



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 [RD(DWH1)].**
- (d) Any of the above.**

Question 1.2

A receiver appointed pursuant to a charge created by a company (A) over its assets in favour of its lender (B) acts as:

- (a) Agent of the company granting the charge (A, in this instance [RD(DWH2)]).**
- (b) Agent of the lender appointing him (B, in this instance).**
- (c) Agent of the Official Receiver.**
- (d) An officer of the court.**

Question 1.3

Which of the following is a correct statement as to the core requirements which need to be satisfied before the Hong Kong court will wind-up a foreign company:

- (a) All of the below apply.**

(b) At least one of the directors must be a Hong Kong resident.

(c) The petitioning creditor must be a Hong Kong company or a Hong Kong resident.

(d) There must be a reasonable possibility that the winding-up order would benefit those applying for it^[RD(DWH3)].

Question 1.4

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

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

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

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

(d) will be kept entirely by the receiver for the benefit of the charge holder irrespective of what claims, preferential or otherwise, exist against the company.

Question 1.5

The date of commencement of liquidation for a compulsory liquidation is -

(a) the date on which a creditor serves a statutory demand.

(b) the date on which the petition is presented^[RD(DWH5)].

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

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

Question 1.8

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

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

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

(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^[RD(DWH8)].

Question 1.9

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

(a) cease completely, with no exceptions.

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

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

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

Question 1.10

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

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

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

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

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

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

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

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

A receiver appointed pursuant to a charge owes duties primarily to the debenture or charge holders when selling the secured property. The duties owed are the same as those owed by a mortgagee who is selling mortgaged property. The duties of the receiver when selling the charged asset are to act in good faith and in accordance with the powers ascribed to him/her under the debenture or charge.

A receiver may put the interests of the debenture or charge holder first when making a decision about the receivership, even if it may be detrimental to the borrower. However, receivers remain subject to an overriding requirement that in making

decisions as to both the management of the secured property, and the sale of it, they should use reasonable skill and care. If they do not, they will be liable to the borrower.

Question 2.2 [maximum 3 marks_[RD(DWH12)]]

In a compulsory liquidation, what elements must a liquidator satisfy in order to successfully demonstrate a transaction (with a non-associate) amounted to an unfair preference? Please provide an outline only.

An unfair preference is a transaction entered into between a company and a creditor or a guarantor, which has the effect of putting the recipient into a better position than it would have been in during the company's subsequent insolvency. The transaction may be a payment or the granting of security by the company.

For a transaction with a non-associated person or entity to amount to an unfair preference, the following must be established:

- 1. the transaction must have been entered into in the preceding 6 months before the commencement of the liquidation, which in a compulsory liquidation commences on the date that the petition is filed;*
- 2. at the point the transaction was made, the company was either already unable to pay its debts or became unable to pay its debts as a consequence of the transaction; and*
- 3. the liquidator must prove that the transaction was made because the company was "influenced by a desire" to put the recipient into a better position if it subsequently went into liquidation.*

In practice, the third element is the most difficult to establish because it must be shown that "the company positively wished to improve the creditor's position in the event of its own insolvent liquidation" and it has been said that a person does not necessarily desire all the resulting consequences of his/her actions.¹

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

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

The cooperation mechanism between Hong Kong and the Mainland derives from the record of meeting between representatives of the Supreme Court in the Mainland, and representatives of the Hong Kong Government in May 2021. The purpose is to enable

¹ *Re MC Bacon* [1990] BCLC 324; *Osman Mohammed Arab v Cashbox Credit Services Ltd* [2017] HKEC 2435.

the mutual recognition of, and assistance with, corporate insolvency proceedings between Hong Kong and the Mainland.

According to the record of meeting, both Hong Kong liquidators and Hong Kong provisional liquidators may apply for recognition in the Mainland. The record of meeting was supplemented by an opinion of the Supreme Court in the Mainland, which provides the following key requirements:

- 1. only certain areas in the Mainland are subject to the mechanism for now, being:
 - a. Shanghai Municipality;*
 - b. Xiamen Municipality of Fujian Province; and*
 - c. Shenzhen Municipality of Guangdong Province;**
- 2. the types of insolvency proceedings commenced in Hong Kong that may be recognised means any collective insolvency proceedings pursuant to either the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) or the Companies Ordinance (Cap 622), including compulsory liquidations, creditors' voluntary liquidations, and schemes of arrangement that are promoted by either a liquidator or a provisional liquidation;*
- 3. the centre of main interests ("COMI") of the debtor must be in Hong Kong, with the Supreme Court explaining that COMI means the place of incorporation. However, the PRC court will take into account other factors including the principal place of business, the location of the main assets, and the location of the main office. When the application is made to the Mainland for recognition, the debtor's COMI must have been in Hong Kong for at least 6 continuous months;*
- 4. a Hong Kong liquidator may only apply for recognition if the debtor's main assets in the Mainland are in one of the three pilot areas listed above, or the debtor has a place of business or a representative office in one of the pilot areas; and*
- 5. it is necessary for the Hong Kong liquidator to obtain a letter of request from the Hong Kong court.*

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

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

Discuss the statutory basis enabling the Hong Kong court's jurisdiction to wind-up a non-Hong Kong company, and the common law principles that the Hong Kong court will consider when deciding whether to exercise that jurisdiction.

Part X of Hong Kong's Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO") provides the Hong Kong court with the statutory jurisdiction to wind up a non-Hong Kong company. Part X is concerned with the "winding up of unregistered companies" in Hong Kong.

Section 326 of CWUMPO defines an "unregistered company" as a company that is not registered under Hong Kong's companies statutes. The definition of an "unregistered company" does, however, include in section 326(2) a "registered non-Hong Kong company". There is a statutory requirement in Part 16 of the Companies Ordinance (Cap 622) for a foreign company to be registered in Hong Kong if it has a place of business in Hong Kong. A "registered non-Hong Kong company" is therefore a foreign company with a place of business in Hong Kong that has been registered with the Registrar of Companies under section 776 of the Companies Ordinance.

In accordance with section 327 of CWUMPO, the circumstances in which the Hong Kong court has discretion to wind up a registered non-Hong Kong company are:

- a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;*
- b) if the company is unable to pay its debts; and*
- c) if the Hong Kong court is of the opinion that it is just and equitable to wind the company up.*

It is expressly prohibited in section 327(2) for an unregistered company to be wound up voluntarily under CWUMPO.

Common Law Principles

*In addition to establishing that one of the circumstances in section 327 applies, the petitioner must also demonstrate to the court that the non-Hong Kong company is sufficiently connected to Hong Kong. The petitioner must establish the "three core requirements" contained in the Court of Final Appeal's judgment in *Re Yung Kee (Kam Leung Sui Kwan v Kam Kwan Lai and Others)* (2015) 18 HKCFAR 501. The three core requirements are:*

- 1. there must be a sufficient connection with Hong Kong, though this does not necessarily mean there must be the presence of assets within Hong Kong;*
- 2. there must be a reasonable possibility that the winding up order will benefit those who are applying for it; and*

3. *the court must have jurisdiction over one or more of the persons interested in the distribution of the company's assets.*

The petition must set out how each requirement is met.

In relation to the first requirement, there can be a sufficient connection if:

- a) *there are assets within Hong Kong of any nature (Re Irish Shipping Ltd [1985] HKLR 437), including a listing on the Hong Kong Stock Exchange; or*
- b) *if there are no assets, a link of genuine substance between the company and Hong Kong, such as carrying out business within Hong Kong (Re China Medical [2014] 2 HKLRD 997).*

For the second requirement, it must be shown that the winding up will benefit the petitioner, usually because there are assets in Hong Kong. The cases have established a rather low threshold, in that it must be shown that the benefit is a real possibility as opposed to a merely theoretical one (Re Carnival Group International Holdings Limited [2022] HKCFI 2668).

In relation to the third core requirement, the petitioner will need to show that there are persons in addition to the petitioner who have a sufficient connection with Hong Kong and who would have a sufficient financial interest in the company being wound up for the court to justify making an order. A creditor must do more than simply present the petition; for example, the creditor must have a place of residence in Hong Kong, or a place of employment, or a place of business, or have obtained a Hong Kong judgment against the company (Re China Medical [2014] 2 HKLRD 997).

However, the Court of Appeal in Re China Medical [2018] HKCA 111 confirmed that while the third core requirement must ordinarily be met, it may be appropriate for the court to make a winding up order if the connection to Hong Kong under the first requirement is sufficiently strong, and the benefits to creditors under the second requirement are sufficiently substantial.

Finally, the statutory power to wind up a non-Hong Kong company can apply both to a "freestanding" petition in Hong Kong, as well as to ancillary proceedings in Hong Kong where there is a main liquidation proceeding elsewhere (Re Information Security One Ltd [2007] 3 HKLRD 780).

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

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

There are no statutory provisions in Hong Kong legislation that provide a mechanism for corporate rescue, save to the extent that a scheme of arrangement can be considered a method of corporate rescue. Schemes of arrangement are provided for in Part 13, Division 2, sections 668 to 677 of the Companies Ordinance (Cap 622). The court procedure that is required to effect a scheme of arrangement is directed by O.102 r 2 and r 5 of the Rules of the High Court.

A scheme of arrangement is a statutory tool by which companies enter into a binding compromise or arrangement with their shareholders and/or creditors (or any particular class of them), which may provide for the alteration or restructuring of debts owed by the company to its creditors, or a reduction of its share capital. In Hong Kong, the procedure for enabling a scheme of arrangement to become binding is, in summary:

- 1. the company, a member, a creditor or a liquidator makes an application on an *ex parte* basis to court by originating summons, for permission to convene a meeting or meetings of the relevant creditors to consider, and if thought fit, approve the proposed scheme;*
- 2. the court considers the application, which must identify the classes of creditors whose rights the proposed scheme seeks to adjust, and gives directions for the convening of the meetings, including providing notice and advertising;*
- 3. the meeting of creditors (or meetings, if there are separate classes of creditors) are held, and following the meeting(s), the applicant updates the court on the results of the vote(s); and*
- 4. the applicant applies to the court to sanction the scheme.*

The advantages of a scheme of arrangement are:

- a) A scheme of arrangement allows a company to compromise or adjust its debts if a particular proportion, rather than all, of the relevant creditors approve the proposed compromise or adjustment and the court then sanctions it. **The specific proportion is at least 75% in value** [RD(DWH16)] *of the creditors present and voting in person or by proxy at the meeting and this applies to each meeting of each class of scheme creditor. The alternative would be to obtain the approval of 100% of the relevant creditors in order to vary the company's debts by contractual methods. A scheme is therefore useful in circumstances where it would be difficult to obtain the unanimous approval of all creditors. The key advantage is that if the requisite majorities are obtained, non-consenting creditors, and creditors who did not attend the meeting, can be bound by the scheme.**
- b) A scheme is thus also useful in a situation where a company has a creditor holding out for an unfair advantage such as an additional payment, in comparison to the majority of the company's similarly-ranked other creditors.*

- c) *A scheme can offer flexibility in coming to a creative solution for the restructuring of debt, as the existing instruments and agreements are replaced with the scheme.*
- d) *From the creditors' perspective, all of the relevant creditors have the right to participate and vote at the scheme meeting, whether they are based in Hong Kong or not. This means that no creditor is excluded on the basis of its location.*
- e) *It is permissible for the debtor company to offer a "consent fee" to any creditor that promises to vote in favour of the scheme, as long as all the creditors have the right to sign up to a "consent fee".*
- f) *Likewise, an application can be made in respect of a foreign non-Hong Kong company that has a sufficient connection with Hong Kong, so the ability to enter into a scheme is not limited to Hong Kong-incorporated companies.*
- g) *A scheme may be modified even after votes have been cast at the meetings, as long as the changes do not result in a scheme that is substantially different from that which has been approved. This means that there is flexibility in situations where circumstances change or there has been an error.*
- h) *Once sanctioned, a scheme will be effective as against any creditor seeking to enforce its debt in Hong Kong, or a judgment from a foreign jurisdiction in relation to the debt.*

The disadvantages of a scheme of arrangement are:

- a) *The process of applying to convene a meeting of creditors to approve a scheme of arrangement does not confer any moratorium on the debtor company. This means that there is no automatic protection from any actions taken by creditors to enforce their debts against the company while the process is ongoing.*

*To address this weakness, there became a practice of an applicant also making an application for the appointment of provisional liquidators to seek a restructuring of the company's debts, which resulted in a moratorium pursuant to section 186 of Hong Kong's Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO"). This practice was first established in *Re Kevview Technology (BVI) Limited* [2002] 2 HKLRD 290 and approved by the Court of Appeal in *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719. It appeared to be no longer possible after the Court of Appeal decision in *Re Legend International Resorts Limited* [2006] 2 HKLRD 192, where the court considered it was not possible under sections 192 to 194 of CWUMPO to appoint provisional liquidators for the purposes of carrying out a restructuring, given those sections provide the court with jurisdiction to appoint provisional liquidators for the purpose of winding up a company.*

*However, it was confirmed in the 2018 case of **China Solar Energy Holdings Ltd [2018] HKCFI 555** that where there are grounds to appoint provisional liquidators for the purpose of winding up a company, the provisional liquidators can apply to the court after their appointment for the power to effect a restructuring if this appears likely.*

- b) The composition of the classes of creditors is only considered at the stage where the court is sanctioning the scheme, which means that the company can go through the process of convening the meetings and attending the meetings at which the classes of creditors approve the scheme by the required majority votes, only for the application to be dismissed at the final hurdle because an objection is raised and sustained as to the composition of the creditor classes. In contrast, the position in England is that the class composition is dealt with at the hearing to convene the creditors' meetings. This means that in Hong Kong, there is uncertainty and risk for the company up until the sanction hearing even if the scheme is voted on favourably at the meetings.*
- c) The Hong Kong court is not bound to sanction the scheme where the required number of votes are attained approving the proposed scheme, which again results in uncertainty as to the outcome. The court will consider a range of factors, including whether creditors have been given sufficient information about the scheme, whether the meeting was convened properly, whether objectively a reasonable person would approve the scheme, and whether the relevant class of creditors was fairly represented and the majority were not coercing the **minority**^[RD(DWH17)].*

Overall, while there are a number of advantages to a scheme of arrangement, the lack of a moratorium (unless there are grounds to appoint provisional liquidators) and the fact that the court may not sanction the scheme even if the required majority of each class of creditors approve the scheme, does lend itself to uncertainty and a lack of breathing space for a company that is expending costs on a process because it is struggling financially. This is in stark contrast to the corporate rescue procedure in Chapter 11 in the USA, which does provide a company with a stay on creditor enforcement action.

Question 3.3 [maximum 6 marks^[RD(DWH18)]

With no legislation to deal with cross-border insolvencies, how has the common law developed to assist foreign liquidations where steps need to be taken in Hong Kong? What are the pros and cons of developing the law in this way?

Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, has not become a party to any international treaties or bilateral agreements with other countries that deal with cross-border insolvency, and nor does its insolvency legislation contain any such provisions.

Initial Developments

However, the recognition of foreign liquidations and assistance to foreign liquidators has been developed in Hong Kong's common law. It has been recognised since at least the 1980s that a foreign liquidator has the right to bring an action in Hong Kong in the name of the company without requiring a formal order recognising the liquidator.² Further, the Hong Kong court has sought to assist foreign liquidators, for example by staying proceedings concerning the enforcement of a judgment against the Hong Kong assets of a company subject to bankruptcy proceedings in another jurisdiction.

*In a 2014 decision in the case of *A Co v B*, liquidators appointed in the Cayman Islands applied to the Hong Kong court for an order recognising their appointment and providing for disclosure of documents from particular unnamed respondents. The court considered that it had discretion under the common law pursuant to a letter of request from a common law jurisdiction that has a similar substantive insolvency law to Hong Kong to make an order of a type that would be available to an insolvency practitioner under Hong Kong's insolvency regime. In the subsequent Privy Council case of *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36, it was held that the common law power of assistance to foreign liquidators is available where the power that is sought to be exercised exists in both a) the jurisdiction in which the principal liquidation was commenced, and b) the assisting jurisdiction. This is known as the *Singularis Principle*.*

These two cases have given rise to the development of the common law in Hong Kong as to the recognition of and assistance offered to foreign liquidators. It is the practice of the Hong Kong court that a letter of request must be presented from the foreign court requesting the assistance of the Hong Kong court. The Hong Kong court will carefully consider the letter, and has refused to grant the orders sought where the type of order sought is not available in Hong Kong.³ Likewise, the Hong Kong court will consider the nature of any proceedings sought to be stayed by a foreign liquidator and will not always grant a stay.⁴

*The *Singularis Principle* has been applied by the Hong Kong court to offer foreign liquidators assistance in the form of an order permitting foreign insolvency practitioners to seek disclosure of documents or the examination of individual witnesses in Hong Kong. With the more common requesting jurisdictions, such as the*

² *Re Irish Shipping* [1985] HKLR 437.

³ *The Joint Administrators of African Minerals Limited (in administration) v Madison Pacific Trust Limited & Shandong Steel Hong Kong Zengli Limited* [2015] 4 HKC 215.

⁴ *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd* [2011] HKCFI 3817.

BVI and the Cayman Islands, the common law developed a "standard order" that a foreign insolvency practitioner was likely to obtain,⁵ though it was limited to any power available to the foreign liquidator in the home jurisdiction.

Should a foreign liquidator seek to access and deal with funds in Hong Kong bank accounts, the Hong Kong court requires a recognition order to be sought and granted.⁶

The common law has also developed to assist foreign officeholders involved in other insolvency processes, such as rehabilitation. One example includes staying Hong Kong proceedings in order to permit a restructuring of a Bermudan company by provisional liquidators.⁷

Pros and Cons

The benefits of developing the law in this way are that there is flexibility for considering each case on its facts and to develop new rules if required. There is no need to wait for legislators to act when a particular situation arises, if the court considers it has jurisdiction to deal with the matter itself. Further, legislators cannot possibly consider every potential scenario when drafting statutes, which gives the court the freedom to adapt as necessary.

*On the other hand, leaving it to the common law to develop the rules gives the court a wide discretion and can result in inconsistent decisions, causing uncertainty for future cases. For example, while in the *Re Z-Obee* case the court essentially recognised provisional liquidators appointed in Bermuda in order to permit a restructuring, there were concerns that the Hong Kong court might recognise "light touch" provisional liquidators appointed in support of a restructuring or other rehabilitation process where the debtor remains in possession of its assets, the likes of which are not possible under Hong Kong domestic law. In the more recent case of *Re Global Brands Group Holding Ltd* [2022] HKCFI 1789, the court suggested that in future it should generally decline to recognise such light-touch provisional liquidators.*

Recent Developments

*In *Re Up Energy Development Group Ltd* [2022] HKCFI 1329, provisional liquidators appointed in Bermuda opposed the application in Hong Kong of a creditor to wind up a company that was incorporated in Bermuda and listed in Hong Kong. The court did not agree with the provisional liquidators' argument that they could seek a recognition and assistance order in Hong Kong instead and made the winding-up order. In doing so, the court explained that it did not have the authority to give foreign liquidators actual powers under Hong Kong legislation. However, it could assist foreign liquidators with specific and limited matters. Rather than following the common practice of obtaining a blanket request for assistance on an *ex parte* application, such*

⁵ *Re Centaur Litigation SPC* (unreported, HMCP 3389/2015, 10 March 2016).

⁶ *Re China Lumena New Materials Corp (in Provisional Liquidation)* [2018] HKCFI 276.

⁷ *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165.

requests should be made *inter partes* on notice to any third parties who would be affected.

Shortly after in the *Re Global Brands* case, the court developed the common law further, by stating that the criteria for recognition should in future be determined by the location of a company's centre of main interests rather than the place of incorporation, which was previously given primacy. The determination of the centre of main interests would consider the location of the company's directors and officers, operations, assets, bank accounts, books and records and where any restructuring activities took place. However, the court did acknowledge that recognition and limited assistance will be given to an extent to a foreign office holder appointed in the jurisdiction of incorporation. This again is an example of the common law being flexible and adapting to changes in Hong Kong, following the concerns surrounding the use of recognition applications for light touch provisional liquidators to seek to bring a debtor-in-possession type proceeding into Hong Kong.

Finally, the *A v B* decision above stated that recognition could be given where there was a request from a common law jurisdiction with a similar substantive insolvency law to that of Hong Kong. The common law has now developed to recognise office holders appointed in the mainland PRC (for example in the *Nuoxi v Peking* case referred to above), despite the PRC not being a common law jurisdiction. This demonstrates the advantage of the Hong Kong court being able to develop the common law in line with policy, without waiting for legislators to act, for example in line with the new May 2021 cooperation mechanism between Hong Kong and the PRC. However, the disadvantage to applicants is again uncertainty, given the inconsistent and changing decisions.

Conclusion

Hong Kong's common law has developed from offering recognition and assistance to foreign insolvency practitioners appointed in similar common law jurisdictions that the foreign company is incorporated in, to offering recognition and assistance to the mainland PRC and to giving more precedence to a company's centre of main interests. There has also been a general shift away from giving blanket recognition and assistance under a standard order, to considering requests very carefully. With these developments in mind, it is perhaps a better approach for office holders to apply for an ancillary liquidation in Hong Kong rather than seek a piecemeal recognition and assistance order that can only grant the powers available under the law of the primary jurisdiction.

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

Question 4.1 [maximum 4 marks_{RD(DWH19)}]

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, Palm Beach Limited's liquidation would not impact the powers of the receiver to hold and/or sell the company's assets as secured by the floating charge. The receiver's realisations would not be able to be used to meet the liquidation costs⁸ or pay any unsecured creditors.

In addition, sections 79 and 265(3B) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (CAP 32) ("CWUMPO") provide that if Palm Beach Limited's unsecured assets are insufficient to meet the debts of preferential creditors, the preferential creditors are given priority over the claims of holders of debentures under any charge created as a floating charge by Palm Beach Limited, and are to be paid out of property that is comprised in or subject to the charge ie the receiver's realisations. Preferential creditors are defined by section 265(1), and are certain specific claims of employees.

However, sections 334 and 335(5)(a) of the Companies Ordinance (Cap 622) provide that Sea Breeze Incorporated ("Sea Breeze") must have registered the floating charge within one month of the date of its execution in order for it to be valid as against the liquidator. If Sea Breeze failed to register the floating charge, it would be void against the liquidator and the liquidator would be entitled to use the receiver's realisations to pay liquidation costs and unsecured creditors.

Further, section 267 of CWUMPO provides that a floating charge will not be valid if it is created within the 12-month period preceding the commencement of the liquidation, and Palm Beach Limited was unable to pay its debts at the time the charge was created, or became unable to pay its debts as a result of entering into the floating charge. In this case, the floating charge was entered into a few months prior to Palm Beach Limited's liquidation and is therefore vulnerable to the effect of section 267, if it can be shown that Palm Beach Limited was unable to pay its debts at the time or became unable to as a result of entering into the floating charge. This would depend on evidence of Palm Beach Limited's financial position at the time the floating charge was entered into. If Sea Breeze is a connected person to Palm Beach Limited, there is no need to show that Palm Beach Limited was unable to pay its debts at the time in order for the floating charge to be void as against the liquidator.

If these circumstances apply, the liquidator will be able to use the receiver's realisations for the purposes of the liquidation costs and unsecured creditors, save that in accordance with section 267(2), the floating charge will, however, still be valid to

⁸ *Butcher v Talbot* [2004] 2 AC 298, applied in *Re Good Success Catering Group Ltd* [2007] 1 HKLRD 453.

the extent of any money, property or services provided to Palm Beach Limited by Sea Breeze at the same time as or after the creation of the charge.

Question 4.2 [maximum 6 marks_[RD(DWH20)]]

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 has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, does not have any bilateral agreements with other jurisdictions dealing with cross-border insolvency, is not a party to any international treaties relating to cross-border insolvency, and has no statutory provisions on cross-border insolvency. L will therefore be reliant on common law principles developed by the Hong Kong courts in seeking recognition.

A foreign officeholder's right to bring an action in Hong Kong in the name of the company in liquidation, without having a formal order recognising the appointment, has been possible in Hong Kong since at least the 1980s.⁹ The policy behind this is that it is for the law of the company's jurisdiction of incorporation to determine the liquidator's authority to represent the company.

Obtaining Bank Documents

For similar reasons, it has been held that banks in Hong Kong should assist foreign officeholders by providing documents in relation to the company's own bank accounts without the foreign officeholder having to obtain a recognition order first.¹⁰ This means that L should be able to obtain the documents he requires from SKL's bank without a recognition order from the Hong Kong court, though in practice the bank may not abide by this and may request a recognition order. If L subsequently wishes to deal with any cash in SKL's bank accounts, L will be required to obtain an order from the Hong Kong court recognising his appointment specifically for this purpose.¹¹

Stay of Proceedings in Hong Kong

⁹ *Re Irish Shipping* [1985] HKLR 437.

¹⁰ *Bay Capital Asia Fund LP (In Official Liquidation) v DBS Bank (Hong Kong)* Unreported, HCMP 3104/2015, 2 November 2016.

¹¹ *Re China Lumena New Materials Corp (in Provisional Liquidation)* [2018] HKCFI 276.

The Hong Kong court has clarified in the cases of *FDG Electric Vehicles Limited* [2020] HKCFI 2931 and *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd* [2021] HKCFI 3817 that it will not always grant a stay of proceedings when granting recognition. It will carefully consider the nature of the proceedings that are sought to be stayed.

Examination of Auditors

L's reference to a "standard order" recognising his appointment and granting a full suite of powers in Hong Kong is a reference to the approach of the Hong Kong court following the cases of *A Co v B* and *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36. In accordance with the "Singularis Principle", the Hong Kong court will grant assistance where the power that is sought is available in both Hong Kong as the assisting jurisdiction and the Cayman Islands as the principal jurisdiction for the liquidation. A "standard order" that liquidators appointed in the BVI and the Cayman Islands and other commonly encountered common law jurisdictions was developed in the cases of *Re Centaur Litigation SPC* (unreported, HCMP 3389/2015, 10 March 2016) and *Pacific Andes* (HCMP 3560/2016). However, the standard order can be varied where it is appropriate, and is also limited to the powers that are available to the foreign officeholder in their appointed jurisdiction^[RD(DWH21)].

In this respect, while section 286B of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO") permits the examination of any person the court thinks is capable of giving information about the promotion, formation, trade, dealings, affairs or property of the company, section 103 of the Cayman Islands Companies Act (2021 revision) (the "Cayman Act") is limited to those who have acted for the company in a certain capacity. This means that L would not be able to obtain an order for the examination of individuals that is as wide as section 286B of CWUMPO. However, section 103(1)(c) of the Cayman Act covers any person who is or was a professional service provider to the company, so the auditors of SKL would be included in this definition and the Hong Kong court would be able, under the Singularis Principle, to grant an order permitting the examination of the auditors.

Procedure and Recent Developments

In order for L to obtain a recognition and assistance order in Hong Kong, L must apply to the Cayman Islands court to issue a letter of request to the Hong Kong court, requesting the assistance of the Hong Kong court for these specific purposes.

L should be aware, however, that recent developments in Hong Kong caselaw may have the following impacts on the above advice. In *Joint Provisional Liquidators of CECEP Costin New Materials Group Ltd v RSM Nelson Wheeler*,¹² the Hong Kong court made it clear that a summons seeking the production of documents from a Cayman company's former auditors could not be made under section 286B of CWUMPO, even

¹² [2021] HKCFI 794.

where a recognition order had already been obtained by the provisional liquidators appointed in Cayman, because the definition of a company in CWUMPO does not include a foreign company. The relevant power had to be exercisable under Cayman law.

In the subsequent case of *Re Up Energy Development Group Ltd*,¹³ the Hong Kong court held that it does not have any authority to give actual powers to foreign liquidators, as the powers available under CWUMPO are only available to liquidators of Hong Kong companies. Furthermore, while the court did not say that a recognition and assistance order in accordance with the Singularis Principle was no longer available, it did say that insofar as any request for assistance would affect third parties, the application should be made *inter partes* with notice to such parties. This would mean that L would need to make the application on notice to the auditors.

The most recent development, in the case of *Re Global Brands*,¹⁴ the Hong Kong court suggested that in future, the criteria for recognition of a foreign officeholder should be determined primarily by reference to the company's centre of main interests, rather than where it is incorporated. The determination of the centre of main interests would consider the location of the company's directors and officers, operations, assets, bank accounts, books and records and where any restructuring activities took place. However, the court did acknowledge that recognition and limited assistance will be given to an extent to a foreign office holder appointed in the jurisdiction of incorporation. The two such categories are:

- a) the recognition is of the foreign liquidator's authority to represent the company and "managerial assistance" is required, such as an order that a bank should act on the foreign liquidator's instructions; and
- b) recognition and limited assistance that is required by the foreign liquidator as a matter of practicality.

SKL is incorporated in the Cayman Islands, listed on the Hong Kong Stock Exchange, with its bank and auditors in Hong Kong, and has assets and a representative office in Shenzhen, PRC. Clearly there are both operations and assets in Hong Kong and the PRC, but it is not known where SKL's directors and officers are based, or where board meetings are held. However, it seems likely that its centre of main interests is either in Hong Kong or the PRC rather than the Cayman Islands. This means that L is unlikely to obtain a recognition and assistance order for all the powers he seeks, having been appointed in the place of incorporation rather than centre of main interests.

It is, however, possible that L will obtain a limited assistance order under the two categories set out in *Re Global Brands*, given that he a) wishes to obtain documents from a bank, and b) seeks to examine the company's auditors^[RD(DWH22)].

¹³ [2022] HKCFI 1329.

¹⁴ [2022] HKCFI 1789.

Conclusion

L should be able to obtain documents from SKL's Hong Kong bank without a court order, but in practice he may need a recognition order for the bank to comply.

*For assistance to be given with the examination of the auditors and a stay of proceedings, the Hong Kong court will consider these requests carefully and the powers must be available under Cayman law. Following the *Re Global Brands* case, it is likely that the court will consider SKL's centre of main interests to be elsewhere than Cayman, in which case L will only be provided with recognition and limited assistance. If L wishes for a broader range of assistance, he will need to apply for an ancillary winding up order over SKL in Hong Kong [RD(DWH23)].*

Question 4.3 [maximum 5 marks [RD(DWH24)]]

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?

A key question is whether Lapwing Limited ("Lapwing") is a company incorporated in Hong Kong. If it is and if Harrier Limited ("Harrier") wishes to wind up Lapwing, Harrier may do so by applying to the High Court in Hong Kong for a compulsory liquidation order.

Section 177(d) of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO") provides that a company may be wound up by the court if it is unable to pay its debts. Section 178(1) of CWUMPO defines a company's inability to pay debts as:

- a) a creditor owed at least HKD 10,000 by the company has served a written demand in the prescribed form on the company's registered office and three weeks has passed without payment or the debt otherwise being secured;*
- b) execution of a judgment, order or decree of any court is unsatisfied; or*
- c) it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining this, the court is to take into account the contingent and prospective liabilities of the company.*

Another key question is whether the debt owed by Lapwing to Harrier is of at least HKD 10,000. If it is, then the quickest route to establishing Lapwing's insolvency would be for Harrier to serve a statutory demand on Lapwing's registered office in accordance with section 178(1)(a) of CWUMPO and following the rules relating to the form and content of statutory demands set out in Rules 3B and 3C of the Companies (Winding Up) Rules (Cap 32H) (the "Rules").

If Lapwing does not pay the debt within the three week period, Harrier can proceed to present a petition for winding Lapwing up. Unlike in personal bankruptcy, there is no procedure for Lapwing to apply to set aside a statutory demand. If Lapwing wishes to dispute the debt under the contract, it should inform Harrier of the grounds, and Harrier can consider whether to withdraw the demand. If Harrier does not consider those reasons to be persuasive, and does not withdraw the demand, Lapwing will need to file an application seeking an injunction to prevent Harrier from presenting a winding up petition, or from advertising it if already filed. The Hong Kong court has stated that in such an application, Lapwing would need to adduce evidence that there is a dispute, and that it is solvent. The threshold to satisfy the court is higher than that required on a summary judgment application.¹⁵ In addition, Rule 32 of the Rules provides that there is only 7 days after the verifying affidavit is filed for such evidence to be filed.

*A further key question is whether the contract for the supply of software products contains an arbitration clause or a jurisdiction clause for the determination of any disputes under the contract. It was previously the position that a creditor could still petition for winding up, and the petition proceedings would not be stayed in favour of arbitration unless the debtor was able to show that a *bona fide* dispute on substantial grounds existed in relation to the underlying debt. The position changed in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426, where the Hong Kong court indicated that a winding up petition would be stayed in favour of arbitration proceedings unless the underlying debt was admitted by the debtor. Most recently, the Court of Appeal overturned a bankruptcy order made under a loan agreement that contained an exclusive jurisdiction clause in favour of New York.¹⁶ While it does not appear from the comments made by the director of Lapwing that this debt is disputed, the director has indicated that Lapwing will fight any petition to wind it up and so Harrier should be aware that if the underlying contract contains an arbitration or other jurisdiction clause, Lapwing may seek to stay the winding up petition in favour of arbitration or the determination by another court of whether the debt is payable.*

In conclusion, the best option for Harrier is likely to be the issue of a statutory demand against Lapwing followed by a winding up petition. However, to advise properly, Harrier would need to explain i) the amount of the debt, ii) where Lapwing is incorporated and iii) if there is an arbitration clause or other jurisdiction clause in the supply contract.

¹⁵ *Hung Yip (HK) Engineering Co Ltd v Kinli Civil Engineering Ltd* [2021] HKCFI 153.

¹⁶ *Re Guy Kwok Hung Lam, ex parte Tor Asia Credit Master Fund LP* [2022] HKCA 1297.

* End of Assessment *

TOTAL MARKS: 45 OUT OF 50