



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.

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.

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.

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.

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

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

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

(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.

- *The receiver who are appointed out of court is a remedy available to a secured creditor;*
- *Secured creditor has power to appoint receiver pursuant to the debenture or charge document when certain event happened/triggered, eg. failure to repay debts, borrower entered liquidation, etc;*
- *Receiver appointed is an agent of the company/debtor but primary duty is to the debenture or charge holder whom appointed him/her;*
- *When selling the charged assets, receiver owes duties to the debenture/charge holder, and must put the interests of the debenture/charge holder first in making any decision;*

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)]: (2.5 marks) Elements are there except the residual duty to chargor and should mention need to act in good faith etc.

- However, the sale proceeds must be used to settle claims of preferential creditors, if there are insufficient assets to meet those claims from the uncharged assets available to the liquidator;
- But sale proceeds is not available to the liquidators to settle liquidator's expenses.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12): (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.

- Unfair preference occurs when an insolvent company do something to place a creditor or guarantor in a better position/higher payment ranking than it would have been in the company's insolvent liquidation;
- To demonstrate a transaction amounted to an unfair preference, the liquidator must show that
 - at the time the asserted unfair preference was given, the company was unable to pay its debts or became unable to pay its debt because of the transaction; and
 - desired to prefer - the company was influenced by a desire to improve that person's position in the event of a liquidation.
- Transactions occurred within six months prior to the commencement of winding-up.

Question 2.3 [maximum 4 marks]

Commented [RD(DWH13): (2.5 marks)

See note below. Also, that the appointment of the liquidator must be in Hong Kong and pursuant to a collective insolvency process

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.

- Letter of request from the Hong Kong court for Hong Kong liquidator to seek recognition and assistance from Mainland; and
- The debtor's COMI must be in Hong Kong; and
- The debtor's principal assets in the Mainland are in the pilot area i.e. Shanghai, Xiamen or Shenzhen; or
- The debtor has a place of business or a representative office in the pilot area.

Commented [RD(DWH14): And have been so for 6 months

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH15): (3 marks)

Should also mention the criteria in s.327 to trigger the jurisdiction

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 CWUMPO deal with winding up of unregistered companies and section 326(2) stated that unregistered companies include a registered non-Hong Kong company.

The court in Hong Kong has a discretionary statutory power under s327 of the CWUMPO (Cap. 32) to wind up foreign companies. In exercising this discretionary power, the following three core requirements must be met:

- (1) the non-Hong Kong company must be sufficiently connected with Hong Kong, but this does not necessarily have to extend to the presence of assets within the jurisdiction;*
- (2) there must be a reasonable possibility that the winding-up order would benefit those applying for it; and*
- (3) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.*

For the common law principles, the court will look at several cases to determine whether the above 3 core requirements are met, when deciding whether to exercise that jurisdiction.

For requirement number 1, sufficiently connected, the assets can be assets of any nature including a listing on the Hong Kong Stock Exchange. If the matter is a shareholders' dispute, the court will look at the shareholders' connection with Hong Kong.

For requirement number 2, it must be shown that the liquidation would benefit the petitioner. If there are assets in Hong Kong and/or in pilot area of the Mainland, it would be easier to show that the petitioner will benefit when liquidators dispose assets and distribute dividend. If there is no asset in the company, as long as the petitioner's debt is not disputed, the court will still consider this second requirement as met if it can "force" the debtor company to repay the petitioner, in order for the debtor company to avoid liquidation, i.e. commercial pressure to achieve the repayment of an undisputed debt is consider meeting this requirement.

As for the third requirement, the petitioner must demonstrate that there is another creditor besides the petitioner, subject to the jurisdiction of the court.

The Hong Kong court has also applied COMI considerations in evaluating the first and second core requirements. This is discussed in Re Solar Touch Ltd's case.

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.

Scheme of Arrangement

- Act as a court sanctioned compromised or arrangement which binds all creditors of the relevant class including those voted against it.
- The scheme can "cancel" the existing instruments and replace with the new instruments.
- The Consent fee is probably in order, but must be offered to all creditors.
- The creditors must be in the same "class" otherwise the court has no jurisdiction to sanction.

The process starts with a company in financial difficulties, with the assistance of its professional advisors (solicitors and/or insolvency practitioner) prepare a proposal to be presented to the company's creditors and shareholders. The proposal will usually seek to compromise the company's debts with a view the business continuing to operate, often under new ownership. Compromise debts here usually refer to creditors taking a hair cut to the amount being owed, in full and final settlement of any claims they may have against the company.

The proposal will show that the return to the creditors in the scheme is better than the returns in a liquidation scenario, which in most cases is nil for the unsecured creditors.

The Proposal must have an Explanatory Statement setting out the background to the company, the reasons for the difficulties faced by the company, why the scheme is needed, and the proposed scheme itself, which explain how it propose to resolve its financial difficulties, which often include change in the control of the company.

The company then made an application to the court for permission to convene meetings of the scheme creditors. If the court granted permission, then notice of meeting must be given to all creditors in the relevant classes.

At the meetings, the proposed scheme must be supported by a majority of 75% in value and 50% in number of those present or represented to approve the proposed scheme. This majority must be achieved at the meeting of every class of creditors and shareholders which is held.

The result of the meeting is then reported to the court and a sanction hearing is held.

The correct comparator must be determined (rights before, rights after the scheme and what rights would be without a scheme).

Commented [RD(DWH16): (4.5 marks)

Good answer. Full marks if mention issue of dealing with classes: similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests

Commented [RD(DWH17): Good; most people miss this

Commented [RD(DWH18): More than 50%...

The court will sanction if it is satisfied the classes are properly constituted and it is considered that the scheme is one which an "intelligent and honest creditor might reasonably approve" and

The scheme take effect when registered at the Companies Registry.

Pros for Scheme of arrangement:

- *has binding effect i.e. it allows companies to make binding compromises or arrangements with their members and / or creditors, including adjustment of debts owed to its creditors or reduction of share capital. Approval threshold is 75% in value and 50% of those present or represented to approve. Without a scheme, a company would need to obtain 100% approval of the relevant creditors to contractually vary the debt.*
- *No other formal procedure available other than provisional liquidation to "protect" and facilitate rescue of part or whole of an ailing business*
- *Can also be used to rescue or restructure private companies*
- *Flexible, up to the company assisted by professional advisor to design its scheme/plan.*
- *has better return for creditors as compared to liquidation scenario.*

Cons for Scheme of arrangement:

- *No moratorium*
- *Heavily court driven process which has significant cost implication*
- *Expensive and time consuming, hence only big companies eg. listed companies, with huge debts will consider going through a scheme.*
- *Restructuring power is not automatically given. The provisional Liquidators has to first preserve the assets and assess the situation then go back to the court to request restructuring powers if a restructuring appears feasible.*

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?

Under common law, a foreign liquidation does not have to originate from a common law jurisdiction may still be recognised in Hong Kong. It also does not need to have reciprocity to apply common law. However, Hong Kong court has discretion to decide whether to allow the foreign liquidation to be recognised. Cases will be considered and assessed on a case-by-case basis. Factors to be considered may include public policy, fraud, inconsistency with previous Hong Kong judgment, etc.. Other requirements to be satisfied include:

- *The application must be within 6 years from the date on which the foreign judgment became enforceable;*
- *Money judgment;*

Commented [RD(DWH19)]: (0.5 marks)

Half mark given for the reference to a foreign liquidator being able to bring an action but the rest of the answer is aimed at enforcement of judgments, not recognition of insolvency proceedings/office-holders

- *Final and conclusive on the merit;*
- *For a fixed sum but cannot be a sum payable in respect of taxes, fines or other charges;*
- *Must come from a competent court as determined by the private international law rules applied by the Hong Kong courts;*

To apply the common law for recognition and seek assistance from the Hong Kong court, the foreign liquidator issues a writ endorsed with a short statement of claim, reciting the judgment. The Hong Kong court will then decide whether the defendant has any bona fide defence such that the enforcement action ought to go to trial. The potential defences include matters of public policy, lack of jurisdiction of the court of origin, fraud, and breach of natural justice.

Pros:

- *If the foreign liquidation cannot be recognised under FJREO (i.e. not 1 of the 15 countries) or MJREO (not from Mainland China) , at least it may be recognised under common law.*
- *There is no reciprocity to apply common law*
- *A party can apply under section 21M of the High Court Ordinance (Cap 4) to seek interim relief in support of foreign proceedings, which include Mareva injunctions, Anton Piller orders, interlocutory injunctions and orders for preservation, inspection or delivery up.*
- *Although Hong Kong has no legislation to deal with cross-border insolvencies, but by continuing to practice and develop common law in Hong Kong (as long as it does not contravene the Basic Law) especially after the handover to PRC, it is easier for foreign liquidators to understand and apply common law as this is the law practice in Hong Kong before the Handover.*
- *The common law principles in Hong Kong has always recognise a foreign liquidators' right to bring an action in Hong Kong. No formal order is necessary for recognition of foreign liquidator. Traditionally, Hong Kong court has been keen to assist foreign representatives by relying on common law principles.*
- *By developing cross-border insolvencies law/decision/rules via common law, the court has discretion and can based on past judgment to make decision. The court can also vary its decision if the case at hand deviate from past cases. Meaning it is flexible to adopt and develop.*

Cons:

- *By developing cross-border insolvencies law/decision/rules via common law, it is in fact a collective of insolvency proceedings. Hence, one needs to know and be familiar with many previous decisions given by the Hong Kong courts instead of relying on some approved and published law/legislation.*
- *Being flexible also means it is harder to predict how new situations will be dealt with.*
- *It is sometimes confusing and difficult to understand as it depends on how the court interpret the matter and compare each case separately depending on*

Commented [RD(DWH20)]: Up to here, the answer seems to be dealing with enforcement of foreign judgments, not recognition of foreign insolvencies/office-holders

Commented [RD(DWH21)]: This does not make sense

Commented [RD(DWH22)]: But only in the name of the company

situation and current development in Hong Kong as well as following the English cases.

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.

First of all, I will inform the liquidator that the realisations made by the receiver out of the assets charged are not available to the liquidator for payment of the liquidation expenses. However, such assets must be used to meet claims of preferential creditors, eg. employee payments, if there are insufficient assets to meet those claims from the uncharged assets available to the liquidator.

I would suggest the liquidator to consider other options to see whether the charge can be void so that liquidators can claw back the sale proceeds. Example, liquidator should check whether the provision purporting to give security is deemed to be a "fraud" on the insolvency legislation it will be void pursuant to the anti-deprivation principle. Pursuant to Section 267 of CWUMPO, a floating charge created within 12 months before the liquidation will not be valid if he can show that the company was unable to pay its debts at the time the charge was created, or became unable to pay its debts as a consequence of the charge. He should also investigate whether Sea Breeze Incorporated has any connection with Palm Beach Limited, because if the charge is a person connected with the company, the 12 months period is extended to two years and there is no requirement to show that the company was insolvent at the time of creation of the charge or as a result of its creation.

However, I will caution the liquidator that if there is new money provided to the company at the time of, or after, the creation of the charge, the floating charge will still be valid to the extent of the new money being injected into the company.

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

Commented [RD(DWH23)]: (2.5 marks)

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(DWH24)]: (3.5 marks)

A bit muddled in parts, see notes below. Including, for example, re missing point about Cooperation Mechanism

Also, does not deal with client's request re stay

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.

By definition, SKL is a foreign company as its incorporation is in Cayman, however the winding up order can be disputed whether the proceeding is a main or non-main proceedings because SKL’s COMI could be elsewhere eg. in Shenzhen where it has assets, a representing office as well as having bank account in Hong Kong and the appointment of its auditor in Hong Kong. Given Global Brand’s case, the court would not give full assistance given the liquidator was not appointed in the place of the company’s COMI.

In order to obtain a recognition and assistance order in Hong Kong, in practice, L must present a “letter of request” issued by the Cayman court to Hong Kong court requesting assistance.

L also have to be informed that the Hong Kong court will consider other underlying principles each time it is asked to assist. Example, the court emphasised that the recognition of foreign insolvency processes is limited by the extent to which the type of order sought is available in Hong Kong. The court will look at the nature of the proceedings sought. Hence, the order is limited by a proviso that any power sought to be exercised in Hong Kong must be subject to the powers available to the liquidators in their “home” jurisdiction. In view that the Cayman legislation permitting examination is much more restrictive than in Hong Kong, L’s best option is to seek ancillary liquidation rather than a recognition order. SKL met the first requirement of having sufficient connection with Hong Kong because its listing in Hong Kong Stock Exchange will often be considered an asset. If it also meets the other 2 core requirements then Hong Kong liquidation is possible.

If L wishes to go further than to obtain documents from SKL’s bank in Hong Kong and to obtain orders to examine the auditors, eg. if L also wishes to take possession of assets in Hong Kong and in Shenzhen, then L should apply for specific recognition order for that purpose. SKL’s assets and representative office in Shenzhen means that it falls under the pilot area in Mainland.

*As to the “standard order” practice, L should be advised that following the *Joint Provisional Liquidators of CECEP Costin New Materials Group Ltd v RSM Nelson Wheeler’s case*, the relevant power must be available to a liquidator in both Cayman jurisdiction (the originating jurisdiction) and in Hong Kong. Section 286B of CWUMPO does not include gives power to order production of information (or an examination) of a foreign company. In the *Re Up Energy Development Group Ltd’s case*, the court commented that until the court makes a Hong Kong winding up order against the company, there is no basis to bring into operation the statutory scheme for winding-up under CWUMPO. The court will not issue a “blanket” recognition and assistance order on an ex parte basis. The application should be made inter partes with notice to those parties being affected.*

Commented [RD(DWH25)]: I do not think the winding up can be 'disputed'. This is different from considering what assistance another court (here, the HK court) might give

Commented [RD(DWH26)]: This should be split into 2: should not need order to get information from the bank (Bay Capital v DBS) as that is a 'company' action, but will need one for examination, an 'officeholder' action

Commented [RD(DWH27)]: You start on this line which is correct, but do not develop it. Need a HK winding up if want to use the Cooperation Mechanism

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?

First of all, the debt must be over HKD10,000 and not statute-barred and within statute limitation period. Then Harrier has to find out whether Lapwing's financial position is solvent or insolvent. The mere verbal comment from Lapwing director that Lapwing can't afford to pay right now does not mean that it is insolvent. Harrier is to consider Lapwing's financial position with both the cashflow test and balance sheet test to determine whether or not Lapwing meet the definition of inability to pay debts under Section 178 of CWUMPO.

Harrier also need to make sure it follows the procedure under Section 178 of CWUMPO like serving written demand in a prescribe form, giving proper notices period, serving the prescribed notice by leaving an original at the registered address etc.. before it petitions to wind up Lapwing.

Another issue to take into account when considering a winding-up petition is whether the debt upon which the petition is to be based arises under a contract which is subject to an arbitration clause. After 2018, Hong Kong court adopted a more "pro-arbitration" line and a Lasmos type test, following certain developments in the English courts, by which a petition would be stayed in favour of arbitration unless the debt was actually admitted by the debtor. Hence, in order not to waste time and money, Harrier must have proper documentation and Lapwing's admission of the debt owed to Harrier and that the debt is non-disputable.

In view that the Hong Kong court looks at COMI and the satisfactory of 3 core requirements to exercise its power to wind up a foreign (non-Hong Kong) company, Harrier is to consider whether Lapwing is a local or foreign company and if foreign company, whether it can satisfy the 3 core requirements, to determine where it should commence its proceedings.

Before commencing a petition and incurring legal cost and time, Harrier should also explore whether Lapwing has any assets worth pursuing and whether Lapwing is or intend to conduct a restructuring exercise. For a unsecured creditor like Harrier, winding up Lapwing is useless as most of the time, unsecured creditor is at the back of the queue when it comes to distribution and often get nothing during the distribution exercise due to its low ranking in payment priority.

Commented [RD(DWH28)]: (4 marks)

A good answer, but see notes below (first para a bit unclear).

Should set out threshold Lapwing would have to reach to oppose petition

Commented [RD(DWH29)]: Statutory demand (your next paragraph) will deem insolvency

Commented [RD(DWH30)]: Or exclusive jurisdiction clause (per Guy Lam)

After going through the above due diligence, if there is a chance that by initiating a petition can exert commercial pressure and that it is worth the time and cost to make Lapwing repay the debt, then it is still worth the exercise. If not, I would suggest Harrier to use the soft approach to negotiate for repayment including giving discount to secure a full and final settlement soonest possible before any other creditor especially bank to commence legal proceeding against Lapwing to wind it up.

* End of Assessment *

TOTAL MARKS: 35 OUT OF 50