



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

Commented [DB1]: 37.5/50 = 75%

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. The correct 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.

9 marks

QUESTION 2 (direct questions) [10 marks]

Commented [DB2]: 9.5/10

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 and unfair preferences are two types of impeachable transactions.

The elements of undervalue transactions: Undervalue transactions refers to a situation where the bankrupt makes a gift or otherwise enters into a transaction for no consideration or the bankrupt enters into a transaction where the consideration is marriage or the bankrupt enters into a transaction for consideration that is less than money's worth of the consideration provided by the bankrupt at the earlier point of acquisition. The transactions must fall within 3 years before the date of the bankruptcy application or 3 years from the date of the bankruptcy order.

The elements of unfair preferences: Unfair preference refers to a situation where an individual is adjudged bankrupt and within the relevant period gives an unfair preference to any person. The official assignee may apply to court to "undo" the transaction and return the parties to the position it would have been if the bankrupt had not given unfair preference.

The key elements are the bankrupt, an intention on the part of the bankrupt to give the other person favourable treatment, the other person being put in a better or improved position as a result of the action of the bankrupt when in a bankruptcy scenario that other person should be treated same as all other creditors of its class. The transaction that constitutes 'unfair preference' must occur within 2 years before the date of the application for bankruptcy or the date the bankruptcy order was made (in the case of a transaction that is not at an undervalue and given to an associate of the bankrupt. An "associate" of a bankrupt refers to a spouse, relative or spouse of a relative or his spouse OR a person with whom the bankrupt is in partnership or the spouse or a relative of an individual with whom the bankrupt is in partnership or a person who the bankrupt employs or by whom the bankrupt is employed, including companies and the directors and officers of those companies or a person who is a trustee of a trust if the bankrupt or an associate of the bankrupt is a beneficiary of the trust or a company where the bankrupt or associate of the bankrupt have control over the company

An official assignee may apply to the court for an order to restore the parties to its position prior to the occurrence of a transaction that is undervalue or confers undue preference. The court is empowered to such orders as it deems fit to achieve restoration.

There is an exception for transactions that are entered into in good faith and for value. If these elements are present, the transaction will not be disturbed. This defence will fail if the other party has knowledge of the circumstances of the bankrupt and the relevant proceedings or was an associate or was connected with the individual with whom he has entered into the transaction. These elements are contrary to good faith.]

Detailed answer. 4 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

[The objective of the JIN Guidelines is to improve the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt commenced in more than one jurisdiction.

The significance of these guidelines – (a) it is the first time a judicial communication and cooperation framework for cross-border insolvency was adopted in Singapore. (b) it has

been adopted by 2 of the leading jurisdictions for cross border insolvency, i.e., the US Bankruptcy Courts for the District of Delaware and the Southern District of New York.]

Concise answer. 2 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?

[(i) annulment:

A bankrupt may apply to court to annul a bankruptcy order. The application must be made within 12 months of the bankruptcy order being made unless leave is given for the application to be made later.

A bankruptcy may be annulled if the order ought not to have been made on grounds existing at that time, the debts and expenses of bankruptcy have been paid or secured to the satisfaction of the court or the distribution of the estate will take place in Malaysia or the majority of creditors are residents in Malaysia and distribution ought to happen in Malaysia.

(ii) discharge:

A bankrupt may also apply to the court for an order of discharge at any time after a bankruptcy order is made. **Who can apply?**

Upon application, the Court may refuse the application or make an order to discharge the bankruptcy absolutely or make an order to discharge the bankrupt on terms as it thinks fit, including conditions with respect to future income or property]

3.5 marks. Also the Official Assignee can issue a certificate of discharge.

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

Commented [DB3]: 9/15

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 clauses:

Ipso facto clauses refer to a contractual provision that allows one party to terminate or modify the operation of a contract upon the occurrence of a contract party's insolvency.

Under the IRDA, ipso facto clauses may not be enforced if a company is undergoing judicial management or a scheme of arrangement.

The applicable section of the IRDA is section 440.

Within the context of the IRDA, ipso facto clauses cannot be invoked (automatically or intentionally) and the counterparty in these contracts are not required to continue to advance funds or credits to an insolvent company (presumably intended to re-balance/mitigate the outcome for both parties, when insolvency is triggered)

Section 440 also contains a provision that allows applications to be filed to court to seek an exemption from the restriction taking effect against the applicant.

The applicant is required to demonstrate to the court that it would experience significant financial hardship.

The court has authority under the IRDA to rule on the applicability of the restrictions and the extent of the restrictions.

In addition to the avenue for applicants to seek a waiver, section 440 also identifies contracts that are not subject to the ipso facto restriction (in other words the ipso facto clauses in these contracts are enforceable).

These include (i) any prescribed eligible financial contract (ii) any contract that is a license, permit or approval issued by the government or a statutory body (iii) any commercial charter of a ship and (iv) any agreement that is the subject of a prescribed treaty to which Singapore is a party. Ipso facto clauses in the contracts on the exclusion list are enforceable. There are many more type of contracts identified in the exclusion list.

Another element of section 440 is that the emphasis is on ipso facto clauses only. A counterparty may still terminate a contract on other grounds/provisions in the contract (i.e., termination for a reason other than insolvency).

(ii) wrongful trading :

Wrongful trading refers to a situation where a company incurs debt or liability without having a reasonable prospect of being able to satisfy such debt or liability while the company is in a state of insolvency or becomes insolvent as a result of incurring such debt or liability.

Wrongful trading is addressed in section 239 of the IRDA.

Section 239 allows a judicial manager of a company, liquidator of a company, official receiver, creditor or contributor of a company (with the leave of the judicial manager or liquidator, or the court) to apply to the court for a declaration that a person who was a party to contract with a company that engages in wrongful trading knew that the company was trading wrongfully, or as an officer of the company, ought to have known that the company was trading wrongfully.

Section 239 also provides that a person who engages in wrongful trading incurs personal liability if the person knew that the company was trading wrongfully or where the person is an officer of the company, the person ought to have known that the company was trading wrongfully.

This concept of wrongful trading originates from insolvency legislation in England. Criminal liability is not a prerequisite to establish the elements of wrongful trading.]

Detailed answer that sets out the elements of both. However, it would have been enhanced with some analysis and commentary. **6 marks.**

Question 3.2 [maximum 7 marks]

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

[Judicial management is a form of debt restructuring. The objective is to keep the company operating. Liquidation is the exact opposite. The purpose of liquidation is to terminate the existence of the company and to distribute the company's assets among its creditors and contributories in an orderly manner and fairly. It is commonly referred to as a dissolution of a company. **Please elaborate further. One of the aims of judicial management is a more advantageous realisation than in a liquidation.**

The process of judicial management is carried out by a judicial manager. In a liquidation process, a liquidator carries out the liquidation exercise. There are specific powers and authority exercised by the judicial manager and the liquidator respectively. One key difference in the powers granted to a judicial manager and a liquidator is that the liquidator has authority to disclaim onerous contracts. A judicial manager does not have this authority. **What can the judicial manager do in respect of ongoing contracts?**

There is no threshold for judicial management to be initiated (other than the fact it is unable or is likely to be unable to pay its debts. In a liquidation procedure, a company is deemed unable to pay its debts if its debt to a creditor exceeds SGD10,000]

The essay is too short and lacks detail. Please examine and compare and contrast the two mechanisms. **3 marks.**

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

Commented [DB4]: 10/15

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)**

[re: Confirmation of the purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order

Judicial management is a corporate rescue initiative available to creditors (amongst others). It is also described as a 'creditor-in-possession' procedure.

Assuming the requirements are met, the court will appoint an independent insolvency practitioner to be the judicial manager of PEC to take control of the business and property of PEC for a period of 180 days. Further extensions to this period can be granted by the court.

In order to be eligible to be granted an order for judicial management, one or more of the following factors must be demonstrated to the court: that there is a 'substantial connection' with Singapore so that the court has jurisdiction to grant the order for judicial management:

- (a) the centre of main interests of PEC is located in Singapore;
- (b) PEC is carrying on business in Singapore or has a place of business in Singapore;
- (c) PEC is registered as a foreign company in Singapore;
- (d) PEC has substantial assets in Singapore;
- (e) PEC has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction; and /or
- (f) the debtor has submitted to the jurisdiction of the Singapore Courts for the resolution of one or more disputes relating to a loan or other transaction.

Considering that PEC is listed on the stock exchange in Singapore, its subsidiaries are all Singapore entities and the loans taken by PEC that are governed by Singapore law, it appears that the Singapore court would have sufficient jurisdiction to grant a court order for judicial management.

The applicant must show that PEC is or is likely to become unable to pay its debts and there is a reasonable probability of rehabilitating the company, or of preserving all or part of its business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding-up.

A comprehensive answer which addresses the key points. Well done. 2 Marks.

re: 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

[PEC must demonstrate that the financing sought is necessary for the survival of PEC or that the financing is necessary to enable PEC to realise its assets and that this is more favourable than having PEC liquidated and distributing the proceeds of the liquidation]

The answer would benefit from a more detailed assessment of the four types of rescue financing and what must be shown in order to access each type. The key issue is always the impact on existing creditors given that priority may be given to a new creditor or to an existing creditor in favour of others. **0.5 Marks.**

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

Under section 94 of the IRDA, each subsidiary may obtain a resolution from its creditors for the subsidiary to be placed under judicial management.

To qualify for judicial management, each subsidiary must be able to demonstrate that it is or is likely to become unable to pay its debts.]

The answer identifies the key requirements but could do with greater explanation. **2 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?

[No it does not have extra territorial effect. If the intention is to be able to rely on or invoke a moratoria that has extra territorial effect, PEC should consider executing a supercharged scheme of arrangement under section 64 of the IRDA. Under section 64 of the IRDA, PEC can initiate a restructuring program that triggers an automatic moratorium which has extra territorial effect, PEC may avail itself to rescue financing. Furthermore considering that it has different categories of lenders, the supercharged scheme can facilitate approval of a restructuring scheme across different classes of creditors (cross class cramdown) and also introduces pre-packaged schemes of arrangement. The moratorium can be further extended by an order of the court.]

Well done for identifying some key differences between the section 64 process and JM. The answer could also have addressed how the company would apply for section 64 protection if it was already in JM and the interplay between the JM and the other processes. **2.5 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 adopted the UNCITRAL Model Law on Cross-Border Insolvency (Model Law). The Model Law is set out in the Third Schedule of the IRDA. With the UNCITRAL Model Law adopted, recognition of foreign proceedings can take place in Singapore pursuant to the amended Companies Act. Foreign representatives may apply to the Singapore High Court for recognition of foreign proceedings. A Singapore court may deny recognition only if recognition is manifestly contrary to public policy. This is one key difference between the UNCITRAL Model Law in its original form and the version adopted by Singapore.

Before Singapore adopted the UNCITRAL Model Law, recognition of foreign insolvency proceedings were guided by common law principles. If a foreign company is insolvent in its jurisdiction of incorporation, or in a jurisdiction where its centre of main interest is located, the Singapore court recognises such foreign insolvencies.

The Reciprocal Enforcement of Commonwealth Judgments Act is another Singapore legislation that recognises judgements issued in foreign courts. Judgments issued by foreign courts are required to be registered in the Singapore High Court. Under this legislation, judgements from the United Kingdom, and Australia and certain specific Commonwealth jurisdictions qualify for registration in the Singapore High Court.

Another piece of legislation that recognises foreign judgment is called the Reciprocal Enforcement of Foreign Judgments Act, which currently recognises judgments granted in the courts in Hong Kong SAR.

Once eligible foreign judgments are registered in the Singapore High Court pursuant to the relevant legislation, the foreign judgment will have the effect of a judgment issued in the Singapore High Court.

Apart from the abovementioned legislations, in the case of a judgment for a fixed sum of money from a foreign court, Singapore common law also recognises foreign judgments where it is final and conclusive by the law of the foreign jurisdiction where the judgment originates and where the court in that foreign jurisdiction has international jurisdiction over the parties. In tandem with these authority of the Singapore court to recognise foreign judgments, there are also defences available to a debtor to resist recognition and enforcement of a foreign judgment, however these defences are limited.]

Well done for identifying the various pieces of legislation. More focus could have been given to how foreign proceedings are recognised and what the effect of that recognition is in the answer. **3 Marks.**

*** End of Assessment ***