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]: 32.5 out of 50 = 65

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

Commented [DB2]: 9 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.

Question 1.5

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

(a) The automatic moratorium lasts for 30 days.

(b) The automatic moratorium may be extended.

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

(a) Informal creditor workouts.

(b) Judicial Management.

(c) Receivership.

(d) Scheme of arrangement.

Question 1.9

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

(a) England and Wales.

(b) Brunei.

(c) The USA.

(d) Australia.

Question 1.10

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

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

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

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

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

9 marks

QUESTION 2 (direct questions) [10 marks]

Commented [DB3]: 7 out of 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.

[The elements of the two types of impeachable transactions under the Singapore insolvency law are:

A. Undervalue transactions: the elements of undervalue transactions are:

- (a) the bankrupt makes a gift or otherwise enters into a transaction for no consideration;
- (b) the bankrupt enters into a transaction where the consideration is marriage; or
- (c) the bankrupt enters into a transaction for consideration which is significantly less, in money's worth, of the consideration originally provided by the bankrupt

B. Unfair preferences: the elements of undervalue transactions are:
- a) the other person is one of the bankrupt's creditors or a surety or guarantor;
- (b) the bankrupt has anything which has the effect of putting the person into a better position than they would otherwise have been upon the bankrupt's bankruptcy; and
- (c) in giving the preference the bankrupt must be influenced by a desire to prefer the other party such they would be in a better position on bankruptcy

Also, the debtor was insolvent at the time of or became insolvent as a result of the transaction. How about the clawback periods?

The Defences that can be identified for both are:
- The Official Assignee may apply to the court to restore the position as if the transaction or the unfair preferences were not made;
- Provisions are only available to a liquidator once the company is placed into liquidation. Accordingly, directors should be alive to the fact that creditors might seek to place the company into liquidation to have the liquidator avail themselves of such actions.] These are not defences.

2 marks

Question 2.2 [maximum 2 marks]

What is the objective and significance of the JIN Guidelines?

[The JIN Guidelines are the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters which was first adopted by the Supreme Court of Singapore on February 1st, 2017 as a development procedure for cross border insolvency law.

The objective of the JIN guidelines is to provide a model law and uniform law to promote cooperation and communication between courts from various jurisdictions when they are faced with two or more proceedings on the same subject across the globe as it is also adopted by the countries like Australia, Bermuda, British Virgin Islands, Canada, Cayman Islands, England & Wales, Singapore and USA.

The significance of the JIN Guidelines is that they are the first set of the model laws which are uniformly accepted by the many countries like Australia, Bermuda, British Virgin Islands, Canada, Cayman Islands, England & Wales, Singapore and USA. It is an attempt to globalize the law so as to decrease confusion and conflict in the cross-border insolvency matters and facilitate the corporations and interested parties. Since, Singapore is a trading hub among the global area, this a landmark development as this is the first time that a judicial communication and co-operation framework for cross-border insolvency has been adopted in Singapore.] This conflates JIN and the model law.

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 has also the option to obtain an annulment or a discharge. Discharge can be obtained either by the Court of the Official Assignee.

(i) An annulment by the Court can be obtained on the following conditions:

1. the order 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.

(ii) A Discharge can be made either by the Court or by the Official Assignee: by the bankrupt too When an application is served upon each of the creditors to file the proof of their debts and the Court will hear the applications of the creditors before discharging of the debts. The court will hear the application and may take the followings actions:

1. refuse to discharge;
2. make an order discharging the bankruptcy absolutely; or
3. make an order discharging on conditions as it thinks fit, including conditions with respect to future income or property.

While the Official Assignee may discharge the debts in its discretion except in certain circumstances.]

3.5 marks

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

Commented [DB4]: 7 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.

[(i) the restrictions on *ipso facto* clauses: Some specific contracts contain *ipso facto* clauses which is a contractual provision which either automatically or manually allows one party to terminate or modify the operation of the contract by reference to the counterparty's insolvency which then makes it difficult for the companies to be restructured or rescued within a formal insolvency regime. Why so? Therefore, to protect the companies from this some insolvency regimes allow to restrict the operation of ipso facto clauses:

Previously, there was no restriction on the application of ipso facto clauses.
Under section 440 (Certain contractual rights limited) of the IRD Act 2018, there is a new provision that limits the exercise of certain contractual rights to terminate by reason only those certain proceedings in respect of a company have commenced, or that the company is insolvent. This does not prevent those contractual rights from being exercised by reason of other grounds provided in the contract, such as non-payment of money owed by the company. There are also carve-outs to be worked out subsequently in regulations.

This means it may no longer be possible to rely on *ipso facto* clauses to terminate a contract with an insolvent company. It may also allow companies to continue key contracts and provide a measure of relief in restructuring efforts.
Section 440(5) however sets out a list of contracts that are excluded from this exception. These include:

1. (a) any eligible financial contract as may be prescribed;
2. (b) any contract that is a licence, permit or approval issued by the Government or a statutory body;
3. (c) any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed;
4. (d) any commercial charter of a ship;
5. (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
6. (f) anyagreementthatisthesubjectofatreatytowhichSingaporeisparty,asmay be prescribed.

The scope of "eligible financial contracts" in paragraph a) above will be very important for financiers contracting with Singapore companies.
Section 440 does not prevent the termination of contracts on grounds other than the *ipso facto* clause

(iii) Wrongful trading

In this provision relating to wrongful trading, the court has been empowered to make a declaration that any person who was a knowingly party to the company trading wrongfully, is personally responsible for the debts or liabilities of the company. A company or any person party to, or interested in becoming party to, the carrying on of business with a company, may apply before the court for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading. The company trades wrongfully if the company incurs debt or liabilities without any reasonable prospect of meeting them in full when the company is insolvent, or becomes insolvent as a result of the incurrence of such debt or liability.
In accordance with Section 239 (*Responsibility for wrongful trading*) of the IRD Act 2018 introduces the new concept of wrongful trading, which imposes personal liability for the company's debts on a person if:

ii. they knew that the company was trading wrongfully; or
iii. as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

This provision is adopted from U.K. insolvency legislation and does not require criminal liability before taking effect. How is this different from insolvent trading?

Wrongful trading is defined as the incurrence of debt or other liabilities without any reasonable prospect of meeting them in full or when the company is insolvent or becomes insolvent as a result of such debt]

This answer would have been enhanced with more commentary and analysis. **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 when the affairs and the management of the company is given in the hands of a judicial manager who is appointed to run the company and save it from liquidation as a corporate rescue tool while liquidation is when the company has to be liquidated and end all its functions so as to discharge the liabilities of the company. The key difference can be outlined under the following heads:

1. Purpose: The purpose of the judicial management is to act as a corporate rescue tool and save the company from liquidation while the purpose of liquidation is to bring the business of a corporation to an end by distributing all its assets to the creditors and discharge the liabilities of the corporation.
2. Appointment: For judicial management, although an insolvency practitioner is appointed but as a judicial manager which acts as stigma to the entire operation and process. In the process of the liquidation a liquidator is appointer in the capacity to liquidate the business.
3. Role of the company's directors and management: In the judicial management the role of the company's directors and management cease to exist entirely and that role is taken up by the judicial manager but in the process of liquidation the role of the company's directors and management, although ceases to exist, but the liquidator may apply to the court to allow the company's directors and management to allow them to act as managers to assist the liquidator.]

Very superficial comparison that barely scrapes the surface. **2 marks.**

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

Commented [DB5]: 9.5 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)**

[1. It is satisfied that the company is or is likely to become unable to pay its debts; and It considers that placing the company under judicial management would be likely to achieve at least one of the three purposes of a judicial management

i. The company's survival, or its undertaking as a going concern (whether in whole or in part);
ii. The approval of a scheme of arrangement; or
iii. The more effective use of the company's assets to satisfy creditors' claims, compared to if the company was wound up.

1 Mark.

2. Requirements

To give a brief background

The first landmark decision that discussed the new additions was Re Attilan Group Ltd where the applicant sought to obtain rescue financing through subscription of additional shares. The applicant, citing section 211E, asked the Court to grant priority status to the "rescue financing". The Court opined that in order to grant priority status under section 211E, three prerequisites must be satisfied.

First, the proposed financing must be "rescue financing" according to section 211E (9);

secondly, the conditions stipulated under section 211E (1), i.e., the financing was the last resort available to the company in the circumstances, must be satisfied; and,

lastly, that the Court must exercise its discretion to grant priority status.

The Court further observed that under the new legislative framework, super priority status should not be granted unless it was absolutely necessary.

Well done for picking up on the Attilan case. **1.5 Marks.**

3. Steps required

Section 94(1) (*Power of Court to make judicial management order and appoint judicial manager*) of the IRD Act 2018 introduces a new voluntary process for initiating judicial management without having to first apply to the Court 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) a resolution of its creditors is obtained.

So above steps has to be taken to put subsidiaries under judicial management out of court

Well done! **3 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?

[In Singapore, the court can order the moratorium to have extraterritorial effect and apply to acts taking place in Singapore or elsewhere only if the creditor is in Singapore or within the jurisdiction of the Singapore courts.

As a result of this requirement for in *personam* jurisdiction, the Singapore courts have previously reasoned that "the court's jurisdiction to grant a moratorium restraining acts outside Singapore is really in substance akin to granting injunctive relief.

So, in a nutshell those assets are not protected if the creditor is not within jurisdiction of Singapore courts]

This analysis applies more so in relation to a section 64 moratorium, not the moratorium for JM but well consdiered. **2 Marks.**

Question 4.2.2 [maximum 4 marks]

What cross-border insolvency laws are available in Singapore to recognise foreign insolvency proceedings? Explain the general requirements in order for a Singapore court to recognise a foreign insolvency proceeding and what the effect will be if the court were to do so.

[Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) through its adoption of the 2017 Amendment Act. Through this, Singapore became the 42nd State in the world to have enacted legislation based on the Model Law.

Prior to the adoption of the Model Law, the Singapore Courts heavily depended on common law doctrines to address cross-border insolvency issues. During the recent years prior to the adoption of the Model Law, a series of decisions in the Singapore courts revealed that the strong impetus toward universalism in its judicial philosophy and illustrated how the Singapore courts were working out, through the incremental development of the common law, modifications that universalism required.

Furtherance to that, on 1 February 2017, the Supreme Court of Singapore adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the JIN Guidelines).

The Adoption of the Model Law via the Amendment Act now allows foreign representatives to apply to the High Court of Singapore for the recognition of foreign proceedings.

The new Companies Act provisions adhere closely to the text of the Model Law itself (and, for example, do not seek to impose any additional conditions to the recognition of foreign insolvency proceedings in Singapore);a new approach which promotes certain and predictability in cross-border insolvency matters and will help to create a level playing-field for foreign insolvency office-holders seeking recognition of insolvency proceedings in multiple jurisdictions which have enacted the Model Law.]

Good answer but would have been enhanced by more detailed assessment of the Model law and effect of recognition and different types of recognition. **2 Marks.**

*** End of Assessment ***