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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.**
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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): Incorrect (0 marks) – see text at 6.4.1

(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).

(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.

Commented [RD(DWH4): Incorrect (0 marks) - see text at 6.4.1 (sections 79, 265B(3) of CWUMPO). Note question states that the entirety of the company's assets are covered by the charge, so there can be no uncharged assets for the liquidator to meet preferential claims

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): Incorrect (0 marks) - 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.

When selling the secured property, the receiver owes the same duty on sale as a selling mortgagee, to act in good faith and in accordance with the powers given to him under the debenture or charge. Receivers are free to put the interest of the charge holders first in making decisions as to the course of which the receivership will take.

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 marks)
Need to mention that at law the receiver remains the agent of the chargor and has residual duty to that person on sale

Commented [RD(DWH12)]: (3 marks) full marks given but could also have mentioned that the preferred person could have been a guarantor, not just a creditor

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.

An unfair preference occurs when an insolvent company acts to place a creditor in a better position than it would have been upon the company's insolvency.

The liquidator must be able to provide that the company was influenced by a desire to improve said creditors position in the event of liquidation.

The liquidator must also show that the company was unable to pay its debts or became unable to pay its debts as a result of the transaction. The transaction must also have occurred within the last six months prior to the commencement of winding up.

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.

A record of meeting refers to Hong Kong appointed liquidators or provisional liquidators in insolvency proceedings to be entitled to apply for recognition in the Mainland and for Mainland administrators to apply for recognition in Hong Kong.

It provides that the Debtors COMI, as per the Supreme court opinion being the place of incorporation of the debtor however other factors such as principal place of business, principal place of assets etc. must be in Hong Kong. A letter of request from the Hong Kong Court is also necessary

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.

Hong Kong has not adopted the UNCITRAL Model Law on Cross border insolvency as is not party to any international treaties that deal with cross border insolvency. Whilst Hong Kong does lack statutory framework to deal with cross-border insolvency the Hong Kong court has followed common law principles, such as a foreign liquidator to bring action in Hong Kong has long been recognised.

Commented [RD(DWH13)]: (1.5 marks)

Need to say that the HK proceeding must be a collective insolvency process; and also need to say that the request must be for assistance in a pilot area (naming them) and that the debtor's principal Mainland assets or a rep office/place of business is there; and that COMI in HK must have been for 6 months

Commented [RD(DWH14)]: (2.5 marks)

The elements are present but the answer is a bit too jumbled to warrant a higher mark

Commented [RD(DWH15)]: This is a recognition point rather than a winding up jurisdiction point

Where there is a dealing with winding up non-Hong Kong companies, there are certain requirements which need to be met for the Hong Kong Court to exercise its jurisdiction to wind them up. The basis on which an **un-recognised** company may be wound up are here:

- 1) The Company is unable to pay its debts
- 2) The court is of the opinion it is just and equitable that the company should be wound up
- 3) The company is dissolved or has ceased to carry on business

However there needs to be satisfaction from the court that the company y is sufficiently connects to Hong Kong by the following requirements

- (i) There must be sufficient connections, not just the presence of assets
 - a. This could be the a listing on the Hong Kong stock exchange, Hong Kong being designated COMI, the principal place of business is in Hong Kong,
- (ii) There must be a reasonable possibility there will be benefit for **others** if it is wound up
 - a. There needs to be a reasonable not just a mere possibility and therefore this requirement can be met if the assets of in Hong Kong however in the case of *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd* where the court needs to be satisfied that the lack of assets wis not used as shield to avoid winding up non-HK companies
 - b. Such corporations, for example, are listed in HK, incorporated in Bermuda or Cayman, and the business is ran through holding companies in the BVI
- (iii) The court should exercise jurisdiction over one or more persons interested in the company's asset
 - a. This being said, any petitioner would need to show there are persons with sufficient connect with Hong Kong who have sufficient economic interest in the winding up of the Company - just by presenting a petition would not provide this and there needs to be evidence of other creditors in Hong Kong.

The petiton needs to stake how the three requirements are satisfied

With that being said Hong Kong common law has show to adapt and innovate with respect to corporate restructuring. The introduction of recognition and granting assistance to soft touch provisional liquidators, a process where powers still remain with the directors however the provisional liquidators provide more of an oversight role. Whilst it has been used as a defense mechanism to avoid a winding up in Hong Kong, the Hong Kong court is now considering not to refuse this appointment it will consider this carefully especially the reason why the light touch appointment has been made and will make a winding up order in Hong Kiong it it considers it the most appropriate for creditor interest. Hong Kong however will ensure to consider the underlying principles each time it is asked to assist for example when administrators in England sought an order to recognise their appointment this was refused as Hong Kong will consider the type of appointment which is being requested assistance for, as there is not an equivalent process in Hong **Kong**

Commented [RD(DWH16)]: Unregistered not unrecognised

Commented [RD(DWH17)]: The petitioner

Commented [RD(DWH18)]: This was more to do with the relief/assistance sought than the fact the request was from UK administrators

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 or arrangement is a process whereby it allows companies to make binding compromises or arrangements with their members and/or creditors such a reduction in share capital or an adjustment in the debt owed to creditors.

The scheme of arrangement, for restructuring purposes enables to company to compromise its debts if stipulated by majorities of creditors who approve and the court sanctions this arrangement, otherwise if not the Company would require 100% of creditors support to adjust the debt. Under s670 of the Ordinance Cap, Division 2, a meeting may be summoned by an order of the court with the creditors and/or the members and if approved, an application is made to the Court to sanction the scheme.

'Pros' of the scheme

As already outlined if a scheme is approved, it only requires 75% by creditor value who are present voting, or by proxy, to approve rather than 100% of all creditors to become effective, therefore this assist with lack of creditor engagement. It will apply to all scheme creditors whether they voted or not.

Given a scheme is not a formal insolvency process, it allows the directors to remain in control and there are less stigmas surrounding the process

'Weaknesses' of the scheme of arrangement

While the scheme is being developed, negotiated, and approved there is no moratorium protecting the company from creditor claims and action.

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 these common law principles arises out of the courts desire to ensure there is a unitary system for the collection and distributions of assets however judges have developed Hong Kong law in the context of how foreign liquidations should be assisted, such as giving consideration to COMI a key factor. For example, in the case of *Global Brands* the common law developed rules and principles which*

Commented [RD(DWH19)]: (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; the statutory majorities needed; the court's role on sanction

Commented [RD(DWH20)]: And majority in number

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

Some of the main elements are here but should mention Singularis and the principles that apply (cannot do something in HK that would not have power to do in home jurisdiction); letter of request needed.

Can assist by refusing to allow enforcement of judgments where there is a foreign rehabilitation process

should apply to changing circumstances or a jurisdiction. Here the development of adopting the COMI criteria in line with the mainland, from Hong King, does not itself ignore the place of incorporation but allows there to be a distinguish both recognition and giving the assistance to the foreign liquidator to allow them to facilitate steps in Hong Kong.

As outlined the strength of the common law is its ability to adapt, There is nothing in principle prevent the recognition of liquidators appointed in a company's centre of main interest or a jurisdiction with it has a sufficiently strong connection to justify recognition (Lamtex)

The Hong Kong court has developed its approach to deal with foreign recognition and cross border recognition despite there initially being issues with the light touch provision, where this is common to a debtor in possession which was rejected in Hong Kong.

As a result of their being a unitary statement for the collection and distribution of assets, this results in the requirements that the proceedings being assisted are collective insolvency proceedings and therefore the court declines to give assistance of a solvent company.

The developments have also assisted other insolvency processes, alongside recognising foreign insolvency process such as rehabilitation procedures, such as the appointment of provisional liquidators in Bermuda and Cayman islands to permit a restructuring. However the Hong King Court has ruled, in Lamtex for example, that if there is any abuse with respect to the provisional liquidation then it will make a liquidation order in Hong Kong, if it considers it right to do so.

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.

Firstly, it would be important establish the registration of the charge and the date the charge was granted to Sea breeze. A creditor cannot be put in a better position to other creditors and therefore it would be important to discuss the date the charge was granted and at what point Palm Beach was insolvent. A floating charge grants early

Commented [RD(DWH22)]: This misunderstands the position a little: recognition to light touch PLs was common until it became abused as a debtor-led process that tried to usurp the HK court's jurisdiction

Commented [RD(DWH23)]: (2.5 marks)

See below comments

repayment ahead of unsecured creditors and therefore we would want to discuss the impacts on this and whether this is an unfair preference. In Hong Kong, a floating charge is not valid if it was entered into a period of 12 months prior to the commencement of the liquidation and the company at the time was unable to pay its debts or become unable to pay its debts at the time the charge was entered.

The second thing to discuss will be that a floating charge is different to a fixed charge in that the security is not absolute in the same way as a fixed charge. Where realisations are made out of the assets covered by a floating charge then these will need to pay 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.

I would first explain that the Hong Kong court has granted recognition and assistance orders to permit foreign officeholders to then seek production documents or examination of individuals in Hong Kong however I would explain that the Hong Court compares the scope of the relevant provisions between Hong Kong and the requesting jurisdiction based on the Singularis Principle. Yes a standard order can be applied however the powers to take steps in Hong Kong must also have the relevant powers available to liquidator in Cayman.

With respect to Banks, it will be important to explain that Banks should be readily able to assist foreign representatives by providing documents in relation to the Company's own accounts even without the foreign representative not having obtained a Hong Kong court order as banks recognise liquidators as being authorised by 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.

Commented [RD(DWH24)]: Should add the test (influenced by a desire to prefer etc.)

Commented [RD(DWH25)]: or within 2 years if Sea Breeze connected and then no need to show insolvency - in either case except as to new money advanced).

Commented [RD(DWH26)]: Only if insufficient uncharged assets (s. 265(3B))

Commented [RD(DWH27)]: (1.5 marks)

Mentioning the Singularis principle is good (and that banks should cooperate without an order) but not a very comprehensive answer.

What about the following, for example?

Things will not be as straightforward as L believes

Examinations may go beyond what SKL (as a company) is entitled to. It is, however, information in respect of which a Hong Kong liquidator could seek an examination order (section 286B of CWUMPO) – note CECF Costin v RSM case as to the nature of an examination order by way of assistance

BUT: can L get "recognition and assistance"? On the facts given, likely to be difficult in light of recent cases. 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); may be that enforcement would be stayed (for example, Ambow Education) – recent cases have not dealt with this

However, and in any event, 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(DWH28)]: Court has moved away from standard order

Commented [RD(DWH29)]: More accurately, banks should recognise – authority of liquidator to speak in name of the company

Commented [RD(DWH30)]: (0.5 marks)

You mention statutory demand but then mix up bankruptcy and liquidation concepts.

Also, should mention the following:

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.

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?

Whilst Lawpig has expressed that it can't pay, Harrier should present a statutory demand for the amounts owed. So that there is not an issue with service of the demand, Harrier will need to make sure that the demand advertised in the newspaper or where applicable in the jurisdiction to ensure that this is brought to the debtor's attention. A statutory demand can only be presented if the debt exceeds HK10,000, the debt is for a liquidated sum payable immediately is unsecured. The debt also should have no reasonable prospect of being paid and there is not outstanding application to set aside a statutory demand. So we need to establish the size of the debt and that there is no prospect of this being paid. We also need to understand the relationship between Lawpig and Harrier and the payment terms in the contract and what happens on default of these terms

Commented [RD(DWH31): Suggest "establishing insolvency" instead of this phrase

Commented [RD(DWH32): This is for bankruptcy, not winding up

Commented [RD(DWH33): This is not a test

Commented [RD(DWH34): This is for bankruptcy, not winding up

* End of Assessment *

TOTAL MARKS: 24 OUT OF 50

**MARK ADJUSTED TO 25 = 50%
COURSE LEADER.**