



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

***This is the summative (formal) assessment for Module 8C of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 8C. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment8C]. An example would be something along the following lines: 202223-336.assessment8C. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 8 pages.**

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

**Question 1.1**

**Which of the following is / are among the jurisdictional criteria required to be satisfied for the Hong Kong court to make a bankruptcy order against an individual?**

- (a) The individual must hold a Hong Kong permanent identity card.**
- (b) The individual must be ordinarily resident in Hong Kong at the date of the hearing of the petition.**
- (c) The individual is domiciled in Hong Kong [RD(DWH1)].**
- (d) Any of the above.**

**Question 1.2**

**A receiver appointed pursuant to a charge created by a company (A) over its assets in favour of its lender (B) acts as:**

- (a) Agent of the company granting the charge (A, in this instance [RD(DWH2)]).**
- (b) Agent of the lender appointing him (B, in this instance).**
- (c) Agent of the Official Receiver.**
- (d) An officer of the court.**

**Question 1.3**

**Which of the following is a correct statement as to the core requirements which need to be satisfied before the Hong Kong court will wind-up a foreign company:**

- (a) All of the below apply.**

**(b) At least one of the directors must be a Hong Kong resident.**

**(c) The petitioning creditor must be a Hong Kong company or a Hong Kong resident.**

**(d) There must be a reasonable possibility that the winding-up order would benefit those applying for it**<sup>[RD(DWH3)]</sup>.

Question 1.4

**A receiver is appointed over the entirety of a company's assets and the company goes into liquidation. Assuming the charge under which the receiver is appointed (and the receiver's appointment) cannot be challenged, realisations made by the receiver -**

**(a) must first be used to satisfy the costs and expenses of the liquidator.**

**(b) must first be used to satisfy the whole of all claims by employees but no other claims.**

**(c) must first be used to satisfy the claims of preferential creditors as described in the relevant section of Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (CWUMPO**<sup>[RD(DWH4)]</sup>**).**

**(d) will be kept entirely by the receiver for the benefit of the charge holder irrespective of what claims, preferential or otherwise, exist against the company.**

Question 1.5

**The date of commencement of liquidation for a compulsory liquidation is -**

**(a) the date on which a creditor serves a statutory demand.**

**(b) the date on which the petition is presented**<sup>[RD(DWH5)]</sup>.

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

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

Question 1.6

**In respect of a Hong Kong creditor's scheme of arrangement promoted by the company, the legislation provides:**

**(a) For a stay of all proceedings against the company pending the sanctioning of the scheme.**

**(b) For a stay of enforcement of any judgment against the company.**

**(c) For a stay of all proceedings against the company if the statutory majorities are met at the creditors' meeting.**

**(d) None of above, as the scheme legislation provides for no stay**<sup>[RD(DWH6)]</sup>.

Question 1.7

Select the correct answer as to whether the following statement is true or untrue:

**Hong Kong legislation provides a comprehensive statutory regime relating to corporate rescue.**

**(a) This statement is true because of the combined effect of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and the Companies Ordinance (Cap 622).**

**(b) This statement is true because of recent legislation called the Companies (Corporate Rescue) Bill.**

**(c) This statement is untrue, as Hong Kong has no comprehensive statutory regime for corporate rescue**<sup>[RD(DWH7)]</sup>.

**(d) This statement is true because of the recently enabled Cooperation Mechanism for cooperation in relation to insolvency matters as between Hong Kong and the Mainland, People's Republic of China.**

Question 1.8

Select the correct answer as to whether the following statement is true or untrue:

**Since the Handover in 1997, no decisions of any United Kingdom (UK) court are binding in Hong Kong.**

**(a) This statement is untrue as decisions of the UK Privy Council on appeals from Hong Kong remain binding.**

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

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 primary duty of a receiver, appointed pursuant to a charge, is to the debenture/charge holder, despite the fact that the receiver is an agent of the company that is providing the charge.*

*The receiver is allowed to put the debenture/charge holder's interests first when making decisions as to which course the receivership should take even if these decisions are disadvantageous to the borrowing company. Receivers should however*

*use reasonable skill and care when making decisions and will be answerable to the company if they don't.*

*When a receiver is selling the secured property it owes the same duty as a selling mortgagee, meaning the receiver should act in good faith and in accordance with powers provided to the receiver under the charge or debenture.*

**Question 2.2 [maximum 3 marks]<sub>[RD(DWH12)]</sub>**

***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 liquidator must show the following points to successfully demonstrate an unfair preference:*

- 1. That the company was unable to pay its debts at the time of the asserted unfair preference was made, or that the company became unable to pay its debts as a result of the asserted unfair preference.*
- 2. That the company was influenced by a wish to improve the creditor's position in the event of a liquidation of the company.*

**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 key elements are:*

- The Opinion is only designated to three pilot areas in the Mainland, being Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province.*
- A Hong Kong Insolvency Proceeding should be any collective insolvency proceedings commenced under the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO") or the Companies Ordinance (Cap 622) ("CO"). This includes schemes of arrangement promoted by a liquidator or a provisional liquidator, compulsory liquidations and creditors' voluntary liquidations ("CVL").*
- The debtor's COMI must be in Hong Kong continuously for at least six months at the point of application. The Supreme Court Opinion states the COMI generally means the place of incorporation of the debtor but the people's court will take account of other factors.*

- *A Hong Kong Administrator [RD(DWH14)] can apply for recognition of and assistance to the Hong Kong Insolvency Proceedings if the debtor's principal assets are in a pilot area or its place of business or representative office is in a pilot area.*
- *It is necessary to provide a letter of request from the Hong Kong court.*

**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.***

*The legislative basis for a Hong Kong court to wind up a non-Hong Kong company is section 327 of the CWUMPO. This section provides that the following three core requirements need to be satisfied:*

- 1. A sufficient connection with Hong Kong must exist (not just meaning that assets are present in Hong Kong);*
- 2. There must be a reasonable possibility that those applying for the winding-up order will benefit from it; and*
- 3. The court must have the ability to exercise jurisdiction over at least one person interested in the distribution of the assets of the company.*

*As regards to the first core requirement, the jurisdiction to wind up the company remains even if the connection to Hong Kong has ceased to exist. This is to prevent companies removing assets in an aim to show that the three core requirements are not satisfied.*

*Previous case law would also be taken into consideration when deciding to exercise jurisdiction to wind up non-Hong Kong incorporated companies. For instance, cases *Re Solar Touch Ltd* and *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd* may have an impact in regard to satisfying the second core requirement, whereby the court held that the second core requirement cannot be dispensed with or moderated, albeit this has developed so there is a low threshold for satisfying this second core requirement.*

**Question 3.2 [maximum 5 marks [RD(DWH16)]]**

***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 a binding compromise or arrangement with a debtor's members or creditors and it includes adjustment of debts owed to creditors or a*



reduction in share capital. The statutory regime is detailed in Part 13, Division 2 of the CO and the court procedure is detailed in O.102 r2 and r5 of the Rules of the High Court (“RHC”).

One benefit of the scheme of arrangement is that without it a debtor would need 100% approval from creditors to vary their debt, whereas a scheme only requires 75% (in majority by value) [RD(DWH17)] approval. This makes the scheme of arrangement necessary when unanimous consent is not achievable. Another benefit is that schemes are useful when there are hold-out creditors who look for an unfair advantage.

A downfall of the scheme of arrangement is that it does not have any moratorium period. A practice has been developed in Hong Kong where a winding up order would be presented and an application would be made for a provisional liquidator to be appointed which would give the provisional liquidator specific powers to investigate the possibility of and implementation of, if feasible, a restructuring of the company’s debts. This then allows a moratorium under section 186 of the CWUMPO. This method was used first in the case *Re Keview Technology (BVI) Limited* [RD(DWH18)].

**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?***

Other than winding up of foreign or unregistered companies, the insolvency legislation of Hong Kong doesn’t contain any provisions to deal with cross-border insolvency. There are no bilateral agreements with other countries, no international treaties and Hong Kong has not adopted the UNCITRAL Model Law. As of May 2021, however, there is now an arrangement between Hong Kong and three designated pilot areas of Mainland China which provides for recognition and co-operation between the two states.

One benefit of the common law system is that it can be flexible and develop. Once a court has made a decision on a proceeding, it can be used as precedent and can pave the way for other cases with similar key aspects. An example of this is the case *A Co v B* where the court determined that the Companies court may, pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law, make an order of a type which is available to a provisional liquidator or liquidator under Hong Kong’s insolvency regime. Following this case, it became fairly routine practice for a foreign liquidator to apply for a recognition order, so much so that a ‘standard order’ was developed. This [RD(DWH20)] also shows that common law systems can be more efficient and therefore can be cheaper for companies to bring proceedings. It also brings more predictability.

*Another benefit of a common law system is that it can fill the gaps where there is no current legislation. As international trade grows, and the way businesses operate changes, legislation can become outdated and irrelevant. It can take years to update legislation so a common law system allows the law to be adapted to new circumstances which the legislation is being developed.*

*A drawback of common law, however, is that it can be difficult to predict how new situations will be dealt with. This can be illustrated by the cases of *Legend Resorts* and *Lamtex Holdings Limited* where foreign provisional liquidators were appointed with "light touch" powers and the current management was still heavily involved in the decision process<sup>[RD(DWH21)]</sup>.*

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

**Question 4.1 [maximum 4 marks<sup>[RD(DWH22)]</sup>]**

***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.***

*Firstly, it should be checked whether the charge granted to Sea Breeze Incorporated has been properly registered at the Companies Registry. A floating charge is included as a type of charge that needs to be registered as per Part 8 of the CO, section 334. Security will be void as against a liquidator if the charge is not registered properly.*

*Whilst a floating charge is recognised in Hong Kong law as a security interest that attaches to a certain class of assets at the time of crystallisation, the security is not absolute in the same way as a fixed charge or mortgage whereby the secured creditor can look to the asset for repayment without the need to consider other creditors. Realisations made from assets subject to a floating charge should be first used to meet claims of preferential creditors if there are insufficient uncharged assets to cover those costs as per sections 79 and 265(3B) of the CWUMPO.*

*Additionally, section 267 of CWUMPO provides that if a floating charge was entered into within 12 months prior to liquidation of the company 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, then the charge will not be valid. This period is extended to 2 years and the requirement to prove insolvency at the time of, or as a result of, the charge creation falls away if the charge is a connected person.*

*If the charge in favour of Sea Breeze Incorporated is determined to be void then the assets under charge can be considered part of the liquidation estate. Any realisation*

*of the assets can therefore be used to pay liquidation costs and pay unsecured creditors. The priority of claims are first the liquidation expenses, then preferential debts, preferential charge on distrained goods, payment to creditors on a pari passu basis, interest on debts which rank equally then finally any residual amount will go to members in accordance with their rights and interest.*

**Question 4.2 [maximum 6 marks<sub>RD(DWH23)</sub>]**

***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 may grant recognition and assistance orders to allow foreign officeholders to seek production of documents or examination of individuals in Hong Kong. When considering this type of application, the court will compare the scope of the relevant provisions between Hong Kong and the Cayman Islands in accordance with the Singularis Principle.*

*Whilst recognition and assistance orders are available, they will give more restrictive powers than those given to a liquidator of a company subject to a winding up order in Hong Kong. A 'standard order' (which can be departed from where the court deems appropriate) has been developed so that a foreign liquidator can expect to obtain one, but it comes with limitations. It is also not a given that a stay will be ordered, as we have seen in the case of *The Joint Administrators of African Minerals Limited (in administration) v Madison Pacific Trust Limited and Shandong Steel Hong Kong Zengli Limited*.*

*Any power sought to be used in Hong Kong must also be available to a liquidator in their home jurisdiction. The Cayman Islands legislation around permitting examination is more restrictive than the Hong Kong equivalent. L will need to be sure that the investigations that it wants to carry out in Hong Kong must also be permitted under Cayman insolvency law. If the proposed powers that L seeks are not available under Cayman insolvency law then L might be best to seek an ancillary liquidation order. Additionally, it should be noted that if L wants to go further than obtaining information, e.g. by realising certain assets in Hong Kong, then a recognition order specifically for that purpose should be sought. L should consider this when submitting the recognition application.*

*To be successful in achieving an ancillary winding up order in Hong Kong, the court will need to be satisfied the three core requirements are met, being i) there must be a sufficient connection with Hong Kong, ii) there must be reasonable possibility that the winding up order would benefit 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. Even though it could be argued that being listed on the Hong Kong Stock Exchange can be considered an asset, the presence of an asset in Hong Kong is not necessarily enough to be a 'sufficient connection'.*

*Another point for L to consider is where the COMI of SKL is. Previously, recognition applications have focused on proceedings being brought in the place of a company's incorporation, however, common law has developed whereby a court has explained (in the conclusion of the case *Global Brands*) "in future a foreign liquidator will need to show that the foreign liquidation is being conducted in the jurisdiction of the COMI of the company", albeit the court will still provide assistance in certain circumstances. As per advice given by the Hong Kong court on determining a company's COMI, it could be considered that SKL's COMI is Mainland China, due to having assets and a representative office in Shenzhen.*

*If a foreign liquidator is seeking recognition in Hong Kong where a company is being wound up in its place of incorporation but the COMI is not in that jurisdiction, and the three core requirements are not met, one option would be for L to seek a winding up order in the place of the COMI, if possible.*

**Question 4.3 [maximum 5 marks<sub>RD(DWH24)</sub>]**

***Harrier Limited supplies software products to Lapwing Limited pursuant to an ongoing contract signed between the two. Lapwing has stopped paying Harrier's invoices. It has not made any complaint about the supplies but in a conversation a Lapwing director told a Harrier director "sorry, we just can't afford it right now". The Harrier director said he may therefore have no option but to wind-up Lapwing, to which the Lapwing director replied "try that and I'll fight it" but he does not say on what grounds. Harrier come to you and ask you to talk them through the issues. What key questions do you need to ask and what comments can you give?***

*The first thing Harrier Limited ("Harrier") should establish is if Lapwing Limited ("Lapwing") is a registered company in Hong Kong. Whilst it is possible to wind up a non-registered company in Hong Kong there are different provisions that regulate this type of winding up petition and there are also different requirements that need to be met. Part X of the CWUMPO deals with winding up of unregistered companies and this includes registered non-Hong Kong companies. A creditor can bring a winding up petition under the Hong Kong insolvency legislation so it does not matter where Harrier is registered.*

*Another thing for Harrier to consider is, seeing as the debt has arisen under a contract, whether that contract is subject to an arbitration clause. In 2018 the then Companies Judge adopted a pro-arbitration stance, following English courts whereby a petition would be stayed in favour of arbitration, unless Lapwing were to admit the debt* [RD(DWH25)].

*The Hong Kong court provides a clear system for creditors to enforce their rights but the insolvency regime should only be used for claims where it is clear the debt is not disputed. Lapwing have stated that it will fight a winding up petition but it has not shared the grounds upon which it will fight. If Lapwing were to argue that the debt is disputed, then it will need to file actual evidence to demonstrate that there is a bona fide dispute on substantial grounds, as per the case *AWP Group Limited [2021]*.*

*If Harrier wanted to bring a winding up petition against Lapwing it would first have to serve a written demand on Lapwing, pursuant to section 178 of CWUMPO, leaving it at Lapwing's registered office. Lapwing would have 3 weeks to pay the sum. The debt owed to Harrier must be more than HKD 10,000.*

**\* End of Assessment \***

**TOTAL MARKS: 36 OUT OF 50**