers and service providers that help to retain stability and value in the business as a going concern. For this reason, it is common in other jurisdictions for the use of ipso facto clauses to be restricted in some circumstances, for example Singapore have modelled their section 440 off similar provisions found under Canadian Law.

Previously, there were no restrictions on the enforcement of an ipso facto clauses under Singapore law, however, the introduction of section 440 may now allow for companies to continue key contracts and provide a relief during a restructuring. In light of the fact that Singapore's insolvency system strongly encourages corporate rescue and the restructuring of companies when they enter financial difficulties, section 440 is consistent with this overall approach. To this end, section 440 restricts the enforcement of ipso fact clauses once proceedings relating to any applications under judicial management or a scheme of arrangement, involving the "supercharged" scheme process are commenced by a company.

Whilst Section 440 may prove to offer significant relief for an insolvent company that is being restructured and can assist in providing some certainty over valuable contracts, this is not necessarily favourable or necessarily in the best interests of the counter party who may find themselves locked into business with a company that is financially unstable. With this in mind, section 404 is “softened” for the benefit of the counterparty, as although the contract remains operational and cannot be terminated due to the insolvency, the counter party is not required to continue to advance money or new credit to the insolvent company. Further, sub-sections (4) and (5) also operate to provide further relief in some circumstances.

Firstly, Section 440(4) provides the Singapore Courts with a discretion to rule on the applicability of the restrictions in the event that an application by a counterparty can demonstrate that it will suffer “significant financial hardship” in the event that it is prevented from relying on the ipso facto clause and being able to terminate the relevant contract with the insolvent party.

Further, section 440 (5) sets out a list of contracts which are excluded from the exception, and therefore, can still terminate in reliance on an ipso facto clause. These contracts include:

- Any eligible financial contract as may be prescribed (clearly, this will provide significant relief for any financiers, lenders, or banks contracting with Singapore companies).
- Any contract that is a licence, permit or approval issued by the Government or a statutory body.
- Any contract that is likely to affect the national interest, or economic interest of Singapore, as may be prescribed.
- Any commercial charter of a ship.
- Any agreement within the meaning of the Convention as defined in section 2(1) of the international Interests in Aircraft equipment Act; or
- Any agreement that is subject of a treaty to which Singapore is party, as may be prescribed.

The introduction of section 440 (restricting the use of *ipso facto* clauses) and section 239 to hold persons personally accountable for wrongful trading, are important developments within Singapore law and which help to further modernise the insolvency and restructuring regimes in this jurisdiction. These legal developments are also reflective of Singapore’s focus on corporate rescue and ensuring that companies facing financial difficulty are given an opportunity to restructure and continue trading, in circumstances where, if given the correct oversight and management, there is the ability to do so.

Very detailed essay. Well done. Good concluding paragraph that sets out the importance of these two amendments. 8 marks.

Question 3.2 [maximum 7 marks]

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

Judicial Management is an alternative process which can be used by a company as a compromise to a formal liquidation. One common criticism of judicial management is that it is more of an insolvency process than a corporate rescue mechanism, there are however, clear differences between a company in liquidation and a company being placed under judicial management.

The critical difference between the two mechanisms is found in the ultimate aim for each process. For a liquidation, the end goal, or the final intention is normally to bring the company

to an end and dissolve the business. By comparison, the end result of the judicial management process is primarily to rehabilitate the company, or at least salvage parts of it so that it can continue to be profitable, and in the end, it can continue as a going concern. The exception to this latter point, is that creditors are able to use the judicial management process as a means of liquidating the company, but only if they can show that judicial management will yield a more valuable outcome for the creditors, compared with a normal winding up procedure. Accordingly, it is at this point that the two mechanisms overlap or become similar.

Commencement of liquidation compared with Judicial Management

The objective of a liquidation in Singapore is to ensure fair and orderly distribution of the company's assets as between the creditors and other contributors, and to terminate existence of the company, by way of dissolution once the liquidation process is complete. On this basis, liquidation can be voluntary, or court ordered, and there are three types in Singapore being members voluntary winding-up (MVL), creditors voluntary winding-up (CVL) or compulsory liquidation (CL). A voluntary winding up is completed outside of the court process and is brought into effect by the passing of a special resolution by the members or creditors and members. An MVL can only occur if the company is solvent and is able to pay its debts in full and discharge its liabilities before being dissolved. On the other hand, a CVL or a CL occurs due to the insolvency of the company.

By comparison, judicial management is a form of corporate rescue and is an alternative compromise to a formal insolvency proceeding. Similarly, to a liquidation, it requires the appointment of an insolvency practitioner, although they are appointed by the Court as a "judicial manager". The judicial manager replaces the company's directors and takes over the responsibility of running the company once appointed (section 227B(2)). Either the Company or the creditors can apply to the court to appoint a judicial manager where there is evidence that demonstrates that the company is likely or is likely to become unable to pay its debts. Further, it must be evidenced that one or more of the purposes prescribed in the act will be achieved, such as the survival of the company, or the restructuring of parts of the company so that it can continue as a going concern or that more assets can be realised through this process compared to with a formal liquidation procedure.

Accordingly, and as noted above, a key difference between liquidation and judicial management is the intended outcome at the end of the process. Liquidation is intended to culminate in dissolution of the company, whereas judicial management should only be pursued where there is a reasonable probability of rehabilitating the company or of preserving part of the business as a going concern (or it needs to be demonstrating that the interested of the creditors would be better served in a JM compared with a liquidation).

Whilst there are no prescribed circumstances which compel the company to file for either process, because of the wrongful trading provisions under the IRDA, directors need to be careful that they do not permit the company to trade whilst insolvent, as they can end up personally liable for any losses caused. Where a creditor or a shareholder has not already initiated either process, this risk is normally persuasive enough to cause a director to file the winding up petition or to enter into judicial management.

Notably, the court will not make a judicial management order if the company has already gone into liquidation, or where the company is a bank, an insurer or a finance company. Accordingly, judicial management is a step that needs to occur prior to liquidation, with the possibility that a liquidation could follow if judicial management is unsuccessful. Judicial management, therefore, only arises in anticipation of the company becoming insolvent and as a means of trying to remedy that, whereas a liquidation is a more flexible mechanism which can be used for both an insolvent company, but also a solvent company, both as a means of dissolving the business. **Good analysis on the differences**

The effect of the applications being made:

In a court ordered liquidation there is a period of vulnerability for a company where until the winding up order is granted by the court, the company or any creditor can apply to restrain the proceedings. After the order is made however, there is a moratorium against further actions against the company being brought, without leave of the court.

By comparison, in a judicial management process, an automatic moratorium comes into effect upon the filing of the application and then if the order is granted, this stay will extend for the period of the judicial management process. The judicial manager and the court retain discretion to allow certain proceedings that would have otherwise been prohibited, or for enforcement actions to be continued.

When the winding up application is made, the applicant is able to nominate a person to be appointed as the liquidator in the event that the order is granted. The fundamental role of the liquidator is then to investigate the affairs of the company and the conduct that has taken place in running the business, to recover and realise the assets, which will often involve selling off parts of the business or pursuing legal proceedings in order to recover value, and to adjudicate creditors' claims to ensure an equitable distribution of the assets and in accordance with the order of preferences under the act. As this process is occurring, the liquidator is gradually winding the company up, and shutting down operations (although in the most cost effective and economic way possible, to maximise the recovery for the creditors and interested parties).

By contrast, upon the granting of the judicial management order by the Court a judicial manager is appointed who is an independent insolvency practitioner (as with a liquidator). They then take control of the company and the assets for 180 days (which can be extended by agreement of the court) and are responsible for continuing to oversee the running and management of the company (with a view to it surviving rather than being wound up), whilst also formulating a plan (or 'scheme') in order to restructure and salvage the business. The **JM would also have investigative powers that are similar to a Liquidator**

During this process, and whilst creditors will play a limited role in decisions regarding the management of the company itself, they retain more of an influential role within a judicial management process, than compared with a liquidation. Firstly, a creditors committee is formed which will consider and approve proposals of reorganisation put forth by the judicial manager. The creditors committee (once formed) can be granted the power to require the judicial manager to appear before it and provide information relating to the functions of the judicial manager, and the company, as the process progresses. If the committee is dissatisfied with the extent or the nature of the information being provided by the judicial manager, it can apply to the court (and if the court agrees) for the judicial manager to be given certain directions, as to the running of the process, and as the Court considers appropriate. Accordingly, due to the powers allowed to the creditors through this process, judicial management, by comparison to a formal liquidation, is 'a creditor in possession' procedure. **A committee of inspection can also be formed in a liquidation**

A critical aspect of the judicial management procedure which does not exist in a liquidation is that the judicial manager develops and executes a rescue plan which must be approved by a majority of the creditors. Pursuant to section 117 of the IRD Act 2018, for a proposal to be binding on the company, the judicial manager and the creditors or a class of creditors, it must be approved by:

- A) A majority in number of each class of creditors present and voting (in person or by proxy) at the meetings convened by the court. And

B) Such a majority in number must represent three-quarters in value of the respective class of creditor present and voting.

Votes are taken at the meetings of each class of creditors (where there are multiple classes). In order to try and achieve approval of the scheme, judicial management also allows for cross-class cramdown by way of the IRD Act 2018. Accordingly, although one or more classes of creditors may have rejected the proposed scheme, subject to certain conditions, a scheme can still be approved if a majority in number of creditors meant to be bound by the compromise have agreed. The underlying intention here is to not allow overall influence by a minority of creditors, to prevent a scheme from proceeding.

In order for a cross class cramdown to occur, and in order for the Court to approve it, the majority in number of creditors supporting the scheme, must also represent three-fourths in value of the creditors who are meant to be bound by the compromise arrangement. Finally, the Court must also be satisfied that the compromise arrangement doesn't fairly discriminate between two or more classes of creditors and is fair and equitable to the dissenting classes.

Completion and discharge of the procedures:

As noted above, once the distribution of assets and the discharge of any remaining liabilities has been concluded, the winding up of the company is at an end and the company can be dissolved. The process is then formally ended by the liquidator preparing an account which records how the company has been disposed of and then a meeting is held where the account is presented to the shareholders. A final meeting is then held with a quorum of (being at least two) shareholders, following this and within 7 days the liquidator must lodge with the Registrar and the Official Receiver a return recording that the final meeting has been held and attaching the final account. Three months following the lodging of the return, the company will be deemed to have been dissolved.

By comparison, judicial management will be discharged after the 180-day timeframe (or at the end of the time extensions) during which time hopefully, the proposed scheme will have been approved by the necessary portion of creditors and approved by the Court allowing the company to continue as a going concern.

If a scheme has not been agreed and approved within the timeframe (and no extension of time is sought) then this can also bring the judicial management to an (unsuccessful) end. Further, judicial management can also be brought to an end (prior to the 180-day timeframe) if the judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved, or if (in the opinion of the creditors and the court) the judicial manager has acted in a manner that would unfairly prejudice the interests of the creditors or the managers of the company. Accordingly, if a scheme is not achieved and the company is not successfully restructured, then the failure of the judicial management process can give rise to a liquidation.

Accordingly, whilst judicial management and liquidation do have similarities throughout parts of the processes, they are effectively two distinct insolvency mechanisms with distinct management processes and quite different intended outcomes.

Good comparison of the differences between the two mechanisms especially in respect of the reasons why a company would choose either. However, the analysis after either mechanism has been commenced could be sharpened. 5 marks.

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

Commented [DB4]: 13.5/15

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:

- 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)**

Firstly, the lenders should be advised that judicial management is one form of corporate rescue available under Singapore law which is a creditor-in-possession procedure and involves the appointment of an independent insolvency practitioner by the court. The judicial manager then takes over the management and control of the company in place of the directors. The key purpose of judicial management is to try and rehabilitate or restructure the company or at least parts of the business, so that it then may continue as a going concern. The purpose can also be used where the outcome for the creditors is likely to be advantageous (for example, due to a greater realisation of assets) compared with winding the company up. To obtain a judicial management order, the application may be brought by the company, its directors or its creditors and must show that:

1. The company is or will be unable to pay its debts, and
2. there is a reasonable probability of rehabilitating the company, or of preserving all or part of its business as a going concern, or that otherwise, the interests of the creditors would be better served (by way of judicial management) than by resorting to a winding-up (per section 90 of the IRD Act 2018).

The Court will only make the order if it is satisfied that at least one of these purposes will be achieved.

A final point to note is that given that PEC has operations in a number of other countries, and was incorporated in the Cayman Islands, the Lenders should be further advised that if PEC is considered a foreign debtor, then it is still able to be placed under judicial management, provided that it can show a "substantial connection" with Singapore. In respect of PEC, this could be demonstrated by showing that i) PEC is carrying on business in Singapore, ii) that PEC has substantial assets in Singapore and/or iii) that PEC's centre of main interests (COMI) is located in Singapore (given the nature of PEC's overseas operations, there may be debate as to the actual location of PEC's COMI).

A good analysis. The fact it owns Singapore subsidiaries would also be relevant. There might also be Singapore law governed security or loan documents. 2 Marks.

Assuming that PEC is then placed under judicial management then upon application by PEC/the Judicial Manager, the Singapore Court may make an order regarding rescue financing. The requirements that must be satisfied for this are that the rescue financing are as follows (either or both requirements can apply);

1. that obtaining the financing is necessary for the survival of PEC, and/or,

2. that obtaining the financing is necessary to achieve a more advantageous realisation of the assets of PEC, compared with the winding up of the company.

More detail is required here. A key point to highlight would be the different types of priority afforded to rescue financings and how existing creditors have adequate protection as required under the legislation. **1 Mark.**

Finally, and regarding PEC's subsidiary companies being placed under judicial management outside of court, this is possible, however the lenders should first be advised that as PEC's business operations are by way of a group company structure, with various separate companies that form the one entity, Singapore law does not recognise the concept of insolvency proceedings for a group of companies. Each company is treated as a separate legal entity and in the case of an insolvency, separate proceedings would need to be filed for each company. As to placing the subsidiaries under judicial management out of court, section 94(1) of the IRD Act has introduced a new voluntary process for initiating judicial management without having to apply to the court if:

1. the company is, or is likely to become unable to pay its debts.
2. There is a reasonable probability of achieving one or more of the purposes of judicial management mentioned above, and
3. A resolution of the company's creditors is obtained.

Accordingly, in placing each of the subsidiaries into judicial management out of court, these requirements will have to be met for each of the PEC subsidiary companies that are to be placed under judicial management, rather than being able to group the companies together and treat them as one entity.

The lenders should also be advised that section 94 of the IRD Act then sets out the procedure for a voluntary management process which includes i) the manner in which creditor meetings are to be conducted, ii) notice requirements and iii) relevant timelines.

A good summary. More details of the specific requirements would have assisted. **2.5 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?

From the point that the judicial management application is filed, there is an automatic moratorium on legal proceedings against the company. Once the judicial management order is made, which is the case here, a more extensive moratorium will come into effect for the period of the judicial management (see IRD Act 2018, s 96 (4)). Only the Court or the judicial manager has the discretion to allow (what would otherwise be) prohibited proceedings or enforcement actions to be commenced or continued. Whilst the moratorium would prevent foreign creditors and other interested parties from bringing actions against PEC and its assets in Singapore, there is nothing under section 96 of the IRD Act which specifies that the moratorium has extra territorial effect, as is specifically provided for by way of a Super-charged scheme of arrangement (pursuant to section 64 of the Act).

Although, upon the appointment of a judicial manager, that individual has authority to deal with all of the company's assets (as recognised by the Singapore Court) in order for that authority and the judicial management procedure (and therefore the moratorium) to have extra territorial effect, PEC should be advised that they will need to seek recognition of the proceeding in the foreign jurisdictions where the various assets are located (insofar as they haven't initiated separate insolvency proceedings in those locations), and then apply to those courts for specific relief in order for the moratorium to be recognised and effective in those jurisdictions. For the assets that are in jurisdictions where the Model Law has been adopted, the recognition applications should be straight forward, and provided there is no dispute that Singapore is the COMI for PEC, then it should be recognised as the foreign main proceeding, with the ability for the moratorium to then be recognised in the foreign jurisdiction. Even if it is not recognised as the main proceeding, the Model Law still allows for the Court to order a stay at its discretion and if it is appropriate in the circumstances. We are told that PEC has initiated insolvency proceedings in some of the jurisdictions where its assets are located in order to obtain the benefit of a moratorium for actions against the assets in those places – this is sensible given that China and Malaysia have not adopted the Model Law.

A comprehensive answer. Well done. 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.

In March 2017 Singapore adopted the UNCITRAL Model Law on Cross Border Insolvency ("the Model Law") via the 2017 Amendment Act. It is through this legislative framework that a foreign representative can now apply to the Singapore High Court for recognition of foreign insolvency proceedings. Prior to the adoption of the Model Law, the representative would have had to rely on common law principles.

Furthermore (and although the Model Law is the operative mechanism to use in recognition application), the Reciprocal Enforcement of Commonwealth Judgements Act (RECJA) allows for judgements in certain specific Commonwealth Countries, such as the UK and Australia to be recognised and enforced in the Singapore High Court (if the HC is of the opinion that it is just and convenient for the judgement to be enforced). There is a further regime in Singapore for the recognition of foreign judgements, and that is by way of the "reciprocal Enforcement of Foreign Judgements Act, however, so far only Hong Kong SAR is a recognised country for registration under that Act.

Finally, in February 2017, the Supreme Court of Singapore adopted the Guidelines for communication and cooperation between courts in cross-border insolvency matters (the JIN Guidelines). This is significant because it provides a framework for judicial communication and Co-operation between the Singapore Court and another foreign Court both dealing with a cross border insolvency proceeding.

The general requirements for the Singapore Court to recognise a foreign insolvency proceeding are firstly that the proceeding is in relation to an insolvency or a reorganisation of a foreign debtor. Insolvency proceeding (under the model law and at Singapore Common Law) is normally given a broad interpretation. Furthermore, it must be demonstrated to the court that the foreign representative has been granted authority to act in the matter, by the foreign Court. Finally, the foreign representative must demonstrate that the foreign debtors has a substantial connection with Singapore. This could be by way of one (or more) of the following:

- a) the foreign debtor's centre of main interest (COMI) is located in Singapore;
- b) the foreign debtor is carrying our business in Singapore or has a place of business in Singapore;
- c) the foreign debtor is registered as a foreign company in Singapore;
- d) the foreign debtor has substantial assets in Singapore;
- e) the foreign debtor has chosen Singapore as the law governing a loan or other transaction or the law governing one of the disputes in the insolvency proceeding;
- f) the foreign debtor has submitted to the jurisdiction of the Singapore Courts for the resolution of one or more of the disputes.

If recognition is granted, the foreign proceeding will either be recognised as the "foreign main" or "foreign non-main" proceeding. If the debtor's COMI is located in the foreign jurisdiction from where the foreign proceeding and representative have originated, then the proceeding will be recognised as the "foreign main proceeding" and will be granted automatic relief upon the proceeding being recognised. If the foreign proceeding is only recognised as a 'non-main' proceeding, then relief is still available but it is not automatic and specific applications will need to be made to the Singapore Court for the relief that is required.

Notably, there is no requirement for reciprocity under Singapore's adoption of the Model Law which means that the foreign representative will still be eligible to apply under the law, regardless of whether the foreign applicant's own jurisdiction would have also granted a recognition application to Singapore.

Recognition of foreign proceedings is also available in respect to restructuring proceedings (whether voluntary or not), so it is not just limited to those companies that are in liquidation.

Finally, it should be noted however, that under the Model Law, the Singapore Court can decline the recognition application if the recognition is "manifestly contrary" to public policy.

Another comprehensive answer which addresses and analyses the key issues. 4 Marks.

*** End of Assessment ***