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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): Correct (1 mark)

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.**

Commented [RD(DWH3): Incorrect (0 marks) - there is no requirement for a director or the petitioner to be Hong Kong based

(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.

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.

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.

(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.

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).

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.

The Receiver's primary duty is to the debenture/charge holder.

In relation to the sale of charged assets, the receiver must exercise a reasonable degree of skill and care and act: (i) in good faith; and (ii) in accordance with the powers granted by the relevant instrument. To the extent they do not, the receiver may be answerable to the company.

Assuming the relevant charge is registered not less than 1 year earlier, the receiver is not liable to pay the debts of the transferor (ie company) - under the Transfer of Businesses (protection of Creditors) Ordinance (CAP 49).

Commented [RD(DWH9)]: Correct (1 mark) – see section 244 of CWUMPO

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

Commented [RD(DWH11)]: (2.5 marks) Should identify that receiver is still agent of the chargor hence the residual duties are still owed to the borrower/chargor; not clear from the answer

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.

A (compulsory or voluntary) liquidator can make an application to court to set aside an unfair preference where the insolvent¹ company places a creditor (or guarantor) in a better position than otherwise in a liquidation scenario: see sections 266A(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (CWUMPO).

The transaction could be the giving of an asset, payment of cash or the granting of security (without limitation), but must have occurred within 6 months² of the commencement of the winding-up of the company (assuming a non-associate beneficiary).

The liquidator must also prove that the company was influenced by a desire to improve the creditor's (or guarantor's) position compared to liquidation: section 266(4) of CWUMPO. The presumption of influence is not applicable to non-associates: section 266(5) of CWUMPO.

Desire requires, according to the courts, "the company to positively wish to improve the creditor's position in the event of its own insolvent liquidation".³

If the liquidator can meet the above elements, the court may make the orders found in sections 266(3) and 266C of CWUMPO.

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.

Co-operation between Hong Kong and the Mainland is set out in the Record of Meeting between the PRC Supreme Court and the Hong Kong Government (May 2021), and supplemented by the Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region.

The key elements are:

¹ Where it cannot pay its debts when due: section 266A(2) of CWUMPO.

² Section 266B(1)(c) of CWUMPO.

³ Re MC Bacon [1990] BCLC 324.

Commented [RD(DWH12)]: (3 marks) Good. Clear and concise answer

Commented [RD(DWH13)]: (3.5 marks) Good, but see note below

- Only the pilot municipalities on the Mainland are covered. These are Shanghai, Xiamen and Shenzhen;
- The Hong Kong insolvency proceedings must be covered by CWUMPO or the Companies Ordinance (CO);
- The debtor's Centre of Main Interest (COMI) must be in Hong Kong continuously for at least 6 months; and
- Have received a letter of request from a Hong Kong court.⁴

Commented [RD(DWH14)]: Should state that must be a collective insolvency process (e.g. MVL may not be covered)

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH15)]: (4 marks)
Good 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.

Part X of CWUMPO deals with the winding-up of unregistered companies.

Section 326 of CWUMPO defines an unregistered company as including a registered non-Hong Kong company or an unregistered non-Hong Kong company.

An unregistered company can be wound up by the court (but not voluntarily⁵), if:⁶

- The company is dissolved, not carrying on its business or only carrying on business to wind-up its affairs;
- The company cannot pay its debts⁷ above the specified amount;⁸ and
- It is just and equitable.

The Courts⁹ have held that, at the time of the presentation of the petition,¹⁰ the following three core requirements must be met (and recorded in the petition)¹¹ to wind-up an unregistered company:

1. Sufficient connection with Hong Kong (not necessarily limited to assets within Hong Kong¹²);

⁴ See *Re Zhaoheng Hydropower (Hong Kong) Ltd* [2022] HKCFI 248.

⁵ Section 327(2) of CWUMPO.

⁶ Section 327(3) of CWUMPO.

⁷ This is defined by s327(4) of CWUMPO.

⁸ Sections 327(5) and 327(6) of CWUMPO.

⁹ *Kam Leung Sui Kwan v Kam Kwan Lai and Others* (2015) 18 HKCFAR 501.

¹⁰ Even if post-petition the connection ceases to exist: *Penta Investment Advisers v Allied Weli Development Ltd* [2017] HKEC 1475.

¹¹ *Excellent Asia (BVI) Limited v Mas Media Group Ltd* [2021] HKCFI 3605.

¹² *Re Irish Shipping Ltd* [1985] HKLR 437.

Given the broad¹³ definition given to the word assets by Hong Kong courts, some jurisprudence has increasingly applied COMI considerations in evaluating the first and second core requirements.¹⁴

2. Reasonable possibility¹⁵ that the wind-up order will benefit the petitioner; and

Typically, having assets from which realisations can be achieved ought to be enough to meet the second core requirement, but increasingly courts have identified other real possible benefits that petitioners can rely upon. For instance, one such possible benefit may be that the presentation of a petition, for an undisputed debt, may 'force' an unregistered company to pay the petitioner's debts (and costs).¹⁶

3. The court must have jurisdiction over at least one other¹⁷ person interested in the realisation/distribution of the company's assets. This connection to Hong Kong should have sufficient economic interest in the company's winding-up.¹⁸

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 currently the **only mechanism** in Hong Kong to restructure one's debts, if the stipulated majority of creditors approve said arrangement. It is a statutory mechanism found in sections 668 to 677 of the Companies Ordinance (Cap 622) that requires an application to court under O.102 r 2 and r 5 of the Rules of the High Court.

Pros:

- Can apply to court to refuse or stay enforcement action from a judgement creditor;¹⁹
- No need to seek approval from all creditors, only need the stipulated majority. This is particularly helpful when a debtor has a substantial amount (in number or dollar value) or creditors;
- Prevents or limits the influence of hold-out creditors;
- Classes of a creditor meeting(s) is determined by the legal rights of the creditors, not their legal interest; and

¹³ Ibid.

¹⁴ *China Huiyan Juice Group Limited* [2020] HKCFI 2940.

¹⁵ The possibility was be real, rather than merely theoretical: *Re Carnival Group International Holdings Limited* [2022] HKCFI 2668.

¹⁶ *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd* [2022] HKCFA 11.

¹⁷ *Excellent Asia (BVI) Limited v Mas Media Group Ltd* [2021] HKCFI 3605.

¹⁸ *Re China Medical* [2018] HKCA 111.

¹⁹ *Paloma Co Ltd v Capxon Electronic Industrial Co Ltd* [2020] HKCFI 754.

Commented [RD(DWH16)]: (3 marks)

Concise but the answer should also refer to 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

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Commented [RD(DWH17)]: Only statutory mechanism, yes. But can have consensual restructurings

- The scheme may allow for the release of personal guarantees, in the appropriate circumstances.²⁰

Cons:

- Expensive, and requires court oversight;
- Not likely to be a commercially-viable options for small-to-medium sized businesses;
- No automatic stay power,²¹ however, the courts may now have discretion to order same;²²
- Requires approval from a majority in number representing at least 75% by value of creditors present and voting the scheme meeting; and
- Even if the requisite majority is obtained, the court still retains a discretion whether to approve same.²³

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?

Hong Kong's common law requires that a foreign representative present to a Hong Kong court a letter of request/assistance from a foreign court.²⁴ The substance of the letter of request must, however, have a similar basis at law in Hong Kong (eg staying a secured creditors powers in Hong Kong is not analogous).²⁵

For a foreign liquidator to have standing to apply for said assistance/recognition, the foreign liquidation needs to either be conducted in the company's COMI, or, in respect of the liquidation occurring only in the company's place of incorporation, only limited assistance is required.²⁶

Pros:

- Possibly no need to commence ancillary liquidation proceedings in Hong Kong;
- More cost effective, if recognition to provide assistance granted;
- The foreign liquidator can commence proceedings in Hong Kong without a formal order;²⁷
- The application appears to be *ex parte*; and
- Common law can be flexible and adaptable;

²⁰ *Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 467.

²¹ *Credit Lyonnais v SK Global Hong Kong Ltd* [2003] HKCU 904.

²² *Eastman Chemical Ltd v Heyro Chemical Co Ltd* [2012] HKEC 272.

²³ *Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 467, 7.

²⁴ *A Co v B* [2014].

²⁵ *The Joint Administrators of African Minerals Limited (in administration) v Madison Pacific Trust Limited & Shandong Steel Hong Kong Zengli Limited* [2015] 4 HKC 215.

²⁶ *Re Global Brands*.

²⁷ *Re Irish Shipping* [1985] HKLR 437.

Commented [RD(DWH18)]: (4 marks)

Good pros and cons section. Better if explain developments, e.g. 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. 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)

Cons:

- *The substance of the request must be analogous to a Hong Kong right/remedy;*
- *The court ultimately retains a discretion, so it can be costly if recognition is not granted;*
- *The substance of the request must be analogous to the foreign liquidator's domestic right/remedy;*
- *Does not apply to the liquidation of solvent companies;²⁸ and*
- *Judgements arising out of the common law can be difficult to predict;*

²⁸ *Re Seahawk China Dynamic Fund* [2022] HKCFI 1994.

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 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.

Ordinarily, realisations of floating assets achieved by a receiver are not payable to a liquidator for their fees or costs.²⁹ However, this is not necessarily the case when there is a surplus of assets to pay the secured creditor(s) and the preference claims (as defined by s 265 of CWUMPO).³⁰

To the extent that there is a deficiency from the realisation of floating charges, then the statutory preferential claims must be paid first: section 79 and 265(3B) of CWUMPO. Examples of statutory preferential claims are wages, salaries, other employee entitlements, statutory debts due to the government,³¹ etc. This is not the case if there are sufficient assets in the general estate to pay preferential creditors.³² General unsecured creditors are not covered by s265 of CWUMPO and therefore the liquidator would need to carefully work through the list of unsecured creditors to determine whether a particular unsecured creditor falls under any of the limbs in s265.

The factual matrix states that the floating charge was only granted a few months before the liquidation. I have assumed that the liquidation is not a solvent liquidation, that the secured party is not a related party/associate and that a few months is 3 or more months (but not greater than 6 or 12 months).

For the 12 month assumption

Pursuant to s267 of CWUMPO, a floating charge is not valid if granted within 12 months prior to the commencement of the liquidation. Invalidity requires the company to be insolvent,³³ and that no new consideration was provided by Sea Breeze. The liquidator needs to investigate whether new consideration was given by Sea Breeze to be granted this security.

For the 6 month assumption

²⁹ *Re Good Success Catering Group Ltd* [2007] 1 HKLRD 453.

³⁰ Section 265(4) of CWUMPO.

³¹ Section 265(1)(d) of CWUMPO.

³² Section 265(3B) of CWUMPO.

³³ Where it cannot pay its debts when due: section 266A(2) of CWUMPO.

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

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

Also, the answer does not address the specific advice sought as to liquidation costs (Leyland Daf case - cannot use floating charge realisations)

Commented [RD(DWH20)]: Should be unsecured assets

Pursuant to sections 266 and 266B, the floating charge may be void as an unfair preference, given:

- 1) The transaction (ie the granting of the security) presumably occurred within 6 months;
- 2) The granting of the charge may have had the effect of bettering Sea Breeze's position compared to in a liquidation scenario. The liquidator needs to investigate whether new consideration was given by Sea Breeze to be granted this security;
- 3) The transaction occurred at a time when Palm Beach was insolvent.³⁴ The liquidator needs to carry out a cash flow test analysis to determine at what date they believe Palm Beach became insolvent;
- 4) Palm Beach must have been influenced by a desire to prefer Sea Breeze. The factual matrix provides no background information on this issue.

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.

Hong Kong's common law requires that a foreign representative present to a Hong Kong court a letter of request/assistance from a foreign court.³⁵ The substance of the letter of request must, however, have a similar basis at law in Hong Kong.³⁶ Compare this however with the *Singularis Principle*³⁷ which appeared to have broadened that scope to powers existing in the foreign jurisdiction. Applying the *Singularis Principle*, although the Cayman Island's legislation includes the power to examine,³⁸ said power is said to be more restrictive³⁹ than the Hong Kong equivalent.⁴⁰

One of the most common jurisdictions applying for said assistance is the Cayman Islands, which brought about the development of the "standard order" that a practitioner could expect to receive in relation to securing information or books and records from a Hong Kong resident.⁴¹

³⁴ Where it cannot pay its debts when due: section 266A(2) of CWUMPO.

³⁵ **A Co v B [2014]**.

³⁶ *The Joint Administrators of African Minerals Limited (in administration) v Madison Pacific Trust Limited & Shandong Steel Hong Kong Zengli Limited* [2015] 4 HKC 215.

³⁷ *Singularis Holdings v PWC* [2014] UKPC 36.

³⁸ Cayman Companies Law, section 103.

³⁹ Guidance text, page 78.

⁴⁰ CWUMPO, s286B.

⁴¹ See *Re Centaur Litigation SPC* (unreported, HCMP 3389/2015) and *Pacific Andes* (HCMP 3560/2016).

Commented [RD(DWH21)]: (3 marks)

A few missing elements (plus see note below)

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)

Court may give "managerial assistance" for practicalities (for example, if the bank does not co-operate) but beyond that is perhaps unlikely. Based on recognising that law of incorporation will govern who can properly act in the name of the company.

Should address part of question re stay. (No automatic stay; could be a case management stay)

Commented [RD(DWH22)]: Not quite. The Singularis principle requires the power to be one available both in the home jurisdiction and the assisting jurisdiction

Commented [RD(DWH23)]: 'standard order' likely a thing of the past now

For a foreign liquidator to have standing to apply for said assistance/recognition, the foreign liquidation needs to either be conducted in the company's COMI, or, in respect of the liquidation occurring only in the company's place of incorporation, only limited assistance is required.⁴²

[sorry I could not provide more, I ran out of time].

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?

Section 178 of CWUMPO provides the definition for inability to pay debts, which is also determined by reference to the cash flow test and balance sheet test.⁴³ An inability pay debts includes:

- 1) A written demand has been served on the company, for the specified amount of HKD 10,000 and 3 weeks (at least) has passed. Harrier could consider issuing such a demand, but it is unclear on the facts whether the sum of the invoices exceed HKD 10,000;*
- 2) If execution of a judgment, decree or order in favour of the creditor is returned unsatisfied. It is unclear on the facts whether Harrier has already obtained judgment in relation to these unpaid invoices; or*
- 3) It can be proved that the company cannot pay its debts. Harrier could attempt to find out whether Lapwing has been unable to pay other creditors' debts. In Australia, we can perform credit bureau checks, and even contact known suppliers of debtors.*

Assuming Harrier can show that Lapwing is unable to pay its debts within the meaning of s178, Harrier may apply for an order to compulsorily wind-up Lapwing under s177 of CWUMPO.

Lapwing can attempt to injunct Harrier's application if it can show that it has a valid defence/dispute to the claim. Lapwing would need to adduce, in writing and within 7 days, evidence of its dispute, including evidence of its solvency. Harrier should, before proceeding with the petition, obtain as much information as reasonably practicable

⁴² *Re Global Brands.*

⁴³ *Re K Vision International Investment (HK) Limited* (unreported, HCCW 282/2011).

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

Well-written answer but assumes Lapwing is a HK company. That should be the first question - if it is not will need to satisfy the 3 core requirements.

Also, check if any arbitration or exclusive jurisdiction clause.

Advise Harrier that if proceed then will only rank pari passu with other unsecured creditors. Also that court retains discretion not to wind up (e.g. if there is a restructuring underway)

from Lapwing in relation to the nature of its dispute with the invoices and the veracity of same.

* End of Assessment *

TOTAL MARKS: 36 OUT OF 50