INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

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**.

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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.

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.

9 marks

QUESTION 2 (direct questions) [10 marks]

Commented [DB2]: 8.5/10

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.

Unfair Preference Transactions

The elements of an unfair preference transaction are:

- The beneficiary of the unfair preferential transaction is either a creditor or a guarantor of the debtor in respect of any of its debts/liabilities.
- The debtor company was insolvent at the time of entering into the unfair preferential transaction, or the debtor company became insolvent as a result of entering into the unfair preferential transaction.
- As a result of the unfair preferential transaction, the beneficiary of the unfair preferential transaction has been put in a financially better position as opposed what it would have been in, had the debtor company been liquidated.
- The debtor company had the intention of giving an unfair preference to the beneficiary of the unfair preferential transaction. Additionally, the debtor company is presumed to have an intention to give a preference in all those cases where the beneficiary is an associate/related party of the debtor company.

The relevant time period for determining whether the debtor company has entered into an unfair preferential transaction is two years from the date of the winding up petition in case the beneficiary is an associate/related party of the debtor company; whereas, the relevant time period in case non-associate/unrelated parties is six months. The lookback period is incorrect.

Undervalue Transactions

The elements of an undervalue transactions are:

- If the company makes a gift to the beneficiary or if the company executes a transaction where the value of the provided consideration is significantly lesser than the value of the received consideration.
- The company was insolvent at the time it entered into the undervalue transaction or it became insolvent as a result of entering into the undervalue transaction.

Also, the debtor company is presumed to have an intention to enter into an undervalue transaction in all those cases where the beneficiary is an associate/related party of the debtor company. The relevant period for determining whether the debtor company has entered into an undervalue transaction is 5 years from the date of the winding up application regardless of whether or not the beneficiary is an associate/related party. The lookback period is incorrect.

Defences

- If an interest in the bankrupt debtor's property has been acquired through another person/entity apart from the bankrupt debtor.

- Any transaction entered into in with good faith and for value will stand the scrutiny of the law on impeachable transactions.

Decent effort save for some inaccuracies. **3 marks.**

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

The Judicial Insolvency Network ("**JIN**") held its maiden conference in Singapore from October 10-11, 2016, wherein the "*Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters*" ("**JIN Guidelines**") were first conceptualized. What is the significance of this? First of its kind?

The JIN Guidelines broach the key and material aspects of communication and cooperation amongst courts, the insolvency representatives, and other parties/stakeholders involved in any cross-border insolvency proceeding. The JIN Guidelines also provide for conducting joint hearings.
The objectives of the JIN Guidelines are:

- Co-ordinate and administer insolvency proceedings opened in more than one jurisdiction ("**Parallel Proceedings**") in a timely and an efficient manner.
- Administering Parallel Proceedings in a manner in which all the stakeholders' interests are protected.
- Preserving and maximizing the value of the assets of the debtor company.
- Efficiently managing the debtor's estate and business undertaking while balancing the interests of all the stakeholders, the complexity of the issues at stake, etc.
- Ensuring adequate sharing of data and information for the reduction of costs.
- Minimization/prevention of litigations and associated costs in Parallel Proceedings.

1.5 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?

- **Annulment**- A court may annul a bankruptcy in the following situations:
  - If a bankruptcy order shouldn't have/ought not to have been made basis the grounds that were in existence at the time of making the bankruptcy order.
  - The debts and expenses pertaining to the bankruptcy have been subsequently repaid or have been additionally secured to the court's satisfaction.
  - If the bankrupt's estate is to be distributed in Malaysia, or if the majority of the bankrupt's creditors are Malaysian residents and the distribution of the bankrupt's estate is ought to happen in Malaysia.

  An annulment application is required to be made within a period of 12 months from the date of the bankruptcy order, unless the court grants a leave to the applicant bankrupt to make an annulment application later.

- **Discharge**- A bankrupt may move the court for a discharge any time after the bankruptcy order is made. The bankrupt is required to serve a copy of the application seeking discharge on all creditors that filed their respective proofs of debt during the bankruptcy proceedings of the bankrupt. Further, the court is required to hear any creditor that wishes to be heard before granting a discharge application.

  The court may pass the following orders in relation to a discharge application:

  - It may refuse to grant the discharge to the applicant bankrupt.
  - It may pass an order absolutely discharging the bankruptcy.
  - It may pass a conditional discharge order subject to certain terms and conditions that it deems fit, including conditions with respect to the future income/property of the bankrupt debtor.

4 marks. Also note that the OA can issue a certificate of discharge.

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

Commented [DB3]: 10/15

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.

(i) Restriction on *ipso facto* clauses

Pursuant to *ipso facto* clauses in contracts, a party to a contract can either modify or terminate a contract following the insolvency/bankruptcy of the other counterparty.

As opposed to the previous Singaporean insolvency regime, the IRDA contains restrictions on the operability of *ipso facto* clauses in certain circumstances. The IRDA provisions restricting the operability of *ipso facto* clauses have been modeled along the lines of the Canadian insolvency legislation.

Section 440 of the IRDA imposes restrictions on the enforcement of *ipso facto* clauses once either judicial management or a scheme of arrangement involving the supercharged process are commenced in relation to a company.

It is however important to note that Section 440 of the IRDA does not prevent the exercise of other contract termination rights such as failure of a counterparty to pay the requisite dues.

Nonetheless, the following contracts are exempted from the restrictions under Section 440 of the IRDA: (i) eligible financial contracts that are so prescribed; (ii) contracts that operate as a license, permit or approval pursuant to a sanction/approval granted by a governmental/statutory body; (iii) commercial charters of ships; (iv) agreements that are subject to treaties ratified by Singapore; (v) contracts that pertain to the national/economic interests of Singapore; (vi) Agreements that fit within the definition “Convention” as has been

defined under Section 2(1) of the International Interests in Aircraft Equipment Act (Cap. 144B).

However, the IRDA does not cast any obligation on counterparties to advance new monies/credit to insolvent companies.

Lastly, pursuant to Section 440(4) of the IRDA, Singaporean courts have been conferred with overriding powers to rule on the applicability and extent of application of the aforementioned restrictions pertaining to *ipso facto* clauses, subject to the applicant demonstrating the possibility of the occurrence of "significant financial hardships" as a result of enforcing the restriction on *ipso facto* clauses.

(ii) Wrongful Trading

Pursuant to Section 239 of the IRDA, a court can hold a person that was/is knowingly a party to a company engaging in wrongful trading, to be personally accountable for the debts/liabilities of the company.

Wrongful trading occurs when a company takes on debt/liabilities without there being a reasonable chance of it being able to meet them, at a time when the company is insolvent or it becomes insolvent subsequent to it taking on the debt/liabilities.

If a person/entity is interested in engaging commercially with the company, then they might make an application to the court requesting that their proposed commercial engagement with the company not be construed as wrongful trading.

Pursuant to Section 239 of the IRDA, personal liability can be imposed on a person if:

- That person knew that the company was engaged in wrongful trading; or
- In their capacity as an officer of the company, they ought to have known that the company was engaged in wrongful trading.

The present wrongful trading provision in the IRDA has been inspired by English insolvency law, and does not require that there be any criminal liability before it becomes applicable. How is this different from insolvent trading?

Decent answer which could have been enhanced with more commentary and analysis. **6 marks.**

Question 3.2 [maximum 7 marks]

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

Judicial management is a corporate rescue tool, whereas liquidation is not. So what is liquidation then? In fact, judicial management is considered to be as an alternative to liquidation.

In a judicial management, the creditors committee can require the judicial manager to appear before it and furnish to them such information that they desire, and they can even move the court for directions in case they're not satisfied with the inputs that they receive

from the judicial manager. Whereas, the creditors have no such power in a liquidation. Are you sure in respect of liquidation?

Post-appointment, a judicial manager stays in control of the company and its undertaking for a period of 180 days, unless that period is extended by the court. Whereas, a liquidator stays in office till the dissolution of the company.

An application for judicial management can only be made when a company is unable to pay its debts or foresees its inability to pay its debts subsequently, and that there is a reasonable possibility of: (i) rehabilitating the company; and (ii) preserving a part or whole of its business. Additionally, it must also be proved to the court that the interests of its creditors would be better served in a judicial management as opposed to a winding up proceeding. Whereas, liquidation can be initiated by the members of the company when it is solvent (i.e., members' voluntary liquidation), or by its creditors when its unable to pay its debts (i.e., creditors' voluntary liquidation), or even by the court basis certain grounds, including inability of the company to pay its debts (i.e., compulsory winding-up).

An automatic moratorium is imposed after a judicial management application is filed. Whereas, a moratorium under the liquidation procedure is enforced after the commencement of the winding-up proceedings. How is the scope of the moratorium different for both?

A court may appoint an interim judicial manager in certain circumstances mainly for protecting the interests of the debtor company and its creditors. However, Singaporean insolvency law does not provide for the appointment of an interim/provisional liquidator.

The judicial manager's powers in a judicial management (listed in Sch. I of the IRDA) are more limited as opposed to the powers of a liquidator in a liquidation proceeding (listed in Section 144 of the IRDA).

Pursuant to Section 254 (2) of the Companies Act, only a creditor to whom the debtor is indebted in a sum exceeding SGD 10,000 can prospectively file a winding-up application (after following other statutory steps such as serving a demand notice on the company and waiting for a minimum period of 3 weeks thereafter before filing a winding up petition). Whereas, there is no such monetary threshold requirement prescribed for creditors desirous of initiating judicial management against a debtor. All they need to prove in order to obtain a judicial management order is that the company is unable to pay its debts. Or is likely to be unable to pay its debts.

The different rationale for both mechanisms is not explained. The essay could also have covered more points and be better organised starting from application and moving linearly onwards. **4 marks.**

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

Commented [DB4]: 9/15

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)**

Overview and Purpose of Judicial Management Proceedings

Judicial management is a creditor-controlled corporate rescue mechanism that aims to preserve economic value in a debtor company for the benefit of its creditors. A court factors in whether one or more of the below mentioned prospective purposes will be achieved before it passes a judicial management order.

Pre-requisites to Obtain a Judicial Management Order from the Court

- The court must be satisfied that the company is unable to pay its debts or anticipates being unable to pay its debts.

- The court considers that passing a judicial management order is likely to help in achieving one or more of the below mentioned purposes:

    - Ensuring the survival of either whole or part of the debtor company and/or its business undertaking;
    - Making way for an approval pursuant to Section 210 of the Companies Act to make way for a company to enter into an arrangement/compromise with certain persons/entities listed under Section 210.
    - Making way for a company to enter into judicial management will likely result into a greater realisation of the company's assets as opposed to initiating winding-up proceedings against that company.

The court will consider whether appointing a judicial manager will help in achieving one of the aims listed in Section 91 of the IRDA.

Good answer although consider how JM would be applied for given the company has section 64 moratorium protection. **1.5 Marks.**

Rescue Financing under the IRDA for PEC

The following will be required to be demonstrated to the court in order for PEC to be able to access rescue financing:

- That the rescue financing is necessary for PEC's survival
  AND/OR
- That the rescue financing will help in achieving a more commercially viable realisation of PEC's assets, as opposed to the realisation that would occur should winding-up proceedings be initiated against PEC.

Good summary but could addres the four levels of priority for rescue financing and conditions for the same. **1 Mark.**

Initiation of Out of Court Judicial Management Proceedings Against PEC's Subsidiaries

Since Singaporean insolvency law does not provide for the insolvency proceedings of enterprise groups, separate judicial management applications will have to be filed against each individual PEC subsidiary. Further, creditors will have to file their individual claims against each PEC subsidiary.

Nevertheless, upon request, courts in Singapore can grant a moratorium in respect of the PEC subsidiaries under Section 65, since they would play an integral role in PEC's Section 64 moratorium.

Also, Singaporean insolvency law does permit batches of applications to be heard together before the same insolvency judge. Further, there is no requirement that one enterprise group entity file for the same legal protection against attachment and enforcement that the other group entities have filed.

The question if focused on JM, not section 64 or 65. They are different processes. **1 Mark.**

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?

The judicial management moratoria obtained by PEC and its subsidiaries will not have an extra-territorial effect on the assets owned by the group in jurisdictions outside of Singapore.

However, the moratorium obtained by the PEC subsidiaries under Section 211C of the Companies (Amendment) Act, 2017 will have an extraterritorial effect so long as the creditor concerned is located in Singapore or comes within the long arm jurisdiction of the Singaporean court.

All that is missing is an explanation as to why the JM moratoria does not apply extra territorially. **3.5 Mark**

Question 4.2.2 [maximum 4 marks]

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

The following cross-border insolvency laws are available in Singapore to recognize foreign insolvency proceedings:

- UNCITRAL Model Law on Cross-Border Insolvency (as it has been adopted and enacted by Singapore)
- Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters
- The Reciprocal Enforcement of Commonwealth Judgments Act (which permits the registration of judgments from the UK, Australia and other Commonwealth countries in the Singaporean High Court)
- The Reciprocal Enforcement of Foreign Judgments Act (under which only Hong Kong SAR has been gazetted as a recognized jurisdiction so far)

A foreign insolvency judgment will be recognized in Singapore if: (i) the judgment is final and conclusive in accordance with the laws of the jurisdiction where the foreign proceeding has been initiated; and (ii) the court in the foreign jurisdiction had international jurisdiction (as defined under Singaporean law) over the parties to the proceeding.

Once a foreign judgment has been registered with the Singapore High Court, it will be enforced as if it were a judgment that was entered by the Singapore High Court itself without the need for initiating fresh proceedings for enforcing the foreign judgment. Also, a recognized foreign judgment has an effect of estoppel on a particular issue or cause of action.

A good high level summary which would benefit from so more detail as to the effect of recognition. **2 Marks.**

*** End of Assessment ***