



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).**
- (b) Agent of the lender appointing him (B, in this instance [RD(DWH2)]).**
- (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).

(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^[RD(DWH4)].

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 [RD(DWH6)].

(d) None of above, as the scheme legislation provides for no stay.

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 [RD(DWH8)].

(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.

The receiver owes duties to the debenture or charge holder when selling the asset charged. This is despite the receiver being an agent of the company.

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.

In order to successfully demonstrate a transaction (with a non-associate) amounted to an unfair preference in a compulsory liquidation, the liquidator must show that, at the time the asserted unfair preference was given, that the company could not pay its debts or became unable to meet its debts as a direct result of the disputed transaction. The liquidator must also prove that the company was 'influenced by a desire' to improve the position of the non-associate in the event of a 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.

*They key elements needed for a Hong Kong liquidator to make use of the mechanism for cooperation between Hong Kong and the Mainland are: (i) the **liquidation proceedings**_[RD(DWH14)] in the Mainland are in the Shanghai Municipality, the Xiamen Municipality of Fujian Province and the Shenzhen Municipality of Guangdong Province; (ii) the debtors COMI must be in Hong Kong and shall have been in Hong Kong continuously for at least six months; (iii) a letter of request from the Hong Kong court must be obtained.*

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

Question 3.1 [maximum 4 marks_[RD(DWH15)]]

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.

Despite the fact that Hong Kong lacks a statutory basis with respect to dealing with cross-border insolvency, the Hong Kong court has historically followed common law principles in this regard. The right of a foreign liquidator to bring an action in Hong Kong (in the name of a company) has long been recognised by the Hong Kong court. In Hong Kong, a formal order to recognise the foreign liquidator is not required. The reasoning for this is that (at least in relation to a liquidator appointed in the company's place of incorporation) Hong Kong should recognise that the law of the place of incorporation of the company should govern who is entitled to direct the actions of the company.

There are various common law principles that the Hong Kong court will consider when deciding whether to exercise their jurisdiction. One such example is that the Hong Kong court has assisted foreign rehabilitation proceedings by way of refusing to allow

enforcement of a judgement against assets held in Hong Kong of such company. The court has dealt with the issues of liability and enforcement separately in this example, i.e. even if liability is established, the Hong Kong court refuses the enforcement against the assets located in Hong Kong if it considers that, through comity, it should assist the foreign rehabilitation proceedings. The Hong Kong court will assess each case according to their specific circumstances in order to assert their **position** [RD(DWH16)].

There **are numerous legislative provisions** [RD(DWH17)] that the Hong Kong court can utilise to wind-up a non-Hong Kong company. Under Part X OF CWUMPO, a non-Hong Kong registered company can be wound-up if: (i) 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; (ii) the company is not able to pay its debts; and (iii) the court is of the opinion that it is just and equitable for the company to be wound up. Further, to wind up a non-Hong-Kong 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, as set out in the CFA's decision in *Re Yung Kee*. The requirements are as follows: (i) there must be sufficient connection with Hong Kong; (ii) there must be a reasonable probability that the winding-up order benefits those applying for it; and (iii) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Question 3.2 [maximum 5 marks] [RD(DWH18)]

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

The scheme of arrangement is Hong Kong's only statutory tool for corporate rescue and has been used for a number of years to effect restructurings in Hong Kong. The scheme of arrangement is a statutory mechanism under Hong Kong law that enables companies to make binding arrangements with their members and/or creditors. This includes an adjustment of debt owed to creditors or a reduction in share capital. With regard to the restructuring of debt, a scheme of arrangement allows companies and their creditors to compromise or adjust their debts if a majority of the relevant creditors approve such compromises or adjustments. One such pro of the scheme of arrangement is that it does not need to obtain the approval of 100% of the relevant creditors to contractually vary the debt. Schemes of arrangement can also be useful where there are hold-out creditors who seek an unfair advantage (e.g. additional payment) as against a substantial majority of creditors who are similarly ranked.

Cons of the scheme of arrangement include its lack of any moratorium. To address this in part, a practice developed in Hong Kong whereby a petition for the winding-up of a company was presented and an application made for the appointment of provisional liquidators who would have specific powers to investigate the possibility of a restructuring of the company's debts. A moratorium can then be obtained through section 186 of CWUMPO. An example of this in practice is the decision of *Yuen J in Re*

Keview Technology (BVI) Limited. This mechanism was popular for a number of years until the decision of the Court of Appeal in Re Legend International Resorts Limited where the Court refused to appoint provisional liquidators for the purpose of corporate rescue on the basis that it was not within the jurisdiction of the court to do so. The Court held that the appointment of provisional liquidators solely for the purpose of restructuring the company was the exact opposite of the “purpose of winding-up” the company. Despite this, there were still a number of company restructurings effected using this mechanism since this judgement.

Question 3.3 [maximum 6 marks_[RD(DWH19)]]

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?

With no legislation to deal with cross-border insolvencies, common law in Hong Kong has developed to assist foreign liquidations where steps need to be taken in Hong Kong. One such example of this is the Hong Kong court assisting foreign rehabilitation proceedings by way of refusing to allow a judgment to be enforced against Hong Kong assets of a company. The court has dealt with the issues of liability and enforcement separately in this example, i.e. even if liability is established, the Hong Kong court refuses the enforcement against the assets located in Hong Kong if it considers that, through comity, it should assist the foreign rehabilitation proceedings. The Hong Kong court will assess each case according to their specific circumstances in order to assert their position.

In Hong Kong, to obtain a recognition and assistance order a foreign representative must present a ‘letter of request’ issued by the foreign court to the Hong Kong court requesting assistance. Under common law principles there is no requirement for a formal letter however this is the practice in Hong Kong. Even when receiving a letter of request from a foreign court, the Hong Kong court will still consider the underlying principles of common law each time its assistance is requested. Further, although common practice to seek a recognition, at least in part, in order to obtain a stay of proceedings, the Hong Kong court does not always grant such stays and instead will consider the nature of the proceedings sought to be stayed. One reflection of the recognition of foreign liquidators as being authorised to represent the company in Hong Kong is that banks in Hong Kong should assist foreign liquidators by providing all documents related the company’s accounts, even without the foreign liquidator having to first obtain an order from the Hong Kong court. The court has also granted recognition and assistance orders to enable foreign liquidators to seek production of documents or examination of individuals in Hong Kong. The Hong Kong court makes use of the Singularis principle in considering such applications. If foreign liquidators wish to go further than obtaining information by dealing with Hong Kong assets, the court states that the foreign liquidator needs to apply for a specific recognition order.

These developments in common law arise out of the Hong Kong courts' desire to ensure there is a unitary system for the collection and distribution of assets.

There are various pros and cons to the development of common law in this way. A pro is the flexibility of the law to adapt and develop. A related con is that it can prove more difficult to predict how new situations will be dealt with as they arise.

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

Question 4.1 [maximum 4 marks]_[RD(DWH20)]

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 appointment of the receiver by Sea Breeze would have had the effect of crystallising Sea Breeze's floating charge over the company. The receiver's primary duties are to the charge holder, Sea Breeze. Ordinarily, a creditor with security such as Sea Breeze will obtain priority over the company's unsecured creditors although as it is a floating charge, the receiver's realisations must first be used to meet statutory preferential claims, such as certain (but not all) employee payments. CWUMPO, section 79 provides that preferential claims must be met out of the realisations of a floating charge. CWUMPO, section 265(3B) further states that when a company is in liquidation, the preferential claims are paid out of the realisations from floating charges to the extent that there are insufficient 'uncharged' assets available to the liquidator. In this case, whether the liquidation costs or unsecured creditors are paid from the receiver's realisations will depend on the availability of 'uncharged' assets to the liquidator. _[RD(DWH21)]

Another point to consider in this case is that floating charges that are created within a certain period before the commencement of the liquidation may be voidable. In this case, the company granted the floating charge to Sea Breeze only a few months before the commencement of the liquidation. Under CWUMPO section 267, a floating charge is not valid if it is entered into within a period of 12 months before the commencement of the liquidation and the company was unable to pay its debts at the time the charge was created, or became unable to pay its debts as a result of the charge. Further, if the chargee, Sea Breeze, is connected with the company, this period is extended to two years and there is no requirement to prove the company was insolvent at the time the charge was created or as a direct result of the charge.

Question 4.2 [maximum 6 marks]_[RD(DWH22)]

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.

The Hong Kong court, in the absence of a statutory framework to deal with cross-border insolvency, has always followed common law principles with respect to assisting foreign liquidators. As referenced by L, the Hong Kong court will recognise their right to bring an action in Hong Kong (in the name of the company) and no formal order is necessary for such purpose. Notwithstanding this, in order to obtain a recognition and assistance order in Hong Kong, L must provide a letter of request issued by the Cayman court to the Hong Kong court requesting assistance. The Hong Kong court will then carefully consider the underlying principles each time it is asked to assist.

L should have no issues in obtaining documents from SKL's bank in Hong Kong as Hong Kong banks should readily assist foreign liquidators by providing documents for the company's accounts, even without L needed to first obtain an order from the Hong Kong court for such documents.

With regard to obtaining an order to examine the Hong Kong auditors, this may prove more challenging for L. The Hong Kong court has granted recognition and assistance orders allowing foreign liquidators to seek production of documents or examination of individuals in Hong Kong, such as the auditors in L's case. However, when considering these applications, the Hong Kong court compares the scope of the relevant provisions between Hong Kong and, in this case Cayman, in accordance with the Singularis principle. Previously, with commonly encountered jurisdictions such as Hong Kong and Cayman, a 'standard order', as mentioned by L, could be obtained by the foreign representative. This order is, however, limited by a proviso that any power sought to be exercised by the foreign representative in Hong Kong must be subject to the powers available to the foreign liquidation in their 'home' jurisdiction, i.e. Cayman. In Cayman, the legislation permitting examination is much more restrictive than in Hong Kong and so this is a relevant factor to note in this case. In these circumstances, L might be better advised to seek an ancillary liquidation rather than a recognition order in order to conduct a thorough examination of the auditors in Hong Kong.

Lastly, with regard to obtaining a 'stay' of any actions that any creditor of SKL may bring in Hong Kong, it used to be common practice for liquidators in certain offshore jurisdictions (such as Cayman) to engage in 'light touch' provisional liquidations whereby provisional liquidators would be appointed solely for the purpose of a restructuring with other powers being retained by the company's directors. The

directors would then apply for the appointment of the 'light touch' provisional liquidators and seek recognition of the appointment in Hong Kong, alongside the commonly granted stay of proceedings. In recent years, the Hong Kong court has been more wary of these 'light touch' provisional liquidations as they were increasingly being used as a mechanism to avoid a winding-up in Hong Kong.

A relevant case here is Joint Provisional Liquidators of CECEP Costin New Materials Group Ltd vs RSM Nelson Wheeler, where the Cayman appointed provisional liquidators obtained a recognition order on the back of which they then issued a summons requesting the production of documents from the former auditors of the company. The Hong Kong court adjourned the application for the provisional liquidators to first seek an order from the Cayman court with respect to the matter^[RD(DWH23)].

Question 4.3 [maximum 5 marks^[RD(DWH24)]

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?

Lapwing Limited is a creditor of Harrier Limited^[RD(DWH25)] *and they have a signed contract. If Harrier Limited wants to proceed with winding up Lapwing, it can issue a statutory demand to Lapwing. The statutory demand should be served personally on Lapwing, and if this is not successful, Harrier should take reasonable steps to bring the demand to the attention of Lapwing, such as advertising the statutory demand in a newspaper*^[RD(DWH26)]. *Harrier must do all that is reasonable for the purpose of bringing the statutory demand to Lapwing's attention.*

Some key considerations in this case are the specifics of the contract between the two parties. There is no general rule for the treatment on insolvency of executory contracts^[RD(DWH27)] *at common law and the position is not regulated by statute. I would need to inquire as to the nature of the contract between Harrier and Lapwing and if there is any provision in the contract regarding non-payment or default on payments.*

Other considerations would be if any formal written notices or demand letters were sent to Lapwing by Harrier regarding the non-payment, if Lapwing has provided any specific reasons for not making the payments other than 'we just can't afford it right now' and if there is any evidence to prove that Lapwing is in financial difficulty.

*** End of Assessment ***

TOTAL MARKS: 30 OUT OF 50