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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.***

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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.*

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

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

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

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

Question 1.4

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

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

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

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

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

Commented [RD(DWH4): Incorrect (0 marks) - see text at 6.4.1 (sections 79, 265B(3) of CWUMPO). Note question states that the entirety of the company's assets are covered by the charge, so there can be no uncharged assets for the liquidator to meet preferential claims

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.

Receivers appointed out of Court are appointed by a secured creditor - the power to so appoint arises from the debenture or charge documentation.

When a receiver is appointed pursuant to a charge (the security documentation in particular, which will set out its powers and obligations), a receiver is an agent of the charger (the Company / borrower) and their primary duties are owed to the charge holders (the lender).

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)]: (3 marks)
A good answer

When selling the charged asset, however, there is a residual duty to the borrower to act with reasonable care and skill. Like a selling mortgagee, when selling the charged asset, a receiver must act in good faith and in pursuant to the powers granted to them under the debenture or charge documentation. Receivers are generally free to put the debenture or charger holder's interests first when making decisions, even where it may be disadvantageous to the borrower company, subject to an overriding requirement (noted just above) that in making decisions must use reasonable skill and care and answer to the company if they do not do so.

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 liquidation is one whereby a company is wound up by order of the High Court, typically pursuant to a petition presented by creditors on the grounds of insolvency. In relation to unfair preferences, those occur where an insolvent company acts to place a creditor or a guarantor in a better position that they were upon entry into the company's insolvency (sections 266, 266A and 266B CWUMPO). A company's liquidator can apply to set aside any such transaction. Transactions that may be captured are those granting security as well as payments, where any such transaction is, relevantly, entered for in the 6 month period before commencement of winding up (or 2 years where the beneficiary was a person connected to the company). The liquidator needs to prove that:

- at the time of the alleged unfair preference was provided, the company was insolvent (unable to pay its debts or became unable to pay them) as a result of the impugned transaction; and**
- that the company was acting with a desire to improve that person's position in the liquidation.**

Orders available once an unfair preference is proven, are set out in section 266 of the 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.

In May 2021, a new arrangement between Hong Kong and certain pilot areas of Mainland PRC (Shanghai, Ziamen, Shenzhen), came into effect for co-operation between Hong Kong and the Mainland. The arrangement enables Hong Kong officeholders to obtain recognition and assistance from those pilot areas of the Mainland and vice versa (it arose by virtue of a record of meeting between the

Commented [RD(DWH12): (2 marks)
Good answer but see notes below

Commented [RD(DWH13): Not quite right. The position is looked at to see if the act puts the creditor/guarantor into a better position than other creditors if the company goes into liquidation. A preference could not be created after the liquidation

Commented [RD(DWH14): Need to show was insolvent or became insolvent as a result...

Commented [RD(DWH15): (3.5 marks)
Good answer. For full marks, see comments below

Commented [RD(DWH16): Strictly, the arrangement is with the whole of the Mainland - but operable in these pilot areas only at present

Supreme Court of the Mainland and Hong Kong Government, and has been supplemented by an opinion of the Supreme Court). The Supreme Court opinion guidance provides that Hong Kong insolvency proceedings means those collective insolvency proceedings via CWUMPO (or CO) and will include liquidations. A debtor's COMI must be situate in Hong Kong, and COMI generally means the place of incorporation of a debtor, but relevant factors will include the place of principal office, principal place of business, location of principal assets of the debtor. The debtor's COMI must have been in Hong Kong continuously for 6 months or more. Where a debtor's assets are situate in a mainland pilot area, or its place of business or representative office is in those areas, the Hong Kong Administrator can apply for recognition and assistance. Letters of requires from the Hong Kong Court will be required. An example of this mechanism in action was seen in Hong Kong Fresh Water International Group Ltd [2022] HKCFI 924.

Commented [RD(DWH17)]: Principal assets

Commented [RD(DWH18)]: request

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH19)]: (4 marks)

A good answer - although intro not entirely relevant

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.

Under Hong Kong law, there is no formal statutory definition of insolvency. Hong Kong Court's will consider both the balance sheet and cash flow tests for insolvency, as required (see e.g. HCK China Investments Limited and another v Wah Nam Group Limited (unreported, HCCW 166/2000, 26 July 2000). A petition can be presented to the Hong Kong Court to wind up a company where it is unable to pay its debts, amongst other grounds. An inability to pay debts is defined in section 178 of CWUMPO, and for winding up *unregistered* foreign companies, see section 327(4)(d) of CWUMPO. In summary, a company is statutorily deemed unable to pay its debts where (1) a creditor has served written demand and the company has not paid the demand within three weeks after service, (2) execution of a judgment, decree or order of any court in favour of a creditor of the company is unsatisfied in whole or in part and (3) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

Commented [RD(DWH20)]: Relevance?

An unregistered company is defined as a company not registered under the companies legislation (section 326 of CWUMPO).

An unregistered company can be wound up as follows (see section 327 of CWUMPO):

- where the company is dissolved or ceased carrying on business or only doing so for purposes of winding down;
- where the company is unable to pay its debts; and
- if a Court determines it just and equitable that the company be wound up.

To wind up an unregistered company in Hong Kong, the petitioner must satisfy the three core requirements set down in the Kam Leung Sui Kwan v Kam Kwan Lai and Others (2015) 18 HKCFAR 501 - there must be (1) a sufficient connection with HK (assets can be of any nature (see e.g. Re Irish Shipping Ltd [1985] HKLR 437). If no assets exist, there must be a genuine substantive link with the jurisdiction, such as business trading activities; (2) a reasonable possibility that a winding up order would benefit the applicant - as long as the benefit could be said to be a real possibility, as opposed to a theoretical one, this requirement should be satisfied (see e.g. Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd [2022] HKCFA 11) and (3) the Court must be able to exercise jurisdiction over one or more persons interest in the distribution of the company's assets - this requires the petitioner to show that there are persons who have a sufficient economic interest in the winding up of the company justifying the order (see e.g. Re China Medical [2014] 2 HKLRD 997). The petitioner must state how each of these three requirement is satisfied (see Excellent Asia (BVI) Limited v Mas Media Group Ltd [2021] HKCFI 3605).

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.

To obtain sanction of the Court for a scheme of arrangement, the application must show that the Court has jurisdiction in respect of the company and that the scheme would be effective such that it would be recognised in other jurisdictions.

Pros of this tool for corporate rescue include:

- parallel schemes in multiple jurisdictions are possible, though, increasingly difficult to obtain - applicants now need to positively identify in its evidence why the parallel scheme must be introduced (China Oil Gangran Energy Group Holdings Limited (No 2) [2021] HKCFU 1592).
- a Hong Kong Court can sanction a scheme for companies not incorporated in Hong Kong, provided there is a sufficient connection between that foreign company and Hong Kong (see e.g. Re LDK Solar Co Ltd [2015] 1 HKLRD 458). This requirement is generally not understood to mean that a company needs to establish its COMI is in Hong Kong, however, similar factors are considered.
- They are widely used for restructuring companies listed on the HKSE - once in difficulty, trading in a company's shares are usually suspended. The Exchange then issues "redemption guidelines" identifying what's required for the suspension to be lifted. 18 months is then provided to meet the guidelines.

Cons of this tool for corporate rescue include:

- A recurring issue meeting the requirements for this tool arises because many of the companies listed on the HKSE are foreign companies, and also as contracts

Commented [RD(DWH21)]: (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

may be governed by non-Hong Kong law, and for many modern debt instruments, this is typically the case.

- Hong Kong Courts have recently questioned whether parallel schemes are available, questioning the need for any scheme in the place of incorporation (see e.g. *Re Da Yu Financial Holdings Ltd* [2019] HKCFI 2531).
- A scheme in an offshore jurisdiction in respect of a compromise of Hong Kong law governed debt will be effective only for a creditor who submitted to that foreign jurisdiction, but will not be binding on those creditors who do not participate in the scheme proceedings (an application of the *Gibbs* principle).
- Despite the popularity of the use of schemes re HKSE listed companies, the rules are very stringent, and the Hong Kong Courts have made clear that it will not make decisions open to interpretation as to any indication of what the Exchange should do in certain circumstances (see e.g. *Burwill Holdings Limited* [2021] HKCFI 1318). There is also little weight given to corporate rescue culture.

Commented [RD(DWH22)]: Yes, but need to say why this is an issue (Gibbs principle)

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?

Commented [RD(DWH23)]: (3 marks)
A reasonable answer but mixes up ancillary liquidation issues and recognition/assistance issues. What about, for example, recognising office holder as agent of company if that is the case in the law of the place of incorporation

Hong Kong Courts have always applied common law principles to recognise and assist foreign insolvency procedures where appropriate.

The Hong Kong Court's jurisdiction to wind up companies that are not incorporated in Hong Kong, can apply to free standing Hong Kong liquidations, or can be used to commence and aid ancillary liquidations in Hong Kong where a principal liquidation is elsewhere. In dealing with the ancillary liquidations, the Hong Kong Court's have used the approach of modified universalism (e.g. *Re Global Brands Group Holding Ltd. (in liquidation)* [2022] HKCFI 1789) - this means that the liquidation in Hong Kong will generally be treated as ancillary in the sense that the liquidator's functions are to collect assets in HK, settle a list of creditors in HK and transmit assets and list to the principal liquidators to enable the declaration of a dividend and payment of the same (see e.g. *Re Pioneer Iron and Steel Group (Unreported, HCCW 322/2010, 6 March 2013)* at [30]).

Commented [RD(DWH24)]: Global Brands is not really an ancillary liquidation case. There is a difference between an ancillary liquidation and an application for recognition and assistance

The Hong Kong Court needs to be satisfied that the three core requirements are met in order to grant an ancillary winding up order. No less stringent test is appropriate (*Re Pioneer Iron and Steel Group*). Liquidators appointed in ancillary liquidations in Hong Kong enjoy powers exercisable under CWUMPO.

Recent decisions have provided further clarification on the assistance offered to foreign officeholders, including in:

- ***A Co and B*: where orders were granted to recognise the appointment of liquidators in Cayman, and to order the production of documents from certain**

unnamed respondents in Hong Kong. The companies could have been found, pursuant to a letter request from a common law jurisdiction with a similar substantive insolvency law, to be able to make an order of a type which is available to a provisional liquidator or liquidator under HK's insolvency regime.

- *Singularis Holdings v PwC*: explored and clarified that the common law power for assistance arises where powers to be exercised exist in the jurisdiction of the principal liquidation and assisting jurisdiction.

Therefore, in view of these decisions, to obtain recognition and assistance orders in Hong Kong, a foreign rep must present a letter of request issued by a foreign court requesting assistance.

Further, the *Global Brands* decision makes clear that it is a requirement that the proceedings being assisted are collective insolvency proceedings - the Court in that case therefore declined to give assistance to liquidators of a solvent company.

In terms of the law developing in this way, there are pros and cons:

1. Pros:

- a. It is flexible and Courts can adapt to changing circumstances and developments in technology and the way business is conducted.
- b. Courts can provide clarity by interpreting obscure or untested legislation, and guidance for procedures in future applications.

2. Cons:

- a. As it is flexible, change, including drastic and unexpected change, can be introduced. This can make planning difficult, and in some instances, impossible.
- b. Courts can limit the utility of recognition and assistance provisions, or strictly interpret existing (and useful) requirements and procedures. E.g. following the *Up Energy* and *Re Global Brands* decisions, judges have developed Hong Kong law in relation to assistance by giving primacy to a company's COMI, instead of giving primacy to a company's place of incorporation (as was previously the case).

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.

Commented [RD(DWH25)]: And in company's COMI

Commented [RD(DWH26)]: Why is that a con?

Commented [RD(DWH27)]: (3 marks)

A good answer that just misses that to be void, the floating charge not only must be given within the relevant period but also when the company was insolvent (or became insolvent as a result of the charge), except to extent of new money; and that insolvency need not be shown if chargee (Sea Breeze) is connected to Palm Beach.

Should also consider whether SB's charge operates as an unfair preference

First, I would advise the liquidator that general in Hong Kong, secured creditors and their security are not dealt with as part of the insolvency process. The fact of them holding security typically means they are able to enforce their security without accord to any insolvency on foot. The insolvency process in Hong Kong is aimed at being a collective process to benefit unsecured creditors, whereby officeholders realise available assets for the benefit of unsecured creditors. Assets which are subject to security arrangements are usually not available to be realised by officeholders in liquidation.

Exceptions do exist to the above general position. E.g. where a security must be registered by has not been, the security is therefore void as against the officeholders. Further, preferential creditors must be paid out of assets that are subject to a floating charge before such assets are available for use to satisfy the floating charge holders - that is unless the company is in liquidation and there are sufficient assets to make payments out of the general estate. Section 79 of CWUMPO provides that preferential claims must be met out of a floating chare realisations. Note that section 265(3B) clarifies that when in liquidation, the preferential claims are paid out of floating charge realisations only to the extent that there are insufficient uncharged assets available for the liquidator. Further a floating charge created within a prescribed period before commencement of liquidation can also be voidable.

I would advise the liquidator that the realisations made by a receiver out of charged assets are not available to the liquidator to meet the costs of the liquidation. Nor will the realisations be available for payment of any unsecured creditor, unless and until the secured creditor is repaid to the extent secured.

I would also advise the liquidator that a secured creditor who submits a proof of debt can only vote or prove the extent it is unsecured. If a creditor does not properly value its security or does not account at all, that security is deemed to be waived and the asset(s) is available for realisation by the liquidator for benefit of the unsecured creditor body.+

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.

Commented [RD(DWH28)]: (3.5 marks)

A reasonable answer but see comments below, and also:

Does not address client's question about a stay

Should not need order to get bank documents (Bay Capital v DBS)

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

The Hong Kong Court does grand recognition and assistance orders permitting foreign officeholders (like L on these facts) to examine individuals in HK and to seek the production of documents (see e.g. Re BJB Career Education Co Ltd [2017] 1 HKLRD). When presented with these applications, the HK Court compares the scope of the relevant provisions between Hong Kong and the requesting jurisdiction(s), pursuant to a principle from the Singularis decision.

In relation to the most common jurisdictions for HK (BVI and Caymans), a "standard order" that a foreign rep could obtain has been developed in the cases, though this can be departed from. The standard order was annexed to the Centaur decision, and further developed in the Pacific Andes case. A departure from this standard order can be seen in the Re Rare Earths Magnesium Technology Holdings Ltd [2020] HKCFI 2260 case. I would advise L that any standard order is limited by the proviso that any power sought in Hong Kong must be subject to the powers available in Cayman (as its home jurisdiction) - it should be noted in this regard that, Cayman legislation permitting examination is far more restrictive than in Hong Kong (section 268B of CWUMPO). In the circumstances of these facts, I would advise L that it may be better if they sought an ancillary liquidation as opposed to a recognition order - such an option is also supported by recent case law developments in HK.

Should L wish to go further than obtaining documents and obtain information dealing with HK assets, which we SKL has, L should apply for a specific recognition order for that purpose (Re China Lumena New Materials Corp (in Provisional Liquidation) [2018] HKCFI 276).

As the proposed application for recognition concerns an *insolvent* liquidation in Cayman, the issues encountered by the application in Global Brands are not relevant here. Following the A v B Co decision, L should seek to obtain recognition by obtaining a letter of request from the Cayman Grand Court and making a recognition application in Hong Kong, expecting to obtain a standard order that stated L has the power to take steps in HK provided the relevant power was available to the liquidator in Cayman and Hong Kong.

However, the decisions of Re Up Energy Development Group Ltd and Re Global Brands have refocused the Court's attention from giving primacy to a company's place of incorporation, to considering a company's COMI, for purposes of considering requests for assistance by foreign liquidators. In this case, the foreign liquidation was made in the jurisdiction of the company's incorporation. Assistance is sought in HK, but the company trades on the HKSE and has a representative office and assets in China, which is arguably its COMI. Recognition in HK could historically be obtained where the foreign proceeding was a collective proceeding, and opened in the company's place of incorporation - both such requirements are met on these facts. However, developments in the law have refocused the Court's primacy to be to a company's COMI, which here may be Shenzhen. If J can point to a sufficient connection with HK, it may be advisable (and in accordance with Up Energy) to obtain parallel winding up orders in HK first, before seeking recognition. Or, as specific steps are sought to be

Commented [RD(DWH29)]: Why not? Global Brands is relevant in that one must consider COMI

Commented [RD(DWH30)]: Not really - this practice has been departed from as per your answer earlier

Commented [RD(DWH31)]: If get a parallel winding up, would not also need recognition

taken, seeking a specific recognition order for purposes of the document request and examination, is a further alternative.

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?

The first key question that should be asked is whether Lapwing gave any form of security to Harrier in respect of its supply arrangement, which might include a pledge, lien, mortgage and or fixed or floating charge of its assets to Harrier, in respect of their supply arrangements. The answer to that question will determine what options are available to Harrier to seek repayment of the debts owed by Lapwing.

A creditor, such as Harrier here, with security will typically obtain priority over the debtor's unsecured creditors, although there are certain exceptions (including realisations from floating charges, certain employee payments, etc.).

Depending on the security held (if any), the options available to Harrier include:

- a. Pledge: if Lapwing pledged a negotiable instrument, such as a bill of lading - a pledge entitles the holder to an implied power of sale. This could be sued by Harrier to satisfy the debt it is owed by Lapwing, if issues.**
- b. Charge: a floating charge permits a debtor to continue using the asset, or class of assets (like stock and receivables) until a crystallisation event arises. When a triggering event occurs, such as non-payment under the relevant contract, the debtor's right to use the assets terminated, and the security becomes fixed over those assets in the relevant class. The instrument creating the charge will likely include provisions dealing with insolvency. If Lapwing gave a floating charge over its assets for provision of the goods by Harrier, depending on the precise wording of the debenture or note (creating the charge), Harrier can probably take control over the charged assets and realise them to repay the debt owed (subject to certain payments for things like priorities or certain employee payments).**

An important question will be whether the security is registered, as if it required to be (see section 334 of CWUMPO in this regard re company's undertaking or property in particular), and was not, it is voidable by Lapwing as against Harrier. Further, it is important to ask when any charge was entered into. Section 267 of CWUMPO provides

Commented [RD(DWH32)]: (2 marks)

Good to raise possibility of security but that is not the focus. Should address:

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 EJC clause?

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

Commented [RD(DWH33)]: A good question but perhaps unlikely in context of question. If Harrier had obtained security, could expect client (Harrier) to not ask about winding up

that a floating charge will not be valid if entered into within 12 months prior to commencement of liquidation. Another question is whether and how many other charges over Lapwing's assets exist, and if they are registered or not.

If no security is held, Harrier ought to serve a statutory demand personally on Lapwing seeking payment for the debt owed. Failure to pay within the time prescribed by the statute will result in a deemed insolvency, and Harrier could then seek to wind up Lapwing on the basis of its insolvency.

*** End of Assessment ***

TOTAL MARKS: 35 OUT OF 50