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**.

Commented [DB1]: Please read and follow the instructions.

ANSWER ALL THE QUESTIONS

Commented [DB2]: 29/50 = 58%

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 [DB3]: 3.5/10

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.

Undervalue transactions are transactions that entered into by the debtor during the 3 years preceding the bankruptcy filing or date on which the bankruptcy order was made, that are adjudged to be undervalued. Such transactions are sought to be reversed. These transactions are of such nature that the consideration is either non-existent or is significantly

less than in money's worth than the consideration originally provided by the debtor. Please set out the elements in full
Extortionate credit transaction are transactions where the credit has been availed by the bankrupt wherein the terms are grossly exorbitant or unconscionable or substantially unfair. Such transactions could be applied to be set aside during the course of the bankruptcy proceedings.

Where an individual has acquired an interest in the bankrupt's property from a person other than the bankrupt and was carried out in good faith and for value their claims cannot be set aside even if the transaction fulfills the pre-requisites of an impeachable transaction. Further, not being an associate of the company and having carried out these transactions at an arms-length basis may also be considered as a valid defence.

2.5 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

Singapore has made substantial strides towards making itself a cross-border insolvency friendly jurisdiction. In pursuance to this aim it adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, which was a stepping stone towards adoption of a comprehensive judicial communication and co-operation framework.

Answer could be more detailed. **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?

[Type your answer here]

0 marks

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

Commented [DB4]: 8/15

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) Ipso facto clause is a contractual provision that allows a party to terminate an agreement by virtue of the other party's insolvency. Under the earlier Singapore law there were no restrictions for the usage of ipso facto clause during insolvency proceedings. However, the newly introduced Section 440 of the IRD Act, 2018 restricts the exercise of the ipso facto clause one any proceedings relating to any application under judicial management, scheme of arrangement involving the supercharged scheme process are commenced by a company. The aim with the introduction of such a restriction would be to counter productive to the rescue and rehabilitation of these companies if all the contracts are allowed to be terminated vide the ipso facto clause. Therefore it allows companies to maintain key contracts and provide a relief in restructuring efforts. There are however, some exceptions to the general rule of application of inapplicability of ipso facto clauses, such as:

a. Financial contracts that are eligible;
b. A license, permit or approval issued by the Government;
c. Any contract that may have an impact on the national interest or economic interest of Singapore;
d. Commercial charter of a ship;
e. Agreement falling within the scope of Section 2(1) of the International Interests in Aircraft Equipment Act;
f. Any agreement that is the subject of a treaty to which Singapore is a party as may be prescribed.

This a fairly decent effort.

(ii) Wrongful trading is when a company enters into a transaction or a series of transaction wherein it incurs a debt that it would not be able to repay owing to it being insolvent or becomes insolvent as a result of incurring such debt. Under the provision dealing with wrongful trading under the IRD Act, 2018, the court is empowered to make a declaration as to the personal liability of any person who has been a party to the company trading wrongfully, knowingly. Such persons or the company or any person interested in becoming party to or carrying on business may apply to the court for a declaration otherwise that a transaction or a series of transactions do not constitute wrongful trading. Section 230 introduces personal liability on a person if they know that the company is trading wrongfully or as an officer of the company ought to have known. Some analysis and commentary should have been included.

5 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 order is passed when the Court is satisfied that the debtor is or is likely to become unable to pay its debts or achievement of any one of the following purposes namely: (1) survival of the company; (2) approval of a compromise or scheme of arrangement; (3) more advantageous realisation of assets than in a winding up. Judicial management is a creditor-led process and the court appoints an insolvency practitioner as a judicial manager. The judicial manager takes over the management and running of the business from the management. As there is a stigma attached to the appointment of the judicial manager and divesting the management from its powers, it more akin to insolvency process than a rescue mechanism. Creditors generally form a creditors' committee to review the proposals of the judicial manager and can even apply to remove the judicial manager.

Judicial management although yields little to no rescue benefits is a corporate rescue tool by design. The judicial management route is a time-bound mechanism wherein the process must be completed in 180 days. Companies that are eligible to be wound up under the IRD Act, 2018 can apply for judicial management. JM order can be extended.

Liquidation although involves similar process the aim is fair and orderly distribution of the company's assets among creditors and contributories and to terminate the existence of the Company either voluntarily or by the order of the Court. The threshold to initiate a liquidation process is inability to pay debts. All companies incorporated under the Companies Act are eligible to be liquidated under the Act. There is as such not time restriction on the completion of liquidation. Relatively a larger set of stakeholders can bring a company to liquidation as compared to judicial management. Upon on discharge of an application for judicial management liquidation may be the consequence that follows based on the order of the Court.

There is no compare and contrast at all. All this essay does is to list out a few features of each process. **3 marks.**

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

Commented [DB5]: 8.5/15

Paladin Energy Corporation Ltd (PEC) is a Cayman-incorporated company listed on the Singapore stock exchange. PEC was formed to become the dominant market player in all aspects of energy in South East Asia and China. Its primary lines of business are:

- oil and gas exploration and production with assets and fields in Malaysia, Thailand and Cambodia;
- Renewable energy, specifically solar and wind, with projects in Malaysia, Vietnam and the United States; and
- Water and waste to energy with plants in Singapore and China.

PEC has three wholly-owned Singapore incorporated subsidiaries that run each of the three lines of business:

- PEC Oil and Gas Pte Ltd;
- PEC Renewables Pte Ltd; and
- PEC WWE Pte Ltd.

Each entity in turn owns all, or substantially all, of the shares in the relevant entities incorporated in the local relevant overseas jurisdiction.

PEC had traditionally funded its business via bank lending, with project financing facilities advanced directly to a combination of the three Singapore subsidiaries referenced above and directly to the underlying project companies. As at 2016, the group had raised SGD 2 billion in bank lending, all of which was guaranteed by PEC.

In 2018, PEC wanted to take advantage of an opportunity to expand their water and waste to energy business and raised an additional SGD 1 billion in retail bonds for working capital purposes. Water (and energy needs in general) is of strategic importance to Singapore given

its geographical position and many retail investors took up the bond issue. The retail bonds were stated to be specifically subordinated to all other debt of the PEC group.

PEC traded positively throughout 2018 and 2019. However, in late 2019 it started informing some of its bank lenders that they may require waivers on certain terms in the loan and potentially further time to repay certain amounts owing. In early 2020, PEC appointed legal and financial advisors to provide it with advice as to the best steps to take. Shortly thereafter, PEC announced that it had filed for protection under section 211B of the Companies (Amendment) Act 2017. Further to this, PEC Oil and Gas Pte Ltd, PEC Renewables Pte Ltd and PEC WWE Pte Ltd filed for protection under section 211C of the Companies (Amendment) Act 2017.

Into the first six (6) months' extension of the moratorium, the bank lenders decide that they have lost their patience and no longer have confidence in PEC's management. They have therefore decided to apply to court to place PEC under judicial management.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 7 marks]

The working group of the bank lenders has asked its advisors to provide it with a written analysis covering the following critical issues for PEC. Please provide analysis on the following issues:

- Confirmation of the purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order; **(2 marks)**

- Assuming that PEC is placed under judicial management, what requirements must be satisfied in order for PEC to be able to access rescue financing under the IRDA?; **(2 marks)**

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

    - Judicial Management is a corporate rescue tool under the Singapore insolvency regime. For an application of judicial management to succeed it should be shown that on one of the three aims of the IRDA must be satisfied that is: (i) survival of the company; (ii) survival of the whole or part of the business as a going concern; or (iii) or more advantageous realisation of the company's assets than through a winding-up order.

A good effort and JM is addressed to some degree above but the answer would be more complete if the overall purpose of the Jm was spelt out, including the moratorium and features and how it helps a corporate rescue, as wlel as the specific requirements the court must be satisfied of, including with respect to existing secured creditors (who must not object). **1 Mark.**

    - Debtors under judicial financing are eligible to avail rescue financing that is necessary for its survival and/or is necessary for achieving a more advantageous realisation of the assets as opposed to under winding up of that debtor. The rescue financing so availed shall be: (i) treated as cost and expenses of winding up in the event that the debtor is wound up; (ii) enjoy priority over preferential debt if winding up order is passed later; (iii) be secured by security interest not otherwise encumbered or secured with subordinate charge over property already encumbered if the debtor would not have been able to secure such funding otherwise; or (iv) be

secured by security interest not otherwise encumbered or secured with higher priority over property already encumbered if the debtor would not have been able to secure such funding otherwise.

A good explanation but the answer would be more complete if the impact on existing creditors in particular was explained in relation to each of the 4 types you have identified. This is a key part. **1 Mark**.

- An application for judicial management could be filed by creditors or the debtor themselves where it shown that the company is or is likely to become unable to pay its debts and survival of the company or substantial part of its business would be possible with the acceptance of the judicial management order. Companies eligible under Section 90 of the IRDA would be eligible to apply for judicial management. The Debtors would have to demonstrate substantial connection with Singapore. 'Substantial Connection' to Singapore could be demonstrated by one or more of the following: (i) COMI lies in Singapore; and/or (ii) debtor is carrying on the business in Singapore or has a place of business in Singapore; and/or (iii) debtor is registered as a foreign company in Singapore; and/or (iv) debtor has substantial assets in Singapore; and/or (v) Singapore law is the governing law in transactions or loan or dispute resolution arising out of the transaction; and/or (vi) the debtor has submitted to the jurisdiction of Singapore Courts for resolution of one or more disputes relating to a loan or other transactions.

A good explanation of how a foreign company can access JM but this does not really answer the question and also as the subsidiaries are all SG companies, the sufficient connection test does not apply.. There is now a procedure under section 94 for a company to commence JM by a resolution of creditors which was the key focus of the question. **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?

An automatic judicial moratorium comes it effect upon a filing of application for judicial management by the debtor or the creditors. Once the application is accepted a more

extensive moratorium comes into effect. During the automatic moratorium period: (i) no order for winding up of the Company; and (ii) no enforcement of security except with the leave of the Court; and (iii) no proceedings may be initiated without the leave of the Court; and (iv) no execution or other legal process may be allowed and no distress may be levied without the leave of the Court. The court or the judicial manager have the discretion to allow otherwise prohibited proceedings or enforcement actions to be commenced or continued as is laid down in the case of Hinckley Singapore Trading Pte Ltd v. Sogo Department Stores. However, the moratorium imposed under a judicial management does not have an extra-territorial effect and the assets owned by the group outside Singapore shall be guided by the respective proceedings in those jurisdictions.

A good explanation which succinctly summarises the position within Singapore and extra-territorially. **3.5 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 has adopted UNCITRAL Model Law for cross-border insolvency. The Model Law provides a framework for foreign representatives to apply to High Court of Singapore for the recognition of foreign proceedings. However, there is no requirement for reciprocity with the State in which the foreign proceeding is occurring. Singapore has also adopted the Guidelines for Communication and Cooperation between Courts inn Cross-Border Insolvency Matters.
A judgment from a foreign court may be recognised by an action at common law through the Singapore Courts. Further, under the Reciprocal Enforcement of Commonwealth Judgments Act judgments from the UK, Australia and certain other commonwealth countries could b registered in the Singapore High Court. Finally under Reciprocal Enforcement of Foreign Judgments Act only Hong Kong and SAR have been gazetted countries recognised for registration. Once registered the judgment maybe enforced as if issued by the Singapore High Court. A foreign judgment that is recognised potentially has an estoppel effect on certain specific issues or on a cause of action. A judgment for a fixed sum of money from a foreign court of law is capable of recognition if it is: (a) final and conclusive by the law of that country; and (b) where that court had international jurisdiction over the parties.

A good answer and well done for identifying the other potential applicable legislation outside of the Model Law. The answer would benefit from a more detailed assessment of the requirements to satisfy for recognition, for example foreign main proceeding v foreign non-main proceedings and the respective effects. **2 Marks.**

*** End of Assessment ***