



**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: **[studentID.assessment8C]**. An example would be something along the following lines: 202122-336.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.**
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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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:

A receiver can be appointed –

- (a) only pursuant to a charge over shares.
- (b) only by the court.
- (c) only pursuant to a legal mortgage over land.

**(d) any of the above.**

**Commented [RD(DWH1)]:** Correct (1 mark) – A ‘receiver’ can be appointed by the court or under a charge document (whether over shares or land, or indeed other assets).

#### **Question 1.2**

When a trustee in bankruptcy is appointed, she may seek to unwind a transaction of the bankrupt if the transaction was entered into at an undervalue. **What is the “look-back” period** for such actions (that is, what are the oldest transactions that the trustee can look at in order to be able to take such action):

- (a) It depends on whether the person with whom the bankrupt transacted is an associate of his or not.
- (b) Two (2) years before the date of the bankruptcy order.
- (c) Five (5) years before the date of the petition on which the bankruptcy order was made.

**(d) Five (5) years before the date of the bankruptcy order.**

**Commented [RD(DWH2)]:** Incorrect (0 marks) - Although the commencement of a bankruptcy is the date of the order, most of the provisions dealing with the trustees’ ability to challenge earlier transactions use the date of the petition as the starting point of the ‘relation-back’ period (see 6.2.2 of text) and s.51(1)(a) Bankruptcy Ordinance

#### **Question 1.3**

Which of the following **is correct** in describing whether the Hong Kong court can make a winding up order against a company that is not incorporated in Hong Kong:

- (a) The Hong Kong court can wind up such a company only if a director resides in Hong Kong.
- (b) The Hong Kong court has no jurisdiction to wind up such a company.

(c) As a matter of common law, the Hong Kong court has the right wind up such a company.

(d) The Hong Kong court has a statutory jurisdiction to wind up such a company, and can exercise that jurisdiction if certain requirements are met.

**Commented [RD(DWH3):** Correct (1 mark) – s.327 CWUMPO (section 7 of text)

#### Question 1.4

Select the **correct** answer:

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 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):** Correct (1 mark) – see section 6.4.1 of text. Note the question refers to the charge being over all of the company's asset, such that there would be no uncharged assets for the liquidator to meet the preferential claims out of uncharged assets

#### Question 1.5

Select the **correct** answer:

The date of commencement of liquidation for a Creditor's Voluntary Liquidation is:

(a) the date on which the creditors pass a resolution to wind up the company.

(b) the date on which the court approves the appointment of liquidators.

(c) the date on which the members pass a special resolution to wind up the company.

(d) the date on which notice of the liquidator's appointment is registered at the Companies Registry.

**Commented [RD(DWH5):** Correct (1 mark) – s.230 CWUMPO (section 6.3.3 of text). Note, however, that a liquidator has limited powers pending the creditors' meeting

*NB: for distinction between members' resolution and creditors' resolution in this context see sections 228(2) and 230 CWUMPO.*

#### Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

(b) the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

(c) the Companies (Winding Up) Rules (Cap 32H).

(d) none of above.

**Commented [RD(DWH6):** Correct (1 mark) – see section 6.3.1 of text

#### Question 1.7

Select the **correct** answer:

In a compulsory winding up, there is a mandatory stay of litigation claims against the company:

- (a) from the date on which the petition is presented.
- (b) from the date of commencement of the liquidation.
- (c) from the date of the winding up order.
- (d) There is no statutory provision for a mandatory stay; whether the claimant can continue is a matter for the court's discretion.

**Commented [RD(DWH7):** Correct (1 mark) – s.186 CWUMPO (section 6.3.7 of text); the mandatory stay also applies if a provisional liquidator is appointed.

#### Question 1.8

Select the **correct** answer:

In a compulsory winding up, at the first meeting of creditors where a resolution is proposed for the appointment of a liquidator, a creditor holding security from the company:

- (a) is not allowed to vote.
- (b) can vote and the whole amount of its claim is counted.
- (c) can vote if it has valued its security and the amount that is counted is the difference between its claim and that value.
- (d) must get special permission from the chairperson of the meeting to vote.

**Commented [RD(DWH8):** Incorrect (0 marks) – Rule 84 CWUR (section 5.5 of text); permitted to vote for unsecured part

#### Question 1.9

In considering what previous court decisions are binding on the Hong Kong courts, which of the following statements **is correct**?

- (a) A 1995 decision of the English House of Lords is binding.
- (b) A 1993 decision of the UK Privy Council on an appeal from Hong Kong is binding.
- (c) A 1996 decision of the UK Privy Council on an appeal from the Cayman Islands is binding.
- (d) None of the above because they all pre-date the Handover in 1997.

**Commented [RD(DWH9):** 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).

#### Question 1.10

A liquidator appointed in another jurisdiction wants to seek Hong Kong recognition of his appointment. Which of the following **is correct**?

- (a) He must make an application to the High Court of Hong Kong using the provisions of the UNCITRAL Model Law.
- (b) He must first seek permission from the Ministry of Justice in Beijing.
- (c) No recognition is possible.
- (d) None of the above.

**Commented [RD(DWH10):** Correct (1 mark) – Hong Kong has not enacted UNCITRAL; the Ministry of Justice in Beijing would not be involved (“1 country, 2 systems”); the courts have developed a practice of giving recognition to foreign office holders in certain circumstances.

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 3 marks]

What are the jurisdictional requirements as regards a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over that person?

The jurisdictional requirements as regards a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over that person are that the debtor must be:

- (a) An individual
- (b) Be domiciled in Hong Kong
- (c) Be personally present in Hong Kong on the day on which the petition is presented or
- (d) At the time in the period of 3 years ending at that day (i) have been ordinarily resident or have had place of residence in Hong Kong or (ii) have carried on business in Hong Kong.

**Commented [RD(DWH11)]:** (2.5 marks). Should include the source (s.4 of Bankruptcy Ordinance) given a specific reference to jurisdictional requirement

### Question 2.2 [maximum 3 marks]

What are the "core requirements" that enable the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company?

There are 3 core requirements that enable the HK court to exercise its jurisdiction to wind up a non-HK company:

- (a) A sufficient connection with Hong Kong. This is not necessarily just the presence of assets within the jurisdiction;
- (b) A reasonable possibility that the winding up order would benefit the applicant; and
- (c) The court would be able to exercise its jurisdiction over one or more persons interested in the distribution of the debtor company's assets.

**Commented [RD(DWH12)]:** (3 marks). Would have been preferable to include source (CFA's decision in Yung Kee)

### Question 2.3 [maximum 4 marks]

When can a provisional liquidator be appointed, and in what circumstances and for what purposes?

1. On the plain reading of HK insolvency law, a 'provisional liquidation' does not exist. However, the term 'provisional liquidation' is used where provisional liquidators have been appointed under section 193 of the CWUMPO (Companies (Winding Up and Miscellaneous Provisions Ordinance) .
2. A provisional liquidator is appointed where there is a need to preserve assets during the period between the presentation of the petition and the making of a winding up order. There is generally no requirement for the provisional liquidator to realize the assets of the company unless it is necessary to preserve their value.
3. The application to appoint a provisional liquidator can be made any time after the petition has been made. In urgent circumstance the application to appoint a provisional liquidator may be presented at the same time when the application liquidation petition is presented. The court will not appoint a private provisional liquidator even if the

**Commented [RD(DWH13)]:** (2.5 marks). See note below, plus would be better to mention need for urgency, and that powers are as prescribed by the court. Should also mention the Legend Resorts 'restriction' that PL cannot be appointed solely for restructuring

application is made immediately prior to winding up. The court may, however, appoint provisional liquidators even where a voluntary liquidator has been appointed.

**Commented [RD(DWH14):** This confuses another issue - namely that the court will not (usually) allow a petitioner to apply to appoint a PL 'at the last minute' just before a winding up order is made in order to avoid the statutory mechanism of the Official Receiver being appointed and a creditors' meeting being called

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

#### Question 3.1 [maximum 5 marks]

**Commented [RD(DWH15):** (4.5 marks). Good, but see note below

Describe why you think a liquidator is able take action to challenge an unfair preference and set out what a liquidator must show to succeed in such a claim.

The main duty of the liquidator is act on behalf of the class of creditors. Therefore where a debtor is aware that it is insolvent or aware that it will become insolvent and carries out a transaction that place a single unsecured creditor in a better position that it would have been than in liquidation, this is the exact activity the liquidator has been appointed to investigate and undo. It is entirely fair to the group of creditors for the value dissipate by the unfair preference to be returned to the insolvent estate to be distributed pari pasu among the creditors.

The liquidator may take such an action in relation transactions entered during the 6 months prior to the commencement of winding up or 2 years where the beneficiary under the unfair transaction was a person connected to the company. These transactions include where there was for example a granting of a security as well as payment during that period.

The liquidator will need to demonstrate that

- (i) At the time the asserted unfair preference was entered into, the insolvent company was unable to pay its debts or became unable to pay its debts as a result of same. This requirement will be presumed where a person connected with the company is on the other side of the transaction - that is, an associate of a director or shadow director of the company;
- (j) The company was influenced by a desire to improve that person's position in the event of the company going into liquidation. This is difficult to prove, and the transaction will not be set aside unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation and the person does not desire all the necessary consequences of his actions.

**Commented [RD(DWH16):** Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

#### Question 3.2 [maximum 5 marks]

**Commented [RD(DWH17):** (5 marks)

Hong Kong has limited formal arrangements to deal with cross-border insolvency. Given that Hong Kong and the Mainland are one country, does this statement stand correct for the Mainland? Discuss.

Although Hong Kong is a Special Administrative Region of the PRC and so while it is part of PRC, it enjoys some autonomy. The "English" Laws in force as at 30 June 1997 continued to apply in Hong Kong after the Handover from the UK to the PRC. Therefore, different rules may apply in some areas of the law.

Hong Kong has no formal requirements for cross-border insolvency, save for provisions for winding up of non-Hong Kong companies. Notwithstanding the foregoing, in May 2021, Hong Kong and certain areas of the Mainland entered into an arrangement, which

provide mechanisms for Hong Kong insolvency officeholders to obtain recognition and assistance in certain areas in Mainland, and vice versa.

The new arrangement originated from a meeting between representatives of the Supreme Court in the Mainland and the Hong Kong government.

In a subsequent opinion from the Supreme Court, it was made clear that

- (i) the applicable Mainland designated areas under the agreement were Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province (the pilot area)
- (j) the definition of what would constitute a Hong Kong insolvency proceeding would be any collective insolvency proceeding commenced under the CWMPO or the CO and would include compulsory liquidations, creditors' voluntary liquidations and schemes of arrangements which are promoted by the provisional liquidator/liquidator;
- (k) the applicable COMI for the purposes of recognition would be Hong Kong. The place of incorporation is presumptive of this, but the court will consider other factors such as whether Hong Kong was the principal office, the principal place of business or the place of principal assets of the debit. Additionally, the COMI should have been in Hong Kong for at least 6 months prior to the application for recognition.
- (l) Where the debtor's principal assets are in the pilot area of the Mainland, then the Hong Kong administrator could apply for recognition / assistance in Mainland. A letter of request from the Hong Kong court would not be necessary.

**Question 3.3 [maximum 5 marks]**

Commented [RD(DWH18): (4 marks)]

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

Pursuant to Part 13, Division 2 of the Companies Ordinance and O102 r 2 and r 5 of the RHC, A scheme of arrangement is a statutory scheme is where the insolvent company enters a binding compromise or arrangement with its members and creditors. It includes plans for an adjustment of debts owed to the creditor and reduction of share capital. The arrangement will need to be approved by a stipulated majority of the creditors (75% by value of the creditors present and voting in proxy or in person) and sanctioned by the court.

Commented [RD(DWH19): And a majority in number]

The pros of a scheme of arrangement includes:

1. It is a court sanctioned arrangement which binds all creditors of the relevant class;
2. It can be used to cancel existing instruments and replace them with new instruments
4. it enables the company and the creditors to adjust debts in circumstances where there are many creditors, divergent views and a difficulty in obtaining 100% agreement on contractually varying the debt of the company. Without a scheme of arrangement the company would need to get the 100% of creditors (as opposed to a stipulated majority) to contractually vary the debt.
4. Additionally, the scheme will be binding on non-consenting / hold-out creditors so long as they are in the category of creditors where the stipulated majority of the creditors have approved the scheme.



5. The scheme of arrangement is also a good alternative to winding up the company. It allows the company the possibility of continuing as a going concern following the approval of the scheme.

The cons are:

1. A scheme of arrangement implemented and sanctioned in Hong Kong, in accordance with the rule in Gibbs does not have the effect of discharging a debt which is governed by a foreign law (unless the relevant creditor takes part in the scheme)
2. The creditors must be in the same class or the court will have no jurisdiction to sanction the scheme.

**Commented [RD(DWH20):** And no moratorium

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

##### Question 4.1 [maximum 4 marks]

Mr Chan is the sole director of Mountainview Limited, which is a Hong Kong incorporated company. Mr Chan comes to you and tells you that the company has financial difficulties and is unlikely to be able to continue in business. A friend has told him that his only option is that he must go to court to wind up the company, and that he should ensure he appoints a "friendly" liquidator who will not investigate the company's affairs too closely. Mr Chan asks whether his friend is correct and to advise him generally on what he should do and his position as a director.

**Commented [RD(DWH21):** (0 marks) IVA are for individuals.

Should be advising Mr. Chan that rather than go to court could adopt voluntary liquidation  
First piece of advice is that it is not correct that Mr. Chan "must" go to court. The voluntary liquidation options should be discussed. (For completeness, could add that a company cannot petition on the basis of a resolution by directors alone (Emmadart) and there is no indication that Mr. Chan is (necessarily) the only shareholder)

No indication in the question of shareholding structure so should add that a voluntary liquidation will need a special resolution (at least 75% of shares)

Importantly, should also advise Mr. Chan that Liquidators should be neutral and carry out their duties (including investigation of how the company has been run/conduct of directors) irrespective of who appoints/nominates them

Winding up the company is not the only option available to Mr Chan. He should be advised that the company may make an application for an individual voluntary arrangement (IVA) on the basis that the company (as debtor) has problems with debt repayment.

**Commented [RD(DWH22):** No, IVA only for individuals

In applying for an IVA Mountainview will need to must find a Nominee, as oppose to a liquidator. Mountainview must prepare a proposal for the Nominee setting out how the company intends to repay its creditors. Mountainview would also need to submit an up to date Statement of affairs to the Nominee. The company would then make an application for an Interim Order implementing the IVA. The Nominee would then file a report stating whether in his opinion a meeting of the creditors must be fixed to consider the IVA. The Nominees would need to carry out investigations in regarding the company's affairs. The Nominee would then need to convene a creditors' meeting to decide whether or not to approve the IVA. The IVA would have to be approved by a majority in excess of 75% by value of the creditors present and voting (in person or proxy). The chairman would then report to the court and the Official Receiver the details of the IVA.

This out of court procedure may afford Mr Chan a chance at restructuring Mountainview Limited without proceeding to winding up.

##### Question 4.2 [maximum 5 marks]

**Commented [RD(DWH23):** (0 marks) No answer given

Kite Limited is a Hong Kong incorporated company involved in an import / export business. It buys goods on its own account from suppliers in Mainland China, then sells them on to buyers in Europe at a mark-up. The company has been in difficulty for some time, for example due to reducing margins; unfavourable credit terms leading to a mis-match between the dates on which Kite must pay its suppliers and the dates on which it gets paid by its buyers, thus affecting Kite's cashflow; European buyers going straight to Mainland suppliers, etc.

Goshawk Financial Limited (GFL) is one of Kite's lenders. Having been troubled by the way Kite's business has been heading, some months ago GFL insisted that Kite execute a charge over its receivables, also insisting that the charge was stated to be a "fixed charge". Kite agreed and executed the document. No separate account was opened and Kite continued to trade with its customers as before, with money being paid into and out of its normal operating account (not held with GFL).

Recently, GFL appointed a receiver pursuant to the charge executed in its favour. The company has also been wound up on a petition presented by another creditor and a liquidator appointed. The receivables appear to be Kite's only assets. The liquidator asks for your advice on whether she can insist that the receiver hand over realisations he makes in order that the costs and expenses of the liquidation can be met and the unsecured creditors paid at least a partial dividend.

[Type your answer here]

**Question 4.3 [maximum 6 marks]**

Commented [RD(DWH24)]: (0 marks) No answer given

Mr Xu entered into a Framework Agreement (FA) with his business associate, Mr Qi. The FA is governed by Hong Kong law. The idea was to develop a resort project in Fiji. The FA provided that Mr Qi would incorporate a BVI company to purchase a 100% interest in the project from its original owners. To this end, Mr Qi incorporated Sunrise Pacific Limited (SPL) in the BVI. He was (and remains) the sole director and shareholder of SPL, telling Mr Xi that this was necessary because the original developers of the resort trusted him and him alone. The FA provided that Mr Xu would inject USD 20 million into the project by advancing that sum to SPL. The FA also provided that if the project could not be developed and sold on to a buyer within a period of two (2) years from the date of the FA, then SPL will pay a sum of USD 22 million to Mr Xu (representing a return of his investment plus USD 2 million to represent interest).

Mr Xu remitted the USD 20 million to SPL but over the months that followed became concerned that the project was not progressing, with many excuses coming from Mr Qi. He subsequently discovered that the project had not even started (and may be a scam entirely). More than two (2) years has passed since the date of the FA and SPL did not pay any money to Mr Xu. Mr Xu therefore obtained a winding up order over SPL in the BVI.

The BVI liquidator appointed has identified:

- (a) There is a clause in the FA that states that if SPL becomes insolvent then all other provisions (including the requirement to pay Mr Xu) are void, and all assets automatically and immediately vest in Mr Qi in order to repay shareholder loans Mr Qi has made;
- (b) SPL has a (supposedly independent) director, Mr Zhang, who lives in Hong Kong; and SPL also has a book-keeper, Mr Wong, who lives in Hong Kong. Neither Mr Zhang nor Mr Wong are replying to emails from the liquidator;
- (c) SPL has a bank account at a bank in Hong Kong;
- (d) It is not known where Mr Qi is currently, but it is believed he is a Hong Kong resident;

(e) SPL is believed to have assets in the Mainland, but the liquidator is not sure where these assets are located.

**The liquidator asks for your advice on what steps he can take in Hong Kong**, including as regards a concern he has that Mr Xu in fact had no standing to bring the winding up proceedings in the first place given the clause in the FA at (a) above. The liquidator has also read about a new “co-operation mechanism” between Hong Kong and the Mainland that he would like to use in respect of (e) above.

[Type your answer here]

**\* End of Assessment \***

**TOTAL MARKS: 29.5 out of 50**

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