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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

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.**
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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).**
- (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.**

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

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.**
- (c) the date of the winding-up order.**
- (d) the date on which notice of the liquidator's appointment is advertised.**

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

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.**
- (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.

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

Question 1.8

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

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

- (a) This statement is untrue as decisions of the UK Privy Council on appeals from Hong Kong remain binding.
- (b) This statement is true as all aspects of English law ceased on the Handover as otherwise this would be seen as conferring an advantage on the UK.
- (c) This statement is true as after the Handover only decisions of the Hong Kong court are allowed to be cited and relied upon.
- (d) **This statement is true as although decisions from common law jurisdictions can be cited and may be persuasive, they are not binding.**

Commented [RD(DWH8)]: Incorrect (0 marks) - 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)

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 debenture or charge often contain the power to appoint a receiver and this power will only arise if certain events occur as detailed in the charge, like a default in payment. When a receiver is appointed under the powers contained in the charge and not by the court is this context, either as a receiver or as a receiver and manager (where they fully manage the company) they owe duties to the charge holder ("chargor") and not the company, notwithstanding that the receiver is an agent of the company. The first duty of a receiver is to, within 7 days, send a statement to the Registrar of*

**Commented [RD(DWH11)]:** (3 marks) Good answer. Should have mentioned point in note below but additional elements stated (registration, Cap 49) mean full marks given

**Commented [RD(DWH12)]:** But residual duties owed to chargor/borrower

*Companies informing them of their appointment and providing details of their identity.*

*The receiver's main duties are to the chargor. They have a duty to act in good faith when selling, for example, secured property, to ask with reasonable care and skill, and to generally act in accordance with the powers bestowed upon them pursuant to the charge.*

*The Transfer of Business (Protection of Creditors) ordinance (Cap 49) does not apply in the context of a receiver acting pursuant to their appointment under a charge as long as the charge has been registered for a year or more before any transfer takes place.*

**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.***

*In the above context of a compulsory liquidation a liquidator must satisfy the following aspects in order to demonstrate a transaction, with a non-associate, was an unfair preference by, for example, granting some form of security or making payments to them, when seeking to set aside these types of transactions that have taken place within 6 months (with a non-associate) prior to the winding-up commencing:*

- 1. That the company was unable to pay its debts or that the company was unable to pay its debts as a result of the transaction (which the liquidator is trying to show was preferential)*
- 2. That the company by carrying out the transaction was influenced by a desire to improve that person's or other company's position should the company end up in liquidation. This particular aspect has the consequence of being very difficult to prove as noted in some case law<sup>1</sup>. In the context of an alleged preference being made to a non-associate it is to be expected that proving a desire would result in a higher threshold having to be met.*

**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.***

<sup>1</sup> Re MC Bacon [1990] BCLC 324 and the Hong Kong case Osman Mohammed Arab v Cashbox Credit Services Ltd [2017] HKEC 2435

**Commented [RD(DWH13)]:** (2.5 marks) Need to mention that the person 'preferred' must be a creditor or guarantor

**Commented [RD(DWH14)]:** (4 marks) See note below, but good answer

Following the record of meeting <sup>2</sup> where bankruptcy proceedings (corporate insolvency) take place between Hong Kong <sup>3</sup> and mainland China, the main key elements a liquidator (including provisional liquidators) needs in order to make use of the co-operation mechanism between Hong Kong and mainland China are as follows<sup>4</sup>:

1. That recognition is sought in one of the designated pilot areas in mainland China<sup>5</sup>
2. The Hong Kong insolvency proceedings must be commenced under the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO") or Companies Ordinance (Cap 622) ("CO"). Therefore, including compulsory liquidations, creditors' voluntary liquidations and schemes of arrangement as put forward by the liquidator.
3. The debtor's centre of main interest ("COMI") must be in Hong Kong, for six months or more, which is generally the place of incorporation of the debtor, however, other factors will be taken into account such as, the place of the principal office, principal place of business and place of principal assets of the debtor and so on<sup>6</sup>.
4. Where the debtor's principal assets, place of business or representative office are in one of the 4 pilot areas in mainland China the Hong Kong administrator can apply for recognition and assistance by sending a letter of request from the Hong Kong court.

Commented [RD(DWH15)]: Only 3

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH16)]: (4 marks)  
Good, complete answer

**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.**

#### Statute

The statutory basis upon which a Hong Kong court can wind-up a non-Hong Kong company are found under Part X of CWUMPO. Section 326 essentially defines what an unregistered company is (and it does include registered non-Hong Kong companies)<sup>7</sup> and section 327 provides the situations in which a company which is unregistered can be wound-up. These include, if a) the company has been dissolved or no long carries on business or is carrying on but only for the purpose of winding-up, b) the company is

<sup>2</sup> Meeting between the Supreme Court in mainland China and the Government of Hong Kong in May 2021 to further a form of reciprocity between Hong Kong and mainland China regarding judicial relations in the insolvency sphere; record of meeting wording found –

[https://www.doi.gov.hk/en/mainland\\_and\\_macao/pdf/RRECCJ\\_RoM\\_en.pdf](https://www.doi.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf)

<sup>3</sup> Hong Kong Special Administrative Region

<sup>4</sup> As supplemented by an opinion of the Supreme Court of China

<sup>5</sup> Shanghai Municipality; Xiamen Municipality of Fujian Province; Shenzhen Municipality of Guangdong Province

<sup>6</sup> The Supreme Court of China appears to be moving towards the COMI test in relation to recognition; CEFC Shanghai International Group Ltd (Mainland Liquidation) [2020] HKCFI 167

<sup>7</sup> CWUMPO, s.326(2)



unable to pay its debts, and c) the court thinks it just and equitable to wind-up the company.

Also, under Part 16 of CO a non-Hong Kong company must be registered<sup>8</sup> if the company has a place of business in Hong Kong<sup>9</sup>.

#### Case Law

The common law principles that the Hong Kong court will consider when determining whether it is appropriate to exercise this jurisdiction includes reference to certain case law.

In the case of *Young Kee*<sup>10</sup> three core requirements were set out by the court where the court would exercise its discretion and wind-up an unregistered company. These three requirements must be set out in the Petition which is filed clearly demonstrating that they are satisfied<sup>11</sup>.

Firstly, the court had to be satisfied that the connection to Hong Kong was sufficient (which did not mean having a presence of assets<sup>12</sup>). Although more difficult to demonstrate to the court, listing on the Hong Kong Stock Exchange can be considered an asset. Other types of connections will also be considered, such as, carrying out activities relating to the business within Hong Kong<sup>13</sup> and where the centre of main interest (“COMI”) is<sup>14</sup> (which also applies to the second core requirement and the shareholders connection to Hong Kong (if it is a shareholder dispute)<sup>15</sup>.

Secondly, that those applying for the winding-up order would in fact benefit from such an order being made. The threshold for satisfying this core requirement is viewed as a low one. The benefit has to be real and not theoretical<sup>16</sup> and is broad in its remit when the court assesses this aspect<sup>17</sup>

Thirdly, the Hong Kong court has to be able to exercise its jurisdiction over those who company assets are distributed to. This can be satisfied where a different creditor is also subject to the jurisdiction of the Hong Kong court<sup>18</sup>. Although the court has been willing to make a winding-up order despite this third requirement not necessarily being met<sup>19</sup>.

<sup>8</sup> According to the HKEX Fact Book 2022 there were 2,572 listed companies on the main board of the Exchange at the end of 2022

<sup>9</sup> CO, s.776

<sup>10</sup> *Jam Leung Sui Kwan v Kam Kwan Lai and Others* (2015) 18 HKCFAR 501

<sup>11</sup> *Excellent Asia (BVI) Limited v Mas Media Group Ltd* (2021) HKCFAR 3605

<sup>12</sup> Which can be any kind of assets as per, *Re Irish Shipping Ltd* [1985] HKLR 437

<sup>13</sup> *Re China Medical* [2014] 2 HKLRD 997

<sup>14</sup> *China Huiyuan Juice Group Limited* [2020] HKCFI 2940

<sup>15</sup> *Re Gottinghen Trading Limited* [2012] 3 HKLRD 453

<sup>16</sup> *Re Carnival Group International Holdings Limited* [2022] HKCFI 2668

<sup>17</sup> *Shandong Chenming* [2022] HKCFA 11, para 28

<sup>18</sup> *Excellent Asia (BVI) Ltd v Mas Media Group Ltd* [2021] HKCFI 3605

<sup>19</sup> *Re China Medical* [2018] HKCA 111

*The court considers its jurisdiction to wind-up a non-Hong Kong company can be free standing or used as an ancillary liquidation where the primary liquidation takes place in a different jurisdiction. Even in these contexts the court will require the three core requirements to be met.*

**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.**

*In Hong Kong the only mechanism for corporate rescue is a scheme of arrangement. This mechanism is found in the Hong Kong's law and procedure in CO, Part 13, Division 2<sup>20</sup> and Rules of the High Court ("RHC")<sup>21</sup>. There is a three step process in force in Hong Kong<sup>22</sup>.*

*Firstly, an ex parte originating summons, together with a supporting affirmation which will include various documents demonstrating why a scheme is needed and details of the scheme, is filed by the company, member, creditor or liquidator and this application is for leave for meetings to be convened of creditors who will consider and approve a scheme. This application is heard by the court who order directions relating to notice and advertisement of such scheme meetings. Secondly, the scheme meetings take place where at least 75% in value of the creditors who attend such a meeting must support it. The court is then informed about the result of the same. Thirdly, a petition is filed in order for the court to sanction the scheme which the court will do if it is satisfied the the classes of creditors has been properly constituted. Once sanctioned the the scheme is deemed to be in effect as soon as it is registered on the Companies Register.*

*A disadvantage is that there is no moratorium, although not in statute the courts have previously used their case management powers to stay<sup>23</sup>, however, it is unclear whether this will be developed further. As a variation on a theme the court has used a different mechanism for achieving a restructuring after a petition was presented provisional liquidators were appointed which triggered the relevant moratorium under a specific law<sup>24</sup> and part of their scope was to explore restructuring. This approach has been bless by the Court of Appeal<sup>25</sup>. However, this has been tightened up by the Court of Appeal which later found that it could not appoint provisional liquidators solely for the purpose of restructuring as that was not what was provided for in the statute. Although the appointment of provisional liquidators is still permitted in certain circumstances where it can be shown that assets are at risk and once this has*

<sup>20</sup> Sections 668 to 677

<sup>21</sup> O.102, r.2 and r.5

<sup>22</sup> Re Hawk insurance Co Ltd [2001] EWCA Civ 241 (older English case law still followed); confirmed in UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin (UDL)

<sup>23</sup> Eastman Chemical Co Ltd [2012] HKEC 272

<sup>24</sup> CWUMPO, s.186; Re Keview Technology (BVI) Limited [ 2002] 2 HKLRD 290

<sup>25</sup> Re Luen Cheong Tai International Holdings Ltd [2003] 2 HKLRD 719

**Commented [RD(DWH17)]:** (3 marks)

A good answer but see note below on majorities needed. Also, should identify that the classes of creditor must be selected and the test for putting creditors in the same class is that those creditors must have similar legal rights. The test is based on "similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights"

Also, perhaps a note about effectiveness/the Gibb principle

**Commented [RD(DWH18)]:** And a majority in number

*been assessed only then may provisional liquidators return before the court and seek the power to restructure, if that is what is deemed to be the most appropriate action<sup>26</sup>.*

*Using the example of a creditor application, the court is ultimately asked to grant sanction for an arrangement binding all creditors of a relevant class of creditors (the creditor should be in the same class in order to obtain the sanction of the court) even if certain creditors in that class did not vote for that particular scheme. If you are a creditor voting against this scheme being presented to the court which the court sanctions then this is a clear disadvantage to those creditors who vote against it. Any particular scheme of arrangement which is sanctioned can cancel any instruments in place and replace them.*

*The advantage to the majority of creditors using these process in order to obtain a satisfactory scheme of arrange to the majority at least, depending on the circumstances can be much more beneficial to them than a company being wound-up in the usual way.*

**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?***

*In light of the fact that there is no legislation in place to assist with cross-border insolvencies the common law has developed the law in Hong Kong in this regard. Hong Kong is yet to adopted the UNCITRAL Model Law on Cross-Border Insolvency<sup>27</sup> or entered into any treaties or bilateral agreements with other countries which deal with the cross-border insolvencies, save for the co-operation agreement between Hong Kong and mainland China (specific pilot areas). In the case of *Re Seahawk China Dynamic Fund*<sup>28</sup> Harris J, made it clear that "recognition and assistance in Hong Kong are matter purely of common law".*

*Notwithstanding that there is no statute providing assistance to foreign liquidators the common law in Hong Kong has been and is flexible in its approach to assistance that may be required in cross-border insolvencies. The Hong Kong courts have for some time assisted foreign liquidators in relation to recognising a right of the same to bring an action before the courts in Hong Kong<sup>29</sup> with no need for an formal recognition required which is an advantage for the foreign liquidator.*

<sup>26</sup> China Solar Energy Holdings Ltd [2018] HKCFI 555

<sup>27</sup> The Joint Official Liquidators of A Company v B and Another [2014] 4 HKLRD 374 (A Co v B)

<sup>28</sup> [2022] HKCFI 1994

<sup>29</sup> Re BGA Holdings Ltd [2021]HKCFI 3433

**Commented [RD(DWH19)]:** (2.5 marks)

Some of the right elements but a bit jumbled.

The answer should, for example give some explanation of the developments, based largely on the Privy Council's decision in *Singularis* and the principles that apply (cannot do something in HK that would not have power to do in home jurisdiction). 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.

Also: *Global Brands* – court will be reluctant to give any recognition/assistance to a liquidator from somewhere that is not the company's COMI (even if it is the place of incorporation)

*A disadvantage may be that a defendant to an action potentially brought by a foreign liquidator could result in an application by a defendant for security for costs<sup>30</sup> if the defendant is ultimately successful in its defence. Security for costs is highly likely to be required given that the the foreign company is already in liquidation which is ostensibly indicative of an inability to pay. If there are any issues in this regard then a foreign liquidator's ability to continue with an action in Hong Kong could be scuppered.*

*An advantage and disadvantage of the court applying the common law principles can in the former case assist foreign proceedings by splitting for example liability and enforcement in order to come to the aid of the foreign proceedings where rehabilitation of a company was being sought but in order to achieve that outcome comity came into play and enforcement of a judgment can be refused<sup>31</sup> - which is designed to assist the rehabilitation proceedings in the foreign jurisdiction. In relation to the latter a disadvantage can be assistance is refused<sup>32</sup>. The development of light touch 'light touch' provisional liquidations which keep a debtor in possession has been rejected by the Hong Kong courts where a liquidator is seeking assistance and recognition due to the fact that Hong Kong take an opposing position in this regard, favouring above all the creditors interests<sup>33</sup>*

*The Hong Kong court in a more recent case<sup>34</sup> the court refused to assist provisional liquidators appointed in Cayman who had their application adjourned with a requirement to initially go back to the Cayman court in order to ensure they had an order permitting what they were seeking to obtain from the Hong Kong court (production of documents). This case demonstrates the uncertainty that can result of only common law being used to assist foreign liquidators. A practice can be initially accepted and then later completely be refused.*

*Whilst the common law enables flexibility it creates uncertainty for foreign liquidators who are seeking assistance in Hong Kong. Legislation that provides a framework would likely make it clearer to foreign liquidators who wish to seek the Hong Kong court's assistance.*

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

##### Question 4.1 [maximum 4 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**

<sup>30</sup> Companies Ordinance, s.905(3)

<sup>31</sup> CCIC Finance v GITIC [2005] 2 HKC 589

<sup>32</sup> Nuoxi Capital Ltd v Peking University Founder Group Co Ltd [2021] HKCFI 2817

<sup>33</sup> Re Global Brands Group Holdings Ltd [2022] HKCFI 1789

<sup>34</sup> Joint Provisional Liquidators of CECEP Costin New Materials Group Ltd v RSM Nelson Wheeler [2021] HKCFI 794

Commented [RD(DWH20)]: (3 marks)

A good answer but see comments below as to the elements missing/not quite complete. Should also specifically reference the liquidation costs (per question) - Leyland Daf case

**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.**

*In relation to the compulsory liquidation of Palm Beach Limited ("PBL"), a HK company, and the granting of a floating charge to a creditor Sea Breeze Incorporated ("SBI") only a few months before the liquidation there are a number a matters which need to be considered. More so considering that SBI then itself has receivers appointed to realise its assets. Whether the receivers, appointed over SBI, realisations can be used by the liquidators of PBL to pay for the liquidations costs or pay unsecured creditors requires exploration.*

*We would highlight the following to the liquidator of PBL.*

*The floating charge given to SBI just months before PBL was placed into compulsory liquidation could be deemed as PBL, at that time, providing a preference to SBI. The liquidators under s. 286B have the ability to claw back any transactions considered to be preferences or potentially consider bringing an action against the directors for breaching their fiduciary duty, depending on the specific details involved which would need a further detailed consideration.*

*A floating charge is required to be registered pursuant to s.334 of the CO if that floating charge is over a company's undertaking or property. If a floating charge is not registered<sup>35</sup> then that security will be void against the liquidator or creditor. A search of certain registries may be worth carrying out. Ostensibly, in the first instance a floating charge could potentially be void if this was provided within 1 year (2 years where the chargee is connected with the company) of the commencement of winding-up proceedings. Pursuant to CWUMPO ss. 79 and 265(3B) realisations made out of assets covered by a floating charge must first be used to meet claims of preferential creditors (if there are not enough uncharged assets in the liquidation to meet the costs).*

*We would need to enquire about whether there were any other chargees as this can affect who takes priority. The appointment of a receiver has the effect of crystallising a floating charge but if there are other pre-existing and registered chargees then they would take priority.*

*The anti-deprivation principle may also apply depending on further details obtained. A creditor cannot benefit or better their position if it is considered a fraud, so preventing the use of contractual agreement to gain an unfair advantage where insolvency is apparent. Contracts cannot be given preference over creditors in this context. The court in Hong Kong will however support a genuinely entered into*

<sup>35</sup> Within one month of the date of its execution per s.335(5)(a) of CO

Commented [RD(DWH21)]: Section 266

Commented [RD(DWH22)]: If the company was insolvent at the time or became so as a result of the charge; save to the extent of new money advanced

Commented [RD(DWH23)]: Correct but more a point for the receiver not the liquidator

commercial contract, subject to no successful arguments being advanced that they were intended to create some kind of unfair advantage.

Whilst it does not appear to be the case in this scenario double-dipping is often a further aspect which should be considered where the creditor holds a claim against the debtor and against another as guarantor.

In light of the fact that SBI have appointed a receiver, the liquidators of PBL seeking to recovery any of SBI's realisations in order to meet the PBL liquidation costs or pay any unsecured creditors - further information would be required. However, it appears that any realisations made by the receivers may have to be used for preferential claims.

Question 4.2 [maximum 6 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.**

SKL is a Cayman incorporated company but registered on the HKSEX. It also has assets and a representative office in Shenzhen, in mainland China. It is unknown whether the assets and representative office in Shenzhen would be enough to constitute SKL's centre of main interest ("COMI")<sup>36</sup> and further information would be needed in order to advise in relation to this, given that the HK court's current position is to give primacy to a company's COMI, potentially HK or mainland China, instead, as it used to do, its place of incorporation, in this instance Cayman. The insolvent liquidation in Cayman is already a reality. In order for the L to obtain documents from SKL's bank and examine auditors in Hong Kong, certain steps would need to be taken.

In order to seek recognition of L's appointment in HK in relation to the insolvent liquidation<sup>37</sup> a formal letter of request could be made from the Cayman court to the Hong Kong court for assistance and recognition. The Hong Kong court has refused a request to extend a moratorium<sup>38</sup> imposed in the foreign court, including a stay, the reason given by the Hong Kong court being that there is a limit to what assistance can be provided if it is not something that is available in Hong Kong. There is movement away from 'standard order' that the Hong Kong has previously granted.

<sup>36</sup> Re Global Brands Group Holding Ltd. (In liquidation) [2022] HKCFI 1789

<sup>37</sup> Court expressed requirement for proceedings to be collective insolvent proceedings – Re Global Brands Group Holding Ltd. (In liquidation) [2022] HKCFI 1789

<sup>38</sup> The Joint Administrators of African Minerals Limited (in administration) v Madison Pacific Trust Limited & Shandong Steel Hong Kong Zengli Limited [2015] 4 HKC 215

Commented [RD(DWH24)]: Correct principle but unlikely to apply here

Commented [RD(DWH25)]: (4 marks)

A good answer but misses a couple of elements:

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

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

SKL's Hong Kong banks should provide documents requested to L in relation to SKL's own accounts regardless about whether L has or has not obtained an order from the Hong Kong court<sup>39</sup>. L is effectively representing SKL and therefore entitled to the documents. It is unclear from the information provided whether the banks in Hong Kong are being uncooperative. It is noted that there is a lack of cooperation by the auditors based in Hong Kong.

The 'standard order' mentioned by L used to often be granted in Hong Kong, the court when considering any application seeking recognition and assistance in order to have documents produced or an individual based in Hong Kong examined would look at the Singularis<sup>40</sup> principle. However, these types of 'standard orders' are not always granted<sup>41</sup>. In more recent case law the Hong Kong courts have moved towards a more restrictive approach.

Further, any powers granted should not be more than those conferred upon L in their jurisdiction, Cayman.

In light of more recent developments in Hong Kong it may be prudent to also consider the option to apply for an ancillary liquidation and not a recognition order, if a stay is required in HK to prevent any other creditor actions in HK.

#### 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?**

*Harrier Limited ("HL") and Lapwing Limited ("LL") have a contractual relationship whereby HL supplies software products to LL. There appears to be no complaint made in relation to the supply of those products and therefore it would be natural for HL to assume that LL are satisfied with the products they receive. However, this aspect would need to be fully investigated in the first instance internally to ensure that there were, in fact, no complaints that arise later. Once HL are satisfied that there were no complaints whatsoever then it would be natural for HL to think that LL is in some financial difficulties, more so given the conversation that a HL director had with the LL director relaying that they cannot afford to pay HL's outstanding invoices.*

<sup>39</sup> Re Rennie Produce (Aust) Pty Ltd (unreported, HCMP, 3560/2016, 26 August 2016);

<sup>40</sup> Singularis at 1683 C-D

<sup>41</sup> Re Rare Earth Magnesium Technology Group Holdings Ltd [2020] HKCFI 2260

#### Commented [RD(DWH26)]: (3 marks)

A good answer that gets most of the points, but what about advising HL that winding up does not put it ahead of other creditors?

Should also consider whether there is an arbitration or exclusive jurisdiction clause.

**Key questions:**

*Where are two companies incorporated or are any of the criteria satisfied if they are not incorporated in HK.*

*Are HL 100% satisfied that there have been no complaints by LL about the product they supply?*

*How much debt is outstanding?*

*Do they know of any other suppliers to LL who are having the same difficulties getting paid by LL?*

*Do we know whether LL is cash flow insolvent at this point?*

*Would HL be prepared to explore other options to resolve the issue if LL were open to them as well, in stead of immediately seeking a winding-up order?*

**Comments:**

*If HL wish to proceed inside the insolvency regime then HL can clearly demonstrate unpaid invoices which is fundamental evidence required if they wish to proceed with a w/up application within the insolvency regime. The only way that LL could challenge a w/up application would be to present evidence that there is a dispute on substantive grounds<sup>42</sup> which is why knowing for certain whether there is any form of complaint made about the product is so important, as this could constitute a valid opposition to the application. The court could also exercise its discretion to not wind up the company if there is an alternative presented such as restructuring<sup>43</sup>.*

*The alternative would be to commence proceedings by way of writ for debt claim. A further alternative option would be restructuring.*

*The amount of debt owed to HL is an initial factor to be considered as this will determine whether w/up proceedings could even be commenced and if they are which court they would be commenced in. [ Page 7 different thresholds ]*

*Possible ground for winding-up - cash flow insolvent if cannot pay invoices. Stat demand? Then if not paid w/up petition.*

**\* End of Assessment \***

**TOTAL MARKS: 36 OUT OF 50**

<sup>42</sup> AWP Group Limited [2021] HKCFI 352

<sup>43</sup> Lerthai Group Limited [2021] HKCFI 207

**Commented [RD(DWH27)]:** On the right lines here - but not needed for both companies; just check whether LL is HK or not. If not and HL wants to wind up must satisfy the 3 core requirements.

**Commented [RD(DWH28)]:** ??



