



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.**
- 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 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 [RD(DWH1)].**
- (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 [RD(DWH2)]).**
- (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.**

**(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<sup>[RD(DWH3)]</sup>.**

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<sup>[RD(DWH4)]</sup>).**

**(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<sup>[RD(DWH5)]</sup>.**

**(c) the date of the winding-up order.**

**(d) the date on which notice of the liquidator's appointment is advertised.**

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**<sup>[RD(DWH6)]</sup>.

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**<sup>[RD(DWH7)]</sup>.

**(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**<sup>[RD(DWH8)]</sup>.

**(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** [RD(DWH9)].

**(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** [RD(DWH10)].

**(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] [RD(DWH11)]

To whom does a receiver (appointed pursuant to a charge) owe duties when selling the asset charged? Please provide an outline only.

**A receiver's primary duty is to the charge holder who has appointed them to act, not to the company which owes the debt. However, the receiver does owe a duty to the company to act in good faith and strictly in accordance with the powers bestowed upon them by the charge. This is akin to the duty on sale as a selling mortgagee.**

Question 2.2 [maximum 3 marks] [RD(DWH12)]

In a compulsory liquidation, what elements must a liquidator satisfy in order to successfully demonstrate a transaction (with a non-associate) amounted to an unfair preference? Please provide an outline only.

***The liquidator must demonstrate that a relevant transaction (which can include payment of a debt to a creditor, granting of a security etc.) was entered into during the six months prior to the commencement of the winding up (the date the petition was presented). Further the liquidator must prove that at the time it is alleged that the unfair preference was bestowed, the company was either already unable to pay its debts or became unable to pay its debts as a result of the relevant transaction. Evidence must also demonstrate that the company was influenced by a specific desire to improve the non-associate's position in the event of a liquidation, the fact that there was an improvement in position is not sufficient if it was a by-product of the transaction and not the intention behind it.***

Question 2.3 [maximum 4 marks<sub>RD(DWH13)</sub>]

***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.***

- 1. The jurisdiction to which any application by a Hong Kong liquidator relates must be one of the designated pilot areas in the Mainland.***
- 2. The debtor's centre of main interest ("COMI") must in Hong Kong.***
- 3. The COMI must have been in the Hong Kong Special Administrative Region continuously for a minimum of six months.***
- 4. A letter of request from the court in Hong Kong is required.***

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

Question 3.1 [maximum 4 marks<sub>RD(DWH14)</sub>]

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.

***A non-Hong Kong company (that is a company not incorporated or registered in Hong Kong) can be wound up under the provisions of Part X of CWUMPO. Such a company cannot be wound up voluntarily.***

***In accordance with section 327 of CWUMPO a non-Hong Kong company can only be wound up if:***

- 1. the company is either carrying on business only in order to wind up its affairs, or it is dissolved or it has ceased carrying on business;**
- 2. the company is unable to pay its debts; and**
- 3. the court is persuaded that it is just and equitable to wind the company up.**

***This presents a much higher hurdle for a winding up than the statutory basis for winding up Hong Kong companies.***

***In order for the court to exercise its discretion to wind up an un-registered company the court must also be satisfied that the three core requirements are met. These requirements have developed through the common law. The core requirements are:***

- 1. the company has a sufficient connection with Hong Kong;**
- 2. there is a reasonable possibility that those applying for the winding up order will benefit from it; and**
- 3. the court will be able to exercise jurisdiction over one or more persons who are interested in the distribution of the company's assets.**

***Interestingly the law has developed such that exerting commercial pressure to pay a debt can amount to a benefit received by an applicant. The common law does not require options in the jurisdiction of incorporation or COMI to achieve the same result to be exhausted before a winding up in Hong Kong is pursued.***

**Question 3.2 [maximum 5 marks<sub>RD(DWH15)</sub>]**

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 is a statutory procedure under Hong Kong law which allows companies to make compromises with members and creditors (or any particular class of them). Such compromises can include the adjustment of debts owed by the company or a reduction of share capital and these compromises will be binding providing the appropriate votes are obtained.***

***To pursue a scheme of arrangement the debtor makes an *ex parte* application by originating summons for leave to convene meetings of the relevant creditors. The court will then give directions and the meeting takes place. At the meeting creditors are grouped into classes according to the rights that they enjoy and each class then votes on the scheme. The scheme must be approved by a majority in number representing a minimum of 75% by value of the creditors present and voting. Such a majority in each class must vote in favour to bind a given class. If such approval is obtained, sanction of the court should then be sought. A court must be satisfied that each class of creditors was fairly represented and there was no coercion of the minority.***



***A big draw back of the scheme of arrangement procedure is that there is no statutory power to grant a moratorium. Nor can a judge appoint a provisional liquidator to come in and investigate the viability of a scheme of arrangement unless there are also the required grounds of jeopardy to assets. Positives include that creditors can be bound even if voting against the scheme, providing the majority of that creditor's class vote in favour of it. Use of the common law also allows courts flexibility, to an extent, to craft a mechanism which works most effectively and to refine the law in order to achieve this.***

**Question 3.3 [maximum 6 marks<sup>[RD(DWH16)]</sup>]**

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 any area of law through the common law always creates a degree of uncertainty. Assistance offered by Hong Kong courts to foreign liquidations is no different. For example, it had previously been the case that foreign liquidators with a letter of request from a foreign court could make a recognition application and obtain powers to take steps in Hong Kong akin to some of those powers bestowed on Hong Kong appointed liquidators. However, the court in later cases, in particular *Joint Provisional Liquidators of Cecep Costin New Materials Group Ltd. v RSM Nelson Wheeler and Re Up Energy Development Group Ltd.*, concluded that no powers could actually be bestowed upon a foreign liquidator upon a recognition application, the court could only offer assistance to exercise powers already available to them in the foreign jurisdiction. Foreign liquidators now have to apply for a winding up order in Hong Kong to obtain powers<sup>[RD(DWH17)]</sup>. They may not always be eligible to make such an application, particularly if the liquidation is not in the place of the company's centre of main interest ("COMI") or the place of incorporation. This inability to grant powers under the common law reduces the effectiveness of cross-border insolvencies with a Hong Kong element and likely increases the cost to the estate. Hong Kong courts also will not recognise or assist in foreign "light touch" insolvencies which use the debtor in possession model. These are increasingly common elsewhere in the world and the absence of assistance in Hong Kong may be considered a real detriment to the legal system in Hong Kong.***

***An advantage of the common law, however, is that development through such common law does permit judges a degree of flexibility to craft laws best suited to the scenario before them. There is also considerable persuasive case law from other jurisdictions, particularly England and Wales, which can be useful guidance as to what the common law approach should be.***

***Generally speaking the common law has developed in Hong Kong in a cross border context such that the foreign liquidator will need to demonstrate the existing liquidation is in the company's COMI. This is often, though not exclusively determined, by the location of directors, assets, operations, books and records, where the place of***

**incorporation is and also where any restructuring took place, if applicable. If the court is satisfied that the liquidator is applying for recognition based on an existing liquidation in the company's COMI, recognition will usually be granted. The foreign liquidators may then exercise their powers granted by the foreign court in Hong Kong, with the exception of the removal of assets from Hong Kong.**

**This is advantageous in that it is inline with many other countries and permits most foreign liquidators to obtain recognition. There may be cases, however, where a foreign liquidator is appointed in a jurisdiction which is neither the company's COMI no place of incorporation and as such a disadvantage is they would not be able to obtain recognition.**

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

**Question 4.1 [maximum 4 marks]<sub>[RD(DWH18)]</sub>**

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.

**The first question I would have is whether or not the charge was registered and if so when. If it was not registered within one month of the date of its execution then it would be void in the liquidation.**

**If it was registered, and registered within time, I would then want to understand from the liquidator why the charge was granted to Sea Breeze. If Sea Breeze was only incorporated a few months <sub>[RD(DWH19)]</sub> before the liquidation commenced then, in accordance with section 267 of CWUMPO the charge would be invalid if, at the time the charge was created, Palm Beach Limited (the "Company") was unable to pay its debts or, as a result of the granting of the charge, became unable to pay its debts. This would seem likely given the proximity to the commencement of the liquidation. However, if Sea Breeze was putting new money into the Company at the time of the charge being granted, or in consideration for the charge being granted, then I would advise the liquidator that the timing would not void the charge <sub>[RD(DWH20)]</sub>.**

**I would also discuss whether the charge could be a fraud on the insolvency laws and thus fall foul of the anti-deprivation principles. This seems unlikely to be relevant but should be canvassed. It seems unlikely to be relevant because if it's a charge granted for new money then it's hard to see how it could fall foul of this principle and if it's not then it would be void for the above reason in any event. However, to be sure I would discuss with the liquidator what the intention was in granting the charge to ensure it was part of a genuine transaction and that the intention was not to put Sea Breeze in a**

**better position in the liquidation than other creditors. If the intention (as opposed to simply the effect) was to put Sea Breeze in a better position then it would fall foul of the principle and the transaction should be struck down** [RD(DWH21)].

**If the change is void the Sea Breeze ranks as an unsecured creditor and the liquidator can use the realisations in the normal course of the liquidation, including to meet the costs of the liquidation and, if sufficient funds, to pay any unsecured creditors.**

**Assuming the charge is valid the liquidator can still pay preferential creditor claims as these would be payable in priority to Sea Breeze's charge in accordance with section 265(3B) of CWUMPO unless there are sufficient uncharged assets available to pay them in full. The preferential claims the liquidator could pay include some employees claims: accrued holiday pay and arrears of wages up to HK\$8,000, pay in lieu of notice up to HK\$2,000 and severance pay up to HK\$8,000. Liquidators costs and unsecured creditor claims are not preferential and would not be payable from the realisations made by the receiver.**

**We would also need to discuss, however, whether Sea Breeze is seeking to, or entitled to, recover its debt through against any other entity, such as a guarantor, to ensure there is no double recovery sought. It would be worth encouraging Sea Breeze to do so to maximise recovery for the estate and to use funds otherwise payable to Sea Breeze for expenses such as the liquidators costs and, if recoveries are sufficient, also to pay unsecured creditors** [RD(DWH22)].

**Question 4.2 [maximum 6 marks** [RD(DWH23)]

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.

**It used to be standard practice that a foreign liquidator in Cayman could fairly easily obtain recognition of the Cayman liquidation such as to obtain a standard order which would grant the liquidator the same or similar powers available to Hong Kong appointed liquidators. However, this line of common law authority has been overturned and this is no longer possible. L can still obtain recognition in Hong Kong (assuming this is not a light touch liquidation) on the basis of which he would be able to obtain information from SKL's bank** [RD(DWH24)] **(providing L has those powers in the Cayman liquidation which L certainly would). However, such recognition will not entitle L to the standard order he seeks or to a full suite of powers. Upon recognition courts have held that they can only recognise existing powers granted in Cayman, they**

**cannot grant new ones. Nor would recognition entitle L to obtain a stay on behalf of SKL, although the Hong Kong court may refuse to allow enforcement of a judgment against Hong Kong assets of SKL still. This is entirely discretionary.**

**To obtain the suite of powers sought, L would be best served by applying to wind-up SKL in Hong Kong. This would likely also be required for the Court to compel examination of the auditors, although if this power has already been bestowed by the Cayman court, it is possible the Hong Kong court could compel cooperation of the auditors on the basis of recognition only. At the very least the Hong Kong court can compel the auditors to share information with L under a recognition order.**

**Question 4.3 [maximum 5 marks<sub>RD(DWH25)</sub>]**

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?

**It would be very difficult to comment on this at all without knowing where Lapwing Limited is based, whether there is any connection to Hong Kong and what the value of the debt is. However, I would start by asking the following questions:**

- 1. Where is Lapwing Limited incorporated?**
- 2. Where is Lapwing Limited's COMI with reference to such factors as the location of directors, assets, operations, books and records, where the place of incorporation is and also where any restructuring took place, if applicable.**
- 3. If the incorporation and/or COMI are not in Hong Kong, what is the connection with Hong Kong?**
- 4. What is the value of the debt?**
- 5. What is the nature of the debt - is it secured for example?**
- 6. If so when was security granted, why was it granted, is it registered?**
- 7. Is there a guarantor or any other person or entity against whom the debt could be enforced?**
- 8. What is the age of the debt?**
- 9. Is it known if Lapwing Limited has reason to be in short term difficulties only - e.g. an immediate cash flow issue which may soon be resolved?**
- 10. Does Harrier Limited know the position with any other creditors of Lapwing Limited?**
- 11. I would want sight of the contract to consider enforcement outside of an insolvency process.**

***My general comments subject to the above would be that winding up is not ideal if it can be avoided. It can be costly and payment for most debts (unless secured) would be on a *pari passu* basis. A judgment based on breach of contract would be preferable but will be worthless in the Lapwing Limited is insolvent because a judgment will not change the priority of the debt, its purpose is to aid enforcement against a solvent company.***

***If Lapwing Limited is not incorporated in Hong Kong or its COMI is not in Hong Kong I would be suggesting consideration of winding up in the country of incorporation or COMI instead of Hong Kong.***

\* End of Assessment \*

**TOTAL MARKS: 39.5 OUT OF 50**