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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.**

**Commented [RD(DWH1):** Correct (1 mark) – 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.

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.**

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

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.**

**(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.**

**Commented [RD(DWH3):** Correct (1 mark) – there is no requirement for a director or the petitioner to be Hong Kong based

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).**

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

**Commented [RD(DWH5):** Correct (1 mark) – section 184 CWUMPO

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.**

(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).

(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.**

Commented [RD(DWH7)]: Correct (1 mark)

(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.

(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.**

Commented [RD(DWH8)]: Incorrect (0 marks) - 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)

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.**

*While a receiver selling a charged asset must use reasonable skill and care in doing so (or else be liable to the company), the receiver's primary duties are to act in good faith and in accordance with the powers granted pursuant to the charge or debenture. In practice, this means that the receiver is free to prioritize the interests of the charge holder over the interests of others, including the company.*

Question 2.2 [maximum 3 marks]

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

Commented [RD(DWH10)]: [A] 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 marks)  
OK, but not a very full answer. Should identify that receiver is agent of the chargor but owes primary duty to lender/chargee. The residual duties are still owed to the borrower/chargor but that is not clear from the answer

Commented [RD(DWH12)]: (2.5 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.**

*The liquidator must show that the company was unable to pay its debts at the time of the transaction or that, as a result of the transaction, the company was rendered unable to pay its debts. The liquidator must also prove that, as a result of the transaction, the preferred creditor was placed in a better position in the liquidation than it would have been absent the transaction. Finally, the liquidator must show that the company was influenced by a desire to prefer the creditor or to place the creditor in a better position. The final element is practically challenging to prove when the allegedly preferred creditor is a non-associate.*

**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 of the new Hong Kong/Mainland co-operation mechanism are that: (1) as it relates to the mainland, the asset or subsidiary the liquidator needs to access must be located within one of the pilot areas in the Mainland; (2) the insolvency proceeding was commenced under CWUMPO or the CO; (3) the debtor's centre of main interests (COMI) must be in Hong Kong; and (4) a letter of request from the Hong Kong court is required.*

**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.**

*Part X of the CWUMPO governs the winding up of unregistered companies. Section 326 of the CWUMPO defines 'unregistered company' and such definition incorporates companies which are registered, non-Hong Kong (foreign) companies. For this reason, Part X will also govern the winding up of a foreign company if the court elects to exercise jurisdiction.*

*To enable the court to exercise jurisdiction over the foreign company, the court must be persuaded that the company has sufficient connections to Hong Kong. The court will consider three core requirements established by the common law when deciding whether to exercise jurisdiction: First, whether there is a sufficient connection to Hong Kong; Second, whether there is a reasonable possibility that the parties petitioning for*

**Commented [RD(DWH13)]:** (2 marks)

The answer should refer to the fact that the COMI must have been in HK for 6 months; and also should identify the 3 pilot areas. Also not all assets need to be in the pilot area and it could be a place of business or rep office (not necessarily a subsidiary)

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

Should also describe the circumstances stated (s.327) as founding jurisdiction:

- (i) dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- (ii) unable to pay its debts;
- (iii) just and equitable

*the winding-up order will benefit from it; and Third, whether the court can exercise jurisdiction over one or more parties with an interest in the distributions from the winding 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 flexible statutory tool for restructuring a company's debts. Its benefits are numerous and include the ability to make a binding compromise with the company's creditors and/or members. The primary benefit is that, rather than negotiating individually with each creditor regarding a restructuring - a practice which would require 100% participation by creditors - the scheme of arrangement allows a company to compromise with creditors without receiving unanimous support and prevents holdout creditors. Furthermore, so long as the requisite number of creditors within a class have voted to approve the scheme, non-consenting creditors will also be bound. As a benefit to creditors, all creditors receive the same voting rights, regardless of if they are based in Hong Kong or are a foreign company. An additional benefit to creditors is the level of court supervision - the court ultimately approves the scheme following an evaluation to ensure the scheme is fair, equitable, and that classes were fairly represented.*

*The Scheme of Arrangement, while flexible, does have downsides. In particular, the Scheme of Arrangement vehicle does not incorporate a moratorium on creditor action. Practically, however, Hong Kong practitioners achieve a moratorium by first petitioning for winding up and for the appointment of a provisional liquidator with specifically enumerated powers which further the scheme of arrangement. Doing so allows practitioners to obtain a moratorium under CWUMPO section 186. However, such practice has been questioned and even denied by courts in recent years. Furthermore, while an approved scheme will be binding in Hong Kong and for debts governed by Hong Kong law, it does not act to prevent creditors from seeking to enforce the debt under any foreign law which governs the debt.*

**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?***

*While Hong Kong has developed statutory schemes to assist with cross-border insolvency, such as the recently developed scheme for co-operation with mainland China and the application of Part X of CWUMPO to the winding up of non-Hong Kong companies, nearly all cross-boarder insolvency issues are governed by the common law.*

**Commented [RD(DWH15)]:** (3 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 (important); the court's role on sanction

**Commented [RD(DWH16)]:** Since Legend, it is not directly available

**Commented [RD(DWH17)]:** (2.5 marks)

A reasonable broad description but 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)]:** Winding up under Part X is not a recognition issue



*The common law of Hong Kong has developed in such a way that courts are empowered to (1) recognize foreign liquidations, (2) assist foreign liquidators, and (3) support foreign insolvency procedures, such as rehabilitation. For example, the courts, applying common law, generally recognize the right of a foreign representative to bring an action in Hong Kong. Furthermore, the courts have also assisted foreign representatives by, for example, refusing to enforce a judgment against Hong Kong assets when a foreign insolvency proceeding was in progress, relying on the principle of comity in its ruling. Conversely, however, the court has refused to prevent a certain security from being enforced in Hong Kong despite a pending administration in the United Kingdom because there is no equivalent to administration (or the attendant moratorium) in Hong Kong.*

*The apparent inconsistency above highlights the primary weakness of Hong Kong's reliance on the common law to deal with cross-border insolvency - the lack of predictability. While relying on the common law allows for flexibility and development, without a statutory scheme to rely on, foreign representatives are at the mercy of an ever-evolving common law.*

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.**

*In Hong Kong, secured creditors generally do not participate in the insolvency process and realisations from the assets subject to the security, sold by the receiver appointed by Sea Breeze, will not be available to you as the liquidator. However, because there are exceptions to this general rule, we should discuss our investigation into the validity of Sea Breeze's security and what type of unsecured creditors are in Palm Beach Limited's case.*

*First, we should investigate the validity of Sea Breeze's security by determining whether their security needed to be registered and then confirming registration on ICRIS. If Sea Breeze was required to register their security and failed to do so, their security will be void against you as the liquidator and you could access the receiver's realisations. Because Sea Breeze has a floating charge, it was required to register its charge pursuant to Section 334. If it failed to do so, the charge is void against you, as liquidator, and other creditors of the company. Furthermore, we should investigate the date on which Palm Beach Limited granted the floating charge to Sea Breeze. Pursuant to Section 267, a floating charge is invalid if it was created within 12 months before the liquidation and at a time when Palm Beach Limited was unable to pay its debts. Because Sea Breeze only took the floating charge a few months ago, it's likely that the*

**Commented [RD(DWH19)]:** Not quite: that case makes clear that assistance may be given to UK Administrators in certain circumstances - the relief sought, however, went beyond what a HK office holder could do so was denied

**Commented [RD(DWH20)]:** (2.5 marks)

A clearly written answer but see notes below

Could also examine whether the charge can be challenged as an unfair preference

Does not deal directly with liquidation costs (not payable if charge valid - Leyland Daf case)

charge would be invalid, so long as we can show Palm Beach Limited was unable to pay its debts at the time.

Second, if we determine that Sea Breeze's charge is valid and they are properly secured, we should discuss what types of unsecured claims exist in Palm Beach's case. While generally we could not access the realisations of the receiver, if certain preferential claims exist, the realisations from the floating charge must be used to satisfy those first. For example, if there are amounts owing to employees, a portion of those amounts are considered preferential.

#### 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.**

While it is true that the Hong Kong courts generally assist foreign insolvency representatives such as liquidators, because the courts rely on the common law to do so, we can't necessarily predict whether you will get all the relief you are seeking by applying to the courts for recognition. For example, in one case the courts refused to allow the enforcement of a judgment against the Hong Kong assets of a foreign company while foreign rehabilitation proceedings were still ongoing, but the court has also refused to stay proceedings in similar cases, such as when administrators were appointed in a case in the Mainland. However, I believe its likely that, if you provide a "letter of request" from the Cayman court, that the Hong Kong court will recognize you as a foreign liquidator and assist you in obtaining documents. I am not confident, based on recent precedent, that the court would impose a stay on actions against SKL.

However, because SKL is a foreign company registered on the Hong Kong Stock Exchange, it may be beneficial to commence an ancillary liquidation and winding up proceeding in Hong Kong under Part X of CWUMPO. If you can prove there is a sufficient connection to Hong Kong, you could commence this domestic proceeding and have all the powers of a Hong Kong liquidator while retaining your principal liquidation procedure in the Cayman Islands. In order to commence this proceeding, you must meet the three core requirements - First, there must be a sufficient connection to Hong Kong; Second, there must be a reasonable possibility that the parties petitioning for the winding-up order will benefit from it; and Third, the court must be able to exercise jurisdiction over one or more parties with an interest in the distributions from the winding up. If you can meet these requirements, I would advise that you attempt to open an ancillary liquidation because obtaining a stay is important to you.

**Commented [RD(DWH21)]:** Except as to any new money advanced.

Also, or within 2 years if Sea Breeze connected and then no need to show insolvency

**Commented [RD(DWH22)]:** If insufficient uncharged assets

**Commented [RD(DWH23)]:** (2 marks)

Not a very complete answer. At the least, should explain the Singularis principle and the fact that HK court moving away from 'standard orders' (this being directly mentioned by the client), and move towards COMI recognition only (save for managerial assistance). For example, bullet points for answer include:

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?).

Court may give "managerial assistance" for practicalities (for example, if the bank does not co-operate) but beyond that is perhaps unlikely. Based on recognising that law of incorporation will govern who can properly act in the name of the company.

If an application is to be made: Need letter of request from Cayman; there are still the Singularis principles – with narrower examination powers in Cayman this could be problematic; granting of a stay not "automatic" (FDG Electric Vehicles; Nuoxi v Peking University);

Also 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

**Commented [RD(DWH24)]:** Slightly different type of 'recognition' stay but broadly right

**Commented [RD(DWH25)]:** Should not need an order to get documents from the bank (the wording suggests it is SKL's own account) – Bay Capital; Seahawk; (Global Brands explanation of "recognition" proper being acknowledgment of the liquidator's authority to represent the company)

Question 4.3 [maximum 5 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?**

*In this instance, Harrier's only option to wind up Lapwing, given that Lapwing will not cooperate, is to attempt a compulsory liquidation. As a creditor, Harrier is eligible to file a petition with the High Court and allege that Lapwing is unable to pay its debts. However, before moving forward with the petition, there are key questions to investigate.*

*First - is Harrier and Lapwing's contract subject to an arbitration clause? If so, Harrier should be cautious about proceeding because courts have recently been unclear about whether, when the debtor denies the debt or has a bona fide dispute, the arbitration clause prevents the winding up or not. However, the most recent precedent indicates that Lapwing is unlikely to be successful in disputing the petition if the sole basis for the dispute is the arbitration clause.*

*Second - Harrier should consider whether Lapwing could dispute the debt, not only because it might implicate a potential arbitration clause, but also because, if Lapwing can legitimately dispute the debt, it can force Harrier to withdraw the petition. In that instance, a court would require Lapwing to do more than make a mere allegation that the debt is in dispute. Lapwing will be required to present evidence of the dispute and evidence of its solvency. However, from the facts stated, Lapwing didn't have any issues with the products, so it's unlikely they could legitimately dispute the debt by presenting evidence before the court.*

\* End of Assessment \*

**TOTAL MARKS: 30.5 OUT OF 50**

Commented [RD(DWH26)]: (2 marks)

Good to note the need to check for arbitration clause but otherwise quite light on what Harrier needs to know. For example:

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)

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

Commented [RD(DWH27)]: Or negotiate....