



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).**
- (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^[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).

(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^[RD(DWH4)].

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 [RD(DWH6)].

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

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.

[There are significant differences in terms of to whom the receivers owes duties, and what powers the receiver has. In terms of whom a receiver appointed pursuant to charge their duties are primarily owed to the debenture or charge holder and not to the company when selling the asset charged. This is despite the receiver being an agent of the company. When selling the secured property, a receiver owes the same duty on sale as a selling mortgagee, to act in good faith and in accordance with the

powers given to him under the debenture or charge. Receivers are actually free to put the interests of the debenture or charge holders first in making any decision as to the course which the receivership will take.]

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.

[In a compulsory liquidation, a liquidator to successfully satisfy and demonstrate a transaction with a non-associate amounted to an unfair preference by showing that at the time the asserted unfair preference was given, the company was not able to pay its debts as they fall due or unable to meet its debts as a direct result of the disputed transaction. The liquidator must also prove that the company was 'influenced by a desire' to improve the position of the non-associate in the event of the liquidation. It should be noted that in practice it is hard for the liquidator to demonstrate that the company was influenced by a desire to improve the position of that particular creditor.]

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.

[The key elements required for a Hong Kong liquidator to make use of the mechanism for cooperation between Hong Kong and the Mainland are:

- *The liquidation proceedings in the Mainland_[RD(DWH14)] are in the Shanghai Municipality, the Xiamen Municipality of Fujian Province and the Shenzhen Municipality of Guangdong Province*
- *The debtor's COMI must be in Hong Kong, with the Supreme Court Opinion stating that centre of main interests means the place of incorporation of the debtor*
- *A letter of request from the Hong Kong Court is necessary*
- *If the debtors principal assets in the Mainland are in a pilot area, the Hong Kong administrator_[RD(DWH15)] may apply for recognition of and assistance to the Hong Kong Insolvency Proceedings in accordance with this Opinion.]*

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

Question 3.1 [maximum 4 marks_[RD(DWH16)]]

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 actually lack a statutory framework to deal with cross-border insolvency, but despite this, the court has always followed common law principles in this regard. Take for example a foreign liquidator's right to bring an action in Hong Kong (in the name of the company) has long been recognised. Irish Shipping (1985) is an example of a case whereby Miss Justice Carroll's judgment in Irish Court was passed in Hong Kong. No formal order recognising the foreign liquidator is necessary for such purpose. 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. There are a number of common law principles that the Hong Kong Court will take into consideration when deciding whether to exercise their jurisdiction. The Hong Kong court has assisted foreign rehabilitation proceedings by way of refusing to allow enforcement of a judgment against assets held by such a company in Hong Kong. In this example, liability and enforcement are dealt with separately. Even if the liability is established, the Hong Kong court will reduce the enforcement of a judgment against those assets situated in Hong Kong. In order to assert their position, the Hong Kong court will assess each case in accordance with their specific circumstances] [RD(DWH17)].

There are legislative provisions that are on hand of the Hong Kong court to wind up a non-Hong Kong company. Under Part X of the CWUMPO, a non HK registered company can be wound up under the following circumstances:

- *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*
- *If the company is unable to pay its debts*
- *If the court is of the opinion that it is just and equitable that the company should be wound up*

To wind-up an unregistered company in Hong Kong, the petitioner must satisfy the court that the company in question is sufficiently connected to Hong Kong by satisfying the three core requirements set out in the CFA's decision in Re Yung Kee.

- a) *There must be sufficient connection with Hong Kong*
- b) *There must be a reasonable possibility that the winding up order would benefit those applying for it*
- c) *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] [RD(DWH18)]

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

[There is no legislation in Hong Kong specifically dealing with corporate rescue, and there have been efforts to address this lack of legislation of late, namely in relation to the Insolvency Law Reform. It has actually been the application of the common law principles that has enabled a number of corporate rescues in Hong Kong over the past number of years. The scheme of arrangement is Hong Kong's only statutory tool for corporate rescue and it has been used for many years in restructurings. It enables companies to make binding arrangements with their members and/or creditors. This includes an adjustment of debt owed to creditors or a reduction in share capital. With regard to restructuring of debt, a scheme of arrangement allows companies and their creditors to compromise or adjust their debts if a majority of the relevant creditors approve them.]

A positive/pro of the scheme of arrangement is that it does not need to obtain the approval of 100% of the relevant creditors to contractually vary the debt. Schemes of arrangement can also be very useful in situations where there are hold-out creditors who seek an unfair advantage such as additional payments, versus a majority of creditors who are otherwise ranked similarly.

The scheme of arrangement has associated negatives/cons also, for instance Hong Kong law does not provide for a moratorium on creditors' actions while such a scheme of arrangement plan is being processed and in the past the courts have refused applications for such a stay. Having said that, the decision was before certain amendments to the Rules of the High Court, which now provide that the court's case management powers include a specific power to stay proceedings and it would appear that the court accepts that a possible winding-up is a situation where discretion could be exercised in that regard [RD(DWH19)].

Question 3.3 [maximum 6 marks [RD(DWH20)]]

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?

[Common law in Hong Kong ("HK") has developed to assist foreign liquidations where steps need to be taken there. The HK Court has assisted foreign rehabilitation proceedings by way of refusing to allow a judgment to be enforced against Hong Kong assets of a company. As mentioned previously, the court deals with the matters of liability and enforcement separately here. The HK court refuses enforcement against the assets located in HK, even if liability is established. It considers that through comity that it should assist in the foreign rehabilitation proceedings. In this case, the specific circumstances of each case are assessed. A Letter of Request must [RD(DWH21)] be presented to obtain recognition and assistance by the foreign representative. Under common law, there is no formal letter requirement but this is standard practice in HK.]

In order to obtain a stay of proceedings, the Hong Kong court does not always grant such stays and instead will consider the nature of proceedings, that are sought to be stayed. The banks in HK should assist foreign liquidators by providing all documentation related to the entity's accounts, even without the foreign liquidator having to obtain an order from the HK Court. The court has also granted recognition and assistance orders to enable foreign liquidators to seek production of documents or examination of individuals in Hong Kong. The Singularis principle is utilised in considering such applications by the HK court [RD(DWH22)].

There are various pros and cons to the development of common law in this way.

Pros:

- *Flexibility and Adaptability: Common law allows judges to adapt legal principles to suit evolving circumstances and address novel issues in cross-border insolvency cases*
- *Case-by-case basis: decisions made on this basis allows for a fresh approach that considers the specific facts and complexities of each insolvency situation.*
- *Cost-Efficiencies: common law approach can be more cost-efficient than enacting new laws*
- *Globally recognised: This enhances HK's reputation as a jurisdiction, as it shows their willingness to cooperate in international insolvency matters, fostering cross-border investment and trade - which in turn boosts the HK economy and business activity.*

Cons:

- *Lack of certainty: due to the lack of specific legislation, there may be uncertainty and inconsistency in the application of common law principles which harbours unpredictable outcomes*
- *Limited guidance: judges may face challenges in applying consistent standards across different cases*
- *Time-consuming: Adjudicating cross border insolvency cases under common law can take time, as each case requires a detailed analysis of facts and legal principles.*

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

Question 4.1 [maximum 4 marks [RD(DWH23)]]

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.

[A floating charge is a type of security granted over the company's assets. Unlike a fixed charge that attaches specific assets, a floating charge hovers over a class of assets that can change. The assets would remain accessible for the company to use until certain events trigger the crystallisation of the charge - then it becomes a fixed charge. In this case, the appointment of the receiver by Sea Breeze would have led to the crystallisation of Sea Breeze's floating charge over the company. The receiver's duties are primarily to the charge holder, being Sea Breeze. The primary responsibility here would be to realize the assets covered by the floating charge on behalf of Sea Breeze.]

The receiver's realisations must first be used to meet statutory preferential claims, for example payments to employees. Under section 79 of the CWUMPO, preferential claims must be met out of the realisations of a floating charge. It further details in section 265 that when a company is in a liquidation, the preferential claims are paid out of the realisations from floating charges to the extent that there are insufficient 'uncharged' assets available to the liquidator. The availability of uncharged assets to the liquidator will determine whether the liquidation costs [RD(DWH24)] or unsecured creditor payments can be paid from the receiver's realisations. It should be noted that secured creditors are entitled to be repaid from the proceeds of the assets they hold security over before unsecured creditors receive any repayments. Any remaining assets after meeting Sea Breeze's claim could then be used to meet the liquidation costs to and the unsecured creditor claims.

Palm Beach granted a floating charge to Sea Breeze just a few months before the liquidation commenced. Under section 267 of the CWUMPO, a floating charge is not valid if it is entered into within 12 months before the commencement of a liquidation and the company was in a position where it was unable to pay its debts at the time the charge was created. If Sea Breeze has a connection with the company, then the period is actually extended further to 24 months and there is no requirement to prove the company was insolvent at the time the charge was given/created.]

Question 4.2 [maximum 6 marks [RD(DWH25)]]

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.

[As there is an absence of a statutory framework dealing with cross-border insolvency in the HK Court, common law principles will be used at the disposal of the foreign liquidators. No formal order is needed to recognise the right to bring action in Hong

Kong, however in order to obtain a recognition and assistance order in HK, L would need to have a letter of request issued by the court in Cayman which would in turn request the assistance of the HK court.

With regards to the auditors, the liquidator will have to carefully assess the reasoning for obtaining the documents from them as it would be considered crucial for the liquidation process. When considering these applications the HK Court draws the comparison of scope of the relevant provisions between HK and Cayman in accordance with the Singularis Principle. In the Cayman Islands where SKL was incorporated, the legislation permitting examination is much more restrictive than it is in HK. A potential avenue for L would be to seek an ancillary liquidation rather than a recognition order to enable him to carry out a proper and full examination/investigation of the HK auditors.

SKL's bank in Hong Kong would [RD(DWH26)] be helpful in assisting the foreign liquidators by providing the documents for the company's accounts. An order from the HK court for such documents would still be required [RD(DWH27)].

The liquidator L should be cautious in with regards to depending on the standard order alone to stay actions by the creditors in Hong Kong. There is a possibility that some creditors could even challenge the order, particularly those that are of the belief that their rights are being mistreated. Certain offshore jurisdictions developed the tool of the so-called 'light touch' provisional liquidators. The purpose of this is to address any issue that practitioners in those jurisdictions may face from a decision similar to the HK decision in Legend Resorts. It actually permits provisional liquidators to be appointed solely for the purpose of attempting a restructuring, often with other powers being retained by the board of directors.

One of the first cases to reassess the basis of a liquidator appointed elsewhere obtaining a letter of request and making a recognition application in HK, with the expectation of getting a standard order was Costin New Materials Group Ltd vs RSM Nelson Wheeler. As the court explored the decision, where Cayman appointed provisional liquidators obtained a recognition order issuing a summons on documents from the company's former auditors, the HK Court adjourned the application to first go and seek a separate order from the Court in the Cayman Islands with respect to the matter. The listing of the shares of the company were infact cancelled on 14 February 2022 under Practice note 17 to the Listing Rules, of the Stock Exchange of Hong Kong Limited [RD(DWH28)].

Question 4.3 [maximum 5 marks [RD(DWH29)]]

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?

[Firstly, we would need to consider the key questions that need, then we can address the option to wind-up Lapwing.]

Questions:

- *Are the unpaid invoices from Lapwing overdue, and has Harrier provided the software products as detailed in the contract?*
- *Has there been a breach of contract from either Harrier or Lapwing?*
- *Have there been written communications records regarding the payment issue?*
- *Can Harrier provide some information or data on the financial status of Lapwing, like the financial stmts or latest accounts?*
- *Is there evidence to suggest that Lapwing have some more long term solvency/liquidity issues?*
- *From a winding up perspective, has Harrier identified any other grounds for seeking the wind up other than the invoices that are unpaid?*
- *From a winding up perspective, Lapwing mentioned they would fight it, are there any specific defenses they would raise to contest a winding up of their affairs?*

Comments:

Harrier may consider issuing a statutory demand for payment under section 178 of the CWUMPO. A company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum then due that equals or exceeds the specified amount, has served on the company a written demand in the prescribed form requiring Lapwing to pay the sum due, or by leaving it at the registered office of the company, and if the company has for 3 weeks after the service of the demand, neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor. Also if the execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part. A company shall be also deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

Other considerations:

*Harrier should collect evidence on Lapwing's **insolvency**^[RD(DWH30)] which would be inclusive of unpaid invoices and dishonored payments. Enforcing security **interest**^[RD(DWH31)] as well as pursuing legal action for debt recovery should also be assessed.]*

* End of Assessment *

TOTAL MARKS: 29.5 OUT OF 50