



Style Definition: INSOL style heading 4: Justified

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).**
- 4. You must save this document using the following format: [studentID.assessment8C]. An example would be something along the following lines: 202223-336.assessment8C. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 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).

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 appointed pursuant to a charge owes duties to the charge holder and not to the company. Accordingly, a receiver is entitled to put the interests of the charge holder first, even if such action may be disadvantageous to the company.

These duties owed by the receiver to the charge holder are to act in good faith and in accordance with the powers given. The receiver should also act with reasonable skill and care so as to insulate themselves from any action by the company in the event the

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) Not a bad answer but should refer to fact receiver acts as agent for the company, hence a residual duty does exist

Commented [RD(DWH12)]: Not quite - see above

receivership acts in a way detriment to the company (but to the benefit of the charge holder).

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.

The key elements that a liquidator must satisfy in order to demonstrate successfully a transaction (with a non-associated) amounted to an unfair preference to a person are set out at sections 226 and 226A of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO"), namely:

- 1. the person is:
 - a. a creditor of the company; or*
 - b. a surety or guarantor for any of the company's debts or other liabilities;**
- 2. the company enters into a transaction that has the effect of putting that person in a better position which, in the event of the company being placed into liquidation, would be better than the position the person would have been in if that transaction had not been carried out; and*
- 3. the company was influenced by a desire to improve the position of the person referred to in (2) above, i.e. that the company positively wished to improve that person's position in the event of the company's insolvent liquidation.*

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.

The key elements needed for a Hong Kong liquidator to make use of the Hong Kong / Mainland Co-operation Mechanism (the "Cooperation Mechanism") are as follows:

- 1. the Hong Kong liquidator is seeking cooperation with one of the pilot areas in the Mainland, being:
 - a. Shanghai Municipality;**

Commented [RD(DWH13)]: (1.5 marks) Answer also needs to mention that company was insolvent at the time of the transaction, or became insolvent as a result of it; and that the transaction (for non-associate) must have been within 6 months of commencement of liquidation

Commented [RD(DWH14)]: (3.5 marks) The answer should also refer to the fact that the COMI must have been in HK for 6 months

b. Xiamen Municipality of Fujian Province;

c. Shenzhen Municipality of Guangdong Province;

2. The subject liquidation falls within the definition of "*Hong Kong Insolvency Proceedings*", i.e. any collective insolvency proceedings commenced under the CWUMPO or the Companies Ordinance (which would include a compulsory liquidation, as this appears to be);

3. The debtor company's centre of main interest must be in Hong Kong, which has been clarified by the Supreme Court as generally being the place of incorporation; but may change depending on other factors such as the company's:

a. The place of principal office;

b. The principal place of business;

c. The place of principal assets etc.

4. The company must either:

a. Have its principal assets in one of the pilot areas (referred in (1) above) in the Mainland; or

b. Has a place of business or representative office in one of the pilot areas.

If the above elements are made out, the Hong Kong liquidator may apply for recognition of, and assistance to, the insolvency proceeding in accordance with the Cooperation Mechanism. A letter of request from the Hong Kong court would be necessary in order to do so.

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 basis enabling and giving jurisdiction to the Hong Kong court to wind up a non-Hong Kong company is found in Part X of the CWUMPO, which deals with the winding up of "unregistered companies". The term "Unregistered companies" is

Commented [RD(DWH15): (4 marks)
Good answer

relevantly defined in section 326(2) as including "a registered non-Hong Kong company".

The statutory preconditions to winding up an unregistered company are set out in section 327(3) of the CWUMPO, being:

1. if the unregistered company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
2. if the unregistered company is unable to pay its debts;
3. if the court is of opinion that it is just and equitable that the unregistered company should be wound up.

As to (2) above (inability to pay its debts), section 327(4) stipulates a number of scenarios by which an unregistered company shall, for the purposes of this Ordinance, be deemed to be unable to pay its debts. This includes the non-satisfaction of a written demand 3 weeks after service (section 327(4)(a)).

The common law principles that a Hong Kong court will consider when deciding whether to exercise that jurisdiction is found in the Hong Kong Court of Final Appeal (the "CFA") decision of *Kam Leung Sui Kwan v Kam Kwan Lai & Ors* FACV 4/2015. This was an appeal in relation to a winding up petition brought on just and equitable grounds. The CFA determined that, as a preliminary point, the most appropriate jurisdiction to wind up a company is the place of incorporation. However, the CFA recognised that there were three core requirements that must be met before the Hong Kong Courts would exercise the jurisdiction granted under section 326 of the CWUMPO to wind up an unregistered company, these are as follows:

1. there must be a sufficient connection with Hong Kong;
2. there must be a reasonable possibility that a winding up order would benefit the applications; and
3. the Hong Kong court must be able to exercise jurisdiction over one or more persons in the distribution of the unregistered company's assets.

Accordingly, the winding up petition should set out how each of these core requirements have been satisfied.

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 set out in Part 13, Division 2 ("Arrangements and Compromises") of the Companies Ordinance (Cap 622) (the "CO"). A scheme of arrangement allows a company to make a binding compromise or

Commented [RD(DWH16)]: (3 marks)
Good but the question calls for a description, but the answer does not include, for example, : the role of the explanatory statement; how classes are constituted; leave to convene meetings; the statutory majorities needed; the court's role on sanction

arrangement with its members (i.e. shareholders) or creditors, or any class thereof. This could include reducing share capital of members and adjusting debts owed to creditors. It is, in essence, Hong Kong's only statutory tool for corporate rescue.

The pros of a scheme of arrangements are:

- 1. the flexibility afforded by both the development of the common law, the creativity of Hong Kong practitioners and the support of the Hong Kong courts allow schemes of arrangement to effect a restructuring despite the absence of any standalone corporate rescue legislation, with the attendant benefits of being able to deal with novel issues in a pragmatic way;*
- 2. the benefit of the vast body of English law cases with respect to schemes, which are of persuasive value (although noting that there are some key procedural differences between English and Hong Kong schemes of arrangement);*
- 3. the ability to 'cram-down' creditors (subject to court sanction), obviating the need to obtain unanimous creditor consent to vary debts and to reduce risks of creditors 'holding-out' or attempting to derive an unfair advantage from a restructuring; and*
- 4. the flexibility to vary the terms of the scheme, even in advance stages of the process.*

The cons of a scheme of arrangements are:

- 1. there is no automatic moratorium on claims and therefore schemes are usually effected in conjunction with the appointment of provisional liquidators - this practice has been subject to recent problems in Hong Kong because the courts have been unwilling to appoint provisional liquidators solely for the purpose of restructuring (as opposed to winding up); however, practitioners have been able to first appoint provisional liquidators on 'traditional' grounds, with restructuring being an ancillary power that is subsequently sought;*
- 2. even if the scheme obtains the requisite majorities (being, in a creditors' scheme, a majority in number representing 75% by value of creditors present and voting for each class), the Hong Kong court is not bound to sanction the scheme, which may lead to uncertainty and possibly provide further opportunities for dissenting classes to attempt to derail the scheme; and*
- 3. conceptually, it is not immediately obvious that a scheme can effect a release of third party rights (e.g. guarantors), although a practice has established in both England and Hong Kong to address this issue.*

Question 3.3 [maximum 6 marks]

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

Answer mixes up assisting foreign liquidators and winding up here in HK. Should describe scope of assistance (e.g. cannot do something in HK that would not have power to do in home jurisdiction - Singularis). 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 less likely to assist foreign liquidation not in place of company's COMI

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?

Despite not having legislation dealing with cross-border insolvencies, nor being a party to any international treaties that deal with cross-border insolvency, the common law can be used to assist foreign liquidations in relation to Hong Kong matters.

In particular, Hong Kong courts have, for a long time, recognised a foreign liquidator's right to bring an action in Hong Kong in the name of the company without requiring a formal order recognising the foreign liquidation proceedings (see, *In Re Irish Shipping Ltd.* [1985] HKLR 437). Hong Kong courts have also been willing to refuse enforcement (as opposed to liability) of judgments on the basis of judicial comity in order to assist foreign rehabilitation proceedings.

As set out above in answer to question 3.1, the common law principles that a Hong Kong court will consider when deciding whether to exercise that jurisdiction is found in the CFA decision of *Kam Leung Sui Kwan v Kam Kwan Lai & Ors* FACV 4/2015, being:

1. there must be a sufficient connection with Hong Kong;
2. there must be a reasonable possibility that a winding up order would benefit the applications; and
3. the Hong Kong court must be able to exercise jurisdiction over one or more persons in the distribution of the unregistered company's assets.

Additionally, the Hong Kong courts have also been willing to grant ancillary winding up orders in Hong Kong in circumstances where the principal liquidation is elsewhere. The Hong Kong courts have adopted a 'modified universalism' approach, whereby the Hong Kong liquidation would be ancillary to the principal liquidation for the purposes of collecting in assets and paying out creditors in Hong Kong. In dealing with ancillary winding up orders, the Hong Kong courts will still apply the *In Re Irish Shipping* criteria and the Hong Kong courts have determined that the test is no less stringent for such ancillary liquidations.

As a matter of common law, the Hong Kong courts recognise foreign representatives as being authorised to represent the company, such that the Hong Kong courts readily facilitate the provision of documents relating to the company's own accounts and the production or examination of individuals in Hong Kong.

The pros of relying on common law are:

1. Flexibility - whilst the Hong Kong courts have developed a 'standard' form of order that foreign liquidators might expect to obtain, this is not concrete (nor

Commented [RD(DWH18)]: Not quite - this is in relation to winding up non-HK companies, not recognition of a foreign process underway

Commented [RD(DWH19)]: Per cases dealt with in the text, court has now moved away from this

guaranteed) and can change and adapt as the needs of practitioners change and the law develops;

2. *The development of a unitary system - the Hong Kong courts have endeavoured to ensure a unitary system for the collection of distribution of assets in a manner that would be consistent with the principal liquidation (but might be contrary to what would otherwise happen in Hong Kong) in order to assist that foreign principal liquidation;*
3. *Judicial comity - similar to the above, the Hong Kong courts will also uphold the principle of judicial comity to assist and co-ordinate with foreign liquidation proceedings (within reasonable bounds)*

The cons of relying on common law are:

1. *Potential conflicting issues - for example, as mentioned above, Hong Kong courts would readily facilitate the provision of documents relating to the company's own accounts. However, the Hong Kong courts have also taken the contrary position in respect of anything that goes further than this, with the Hong Kong court saying that a specific recognition order would be required. This may result in uncertainty or inconsistent decisions because they may be difficult in practice (despite being simple conceptually);*
2. *Uncertainty in relation to novel situations - the flexibility of the Hong Kong courts, whilst generally an advantage, may mean that there is uncertainty as to how the Hong Kong court would determine novel issues. A key and recent example of this is the Hong Kong court's unwillingness to recognise 'light-touch' liquidation proceedings in the Cayman Islands, which was seen as a mechanism as a way to insulate Hong Kong companies from a winding up because of the moratorium that arises, along with effectively introducing a debtor-in-possession model through the backdoor in Hong Kong. In these circumstances, the Hong Kong court has been willing to 'look behind' the 'light touch' provisional liquidation order to ascertain whether it was entered into for a genuine liquidation or to defeat Hong Kong creditors' rights.*

Commented [RD(DWH20)]: I am not sure why this is a 'con' but I take the point

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(DWH21)]: (3.5 marks)

A good answer which only misses that the preferential creditors are paid out of floating charge realisations only if insufficient uncharged assets to meet the same

The following points would be important to discuss with the liquidator:

- 1. Whether the charge was registered - if a security should have been registered but was not, then it is void as against the liquidator and any realisations can be used in the ordinary course as if there was no floating charge; and*
- 2. Whether the charge is otherwise invalid - a floating charge created within 12 months of the commencement of the winding up is invalid except to the extent of the value of the consideration paid at the time of the creation of the charge (plus interest thereon) pursuant to section 267 of the CWUMPO. It is unclear whether Sea Breeze is related to Palm Beach Limited. If they are unconnected entities, then the floating charge must have also been created at a time when Palm Beach Limited was insolvent (or became insolvent as a result of the creation of the charge) pursuant to section 267A of the CWUMPO;*

Given that the floating charge was granted "a few months before the liquidation", then it is likely subject to invalidation if the statutory preconditions can be made out. If not, then the floating charge stands and the realisations cannot be used to meet the liquidation costs or pay any unsecured creditors until satisfaction of Sea Breeze's debt and the receiver's costs. An exception exists in circumstances where Palm Beach Limited might have sufficient assets to make those payments out of the general liquidation estate.

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.

Despite Hong Kong not having a statutory framework to deal with cross-border insolvencies, the Hong Kong courts have developed common law principles to assist foreign liquidation proceedings.

Whilst Hong Kong banks would generally and readily assist L by providing documents in respect of SKL's bank accounts, if L requires further information, then a formal order would be required.

As a matter of practice, L would have to apply for such an order by way of a Letter of Request from the Cayman Islands court to the Hong Kong court, requesting assistance.

Commented [RD(DWH22)]: (4 marks)

A very good answer that would be improved by reference to the Singularis principle if recognition is to be sought, and need for COMI considerations (Global Brands).

Also discussion as to 'managerial assistance' to recognise that law of place of incorporation governs who can take steps in the name of the company.

The Hong Kong court has indeed developed a 'standard' form of order that a foreign liquidator such as L might expect to obtain, and would usually allow L to seek production of further documents and the examination of individuals in Hong Kong.

Commented [RD(DWH23)]: HK court did develop a standard order, but more recent cases suggest that this will not now be given

*However, any such order is limited and subject to the powers available to L in the Cayman Islands. Section 103 of the Cayman Islands Companies Act (dealing with examination of relevant persons) is much more restrictive than the Hong Kong equivalent and does not extend to auditors (see *In the Matter of ICP Strategic Credit Income Funds Ltd (In Liquidation)* and *In the Matter of ICP Strategic Credit Income Master Fund Ltd. (In Liquidation)*).*

Moreover, in any event, it is not guaranteed that L will obtain all of the powers in the 'standard' form of order, which can be deviated from in appropriate circumstances. Most relevantly, the Hong Kong courts have been increasingly wary of 'soft touch' provisional liquidations in the Cayman Islands, which have been used by companies to insulate themselves from legitimate creditor action in Hong Kong by virtue of the moratorium / stay of proceedings as a matter of Cayman Islands law. Additionally, such 'soft touch' provisional liquidations also effectively introduce a debtor-in-possession restructuring, which is impermissible as a matter of Hong Kong law. Accordingly, the Hong Kong court would scrutinise the purported liquidation in the Cayman Islands to ascertain whether it is genuine or simply for the purposes of defeating creditors' interests (it is not clear if L is a provisional or official liquidation in the Cayman Islands).

*In light of the above uncertainties, it would be more practical for L to seek an order for an ancillary liquidation. In such circumstances, L would have to satisfy the three core criteria set out in *Kam Leung Sui Kwan v Kam Kwan Lai & Ors* FACV 4/2015, namely:*

- 1. there must be a sufficient connection with Hong Kong;*
- 2. there must be a reasonable possibility that a winding up order would benefit the applications; and*
- 3. the Hong Kong court must be able to exercise jurisdiction over one or more persons in the distribution of the unregistered company's assets.*

Upon winding up, SKL would also be able to benefit from a mandatory stay as a matter of Hong Kong law, to protect SKL from any claims or enforcement action by creditors in Hong Kong.

An ancillary liquidation would be particularly useful given that SKL might also have assets in Shenzhen. By applying for (and obtaining) an ancillary liquidation in Hong Kong, L might be able to make use of the Hong Kong / Mainland Co-operation Mechanism (the "Cooperation Mechanism") to seek recognition in the designated pilot areas in the Mainland (which include Shenzhen). However, in order to take advantage of the Cooperation Mechanism, one of the factors that L would have to establish is that Hong Kong is SKL's centre of main interest ("COMI"). Even though the COMI is usually the place of incorporation (i.e. Cayman Islands), the Mainland court

can take into account other factors such as SKL's principal office, place of business and location of assets. Given that SKL is listed in Hong Kong, it might be arguable that Hong Kong is SKL's COMI.

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 key questions to ask Harrier are:

1. The COMI of Lapwing - and whether Hong Kong is the correct jurisdiction to bring winding up proceedings. It may be that Lapwing is a foreign company (this is not clear from the facts) that has a COMI elsewhere (e.g. the Cayman Islands). If Lapwing's COMI is in a foreign jurisdiction, there may be other considerations such as whether Lapwing has commenced (or will commence) restructuring proceedings that might insulate it from creditor action.
2. Whether the debt has crystallised - invoices usually have payment terms and the supply contract might have a cure period to remedy breaches before enforcement action can be undertaken. Harrier will need to be sure that there is an enforceable debt before taking steps to wind up Lapwing.
3. Whether the supply contract includes an arbitration clause to settle disputes and whether it is governed by Hong Kong law - the Hong Kong court has in more recent times taken a more pro-arbitration stance, such that any winding up petition is likely to be stayed pending arbitration unless the debtor actually admitted the debt. Here, whilst Lapwing has said that it "can't afford" to pay the invoices, there may be other (not yet complained of) reasons such as a purported breach by Harrier, counterclaims / set-off (to the extent permitted under the contract) etc. It will be up to the Hong Kong court to determine whether there is indeed a bona fide dispute of the debt on substantial grounds. It is telling that no such complaints have been raised to date, which might allow the Hong Kong court to infer that any belated complaints are not bona fide but made simply in an attempt to resist being wound up

Commented [RD(DWH24): (2.5 marks)

A solid answer, to which could be added:

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

If Lapwing is not a HK company, 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)

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

Commented [RD(DWH25): May lead to no enforcement (e.g. Ambow) or the court refusing to wind up (per discretion) but any moratorium from other jurisdiction will not be automatically applied in HK.

Commented [RD(DWH26): Or an exclusive jurisdiction clause

* End of Assessment *

TOTAL MARKS: 37 OUT OF 50