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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?

The Official Receiver is the head of the Official Receiver’s Office and he/she carries out the following role:

a. Act as liquidator or trustee in bankruptcy where no “private liquidator” is appointed.

b. Provides insolvency management services such as realising the assets of an insolvent company, investigating and adjudicating creditors’ claims and distributing proceeds.

c. Monitor the conduct of private insolvency practitioners.

d. Reviews and proposes changes to laws, policies and procedures relating to insolvency issues.

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?

There are 2 effects as follows:

a. The civil action may be stayed pending disposal of the liquidation process. However, such stay is not automatic and is only granted upon the application of the company, creditor or contributory, and upon the court’s discretion.

b. Where a winding-up order is granted upon such liquidation process, the civil action will be stayed automatically.

c.

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.

The key elements are as follows:

a. The application for recognition of insolvency proceedings can only be made in 3 pilot areas of the Mainland, namely – Shanghai, Xiamen and Shenzhen.

b. The insolvency proceedings in question must be one which is a collective insolvency proceeding commenced under the Companies (Winding Up and Miscellaneous Provisions) Ordinance and Companies Ordinance.

c. The debtor’s Centre of Main Interest must be in Hong Kong for at least 6 months;

d. A letter of request from the Hong Kong court is necessary.

**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.

An individual debtor may apply to set aside a statutory demand pursuant to section 6A of the Bankruptcy Ordinance. Such application can be made by an individual debtor within 18 days from the date upon which he received the statutory demand.

As for a corporate debtor, there is no provision to set aside the statutory demand. A corporate debtor can only apply for an injunction (Fortuna Injunction) to restrain the petitioner from presenting a petition. Where a petition has already been presented, an injunction to restrain advertisement of such petition. In making such application, the corporate debtor must show evidence that the dept is bona fide disputed.

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.

The scheme of arrangement is a statutory corporate rescue mechanism under Part 13, Division 2 of the Companies Ordinance which allows companies to making binding compromises or arrangement with their members / creditors.

The debtor company would file an application for leave to summon a meeting with its creditors. Once that leave is granted, the debtor company would issue to its creditors an explanatory statement which sets out the details of the scheme of arrangement. The debtor company would then convene a meeting with its creditors where the creditors would then vote on the scheme of arrangement. If the scheme of arrangement is voted in favour by 75% of its creditors present and voting, the debtor company can then apply to court to sanction the scheme of arrangement so that it is made binding on all its creditors.

Its benefits include the following:

1. Allowing the debtor company to restructure its debts with its creditors while remain in possession of the company.
2. Allowing the scheme of arrangement to be binding on all its scheme creditors if the scheme has obtained approval of 75% of its creditors present and voting, and once the court has sanctioned such scheme.

Its weakness is that there is no statutory moratorium provision to facilitate a scheme of arrangement. Hence, creditors can still continue their legal action against a debtor company despite an ongoing scheme of arrangement proceeding.

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 are essentially 3 types of securities that can be created over assets of a Hong Kong company, and they are as follows:

1. Pledge, which is created by delivering to a creditor a negotiable instrument that operates as a document of title (i.e. bill of lading).
2. Lien, which is created over assets retained by the creditor (i.e. solicitors’ lien).
3. Mortgages, which are created when the ownership of the assets are transferred to the creditor for security (i.e. mortgage over lands).
4. Charges, where a fixed or floating charge can be created over the assets of a company, but the ownership of the assets remain with the debtor company.

The effect of such security is that they give the creditor a secured right and the secured creditor will stand outside the liquidation process of the company. This is because the insolvency process is intended to be a collective process for the benefit of unsecured creditors.

**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 subsequent liquidation of PTM does not affect the receivership and it does not affect the receiver’s powers to hold / sell the assets and undertaking secured by the charge under which the receiver was appointed. Hence the receiver needs not hand over any assets to the liquidator.

Any realisations made by the receiver from the charged assets also are not available for the liquidator for payment of the liquidation expenses. Hence, the receiver need not hand over any realisations to the liquidator.

However, there is an exception under ***section 79 and 265(3B) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance***. Where there are insufficient uncharged assets in the liquidation to pay off any claims by preferential creditors, then the realisations of any charged assets must be handover over to the liquidator to be used to meet the claims of preferential creditors.

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.

In so far as any application to recognise the Cayman Islands’ insolvency proceedings in Hong Kong, it may be difficult to do so. This is because a key element for any recognition of foreign insolvency proceeding is whether the foreign insolvency proceedings are conducted in the jurisdiction in which the company’s centre of main interest is located (***Re Global Brands Group Holding Ltd (in liquidation)* [2022] HKCFI 1789**).

In SKL’s case, it is doubtful whether the Cayman Islands is SKL’s centre of main interest. This is because its only connection to the Cayman Islands is the fact that it was incorporated there.

Hence, it is unlikely that the Hong Kong court would allow only application to recognise the Cayman Islands’ insolvency proceedings.

Instead, the liquidator should consider commencing insolvency proceedings in Hong Kong, by filing a winding up petition in Hong Kong to put SKL under compulsory liquidation. SKL may be able to fulfil the 3 core requirements as set out in ***Re Yung Kee*** **(2015)** which are as follows:

1. There must be sufficient connection in Hong Kong – This is satisfied as SKL is listed in Hong Kong and maintains a bank account in Hong Kong.
2. There must be a reasonable possibility that the winding up order would benefit those applying for it – This is satisfied as it can be shown that the winding up would allow the liquidator to obtain documents and to examine the auditors who are in Hong Kong.
3. The court must be able to exercise jurisdiction over one or more persons in the distribution of the company’s assets – This can be satisfied if it can be shown that there are other creditors of SKL who are based in Hong Kong.

Upon the winding up of SKL in Hong Kong, the liquidator (assuming he is also appointed as the liquidator by the Hong Kong courts) can then exercise his powers to apply for an order to compel the production of documents and to examine the auditors.

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.

L can consider an action to challenge a transaction made at an undervalue. This is pursuant to ***Section 265D of the* *Companies (Winding Up and Miscellaneous Provisions) Ordinance*.**

This provision applies when at a relevant time, a company enter into such transaction at an undervalue and the company is later wound-up. In such situation, a liquidator can apply to court for an order to restore the company’s position to what it would have been if the company had not entered into the transaction. The relevant time is set out in ***Section 266B of the* *Companies (Winding Up and Miscellaneous Provisions) Ordinance*** – 5 years before the commencement of the winding up.

In the present case, L may be able to prove that the transfer of Lobster’s shares in Continental was made at an undervalue for the following reasons:

1. the transaction was made 1.5 years before the liquidation. Hence, the transaction would be caught under the relevant time.
2. The transaction was made without consideration. This satisfies the meaning of “transaction at an undervalue” pursuant to ***Section 265E of the* *Companies (Winding Up and Miscellaneous Provisions) Ordinance.***
3. The transaction was also made to a person connected with the company. This is because it was made to Verendah who is controlled by the wife of Mr Aubrey, the main director and shareholder of Lobster.

However, L’s application may be defeated if Mr Aubrey and/or his wife is able to show the exceptions under ***Section 265D (4) of the* *Companies (Winding Up and Miscellaneous Provisions) Ordinance***, i.e. (i) that the transaction was made in good faith and for the purpose of carrying on its business, and (ii) at the time of the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

Unless Mr Aubrey and/or his wife has any evidence that the shares were held on trust for Mr Aubrey’s wife and such trust was created before the relevant time, then it is unlikely that Mr Aubrey and/or wife would be able to meet those exceptions. This is because the transfer of shares to Verendah is unlikely made for the purpose of carrying on Lobster’s business and is unlikely to benefit Lobster.

**\* End of Assessment \***