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**.

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

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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.

Question 1.5

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

(a) The automatic moratorium lasts for 30 days.

(b) The automatic moratorium may be extended.

(c) The automatic moratorium can be obtained without filing an application to Court.

(d) The debtor has to either propose or intend to propose a scheme of arrangement.

Question 1.6

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

(a) A receiver is appointed over the assets of the company.

(b) The creditors decline to approve the judicial manager's proposals.

(c) The judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved.

(d) The judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

Question 1.7

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

(a) To allow the directors to oversee the restructuring of the company.

(b) Preserving all or part of the company's business as a going concern.

(c) As a means for the secured creditors to realise their security.

(d) To liquidate the company in a fast-track and cost-efficient manner.

Question 1.8

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

(a) Informal creditor workouts.

(b) Judicial Management.

(c) Receivership.

(d) Scheme of arrangement.

Question 1.9

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

(a) England and Wales.

(b) Brunei.

(c) The USA.

(d) Australia.

Question 1.10

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

(a) The High Court did not grant full recognition of the US Chapter 7 proceedings.

(b) The US bankruptcy proceedings continued in breach of the Singapore injunction.

(c) This is the first reported decision where a Singapore court has been faced with the question of public policy in an application for recognition of a foreign insolvency proceeding.

(d) The Court held that the omission of the word "manifestly" from Article 6 of the Singapore Model Law meant that the standard of exclusion on public policy grounds was higher than in jurisdictions where the Model Law had been enacted unmodified.

10 marks

QUESTION 2 (direct questions) [10 marks]

Commented [DB2]: 6/10

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.

Impeachable transactions are clawback transactions. There are two types of impeachable transactions: (a) Undue or unfair preference transactions; and (b) Undervalue transactions. For proving a transaction is an unfair preference transaction, the following elements are required to be proved:

(a) The preferred party should be a creditor or guarantor for any of the company's debt.
(b) The debtor was insolvent at the time of the transaction or became insolvent after the transaction.
(c) The preferred party gains an advantage in his position in liquidation scenario of the debtor by entering the transaction.
(d) The debtor was influenced to enter the transaction with the preferred party. If the preferred party is an associate company, then it is presumed that the debtor was influenced.

For proving a transaction as an undervalue transaction, the following elements will be relevant: (a) the transaction is a gift; or (b) if the debtor enter a transaction and the consideration received is significantly lower than the value of the consideration provided for; (c) the company was insolvent at the time of the transaction; or (d) the company became insolvent after it entered the transaction.

What is the lookback period? Also you have not set out the defences. **2 marks.**

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

JIN Guidelines were adopted by the Supreme Court of Singapore on February 1, 2017. These are guidelines for communication and cooperation between courts in the cross-border insolvency matters. Communication and co-operation play an important role in the cross-border insolvency as it sets protocols on exchange of information, filing of application and co-ordination between the courts.

What is the significance? **1 mark.**

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?

The bankrupt is required to make an application to the court for annulment of the bankruptcy order. This application is required to be made within 12 months of the bankruptcy order unless leave is given for the application to made after 12 months. On filing the application, the court may annul the bankruptcy order, if: (a) if the order was not supposed to made on the grounds existing at the time of issuing the order; (b) debts and expenses of the bankruptcy have been paid by the bankrupt or secured; (c) distribution of the bankrupt estate will take place in Malaysia or the majority of the creditors are in Malaysia and the distribution is ought to happen in Malaysia.

The bankrupt can make an application to the court, any time after the bankruptcy order, for the discharge. Further, such application should be filed on all the creditors, who have filed a proof of claim and the court can hear any creditor before making the discharge order. Consequently, upon filing the application and hearing, the court may: (a) refuse to discharge; or (b) make an order discharging the bankrupt absolutely; or (c) make an order discharging the bankrupt with conditions on future income or property.

Who else can make an application for discharge? **3 marks.**

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

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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.

Ipso Facto Clauses

Prior to IRDA, there were no restrictions on application of *ipso facto* clauses. *Ipso facto* clauses are those clauses which gives a party the right to terminate the contract on account of the counter party entering insolvency or other proceedings. The rights under these types of clauses can be restricted from being terminated if it determined that it is essential for rescuing the corporate as it forms an important contract from the debtor perspective. With introduction of new provisions in Section 440 IRD Act, 2018, it limits the exercise of the contractual rights i.e., termination or otherwise only because the company has entered into certain proceedings, or it is insolvent in nature. How can a debtor avail itself of section 440? However, this does not prevent the contract being enforced if it is for non-payment of money owed by the company. Consequently, the parties cannot terminate the contract by relying on *ipso fact* clauses if the company enters certain proceedings or insolvency. This will provide relief to the corporate debtors in restructuring efforts. How so? It is also pertinent to highlight that the following contracts are excluded from the above exception:

(a) financial contracts as prescribed. This is an important exclusion and the lenders in Singapore should be aware what contracts are excluded.
(b) If the contracts are license, permit or approvals issued by the government or statutory body.
(c) If the nature of the contract is such that it will affect the national or economic interest of Singapore.
(d) Any commercial charter of a ship.
(e) Any agreement which falls within the meaning of the convention as defined in Section 2(1) of the International Interests in Aircraft Equipment Act (Cap. 144B); or
(f) If an agreement is subject of a treaty to which the Singapore is a party.

Wrongful Trading

Wrongful trading is a new provision introduced in IRDA. The provision empowers the court to make a declaration that any person who knowingly becomes a party to the company trading wrongfully, then such a person shall be personally liable for debts and liabilities of the company. A trading will be considered as wrongful trading if the company incurs debts or liabilities without reasonable prospect of repaying such debts or liabilities in full when the company is insolvent, or it becomes insolvent after entering to transactions which results in incurrence of debts or liabilities. However, if the company or any person who is party to or interested in becoming a party to, the carrying on a business with the company, may apply to the court for a declaration that a particular transaction or course of conduct or a series of transactions would not constitute wrongful trading. How is this different from insolvent trading?

Two conditions to be satisfied under Section 239 of the IRDA Act 2018, to introduce personal liability on a person for the Company's debt, if: (a) the person knew that the company was trading wrongfully; or (b) an office of the company, ought, in all the circumstances should have known that the company was trading wrongfully.

As against fraudulent trading, wrongful trading does not bring in criminal liability aspect. The provision for wrongful trading is common in common law jurisdiction insolvency like India and English. The Singapore wrongful trading provision has been borrowed from the English insolvency legislation.

Lack of analysis and commentary although to a certain extent the answer does display some basic understanding of the concepts. **5 marks.**

Question 3.2 [maximum 7 marks]

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

The fundamental difference between judicial management and liquidation is, former is a corporate rescue, and the latter is more of an enforcement of creditors and contributories interest in the company. Not quite for liquidation it is more bring the company to a close. In judicial management, on application by the company or the creditors, if the court grants an order of the judicial management, then the court will appoint a judicial manager, an independent insolvency practitioner, who will take control of the company's assets and business for a period of 180 days' subject to any extensions by the court. In case of liquidation, the winding up or liquidation can be either voluntarily or ordered by the court. The three modes of winding up are: (a) members' voluntary liquidation; (b) creditors voluntary liquidation; and (c) compulsory liquidation. Consequently, the judicial management is an alternate to liquidation.

A judicial management application can be initiated by: (a) the company subject members passing a resolution; (b) directors subject to a board resolution; (c) its creditors either together or separately. Further an application for judicial management can only be made if the following two conditions are satisfied that: (a) if the company is or will not be able to pay its debts; and (b) interests of the creditors will be best served by rehabilitating the company instead of winding up. In case of liquidation, as mentioned above, liquidation can be introduced in three different ways. A members' voluntary liquidation can be introduced only if the company is solvent subject to other aspects like members' resolution for winding up, directors' declaration on company being solvent etc. A creditors' voluntary liquidation happens when the company is unable to pay its debt and compulsory liquidation is by way of making an application to the court that the company is unable to be its debts hence it should be wound up.

In case of liquidation, there is no specific provision which can help in converting the liquidation to a corporate rescue. A liquidation may be terminated to facilitate this. In case of judicial management, if the judicial management order is discharged because of events such as creditors not approving the judicial manager proposal, the court may order liquidation of the company, but it is not an automatic liquidation.

In moratorium situations, if it is a voluntary winding up, the moratorium is imposed from the commencement of the winding up. However, in case of the judicial management order, the moratorium is imposed on filing of the application itself and an extensive moratorium is ordered on judicial management order being made. How about the scope of the moratorium when it comes to enforcement of security? Another important distinction is that unlike

liquidators, judicial managers cannot disclaim onerous contracts entered by the company prior to the judicial order being made. How can a judicial manager deal with existing contracts of the company?

Decent effort but fails to identify the difference in the purpose of the two processes. **4 marks.**

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

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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)**

PEC is a Cayman incorporated company but listed on the Singapore stock exchange. A company which is eligible under the IRD Act 2018 may apply under Section 90 or for judicial management. The company can be a foreign company also provided it has substantial connection with Singapore. Substantial connection of PEC in Singapore can be established with the following factors:

(a) centre of main interest of PEC is in Singapore. In this case PEC is listed in Singapore.
(b) PEC is carrying its business in Singapore or has a place of business in Singapore.
(c) PEC has substantial assets in Singapore. In this case, it's all three wholly owned subsidiaries are incorporated in Singapore. Further, retail bonds are issued in Singapore and PEC subsidiaries and the underlying projects are funded by bank lending.

Consequently, for the purpose of placing PEC in judicial management, the above factors should be presented to the court.

The answer could focus more on the purpose of JM I.e. what does it do and the vrious other requirements. **1 Mark.**

- 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)**

Rescue financing or DIP financing is a financing that is either or both: (a) necessary for keeping the corporate debtor as going concern (survival) or (b) it will be advantageous to achieve a better realisation of the assets of rescue of the corporate debtor. Consequently, for PEC to take DIP financing it need to satisfy either or both the conditions.

The other conditions are the four types of rescue financing with different levels of priority and different requirements. **1 Mark.**

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

I understand that the question is what steps the creditors need to take to place PEC's subsidiaries under judicial management. Creditors (including contingent or prospective creditors) together or separately, will be required to file a judicial management application before the court. The application should be accompanied with a statement that PEC subsidiaries will not be able to pay debts and there is a reasonable probability of reviving the company or preserving all or substantially all the assets of the subsidiaries or the interest of

the creditors will be protected in judicial management rescue as against liquidation. Consequently, on filing of the application, the moratorium will kick in.

Section 94 provides for an out of court JM process by creditor resolution. **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?

Yes, the moratorium obtained under judicial management has extra territorial effects. This allows the courts in Singapore to restrain proceedings in foreign jurisdiction if the Singapore court has *in personam* jurisdiction over the party seeking to be enjoined. Once the moratorium is in effect on judicial management application in Singapore against PEC and its subsidiaries, then such moratorium will come into effect on its assets, wherever it is situated. The judicial manager can apply in the jurisdictions where assets are located and seek to enforce moratorium on the enforcement of assets. Not sure the last sentence is correct. see below.

Be careful not to conflate JM with section 64 – they are diferent. Section 64 has an express provision re: extra-territoriaity but JM does not. **2 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.

There are two statutory regimes in Singapore for recognition of the foreign proceedings. The Reciprocals Enforcement of Commonwealth Judgments Act enables judgments from the United Kingdom and Australia, and certain specific commonwealth countries to be registered in the Singapore High Court. The other regime is Reciprocal Enforcement of Foreign Judgments Act, where only Hong Kong SAR has only been the gazetted country recognised for registration. Consequently, once registered, there is no requirement of fresh proceedings to be commenced and the registered judgments can be enforced as though it is a judgment

issued in Singapore. Recognised judgments also act as estoppel on a cause of action or issue.

The following two conditions are required to be met for recognition of foreign judgments: (a) it should be a final and conclusive judgment by the law of that country; and (b) court should have had international jurisdiction (as defined under the Singapore Law) over the parties.

The answer does not address UNCITRAL MODEL LAW which is the key legislation for recognition of foreign insolvency processes, which is different to recognition of foreign judgments. **1 Mark.**

*** End of Assessment ***