



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

*Notwithstanding the fact that a receiver is an agent of the company creating the charge, a receiver's primary duties are towards the charge holder. When selling assets charged, there is 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.***

*The transaction must have taken place during the period of six months prior to the commencement of the winding up. The liquidator must also show that at the time the asserted unfair preference was given, the company was unable to pay its debts or become unable to pay its debts as a result of the transaction in question. The liquidator must also show that the company was influenced by a desire to improve that person's position in the event of liquidation.*

**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.***

- (i) There must be a letter of request from the Hong Kong Court;*
- (ii) It must involve pilot areas in the Mainland and there are Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province;*
- (iii) The debtor's COMO must be in Hong Kong. This means that the place of incorporation of the debtor, but the people's court shall also take into account other factors such as the place of principal office, the principal place of business, the place of principal assets of the debtor<sub>[RD(DWH14)]</sub>;*
- (iv) If the debtor's principal assets in the Mainland are in a pilot area, or it has a place of business or a representative office in a pilot area, the liquidator may apply for recognition of and assistance to the Hong Kong Insolvency Proceedings.*

**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.***

*Section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance is the statutory basis enabling the Hong Kong's jurisdiction to wind-up a non-Hong Kong company.*

*The petitioner must satisfy the court that the debtor company in question is sufficiently connected to Hong Kong by satisfying the three core requirements set out in the case of Re Yung Kee which are as follows:*

- (i) *It is necessary to demonstrate that there is sufficient connection with Hong Kong, but this does not mean that the debtor company must have assets within the jurisdiction;*
- (ii) *There must also be reasonable possibility that the winding up order would benefit those applying for it;*
- (iii) *Finally, 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<sub>RD(DWH16)</sub>]**

***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 Hong Kong law which allows companies to make binding compromises or arrangements with their members and/or creditors (or any class of them), including adjustment of debts owed to its creditors or reduction of share capital. The statutory provisions governing schemes of arrangement is contained in Part 13, Division 2 of the Companies Ordinance.*

*One pros of a scheme of arrangement is that it enables companies and their creditors to compromise or adjust debts if stipulated majorities of the relevant creditors approve such compromise or adjustment and the court sanctions such arrangement. Without a scheme of arrangement, a debtor company would have to obtain the approval of 100% of the relevant creditors for the debt to be contractually varied. Scheme of arrangement is also beneficial where there may be hold-out creditors who seek an unfair advantage by for example, demanding for additions payment.*

*However, one weakness in the scheme of arrangement regime is the lack of any moratorium.*

**Question 3.3 [maximum 6 marks<sub>RD(DWH17)</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?***

*For instance, it has been recognised under common law that a foreign liquidator has the right to bring an action in Hong Kong in the name of the company even without a formal order recognising the foreign liquidator. The rationale for this is that Hong Kong should recognise that the law of the place of incorporation should govern who is entitled to represent/direct the actions of a company.*

*Hong Kong courts have also been keen to assist foreign representatives by relying on common law principles. For instance, the Hong Kong court has assisted foreign rehabilitation proceedings by refusing to allow enforcement of a judgment against*



*Hong Kong assets of such company. In this respect, the Hong Kong court has adopted a two-stage approach by dealing with the issues of liability and enforcement separately. This means that even if liability is established, the court will still refuse enforcement against assets located in Hong Kong if it considers that, through comity, it should instead assist the foreign rehabilitation proceedings. As an example, the Hong Kong court has stayed garnishee proceedings taken out against a company which was subject to bankruptcy proceedings in the Mainland. Be that as it may, Hong Kong courts will also assess the position based on the circumstances of each case. For instance, in a recent decision, even though the Hong Kong court recognised administrators appointed in the Mainland over a debtor company, the court still refused to stay proceedings brought against the said company in Hong Kong.*

*Hong Kong court has also granted recognition and assistance orders to permit foreign officeholders to then seek production of documents or examination of individuals in Hong Kong, in the cases of *Re BJB Career Education Co Ltd* [2017] 1 HKLRD.*

*In addition,*

*One of the strengths of developing the law through common law is that common law is flexible and so it allows the law in this area to adapt and develop. However, one of the weaknesses is that it is more difficult to predict how new situations will be dealt with.*

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

**Question 4.1 [maximum 4 marks<sub>RD(DWH18)</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.***

*I will explain to the liquidator that there is a possibility that the floating charge may be challenged under section 267 of the CWUMPO and if successful, the liquidator can then use whatever is realised by the receiver to meet the liquidation costs and/or to pay the unsecured creditors. Under section 267 of the CWUMPO, if the charge was created within a period of 12 months prior to the commencement of the liquidation and Palm Beach Limited was unable pay debts at the time the charge was created or became unable to pay debts due to the charge, the charge will be invalid. If Sea Breeze is a person that is connected with Palm Beach, the 12 months period is extended to 2 years and there is also no requirement to show that Palm Beach Limited was unable pay debts at the time the charge was created or became unable to pay debts due to the charge. In either case, the floating charge will still be valid to the extent of any*

*“new money” provided to Palm Beach by Sea Breeze at the time of, or after the creation of the said charge.*

**Question 4.2 [maximum 6 marks<sub>[RD(DWH19)]</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.***

*I will explain to him that the Court has previously granted recognition and assistance orders to permit foreign officeholders such as liquidators to seek production of documents or examination of individuals in Hong Kong. This was seen in the cases of Re BJB Career Education Co Ltd [2017] 1 HKLRD as well Re Centaur Litigation SPC (unreported, HCMP 3389/2015, 10 March 2016). When faced with such application, the Hong Kong Court would compare the scope of the relevant provisions between Hong Kong and Cayman Islands in accordance with the singularis principle. This means that the Hong Kong court would grant such orders where, (a) the power sought to be exercised exists in the jurisdiction of principal liquidation, here Cayman, and (b), the same power exists in the assisting jurisdiction, here, Hong Kong. Here, it is important to note that in the context of investigation, it must be highlighted that while Cayman legislation permits examination, such powers are more restrictive there as compared to the Hong Kong equivalent. So if the intention is to examine auditors in Hong Kong, it may be better for L to seek an “old fashioned” ancillary liquidation in Hong Kong rather than a recognition/assistance.*

*If L wish to obtain documents from the bank in Hong Kong, L should apply for a specific recognition order (see the case of Re China Lumena New Materials Corp (in Provisional Liquidation) [2018] HKCFI 276<sub>[RD(DWH20)]</sub>).*

*In terms of power to stay any actions that any creditor of SKL may bring in Hong Kong, it also depends on whether such powers exists under Cayman law<sub>[RD(DWH21)]</sub>.*

*Even though Cayman is one of the commonly encountered jurisdictions in Hong Kong, and as a result, a “standard order” was developed, such order can still be departed from in appropriate circumstances and is now less likely to be utilised moving forward given recent developments.*

**Question 4.3 [maximum 5 marks<sub>[RD(DWH22)]</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?**

*Some of the key questions that I will have to ask Harrier's director are as follows:*

- (i) in which country Lapwing Limited was incorporated/registered;*
- (ii) how much is owed by Lapwing Limited to Harrier;*
- (iii) whether Harrier owes Lapwing any debt which can be set off.*

*I will then explain to Harrier's director that:*

- (i) if Lapwing Limited is a company incorporated in Hong Kong, Harrier can present a winding up petition against Lapwing under section 178(1)(a) of the CWUMPO if it is unable to pay its debts. Lapwing would be deemed to be unable to pay debts if the following requirements are met:
  - (a) if the debt owed to Harrier equals to or exceeds HKD10,000; and*
  - (b) Harrier has served on Lapwing, a written demand in the prescribed form requiring Lapwing to pay the sum due and Lapwing has for 3 weeks after the service of the said demand, neglected to pay the said sum or to secure or compound for it to the reasonable satisfaction of Harrier;*
  - (c) If Lapwing is an unregistered/foreign company, whether there are any assets in Hong Kong, whether its directors are in Hong Kong and whether there are any presence in Hong Kong vis-à-vis Lapwing.**
- (ii) I will also explain that if Lapwing is able to show that Harrier owes Lapwing any debt due whether due to the supply of the software products or otherwise, Lapwing may then claim set off and if the net amount of debt due to Harrier falls below HKD10,000, it would not be possible for Lapwing to be wound up pursuant to section 178(1)(a) of the CWUMPO.*
- (iii) If Lapwing Limited is an unregistered/foreign company, it can still be wound up provided:
  - (a) It is necessary to demonstrate that there is sufficient connection with Hong Kong, but this does not mean that the debtor company must have assets within the jurisdiction;**

*(b) There must also be reasonable possibility that the winding up order would benefit those applying for it;*

*(c) Finally, the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.*

\* End of Assessment \*

**TOTAL MARKS: 31.5 OUT OF 50**