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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 or Avenir Next 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: **[studentID.assessment8C]**. An example would be something along the following lines: 202223-336.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 “studentID” 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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**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.

**Question 1.1**

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 statutory demand in the prescribed form and the company has, more than 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 1.2**

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

1. Agent of the company granting the charge (A, in this instance).
2. Agent of the lender appointing him (B, in this instance).
3. Agent of the Official Receiver.
4. An officer of the court.

**Question 1.3**

Which of the following is a correct statement as to the **core requirements** which need to be satisfied before the Hong Kong court will wind-up a foreign company:

1. All of the below apply.
2. At least one of the directors must be a Hong Kong resident.
3. The petitioning creditor must be a Hong Kong company or a Hong Kong resident.
4. There must be a reasonable possibility that the winding-up order would benefit those applying for it.

**Question 1.4**

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

Choose the correct statement:

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: the CO alone provides for such a regime.
4. This statement is untrue: Hong Kong has no comprehensive statutory regime for corporate rescue.

**Question 1.5**

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. Is it binding in Hong Kong?

1. Yes, because it is a House of Lords decision pre-dating the Handover in 1997 so it is binding on the Hong Kong court.
2. No, because all decisions from England ceased to have any relevance in Hong Kong after the Handover in 1997.
3. Yes, because it is directly on point.
4. No, because the decision is from the House of Lords and is not a Privy Council decision made on an appeal from Hong Kong (only those decisions were ever binding in Hong Kong, and they remain so).

**Question 1.6**

After a winding up order is made against a company, which one of the following can a creditor of that company still do?

1. Issue a writ to pursue its claim in the usual way.
2. Continue to enforce against the assets of the company if it already has a judgment.
3. Apply to the court to appoint a receiver over the assets of the company so that the receiver can collect in assets for the creditor’s own benefit.
4. Retain the proceeds of enforcing a judgment where such proceeds were received by the creditor one month before the date of the petition on which the winding up order was made.

**Question 1.7**

Which one of the following statements is correct in relation to cross-border insolvency law in Hong Kong?

(a) Part X of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) gives the Hong Kong court jurisdiction to wind up foreign companies.

(b) The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) gives the Hong Kong court jurisdiction to make a winding up order against a foreign company if the creditor has a judgment in the company’s country of incorporation.

(c) The UNCITRAL Model Law on Cross-Border Insolvency as adopted in Hong Kong provides a complete code as to cross-border insolvency law in Hong Kong.

(d) The only jurisdiction in respect of which the Hong Kong court can give any recognition or assistance to non-Hong Kong liquidators is the Mainland of the PRC due to the 2021 Co-operation Mechanism.

**Question 1.8**

Which of the following statements can accurately complete this phrase: “A voluntary liquidation of a Hong Kong company…”

1. can only be commenced by the company’s creditors.
2. is commenced by the shareholders passing a special resolution to wind up the company voluntarily.
3. can only be commenced if all debts can be paid within 12 months.
4. is commenced by the directors advertising a notice in the Hong Kong Gazette.

**Question 1.9**

Which of the following statements can accurately complete this phrase: “Where there is a valid floating charge over certain of a company’s assets and the company goes into compulsory liquidation five years later, and the charge-holder has appointed a receiver…”

1. the liquidator takes control of the charged assets but pays the expenses of the receivership.
2. the receiver must have his appointment confirmed by the court and then takes control of the company.
3. the receiver realises the charged assets for the benefit of the charge holder, only remitting to the liquidator any sums necessary to pay preferential creditors in the liquidation if the liquidator has no uncharged assets to do so.
4. no winding up order can be made because the company is already in receivership.

**Question 1.10**

Which of the following ingredients is required for a creditor’s scheme of arrangement to be sanctioned?

1. At least 75% of the creditors of the relevant class who are entitled to vote must attend the meeting.
2. A majority in number representing at least 75% by value of the creditors attending and voting must vote in favour of the scheme.
3. The company is a Hong Kong incorporated company.
4. None of the above describe any of the ingredients required.

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

**Question 2.1 [maximum 3 marks]**

What is the role of the Official Receiver?

* To act as a liquidator or trustee in bankruptcy where no private practitioner is appointed;
* To provide oversight and make policy submissions in complex compulsory liquidations;
* Oversight of conduct of private insolvency practitioners to ensure they properly carry out their duties;
* Prosecution of insolvency offenses and disqualification of directors;
* Monitoring legislation relating to insolvency matters.

Question 2.2 [maximum 3 marks]

A creditor is pursuing a company by way of a civil (writ) action. What effect could liquidation steps taken by another creditor have on the first mentioned creditor’s action?

* If the second creditor has presented a winding-up petition to the Court, and a winding-up order is yet to be made, the court may grant a discretionary stay against all proceedings including the first creditors’ action;
* If a winding-up order is made, all actions are automatically restrained by a mandatory stay;
* If the first creditor has obtained full or partial satisfaction of their claim, they may be subject to an unfair preference claim by a liquidator if one is appointed by the court.

Question 2.3 [maximum 4 marks]

What are the key elements needed for a Hong Kong liquidator to make use of the mechanism for co-operation between Hong Kong and the Mainland? Please provide an outline only.

* That the proceedings are commenced under CWUMPO or the CO;
* The debtor’s COMI must have been in Hong Kong continuously for at least 6 months;
* The debtor’s principal assets, place of business or representative office must be located in one of the Mainland pilot areas;
* A letter of requested from the Hong Kong court must be granted.

**QUESTION 3 (essay-type question) [15 marks]**

Question 3.1 [maximum 4 marks]

Where a creditor makes a statutory demand against a debtor and the debtor disputes the debt, what steps can it take to counteract the statutory demand? Your answer should deal with the position both for an individual debtor and a corporate debtor.

* A corporate debtor should first put the petitioner on notice of the debt, and if clear the creditor should withdraw the petition;
* Failing that, the debtor may apply for an injunction to restrain the petitioner, providing the debtor can present evidence of its position and solvency;
* The debtor must be able to show that the petition would be an abuse of process, and that the creditor knows or should know there is a genuine defence;
* An individual debtor may apply to set aside the statutory demand pursuant to the Bankruptcy Ordinance s6A.

Question 3.2 [maximum 6 marks]

The scheme of arrangement is, in essence, Hong Kong’s only statutory tool for corporate rescue. Describe it, listing its pros and cons.

A scheme of arrangement (SoA) is a statutory mechanism allowing a debtor company to make compromises with members and/or creditors, including compromises of debt/equity. The relevant law is contained within s668-677 of Part 13, Division 2 of the Companies Ordinance.

Such compromise is allowed if the requisite majorites of relevant creditors (or shareholders) approve same, and is then sanctioned by the court.

A SoA is commenced by making an application for leave to convene the relevant meetings to consider and approve the schemes. The scheme meetings take place, and if approved, further application is made to the court to sanction the scheme.

SoAs provide for greater flexibility in corporate rescue in Hong Kong, as demonstrated by the courts when applying common law principles. Without a SoA, a distressed debtor must obtain agreement from 100% of relevant creditors to compromise those debts.

A key weakness of the SoA regime is the lack of statutory moratorium. To address this weakness, a common practice is to apply for a winding up petition and appointment of provisional liquidators, wherein a moratorium may be obtained pursuant to s186 of CWUMPO. Such petition is generally dismissed on a successful scheme implementation.

Question 3.3 [maximum 5 marks]

Describe (briefly, in overview) what security can be created over assets of a Hong Kong company and the effect of such security on the liquidation of the company.

There is no prescribed limit as to the forms of security that may be granted; an instrument can theoretically be drafted in any way to improve the position of a secured creditor. Notwithstanding, the most common types of real security include:

* Pledges – where actual or constructive possession passes to the creditor
* Liens – where an asset is retained by the creditor until the liability is satisfied. A lien can arise contractually or from common law.
* Mortgages – where ownership is transferred to the creditor by way of security, with the debtor have a right to re-transfer ownership upon discharge of debt
* Charges – which operates as an incumbrance over the asset, giving the creditor a right to enforce against the charged assets and recover debts, whilst ownership remains with the debtor. Charges can be fixed (debtor cannot deal with the asset without consent) or floating (debtor can continue to use the asset, and there is no specific asset attached to the security until a crystallisation event).

Secured creditors and their security will generally not be dealt with as part of the insolvency process. Certain exceptions include faulty registrations, and realisations from a floating charge must fist be used to meet statutory preferential claims. Additionally, if the security is deemed to be a fraud on the insolvency legislation, it will be void under the anti-deprivation principle.

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

Question 4.1 [maximum 5 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. What (if any) assets or realisations should be handed over by the receiver?

The appointment of the receiver has the effect of crystallising a floating charge. It is the assets available pursuant to the floating charge at that point in time that is available to the secured creditor. In this case, this includes all assets of PTM at appointment of the receiver.

The receivers’ response is contingent on the secured creditors’ debt position, as well as the quantum of statutory preferential creditors in the liquidation.

The receivers should write to the liquidators requesting a relevant proofs of debts of the statutory preferential creditors, and subject to same, should hand over assets / realisations sufficient to discharge same.

Question 4.2 [maximum 5 marks]

Soaring Kite Limited (SKL) is a Cayman incorporated company that is listed on the Hong Kong Stock Exchange, and has assets and a representative office in Shenzhen. SKL is in insolvent liquidation in Cayman. The liquidator appointed in Cayman (L) tells you he wants to obtain documents from SKL’s bank in Hong Kong and he also wants to obtain orders to examine the auditors who are in Hong Kong and who will not co-operate with his investigations. L says he has heard that it is straightforward to get a “standard order” from the Hong Kong court recognising his appointment and giving him a full suite of powers in Hong Kong, including a stay of any actions that any creditor of SKL may bring in Hong Kong. Outline the advice you would give to L.

Hong Kong courts apply common law principles to recognise and assist foreign procedures where appropriate. A common practice is for foreign officeholders to commence ancillary liquidation proceedings in Hong Kong. However, such a procedure may not be available to SKL, given that it is a Cayman incorporated company, and assets and offices in Shenzhen (it’s activities in Hong Kong appear limited to its listing).

SKL may apply to the court to grant recognition and assistance to seek production of documents from the bank, and examination of the auditors. In considering such a request, the court will compare the scope of relevant provisions between Hong Kong and Caymans in accordance with the Singularis principle. It is worth noting in this regard that the Cayman legislation with respect to examinations is much more restrictive than in Hong Kong.

Whilst it was common to refer to a “standard order”, the courts now expect office-holders to formulate the terms of the order sought in more detail, and in accordance with the specific circumstances.

Question 4.3 [maximum 5 marks]

L has been appointed in Hong Kong as a liquidator of Lobster Investments Ltd (Lobster), a Hong Kong company against which a winding-up order has been made.

In conversations with former employees, L has been told that Lobster has a valuable property on the Peak but there is no reference to this in the books and records.

On investigation, it seems the property is owned by another Hong Kong company called Continental Limited (Continental). L learns that until about one and a half years before the liquidation, Lobster held all the shares in Continental but the main director and shareholder of Lobster (a Mr Aubrey) then executed share transfer documents to transfer the shares in Continental to Verandah Limited (Verandah), a BVI company. L then learns that the sole director / shareholder of Verandah is Mr Aubrey’s wife. There is no indication that Lobster received any consideration upon the shares transfer.

Outraged, L confronts Mr Aubrey who tells L that the former employees are mistaken, and the property never belonged to Lobster as Lobster had only ever held those shares on trust for Mrs Aubrey for convenience and because she had lent money to Lobster, but, as they were going through some matrimonial issues a couple of years ago, she insisted that the shares be transferred to her own name.

L asks you what she could do to pursue the matter. Relevant statutory provisions should be referred to.

In the first instance, L should write to Mr Aubrey and the director of Verandah, seeking further details and documentation of the trust arrangement(s), the circumstances of the transfer of shares, loans advanced, and any separation arrangements with respect to the marriage.

Should these be insufficient to demonstrate the legitimacy of the transfer, L may consider avoiding the transfer of shares as a potential undervalue transaction pursuant to s266D of CWUMPO. Such a transaction may be set aside, if it can be established that the transfer was no (or undervalue) consideration.

Such an action is available given it took place within 5 years prior to the winding up. It must be established that the company was unable to pay its debts at the time of the transaction. Mr Aubrey and Verandah may have an available defence if the transaction was entered in good faith.

Subject to the above, the court has wide discretion to make any order it thinks fit to restore the company to its original position, such as transferring the shares of Verandah, or title to its assets to Lobster.

**\* End of Assessment \***