



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).**
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- 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.*

Commented [RD(DWH1): Correct (1 mark) – choices (a) and (b) do not appear in section 4 of the Bankruptcy Ordinance (Cap 6). Note that (b) would have been correct if it referred to the debtor being present in Hong Kong on the date of the petition.

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).*
- (c) *Agent of the Official Receiver.*
- (d) *An officer of the court.*

Commented [RD(DWH2): Correct (1 mark)

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.

Commented [RD(DWH3): Correct (1 mark) – there is no requirement for a director or the petitioner to be Hong Kong based

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).

Commented [RD(DWH4): Correct (1 mark) – see text at 6.4.1 (sections 79, 265B(3) 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.

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.

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

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

Commented [RD(DWH5): Correct (1 mark) – section 184 CWUMPO

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.

Commented [RD(DWH6): Correct (1 mark)

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.

Commented [RD(DWH7): Correct (1 mark)

(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.

Commented [RD(DWH8): 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)

(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.

(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.

(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]

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

A receiver appointed pursuant to a charge primarily owes duties to the charge holder, including to act in good faith and in accordance with the powers given to him under the charge. However, when selling the asset charged, the receiver also owes a residual duty to the borrower to act with reasonable skill and care.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH9)]: [B] Correct (1 mark) – see section 244 of CWUMPO

Commented [RD(DWH10)]: [A] Correct (1 mark) – Hong Kong has not adopted UNCITRAL, there are no relevant bilateral treaties with other common law jurisdictions, and Cap 319 deals with enforcement of judgments, not cross-border insolvency

Commented [RD(DWH11)]: (2.5 marks)
Should also mention that at law the receiver is the agent of the chargor

Commented [RD(DWH12)]: (3 marks)
Could also have mentioned that the 'preferred' party could be a guarantor

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 will need to show that: (a) at the time the transaction happened, the company was unable to pay its debts or became unable to pay its debts as a result of the transaction; (b) the company was influenced by a desire to improve the creditor's position in the event of a liquidation (ie that the company positively wished to improve the creditor's position in the event of its liquidation); and (c) the transaction was entered into during the period of six months before the commencement of the liquidation.

Question 2.3 [maximum 4 marks]

Commented [RD(DWH13): (4 marks)

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.

A Hong Kong liquidator can apply for recognition in the Mainland in pilot areas of the Mainland (being Shanghai, Xiamen and Shenzhen) if: (a) they have been appointed as liquidator in any collective insolvency proceedings commenced under the Companies Winding Up and Miscellaneous Provisions Ordinance or the Companies Ordinance, being compulsory liquidations, creditors' voluntary liquidations and schemes of arrangements; (b) the debtor's centre of main interests is in Hong Kong and has been so continuously for at least 6 months (the centre of main interests has been taken by the People's Supreme Court Opinion as generally meaning the place of incorporation of the debtor, and taking into account other factors including the place of principal office, the principal place of business and the place of principal assets of the debtor; (c) the debtor's principal assets are in a pilot area in the Mainland, or the debtor as a place of business or a representative office in a pilot area; and (d) a letter of request has been issued by the Hong Kong Court.

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH14): (4 marks)
Good answer

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.

Part X of the Companies Winding Up and Miscellaneous Provisions Ordinance governs the winding up of non Hong Kong companies. Under section 327 of the Ordinance, a non-Hong Kong company may be wound up if: (a) the company is dissolved or has ceased to carry on business, or it carrying on business only for the purpose of winding-

up its affairs; (b) the company is unable to pay its debts; and (c) it is just and equitable in the Court's opinion that the company should be wound-up.

Pursuant to a Court of Final Appeal decision in *Re Yung Kee*, the petitioner must also satisfy the Court that: (a) the non-Hong Kong company has a sufficient connection with Hong Kong (being assets of any nature although it is not a requirement that there be assets in Hong Kong); (b) there is a reasonable possibility (being a real possibility rather than a merely theoretical one) that the winding up order would benefit those applying for it; and (c) the Court is able to exercise jurisdiction over one or more persons interested in the distribution of the non-Hong Kong company's assets (that is, there is a creditor other than the petitioner subject to the jurisdiction of the court).

Question 3.2 [maximum 5 marks]

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 mechanism under Part 13, Division 2 of the Companies Ordinance which allows companies to make binding compromises or arrangements with their members and/or creditors. This can include for example, an adjustment of debts owed to creditors, or a reduction of share capital.

The pros of a scheme of arrangement include:

- *Allowing a compromise or arrangement without the need for 100% approval from the relevant creditors to contractually vary the debt (which may be impossible);*
- *Being able to avoid a situation where there are hold-out creditors who seek an unfair advantage against a substantial majority of similarly ranking creditors;*
- *Giving a company an alternative to liquidation;*
- *Once sanctioned by the court, the scheme will bind all creditors and/or members in their relevant classes.*

The cons of a scheme of arrangement include:

- *The lack of any moratorium as part of the scheme of arrangement (unless a petition for winding up is also presented);*
- *A scheme of arrangement can be expensive because of the need for court approval;*
- *A scheme of arrangement may not necessarily be recognised overseas outside Hong Kong.*

Question 3.3 [maximum 6 marks]

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?

Commented [RD(DWH15)]: (2.5 marks)

Good pros and cons but the question calls for a description, but the answer does not include, for example, : the role of the explanatory statement; how classes are constituted; leave to convene meetings; the statutory majorities needed; the court's role on sanction. Why it may not be effective in other jurisdictions

Commented [RD(DWH16)]: (2 marks)

Need to give some explanation of the developments, based largely on the Privy Council's decision in *Singularis* and the principles that apply (cannot do something in HK that would not have power to do in home jurisdiction). Court had developed an almost 'standard order' that was then whittled away, in part due to the use (misuse?) of the provisions to assist 'debtor-led' processes in certain offshore jurisdictions.

Global Brands – court will be reluctant to give any recognition/assistance to a liquidator from somewhere that is not the company's COMI (even if it is the place of incorporation)
Up Energy shows that court recently taking a more 'strict' legal approach to what the HK court can or cannot do.

In the absence of legislation to deal with cross-border insolvencies, the common law has developed to assist foreign liquidations by: (a) recognising a foreign liquidator's right to bring an action in Hong Kong (in the name of the company); (b) allowing for non Hong Kong companies to be wound up; and (c) granting recognition and assistance orders to foreign liquidators. The Hong Kong courts have developed the common law in accordance with the principles of comity and a desire to ensure that there is a unitary system for the collection and distribution of assets.

Commented [RD(DWH17): This is not a common law development but comes from the statute

The pros of developing the law in this way are:

- *Flexibility in how foreign representatives might be assisted - the common law is able to adapt and develop to apply to new situations; and*
- *The common law is able to adapt to techniques being used to avoid winding up petitions in Hong Kong.*

The cons of developing the law in this way are:

- *A lack of statutory protections to foreign liquidators. Defendants would be able to for example, apply for security for costs against a company in liquidation; and*
- *Uncertainty in the law as to how new situations might be dealt with.*

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH18): (2.5 marks)

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.

Also, should identify whether required registration and if so, whether was in fact properly registered. Otherwise the charge would not bind the liquidator.

A charge may also be an unfair preference

Under sections 79 and 265(3B) of the Companies Winding Up and Miscellaneous Provisions Ordinance, preferential claims can be met out of realisations made from a floating charge, to the extent that there are insufficient "uncharged" assets available to the liquidator. Preferential claims are not however defined to include liquidation costs or unsecured creditors (other than certain wages and salaries, and certain other payments).

As the floating charge was granted just a few months before the liquidation, the liquidator should also consider whether the charge is voidable. Under section 267 of the Companies Winding Up and Miscellaneous Provisions Ordinance, a floating charge will not be valid if it is entered to within 12 months prior to the commencement of a 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 consequence of the charge. Further, if Sea Breeze Incorporated is connected to Palm Beach Limited, then the floating charge will not be valid if it was entered into within 2 years of the commencement of the

liquidation except to the extent that new money was provided to Palm Beach Limited at the time or after the creation of the charge.

Question 4.2 [maximum 6 marks]

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.

L's understanding is correct that it's possible to get a "standard order" from the Hong Kong Court in the form annexed to re Centaur Litigation SPC (unreported, HCMP 3389/2015, 10 March 2016). This is however subject to developments in the Hong Kong law and can be departed from. Recent case law suggests that the Hong Kong Court may now be taking a more restrictive approach to providing assistance to foreign liquidators and may take issue with the fact that SKL's centre of main interests may not be in the Cayman Islands.

Pursuant to the Hong Kong decision of A Co v B (and the subsequent Privy Council decision in Singularis Holdings v PricewaterhouseCoopers [2014] HKPC 36), the Hong Kong Court can make orders recognising a liquidator's appointment pursuant to a letter of request from a common law jurisdiction. In order to obtain a recognition and assistance order, L will need to present a letter of request from the Cayman Court to the Hong Kong Court which requests assistance.

Upon receiving the letter of request, the Hong Kong Court will consider whether there is an equivalent process available in Hong Kong. This means that the Hong Kong Court will consider whether the suite of powers sought by L is in fact available in Hong Kong. The Hong Kong Court will also consider the nature of the proceedings sought to be stayed and will not always grant a stay (see for example, FDG Electric Vehicles Limited [2020] HKCFI 2931).

In terms of the documents that L wants to obtain from SKL's bank in Hong Kong, SKL's bank should assist L without L first having to obtain a Hong Kong court order by virtue of Hong Kong recognising the liquidator as being authorised to represent the company (see for example, Bay Capital Asia Fund LP (In Official Liquidation) v DBS Bank (Hong Kong) Unreported, HCMP 3104/2015, 2 November 2016).

In terms of the orders to examine SKL's auditors, it is possible for L to obtain an examination order (see for example, Re Centaur Litigation SPC (unreported, HCMP 3389/2015, 10 March 2016). The examination order that is granted as part of the

Commented [RD(DWH19)]: (3.5 marks)

See notes below re 'standard order' and Cooperation Mechanism.

Also Up Energy holds that cannot "give" powers, so even if would assist, would not be the "full suite" hoped for by L. Further and in any event Global Brands says must look at COMI, being examples: Location of directors, officers, board meetings; Location of operations, assets, bank accounts (here – the listing?).

Also discussion as to 'managerial assistance' to recognise that law of place of incorporation governs who can take steps in the name of the company.

Commented [RD(DWH20)]: Not really; as your paragraph goes on to say, the court now takes a more restrictive approach

Court's recognition and assistance order will however be limited to L's powers in the Cayman Islands (being more restrictive than what is available in Hong Kong). It may be therefore that if L wishes to obtain more extensive examination orders, L might consider applying for an ancillary liquidation rather than a recognition order.

Question 4.3 [maximum 5 marks]

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?

The key questions to ask Harrier will include whether: (a) Harrier has delivered the software products as agreed under the contract (so that contractually, there is an obligation for Lapwing to pay the invoices); (b) whether there are any possible arguments that Lapwing might raise regarding their obligation to pay Harrier; (c) the outstanding sums due from Lapwing to Harrier; (d) Harrier's knowledge of Lapwing's financial situation; and (e) whether any formal demand has been made to Lapwing for the outstanding sums.

As a first step, Harrier can consider serving a statutory demand on Lapwing for the outstanding amount if there is a sum in the amount of over HKD10,000 that is owing. If the statutory demand is not paid within 21 days, then Lapwing will be deemed under section 178 of the Companies Winding Up and Miscellaneous Provisions Ordinance to be unable to pay its debts and provide a basis for a winding up petition.

It is possible however, that Lapwing might dispute the statutory demand by arguing that the amount is not actually outstanding or that the amount is not correct. Lapwing might also oppose any winding up petition by arguing that Lapwing is not in fact insolvent (and that it is cash flow and/or balance sheet solvent).

One issue Harrier should also be aware of is that Harrier will not necessarily make full recovery of its debt if it winds up Lapwing. There may be preferential creditors and secured creditors that rank before Harrier (on the assumption that Harrier is an unsecured creditor), and Harrier will rank the same as other unsecured creditors.

* End of Assessment *

TOTAL MARKS: 37 OUT OF 50

Commented [RD(DWH21): If ancillary liquidation: core requirements.

Also, note the reference to presence in Shenzhen. Shenzhen is a pilot area under the Hong Kong / Mainland cooperation mechanism. That mechanism is only open to Hong Kong appointed office-holders. If core requirements can be met may therefore be better to get winding-up order in Hong Kong. Identify the core requirements

Commented [RD(DWH22): (3 marks)

A good answer but misses a few points:

Is Lapwing a Hong Kong company? If not, will also need to advise as to the core requirements.

Re ability to wind up if 'otherwise satisfied' company insolvent: statement "cannot pay" is offset by the statement "will fight it" – evidence (hence Stat Demand advisable)

Any arbitration or EJC clause?

Discretion not to wind up if, for example, Lapwing is undergoing a genuine restructuring

Commented [RD(DWH23): Good - most candidates miss this basic point

