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SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

This is the summative (formal) assessment for Module 8C ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 8C. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
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- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 8 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following is / are among the jurisdictional criteria required to be satisfied for the Hong Kong court to make a bankruptcy order against an individual?

- (a) **The individual must hold a Hong Kong permanent identity card.**
- (b) The individual must be ordinarily resident in Hong Kong at the date of the hearing of the petition.**
- (c) **The individual is domiciled in Hong Kong.**
- (d) **Any of the above.**

Commented [RD(DWH1): 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.

Commented [RD(DWH5): Incorrect (0 marks) - section 184 CWUMPO

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

Question 1.6

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

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

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

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

(d) None of above, as the scheme legislation provides for no stay.

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 for the sale of assets under a charge owes their duties while selling the asset to the charge holder not the company which owns the asset subject to the charge. However, within this duty the receiver owes a duty to act in good faith and in line with the powers granted to them under the terms of the charge

Question 2.2 [maximum 3 marks]

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. And that receiver must use reasonable skill and care

Commented [RD(DWH12)]: (1 mark) See note below. 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

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 criteria for a transaction to be proven as an unfair preference are:

- *If the receiver of the transaction was a guarantor or surety for any of the debtors' other debts or liabilities.*
- *If the debtor was influenced by a want to prefer the creditor*
- *If the debtor commits an act which has the effect of putting the creditor in position in a position that would be more beneficial should the debtor enter bankruptcy*

Commented [RD(DWH13): Or creditor (an important omission)

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 required for a Hong Kong liquidator to make use of the mechanism for co-operation between Hong Kong and the Mainland are:

- *The Hong Kong proceeding must be a collective insolvency process commenced under either the CWUMPO or the CO*
- *The COMI of the debtor must be in Hong Kong*
- *A letter of request for the required assistance from a Hong Kong Court*
- *The request must be made for a "pilot area" in Mainland China; these being: the Shanghai Municipality, Xiamen Municipality of the Fujian Province and Shenzhen Municipality of Guangdong Province*

Commented [RD(DWH14): (2.5 marks)
The answer should (i) refer to the fact that the COMI must have been in HK for 6 months; and (ii) 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

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.

Part X of the CWUMPO discusses the basis for Hong Kong courts to wind-up a non-Hong Kong Company, however in order to first be considered for a winding-up order the petition must satisfy the court in question that the company is adequately connect

Commented [RD(DWH15): (3 marks)
See note below - suggests some misunderstanding

Commented [RD(DWH16): Provides rather than 'discusses'

to Hong Kong per the requirements as set out in the CFA decision of *Kan Leung Sui Kwan v Kam Kwan Lai and Others* (2015).

The requirements to be adequately connected to Hong Kong are that: there must be sufficient connection with Hong Kong; the court must have the ability to exercise jurisdiction over at least one of the people interested in the distribution of assets of the company; and finally, there must be 'reasonable possibility' that the winding up order would be of benefit to the petitioners.

That being said, should the petition satisfy these criteria with the court, per Part X of the CWUMPO the unregistered company must meet additional criteria in order to be wound up related to the merits of its current position. The circumstances available for winding up are that the company is unable to pay its debts; the court believes it is just and equitable for the company to be wound up; and that the company is already dissolved, ceased to carry on business or is only continuing business in order to wind up its affairs.

With regards to the use of common law principles in makes decisions for this matter the Hong Kong court still typically following common law principles. An example of this is that the Hong Kong will typically refuse foreign enforcement orders against Hong Kong assets of a company, but alternatively will still respect a foreign liquidators right to bring actions in Hong Kong against a company and its assets, albeit under Hong Kong law.

Commented [RD(DWH17)]: This is a recognition point rather than a point relating to the jurisdiction to wind up a non HK company in HK

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.

Commented [RD(DWH18)]: (3.5 marks)
A good answer re pros and cons but the question calls for a description, and 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 (in part given but not in full); the court's role on sanction

One of the missing pieces of Hong Kong's insolvency regime is the lack of a well-equipped corporate rescue tool. While a scheme of arrangement exists in Hong Kong it lacks the effectiveness that would be expected of a scheme when thinking of other jurisdiction equivalent scheme of arrangement, for example England's scheme.

The primary weakness of the Hong Kong scheme of arrangement is the lack of a stay of proceedings on either judgements or actions against the company while in the scheme of arrangement, meaning that if a company is to pursue a resolution of its debts while using a scheme alone it will need to navigate executing a scheme will contesting a plethora of creditor actions against the company which can further destabilise a company.

Nevertheless, a workaround for the lack of stay involving the powers granted under section 186 of the CWUMPO has been executed commonly to combat the lack of a stay in schemes of arrangement. By presenting an application for the appointment of provisional liquidators, to be tasked with investigation of company's affairs for the

purpose of considering the viability of a restructuring of company's debts in conjunction with a scheme of arrangement. A company is able to proceed with the formulation of a scheme with the benefit of a stay of proceeding as granted under the provisional liquidators' powers.

However even still this workaround carry's its issues, one being that typically the powers granted on appointment of the provisional liquidator will not include the power to effectuate a restructuring but rather to preserve the assets of the company and investigate; therefore, an additional application will most typically be required afterwards to request the powers required for a restructuring.

One of the main advantages of a scheme of arrangement is that portions of a creditor class can be crammed down if the requisite majority vote for the scheme is achieved. Outside of a scheme of arrangement in order for the contractual terms of the debt to be altered the company would need to obtain the approval of 100% of the relevant creditors, however within a scheme of arrangement only 75% by value (in person and voting) of a class needs to approve a scheme for it to be relevant to their class. This cramdown makes restructuring of debts a viable option within a scheme.

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

On the other hand, while this the aforementioned 75% cramdown has been noted as a positive of the Hong Kong scheme of arrangement, it should be noted that one of the lacking factors of the Hong Kong scheme is that of a cross-class cramdown. Although uncommon among jurisdictions, restructuring tools offering a cross class cramdown, such as England's Restructuring Plan, offer the ability of the company to cram down a dissenting class of creditor under certain conditions, providing the company and any insolvency officeholder with more options in their pursuit of a solution for the Company.

Overall, the Hong Kong scheme of arrangement on the surface is a corporate restructuring tool that leaves a lot to be desired, especially when compared with industry leading tools such as the US Chapter 11 procedure. However, the scheme is not completely ineffective and does have its uses. By pairing it with other processes in the Hong Kong insolvency regime, company's and practitioners have found ways to effectively restructure debts in a variety of situations using the scheme of arrangement.

Question 3.3 [maximum 6 marks]

Commented [RD(DWH20)]: (6 marks)
I am not sure all of the 'cons' listed are really cons but a good answer nonetheless

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?

Given the fact that no legislation has been created to deal with cross-border insolvencies in Hong Kong, matter of recognition and assistance are almost entirely matters of common law. As a result of this Hong Kong courts continue to follow common law principles for foreign liquidations, an example of this being that Hong

Kong will typically refuse foreign enforcement orders against Hong Kong assets of a company, but alternatively will still respect a foreign liquidator's right to bring actions in Hong Kong. Furthermore, a formal order is not required to recognise a foreign liquidator in Hong Kong provided the liquidator is appointed in the company's place of incorporation, the reasoning being that Hong Kong recognises the laws of the foreign country on who can represent a company.

Commented [RD(DWH21)]: But only for acts in the name of the company, not 'office-holder' actions

*With regards to how common law has developed in Hong Kong, to assist foreign liquidations in the past foreign officeholders were able to commence ancillary liquidation proceedings in Hong Kong when required as in the case of *A Co v B* (2014) and be provided recognition and assistance as they were from a "common law jurisdiction with a similar substantive insolvency law". This was expanded upon in the *Singularis Holdings v PricewaterhouseCoopers* decision which led to additional similar cases that helped solidify the modified universalism stance of the Hong Kong courts in this issue.*

*Although, there are intricacies to this principle and the Hong Kong courts will always seek to closely examine each request for assistance with specific attention being paid to whether there is an equivalent process in Hong Kong to the process being undertaken in the foreign country as per the *Singularis* principle. This issue comes to a head most commonly in cases involving the Cayman Islands and BVI, as in order for an order to be granted for powers in Hong Kong, the equivalent powers must be available in the foreign jurisdiction. In the Cayman Islands the powers granted for examinations are much stricter than the Hong Kong equivalent, which can limit the powers available to be granted to a foreign liquidator, despite them being available in Hong Kong law.*

*Recent developments of the common law approach to this topic have been the increased difficulty of foreign office holders to gain assistance of the Hong Kong courts that had been previously expected. In cases such as *Re UP Energy Development Group Ltd* and *CECEP Costin New Materials Group Ltd v RSM Nelson Wheeler*, Hong Kong courts have ruled (on different grounds) against the provisional liquidators in what some consider a dissatisfaction against "light touch" debtor in possession processes. In provisional liquidations such as these, foreign appointed liquidators seek recognition applications through Hong Kong to deal with affairs in the jurisdiction, however whether due to a dislike of this indirect approach or an increased desire to move more towards the non-common law approach of the mainland these officeholders have faced issues with application once deemed straightforward.*

Commented [RD(DWH22)]: Differently expressed but essentially the same point - the court cannot actually grant powers that are a creature of statute

The overarching viewpoint on the development of common law in this way is that it is flexible. Typically, in the past this approach could be seen as a positive, providing an adaptable set of law which could vary for the variety of cases and situations required. However recent decisions in relation to foreign officeholders have shown that this flexibility may be the cause of the main weaknesses of the common law approach, unpredictability. The growing unpredictability of the courts in relation to cases which had relied on prior precedent continues to cause issues and cast doubt on years of legal decisions within the jurisdiction to the concern of stakeholders and onlookers.

Commented [RD(DWH23)]: The statement is not inaccurate but misses the point that 'light touch' PLs had developed into a debtor-led/controlled process alien to HK and hence the willingness to assist was diluted

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.

Firstly, it should be noted that the duty of the receiver appointed is to the charge holder, Sea Breeze Incorporated, not to Palm Beach Limited or the unsecured creditors. That being said it should be noted that as a receiver they are still under an obligation to act in good faith and in line with the powers granted to them under the charge.

Nevertheless, should any realisations be made by the receiver from the assets under the floating charge that has crystallised, they will not be available to the liquidator to pay liquidation expenses. Rather the realisations made from the floating charge must first be applied to meet statutory preferential claims only if there are insufficient assets to meet those claims from other estate assets that are uncharged. If there are sufficient assets for preferential claims, then the creditor holding the charge will be due the realisations (Sea Breeze Incorporated) before unsecured creditors are considered.

Albeit it is worth noting that due to the timeline of when the floating charge was created, 3 months before the winding-up order, the floating charge may be voidable. Under Hong Kong law a floating charge given by a company can be voided if created within 1 year of a winding-up provided the chargee is unaffiliated with the chargor. In this case as Sea Breeze Incorporated does not appear to be affiliated with Palm Beach Limited the timeline would likely stand at 1 year. Furthermore, in order to be voided it would also need to be proven that Palm Beach Limited was either unable to pay its debts at the time the charge was granted, or alternatively, that the granting of the charge caused the company to be unable to pay its debts.

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 to 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

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

See below for inaccuracies.

Also, should identify whether required registration and if so, whether was in fact properly registered. Otherwise the charge would not bind the liquidator.

A charge may also be an unfair preference

Commented [RD(DWH25)]: I am not sure I understand this sentence, but the gist is correct: floating charge realisations go to charge holder except for preferential creditor claims (where insufficient uncharged assets)

Commented [RD(DWH26)]: There is no reference to 3 months

Commented [RD(DWH27)]: How is this assumption made?

Commented [RD(DWH28)]: Correct, but this element need not be shown if SB is connected to PB

Commented [RD(DWH29)]: (3 marks)

A reasonable answer but with some gaps and misunderstandings - see notes below

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.

Given the fact that no legislation has been created to deal with cross-border insolvencies in Hong Kong, matters of recognition and assistance are almost entirely matters of common law. That being said, there is an extensive amount of precedent for recognition matters such as these, given the close connection that Hong Kong and Cayman Islands companies have and gaining recognition in Hong Kong should not be much of an issue.

The liquidator will need to apply to the Hong Kong courts and present a letter of request issued by the Grand Court of the Cayman Islands requesting assistance, additionally they will need to prove to the Hong Kong court that SKL meets the three core requirements to be adequately connected to Hong Kong. The first requirement; that SKL be sufficiently connected to Hong Kong, will be satisfied as it is listed on the Hong Kong Stock Exchange. The second requirement; that there be a reasonable possibility a winding up order will benefit SKL, should be met as there is sufficient actions to be taken in Hong Kong and in a pilot area (Shenzhen). As for the third requirement, that the court have jurisdiction over at least one person with interest in the company's assets. This would typically require evidence of persons with an economic interest in the company that have a sufficient connection to Hong Kong, e.g., a Hong Kong based creditor. Although the existence of these persons is not explicitly noted in the information provided, it is likely there are Hong Kong based persons for this criteria to be met, however in lieu of this, decisions by the Court of Appeal have confirmed that meeting the third requirement is not essential should the connection to Hong Kong be strong enough and the benefit to creditors be sizable.

Recognition aside, L should be able to obtain the desired documents from SKL's bank in Hong Kong without formal recognition in Hong Kong. This is because banks in Hong Kong usually assist foreign liquidators without recognition orders in relation to documents for their own accounts as they recognition the liquidator being a representative of the company.

With respect to receiving a Hong Kong order authorising the examination of the auditors using a standard order. These orders which are used as part of requests for recognition and assistance are limited to the powers that the liquidator is granted in their own jurisdiction. In this case the powers for examination granted for a Cayman Islands liquidation as much more restrictive than those provided in Hong Kong meaning that the granting of such an order would be difficult. This was assessed in theory in CECEP Costin New Materials Group Ltd v RSM Nelson Wheeler, where it was ruled that an order requesting auditor documents could not be granted because foreign companies could not be granted examination powers under the CWUMPO and even if they could, it would need to be considered whether it was in the scope of Cayman law to have that power.

Commented [RD(DWH30)]: This is not necessarily the case given recent developments, e.g. requirement for COMI connection per Global Brands

Commented [RD(DWH31)]: This paragraph confuses recognition of a foreign proceeding with bringing a separate HK winding up proceeding

Commented [RD(DWH32)]: These are 2 different points. The first part (Singularis principle) is correct. The second part is an illustration of how the HK court has developed the law to clarify that assisting a foreign liquidator is not the same as giving actual powers under the HK statute (best explained in Up Energy)

In lieu of that approach, an ancillary liquidation in Hong Kong would be the best solution for this situation. By seeking a winding up order in Hong Kong rather than a recognition application, L could benefit from the powers under CWUMPO and CWUR and be able to issue the required request to the auditors. Additionally by receiving a winding up order in Hong Kong, SKL will benefit from a stay from any creditors seeking to bring actions in Hong Kong except by leave of court.

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?

A debtor not paying debts for whatever reason is always difficult, however it is made more difficult when said debtor is in distress. The first avenue to explore is typically be to engage with the debtor, which Lapwing has done, although now we know that Harrier is in some sort of financial distress the options become slightly more difficult. Firstly, it would be easier if more information on both the debt and Harriers' situation was available, therefore I would need to ask what the debt amount was, what the initial payment terms were and how long Harrier has been delinquent. With this context provided it would be best to converse with Harrier again to understand their situation, as it may be the case that being unable to pay "right now" may be due to a large receivable coming in a week late, in which case it is only a slight liquidity issue, and the debt can be paid soon. Alternatively, if it is a larger issue and there are other creditors currently taking legal avenues for their debts it may be wise to go down the route of a statutory demand.

In order to first apply for a winding-up order Harrier Limited should attempt to issue a statutory demand on Lapwing, this generally a precursor to a winding-up order but can also be used as negotiating leverage to confirm to the Lapwing director that this issue is being pursued seriously. A statutory demand must be for an amount over HKD 10,000 on a prescribed form and be served at the registered office of Harrier Limited with the original copy. Once served on Harrier Limited an affirmation of service will need to be filed with the High Court Registry which will allow Lapwing to present a bankruptcy petition after 21 days.

If after issuing a statutory demand progress still does not seem likely, the option for a bankruptcy petition is also available, albeit more difficult. In order for a petition to be presented in must be for a debt in excess of HKD 10,000, the debt must be payable to Lapwing and be unsecured, the debtor must be unable to pay or not have a good prospect of paying, and finally the company is unable to pay its debts (CWUMPO 178).

Commented [RD(DWH33)]: And could then make use of the Mainland Cooperation Mechanism, but this is not explained here

Commented [RD(DWH34)]: (2 marks)

Some elements are OK but you have the parties the wrong way round (and remember you are advising a client) and some misunderstandings (e.g. "bankruptcy").

Also:

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.

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?

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

Commented [RD(DWH35)]: You have the parties the wrong way round - Harrier is the creditor. Also, how do we "know" that any party is in financial distress...? Just the director's comment but he could be bluffing....

Commented [RD(DWH36)]: No - bankruptcy applies only to individuals, not corporate entities

Assuming that the debt is over HKD 10,000; the next two requirements should also be met; the main requirement would be to prove that Harrier cannot pay its debts. If a statutory demand has been issued and no response has been received this would suffice, however if not, additional evidence would be required to satisfy the court which may be difficult, especially given that the Harrier director will "fight it".

Nonetheless, gaining a winding up order and becoming an unsecured creditor may allow Lapwing to recoup its credits, however it's unlikely they would receive the full amount if Harrier were in fact insolvent, and furthermore it would not be in a timely fashion. Therefore, the most beneficial scenario would be one where Lapwing first converses with Harrier to further understand their situation and possibly negotiate some type of alteration to the terms of their debt prior to looking at a bankruptcy petition.

Commented [RD(DWH37)]: Lapwing or Harrier?

* End of Assessment *

TOTAL MARKS: 33.5 OUT OF 50