



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]

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.

Answer 2.1: The first type of impeachable transaction is giving unfair or undue preference to any stakeholder. To prove that a transaction falls under this category, the Liquidator must prove to the Court that:

Commented [DB2]: 6.5/10

1. The party which has got the preference or is benefited through it was a creditor or guarantor in relation to debt or liabilities owned by the company,
2. At the time of permitting preference, the company had already become insolvent or insolvency of the company is the result of that particular preference transaction,
3. By taking advantage of the preferred transaction, the party has come to a better position than it would have otherwise been if the transactions had not been entered in the event of Liquidation of the Company,
4. There was a dominant desire in the Company to accord preference to the prefer party especially if the preferred party is an associate of the company.

The second type of impeachable transaction is an undervalued transaction and for establishing that it is undervalued, the liquidator has to prove:

1. Either the company has made a gift to the beneficiary or the Company has entered into arrangement with the beneficiary in a way that consideration value received is significantly lower than the value of the consideration provided,
2. The company was insolvent or insolvency of the company is out of the result of such transaction.

What are the lookback periods i.e. how many years?

The defenses we may have is that the beneficiaries of Preference or undervalued transactions have got unjustified gains from such transactions at the cost of other creditors and it will be unfair to such other creditors who may receive less amount under liquidation which they would have otherwise got. **I believe you have misunderstood the question. You should set out what can the errant counterparty argue in respect in a claim against it for unfair preference/undervalue transaction. An example would be good faith.**

The causes which led to the bleeding or insolvency of the company must be corrected to deliver justice to creditors who are helpless and waiting in que for their legitimate share in the proceeds of liquidation.

2 marks

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

Answer 2.2: The JIN Guidelines adapted by Supreme Court of Singapore on February 01, 2017 facilitate Judicial Communication and cooperation framework for Cross Border insolvency. Consequent to adoption of JIN Guidelines, foreign representatives are able to apply to the High Court of Singapore for the recognition of Foreign Proceedings. The JIN Guidelines also provide for concurrent insolvency proceedings besides international cooperation and communication between Courts and representatives. The other highlight of JIN Guidelines are, it does not require reciprocity with the state in which foreign proceeding is happening.

Answer confuses JIN with the model law. 0.5 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?

Answer 2.3:

An Annulment: The courts in Singapore are competent to annul a Bankruptcy in the following circumstances:

1. The grounds on which the order was made were not apt or reasonable to maintain the application,
2. The costs and the debts leading to Bankruptcy have been satisfied or secured to the satisfaction of the Court,
3. The majority of creditors are residents of Malaysia and distribution should be happening there or distribution of estate will take place in Malaysia.

Besides the application for annulment should be made within 12 months of the Bankruptcy order or delay in filing the application is got condoned.

A Discharge: The Bankrupt, the Official Assignee or any other interested person may apply to the Court anytime after the Bankruptcy Order for another order of discharge. The procedural requirement is that each creditor who has submitted proof of debt in the Bankruptcy, must be kept in loop and the copy of application must be served on them. The Court shall hear any creditor prior to issuing any such discharge order. The discretion with the Court is that it may refuse to discharge, order absolute discharge of Bankruptcy or order conditional discharge with the stipulations as it thinks fit which may include conditions related to future income or property.

The discretion has also been given to the Official Assignee to issue a discharge certificate but he is also prohibited from doing so in certain prescribed circumstances.

4 marks. Answer covers the key points.

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.

Answer 3.1:

1. The restrictions on *ipso facto* clauses:

An *Ipsa Facto* clause in relation to insolvency proceedings is a contractual understanding which permits one party to modify or terminate the operation of the contract while citing insolvency of the counter party. However, termination of contractual clauses may come in the way of restructuring or rescuing companies in a formal insolvency system. Therefore, some insolvency regimes have restricted operation of *ipso facto* clauses.

Earlier to IRDA, 2018 Singapore Law had provided no restriction on resorting to *ipso facto* clauses if Singapore company is formally admitted into insolvency. Taking cue from the Canadian Insolvency Laws, in Singapore section 440 of IRDA, 2018 was introduced which imposes restrictions on the enforcement of *ipso facto* clauses if any proceeding relating to any application under judicial management or a scheme of arrangement involving the "supercharged scheme" process are initiated by the Company.

Moreover, some contracts are expressly excluded from such restrictions and the list includes:

- Any prescribed any financial contract,
- Any contract involving issuance of license, permit or approval issued by any Govt. or a statutory body,
- Any commercial charter of a ship and
- Any agreement that is the subject of prescribed treaty to which Singapore is a party.

Another salient feature is that counter parties are not required to continue to advance new money or credit to the insolvent company although the contracts will remain alive. Under Section 440(4) of the said Act, overriding powers have been given to Singapore Courts to rule on the applicability of the restrictions and their extent if the applicant can demonstrate that it will suffer "Significant Financial Hardship" as a result.

2. Wrongful Trading:

A Company is considered to have traded wrongfully if it owns any debt or liability without having reasonable chances of meeting them in entirety when there is tendency of the Company to become insolvent or the Company becomes insolvent consequent to incurring such debt or liability.

How is this different from insolvent trading?

Under this new provision in Singapore, the Court has powers to declare that any person who has knowledge to the Company trading wrongfully is personally responsible for such debts and liabilities of the Company. However, another feature of Law is that a Company or any person party to, or interested in becoming a party to, the continuation of business with the company, may apply to the court that a particular course of conduct, transaction or series of transaction would not constitute wrongful trading.

Section 239, responsibility for wrongful trading of IRDA, 2018 imposes personal liability for the Companies Debt on a person if:

- It was in their knowledge that the company was trading wrongfully or
- as an officer of the Company, the person ought in the circumstances to have known that wrongful trading is going on in the company.

Section 239 is an adoption taking guidance from English insolvency laws.

This is a decent effort with some commentary. There could have been more detail and analysis for the wrongful trading portion. 5 marks.

Question 3.2 [maximum 7 marks]

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

Answer 3.2: Judicial Management is a rescue process whereby continuation of the company is ensured, whereas, under Liquidation the assets of a Company are sold out to meet its liabilities.

Judicial Management process is headed by an Insolvency Practitioner as Judicial Manager and such appointment is made by the Court whereas under liquidation, Liquidator is appointed to propel the process. **Both JM and liquidator are court appointed officers.**

The Companies Director and Management are replaced by the Judicial Manager who takes over responsibility for running the Company as Ongoing concern. Under Liquidation, all the powers of Companies Directors cease and their continuation depends upon willingness of the Liquidator to the extent he feels necessary for continuation. **The role of JM and liquidator are actually similar although there are some differences.**

The process of judicial management being akin to insolvency process carries a stigma and very few percentage of Companies have been rescued. **How about liquidation? Especially members voluntary liquidation?**

Under Judicial Management, creditors play a limited role in Management and direction of the Company and this task is performed by the Manager. **This contradicts the rest of your paragraph.** Generally, a creditors committee is formed by the Creditors to consider Judicial Managers proposal. Further, the Creditors Committee maybe given powers to call Judicial manager before it to furnish as much information that maybe reasonably required for carrying out Judicial Managers functions. If the Creditors Committee is dis-satisfied with the information furnished by the Judicial manager, it may approach the Court and the Court may issue appropriate directions to the Judicial Manager.

Under Liquidation, the Liquidator may apply to Court to appoint Directors as Special Managers to assist him, if the nature of Business requires such appointment. **How about the role of the creditors?**

The essay generally lacks detail and does not go enough into the elements of both processes. 3 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)**

Answer 4.1:

- Confirmation of the purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order:
From the facts given in the question, in late 2019 it is amply clear that present management of the PEC have not been able to honour its commitment and it has been seeking waivers on certain terms in loan from Bank Lenders and additional time to replay certain amounts. Besides, PEC and its three subsidiaries have also filed protection under 211B and Section 211C of Companies Act with the Competent Court. No doubt the Company is heading towards insolvency as the current management has been unable to manage their company and the current Debt and Lenders have good chance of obtaining a Judicial Management Order to replace the Companies Directors and their Management. These facts can be presented to the Court.

Answer doesn't really address what JM is, what it does and what the criteria are. 0.5 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?

The two basic purposes have been defined under IRDA in respect of Rescue Financing:

- a. Necessary for survival of the Debtor;
- b. Necessary to achieve a more advantageous realisation of assets of a Debtor, than on winding up of that Debtor

The facts in the question problem do not indicate that PEC is taken under Judicial Management because of poor realisation of its assets. Therefore, the only logical purpose for which the rescue financing can be availed is as per point a above "Necessary for survival".

Upon application of the Debtor, the Singapore Court may make an order for rescue financing to be obtained by Debtor will be treated as part of the costs and expenses of the winding-up if the debtor is later wound-up and enjoy priority over preferential debts is the debtor is later wound-up.

Further from the facts given in the question problem, it is not clear whether the company has any property without any created Security Interest. Besides the Company has raised retail Bonds for its working Capital purposes which were stated to be specifically subordinated to all other debt of the PEC Group.

Good answer and well done on applying back to the facts. There are 4 levels / types of rescue financing which have different levels of priority. **1.5 Marks.**

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

The process for Judicial Management out of court is covered under Section 94 (1) of IRDA, 2018 which introduces voluntary process for initiating Judicial Management without having to first apply to the Court if the Company is or likely to be unable to pay its debts, there is reasonable probability of achieving one or more of the purposes of Judicial Management as per section 89 (1) and a resolution of its creditors is obtained.

Accordingly, the following steps are to be followed:

- a. The manner creditor meetings should be conducted;
- b. Notice requirements and
- c. Relevant timelines

3 Marks.

Question 4.2 [maximum 8 marks in total]

As things transpired, PEC was placed under judicial management. Private equity funds are actively talking to PEC's Judicial Managers in order to determine whether or not they might make an investment in PEC, or acquire its assets. One particular private equity fund, Forty Thieves Capital, is particularly interested in acquiring debt relating to the various projects across the oil and gas, renewables and water lines of business with a view to either enforcing over the security of the assets to realise value, or to see if a loan-to-own-type structure can be successfully implemented. Ideally, they would like to do this outside of the judicial management proceedings.

To try and protect against this risk, PEC has commenced local insolvency proceedings in Malaysia, China and the United States to seek protection for the companies that own assets in each of those jurisdictions.

Taking these additional facts above into consideration, answer the questions below.

Question 4.2.1 [maximum 4 marks]

Do the judicial management moratoria obtained by PEC and its subsidiaries have extra-territorial effect such that assets owned by the group in jurisdictions outside of Singapore will also be protected?

Ans: As per facts given in the question problem, Insolvency proceedings by PEC have been initiated for protection of companies that own assets in Malaysia, China and US. It is only logical that assets of such companies will be protected as per local laws of Malaysia, China and US.

Now we come to Question '4.2.1' which enquires whether Moratorium obtained by PEC and its subsidiaries will have extra territorial effects outside Singapore to protect interest. From the contents of Module 8E, we have not come across any provision through which assets of companies or group registered in Singapore have any means to seek protection of their assets in Jurisdictions outside Singapore. Therefore, our conclusion is such a protection to PEC and subsidiary may not be available. The only protection available to such subsidiaries will be dependent on local laws in the Jurisdictions of Malaysia, China and US.

Section 64 expressly allows for extra territorial protection but that does not apply to Judicial Management. Don't always assume the local law has equivalent protection! **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.

Ans: The recognition of foreign insolvency proceedings in Singapore is guided by Landmark decision of "Re Zetta Jet Pte Ltd" of Singapore High Court. This being first reported decision on recognition of foreign proceedings, it sets the ground rules.

This is a classic case where in September, 2017 Zetta Singapore and Zetta US filed voluntary chapter 11, Bankruptcy Proceedings in US. Around the same time one shareholder named AAH commenced proceedings in Singapore Jurisdiction against Zetta Singapore and its other shareholders for initiating chapter 11 proceedings alleging breach of shareholders agreements'. The very next day AAH obtained an injunction from Singapore court for stopping any further steps in and relating to US Bankruptcy Filings of Zetta Singapore and Zetta US. However, the Singapore High Court refused to grant full recognition of Chapter 7 proceedings but recognised King Ltd. as a Foreign Insolvency Representative.

The omission of word 'Manifestly' from Article 6 of Singapore Model Law meant, the Court held, that the standard of exclusion on public policy grounds was lower than in Jurisdictions where the model law had been enacted unmodified. Though the Court refused to specify what would trigger the Public Policy Bar in Singapore, it held that the Standard would atleast require the denial of an application for recognition of foreign proceedings by a foreign insolvency representative appointed under proceeding restrained by Singapore Court. Because King was appointed in US Proceedings conducted in disregard of Singapore Injunction, the public policy exception was invoked, as to allow recognition would undermine the dispensation of justice in Singapore.

However, for striking a balance between protecting the dispensation of justice in Singapore and affording fairness to the Foreign Insolvency Representative, the Court granted King a limited recognition enabling him to apply to set aside or appeal the Singapore Injunction.

An explanation of the Mode Law, its basic requirements and the effect of recognition would have assisted to better understand the context of the Zetta Jet decision. **2 Marks.**

*** End of Assessment ***