



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 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: **[studentnumber.assessment8C]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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.

Any reference to “CWUMPO” in the questions below means the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

Question 1.1

Select the **correct answer** to the question below:

As a lawyer practising Hong Kong law, you are asked to advise a client on a tricky legal issue. There are no Hong Kong authorities dealing with the issue but there is a 1985 decision from the English House of Lords more or less directly on point. It has not been cited in the Hong Kong court. Can you rely on it in forming your advice?

- (a) Yes, because it is a House of Lords decision pre-dating the Handover in 1997 so is binding on the Hong Kong court.
- (b) No, because all decisions of the English court ceased to have any relevance in Hong Kong after the Handover in 1997.
- (c)** Yes, it is not binding as such but the decision will form part of the common law as at the date of the Handover in 1997 and would be persuasive as the common law at that date forms part of Hong Kong law.
- (d) No, because the decision is from the House of Lords and not a Privy Council decision on appeal from Hong Kong.

Commented [RD(DW-H1)]: Correct (1 mark). The decision would be persuasive

Question 1.2

Realisations from a floating charge will always be paid in full to the holder of that charge, even if the company granting the charge goes into liquidation. (You may assume that the floating charge is not open to challenge by the liquidator).

- (a) This statement is true because a creditor by way of a floating charge will always stand entirely outside of the liquidation.
- (b) This statement is untrue because all of the costs of the liquidation must always be paid first out of those realisations.
- (c)** This statement is untrue because creditors with a statutory preferential claim must first be paid out of those realisations (unless the same can be paid out of uncharged assets).
- (d) This statement is untrue because **both (b) and (c)** are correct (that is, the costs of the liquidation must always be paid first out of those realisations and thereafter creditors with a statutory preferential claim must first be paid out of the realisations).

Commented [RD(DW-H2)]: Correct (1 mark). Option (a) is not correct due to the rules on payment of preferential creditors; (b) is not correct because the charged assets are not available to the liquidators

Question 1.3

Upon a bankruptcy order being made against an individual, that individual remains free to deal with his assets provided he reports to his trustee in bankruptcy after doing so.

- (a) This statement is true.
- (b) This statement is untrue because upon bankruptcy the bankrupt's assets are vested in the trustee.
- (c) This statement is untrue because although the assets remain the bankrupt's own he must obtain permission from the trustee before dealing with those assets.

Commented [RD(DW-H3): Correct (1 mark). Bankruptcy differs in this regard from corporate insolvency in Hong Kong. In the latter, the company remains the owner and there is no automatic vesting.

Question 1.4

A petition to wind up a company on grounds of insolvency can be presented when a company is unable to pay its debts. Section 178 of CWUMPO provides three circumstances in which a company shall be deemed to be unable to pay its debts. **Which one of the following** is one of those circumstances?

- (a) A creditor has properly served a demand (statutory demand) in the prescribed form and the company has, for three weeks after service, neglected to pay the sum demanded.
- (b) Where the statutory definition of "insolvency" (appearing elsewhere in the same Ordinance) is satisfied.
- (c) Where the company is insolvent according to its balance sheet.
- (d) Where a judgment has been made against the company.

Commented [RD(DW-H4): Correct (1 mark). The key thing to remember is that there is no statutory definition of "insolvency" in the relevant Hong Kong legislation

Question 1.5

When a company goes into liquidation, the role of the liquidator is to:

- (a) Realise the company's assets, adjudicate the proofs of debt submitted by those claiming to be creditors and distribute dividends to creditors.
- (b) Investigate transactions entered into by the company to determine whether there are any that can be impeached pursuant to the legislation (or otherwise).
- (c) Investigate the cause(s) of failure of the company and the conduct of the directors.
- (d) All of the above.

Commented [RD(DW-H5): Correct (1 mark). The role of the liquidator is a broad one.

Question 1.6

A winding up Petition was presented on 1 April 2019 and the winding up order was made on 5 June 2019. After her appointment the liquidator discovers that a payment was made by the company to a third party on 5 April 2019. Which of the following provisions is **most likely** to be considered by the liquidator (and should be her **first** consideration)?

- (a) Void dispositions after the commencement of winding up - pursuant to section 182 of CWUMPO.
- (b) Unfair preferences - pursuant to sections 266, 266A and 266B of CWUMPO.

Commented [RD(DW-H6): Correct (1 mark). The other options are also possible but (a) should easily be the first option to look at because the legislation deems the transaction to be void (the commencement of the winding up being 'backdated' to the date of the petition). It would be for the recipient to persuade the court that the payment could be retained. For the others, the liquidator would have to prove certain elements.

- (c) Transactions at an undervalue – pursuant to sections 266B, 266D, 266E of CWUMPO.
- (d) Fraudulent trading – pursuant to section 275 of CWUMPO.

Question 1.7

Select the **correct** answer:

A receiver appointed pursuant to a charge created by a company (A) over its assets in favour of its bank (B), acts as:

- (a) Agent of the company granting the charge – in this case A.
- (b) Agent of the company appointing him – in this case B.
- (c) An officer of the court.
- (d) An employee or officer of the Official Receiver's Office.

Commented [RD(DW-H7)]: Correct (1 mark). It should be remembered that the receiver also owes duties to the charge-holder (here, B), but acts as agent of the chargor

Question 1.8

Between them, CWUMPO and the Companies Ordinance (Cap 622) (CO) provide a comprehensive statutory regime relating to corporate rescue.

- (a) This statement is true – the provisions of these two statutes provide a comprehensive package of provisions relating to corporate rescue.
- (b) This statement is untrue – CWUMPO alone provides a comprehensive regime for corporate rescue as well as for liquidations.
- (c) This statement is untrue – CO alone provides for such a regime.

(d) This statement is untrue – Hong Kong has no comprehensive statutory regime for corporate rescue.

Commented [RD(DW-H8)]: Correct (1 mark). Although the CO contains provisions for schemes of arrangement, those provisions could not be said to be "a comprehensive statutory regime relating to corporate rescue". As one example, there is no moratorium.

Question 1.9

Select the **correct** answer:

Part X of CWUMPO gives the Hong Kong court jurisdiction to wind up non-Hong Kong companies in certain circumstances. Aside from this section, other provisions relating to cross-border insolvencies are contained in:

- (a) The UNCITRAL Model Law on Cross-Border Insolvency as adopted in Hong Kong.
- (b) Parts of CWUMPO other than Part X.

(c) Guidance in common law judicial decisions.

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

Commented [RD(DW-H9)]: Correct (1 mark). Hong Kong has not enacted the Model Law; part X is the only part of CWUMPO dealing with the subject matter; and Cap 319 deals only with enforcement of foreign judgments

Question 1.10

Select the **correct** answer:

A liquidator appointed by the Cayman Islands court over a Cayman incorporated company believes that the company has a legal action it should pursue against defendants in Hong Kong. Leaving aside any potential jurisdictional challenges as regards the action itself (for example, the presence of an arbitration clause), the liquidator:

- (a) must first obtain an ancillary winding up order in Hong Kong.
- (b) can commence the litigation in the name of the company without further order in Hong Kong.
- (c) Must first seek a recognition order in Hong Kong and must obtain a letter of request from the Cayman court for such purpose.
- (d) Must first seek a recognition order in Hong Kong and can do so based solely on the Cayman winding up order and without a letter of request.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Describe the effects of the compulsory liquidation of a company upon a creditor who is pursuing the company by way of a civil action.

A compulsory liquidation occurs when the company is wound up by an order of the High Court. When the creditor presents a petition on the ground that the company is unable to pay its debts. This mechanism permits the court to appoint a liquidator who would take over the conduct of the company, collect assets and distribute any proceeds and the company has no influence over which the liquidator is appointed.

Question 2.2 [maximum 4 marks]

Identify each method by which a company can go into liquidation in Hong Kong and briefly describe the circumstances in which each method would usually be implemented.

The different ways a company can go into liquidation in Hong Kong are:

1. Members' voluntary liquidation (MVL) – this method can be used when the Company will be able to settle all liabilities within 12 months of the commencement of the liquidation.
2. Creditors' voluntary liquidation (CVL) – this method will be implemented when a company decides to put itself into voluntary liquidation and it is not solvent.
3. CVL in case of urgency – Pursuant to section 228A of CWUMPO is used where in the directors opinion the company should be wound up with immediate effect. The directors may resolve to wind up the Company at a meeting of the directors no shareholder resolution is required
4. Compulsory liquidation – this method is used when a company is wound up by an order of the High Court. A petition is presented to the court by a creditor on the grounds that the company is unable to pay its debts. The Company can also present a petition to wind up itself, and the court can also wind up on a petition of a shareholder and on the ground it is just and equitable to do so.

Commented [RD(DW-H10)]: Incorrect (0 marks). Although a foreign liquidator may need to get a recognition order to carry out certain tasks, commencing litigation in the name of the company is not one of them (see the *Irish Shipping* case)

Commented [RD(DW-H11)]: 0 marks out of 3. The question relates to a civil action claimant. Should explore stay (discretionary and mandatory) and attachment restrictions. (Ss. 181, 183, 186 CWUMPO)

Commented [RD(DW-H12)]: 3 ½ marks out of 4. When referring to s.228A should mention for special reason only (i.e. directors cannot just choose this in any case)

Question 2.3 [maximum 3 marks]

Where a creditor presents a petition for the compulsory winding up of a company, a court hearing date is fixed approximately two (2) months after the date of presentation. Does Hong Kong law permit an officeholder to be appointed in the meantime (that is, during this interim period of two months before the petition is heard)? If “yes”, in what circumstances? If “no”, what is the policy reason for not permitting such appointment?

Yes, Hong Kong law permits an officeholder to be appointed during the interim period before the petition is heard. The officeholder is called “Provisional Liquidator and they are appointed pursuant to section 193 of CWUMPO. The Provision liquidator is appointed when there is a risk that assets will be dissipated or otherwise be in jeopardy, before a winding up order is made.

Commented [RD(DW-H13)]: 2 marks out of 3. The additional mark would have been given for referencing the powers of a provisional liquidator and the fact that although a PL can have restructuring powers that cannot be the only reason for the appointment (per *Legend*)

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 9 marks]

Question 3.1.1 [maximum 7 marks]

Describe Hong Kong law as it applies to corporate rescue, discussing any advantages / disadvantages to the current system.

There is no legislation in Hong Kong that specifically deals with corporate rescue. The only mechanism available to a company seeking to restructure its debts is the scheme of arrangement procedure. With the lack of corporate rescue legislation per se, the flexibility of the common law, combined with the creativity of the Hong Kong practitioner and the support of the Hong Kong courts to assist in arriving at practical solutions resulting in use of the tools that do exist to achieve similar aims.

A weakness of using a scheme of arrangement on its own is the lack of any moratorium. To combat this weakness, when a petition for winding up of the company would be presented and an application made for the appointment of provisional liquidators, with specific powers to investigate the possibility of and if viable, promulgate a restructuring of the company's debts. The moratorium is then obtained by reason of section 182 of CWUMPO.

The benefit of using a scheme of arrangements is when a company seeks to adjust debts with many creditors at the same time in circumstances when it would be difficult or impossible to seek unanimous consent of all creditors.

The schemes of arrangement are also useful where there may be hold out creditors who seek an unfair advantage against a substantial majority of similarly ranked creditors.

Commented [RD(DW-H14)]: 4 ½ marks out of 7. missing a few elements. For example, reference should be made to informal workouts; the court's discretion to not make a winding up order; and more detail on schemes (the need to carefully select classes the majorities required; court's role on sanction; limitations due to the *Gibbs* principle)

Question 3.1.2 [maximum 2 marks]

Discuss the possible reforms that have been (or are) under consideration with regard to corporate rescue.

The Law Reform Commission in 1996 presented the first legislation to deal with corporate rescue in 1996, which led to a corporate rescue bill being introduced in the legislative council (Legco) in 2001. Under this bill a provisional supervisor could be appointed with a view to exploring restructuring or other rehabilitation procedures. The Bill provided for moratorium to permit the provisional supervisor to carry out a restructuring there were a number of other points which caused difficulty. Over the years the Bill would lapse and be revived in Legco.

Commented [RD(DW-H15)]: 1 ½ marks out of 2. The proposed moratorium was not one of the difficulties.

Commented [RD(DW-H16R15)]:

The most recent news in regards to the bill, the Legco website now suggests it would have been in the 2018/2019 legislative year but it did not happen but further consultation was sought during 2020.

Question 3.2 [maximum 6 marks]

Although Hong Kong has little specific legislation dealing with cross-border insolvency, the Hong Kong courts have supported foreign insolvencies through the common law. Discuss.

Although Hong Kong lacks a statutory framework to deal with cross-border insolvency, the Hong Kong court has always followed common law principles in this regards. No formal order is required to recognise the foreign liquidator. The court has assisted foreign rehabilitation proceedings by refusing to allow enforcement of a judgement against Hong Kong assets of such company. In this regard, the court has adopted a 2 stage approach by which it dealt with the issues of liability and enforcement separately.

There are legislative provisions that deals with the winding up of non-Hong Kong companies. Provided certain requirements are met, the Hong Kong court can exercise its jurisdiction to wind up companies that are not incorporated or registered in Hong Kong.

Part X of CWUMPO relates to the winding up of unregistered companies. In order to wind up an unregistered company in Hong Kong the petitioner must satisfy the court that the company is sufficiently connected to Hong Kong by satisfying the three core requirements set out in the CFA's decision in *Re Yung Kee*.

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

Question 4.1 [maximum 4 marks]

A receiver is appointed pursuant to a floating charge over all the assets and undertaking of Pacific Tin Mines Limited (PTM), a Hong Kong company. Shortly after the receiver's appointment, PTM is put into liquidation. The liquidator writes to the receiver and asks her to hand over all assets (or realisations from assets) of PTM under her control so that the liquidator can pay the costs and expenses of the liquidation and make a distribution to PTM's unsecured creditors. You are asked to advise the liquidator. What (if any) assets or realisations should be handed over by the receiver?

Unfortunately any realisations made by the receiver from the assets that have a floating charge assigned to it are not available to the liquidator for payment of the liquidation expenses. These assets must be used to meet claims of preferential creditors, and if there are insufficient assets to meet those claims from the uncharged assets available to the liquidator.

Question 4.2 [maximum 4 marks]

A liquidator is appointed over luxury car dealer Billion Happy Limited (BH) and learns that BH has recently been granted a facility by Hammerhead Finance Co Limited (HF). HF has shown the liquidator a document entitled "Receivables Purchase Agreement", claiming that all accounts receivables due from BH's customers therefore belong to HF. The document also asserts that as an alternative to ownership of the receivables, HF has a fixed charge over the receivables. Advances from HF to BH were sporadic and could not necessarily be matched to invoices. Further, some customers of BH had paid certain invoices to an account with HF, but which account BH then operated for working capital purposes.

Commented [RD(DW-H17)]: 2 ½ marks out of 6. Not detailed enough. Should mention letter of request and *Singularis*. Only certain things can be done without recognition (e.g. suit, get own documents – *Irish Shipping; Bay Capital*). Core requirements should be set out. Protocols as a possibility. Add that concepts extend to schemes.

Commented [RD(DW-H18)]: 1 marks out of 4. A bit too light for advice. The first step is to examine validity of the charge. For example, s.267; registration. A liquidator can also recoup costs reasonably incurred in realizing charged assets, but in reality only if does so before being aware of the receiver or with the receiver's consent. Also, see note below

Commented [RD(DW-H19)]: 1 ½ marks out of 4. See below. Also, should examine whether HF charge is in fact floating (control? Per *Spectrum Plus*). Floating charge provisions (s.267, preferential creditors) then come in to play.

Telford Co Limited (TC) contacts the liquidator of BH to say that TC had been helping BH sell its cars to wealthy businessmen on the Mainland. TC shows the liquidator an agreement asserting that if BH goes into liquidation then it is deemed that immediately before the liquidation, all cars held at BH's showrooms belong to TC.

The liquidator asks for your thoughts on what issues she should consider when dealing with HF and TC.

A fixed charge is a charge in relation to a specific asset and attaches as soon as the charge is created or the relevant asset is acquired by the debtor. The debtor cannot deal with the asset without the consent of the chargee creditor.

As indicated above the Receivables Purchase Agreement between Hammerhead Finance Co Limited (HF) and Billion Happy Limited (BH) is perceived as a sale of the right to the receivables is a common mechanism employed in Hong Kong as a kind of security. Since this arrangement is considered as a sale, then no registration of the security is required because no security has been created; the business has merely sold a right that it has namely the right to be paid by its customers. On the other hand the arrangement can be considered as a secured financing arrangement where it states that advances from HF to BH were sporadic and could not necessarily be matched to invoices. In this case the instrument should be registered but it wasn't and that could make the arrangement void as against the liquidator.

In this case there is more than one assignee, Telford Co Limited (TC) and HF. The liquidator should also consider the which assignment has priority over the assets. However in Hong Kong they follow the *RULE in Dearle v Hall*. This rule states that in the case of a debt, the first equitable assignee of the debt to give notice of assignment to the debtor is given priority.

Commented [RD(DW-H20)]: A bit confusing

Commented [RD(DW-H21)]: Not the same asset. Thing to consider is the anti-deprivation principle

Question 4.3 [maximum 7 marks]

Cyberbay MedTech Limited (Cyberbay) is a Cayman Islands company listed on the Stock Exchange of Hong Kong. This company appeared in the self-assessment questions in your guidance text, where you were asked to consider the steps that the Cayman-appointed officeholder might take in an effort to restructure the company's indebtedness due to holders of certain Notes. The joint provisional liquidators (JPLs) have now uncovered concerns about accounting irregularities in its Mainland operations and there are also press reports that the founder and Chairman has disappeared in the Mainland and cannot be contacted.

Commented [RD(DW-H22)]: 3 ½ marks out of 7. Should include need for letter of request to recognise; if go liquidation route - core requirements; bring an action (against Chairman, recipients?) - don't need recognition; perhaps take control of the HK subsidiary

Upon further investigation, it appears that the Chairman's disappearance certainly looks as if it is linked to the "accounting irregularities" with large sums of money (raised from the issue of the Notes and the bank borrowing) being paid to entities with no apparent real business with Cyberbay. There is an individual in Hong Kong, Mr Pottinger, who is a friend and business associate of the Chairman. It is believed that Pottinger has information that will help shed light on the payments. The JPLs ask you if there is anything they can do in Hong Kong in this regard. Advise them.

Banks in Hong Kong readily assist foreign representative (Cayman Islands Joint Liquidators – ("JPLs) by providing documents in relation to the company's own accounts even without the JPLs having to first obtain a Hong Kong court order.

The JPLs can apply to the court to grant recognition order to permit the foreign officeholder to seek production of documents or examination of individuals in Hong Kong (Mr. Pottinger). In regards to the Singularis Principle, the Hong Kong court compared the scope of the relevant provision between Hong Kong and the requesting jurisdiction being the Cayman Islands and has become reasonable comfortable that recognition should be given. The standing order that is expected to obtain is limited by a proviso that any power sought to be exercised in Hong

Kong must be subject to the powers available to the liquidators in their home jurisdiction being Cayman Islands, but in this case the Cayman Islands legislation permitting the examination is much more restrictive than that of Hong Kong, therefore it may be best to seek a liquidation rather than a recognition order.

TOTAL: 29 MARKS OUT OF 50

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*** End of Assessment ***