



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.**

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**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**<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).**

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

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**<sup>[RD(DWH7)]</sup>**).**
- (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.
- (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 has a primary duty to the charge holder who appointed them, despite being an agent of the charger. The receiver also has a residual duty to the borrower to act with reasonable skill and care.*

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.***

*A debtor is deemed to have given an unfair preference if the following conditions are met:*

- (1) The person who received the preference is one of the debtor's creditors or a surety or a guarantor for any of their debts or other liabilities.*
- (2) The debtor does anything or suffers anything which results in the preferred entity into a position which, in the event of the debtor's bankruptcy, will be better than the position they would have been in if that had not been done.*
- (3) The debtor must have also been influenced by the desire to prefer and this is assumed if the preferred entity is an associate (although this is rebuttable).*

*This claim must be brought in the appropriate time period.*

**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.***

*The mechanism for co-operation between Hong Kong and the Mainland was introduced in May 2021 and provides a mechanism for Hong Kong officeholders to obtain recognition and assistance in those areas of the Mainland, and for Mainland office-holders to obtain recognition and assistance in Hong Kong.*

*The **officer holder currently**<sub>[RD(DWH14)]</sub> tly must be within one of the pilot areas, being Shanghai Municipality, Xiamen Municipality of Fujian Province or Shenzhen Municipality of Guangdong Province.*

*In addition, the Hong Kong proceedings must be any collective insolvency proceedings communicated under CWUMPO or the CO. This includes compulsory liquidations, CVLs and schemes of arrangement.*

*The debtor's centre of main interest (COMI) must be Hong Kong, which is typically the place of incorporation. However, the mainland may take into account other factors such as the principal office, principal place of business, key place of assets. This COMI must have been effective for at least 6 months.*

*Providing the above criteria are met, the Hong Kong liquidator may then apply for recognition of and assistance to the Hong Kong insolvency proceedings in accordance with this Opinion alongside a required letter of request from the Hong Kong court.*

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

**Question 3.1 [maximum 4 marks<sub>[RD(DWH15)]</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.***

*Typically, the Hong Kong court will rely on common principles when dealing with foreign proceedings and is typically very keen to assist foreign rehabilitation proceedings<sub>[RD(DWH16)]</sub>. The legislation that deals with these winding ups of non-Hong Kong companies is Part X of CWUMPO and an unregistered company is defined in section 326. This section of the legislation lists three criteria to wind up an unregistered company<sub>[RD(DWH17)]</sub>:*

- (1) 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;*
- (2) If the company is unable to pay its debts; and*
- (3) If the court is of the opinion that it is just and equitable that the company should be wound-up.*

*On the contrary, <sub>[RD(DWH18)]</sub> to wind-up an unregistered company in Hong Kong, the court must be persuaded that the company is sufficiently connected to Hong Kong. This can be done by satisfying the "three core requirements":*

- (a) There must be sufficient connection with Hong Kong, which isn't limited to the presence of assets;*
- (b) There must be a reasonable possibility that the winding-up order would benefit those applying for it; and*
- (c) The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.*

*The petition should include how these three criteria have been achieved. The assets could be of any nature and may include stocks listed on the Hong Kong exchange. However, the petitioner must clearly evidence that there is value to obtain from the assets. Should there be assets, the second requirement is usually met as the benefit to the petitioner is clearly the recovery of such assets. The benefit to the petitioner must be a real possibility, rather than merely a theoretical one. This low bar has been set through case law (*Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd*) to prevent companies usually this requirement as a shield. In this case, despite HK not holding any assets, the court ordered the winding-up to put pressure on the debtor to repay the debt.*



*This decision appears to deviate from the opinion that the court should not be used to simply put improper pressure on a debtor. However, in this case the debt was not disputed, and the court held that this decision was a pragmatic approach.*

*Regarding the third requirement, the petitioner would have to show that there are persons with sufficient connection with Hong Kong who would have sufficient economic interest in the winding-up of the company to justify making the order. The filing of a petition is not, on its own, enough to meet this threshold. Whilst this requirement is usually required to be met, the court may make an order if the connection to Hong Kong is sufficiently strong and the benefits to creditors are sufficiently substantial.*

**Question 3.2 [maximum 5 marks]<sup>[RD(DWH19)]</sup>**

***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 can be sought by an applicant if they can show:*

- (1) The court has jurisdiction to do so in respect of that company; and*
- (2) The scheme would be effective in the sense that the scheme would be recognised by other relevant jurisdictions<sup>[RD(DWH20)]</sup>.*

*This is sought regularly due to the number of foreign companies listed on the Hong Kong exchange. Recently to reach the greatest impact, scheme of arrangement cases have shown several parallel schemes in multiple jurisdictions, such as:*

- (a) The place of incorporation of the company;*
- (b) The location of where the shares are listed, for a public company.*
- (c) The jurisdiction of the governing law of a debt.*

*However, it is worth noting that where there is a parallel scheme, the applicant will need to positively identify this scheme and explain why it has been done.*

*One of the key cons of this scheme is the Gibbs principle, being that the scheme will only discharge those debts governed by Hong Kong law and therefore parallel schemes will be needed to provide a complete rescue package. Without a complete solution, winding-up orders may still be made against the company, undermining the scheme. However, it is worth noting that some countries such as the US will discharge the debt after the HK scheme even if it is not governed by HK law provided it can be shown that the court had properly exercised jurisdiction and principles of due process had been followed.*

*There is also a concern around the enforceability of a scheme in Hong Kong itself, where most of the debts are international and the scheme is simply being used due to*

*share registration. There is a sufficient connection test to address this, which identifies “connecting factors with the jurisdiction so that the scheme, if approved, will have a substantive effect”.*

**Question 3.3 [maximum 6 marks]<sub>[RD(DWH21)]</sub>**

***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?***

*Whilst there is no legislation to deal with cross-border insolvencies, common law has been developed to allow a foreign liquidator to be recognised in Hong Kong in situations whereby they will assist the foreign liquidation. The key test is focussed on assisting liquidators, rather than the location of COMI <sub>[RD(DWH22)]</sub> and whether it is situated in Hong Kong. This means that the court looks to provide assistance to foreign insolvencies without the need to satisfy the relevant tests for a liquidation to be recognised in Hong Kong and to obtain a formal order. The basis for this approach is that Hong Kong should recognise the law of the place of incorporation which should govern who is entitled to represent/direct the actions of a company.*

*There has typically been a two staged approach applied by the HK court to enforcement in HK whereby there is a foreign proceeding. This is split into liability and enforcement separately, whereby liability can be proved but enforcement paused to assist a foreign insolvency process. This balanced view is a core pro of this system, as it puts the worldwide creditors at a par.*

*The common law approach also gives the law flexibility to adapt to an ever-changing world. The common law can consider foreign insolvency laws and allow these laws to be implemented domestically when enforcement actions are underway.*

*However, one of the key drawbacks is that the powers granted in Hong Kong are subject to the powers available to the liquidators in their “home” jurisdiction. Therefore, in some circumstances the foreign liquidator may be better obtaining an ancillary liquidation, rather than a recognition.*

*Another con is that these provisions do not apply to solvent liquidations. However, the liquidators of a solvent company can use their powers as directors in Hong Kong.*

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

**Question 4.1 [maximum 4 marks]<sub>[RD(DWH23)]</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.**

*In this situation, the first investigation you would make is whether the floating charge was made fraudulently due to being made in immediate run up to insolvency. This would include a review of whether Sea Breeze was a related party and whether the charge was made for the benefit of the creditors of Palm Beach Limited<sup>[RD(DWH24)]</sup>.*

*On the basis that the charge is legitimate, the receiver has been appointed out of court by way of the secured creditor and it is assumed that this is due to a non-payment of their debt. The receiver has a duty to the charge holder, not to the company (or its wider creditors). Unfortunately, the appointment of the liquidator does not impact the rights of the receiver. As such, the realisations made by the receiver out of the assets charged are not available to the liquidator for payment of the liquidation expenses. However, it is worth noting that the charged assets must be used to meet claims of preferential creditors, if there are insufficient assets to meet those claims from the uncharged assets available to the liquidator.*

*The receiver is also entitled to be paid out of the assets over which they are appointed. In addition, they will be able to apply a lien over these relevant assets. This means that the liquidator is unlikely to be able to use the receiver's realisations to meet the liquidation costs or pay unsecured creditors. However, if there is a surplus once the receiver has realised the assets, then this would be passed to the liquidation for payment of fees or a dividend to creditor.*

**Question 4.2 [maximum 6 marks<sup>[RD(DWH25)]</sup>]**

**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.**

*When advising L, I would outline that Hong Kong has not adopted any cross-border insolvency models, such as the UNCITRAL model. Therefore, the recognition and powers afforded to L would be reliant on those provided by the court of Hong Kong. There are no bi-lateral agreements to be relied upon.*

*The Hong Kong court has followed common law principles historically when it comes to recognition of a foreign liquidation. No formal order is required for this to be effective, and the Hong Kong court is largely cooperative with foreign liquidations* [RD(DWH26)]. *The Hong Kong court will take a practical approach to an insolvency process, such as staying enforcement by a Hong Kong creditor should they deem that, through comity, it would assist the foreign rehabilitation proceeding. The court will likely take a two stepped approach to this situation, splitting out the liability of SKL and the enforceability.*

*For L to be able to wind up the company in Hong Kong, one of the following criteria would need to be met:*

- 1) 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;*
- 2) If the company is unable to pay its debts; and*
- 3) If the court is of the opinion that it is just and equitable that the company should be wound-up.*

*In this case, it appears clear that the company is unable to pay its debts and therefore this threshold would be met. In addition, L must prove to the court that SKL has a sufficient connection to Hong Kong. Three core requirements to prove this were set out in Re Yung Kee:*

- (a) There must be sufficient connection with Hong Kong, which isn't limited to the presence of assets;*
- (b) There must be a reasonable possibility that the winding-up order would benefit those applying for it; and*
- (c) The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.*

*L would need to outline how these requirements are met as part of the petition and is likely to argue the first criteria is met through the exchange listing. There is plenty of case law demonstrating that a listing in the HK exchange can represent an asset as value may be realisable through additional investors. However, realising value from the exchange has become increasingly difficult in the past few years and L will need to prove to the court that "there is a real, not hypothetical prospect of the listing being realised for an amount that produces a meaningful return to creditors". This may be difficult for L as the key reason for seeking the recognition is to obtain disclosure over the auditor and to stay creditors. As the company is in liquidation, it appears unlikely that a restructuring plan would be put in place with new investors. Therefore, this hurdle may be difficult for the liquidator to prove.*

*The second requirement cannot be dispensed with but has a relatively low historical bar to be successful. L would need to prove to the court that there is a real possibility, rather than merely a theoretical benefit of the liquidation being recognised. In this situation, my advice is that this should be relatively straightforward*

*to prove as the auditors are based in Hong Kong and have not been cooperative with the liquidation. The cooperation of the auditors would clearly help the liquidators to understand the history of the business and may help to realise value.*

*However, it should also be raised that there is some case law of liquidators of companies incorporated in foreign jurisdictions (such as Cayman or the BVI) and having listings in Hong Kong being unsuccessful in reaching the second requirement. This has been due to foreign subsidiaries holding the trading and assets of the HK listed company and therefore there not being a clear benefit of recognising the liquidation in Hong Kong. This does not appear to be the case here, with no disclosed subsidiaries and a clear benefit in Hong Kong.*

*To satisfy the third requirement, the liquidator would have to show that there are persons with sufficient connection with Hong Kong who would have sufficient economic interest in the winding-up of the company to justify making an order. This could be proved by L through any known creditors in Hong Kong. Alternatively, the Court of Appeal has case law that a winding-up order may still be made in absence of the third requirement if the connection to Hong Kong is sufficiently strong (which is appears to be in this case, due to the listing) and the benefits to creditors are sufficiently substantial (again, this can be evidenced by the lack of cooperation of the HK auditor).*

*It should also be noted that there is a distinction between the court granting an ancillary liquidation in Hong Kong, as opposed to recognising a foreign proceeding. The recognition of a foreign proceeding is likely to be easier to obtain but is likely to be more restrictive of the powers available to the liquidator. The courts have previously been supportive of recognition orders where the "jurisdiction is a common law jurisdiction with a similar substantive insolvency law"<sup>[RD(DWH27)]</sup>.*

*Finally, and with reference to the Singularis principle, the HK court will<sup>[RD(DWH28)]</sup> allow recognition of a foreign liquidator for production of documents and examination purposes if the powers would be available to the liquidator in their home country. This would have to be proved by L but is likely to be arguable here as the production of documents from an auditor is likely to be allowed in both jurisdictions.*

*Therefore, in conclusion the liquidator should have limited difficulties in obtaining the recognition in the HK court to obtain documents from the auditor and information from the bank<sup>[RD(DWH29)]</sup>, providing they can effectively prove the above.*

**Question 4.3 [maximum 5 marks<sup>[RD(DWH30)]</sup>**

***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 first key comment is what does the contract say between the two and what are the clauses regarding termination [RD(DWH31)]. This would be relevant to understand Harrier’s legal claim against Lapwing Limited.*

*I would also ask what the outstanding fees are to date and whether the costs of all services provided to date have been settled. This is relevant to understand if there is a current debt due which could be used to wind up Lapwing.*

*I would outline to Harrier that a petition can be made to wind-up the company when it is unable to pay its debts. This is effective from 3 weeks after the service of a demand letter for payment. Whilst I am aware of invoices being sent, I would like to understand whether debt demand letters have been sent which would give Lapwing warning of an upcoming winding up petition.*

*I would confirm with Harrier where both companies are registered and incorporated. On the basis that both are in Hong Kong, this process would be relatively straightforward. However, the debt would have to be recognised in Hong Kong by the court if Harrier is based in a foreign jurisdiction [RD(DWH32)].*

**\* End of Assessment \***

**TOTAL MARKS: 25.5 OUT OF 50**