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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.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
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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): Incorrect (0 marks) - (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.**

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

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

**(d) There must be a reasonable possibility that the winding-up order would benefit those applying for it.**

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

Question 1.4

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

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

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

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

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

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

Question 1.5

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

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

**(b) the date on which the petition is presented.**

**(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.**

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

**(b) This statement is true as all aspects of English law ceased on the Handover as otherwise this would be seen as conferring an advantage on the UK.**

**(c) This statement is true as after the Handover only decisions of the Hong Kong court are allowed to be cited and relied upon.**

**(d) This statement is true as although decisions from common law jurisdictions can be cited and may be persuasive, they are not binding.**

Question 1.9

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

**(a) cease completely, with no exceptions.**

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

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

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

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.**

**A receiver, who is appointed in accordance with a charge over a company's assets, is primarily accountable to the secured creditor who appointed him or her. The key responsibility is to realise the charged asset's value to repay the secured debt, with an obligation to obtain the best price reasonably attainable at the time of sale.**

**Simultaneously, the receiver also has a duty of care to the debtor company, whose assets are under his or her management. The receiver must act in good faith, use their**

**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 marks) Well written answer but Should identify that receiver is agent of the chargor hence residual duties. Also see 2nd and 3d comments below - suggests slight misunderstanding of receiver role

**Commented [RD(DWH12):** Better described as a residual duty

*powers for appropriate purposes, and avoid negligent actions that could potentially harm the company.*

*Despite the fact that the receiver's primary allegiance is to the appointing creditor, they also have an obligation of fairness to all unsecured creditors. This does not mean the receiver has to ensure the maximum possible return for unsecured creditors, but rather, the receiver must abstain from unfair or oppressive conduct towards them.*

*Lastly, the receiver is bound by statutory regulations and rules during the sale of the charged asset. In the Hong Kong context, this would include requirements set out in the Companies Ordinance.*

**Question 2.2 [maximum 3 marks]**

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

*The liquidator needs to satisfy the following elements:*

- Relationship of creditor-debtor. *A transaction needs to exist between the debtor (the company in liquidation) and the creditor (the entity receiving the preference).*
- Preferential treatment. *The transaction has resulted in the creditor being placed in a more beneficial position than they would have been in the event of the company's liquidation.*
- Insolvency or looming insolvency. *The company was insolvent at the time of the transaction or became insolvent as a result of the transaction.*
- Intent to prefer. *The company intended to prefer that particular creditor over others. This is often the most challenging aspect to prove and requires demonstration that the company's dominant motive was to give that creditor an advantage.*
- Timeframe. *The transaction should have happened within six months of the commencement of the winding up.*

*These are broad principles and the exact criteria may vary depending on the specifics of the case and the precise statutory provisions under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).*

**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.*

**Commented [RD(DWH13)]:** Only indirectly, and then only if the company is insolvent

**Commented [RD(DWH14)]:** What rules? There are statutory rules as to registration etc. but not method of sale

**Commented [RD(DWH15)]:** (3 marks) Full marks given as clear and full answer although should also mention that the allegedly preferred person can be a guarantor, not just creditor

**Commented [RD(DWH16)]:** (3 marks) The answer should mention the need to show that the company's principal Mainland assets are in one of the pilot areas or that it has a place of business or representative office there

Geographical scope. **The pilot areas in the Mainland are: Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province.**

Topical scope. **Any collective insolvency proceedings under CWUMPO or the CO, including compulsory liquidations, creditors' voluntary liquidations and schemes of arrangement promoted by a [provisional] liquidator.**

COMI. **The debtor's COMI must be in Hong Kong, and have been there for at least 6 months.**

Letter. **A letter of request from the Hong Kong court is necessary.**

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

Question 3.1 [maximum 4 marks]

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

**The statutory authority for the Hong Kong courts to wind up a non-Hong Kong company is given in Section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (CWUMPO). It sets out that, under certain conditions, the court may wind up any company incorporated outside of Hong Kong if it has sufficient connection with Hong Kong.**

**However, statutory provisions alone are not sufficient to wind up a non-Hong Kong company. The courts also take into consideration certain common law principles to decide whether to exercise that jurisdiction. This is grounded in principles of international comity and respect for the jurisdiction of the place of incorporation. Key factors the Hong Kong court may consider when determining whether to wind up a foreign company include:**

- **The company must have a sufficient connection with Hong Kong, which may be established by the presence of assets in Hong Kong, or the fact that the company carried out business or had operations in Hong Kong.**
- **There must be a reasonable possibility that the winding-up order will benefit those applying for it - typically the company's creditors.**
- **The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.**
- **It must be fair and just for all stakeholders. The court will consider whether the winding-up would cause any potential harm to parties in the jurisdiction of the company's origin.**

Commented [RD(DWH17)]: (3.5 marks)

God answer but should differentiate between the 3 core requirements applicable to foreign companies and discretionary elements that apply to all winding up applications



- **The court also considers whether there are parallel insolvency proceedings in the jurisdiction of incorporation and whether winding up in Hong Kong would interfere with those proceedings.**

**Thus, the exercise of jurisdiction by the Hong Kong courts to wind up a non-Hong Kong company involves a careful balancing of the statutory provisions and these common law principles.**

**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 a statutory mechanism under Hong Kong's Companies Ordinance (Part 13, Division 2), which enables a company in financial distress to restructure its debts and reach a compromise with its creditors or members, so as to avoid winding up. It's a flexible tool that can be tailored to the specific needs of the company and its stakeholders.**

Pros of scheme of arrangement

- Flexibility. **A scheme can cover various arrangements including debt rescheduling, equity swaps, or business transfer.**
- Binding on all parties. **If approved by the necessary majority of creditors (75% in value of each class of creditors present and voting), and sanctioned by the court, the scheme is binding on all members or creditors, including the dissenting minority.**
- Avoids liquidation. **The scheme can allow an insolvent company to continue trading, preserving jobs, and often results in a better return for creditors than would be achieved in liquidation.**

Cons of scheme of arrangement

- No statutory moratorium. **Unlike in some other jurisdictions, Hong Kong law does not currently provide for a statutory moratorium or stay of proceedings during the formulation and proposal of a scheme. This can leave the company vulnerable to actions by creditors during this period.**
- Complexity and costs. **Schemes of arrangement can be complex and time-consuming to prepare, involving considerable legal, accounting, and administrative costs.**
- Requirement for court approval. **The scheme needs to be approved not only by the requisite majority of creditors but also sanctioned by the court. The court will need to be satisfied that all material information has been placed before the creditors to enable them to make an informed decision.**

**Commented [RD(DWH18)]:** (3 marks)

Clearly written and good pros/cons 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

Also, see missing element for statutory majorities - note below

**Commented [RD(DWH19)]:** And majority in number

- Lack of cross-class cram-down. **Unlike in some jurisdictions, Hong Kong law does not currently allow for a cross-class cram-down. This means that a dissenting class of creditors can block the scheme, even if it's fair and equitable.**

**In summary, while the scheme of arrangement can be a powerful tool for corporate rescue, it has limitations, particularly the lack of a statutory moratorium and the absence of a cross-class cram-down. There is ongoing debate\* in Hong Kong about possible reform of the corporate rescue framework to address these issues.**

**\* E.g. 'Hong Kong Special Administrative Region is still considering the introduction of a statutory corporate law rescue framework, a potential insolvency law reform that has been debated for decades.' China Law Business Journal, 20 July 2023, [law.asia/australia-insolvency-law-reform](http://law.asia/australia-insolvency-law-reform)**

**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 the absence of a statutory framework for cross-border insolvencies, the Hong Kong courts have developed and employed common law principles to facilitate assistance to foreign liquidations where necessary steps are to be executed in Hong Kong. The principles stem from the notion of universalism, which advocates for a single bankruptcy proceeding in the debtor's home country, with other jurisdictions recognising and assisting that main proceeding.**

**Primarily, the Hong Kong courts have recognized the principles of comity (mutual recognition and respect between jurisdictions) and reciprocity. This has led to the practice of 'modified universalism', where the courts will offer assistance to foreign liquidators, subject to local laws and public policy considerations.**

Pros of developing the law this way

- Flexibility. **The common law has inherent flexibility, which allows the courts to adapt to different situations and offer appropriate relief.**
- Facilitates cross-border cooperation. **This approach promotes international cooperation in multi-jurisdictional insolvency cases and facilitates efficient and orderly administration of assets located in Hong Kong.**
- Protects local creditors. **The courts can ensure the protection of local creditors' rights and public policy considerations.**

Cons of developing the law this way

- Uncertainty. **As common law principles are judge-made, there can be a degree of unpredictability, which can lead to a lack of clarity for liquidators, creditors, and other stakeholders.**

**Commented [RD(DWH20)]:** In practice, a well prepared scheme can deal with this

**Commented [RD(DWH21)]:** (3 marks)  
Very good pros and cons but does not give any detail on how the position has developed through the common law.

Need to 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.

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)

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- No automatic recognition. **Unlike statutory provisions, common law recognition is not automatic and requires a separate application to the court, which could cause delays and increase costs.**
- Limited scope. **Common law assistance to foreign liquidators is often more limited in scope compared to the powers available under a statutory framework, which can make the process less efficient.**
- Lack of harmonisation. **The absence of a legislative framework can lead to inconsistencies in the approach between different jurisdictions, causing potential conflicts and complexities in cross-border insolvencies.**

**In conclusion, while the development of the common law in Hong Kong has provided some level of support for cross-border insolvencies, it is generally accepted that a statutory framework would provide a more certain and comprehensive solution. The Hong Kong government is considering introducing a statutory regime for cross-border insolvency, following the UNCITRAL Model Law on Cross-Border Insolvency.**

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.**

**In addressing the liquidator of Palm Beach Limited, we would need to discuss the implications and enforcement of a floating charge under Hong Kong law.**

**A floating charge is a form of security that a company can grant over its assets, which allows the company to continue to use the assets in its business until an event occurs which causes the charge to "crystallize" into a fixed charge. This typically happens when a receiver is appointed or the company goes into liquidation.**

**Upon the appointment of a receiver by Sea Breeze Incorporated under the terms of the floating charge, the receiver's primary duty is to realize the assets subject to the floating charge for the benefit of the charge holder - in this case, Sea Breeze Incorporated. The receiver does not owe any duty to unsecured creditors and does not have an obligation to pay the liquidation costs.**

**That said, under Section 265 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), there is a requirement to set aside a portion of the assets covered by the floating charge - referred to as the "statutory set-aside" or "preferential debts" - for the payment of certain debts in priority to the claims under the floating charge. These include wages, salaries, and other amounts due to employees, as well as contributions to any employee compensation insurance.**

**Commented [RD(DWH22)]:** (2.5 marks)  
A good answer but see below, and also need to check if required registration and if so, whether was in fact properly registered. Otherwise the charge would not bind the liquidator.

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**Commented [RD(DWH23)]:** I have not seen this expression used before

**Commented [RD(DWH24)]:** These payments only come out of floating charge realisations if no/insufficient uncharged assets

*It would be necessary to review the terms of the floating charge documentation, as well as the details of the assets subject to the floating charge, to understand whether there are any assets that may fall outside the scope of the floating charge. Also, the liquidator may wish to investigate the circumstances of the creation of the floating charge. If the floating charge was granted at a time when the company was insolvent, or its grant resulted in insolvency, it may be possible to challenge the validity of the floating charge, especially if it was granted within the voidable transactions period before the onset of liquidation.*

*The discussion would need to cover these points, and based on the information provided, the liquidator can decide on the appropriate course of action.*

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.*

*In advising the Cayman liquidator (L), we need to clarify a few key points about Hong Kong's approach to cross-border insolvency matters.*

*First, it's important to note that Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, and there is no statutory mechanism for automatic recognition of foreign insolvency proceedings or foreign insolvency officeholders. Instead, the recognition and assistance granted to foreign insolvency officeholders is based on common law principles.*

*Hong Kong courts are generally willing to assist liquidators appointed in the company's place of incorporation, which in this case is the Cayman Islands. However, the recognition and assistance are not automatic and would typically be based on a case-by-case basis. The Hong Kong court would need to be satisfied that it is just and proper to exercise its discretion to recognize and assist the foreign liquidator.*

*In relation to obtaining a "standard order" with a full suite of powers, it should be clarified that there is no such "standard order". The specific powers granted to the foreign liquidator would be determined by the Hong Kong court, based on what the court deems necessary and appropriate for the administration of the foreign liquidation.*

*The foreign liquidator would need to make an application to the Hong Kong court, demonstrating the necessity of the requested powers for the proper conduct of the liquidation. For obtaining documents from SKL's bank in Hong Kong and to examine*

**Commented [RD(DWH25)]:** Should identify what the periods are (and fact that if Sea Breeze connected, no need to show insolvency)

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

A clearly written answer but it misses a few key points, per other comments below, and:

Up Energy holds that cannot "give" powers, so even if would assist, would not be the "full suite" hoped for by L

there are still the Singularis principles – with narrower examination powers in Cayman this could be problematic

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

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**Commented [RD(DWH27)]:** Global Brands says must look at COMI, being examples: Location of directors, officers, board meetings; Location of operations, assets, bank accounts (here – the listing?).

**Commented [RD(DWH28)]:** Bay Capital says should not need order for this element

*the auditors, it's likely the court would consider these powers necessary for the liquidation process. However, obtaining a stay of any actions that any creditor of SKL may bring in Hong Kong might not be as straightforward, and the court would need to consider whether this is necessary and in the interests of the creditors as a whole.*

*In terms of procedure, the liquidator would need to present evidence to support the application for recognition and assistance, including evidence of the liquidator's appointment, the company's insolvency, and the need for the requested powers.*

**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?*

*In advising Harrier, it is important to carefully consider the situation and gather additional information to guide the appropriate course of action. Here are the key questions to ask and some preliminary comments:*

- 1. Confirmation of debt. We need to confirm that the invoices have not been paid. How many are outstanding and what is the total amount due? Also, has a formal demand for payment been issued?*
- 2. Dispute over the debt. Although Lapwing has not complained about the supplies, it would be important to ascertain if there is any possibility that they may dispute the debt on the basis of quality of supplies or any other grounds.*
- 3. Financial health of Lapwing. Does Harrier have any information about Lapwing's overall financial condition? Their inability to pay could be a sign of serious financial distress, not just a temporary cash flow issue.*
- 4. Contractual terms. What are the terms and conditions of the contract between Harrier and Lapwing? Are there any specific provisions for termination, late payment or dispute resolution?*
- 5. Future relations. What is Harrier's desired outcome? Do they want to maintain the business relationship or are they willing to sever ties if necessary?*

*As for comments, here are a few initial observations:*

- If Lapwing's failure to pay is due to insolvency, then presenting a winding-up petition may be a valid course of action. However, winding up a company is a serious matter and should be considered as a last resort.*

**Commented [RD(DWH29)]:** And a letter of request from the Cayman court

**Commented [RD(DWH30)]:** (2.5 marks)

The answer includes good questions to ask Harrier, including as to alternative options, but given the question does not fully explore the winding-up option favoured by Harrier in its approach to you. For example:

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

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

Statutory demand procedure – prescribed form needed for example.

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

Any arbitration or ECJ clause?

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**Commented [RD(DWH31)]:** Note Lapwing says it 'will fight'

**Commented [RD(DWH32)]:** All the more reason to wind-up. Harrier could serve a statutory demand to establish deemed insolvency

- *Winding up a company can be a lengthy and expensive process, and there is no guarantee that Harrier will recover all the outstanding debt.*
- *Before proceeding with a winding-up petition, Harrier may wish to consider other options such as alternative dispute resolution options such as negotiation or mediation, or a simple ordinary commercial litigation debt action to recover the money it is owed.*
- *If Harrier decides to proceed with a winding-up petition, it is crucial to ensure that the debt is not disputable. Otherwise, Lapwing could potentially defend against the winding-up petition on the grounds that the debt is disputed.*
- *If a winding-up petition is presented, Lapwing may choose to fight it. The grounds on which Lapwing could potentially resist the petition could include disputing the debt, asserting that they are solvent, or arguing that winding-up is not in the best interests of creditors as a whole.*

*\* End of Assessment \**

**TOTAL MARKS: 34.5 OUT OF 50**