



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.**
- (d) Any of the above^[RD(DWH1)].**

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^[RD(DWH3)].

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^[RD(DWH4)]).

(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^[RD(DWH5)].

(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^[RD(DWH6)].

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^[RD(DWH7)].

(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^[RD(DWH8)].

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.

The receiver owes duties to the charge holder when selling the charged asset. The receiver's duty in this regard is the same as arises on behalf of a mortgagee selling the mortgaged asset, which is to act in good faith and in accordance with his or her powers under the charge instrument. The receiver should however exercise their powers with reasonable skill and care and is answerable to the company which owns the asset if they are in breach of that requirement.

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.

To demonstrate that a transaction with a non-associate amounts to an unfair preference, the liquidator has to show that the transaction occurred within six months prior to the date of commencement of the winding up, and that at the time of the transaction the company was unable to pay its debts or became unable to pay its debts as a result of that transaction. In addition, the liquidator has to show that the company, in entering into the transaction, was influenced by a desire to improve the other party to the transaction's position in the event of liquidation.

Question 2.3 [maximum 4 marks_{RD(DWH13)}]

What are the key elements needed for a Hong Kong liquidator to make use of the mechanism for co-operation between Hong Kong and the Mainland? Please provide an outline only.

The liquidator needs to be appointed in "Hong Kong Insolvency Proceedings", meaning any collective insolvency proceedings commenced under the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap 32) or the CO. The debtor's Centre of Main Interest must also be in Hong Kong. The debtor's principal assets in the Mainland must be in one of the pilot areas, or it should have a place of business or a representative office in a pilot area. The Hong Kong court will also need to issue a letter of request to the relevant Mainland court.

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

Question 3.1 [maximum 4 marks_{RD(DWH14)}]

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.

Statutory basis

A non Hong Kong company would be considered an 'unregistered company' and can be wound up pursuant to section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, if the following circumstances apply:

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

up.

Common law principles

There are three core requirements that need to be satisfied before a Court will exercise its discretion to wind up a foreign incorporated company (per Kam Leung Sui Kwan v Kam Kwan Lai and Others (2015) 18 HKCFAR 501) namely:

- (1) There has to be a sufficient connection with Hong Kong, but this does not necessarily have to consist of the presence of assets within the jurisdiction;***
- (2) There must be a reasonable possibility that the winding up order would benefit those applying for it; and***
- (3) The court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.***

Question 3.2 [maximum 5 marks_[RD(DWH15)]]

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 process which allows companies to make compromises or arrangements with members and/or creditors (or any class of them) which are binding on the company and those parties, including adjustment of debts owed to its creditors or reduction of share capital.

Its pros are that it allows the company to continue as a going concern and may avoid its winding up. They also enable a company to compromise or adjust debts with creditors if certain majorities of creditors approve the compromise and the court sanctions it, whereas a company would need approval of 100% of the affected creditors to vary a debt otherwise. Once a compromise or arrangement is approved, it binds the entire class of creditors even if certain creditors voted against it.

Its cons include that there is no moratorium on creditor claims. When seeking sanction for compromise of creditor claims, the creditors to whom the compromise or arrangement relates must be in the same class otherwise the court has no jurisdiction to sanction it. In addition, the scheme can only bind creditors if the debt is subject to Hong Kong law or the relevant creditors take part in the scheme.

Question 3.3 [maximum 6 marks_[RD(DWH16)]]

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 Hong Kong court has applied common law principles to cases coming before it in order to assist foreign liquidations and the common law has developed on a case by case basis. As a result of several decisions including *Singularis Holdings v PricewaterhouseCoopers*, the Hong Kong court takes an approach of modified universalism in applying common law principles for this purpose. The Hong Kong Courts have developed common law principles in this way in order to achieve a unitary system for the collection and distribution of assets and therefore the proceedings which the assistance is sought for should be collective insolvency proceedings, and the Courts will not assist solvent liquidations. In respect of how a foreign liquidation should be granted assistance, the Courts have developed the law from previously giving primacy to the company's place of incorporation to now focusing on the company's COMI.*

A pro of this approach is that it gives the Courts flexibility to apply the rules according to the case before it, however a con is that it can be difficult to predict how novel cases will be dealt with and gives rise to uncertainty for foreign insolvency practitioners and their representatives, which ultimately increases costs and impacts the distributions that can be made to creditors.

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

Question 4.1 [maximum 4 marks_{RD(DWH17)}]

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.

*I would advise the liquidator that pursuant to CWUMPO sections 79 and 265(3B), debts which qualify as preferential claims must be paid out of the realisations made by the receiver to the extent that there are insufficient uncharged assets available to the liquidator. **Otherwise, the receiver is not obliged to meet the liquidation costs_{RD(DWH18)} or pay any unsecured creditors from realisations made pursuant to their powers of appointment.***

I would however advise the liquidator to consider the circumstances of Palm Beach granting the floating charge within a few months before the liquidation. If the charge was granted within six months prior to the date of commencement of the winding up, and if PB was insolvent at the time of granting the charge, the liquidator might be able

to seek certain remedies on the basis of it being an unfair preference. The liquidator would need to show that at the time of the charge being granted, PB was unable to pay its debts or became unable to pay its debts as a result of the transaction, and that PB was influenced by a desire to improve SB's position in the event of its liquidation. If the liquidator is successful they could obtain an order vesting the property which is subject of the charge in them or an order releasing the security.

Question 4.2 [maximum 6 marks_{RD(DWH19)}]

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.

There have been recent court decisions which have changed the position and it may not be straightforward to obtain a standard order for recognition of L's appointment in Cayman. Cayman may not automatically be considered SKL's COMI (given that we know some assets and representative office are in Shenzhen) and therefore the Hong Kong Court may refuse to give assistance to L.

*However, it may be possible for L to make use of the mechanism for co-operation between Hong Kong and the Mainland to obtain an order for assistance from the Court in the Mainland. Shenzhen is one of the pilot areas under the scheme. L will need to commence insolvency proceedings in Hong Kong pursuant to CWUMPO or the CO, so that the liquidation of SKL can be considered a 'Hong Kong Insolvency Proceeding'. L will need to show that SKL's COMI (in the six months preceding the application for recognition) is in Hong Kong. Whilst this is usually considered to be the place of incorporation, the requirement can be satisfied if L can show other factors apply including that SKL has a principal office or place of business in Hong Kong. In *Re Grand Peace Group Holdings Limited* [2021] HKCFI 2361, the Court refused an application to wind up a foreign company because the applicant could not show that there was a reasonable possibility that the winding up order would benefit those applying for it. The Court however recognised that if a liquidator's purpose in applying for a Hong Kong winding up of a foreign incorporated company is to then make use of the co-operation mechanism in order to realise those assets situated in a Mainland pilot area, then the Court may grant a winding up order in respect of that foreign company.*

If L can satisfy these requirements, then SKL could be wound up in Hong Kong and L can seek an order for disclosure of documents from SKL's bank and examination of its auditors.

Question 4.3 [maximum 5 marks]_[RD(DWH20)]

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?

*I would need to know where both Harrier and Lapwing are incorporated, and if Lapwing is not a Hong Kong incorporated company, where its **COMI**_[RD(DWH21)] is and whether it has any assets situated in Hong Kong.*

I will need to know the amount of debt that is owed in respect of Harrier's invoices. If the debt is over HKD10,000, then I would advise Harrier to serve a statutory demand on Lapwing (in the prescribed form and by leaving an original copy at Lapwing's registered office, if it is registered in Hong Kong.)

Should Lapwing fail to pay the debt or successfully set aside the statutory demand, I would advise Harrier to petition for its winding up on the basis that it is unable to pay its debts. A petition would need to be presented to the High Court Registry and the court will fix a date for the first hearing on a Wednesday before a Master. We would expect that to take place around 2 months after the filing of the petition.

The petition needs to be served on Lapwing by leaving a copy with any member, officer, or servant of the company at its registered office, or if there is no registered office, then at the principal or last known principal place of business. The petition also needs to be advertised 7 clear days before the hearing (or such other time as the Court may direct). The advertisement requirements prescribed by Companies (Winding up) Rules (Cap 32H) depend on whether Lapwing's registered office or principal place of business is Hong Kong.

Before the first hearing, I will need to attend before the Court Registrar to confirm that technical requirements have been complied with and obtain a Registrar's Certificate, and if granted then the hearing can take place. If Lapwing does not oppose the petition the Court will grant the winding up order, or if it is opposed the petition will be adjourned and a hearing listed before the Companies Judge (usually the following Monday). If the Court does not agree that Lapwing is insolvent, it will not make the winding up order and we will need to pursue Lapwing by way of court proceedings.

If the Court grants the order, the Official Receiver will be appointed liquidator in the first instance before a suitable insolvency practitioner is then appointed liquidator. There will be a meeting of creditors within three months of the date of the winding up

order at which the creditors can vote to appoint a liquidator. We will need to lodge Harrier's proof of debt before that time to be entitled to vote at the meeting. Eventually once they are appointed, it will be the liquidator's role to wind up Lapwing's business and realise its assets in order to distribute to the creditors. Harrier will be an unsecured creditor so its priority in terms of payment will depend on whether there are other preference claims ranking ahead of it.

* End of Assessment *

TOTAL MARKS: 35 OUT OF 50