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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C**

**HONG KONG**

This is the **summative (formal) assessment** for **Module 8C** 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 8C**. 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.assessment8C]**. An example would be something along the following lines: 202021IFU-314.assessment8C. **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**

**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.

**Any reference to “CWUMPO” in the questions below means the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).**

**Question 1.1**

Select the **correct answer** to the question below:

As a lawyer practising Hong Kong law, you are asked to advise a client on a tricky legal issue. There are no Hong Kong authorities dealing with the issue but there is a 1985 decision from the English House of Lords more or less directly on point. It has not been cited in the Hong Kong court. Can you rely on it in forming your advice?

1. Yes, because it is a House of Lords decision pre-dating the Handover in 1997 so is binding on the Hong Kong court.
2. No, because all decisions of the English court ceased to have any relevance in Hong Kong after the Handover in 1997.
3. Yes, it is not binding as such but the decision will form part of the common law as at the date of the Handover in 1997 and would be persuasive as the common law at that date forms part of Hong Kong law.
4. No, because the decision is from the House of Lords and not a Privy Council decision on appeal from Hong Kong.

**Question 1.2**

Realisations from a floating charge will always be paid in full to the holder of that charge, even if the company granting the charge goes into liquidation. (You may assume that the floating charge is not open to challenge by the liquidator).

1. This statement is true because a creditor by way of a floating charge will always stand entirely outside of the liquidation.
2. This statement is untrue because all of the costs of the liquidation must always be paid first out of those realisations.
3. This statement is untrue because creditors with a statutory preferential claim must first be paid out of those realisations (unless the same can be paid out of uncharged assets).
4. This statement is untrue because **both** (b) **and** (c) are correct (that is, the costs of the liquidation must always be paid first out of those realisations and thereafter creditors with a statutory preferential claim must first be paid out of the realisations).

**Question 1.3**

Upon a bankruptcy order being made against an individual, that individual remains free to deal with his assets provided he reports to his trustee in bankruptcy after doing so.

1. This statement is true.
2. This statement is untrue because upon bankruptcy the bankrupt’s assets are vested in the trustee.
3. This statement is untrue because although the assets remain the bankrupt’s own he must obtain permission from the trustee before dealing with those assets.

**Question 1.4**

A petition to wind up a company on grounds of insolvency can be presented when a company is unable to pay its debts. Section 178 of CWUMPO provides three circumstances in which a company shall be deemed to be unable to pay its debts. **Which one of the following** is one of those circumstances?

1. A creditor has properly served a demand (statutory demand) in the prescribed form and the company has, for three weeks after service, neglected to pay the sum demanded.
2. Where the statutory definition of “insolvency” (appearing elsewhere in the same Ordinance) is satisfied.
3. Where the company is insolvent according to its balance sheet.
4. Where a judgment has been made against the company.

**Question 1.5**

When a company goes into liquidation, the role of the liquidator is to:

1. Realise the company’s assets, adjudicate the proofs of debt submitted by those claiming to be creditors and distribute dividends to creditors.
2. Investigate transactions entered into by the company to determine whether there are any that can be impeached pursuant to the legislation (or otherwise).
3. Investigate the cause(s) of failure of the company and the conduct of the directors.
4. All of the above.

**Question 1.6**

A winding up Petition was presented on 1 April 2019 and the winding up order was made on 5 June 2019. After her appointment the liquidator discovers that a payment was made by the company to a third party on 5 April 2019. Which of the following provisions is **most likely** to be considered by the liquidator (and should be her **first** consideration)?

1. Void dispositions after the commencement of winding up - pursuant to section 182 of CWUMPO.
2. Unfair preferences - pursuant to sections 266, 266A and 266B of CWUMPO.
3. Transactions at an undervalue – pursuant to sections 266B, 266D, 266E of CWUMPO.
4. Fraudulent trading – pursuant to section 275 of CWUMPO.

**Question 1.7**

Select the **correct** answer:

A receiver appointed pursuant to a charge created by a company (A) over its assets in favour of its bank (B), acts as:

1. Agent of the company granting the charge – in this case A.
2. Agent of the company appointing him – in this case B.
3. An officer of the court.
4. An employee or officer of the Official Receiver’s Office.

**Question 1.8**

Between them, CWUMPO and the Companies Ordinance (Cap 622) (CO) provide a comprehensive statutory regime relating to corporate rescue.

1. This statement is true – the provisions of these two statutes provide a comprehensive package of provisions relating to corporate rescue.
2. This statement is untrue – CWUMPO alone provides a comprehensive regime for corporate rescue as well as for liquidations.
3. This statement is untrue – CO alone provides for such a regime.
4. This statement is untrue – Hong Kong has no comprehensive statutory regime for corporate rescue.

**Question 1.9**

Select the **correct** answer:

Part X of CWUMPO gives the Hong Kong court jurisdiction to wind up non-Hong Kong companies in certain circumstances. Aside from this section, other provisions relating to cross-border insolvencies are contained in:

1. The UNCITRAL Model Law on Cross-Border Insolvency as adopted in Hong Kong.
2. Parts of CWUMPO other than Part X.
3. Guidance in common law judicial decisions.
4. The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

**Question 1.10**

Select the **correct** answer:

A liquidator appointed by the Cayman Islands court over a Cayman incorporated company believes that the company has a legal action it should pursue against defendants in Hong Kong. Leaving aside any potential jurisdictional challenges as regards the action itself (for example, the presence of an arbitration clause), the liquidator:

1. must first obtain an ancillary winding up order in Hong Kong.
2. can commence the litigation in the name of the company without further order in Hong Kong.
3. Must first seek a recognition order in Hong Kong and must obtain a letter of request from the Cayman court for such purpose.
4. Must first seek a recognition order in Hong Kong and can do so based solely on the Cayman winding up order and without a letter of request.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 3 marks]**

Describe the effects of the compulsory liquidation of a company upon a creditor who is pursuing the company by way of a civil action.

[Type your answer here]

**Question 2.2 [maximum 4 marks]**

Identify each method by which a company can go into liquidation in Hong Kong and briefly describe the circumstances in which each method would usually be implemented.

[Type your answer here]

**Question 2.3 [maximum 3 marks]**

Where a creditor presents a petition for the compulsory winding up of a company, a court hearing date is fixed approximately two (2) months after the date of presentation. Does Hong Kong law permit an officeholder to be appointed in the meantime (that is, during this interim period of two months before the petition is heard)? If “yes”, in what circumstances? If “no”, what is the policy reason for not permitting such appointment?

[Type your answer here]

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

**Question 3.1** **[maximum 9 marks**]

**Question 3.1.1 [maximum 7 marks]**

Describe Hong Kong law as it applies to corporate rescue, discussing any advantages / disadvantages to the current system.

[Type your answer here]

**Question 3.1.2 [maximum 2 marks]**

Discuss the possible reforms that have been (or are) under consideration with regard to corporate rescue.

[Type your answer here]

**Question 3.2 [maximum 6 marks]**

Although Hong Kong has little specific legislation dealing with cross-border insolvency, the Hong Kong courts have supported foreign insolvencies through the common law. Discuss.

[Type your answer here]

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

**Question 4.1 [maximum 4 marks]**

A receiver is appointed pursuant to a floating charge over all the assets and undertaking of Pacific Tin Mines Limited (PTM), a Hong Kong company. Shortly after the receiver’s appointment, PTM is put into liquidation. The liquidator writes to the receiver and asks her to hand over all assets (or realisations from assets) of PTM under her control so that the liquidator can pay the costs and expenses of the liquidation and make a distribution to PTM’s unsecured creditors. You are asked to advise the liquidator. What (if any) assets or realisations should be handed over by the receiver?

[Type your answer here]

**Question 4.2 [maximum 4 marks]**

A liquidator is appointed over luxury car dealer Billion Happy Limited (BH) and learns that BH has recently been granted a facility by Hammerhead Finance Co Limited (HF). HF has shown the liquidator a document entitled “Receivables Purchase Agreement”, claiming that all accounts receivables due from BH’s customers therefore belong to HF. The document also asserts that as an alternative to ownership of the receivables, HF has a fixed charge over the receivables. Advances from HF to BH were sporadic and could not necessarily be matched to invoices. Further, some customers of BH had paid certain invoices to an account with HF, but which account BH then operated for working capital purposes.

Telford Co Limited (TC) contacts the liquidator of BH to say that TC had been helping BH sell its cars to wealthy businessmen on the Mainland. TC shows the liquidator an agreement asserting that if BH goes into liquidation then it is deemed that immediately before the liquidation, all cars held at BH’s showrooms belong to TC.

The liquidator asks for your thoughts on what issues she should consider when dealing with HF and TC.

[Type your answer here]

**Question 4.3 [maximum 7 marks]**

Cyberbay MedTech Limited (Cyberbay) is a Cayman Islands company listed on the Stock Exchange of Hong Kong. This company appeared in the self-assessment questions in your guidance text, where you were asked to consider the steps that the Cayman-appointed officeholder might take in an effort to restructure the company’s indebtedness due to holders of certain Notes. The joint provisional liquidators (JPLs) have now uncovered concerns about accounting irregularities in its Mainland operations and there are also press reports that the founder and Chairman has disappeared in the Mainland and cannot be contacted.

Upon further investigation, it appears that the Chairman’s disappearance certainly looks as if it is linked to the “accounting irregularities” with large sums of money (raised from the issue of the Notes and the bank borrowing) being paid to entities with no apparent real business with Cyberbay. There is an individual in Hong Kong, Mr Pottinger, who is a friend and business associate of the Chairman. It is believed that Pottinger has information that will help shed light on the payments. The JPLs ask you if there is anything they can do in Hong Kong in this regard. Advise them.

[Type your answer here]

**\* End of Assessment \***