



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^[RD(DWH3)].

Question 1.4

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

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

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

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

(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^[RD(DWH5)].

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

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

Question 1.8

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

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

(a) This statement is untrue as decisions of the UK Privy Council on appeals from Hong Kong remain binding[RD(DWH8)].

(b) This statement is true as all aspects of English law ceased on the Handover as otherwise this would be seen as conferring an advantage on the UK.

(c) This statement is true as after the Handover only decisions of the Hong Kong court are allowed to be cited and relied upon.

(d) This statement is true as although decisions from common law jurisdictions can be cited and may be persuasive, they are not binding.

Question 1.9

After a liquidator is appointed in a creditors' voluntary liquidation, the powers of the directors of the company -

(a) cease completely, with no exceptions.

(b) cease except so far as the committee of inspection or the creditors (if there is no committee) agree to any powers continuing [RD(DWH9)].

(c) continue and can be exercised provided the directors do so with creditors' interests in mind.

(d) cease except so far as the liquidator agrees to any powers continuing.

Question 1.10

The law as to cross-border insolvency in Hong Kong can be found in:

(a) The common law and Part X of the Companies (Winding Up and Miscellaneous Provisions) Ordinance [RD(DWH10)].

(b) The UNCITRAL Model Law on Cross-Border Insolvency as adopted in Hong Kong.

(c) Various bilateral protocols with other common law jurisdictions.

(d) The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 3 marks] [RD(DWH11)]

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

[Although a receiver is an agent of the company granting the charge, she/he owes the duty to the charge holder. When the property charged is sold, she/he owes the remaining 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 requirements to void unfair preferences are (i) the company was unable to pay its debts or became unable to pay its debts as a result of the transaction concerned, and (ii) the company was influenced by a desire to improve that person's position in the occurrence of the liquidation.]

Question 2.3 [maximum 4 marks_{RD(DWH13)}]

What are the key elements needed for a Hong Kong liquidator to make use of the mechanism for co-operation between Hong Kong and the Mainland? Please provide an outline only.

[Considering the following elements, Hong Kong appointed liquidators or provisional liquidators in insolvency proceedings can apply for recognition in Mainland:

- (i) the areas are Shanghai Municipality, Xiamen Municipality of Fujian Province or Shenzhen Municipality of Guangdong Province;*
- (ii) Hong Kong liquidators are appointed in collective insolvency proceedings commenced under CWUMPO or the CO;*
- (iii) COMI is in Hong Kong;*
- (iv) the debtor's principal assets in Mainland are in the areas indicated in (i) above;*
- (v) a letter of request from the Hong Kong court is submitted.]*

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

Question 3.1 [maximum 4 marks_{RD(DWH14)}]

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.

[Hong Kong does not have statutory framework to deal with cross-border insolvency. However, Part X of CWUMPO provides "Winding up of unregistered companies", which may apply to not only registered non-Hong Kong company but also company not registered under the companies legislation. In order to wind-up an unregistered company in Hong Kong, there are three core requirements based on the CFA's decision in Re Yung Kee:

- (i) sufficient connection with Hong Kong;*
- (ii) reasonable possibility that the winding-up order would benefit the petitioner applying for it; and*
- (iii) the court's exercisable jurisdiction over one or more persons interested in the distribution of the company's assets.]*

Question 3.2 [maximum 5 marks_{RD(DWH15)}]

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

[Under the scheme of arrangement, the debtor can make binding compromises or arrangements with their members and/or creditors if the relevant majorities approve them and the court sanctions them. This includes adjustment of debts or reduction of capitals. Its main pros is the majority rules_{RD(DWH16)}, i.e., successful adjustment of debts without the approval of all creditors. If the debtor cannot use scheme of arrangement, it must obtain the approval of all relevant creditors to contractually vary debts. As a result, the regime can prevent the debtor from paying unfair advantage to the specific creditors to obtain the relevant approval. Also, this regime is supervised by the court, resulting time-consuming process. However, from a creditors' perspective, this supervision is to guarantee due process protection. Furthermore, even if the relevant majorities approve the proposal, the court does not necessarily sanction it. In sanctioning it, the court considers whether the relevant class of scheme creditors was fairly represented and the statutory majorities were acting bona fide and the minority was adequately treated and, if there is more than one class, the arrangement is entirely fair and equitable as between classes. In this regards, the court sanction process is advantageous for creditors, especially minority creditors. On the other hand, for debtors proposing the arrangement and the majority approving it, the court sanction process after the statutory creditor's approval is disadvantageous.]

Question 3.3 [maximum 6 marks_{RD(DWH17)}]

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?

[Hong Kong has developed the common law principle for the assistance in terms of cross-border insolvencies. For instance, the Hong Kong court refused to enforce the judgement against Hong Kong assets held by the company which was under the foreign rehabilitation proceedings, resulting in the assistance of the foreign rehabilitation proceedings. Also, the court has stayed the garnishee proceedings issued against the company which was under the bankruptcy proceedings in the Mainland. Furthermore, the Privy Council has recognised the Singularis Principle as common law power of assistance: (i) jurisdiction of principal liquidation and (ii) assisting jurisdiction. Moreover, the letter of request issued by the foreign court to the Hong Kong court is required to recognise and assist the foreign representative, although there is no such requirement under the common law. In addition, in recognising and assisting the foreign representatives, the Hong Kong court has put the importance of the company's COMI rather than the company's place of incorporation. These common law principles, which have been continued after the Handover, have

developed by the desire of the court to make is sure that there is a unitary system for the collection and distribution assets. Therefore, the court has refused to assist the liquidators of a solvent company.

The advantage of the common law principle is the flexibility to adopt and develop. However, the disadvantage is that it is difficult to predict how new cases will be treated.]

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

Question 4.1 [maximum 4 marks_[RD(DWH18)]]

You are instructed by the liquidator of Palm Beach Limited, a Hong Kong company in compulsory liquidation. Your client tells you that the company granted a floating charge to a creditor, Sea Breeze Incorporated, a few months before the liquidation. Sea Breeze has appointed a receiver. The liquidator wants to know if any of the receiver's realisations can be used to meet the liquidation costs or pay any unsecured creditors. Outline the discussion you would have with the liquidator.

[The receiver owes the primary duty to the debenture or charge folder, i.e., Sea Breeze in this case, rather than Palm Beach Limited. The receiver can be paid out of the assets and to exercise a lien over those assets pending payment. Such realisations from the assets cannot be used for the liquidation costs. However, the realisations must be used to meet preferential claims even if they are unsecured creditor's claims, provided that there are insufficient assets to pay those claims from the uncharged assets available to the liquidator.]

Question 4.2 [maximum 6 marks_[RD(DWH19)]]

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.

[In order to obtain documents from SKL's bank in Hong Kong, the foreign representative of SKL should apply for a specific recognition order_[RD(DWH20)]. For this recognition order, SKL have to meet the following requirements:

- (i) sufficient connection with Hong Kong;*
- (ii) reasonable possibility that the winding-up order would benefit the petitioner applying for it; and*

(iii) *the court's exercisable jurisdiction over one or more persons interested in the distribution of the company's assets.*

In terms of the first requirement, as SKL is listed on Hong Kong Stock Exchange, SKL may be regarded as the sufficient connection with Hong Kong.

In terms of the second requirement, as we do not have enough information related to its business or assets in Hong Kong, it is not easy to make comments on the satisfaction of this requirement. However, assuming that SKJ has assets and a representative office in Shenzhen where is a pilot area supplemented by the Supreme Court in the record of meeting, it may be regarded as the satisfaction of the second requirement, though there are the contradictory case, i.e., Re Solar Touch Ltd.

In terms of the third requirement, the petitioner have to show that at least one creditor has sufficient connection with Hong Kong who would have sufficient economic interest in the winding-up of SKL. However, we do not have any information in relation to SKL's creditor.

In summary, to make further advice to SKL, we need more information related to these requirements.

If SKL obtains the recognition order, it is not clear whether SLK can seek the production of documents from its auditors under CWUMPO. To make it clear, we have to analyse whether Cayman law allows Cayman liquidator has the power to order production of the relevant documents^[RD(DWH21).]

Question 4.3 [maximum 5 marks^[RD(DWH22)]

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?

[To commence the compulsory liquidation proceeding of Lapwing, Harrier as Lapwing's creditor can present a winding-up petition to the court by showing that Lapwing is unable to pay its debts. Although the court cannot reject the winding-up order on the ground only that Lapwing has no assets or the assets of the company have been mortgaged to an amount equal to or over those assets, the count has the discretion to make the order. For example. If it seems that making the restructuring plan is the best interest for creditors, it is possibility that the court does not make the order. In addition, if Harrier's claims against Lapwing are disputable, Lapwing might dispute that Harrier is not entitled to present the petition. Therefore, to make further analysis about this case, we need to collect further information in relation to this situation about Harrier and Lapwing.]

* End of Assessment *

TOTAL MARKS: 30.5 OUT OF 50