



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]: 34 out of 50 = 68%

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

Commented [DB2]: 8 out of 10

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. Answer is B

Question 1.8

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

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

Question 1.9

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

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

Question 1.10

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

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

8 marks

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

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

[(a) unfair or undue preference was given

Its elements are:

Commented [DB3]: 8.5 out of 10

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

The relevant time period is two years from the date of the winding-up application where the preferred party is an associate, and six months if the party involved is unrelated.

(b) The transaction was conducted at an undervalue

For transactions at an undervalue, the liquidator must establish the two elements:

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

Notably, the company is presumed to have undertaken a transaction at an undervalue if the preferred party is an associate of the company. The relevant time to recover assets or impeach the transaction is 5 years from the date of the winding up application, regardless of whether the undervalue transaction was with an associate or not.

In both unfair preference and transaction at an undervalue, where an individual has acquired an interest in the insolvent's property from a person other than the insolvent company or bankrupt, or has received a benefit or their preference from the transaction, if this was done in good faith and for value, the transaction remains valid and may not be impeached. Such a transaction or benefit will not be in good faith if the individual had notice of the surrounding circumstances and the relevant proceedings, or was an associate of the bankrupt/insolvent company, or was connected with the individual with whom has entered into the transaction.]

Detailed answer save that the clawback periods are incorrect. 3.5 marks.

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

[The adoption of the Supreme Court of Singapore of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines) has as its objectives the promotion of judicial communication and cooperation framework for cross-border insolvency. This is the first time that such judicial cooperation framework has been adopted in Singapore. This is also significant as the JIN Guidelines have also been adopted by US Bankruptcy Courts for the District of Delaware and the Southern District of New York, two of the leading jurisdictions for cross-border insolvency.]

Good 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) The bankrupt can obtain an annulment order from the court upon showing that:

- (1) the annulment is ought not to have been made on grounds existing at the time;
- (2) debts and expenses of the bankruptcy have been paid or secured to the satisfaction of the court;
- (3) distribution of the estate will take place in Malaysia or the majority of creditors are residents in Malaysia and the distribution ought to happen there.

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

[(ii) The bankrupt may apply for an order of discharge any time after the bankruptcy order is made. Any application must be served on each creditor who has filed a proof in the bankruptcy and the court will hear any creditor before making any discharge.]

Who else can apply to court for discharge and what are the other orders the Court can make? 3 marks.

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

Commented [DB4]: 8.5 out of 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.

[(a) An *ipso facto* clause is a contractual provision that allows one party to terminate or modify the operation of the contract (or provides for this to occur automatically) by reference to the counterparty's insolvency. These clauses make rescue or rehabilitation difficult to achieve. In order to promote corporate rescue, Singapore followed jurisdictions like the United States to restrict the enforcement of *ipso facto* clauses during insolvency. Particularly, the amendment was made through section 440 of the IRDA, following the Canadian Insolvency legislation, by introducing a new provision restricting the operation of *ipso facto* clauses in certain circumstances. Section 440 restricts the enforcement of *ipso facto* clauses once a company commences any proceedings relating to any applications under judicial management or a scheme of arrangement involving the 'supercharged' scheme process. However, certain contracts are excluded, including: (1) any prescribed eligible financial contract, (2) any contract that is a license, permit or approval issued by the government or a statutory body, (3) any commercial charter of a ship, (4) any agreement that is the subject of a prescribed treaty to which Singapore is a party. Although contracts remain valid, counter parties are not required to continue to advance new money or credit to the insolvent party. Notably, section 440(4) allows Singapore courts with an overriding power to rule on the applicability of the restrictions and their extent if the applicant can demonstrate

that it will suffer 'significant financial hardship' as a result. **This portion is a decent effort which would have been enhanced with a little more analysis.**

(b) Section 239 of the IRDA introduces the new concept of wrongful trading which makes a person liable if: (1) he knew that the company was trading wrongfully; or (2) as an officer of the company, ought, in all circumstances, to have known that the company was trading wrongfully. A company trades wrongfully if debts or liabilities have been incurred without reasonable prospect of meeting them in full because the company is either insolvent or becomes insolvent because of the debt or liability. Notably, there is no need that the person is found criminally liable before he is found to have breached section 239.] **This write up on wrongful trading is too brief. There has to be more analysis and explanation. How is wrongful trading different from insolvent trading?**

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 is a corporate rescue tool which involves the court appointing an insolvency practitioner as the judicial manager who then takes over the responsibility for the running of the company from its directors and management. First, it is different from liquidation because its main objectives are rescuing the company and the taking of steps which may allow the company to stay afloat. Liquidation, on the other hand, aims to dissolve and wind up the affairs of the company, and then distribute the company assets to all creditors. In liquidation proceedings, rescuing the company is not at all an objective. Rather, it focuses on ensuring a fair and orderly distribution of the company's assets among creditors and contributories and to terminate the existence of the company by its eventual dissolution. **Good introduction paragraph.**

Because of this key difference in their objectives, the judicial manager in judicial management proceedings, is given the power to replace the company's directors and management, and take over the responsibility of running the company. The power to run the company as a going concern is given to the liquidator so far as is necessary for the beneficial winding-up of the company and only for a limited period. The liquidator's power to sell the company assets is given with the objective of eventually distributing the proceeds from the company assets to the company creditors. In judicial management, the judicial manager may sell company assets so as to rescue and rehabilitate the company. Notably, creditors play a limited role in the management and direction of the company, albeit creditor proposals may be made through a creditor committee.

Likewise, the distribution of proceeds from the company assets to the creditors is not the main objective of judicial management unlike in liquidation proceedings. As such, creditors participation in judicial management is limited. Through the creditors committee, they can require the judicial manager to furnish them with information with the view of allowing them to consider and give the judicial manager relevant directions. In liquidation, creditors can commence the liquidation process themselves. **Similarly in JM, creditors can also apply to place the company under JM.** They can file a creditors' voluntary liquidation when the company is unable to pay its debts and directors are unable to provide the declaration of solvency. **This is still a process kickstarted by the Company.** Creditors, in a meeting convened by the company, consider and approve the proposal for a voluntary winding up. Furthermore, creditors also participate by filing proofs of their debts to verify their claims and vote on certain issues. They may also form a creditor's committee to better manage the conduct of liquidation.]

There is some understanding on the difference in the aims of the two processes. However the comparison of both is lacking, when it comes to the procedure e.g. scope of moratorium and the substantive elements such as ability of liquidator and JM to bring actions etc. How are contracts dealt with?

3.5 marks.

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

Commented [DB5]: 9 out of 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 bank lenders in their application for judicial management of PEC must establish that:

(1) PEC is or will be unable to pay its debts; and (2) there is reasonable probability of rehabilitating PEC, or of preserving all or part of its business as a going concern, or that otherwise the interests of the bank lenders as creditors would be better served than by resorting to a winding up.

More detail around what the purpose of JM is and some elaboration on the key aspects would have improved the answer. 1 Mark.

To avail rescue financing, the judicial manager should establish that rescue financing for PEC is either or both: (1) necessary for the survival of a debtor that obtains the financing; (2) necessary to achieve a more advantageous realisation of the assets of a debtor that obtains the financing than on a winding-up of that debtor.

You could expand on the different types of dip financing, including priorities, in more detail as this is one of the key aspects. 1 Mark.

As regards placing PEC's subsidiaries under judicial management, separate applications for placing each subsidiary under judicial management must be made. This means establishing the same two requirements mentioned earlier in placing PEC under judicial management. This is because Singapore has no legislation dealing with group of companies.]

There is no an ability for a company to place itself into JM, without a court application, by a creditor resolution. 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 moratorium on legal proceedings against the company comes into effect upon the filing of the judicial management application. If a judicial management order is made then a more extensive moratorium will come into effect for the period of the judicial management. The length of this moratorium coincides with the period the judicial management order is in effect, which is 180 days unless extended by the court. Notably, this moratorium should prevent legal proceedings, and acts much like an injunction. The only exceptions are those legal proceedings allowed by the judicial manager or the court.

Hence, the effect of the moratoria may go beyond Singapore because the PEC, its subsidiaries and any creditor in Singapore should be bound by the moratoria *in personam*. However, this does not mean that the moratoria is *per se* extra territorial in nature, as courts in other countries could not give automatic effect to the Singapore court-issued moratoria, unless the foreign courts are obligated to do so by treaty or their respective local laws. Hence, assets owned by PEC and its subsidiaries located outside of Singapore are covered by the moratoria because the *in personam* effect of the moratoria to the PEC, its subsidiaries and creditors involved in the Singapore proceedings. In that sense, assets in Malaysia, China and the United States are protected as the Singapore court can penalise the PEC and its subsidiaries in case of breach of the moratoria. Further, should assets be distributed to creditors in Malaysia, China and the United States pursuant to the local insolvency proceedings filed by PEC or its subsidiaries in these jurisdictions, such distribution of assets may not be recognised in Singapore as shown in *Re Zeta Jet Pte Ltd* [2018] SGHC 16, and the public policy defence may be available to avoid recognition in Singapore of those distributions or effects of the foreign insolvency proceedings.]

A good effort. Only the section 64 moratorium process is capable of making orders with extra territorial effect but it is also right to say that whether a foreign court accepts those or not may be another matter. 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.

[Laws which may be relevant in recognising foreign insolvency proceedings in Singapore include: (1) 2017 Amendment Act which adopted in Singapore the UNCITRAL Model Law on Cross-Border Proceedings (Model Law); (2) Reciprocal Enforcement of Commonwealth

Judgments Act (RECJA); (3) Reciprocal Enforcement of Foreign Judgments Act (REFJA); (4) common law principles of recognition. Likewise, the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, although directly does not contain rules on the recognition of foreign insolvency proceedings, is relevant as it provides a framework for judicial communication and cooperation which is very useful in dealing with some issues involved in the recognition of foreign insolvency proceedings.

First, as regards to foreign insolvency proceedings which fall under the Model Law framework, the foreign representative may apply to the High Court of Singapore for recognition of foreign insolvency proceedings under the Model Law. All the effects under the Model Law, like a stay and recognition of the foreign representative, would take effect in Singapore once the foreign insolvency proceeding is recognised.

Second, judgments arising from foreign insolvency proceedings may be recognised in Singapore through the RECJA and REFJA. Particularly, RECJA enables judgments from the United Kingdom and Australia (and several other Commonwealth countries) to be registered in the Singapore High Court. In Singapore, RECJA establishes a statutory scheme for the recognition and enforcement of judgments of superior courts from the abovementioned jurisdictions by allowing the judgment creditor to apply to the Singapore High Court for the registration of a judgment. The Singapore High Court may order such judgment to be registered if it thinks, in all circumstances of the case, that it is just and convenient for the judgment to be enforced in Singapore. On the other hand, REFJA so far only applies to judgments coming from Hong Kong. The scheme under REFJA is similar to RECJA wherein the judgment creditor may also apply before the High Court of Singapore for registration of the foreign judgment. The effect of registration, for judgments made under either the RECJA and REFJA, would be to give such registered foreign judgments the effects as if such judgments was issued from the Singaporean High Court, without the need of commencing fresh proceedings.

Third, the Singapore courts, prior to Singapore's adoption of the Model Law, depended on common law for the recognition of foreign insolvency proceedings. This usually means that common law allows Singapore courts to recognise foreign insolvencies when they take place in the jurisdiction where the company is registered. Singapore courts have further extended this to insolvencies commenced where the debtor company's centre of main interest is located, even if that is different to where the company is registered. Notably, the Singapore courts had extended the common law to enable interim orders in aid of foreign rehabilitation proceedings. Likewise, Singapore courts have confirmed that recognition is also possible for voluntary rehabilitation or insolvency proceedings. Similarly, Singapore courts have extended the common law to address inadequacies in domestic insolvency proceedings. Foreign judgments (which has an *in personam* effect) may be recognised in Singapore or enforced by an action at common law through the Singapore courts. Once recognised, the foreign judgment is treated as if the same has been issued by Singapore courts without the need of fresh proceedings.]

A good answer. More detail on the Model Law recognition would have enhanced the answer as that is really the primary means of recognition. 3 Marks.

*** End of Assessment ***