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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.

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.

Section 50 of the CPO implies the appointment of a receiver. A receiver that is appointed pursuant to a charge is an agent of the borrowing company, however, the receiver's primary duty is to the charge holder. A receiver owes the same duty on sale as a selling mortgagee, to act in good faith and in accordance with the powers given under the charge when selling a charged asset.

A receiver can put the interests of the charge holder in front of the borrowing company. The receiver is however, subject to the overriding principle that a receiver must use

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) Good, but see note below

Commented [RD(DWH12)]: Only over real property and the question refers to a charge

reasonable skill and care and be answerable to the borrowing company when implementing their decisions in relation to the management and disposal of the charged asset.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH13): (3 marks) Good answer

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.

As provided in section 266A of the CWUMPO, an unfair preference is where an insolvent company does anything or suffers anything to be done which places a creditor or guarantor in a better position than it would have been upon the company's insolvency. In order to successfully demonstrate a transaction (with a non-associate) amounted to an unfair preference, a liquidator must prove:

- a. The transaction occurred 6 months prior to the commencement of the winding-up;
- b. At the time of the transaction, the Company was unable to pay its debts or became unable to pay its debts as a result of the transaction; and
- c. The company was influenced by a desire to improve the creditor's or guarantor's position in the event of a liquidation.

While as illustrated in *Stanley Hau* it is difficult to prove desire to prefer, the court has found that the desire to prefer existed. Pursuant to section 266 of the CWUMPO, the court can make a range of orders which includes vesting the subject property in the liquidator or releasing or discharging the security given by the company.

Question 2.3 [maximum 4 marks]

Commented [RD(DWH14): (4 marks) Good answer

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 mechanism for co-operation between Hong Kong and the Mainland was implemented in May of 2021 (the Mechanism). The Mechanism allows officeholders from Hong Kong to obtain recognition and assistance in the designated pilot areas of the Mainland and Mainland officeholders to obtain recognition and assistance in Hong Kong. An opinion of the Supreme court sets out the following which are required for a Hong Kong liquidator to utilise the Mechanism:

- a. Pilot areas in the mainland are Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province (Pilot Areas);
- b. The proceedings must fit the definition of Hong Kong Insolvency Proceedings which includes proceedings commenced under the CWUMPC or the CO;
- c. The debtor's COMI must be in Hong Kong;

- d. The debtor's principle assets in the Mainland are in the Pilot Areas or it has a place of business or a representative in the Pilot Areas; and
- e. A letter of request from Hong Kong is necessary.

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH15)]: (4 marks)
Good answer

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.

The vast majority of companies that are listed on the Hong Kong Stock Exchange (HKSE) are foreign companies. As such, it is important that the Hong Kong court has jurisdiction to wind-up a non-Hong Kong company. Part X of CWUMPO provides for the wind-up of registered and unregistered non-Hong Kong company.

Pursuant to s 327 of CWUMPO a non-Hong Kong company can be wound up if:

- a. *The company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;*
- b. *The company is unable to pay its debts; and*
- c. *The court is of the opinion that it is just and equitable that the company should be wound -up.*

*The court must be satisfied that the non-Hong Kong company is sufficiently connected to Hong Kong before making an order to wind-up the company. The three core requirements which were set out in *Re Yung Kee* are as follows:*

- a. *There must be sufficient connection with Hong Kong. A listing on the HKSE has been considered by the court as an asset, however if no assets as set out in *Re China Medical*, business activities carried out by the company within Hong Kong would be considered as a link of genuine substance between the company and Hong Kong.*
- b. *There must be reasonable possibility that the winding -up order would benefit those applying for it, the petitioner. While this requirement cannot be dispensed with or moderated, assets located in Hong Kong is sufficient to meet this requirement. *Re Carnival Group International Holdings Ltd* held that the benefit can be a real possibility rather than merely a theoretical one. The CFA in *Shandong Chenming Paper Holdings Ltd v Arjowiggins* approved this approach. The court has shown its unwillingness to allow foreign companies to use this requirement as a shield to avoid winding up.*
- c. *The court must exercise jurisdiction over one or more persons interested in the distribution of the company's assets. It must be shown that there is a creditor other than the petitioner which is subject to the Hong Kong's court jurisdiction*

as per the decision of *Excellent Asia (BVI) Ltd v Mas Media Group Ltd*. The creditor is required to actually do something and not merely presenting the petition as per *Re China Medical*. A place of residence in Hong Kong, employment or having a place of business will satisfy this requirement.

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.

A scheme of arrangement, which is Hong Kong's only statutory tool for corporate rescue, enables companies to make binding compromises or arrangements with their members and/or creditors. Part 13, Division 2 of the Cap 22 contains the statutory regime for schemes of arrangement and the RHC O. 102 r 2 and r 5 provides the court procedures.

In the absence of a scheme of arrangement, a company would be required to obtain approval of 100% of the relevant creditors which may be impossible or difficult in some situations. A scheme of arrangement is also beneficial as it can prevent hold-out creditors from obtaining an unfair advantage against a substantial majority of similarly ranked creditors.

While the court does not have any jurisdiction to sanction a scheme of arrangement that does not have the approval of the required majority of creditors it can refuse to sanction a scheme of arrangement that has the approval of the required majority of creditors. If the court sanctions the scheme of arrangement the scheme will be binding on all the scheme creditors in the relevant class even if that creditor didn't attend the creditor's meeting or approve it.

A scheme of arrangement on its own does not have a moratorium. In an effort to address this weakness, when a petition is presented an application is made for the appointment of a provisional liquidator with specific powers to promulgate a restructuring of the company's debt if viable. The moratorium is then obtained pursuant to s 186 of the CWUMPO. Following the decision of *Re Legend International Resorts Ltd* which refused to appoint provisional liquidators, a number of restructurings was still effected using this mechanism.

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?

Hong Kong has had to rely on the common law in the absence of a statutory framework enabling the Hong Kong court's jurisdiction to wind-up a non-Hong Kong company.

Commented [RD(DWH16)]: (2.5 marks)

Also question calls for a description, but the answer does not include, for example, : the role of the explanatory statement; how classes are constituted; leave to convene meetings; the statutory majorities needed

Commented [RD(DWH17)]: Cap 622

Commented [RD(DWH18)]: (0 marks)

There is no detail in this answer, which does not go much beyond the question itself.

As stated in by Harris J in Re Seahawk China Dynamic Fund, recognition and assistance in Hong Kong is purely common law.

The lack of a statutory framework has forced the court to be creative and expanded upon the common law. This is evident from the various decisions regarding recognition applications. This has also allowed Hong Kong to have a flexible insolvency regime which is adoptable and robust.

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH19)]: (4 marks)
All elements present

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.

A secured creditor generally will obtain priority over the unsecured creditors and the secured asset will not be available for the liquidator to realise. However, the following exceptions exist:

- a. The security which should have been registered was not as per section 5.6*
- b. Section 265(3B) provides that where there is a liquidation, preferential claims are paid out of the floating charge realisations if there is insufficient uncharged assets available to the liquidator.*
- c. If the creditor fails to properly value their security or fails to account for their security, then the security is deemed waived and available for the liquidator's realisation as per r.84 of the CWUR.*
- d. Section 267 of CWUMPO provides that a floating charge is invalid if it was entered within 12 months prior to the commencement of the liquidation and the company was unable to pay its debts or became unable to pay its debts as a result of the floating charge. The period will extend from 12 months to 2 years if the charge is connected with the company. The floating charge will however be valid to the extent that any new money is provided to the company at the time or after the creation of the floating charge.*
- e. If it can be shown that the floating charge was aimed at putting Sea Breeze in a better position than other creditors, deprive a benefit from the floating charge, the floating charge can be struck down under the principle of anti-deprivation.*

Commented [RD(DWH20)]: And in that case no need to show insolvency

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.

*The granting of the standard order by the Hong Kong court was developed from dealing with commonly encountered jurisdictions such as Cayman. In considering whether to grant the recognition order, the Hong Kong court will consider whether the power sought is available in both Hong Kong and Cayman in line with the *Singularis* principle. The powers of the order will be restricted to those available in Cayman. Given that Cayman's law on examination is restrictive compared to Hong Kong's law the order will be restricted. The granting of a stay is also not automatic, as per *FDG Electric Vehicles Ltd*, Hong Kong court will consider the nature of the proceedings. In order to obtain recognition a letter of request must be made from the Cayman court to the Hong Kong court.*

Given the restrictive nature of Cayman's law it is unlikely that the Hong Kong court will grant the power to examine the auditors.

In order to obtain the power to examine the auditors an application should be made for an old fashion ancillary liquidation. If L would like to deal with the assets in Shenzhen, then a specific order for this purpose should be sought. The application will need to comply with section 3.1 above.

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?

As an unsecured creditor, Harrier Limited can enforce its right by issuing a Companies Act demand pursuant to section 178 of the CWUMPO and CWUR r3A,3B. A petition

Commented [RD(DWH21)]: (3 marks)

A reasonable answer but should also advise client re

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)

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.

Need letter of request from Cayman

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

Commented [RD(DWH22)]: This would need Cayman advice

Commented [RD(DWH23)]: (3 marks)

A good answer re winding up (and potential alternatives) but should also address:

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

Any arbitration or EJC clause? (viz *Lasmos* and *Guy Lam* decisions)

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

Commented [RD(DWH24)]: There is no "Companies Act" in Hong Kong

can be presented if after 21 days of issuing the Companies Act demand, Lapwing Limited failed to pay the debt which is at least HKD\$10,000. The petition must be filed, served on Lapwing Limited and advertised in accordance with the CWUR.

If Lapwing Limited opposes the petition, then it will be heard by a judge. The liquidator will be appointed if the judge grants the order. Harrier Limited will need to submit a formal written proof of debt unless the court orders otherwise. The claim will be adjudicated by the liquidator.

The issue with Harrier Limited winding -up Lapwing Limited is that as an unsecured creditor, it will not be in front of the queue. As the petitioner Harrier Limited will rank the same as all unsecured creditors and may not receive payment of its debt if Lapwing Limited is insolvent.

If the debt is undisputed, the better option may be for Harrier Limited to enforce its right outside the insolvency system by issuing an action in the District Court of the High Court. The action can commence by filing and serving a writ. If Lapwing Limited does not contest the debt, then a summary judgment can be entered. If Lapwing Limited does contest the debt, then a trial will be set or summary judgment awarded. If Harrier Limited is successful, then it can enforce its judgment in a variety of ways including a garnishee order or a charging order.

*** End of Assessment ***

TOTAL MARKS: 36 OUT OF 50