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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).**
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- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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.

Question 1.1

Which of the following is / are among the jurisdictional criteria required to be satisfied for the Hong Kong court to make a bankruptcy order against an individual?

- (a) *The individual must hold a Hong Kong permanent identity card.*
- (b) *The individual must be ordinarily resident in Hong Kong at the date of the hearing of the petition.*
- (c) *The individual is domiciled in Hong Kong.*
- (d) **Any of the above.**

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:

- (a) **Agent of the company granting the charge (A, in this instance).**
- (b) *Agent of the lender appointing him (B, in this instance).*
- (c) *Agent of the Official Receiver.*
- (d) *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:

- (a) **All of the below apply.**

Commented [RD(DWH1): Incorrect (0 marks) - choices (a) and (b) do not appear in section 4 of the Bankruptcy Ordinance (Cap 6). Note that (b) would have been correct if it referred to the debtor being present in Hong Kong on the date of the petition

Commented [RD(DWH2): Correct (1 mark)

Commented [RD(DWH3): Incorrect (0 marks) - there is no requirement for a director or the petitioner to be Hong Kong based

(b) At least one of the directors must be a Hong Kong resident.

(c) The petitioning creditor must be a Hong Kong company or a Hong Kong resident.

(d) There must be a reasonable possibility that the winding-up order would benefit those applying for it.

Question 1.4

A receiver is appointed over the entirety of a company's assets and the company goes into liquidation. Assuming the charge under which the receiver is appointed (and the receiver's appointment) cannot be challenged, realisations made by the receiver -

(a) must first be used to satisfy the costs and expenses of the liquidator.

(b) must first be used to satisfy the whole of all claims by employees but no other claims.

(c) must first be used to satisfy the claims of preferential creditors as described in the relevant section of Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (CWUMPO).

(d) will be kept entirely by the receiver for the benefit of the charge holder irrespective of what claims, preferential or otherwise, exist against the company.

Question 1.5

The date of commencement of liquidation for a compulsory liquidation is -

(a) the date on which a creditor serves a statutory demand.

(b) the date on which the petition is presented.

(c) the date of the winding-up order.

(d) the date on which notice of the liquidator's appointment is advertised.

Question 1.6

In respect of a Hong Kong creditor's scheme of arrangement promoted by the company, the legislation provides:

(a) For a stay of all proceedings against the company pending the sanctioning of the scheme.

Commented [RD(DWH4)]: Correct (1 mark) – see text at 6.4.1 (sections 79, 265B(3) of CWUMPO)

Commented [RD(DWH5)]: Incorrect (0 marks) - section 184 CWUMPO

(b) For a stay of enforcement of any judgment against the company.

(c) For a stay of all proceedings against the company if the statutory majorities are met at the creditors' meeting.

(d) None of above, as the scheme legislation provides for no stay.

Commented [RD(DWH6): Correct (1 mark)

Question 1.7

Select the correct answer as to whether the following statement is true or untrue:

Hong Kong legislation provides a comprehensive statutory regime relating to corporate rescue.

(a) This statement is true because of the combined effect of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and the Companies Ordinance (Cap 622).

Commented [RD(DWH7): Incorrect (0 marks) – it cannot be said that these Ordinances provide a 'comprehensive statutory regime' for corporate rescue (see text at 6.5)

(b) This statement is true because of recent legislation called the Companies (Corporate Rescue) Bill.

(c) This statement is untrue, as Hong Kong has no comprehensive statutory regime for corporate rescue.

(d) This statement is true because of the recently enabled Cooperation Mechanism for cooperation in relation to insolvency matters as between Hong Kong and the Mainland, People's Republic of China.

Question 1.8

Select the correct answer as to whether the following statement is true or untrue:

Since the Handover in 1997, no decisions of any United Kingdom (UK) court are binding in Hong Kong.

(a) This statement is untrue as decisions of the UK Privy Council on appeals from Hong Kong remain binding.

Commented [RD(DWH8): Correct (1 mark) – The China Field decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text)

(b) This statement is true as all aspects of English law ceased on the Handover as otherwise this would be seen as conferring an advantage on the UK.

(c) This statement is true as after the Handover only decisions of the Hong Kong court are allowed to be cited and relied upon.

(d) This statement is true as although decisions from common law jurisdictions can be cited and may be persuasive, they are not binding.

Question 1.9

After a liquidator is appointed in a creditors' voluntary liquidation, the powers of the directors of the company -

(a) cease completely, with no exceptions.

(b) cease except so far as the committee of inspection or the creditors (if there is no committee) agree to any powers continuing.

(c) continue and can be exercised provided the directors do so with creditors' interests in mind.

(d) cease except so far as the liquidator agrees to any powers continuing.

Question 1.10

The law as to cross-border insolvency in Hong Kong can be found in:

(a) The common law and Part X of the Companies (Winding Up and Miscellaneous Provisions) Ordinance.

(b) The UNCITRAL Model Law on Cross-Border Insolvency as adopted in Hong Kong.

(c) Various bilateral protocols with other common law jurisdictions.

(d) The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

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

Question 2.1 [maximum 3 marks]

To whom does a receiver (appointed pursuant to a charge) owe duties when selling the asset charged? Please provide an outline only.

When a receiver is appointed pursuant to a charge, although the receiver would be an agent of the company, the receiver's primary duty is to the debenture or charge holder. However, the receiver should use reasonable skill and care when putting the interests of the charge holder or debenture first, as they may be answerable to the company if they do not.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH9)]: Correct (1 mark) – see section 244 of CWUMPO

Commented [RD(DWH10)]: Correct (1 mark) – Hong Kong has not adopted UNCITRAL, there are no relevant bilateral treaties with other common law jurisdictions, and Cap 319 deals with enforcement of judgments, not cross-border insolvency

Commented [RD(DWH11)]: (2.5 marks) A good answer but should explain why interest of chargor still relevant - residual duty

Commented [RD(DWH12)]: (2 marks)
You refer to creditor but could also mention that the person 'preferred' could be a guarantor. More importantly, must mention that the transaction must have been (for non-associate) within 6 months prior to the commencement of the liquidation

In a compulsory liquidation, what elements must a liquidator satisfy in order to successfully demonstrate a transaction (with a non-associate) amounted to an unfair preference? Please provide an outline only.

Firstly, the transaction is amounted to be an unfair preference if an insolvent company acts or place a creditor in a better position than it would have been otherwise in the company's insolvency.

In order to successfully demonstrate a unfair preference transaction has occurred, it is a requirement that the liquidator shows that at the time of the transaction, the company was unable to by its debts or that was unable to pay its debts because of that transaction.

The other requirement that is necessary is that the liquidator must prove that the company was 'influenced by a desire' to improve the position of the creditor. As such, a transaction would not be a unfair preference 'unless the company positively wished to improve the creditor;s position in the event of its own insolvent liquidation' and a person does not 'desire' all of the 'necessary consequences of his actions'.

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 first key element needed for a Honk Kong liquidator to use the mechanism for the co-operation between Hong Kong and the Mainland is that the pilot areas in the Mainland are designated as:

- ***Shanghai Municipality,***
- ***Xiamen Municipality of Fujian Province, and***
- ***Shenzhen Municipality of Guangdong Province.***

The second key element is that the 'Hong Kong Insolvency Proceedings' are promoted a liquidator or provisional liquidator. This includes any collective insolvency proceedings which are commenced under CWUMPO or the CO, and also includes compulsory liquidations, creditors' voluntary liquidations, and schemes of arrangements.

Next, the debtor's COMI must be in Hong Kong. The Supreme Court Opinion stated that for these purposes the COMI is generally the place of incorporation, but other factors may be taken into account if need be.

The next element is that, if the debtor's principal assets or a place of business or a representative in the Mainland is in a pilot area, the Hong Kong Administrator may apply for recognition and assistance to the Hong Kong Insolvency Proceedings in accordance with the Opinion above.

Commented [RD(DWH13)]: (3 marks) Most of the elements are there except that the COMI must have been in HK for at least 6 months. The answer is also a bit jumbled

Finally, the last element required is that it is necessary to acquire a letter of request from the Hong Kong court.

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

Question 3.1 [maximum 4 marks]

Discuss the statutory basis enabling the Hong Kong court's jurisdiction to wind-up a non-Hong Kong company, and the common law principles that the Hong Kong court will consider when deciding whether to exercise that jurisdiction.

Firstly, the Hong Kong court will have to ensure there is sufficient connection between the company and Hong Kong. The three core requirements in identifying whether a company is sufficiently connected to Hong Kong are:

- **There must be sufficient connection through the assets of the company to Hong Kong.**
- **There must be a reasonable possibility that the winding-up order would benefit those applying for it.**
- **And finally, the court must be able to exercise jurisdiction over one or more persons interest in the distribution of the company's assets.**

If there is sufficient connection between the company and Hong Kong, then the company may be wound-up under the following circumstances:

- **If the company is dissolved or has ceased its business or is only carrying on its business in order for it to wind-up its affairs.**
- **If the company is no longer able to pay its debts, and**
- **If the court decides that it is just and equitable that the company be wound-up.**

Question 3.2 [maximum 5 marks]

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

The scheme of arrangement is a court-approved proposal which was proposed by a company and its creditors or shareholders. The proposal is a restructuring plan which address the financial difficulties of the company.

As the scheme of arrangement is practically Hong Kong's only statutory tool for corporate rescue, its first pro would be that it provides a company a framework in which it may have an opportunity to save itself from liquidation.

The second pro would be that it does not require consent of all of its creditors. This would be difficult to attain as most times the restructuring plan is a compromise and not all creditors may agree on it. As such, the scheme of arrangement requires 75% or

Commented [RD(DWH14)]: (3 marks)

Should reference the statutory provisions (ss. 326-7 of CWUMPO). Also, the statutory basis must come first and then the common law core requirements

Commented [RD(DWH15)]: (2.5 marks)

Good pros and cons but the question asks for a description the answer should also refer to procedure: the role of the explanatory statement; how classes are constituted; leave to convene meetings; the statutory majorities needed; the court's role on sanction

more of the creditors to agree to the proposal. However, the court must also agree on the proposal and ensure that the dissenting creditors are not treated unfairly.

However, there are some downfalls to the scheme of arrangement. The first downfall would be the lack of moratorium provided by the arrangement. There is no immediate moratorium that is provided by the arrangement. There have been recent developments to address this, however, it is still a process in achieving it.

Another disadvantage of the scheme of arrangement is dealing with the obligations to third parties, such as guarantors. This has become increasingly common whereby a company, through a scheme, may cause the release of its creditors' claims under guarantees provided by third parties, where the guarantees are in respect of the debt being compromised under the scheme.

Another downfall of the scheme of arrangement is the complexity, time, and costs required in the arrangement. There are many steps in creating a restructuring plan for a business, and then even more steps in carrying the plan out. The timeframe can also be challenging for companies who are in need of a swift resolution. As there is no guarantee of success, the company may result in exhausting itself in the restructuring plan and affect its liquidation process as well.

As such, although there are pros and cons to the scheme of arrangement, it is a tool which is available to companies who may be financially distressed, and the liquidators, court and creditors of the company will use it according to if it seems to be the best option for the company.

Question 3.3 [maximum 6 marks]

With no legislation to deal with cross-border insolvencies, how has the common law developed to assist foreign liquidations where steps need to be taken in Hong Kong? What are the pros and cons of developing the law in this way?

The development of the common law has been influenced by judicial decisions and the recognition of certain principles which were derived from international insolvency practices. For example, the recognition of foreign liquidators, the commencing of ancillary proceedings, the use of the letter of request, and the development of the 'light touch' provisional liquidators.

Some of the pros of developing law through common law principles are:

- **Flexibility: The common law has been developing and adapting during the numerous proceedings that have used the common law. As seen above, it has been able to adapt to other cross-border insolvency matters as well. As such, new complexities and unique issues can be addressed through the common law as it has the flexibility to adapt to them.**

Commented [RD(DWH16): No: needs a majority in number representing 75% in value (in each case of those present and voting)

Commented [RD(DWH17): (2 marks)

Need to give some explanation of the developments, based largely on the Privy Council's decision in *Singularis* and the principles that apply (cannot do something in HK that would not have power to do in home jurisdiction). Court had developed an almost 'standard order' that was then whittled away, in part due to the use (misuse?) of the provisions to assist 'debtor-led' processes in certain offshore jurisdictions.

Global Brands – court will be reluctant to give any recognition/assistance to a liquidator from somewhere that is not the company's COMI (even if it is the place of incorporation) Up Energy shows that court recently taking a more 'strict' legal approach to what the HK court can or cannot do.

Commented [RD(DWH18): HK does not have 'light touch' provisional liquidators

- **Individual cases:** As the common law has the flexibility to adapt to development, it then allows the judges to provide fair and tailored resolutions to each case, as each case will have its own unique matters.

Some of the Cons of developing the law this way are:

- **Inconsistency:** As the law is so flexible and the decisions are made on a case-by-case basis, it can lead to many different outcomes and as such can lead to an inconsistency in the treatment of the insolvency proceedings.
- **Difficult to predict:** When new situations arise, as the law does not have well-defined rules or guidelines, it can be difficult to predict the outcome of new complexities.

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

Question 4.1 [maximum 4 marks]

You are instructed by the liquidator of Palm Beach Limited, a Hong Kong company in compulsory liquidation. Your client tells you that the company granted a floating charge to a creditor, Sea Breeze Incorporated, a few months before the liquidation. Sea Breeze has appointed a receiver. The liquidator wants to know if any of the receiver's realisations can be used to meet the liquidation costs or pay any unsecured creditors. Outline the discussion you would have with the liquidator.

The first point of discussion with the liquidator would be date of the floating charge. The floating charge would not be valid if it was entered into a period of 12 months prior to the commencement of the liquidation and that Palm Beach was unable to pay its debts at the time the charge was created, or as a result of the charge. If Sea Breeze is connected to Palm Beach, then the period of 12 months extends to 2 years.

The second point would be the appointment of the receiver. As the receiver has been appointed, this will have the effect of crystallizing a floating charge. As such, this increases the security of Sea Breeze over the asset, and the right of the receiver over the selling of the asset.

Secondly, it would be discussed that the receiver's primary duty is to the charge holder Sea Breeze. This means that the receiver's realizations will be used to repay Sea Breeze's debt including the interest and costs. The receiver is also entitled to be paid out of the assets over which they are appointed over and as such, the realizations will also be used to pay the receiver.

Finally, the last point of discussion would be that the realization made by the receiver are not available for payment of the liquidation expenses. As such, if all the costs of the receiver have been covered, and the debt of Sea Breeze has also been paid, then

Commented [RD(DWH19)]: (2.5 marks)

Also, should identify whether required registration and if so, whether was in fact properly registered. Otherwise the charge would not bind the liquidator.

A charge may also be an unfair preference

if there is any remaining amount, it will be used to meet the claims of preferential creditors.

Question 4.2 [maximum 6 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. It 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 obtain orders to examine the auditors who are in Hong Kong and who will not cooperate 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

As an advisor to the liquidator(L), the following would be the outline of the advice to L would give to L.

Right of the Foreign Liquidator: It is allowed in Hong Kong that a foreign liquidator's right to bring an action in Hong Kong in the name of the company be recognized. As such, L would be able to have some rights in Hong Kong without the standard order and recognition.

Banks in Hong Kong: Another point of discussion would be that in Hong Kong, the banks should readily assist a foreign representatives by providing documents in relation to the company's own accounts even without the foreign representative obtaining a court order. As such, L should be able to use this to obtain the relevant information from the banks.

Examination of Individuals: The Hong Kong court has also granted recognition and assistance orders to permit foreign officeholders to conduct the examination of individuals in Hong Kong. As such, L would have to make clear to the auditors that L has the right to conduct the examination and may be able to take action if they do not co-operate.

Standard order: Hong Kong had established a standard order which a foreign representative could expect to obtain if they are form a commonly encountered jurisdiction. From a Hong Kong context, Cayman Islands is one of the commonly encountered jurisdictions and as such, L may be able to obtain a standard order. However, L must keep in mind that the order is limited to the proviso that any power which is sought to be exercised in Hong Kong must be subject to the powers that L would have in Cayman. As Cayman's examination power is much more restrictive than Hong Kong, L may not have much power in Hong Kong.

Ancillary Proceeding: Due to the restrictive powers of the Cayman examinations, L may want to look to seek an ancillary liquidation in Hong Kong rather than a standard order.

Commented [RD(DWH20): Not quite right: if there are insufficient uncharged assets, then floating charge realisations must first be used to pay preferential creditors

Commented [RD(DWH21): (3.5 marks)

OK, but misses a few points:

Discussion as to 'managerial assistance' to recognise that law of place of incorporation governs who can take steps in the name of the company.

Up Energy holds that cannot "give" powers, so even if would assist, would not be the "full suite" hoped for by L. Further and in any event Global Brands says must look at COMI, being examples: Location of directors, officers, board meetings; Location of operations, assets, bank accounts (here – the listing?).

Importantly, note the reference to presence in Shenzhen. Shenzhen is a pilot area under the Hong Kong / Mainland cooperation mechanism. That mechanism is only open to Hong Kong appointed office-holders. If core requirements can be met may therefore be better to get winding-up order in Hong Kong. Identify the core requirements

Does not address the request from L as to a stay of actions

Commented [RD(DWH22): The bulk of the description is fine, but should advise that the 'standard order' referenced by L is a thing of the past

As this would give L a 'formal' recognition in Hong Kong, they may be able to exercise more power with regards to the examination of the auditors.

Commented [RD(DWH23)]: "Would" be. But need to mention core requirements.

Question 4.3 [maximum 5 marks]

Commented [RD(DWH24)]: (2 marks)

Harrier Limited supplies software products to Lapwing Limited pursuant to an ongoing contract signed between the two. Lapwing has stopped paying Harrier's invoices. It has not made any complaint about the supplies but in a conversation a Lapwing director told a Harrier director "sorry, we just can't afford it right now". The Harrier director said he may therefore have no option but to wind-up Lapwing, to which the Lapwing director replied "try that and I'll fight it" but he does not say on what grounds. Harrier come to you and ask you to talk them through the issues. What key questions do you need to ask and what comments can you give?

Some good points, but loses sight of the focus of client's questions. Elements should advise:

Harrier needs to know that if winds up then is treated same as other creditors

Is Lapwing a Hong Kong company? If not, will also need to advise as to the core requirements.

Statutory demand procedure – prescribed form needed for example.

Re ability to wind up if 'otherwise satisfied' company insolvent: statement "cannot pay" is offset by the statement "will fight it" – evidence (hence Stat Demand advisable)

Any arbitration or EJC clause?

Discretion not to wind up if, for example, Lapwing is undergoing a genuine restructuring

When discussing with Harrier Limited, the I would ask the following key questions:

Contractual Terms and Payments: What are the specific terms and conditions of the ongoing contract, and is there any provisions for late payments such as penalties?

Lapwing's Financial Situation: Is there any way to find out Lapwing's financial situation? Have they communicated any other financial difficulties other than not being able to pay the invoices?

Effect on Harrier: What would be the effect on Harrier is Lapwing does go insolvent? Can Harrier find alternatives to the contract or would it be better to negotiate with lapwing, if possible, to keep the contract going?

Among the comments I would give are:

Communication: Encourage Harrier and Lapwing to keep an open and transparent communication in order to gain a better understanding of the situation. Statements like 'sorry, we just can't afford it right now' can be taken in many different ways and can affect the relationship and contract between the two companies.

Negotiation: Encourage harrier to keep an open attitude to negotiation especially if the contract plays a key part in Harrier's business. It might be better and less time and cost consuming to continue with Lapwing, than to pursue a liquidation and find another customer for the supplies.

* End of Assessment *

TOTAL MARKS: 29 OUT OF 50