INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8E

SINGAPORE

This is the **summative (formal) assessment** for **Module 8E** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 8E. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentnumber.assessment8E]**. An example would be something along the following lines: 202021IFU-314.assessment8E. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 38/50 = 76% Well done!

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following **is not** one of the objectives of the IRDA?

(a) To establish a regulatory regime for insolvency practitioners.

(b) To introduce a new omnibus legislation that consolidates the personal and corporate insolvency and restructuring laws.

(c) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

(d) To enhance Singapore's insolvency and restructuring laws.

Question 1.2

Who may apply to court to stay or terminate the winding up of a Company?

(a) A creditor.

(b) A contributory.

(c) The liquidator.

(d) Any of the above.

Question 1.3

Which of the following factors may enable a foreign debtor to establish a "substantial connection" to Singapore?

(a) The debtor has chosen Singapore law as the law governing a loan or other transaction.

(b) The centre of main interests of the debtor is located in Singapore.

(c) The debtor has substantial assets in Singapore.

(d) Any of the above.

Question 1.4

What percentage of each class of creditors must approve a scheme of arrangement for it to be binding?

(a) Over 50% in number.

(b) 50% or more in number.

(c) Over 75% in number.

(d) 75% or more in number.

Question 1.5

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

(a) The automatic moratorium lasts for 30 days.

(b) The automatic moratorium may be extended.

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

(a) Informal creditor workouts.

(b) Judicial Management.

(c) Receivership.

(d) Scheme of arrangement.

Question 1.9

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

(a) England and Wales.

(b) Brunei.

(c) The USA.

(d) Australia.

Question 1.10

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

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

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

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

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

10 marks

QUESTION 2 (direct questions) [10 marks]

Commented [DB2]: 8.5/10

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.

There are two types of impeachable transactions under Singapore insolvency law: (A) transactions that are undervalued; and (B) transactions involving an unfair preference. The elements involved in each differ slightly whether we refer to an insolvent company or a bankrupt individual.

In the case of (A), the elements that need to be proven by a liquidator against a company are that (i) the transaction is equal to a gift (in that no consideration is received) or consideration is received but for considerably lower amount than what was originally paid; and (ii) the company was or became insolvent as a consequence of this undervalued transaction.

The same element as in (A)(i) needs to be proven by Official Assignees with respect to bankrupt individuals, in that the transaction was a gift or for considerably lower consideration than what was paid. However unlike insolvent companies, Official Assignees do not need to prove that individuals became bankrupt as a result of the undervalued transaction. This point is incorrect because still need show that became bankrupt as a result.

In the case of (B), transactions leading to an unfair preference involve three elements: (i) the transaction is with an existing creditor or guarantor of the company or bankrupt individual; (ii) the effect of the transaction is to place this creditor or guarantor in a better position, than had they undergone the process of the company's insolvency or individual's bankruptcy; and (iii) the transaction was driven by an aspiration to prefer this creditor or guarantor over others so that they achieve a better position through this transaction for unfair preference.

Certain defences are available in the case of impeachable transactions involving bankrupt individuals. One defence is available to bona fide third party purchasers in good faith and for value (who received an interest in a property that was subject to an impeachable transaction) in which case the transaction would then not be challenged. In the case of impeached transactions involving insolvent companies, another possible defence is to argue that the transaction in questions are outside the applicable time period during which such transactions can be challenged.

Answer does not mention the applicable time period. What happens if the counterparty is related to the insolvent party. **3 marks.**

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

According to the website of the Judicial Insolvency Network, the primary aim of the JIN Guidelines is to preserve "enterprise value" and reduce "legal costs", by enabling communication and cooperation between courts in cross border insolvency matters. The JIN Guidelines are significant for Singapore in that it is the first such protocol for communication and cooperation in cross border insolvency matters entered into by the Courts of Singapore.

The answer could do with some elaboration and mentioning some of the other countries that have implemented these Guidelines. **1.5 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?

A bankrupt can obtain an annulment of a bankruptcy order by applying to the Court within 12 months of the relevant bankruptcy order having been issued.

The Court may decide to annul the bankruptcy order if (i) it determines that the order should not have been passed on the grounds existing at that time; (ii) the debt liabilities of the bankrupt have been satisfactorily been cleared or secured; or (iii) the distribution of the assets of the bankrupt is in Malaysia or such creditors are predominantly based in Malaysia.

With respect to discharge, an application to the Court may be made at any time after a bankruptcy order has been passed, and can be filed by the bankrupt, the Official Assignee or any other person who has an interest.

Such application must be provided to each creditor of a bankrupt with a proven debt. The Court shall allow for any creditor to be heard before deciding an application to discharge a bankruptcy order.

There can also be discharge by the Official Assignee. **4 marks**.

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 are provisions that allow for termination or amendment of a contract upon a party to the contract becoming insolvent and therefore insolvency acts as a trigger for such rights to arise. *Ipso facto* clauses, particularly when they are triggered automatically, can hinder restructuring efforts under a legislative framework since it allows for a party to exercise contractual rights which may be adverse to formal restructuring processes.

Consequently, inspired by Canadian legislation, Singapore's IRDA introduced restrictions on the operation of *ipso facto* clauses through Section 440, which under sub-section (1) prevents the exercise of *ipso facto* clauses at any time after the commencement, or before the conclusion of, any proceedings against a company by reason of such proceedings having been commenced. All other clauses in the contract remain enforceable.

Proceedings are defined under Section 440(6) as any application under Section 210(1) of the Companies Act (relating to any compromise or arrangement between a company and its creditors) or applications under IRDA's Sections 71 (compromise or arrangement without meeting of creditors), 64 or 65 (to restrain proceedings against a company, its subsidiary or holding company), 91 (for judicial management order) or 94(5)(a) (for appointment of interim judicial manager).

Section 440(1) of IRDA however does not apply to all contracts which contain *ipso facto* clauses. The excluded contracts that have been identified in Section 440(5) of IRDA are "(a) any eligible financial contract as may be prescribed; (b) any contract that is a licence, permit or approval issued by the Government or a 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 Interests in Aircraft Equipment Act (Cap. 144B); or (f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed".

Prescribed financial and other contracts are provided for in the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020.

Another carve out to Section 440(1) is provided in Section 440(4) which allows for parties to an affected contract to apply for the court's discretion that the restriction on an *ipso facto* clause "would likely cause the applicant significant financial hardship".

(ii) Section 239(1) of IRDA sets out that a court may, upon an application of a judicial manager, liquidator, official receiver or creditor (with leave) of a company, declare any person who was a party to the company trading wrongfully, be personally responsible for debts or other liabilities of the company, if that person knew that the company was trading wrongfully; or as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

Wrongful trading exists in the circumstances outlined in Section 239(12) namely where (a)the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full; or (b) the company incurs debts or other liabilities that it has no reasonable prospect of meeting in full; and that result in the company becoming insolvent.

The court may relieve the person declared as responsible from personal liability under Section 239(2) if such person acted honestly; and having regard to all circumstances, the person ought fairly to be relieved from personal liability.

Good discussion on ipso facto. There could have been more written on wrongful trading especially on how it differs from insolvent trading. **6 marks.**

Question 3.2 [maximum 7 marks]

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

The purpose of judicial management is laid out in Section 89 of IRDA namely to achieve (i) the survival of the company (whole or part) as a going concern; (b) approval of a compromise or an arrangement; or (c) a more advantageous realisation of the company's assets or property than on a winding up. From this perspective, the objective of judicial management is to rehabilitate or restructure the company.

In contrast, the purpose of liquidation is to distribute the assets of a company in an equitable and well managed manner amongst its creditors and to seek the company's winding up through one of two modes given in Section 119 of IRDA, namely through a voluntary procedure (either by its shareholders or through its creditors, as outlined in Section 161 of IRDA) or by court order.

The purpose of judicial management is performed by a judicial manager, who is an officer of and appointed by the court, seeking a plan to rehabilitate or restructure the company. In liquidation, a liquidator or official receiver is appointed to take control of the company and its assets, and undergo the process of liquidation. Both are court appointed officers

For judicial management, the test is whether the company is likely or unable to pay its debts with a reasonable probability of rehabilitating or preserving the company as a going concern,

while in liquidation there is no reference to "likely" or the reasonable probability, only that it is unable to pay its debts. What does this difference tell you?

A foreign company (which has sufficient nexus to Singapore) may enter judicial management however a foreign company can only undergo liquidation in Singapore if the foreign company has gone into liquidation in its home jurisdiction as well. This is incorrect on liquidation.

Judicial management ends within 180 days (unless an extension is granted) according to Section 111 of IRDA in which case the company is discharged from judicial management. Liquidation has no fixed time period and depends on how long it takes to liquidate and distribute assets.

There is a lack of depth in the analysis also there is no meaningful comparison of the two mechanisms. Some brief mention of the difference in purpose of hardly any discussion on the different features. **3 marks.**

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

Commented [DB4]: 10.5/15

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)**

The purpose of judicial management is laid out in Section 89 of IRDA namely to achieve (i) the survival of the company (whole or part) as a going concern; (b) approval of a compromise or an arrangement; or (c) a more advantageous realisation of the company's assets or property than on a winding up.

The legal test for judicial management is given in Section 90 of IRDA including where a creditor considers (a) that the company is, or is likely to become, unable to pay its debts; and (b) that there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern, or that the interests of creditors would be better served otherwise than by resorting to a winding up.

A good summary but the answer would benefit from more detailed as to what must be presented to the court in order to obtain judicial management, including, for example, an assessment of any consent or non-opposition from secured creditors. **1.5 Marks.**

Section 101(10) of IRDA defines rescue financing as financing that satisfies any of the following (a) the financing is necessary for the survival of the company, or of the whole or any part of the undertaking of that company, as a going concern; (b) the financing is necessary for a compromise or arrangement; or (c) the financing is necessary to achieve a more advantageous realisation of the assets of a company than winding up.

These are some of the requirements but the key thing to consider is the four types of rescue financing with different priorities and what is required to satisfy each limb, particularly having regard to the effect it has on existing creditors. **1 Mark.**

Section 94 of IRDA outlines the process for entering judicial management out of court which principally involves obtaining a resolution of the company's creditors if the legal test given above is satisfied. Section 94 goes onto state other aspects of the process including notice period and criteria to appoint a judicial manager.

Well done for identifying the correct section and providing an overview summary. More detail on what those steps require, how an interim JM becomes a permanent JM would have been a nice addition. **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?

Section 95 of IRDA provides for an automatic moratorium which applies when judicial management is commenced. This would be the case when PEC itself enters into judicial management.

In the case of PEC's subsidiaries, as Section 95 does not explicitly refer to the extra territorial effect of its moratorium, an application can be made with respect to its subsidiaries under Section 65 of IRDA, so that group restructurings are possible even when such subsidiaries are based in other jurisdictions. This would be particularly useful given that PEC's subsidiaries are debtors themselves, beyond the debts and guarantees of PEC itself.

Moratoriums issued by a Singapore Court in any case have the effect of restraining creditors based in Singapore or otherwise upon which the Singapore Court has jurisdiction, which can be effective against Forty Thieves Capital if the private equity fund is subject to the jurisdiction of a Singapore Court.

Otherwise there is relief available to PEC under Singapore's adoption of the UNCITRAL Model Law when Singapore proceedings in which moratoriums are issued, are then recognised as foreign main proceedings in another jurisdiction.

A good answer identifying most of the key issues. Note not all jurisdictions have adopted the model law so the JMs may need to rely on the local law processes. **3 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.

Following the adoption of the UNCITRAL Model Law by Singapore, and the JIN Guidelines, the recognition of foreign proceedings has enabled Singapore courts to address cross border insolvency issues. The UNCITRAL Model Law and JIN Guidelines also allows the Singapore courts to cooperate and communicate with foreign courts in managing concurrent proceedings which would appear to be a relevant consideration for the PEC Group.

In order to initiate recognition, the foreign company in question applies to the Singapore court for recognition of foreign proceedings involving the foreign company in doing so, request assistance and cooperation with those proceedings. The Singapore court may decline recognition if do so would be "manifestly contrary" to public policy.

Assuming the foreign proceedings are recognised as main foreign proceedings, the effect of this recognition is that protections under the UNCITRAL Model Law (such as Section 20) come into effect including stays. If the foreign proceedings are considered to be non-main, the Singapore court has discretion how to act in terms of which protections to afford.

The Singapore court may ultimately also allow for distribution of assets based in Singapore to foreign creditors, provided that the interests of other creditors including those in Singapore are also adequately protected.

This is a nice summary of the applicable law. You might want to address the effect if the recognition is of a non-main proceeding and other discretionary relief that is available under the Model Law. **3 Marks.**

*** End of Assessment ***