



**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.**

Answer is A

**Question 1.5**

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

- (a) The automatic moratorium lasts for 30 days.
- (b) The automatic moratorium may be extended.
- (c) The automatic moratorium can be obtained without filing an application to Court.
- (d) The debtor has to either propose or intend to propose a scheme of arrangement.**

Answer is C

**Question 1.6**

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

- (a) A receiver is appointed over the assets of the company.**
- (b) The creditors decline to approve the judicial manager's proposals.
- (c) The judicial manager is of the view that the purposes specified in the judicial management order cannot be achieved.
- (d) The judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

**Question 1.7**

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

- (a) To allow the directors to oversee the restructuring of the company.
- (b) Preserving all or part of the company's business as a going concern.**
- (c) As a means for the secured creditors to realise their security.
- (d) To liquidate the company in a fast-track and cost-efficient manner.

**Question 1.8**

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

- (a) Informal creditor workouts.
- (b) Judicial Management.
- (c) Receivership.
- (d) Scheme of arrangement.

**Question 1.9**

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

- (a) England and Wales.
- (b) Brunei.
- (c) The USA.
- (d) Australia.

**Question 1.10**

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

- (a) The High Court did not grant full recognition of the US Chapter 7 proceedings.
- (b) The US bankruptcy proceedings continued in breach of the Singapore injunction.
- (c) This is the first reported decision where a Singapore court has been faced with the question of public policy in an application for recognition of a foreign insolvency proceeding.
- (d) The Court held that the omission of the word "manifestly" from Article 6 of the Singapore Model Law meant that the standard of exclusion on public policy grounds was higher than in jurisdictions where the Model Law had been enacted unmodified.

**8 marks**

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 4 marks]**

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

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[As per the Singapore Insolvency law, for an unfair preference transaction, the liquidator must show four elements:

- (a) The preferred party (the beneficiary of the transaction) is a creditor or guarantor for any of the company's debts or liabilities;
- (b) The company was insolvent (or become insolvent as a consequence of the transaction) at the time of giving the preference;
- (c) The company has done anything which puts the preferred party in a better position than the preferred party would otherwise have been had the transaction not been entered in the event of the company's liquidation;
- (d) The company was influenced in deciding to enter the transaction by a desire to prefer the preferred party, noting that the company is presumed to have been influenced by a desire to prefer if the preferred party is an associate of the company

For a transaction at an undervalue, the liquidator must show two elements:

- (a) The company makes a gift to the recipient or the company enters into a transaction where the value of consideration received is significantly less than the value of the consideration provided;
- (b) The company was or became insolvent as a result of that transaction

Defence in both the cases is pretty much factual. In case of a preferred transaction, it is always advisable to prove that no preferential treatment was given to the party and rather the transaction was pure business transaction arising out of commercial needs.

Similarly, in case of undervalue transaction, it needs to be proved that the transaction entered was a pure business transaction wherein the price was determined by the market forces and not the inter se relation between the parties.

It is also a defence to prove that the transactions were not instrumental in bringing insolvency or the entity was not declared insolvent at the time of entering into the transaction.]

**How about good faith as a defence? There is a bit of conflation of the elements being made out with the defence. Also what are the lookback periods? 2.5 marks.**

### **Question 2.2 [maximum 2 marks]**

What is the objective and significance of the JIN Guidelines?

[The JIN (Judicial Insolvency Network) held its inaugural conference in Singapore on 10 and 11 October, 2016 which concluded with the issuance of a set of guidelines titled "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the JIN Guidelines.

The JIN Guidelines address key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.]

**What is the significance of JIN? 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?

[(i) The Court may annul a bankruptcy if:

- (a) the order ought not to 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;
- (c) distribution of the estate will take place in Malaysia or the majority of creditors are residents in Malaysia and the distribution ought to happen there.

An application to annul must be made within 12 months of the bankruptcy order being made, unless leave is given for the application to be made later.

(ii) The bankrupt may apply to the Court for an order of discharge any time after the bankruptcy order is made. An application must be served on each creditor who has filed a proof of debt in the bankruptcy and the Court will hear any creditor before making an order for discharge. Upon application the Court may:

- (a) refuse to discharge;
- (b) make an order discharging the bankruptcy absolutely;
- (c) make an order discharging on conditions as it thinks fit, including conditions with respect to future income or property.]

**4 marks.** 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.

[(i) **Restrictions on ipso facto clauses:**

Under section 440 (Certain contractual rights limited) of the IRD Act 2018, there is a new provision that limits the exercise of certain contractual rights by reason only that certain proceedings in respect of a company have commenced, or that the company is insolvent. This does not prevent those contractual rights from being exercised by reason of other grounds provided in the contract, such as non-payment of money owed by the company.

This means it may no longer be possible to rely on ipso facto clauses to terminate a contract with an insolvent company. It may also allow companies to continue key contracts and provide a measure of relief in restructuring efforts.

Section 440(5) however sets out a list of contracts that are excluded from the exception. These include:

- (a) any eligible financial contract as may be prescribed;
- (b) any contract that is a licence, permit or approval issued by the Government or statutory body;
- (c) any contract that is likely to affect the national interest, or economic interest, of Singapore as may be prescribed;
- (d) any commercial charter of a ship;
- (e) any agreement within the meaning of the Convention as defined in section 2(1) of the International Interest in Aircraft Equipment Act; or
- (f) any agreement that is the subject of a treaty to which Singapore is a party, as may be prescribed

Section 440 does not prevent the termination of contracts on grounds other than the ipso facto clause.

**How can an insolvent company avail itself of section 440?**

**(ii) Wrongful Trading:**

In a new provision relating to wrongful trading, the court is empowered to make a declaration that any person who was a knowingly party to the company trading wrongfully, is personally responsible for the debts and liabilities of the company. A company or any person party to, or interested in becoming party to, the carrying on of business with the company, may apply to the court for a declaration that a particular course of conduct, transaction or series of transaction would not constitute wrongful trading. A company trades wrongfully if the company incurs debt or liabilities without reasonable prospect of meeting them in full when the company is insolvent, or becomes insolvent as a result of the incurrence of such debt or liability.

Section 239 (Responsibility for wrongful trading) of the IRD Act 2018 introduces the new concept of wrongful trading, which imposes 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 all the circumstances, to have known that the company was trading wrongfully.

This provision is adopted from English Insolvency Legislation and does not require criminal liability before taking effect.] **As compared to insolvent trading**

**Decent effort with some 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.

[In Singapore, the main legislation applicable to liquidation of and winding up of companies as well as reorganisations (scheme of arrangements and judicial management) is the Companies Act, read with its related subsidiary legislation. **Shouldn't it be the IRDA?**

The insolvency of limited liability partnerships, real estate investment trusts and banks are dealt with under their respective legislation and its related subsidiary legislation.

It can be said that judicial management is an alternative to formal liquidation and is a mechanism to rescue the company. Differences between a judicial management and liquidation may be discussed as hereunder:



**(i) Purpose:**

The purpose of judicial management is corporate rescue while the objective of liquidation is to ensure a fair and orderly distribution of the company's assets among creditors and contributories and to terminate the existence of the company by its eventual dissolution.

**(ii) Entry:**

A judicial management application may be brought by:

- (a) the company (pursuant to member's resolution);
- (b) its directors (pursuant to board resolution); or
- (c) its creditors

The three modes of liquidations are as hereunder:

- (i) member's voluntary liquidation;
- (ii) creditor's voluntary liquidation;
- (iii) compulsory liquidation

**(iii) Conversion from Corporate Rescue to Liquidation:**

A judicial management order is discharged after 180 days unless extended by the court. A discharge does not mean automatic liquidation, but the Court has a discretion to order that the company be placed into liquidation.

However, there is no specific procedure to convert a liquidation to any form of corporate rescue. **It is possible to bring a liquidation to an end by terminating it.**

**(iv) Threshold for entering the procedure:**

A court may only make a judicial management order if it is satisfied that company is or will be unable to pay the debt and the making of order would be likely to achieve one or more of the following purposes:

- (a) The survival of the company, or the whole or part of its undertaking as a going concern;
- (b) The approval under section 210 of the Companies Act of a compromise or arrangement;
- (c) The more advantageous realisation of the company's assets that would occur in winding up

For liquidation, the court should be convinced that the company is unable to pay the debt as per section 254(2) of the Companies Act. **How about voluntary liquidation?**

**(v) Moratorium:**

An automatic moratorium on legal proceedings against the company comes into effect upon the filing of the judicial management application.

In a voluntary winding up, the moratorium is imposed from the commencement of winding up. For Compulsory winding up, during the period until a winding up order is made, the company or any creditor or contributory can apply to court to restrain proceedings. Once a winding up order is made, any action against the company requires the leave of the court.]

**(vi) Rescue Plan:**

As per the purpose of judicial management and pursuant to IRD Act, 2018, for a proposal to be binding on the company, the judicial manager and the creditor or class of creditors, it has

to be approved by a majority of class of creditors present and voting representing three quarters in value of the respective class of creditors.

No such provision in the liquidation proceedings.

**(vii) Disclaiming onerous contracts:**

Judicial managers, unlike liquidators, have no power to disclaim onerous contracts entered into by the company prior to the judicial manager's order. **How can a judicial manager deal with existing contracts of the company?**

**(viii) Preferential/priority claims:**

There are no statutory preferential or priority claims that apply to corporate rescue proceedings.

In distributing the assets of a company in liquidation, its secured creditors will generally first be paid out of the assets that have been charged or mortgaged in their favour, while the remainder of the assets will be distributed among the other creditors.

**This is a very good effort that compares and contrast may of the key features of both mechanisms. 6 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)**
- 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)**
  - A court may only make a judicial management order if it is satisfied that company is or will be unable to pay the debt and the making of order would be likely to achieve one or more of the following purposes:
    - a. The survival of the company, or the whole or part of its undertaking as a going concern;
    - b. The approval under section 210 of the Companies Act of a compromise or arrangement;
    - c. The more advantageous realisation of the company's assets that would occur in winding up

In the given facts, it may be proved that PEC since having assets in various fields, it is essential that to run the company as a going concern and for the survival the company may be put under the judicial management.

It should be presented to the Court that the Company has substantial assets in Singapore and has a place of business as well. It is under an obligation to pay SGD 3 billion and a 6 months' extension has been granted under moratorium and the new Company will not be able to pay its debts. It should also be presented to the Court that

there is a reasonable probability of rehabilitating the company in view of the assets in Singapore.

**1.5 Marks.**

- For obtaining rescue financing, it should be proved either or both:
  - (a) Necessary for the survival of a debtor that obtains the financing;
  - (b) Necessary to achieve a more advantageous realisation of the assets of a debtor that obtains the financing, than on a winding up of that debtor.

**Explain the different types of rescue financing and how they would impact creditors. 1 Mark.**

- Singapore law does not recognise the concept of insolvency proceedings for a family or group of companies. Each company is treated as a separate legal entity and separate insolvency proceedings must be filed for each company. With very limited exceptions, the creditors of a company can only claim against that particular company in its insolvency proceedings. However, the law does permit each separate application to be heard in court together before the same insolvency judge. In this way, the related proceedings for each company in the family can be dealt with by the same judge. Thus, in the present case, creditors of each separate legal entity within a group of companies can decide to file different insolvency or other processes for each entity.

**All of the above is correct however note that Section 94 provides for a mechanism for a company to place itself into JM via a creditor resolution without the need for a court application. 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?

[On 10 March 2017, Singapore adopted the UNCITRAL Model Law on Cross Border Insolvency through its adoption of the 2017 Amendment Act. Adoption of the Model Law via the Amendment Act now allows foreign representatives to apply to the High Court of Singapore

for the recognition of foreign proceedings. The Model Law as adopted in Singapore is substantially in the same form as the original Model Law and also provides for international co-operation and communication between courts and representatives, and for concurrent insolvency proceedings.

Notably, the Model Law as incorporated in the Amendment Act has no requirement of reciprocity with the State in which the foreign proceeding is occurring.

Accordingly, the judicial management moratoria obtained by PEC and its subsidiaries have extra territorial effect, though, the judicial manager is supposed to file for recognition of main proceedings initiated in Singapore, in the other jurisdictions as well. This issue has also been authoritatively adjudicated by the High Court of England & Wales in the case of H&CS Holdings Pte Ltd Vs Glencore International AG (2019) EWHC 1457 (Ch) wherein the High Court recognised a moratorium order granted by the High Court of Singapore under section 211 B of Singapore's Amended Companies Act, as a foreign main proceeding under the Model Law. ]

This conflates a number of concepts. Model Law is about recognition only – it has nothing to do with JM and the scope of its moratorium. It might be possible to apply for recognition outside of Singapore of the JM but as to the question, the JM moratoria does not, of itself, have extra-territorial effect in the way that section 64 can. That is a key difference. **1.5 Marks.**

#### **Question 4.2.2 [maximum 4 marks]**

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

[Singapore is one of the few Asian countries to have adopted the Model Law, which was enacted in the US, UK and Australia more than ten years ago. On March 10, 2017, Singapore adopted the UNCITRAL Model Law on Cross Border Insolvency through its adoption of the 2017 Amendment Act. Further, in a related development, on 1 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 the first time that a judicial communication and co-operation framework for cross-border insolvency has been adopted in Singapore.

The Reciprocal Enforcement of Commonwealth Judgements Act (REJCA) enables judgements from the United Kingdom and Australia to be registered in the Singapore High Court. The second applicable regime in Singapore is that under the Reciprocal Enforcement of Foreign Judgements Act, where so far only Hong Kong SAR has been a gazetted country recognised for registration.

In Singapore, the RECJA establishes a statutory scheme for the recognition and enforcement of judgements of superior courts from the abovementioned jurisdictions to be registered. Under section 3(1), a judgement creditor is allowed to apply to the Singapore High Court for the registration of a judgement. The Singapore High Court may order such judgement to be registered if it thinks, in all the circumstances of the case, that it is just and convenient for the judgement to be enforced in Singapore.

Once registered, the foreign judgement may be enforced against in Singapore as if it was a judgement issued from the Singapore High Court without fresh proceedings to be commenced. A foreign judgement that is recognised potentially has an estoppel effect on a specific issue or on a cause of action.]

A good answer but more detail on the Model Law requirements and the effect of recognition would assist. **2 Marks.**

**\* End of Assessment \***