



**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]: 30.5/50 = 61%

**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]: 6/10

**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, i.e.:

- (i) an unfair preference transaction; and
- (ii) a transaction at an undervalue.

The elements of (i) an unfair preference transaction are as follows:

- (a) the preferred person is one of the company's creditors or guarantors for any of the company's debts or other liabilities;
- (b) the company is unable to pay its debts (or becomes unable to pay its debts in consequence of the transaction) at that time;
- (c) the company does anything or suffers anything to be done which has the effect of putting the preferred person into a position which, in the event of the company's winding up, will be better than the position that the person would have been in if that thing had not been done; and
- (d) the company was influenced in deciding to enter the transaction by a desire to produce the effect mentioned in (c).

The elements of (ii) a transaction at an undervalue are as follows:

- (a) the company makes a gift to the person or otherwise enters into a transaction with that person for a consideration significantly less than the value of the consideration provided by the company; and
- (b) the company is unable to pay its debts (or becomes unable to pay its debts in consequence of the transaction) at that time.

**The answer does not set out the lookback periods and also the defences are not discussed. 2 marks.**

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

What is the objective and significance of the JIN Guidelines?

The objective of the JIN Guideline is to set up a framework for the communication and cooperation between courts in cross-border insolvency matters. The Guideline is significant in cross-border insolvency matters in Singapore because some leading jurisdictions for cross-border insolvency such as the US Bankruptcy Courts for the District of Delaware and the Southern District of New York have adopted the Guideline. **Please elaborate further.**

**Answer is too brief. 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) According to the Singapore IRDA Section 392, a bankrupt can obtain an annulment of a bankruptcy order if the Court finds that:
  - (a) on any ground existing at the time the order was made, the order ought not to have been made;
  - (b) to the extent required by the regulations, both the debts and the expenses of the bankruptcy have all, since the making of the order, either been paid or secured for to the satisfaction of the Court; or
  - (c) (A) proceedings are pending in Malaysia for the distribution of the bankrupt's estate and effects amongst the creditors under the bankruptcy law of Malaysia or (B) a

majority of the creditors in number and value are resident in Malaysia, and that the distribution ought to take place there.

- (ii) According to the Singapore IRDA section 394, in order to obtain an order for discharge from bankruptcy, a bankrupt (or the Official Assignee or any other person having an interest in the matter) must apply to the court for the discharge order. The Court may:
  - (a) refuse to discharge the bankrupt from bankruptcy;
  - (b) make an order discharging the bankrupt absolutely; or
  - (c) make an order discharging the bankrupt subject to such conditions as the Court thinks fit to impose, including conditions with respect to future income or property.

Also, should mention that 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. Also the Official Assignee can issue a certificate of discharge. **3 marks.**

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

Commented [DB3]: 6.5/15

#### **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.

The IRDA 2018, which came into effect on 30 July 2020, introduces new provisions as to (i) the restrictions on *ipso facto* clauses and (ii) wrongful trading.

Regarding (i) the restrictions on *ipso facto* clauses, Section 440 of the IRDA 2018 prohibits a person from exercising certain contractual rights (such as rights to terminate, or claim an accelerated payment under, any agreement), by reason only that the proceedings are commenced or that the company is insolvent.

#### **How do these restrictions on *ipso facto* operate?**

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Regarding (ii) wrongful trading, under Section 239 of the IRDA 2018, the court may declare that any person who was a party to the company trading wrongfully is personally responsible for all or any of the company's debts or liabilities if the person knew (in the case that the person is an officer of the company, ought to have known) that the company was trading wrongfully. A company trades wrongfully if the company, when insolvent, incurs debts or liabilities without reasonable prospect of meeting them in full and that result in the company becoming insolvent.

**Answer is too brief. Please elaborate. 3 marks.**

#### **Question 3.2 [maximum 7 marks]**

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

One of the most essential differences between a judicial management and liquidation is the purpose of the proceedings. The purpose of the liquidation is to dispose of the debtor

(insolvent company)'s assets, to distribute them to the creditors and other parties, and to terminate the existence of the debtor, under the fair proceedings conducted by a liquidator and supervised by the court. On the other hand, as stipulated in Section 89 (1)(a) of the IRDA, the main purpose of the judicial management is to restructure the debtor (financially distressed company)'s business by utilizing the tools provided by the insolvency law such as moratorium, DIP finance, restrictions on ipso facto clause, and others, under the fair proceedings conducted by a judicial manager and supervised by the court.

The difference of the purpose leads to several differences of the proceedings. For example, while an application of liquidation can be made when a company is unable to pay its debts, the requirements for judicial management to be applied are (i) the company is or is likely to become unable to pay its debts and (ii) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern, or the interests of creditors would be better served otherwise than by resorting to a winding up as set forth in Section 90 of the IRDA. Also, under judicial management, the court may make an order that grants preferential treatment for any rescue financing to the debtor so that the debtor may be able to obtain rescue financing more easily. In addition, under judicial management, the judicial manager may submit a statement of proposal that includes the debtor's business restructuring plan (sometimes the judicial manager also obtains approval of creditors under scheme of arrangement) and, if a certain number/value of creditors votes for the proposal (or the scheme), it will be binding the company, its creditors, and other related parties in order to restructure the company's business as a going concern. As liquidation only aims at the dissolution of the company, it does not have the processes of submitting a plan of reorganization/restructuring nor voting for it by creditors or other constituents.

Other than the difference in purpose, the essay fails to go into detail on the differences and similarities between features of both the proceedings. **3.5 marks.**

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

Commented [DB4]: 8/15

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)**

[Type your answer here]

The purpose of judicial management proceedings and what must be presented to the court in order to obtain a judicial management order

The purposes of judicial management proceedings stipulated in Section 89 of the IRDA are as follows:

- (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 or section 71 of a compromise or an arrangement between the company and any such persons as are mentioned in the applicable section;
- (c) a more advantageous realisation of the company's assets or property than on a winding up.

According to Section 90 of the IRDA, in order to obtain a judicial management order, the petitioner must present to the court:

- (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.

In the case of PEC, considering that PEC has required its bank lenders for waivers on certain terms in the loan and the reschedule of certain repayments, it may be arguable that the requirement (a) is satisfied. Also, given that the company carries out water and energy business, which is of strategic importance to Singapore, and the scale of the company is large (considering how much it has already raised funds), although its business has been going downturn, it may be arguable that the requirement (b) is satisfied if the company is properly managed.

**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 well as the specific requirements the court must be satisfied of, including with respect to existing secured creditors (who must not object). 1.5 Marks.**

**What requirements must be satisfied in order for PEC to be able to access rescue financing under the IRDA?**

According to Section 67(9) of the IRDA, rescue financing must satisfy either or both of the following conditions:

- (a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;
- (b) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company.

In addition, for rescue financing in the manner mentioned in Section 67(1)(b)-(d), the company must show that it would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority mentioned in these paragraphs. Moreover, for rescue financing in the manner mentioned in Section 67(1)(d), the company must show that there is adequate protection for the interests of the holder of that existing security interest.

**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. 1.5 Marks.**

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

According to Section 94(1) of the IRDA, the company may, instead of applying to the court for a judicial management order, place itself under the judicial management proceedings (voluntary judicial management) if (a) the company is, or is likely to become, unable to pay its debts; (b) there is a reasonable probability of achieving one or more of the purposes of judicial management mentioned in section 89(1); and (c) the company obtains a resolution of its creditors for the company to be placed under judicial management.

**This is a good summary of the provisions but more detail on the process, timeline, possibility of an interim JM would also have been good. 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 64(5)(b) of the IRDA states that a moratorium order under scheme of arrangement or judicial management proceedings may be expressed to apply to any act of any person in Singapore or within the jurisdiction of the Singapore court, whether the act takes place in Singapore or elsewhere. Therefore, the judicial management moratoria have extraterritorial effect to the extent set out in Section 64(5)(b). In other words, if a person who are not in Singapore nor within the jurisdiction of the Singapore court takes a legal action against the assets owned by the PEC group outside Singapore, then the moratoria cannot suspend such a legal action.

**This is not quite right. The moratorium under section 64 is expressly stated that it can have extra-territorial effect however the moratoria that comes into effect when a JM is appointed is more limited and cannot have extra-territorial effect – it is only effective within Singapore. 1 Mark.**

**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.

Article 17.1 of the Third Schedule of the IRDA, which is basically equivalent to the UNCITRAL Model Law on Cross-Border Insolvency, sets out that subject to Article 6 (public policy exception), a foreign proceeding (defined in Article 2(h)) must be recognised if (a) the person or body applying for recognition is a foreign representative (defined in Article 2(i)), (b) the application meets the procedural requirements stipulated Article 15(2) and (3) and (c) the application has been submitted to the High Court in Singapore.

This is a very high level summary of what is a more detailed procedure. The answer could have addressed the procedural requirements but also examined the difference between recognition of a foreign main versus non-main proceeding and other relief available. **2 Marks.**

**\* End of Assessment \***