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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

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- 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.**
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- 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.**
- (d) Any of the above.**

**Commented [RD(DWH1):** Correct (1 mark) – choices (a) and (b) do not appear in section 4 of the Bankruptcy Ordinance (Cap 6). Note that (b) would have been correct if it referred to the debtor being present in Hong Kong on the date of the petition

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).**
- (c) Agent of the Official Receiver.**
- (d) An officer of the court.**

**Commented [RD(DWH2):** Incorrect (0 marks) – although a receiver's duty is owed primarily to the lender appointing him, at law he is an agent of the company (see text at 6.4.1)

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.**

**Commented [RD(DWH3):** Correct (1 mark) – there is no requirement for a director or the petitioner to be Hong Kong based

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).**

**Commented [RD(DWH4):** Correct (1 mark) – see text at 6.4.1 (sections 79, 265B(3) of 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.**

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.**

**Commented [RD(DWH5):** Correct (1 mark) - section 184 CWUMPO

**(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.**

Commented [RD(DWH6): Correct (1 mark)

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.**

Commented [RD(DWH7): Correct (1 mark)

(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.**

Commented [RD(DWH8): Correct (1 mark) – The China Field decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text)

(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.**
- (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.**

**Commented [RD(DWH9)]:** Incorrect (0 marks) - see section 244 of CWUMPO

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.**
- (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).**

**Commented [RD(DWH10)]:** Correct (1 mark) – Hong Kong has not adopted UNCITRAL, there are no relevant bilateral treaties with other common law jurisdictions, and Cap 319 deals with enforcement of judgments, not cross-border insolvency

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

Question 2.1 [maximum 3 marks]

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

*A receiver's duties are owed to the debenture or charge holder and when selling the property, his duties are the same as a selling mortgagee and therefore, he must exercise reasonable skill and care and must work within the confines or consistently with the powers set out in the debenture or charge agreement. Whilst the receiver can prioritise the interests of the debenture or charge holder when making any*

**Commented [RD(DWH11)]:** (3 marks) Good. Clear and concise answer

determining or taking a course of action in the receivership, it is important that he also have regard for the company for whom he acts as agent.

**Question 2.2 [maximum 3 marks]**

**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.**

*For a liquidator to successfully demonstrate that a transaction with a non-associate amounted to unfair prejudice, the liquidator would have to show that,*

- (i) *The transaction was a relevant transaction,*
- (ii) *The transaction was entered into within 6 months of the time the winding up commenced;*
- (iii) *At the time of giving the unfair preference, the company was unable to pay its debts (or than the transaction caused the company to be unable to pay its debts); or*
- (iv) *The transaction was entered into due to a desire to place **the creditor** in a better position to others.*

*Meeting the last criterion creates some difficulty for the liquidator since a debtor can, in his defence, rely on a genuine pressure exert on him to enter into the transaction rather than a desire to prefer. However, there are some instances where the court has been found to be willing to accept that such a desire was present where for example, where a bank granted a mortgage in circumstances where there were no good reasons for doing so. It was clear that the debtor entered into the transaction in order to protect the company's directors from threatened bankruptcy proceedings.*

**Question 2.3 [maximum 4 marks]**

**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 new co-operation mechanism between Hong Kong and Mainland PRC is one of the new advances that has been borne out of the law reforms to address the deficiency in Hong Kong as regards cross-border matters. The primary aim of the mechanism is to provide mutual assistance as between Hong Kong and Mainland as it relates to insolvency.*

*In order for a Hong Kong liquidator to avail himself of the mechanism, the liquidator would be required to,*

- 1. Obtain a letter of request;*
- 2. Satisfy the court that the debtor's COMI is in Hong Kong i.e. Hong Kong is the place of incorporation although other factors may be relevant;*
- 3. Establish that such COMI was HK for at least 6 months; and*

**Commented [RD(DWH12)]:** (3 marks). Would have been better to specifically mention that one criterion is that the person 'preferred' must be a creditor or guarantor but as you refer at (iii) to 'the creditor' (highlighted), full marks are given

**Formatted:** Highlight

**Commented [RD(DWH13)]:** (3 marks) Need to mention that the office holder seeking assistance must be appointed in a Hong Kong collective insolvency process  
As well as assets in a pilot area can show place of business or representative office there



4. Establish that the debtor's principal assets is located in one of the pilot areas being Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province.

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

Question 3.1 [maximum 4 marks]

**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 court's jurisdiction to wind up a non-Hong Kong company finds its statutory basis in Section 178 of CWUMPO Section 326 of CWUMPO, which is geared towards the winding up of "unregistered companies" defines an "unregistered company" as a company not registered under the companies legislation. Section 326(2) clarifies that definition and makes clear that "unregistered companies" also include companies that are registered in Hong Kong but are not Hong Kong companies. Together, they are referred to as "unregistered companies".*

*In addition to confirming whether the statutory bases set out in Section 327 of CWUMPO have been met, the court follows the principles set out in the decision in Re Yung Kee (2015) 18 HKCFAR 501 in determining whether it should exercise its jurisdiction to wind up an unregistered company. That decision establishes three core requirements that must be present.*

*First, there must be a sufficient connection with Hong Kong - while this rule usually means that there are assets within the jurisdiction, that definition has been expanded to capture cases where for example, the company has removed assets from Hong Kong or assets comprise of securities listed on the Hong Kong Stock Exchange. The court have also considered substantial business activities as meeting the definition of sufficient connection with Hong Kong.*

*The second core requirement is that there must be a reasonable possibility that the winding of order would benefit those applying for it. Whilst this threshold was previously a difficult one to overcome, since it was predicated on there being assets within the jurisdiction, that is no longer the case. The common law has developed so that the threshold is lower and can be met as long as the benefit can be said to be real possibility rather than American theoretical one (Re Carnival Group International Holdings Limited [2022] HKCFI2668.*

*The third requirement established in the decision in Re Yung Kee (2015) 18 HKCFAR 501 is that the petitioning has to show that there is a sufficient connection between persons having a sufficient economic interest in the winding up of the company and Hong Kong. Such connection can only be established if it is demonstrated that the petitioner is subject to the court's jurisdiction.*

**Commented [RD(DWH14):** (3 marks)  
A good answer, but see notes below

**Commented [RD(DWH15):** 178 is for HK companies; ss 326 and 327 govern non-HK companies

**Commented [RD(DWH16):** Not quite: Cannot be petitioner alone (Excellent Asia); if connection strong enough, requirement can (in effect) be dispensed with (China Medical, Court of Appeal)

**Question 3.2 [maximum 5 marks]**

**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 best described as a compromise or arrangement between a company and its creditors or members and which is of binding effect and used for the purpose of effecting a restructuring. The scheme of arrangement mechanism is an important tool given the lack of corporate rescue legislation in Hong Kong.*

*The Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32 of the Laws of Hong Kong) and Division 2 of Part 13 of the Companies Ordinance (Cap. 622 of the Laws of Hong Kong) comprise the statutory framework which governs schemes of arrangements in Hong Kong.*

*Notwithstanding that there are some significant procedural differences with the UK, common law principles based on English court decisions provide important guidance with respect to schemes of arrangements which is followed by the Hong Kong Court.*

*One of the primary benefits of the scheme of arrangement is that it can be agreed upon without requiring 100% of the relevant creditors to approve it. This obviously removes significant administrative burden making the approval process easier and more efficient. Once it is approved, even those creditors who might have voted against it must go along with what the specific majority voted for.*

*One of the primary drawbacks inherent in using the scheme of arrangement tool is the lack of any moratorium which would ordinarily provide a breathing space for the company and prevent creditors from taking action during that time. Whilst it is not a complete solution, the Hong Kong courts have adopted a practice to circumvent this issue i.e. allowing the moratorium to be obtained. Procedurally, the application would be made to appoint the provisional liquidator which would be filed together with a winding up petition. That provisional liquidator would then be given special investigative powers and cause the restructuring of the company. A moratorium would then be obtained on the back of section 186 of CWUMPO.*

**Question 3.3 [maximum 6 marks]**

**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?**

*There are various areas within insolvency law that the common law has been able to address and develop as it relates to assistance to foreign liquidations. The way that the common law has developed to assist in cross-border insolvency demonstrates the*

**Commented [RD(DWH17)]:** (2.5 marks)

Clearly written and the pros/cons are good but it misses the description requested by the answer

**Commented [RD(DWH18)]:** This statement is correct but the answer should also refer to HK procedure: the role of the explanatory statement; how classes are constituted; leave to convene meetings; the statutory majorities needed; the court's role on sanction. Limits could also refer to the Gibbs principle affecting international schemes

**Commented [RD(DWH19)]:** Correct, but should mention limits due to Re Legend

**Commented [RD(DWH20)]:** (2.5 marks)

A disjointed answer that does not address the main points clearly. Need to give some explanation of the developments, based largely on the Privy Council's decision in *Singularis* (not when will assist but what common law jurisdiction exists to do so), but noting that court had developed an almost 'standard order' that was then whittled away, in part due to the use (misuse?) of the provisions to assist 'debtor-led' processes in certain offshore jurisdictions.

Common law (private international law concepts) will recognise that law of country of incorporation (or COMI? – Global Brands) governs who can direct the actions of a corporation

**willingness of the court to ensure the existence of a unitary system to collect and distribute assets.**

Automatic Recognition - **The decision in A Co v B established a new mechanism for permitting foreign office holders to take steps in Hong Kong and which abrogated the need to commence separate ancillary proceedings for the purpose of doing so.**

Clarification of Circumstances to Assist Foreign Office Holders - **Other decisions such as Singularis Holdings v PricewaterhouseCoopers [2014] UKPC have assisted in and have provided clarification of the circumstances in which the common law power to assist will be exercised. The common law further developed to specify how recognition and assistance should be obtained i.e., by way of letters rogatory.**

Moratorium - **Although the common law has developed to provide some level of moratorium against claims being brought against the company once liquidation commences, the court's discretion will not always be exercised in favour of granting one. So there may be instances where a company will still be vulnerable.**

Production of Documents - **As regards company accounts, the Hong Kong court has sought to encourage banks to cooperate with foreign office holders in response to requests for the production. One drawback of the common law position on this aspect is that it does not allow for liquidators to obtain further categories of information regarding Hong Kong assets. It was held in Re China Lumena new Materials Cor (in Provisional Liquidation) 2018 HKCFI 276 that a liquidator should instead apply for specific recognition if the liquidator wishes to obtain such information.**

**The difficulty that this practice is at odds with the traditional method followed by foreign liquidators in which they could deal with the assets of a company and any debts owed to it without the need to obtain an order from the court.**

Examination of Individuals - **In addition to confirming that the court will grant assistance with respect to the examination of individuals, common law provides useful guidance on how the court should exercise its discretion.**

Flexibility Re Conflict - **Another benefit in terms of how the common law has developed is that it can offer flexibility when it comes to the existenc of a conflict between the insolvency laws of the principal place of the liquidation and that of the assisting/ancillary jurisdiction. There are several decisions which support the proposition that a difference in regime should not prevent the court from assisting (Re HIH 2008 1 WLR 852).**

Monitoring and development of safeguards - **By developing the way it has, courts are lot more alive to issues arising and can quickly derive mechanisms to combat issues. An example of this is the problem that arose with the use of soft-touch liquidations as a defence mechanism against winding up petitions brought in other**

**Commented [RD(DWH21):** The sentence itself is not wrong, but the title "Automatic Recognition" leaves a lot to be desired and suggests the effect of A v B not fully understood

**Commented [RD(DWH22):** Not correct. China Lumena confirmed a foreign office holder should be able to get information about the company's accounts but not the assets themselves

jurisdictions. The court was able to quickly adopt and apply a stricter test as a means of ensuring the validity of applications and, as such, minimise abuse.

Commented [RD(DWH23)]: This is a good para; it could be expanded but the main point is got across

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH24)]: (2.5 marks)

**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.**

Most of key elements are present but a bit jumbled, see notes below

Need to check if required registration and if so, whether was in fact properly registered. Otherwise the charge would not bind the liquidator.

*We know from the outset that an arrangement, albeit stated to a floating charge, may not necessarily take effect as such. Determining whether this arrangement is in fact a floating charge would involve an examination of (generally) the level of control Sea Breeze has over the relevant assets (as per *Re Spectrum Plus Limited* 2005 2 AC 680) and whether the typical hallmarks of a floating charge (as set out in *Re Yorkshire Woolcombers Association Limited* 1903 2 Ch 284) are present. Therefore, my first questions to liquidator would involve a general inquiry into the nature of the asset(s).*

Commented [RD(DWH25)]: Correct but approach should be slightly different - usually looking at whether a charge is fixed (which does not suffer from many of the vulnerabilities of a floating charge, e.g. s.267)

*Provided that the arrangement is a floating charge in accordance with the test set out above, we then must look at the time between when the floating charge was created relative to the time that the liquidation commenced. This factor is relevant since section 267 of CWUMPO invalidates floating charges created within 12 months of the liquidation commencement but only if either, at the time of doing so, the company was unable to pay its debts or, the inability to pay its debts resulted from the charge.*

Commented [RD(DWH26)]: 2 years if connected

*We are told that the floating charge was granted only a few months before the liquidation commenced but it is unclear whether the other factors are present i.e. whether Palm Beach Limited was unable to pay debts either at the time the floating charge was created or whether its inability to pay debts resulted from it. Therefore, the discussion with the liquidator would necessarily include the need for the liquidator to inquiries on this aspect.*

Commented [RD(DWH27)]: And whether any new money advanced; floating charge would still be valid to extent thereof

*Subject to ensuring that the floating charge is valid, we can then go on to consider the priority in which creditors will be paid from realisations out of the assets over which the floating charge has been made. It is at this juncture that I would advise the liquidator of the common law principle which dictates that realisations made by the receiver out of the assets charged are not available to the liquidator for payment of the liquidation expenses.*

*As regards the unsecured creditors, I would advise the liquidator of the general rule under Section 79 of CWUMPO i.e. that realisations from assets which are the subject*

Commented [RD(DWH28)]: S.265(3B) given company is being wound up

of a floating charge must first be used to meet claims of preferential creditors. Unsecured creditors may be paid from realisations from the assets subject to the floating charge subject to the any claims of the preferential creditors who rank ahead. Therefore, payment to unsecured creditors will only be possible if there is a surplus amount available following payment to the secured creditors. The liquidator would have to be made aware of the receiver's entitlement to be paid from the assets over which he is appointed and as such, he can exercise a lien over them pending payment. That factor might impact on the amount available to unsecured creditors. The liquidator would also have to investigate where there is more than one charge over the asset since that may also impact on the priority.

**Commented [RD(DWH29)]:** Only if insufficient uncharged assets

**Commented [RD(DWH30)]:** Not the case - if the charge is valid, unsecured creditors will not get paid out of those realisations

**Question 4.2 [maximum 6 marks]**

**Commented [RD(DWH31)]:** (1.5 marks)

**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.**

See notes below (reference to Singularis principle is good for example), but there are quite a few elements missing. For example:

Things will not be as straightforward as L believes

Should not need an order to get documents from the bank (the wording suggests it is SKL's own account) – Bay Capital; Seahawk; (Global Brands explanation of "recognition" proper being acknowledgment of the liquidator's authority to represent the company)

Examinations may go beyond what SKL (as a company) is entitled to. It is, however, information in respect of which a Hong Kong liquidator could seek an examination order (section 286B of CWUMPO) – note CECF Costin v RSM case as to the nature of an examination order by way of assistance

BUT: can L get "recognition and assistance"? On the facts given, likely to be difficult in light of recent cases. Up Energy holds that cannot "give" powers, so even if would assist, would not be the "full suite" hoped for by L. Further and in any event Global Brands says must look at COMI, being examples: Location of directors, officers, board meetings; Location of operations, assets, bank accounts (here – the listing?).

Court may give "managerial assistance" for practicalities (for example, if the bank does not co-operate) but beyond that is perhaps unlikely

If an application is to be made: Need letter of request from Cayman; there are still the Singularis principles – with narrower examination powers in Cayman this could be problematic; granting of a stay not "automatic" (FDG Electric Vehicles; Nuoxi v Peking University); may be that enforcement would be stayed (for example, Ambow Education) – recent cases have not dealt with this

However, and in any event, note the reference to presence in Shenzhen. Shenzhen is a pilot area under the Hong Kong / Mainland cooperation mechanism. That mechanism is only open to Hong Kong appointed office-holders. If core requirements can be met may therefore be better to get winding-up order in Hong Kong. Identify the core requirements

**Commented [RD(DWH32)]:** Not quite: the advice is that in light of recent developments, there is no 'standard order' now available

Proviso Limitation – Re: Auditors

- **First, I would make him aware of the proviso in the "standard order" which would limit his powers to those that would be available to him in Cayman.**
- **Under section 103(2) of the Cayman Islands Companies Act (2023 Revision) places a duty on "relevant persons" to co-operate with the official liquidator, which includes auditors.**
  - **The investigative powers contained in the statute is far more restrictive than the Hong Kong equivalent.**
  - **The decision in the case of Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36 makes clear that the obligation only relates to the production of information belonging to the company and will not include the audit work papers which belong to the auditor.**
- **Even if the liquidator was considering obtaining a summons to produce documents on the back of a recognition order by way of Section 286B of CWUMPO, the decision in Joint Provisional Liquidators of CEEP Costin New**

*materials Group Ltd v. RSM Nelson Wheeler* 2021 HKCFI 794 makes clear that section does not cover a foreign company.

- Given the above, the liquidator would be better off making applying for traditional ancillary liquidation rather than a recognition so that he could make use of the wider powers granted under the Hong Kong legislation.

#### Bank documents

With respect to the bank documents that he is seeking,

- I would advise the liquidator that the “standard order” would not permit him to obtain documents from the bank.
- Such a request is considered under Hong Kong law to be dealing with Hong Kong assets which the court has said requires application for a special recognition order.
- The court’s rationale for taking that approach is to balance the liquidator’s convenience with the need for court supervision and protection of creditors.
- If the liquidator applies for a special recognition, he would have to provide the court with cogent reasons for that request.

#### Stay

There is no automatic stay available in Hong Kong. While the court can grant a discretionary stay of proceedings, it is not always granted and, in any event, one would only be able to apply for it upon the presentation of a winding up petition.

#### Question 4.3 [maximum 5 marks]

**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?**

**Based on the facts, Harrier Limited’s primary concern is that of payment of the outstanding invoices. It appears that there are possibly three routes available to him for the recovery of those sums.**

#### Option 1 - The Litigation Route

- Harrier has the option of bringing a claim without engaging the insolvency process.
- It is stated that Harrier’s supply of software products is pursuant to an ongoing contract. Harrier can therefore file a straightforward debt claim for the outstanding sums.
- In order to do this, he would commence an action in either the District Court or the High Court by way of a writ of summons and serve that writ on Lapwing. If

**Commented [RD(DWH33)]:** Correct - but that is in relation to the exercise of the statutory power. Can still get assistance if Singularis principle is met (power available in both jurisdictions) and other criteria are also met

**Commented [RD(DWH34)]:** See text re Bay Capital v DBS and similar cases - where liquidator’s authority to represent the company is recognised

**Commented [RD(DWH35)]:** A case management stay could be given

**Commented [RD(DWH36)]:** (2.5 marks)

Some good practical points made, but the question is aimed at advising Harrier on its specific question as to its indication to wind up Lapwing.

The following elements should be included:

Harrier needs to know that if winds up then is treated same as other creditors

Is Lapwing a Hong Kong company? If not, will also need to advise as to the core requirements.

Statutory demand procedure – prescribed form needed for example.

Re ability to wind up if ‘otherwise satisfied’ company insolvent: statement “cannot pay” is offset by the statement “will fight it” – evidence (hence Stat Demand advisable)

Any arbitration or ECJ clause?

Discretion not to wind up if, for example, Lapwing is undergoing a genuine restructuring

*the claim is for an amount between HKD75K and HKD 3M, the claim would be issued in the District Court. If the claim is for a higher amount, Harrier would issue in the High Court. However, if the claim is for an amount under 75K, in summary court.*

- *As is normal, Lapwig will have 14 days within which he will have to file an acknowledgment of service indicating whether he intends to defend the proceedings.*
  - *If the defendant indicates on the acknowledgment of service form that he is defending the proceedings, Harrier would either,*
    - *(i) seek summary judgment on the basis that the Lapwig's defence has no merit. (Given that there is an ongoing contract signed by both of them and evidence of non-payment by Lapwig, Harrier should have no difficulty in either obtaining summary judgment or defeating Lapwig in an eventual trial.); or*
    - *(ii) take the procedural steps necessary to bring the matter to trial.*
  - *If Lapwig indicates no intention to defend the proceedings or fails to file an acknowledgement, Harrier would be able to either (i) obtain a judgment in default or in the latter case, (ii) obtain summary judgment.*
- **Enforcement**
  - *Once a judgment has been obtained, Harrier would be enforce the order in the normal ways such as a garnishee order on a third party debtor or a charging order against property owned by Lapwig.*
- **Potential pitfall**
  - *A potential pitfall that Harrier would have to be aware of is the safeguards in place in the legislation that would prevent Harrier from obtaining an unfair advantage over other creditors if it turns out that Lapwig is actually insolvent and the company engages a formal insolvency process before Harrier has completed execution on the judgment.*

Commented [RD(DWH37)]: Good point

#### Option 2 - Winding Up Order

- *Harrier can seek to enforce its right by the insolvency to put Lapwig into liquidation. Harrier can file a petition with the High Court Registry. Although the hearing of the application would be scheduled before a Master, we are already aware that Lapwig intends to oppose the petition, in which case, the petition will be adjourned to be heard before a judge. If the winding up order is made, then the appointment of a liquidator will follow. However, he would act as a provisional liquidator in the interim period.*
- *Harrier needs to be aware of and consider whether:*
  - *There may be other secured creditors who would rank ahead in the liquidation;*
  - *The time that it may take to identify all creditors and go through the entire process (it seems that Harrier just wants to be paid).*
  - *From a commercial and timing standpoint, it would be quicker and easier to simply litigate the matter.*

- *Before the matter even reaches to court, he could even consider,*
  - *Agreeing to a payment plan with Lapwig (given Lapwig's indication that his position is temporary); or*
  - *Withholding delivery of any further products.*

**\* End of Assessment \***

**TOTAL MARKS: 31.5 OUT OF 50**

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