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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): 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.

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

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

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

Commented [RD(DWH8)]: D) Incorrect (0 marks) - The China Field decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text)

Question 1.9

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

(a) cease completely, with no exceptions.

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

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

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

Question 1.10

The law as to cross-border insolvency in Hong Kong can be found in:

(a) The common law and Part X of the Companies (Winding Up and Miscellaneous Provisions) Ordinance.

(b) The UNCITRAL Model Law on Cross-Border Insolvency as adopted in Hong Kong.

(c) Various bilateral protocols with other common law jurisdictions.

(d) The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 3 marks]

To whom does a receiver (appointed pursuant to a charge) owe duties when selling the asset charged? Please provide an outline only.

When selling a charged asset, a receiver owes the same duty on sale as a selling mortgagee, to act in good faith and in accordance with the powers given to him under the debenture or charge. A receiver may prioritise the interests of the debenture or charge holder in making any decision as to the course the receivership will take.

This applies even though it may prove disadvantageous to the borrowing company, subject to the overriding requirement that in implementing their decisions in relation

Commented [RD(DWH9)]: [B] Correct (1 mark) – see section 244 of CWUMPO

Commented [RD(DWH10)]: [A] 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)
Should also mention that at law the receiver is the agent of the chargor

to both management and disposal of charged assets, a receiver ought to use reasonable skill and care, and be answerable to the company if they do not.

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.

In an application to set aside a transaction deemed by the liquidator to be an unfair preference, the liquidator must show that, at the time the asserted unfair preference was given, the relevant company was unable to pay its debts or become unable to pay its debts as a result of the transaction concerned.

The liquidator must also prove that the company was "influenced by a desire" to improve that person's position in the event of a liquidation. Whilst it is difficult in practice for a liquidator to prove that the company was influenced by a desire to improve the position of a particular creditor, a transaction will not be set aside as an unfair preference "unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation" and a person does not "desire" all of the "necessary consequences of his actions" - per *Re MC Bacon* [1990] BCLC 324; *Osman Mohammed Arab -v- Cashbox Credit Services Ltd* [2017] HKEC 2435.

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 "record of meeting" between the representatives of the Supreme Court in the Mainland and of the Hong Kong Government is supplemented by an opinion of the Supreme Court, which provides:

a) **The pilot areas in the Mainland are designated as:**

- I. **Shanghai Municipality;**
- II. **Xiamen Municipality of Fujian Province; and**
- III. **Shenzhen Municipality of Guangdong Province;**

b) **That "Hong Kong Insolvency Proceedings" means any collective insolvency proceedings commenced under CWUMPO or the CO and includes compulsory liquidations, creditors' voluntary liquidations and schemes of arrangement which are promoted by a liquidator or provisional liquidator;**

Commented [RD(DWH12): (2 marks)

Should mention (a) the person 'preferred' must be a creditor or guarantor; and (b) the transaction must have been (for non-associate) within 6 months prior to the commencement of the liquidation

Commented [RD(DWH13): Not for the liquidator to 'deem' the transaction is a preference - must apply to court

Commented [RD(DWH14): (3 marks)

Further marks if had mentioned that the COMI must have been in Hong Kong for at least 6 months; and that the recognition is of the office-holder appointed under the HK collective insolvency process (the answer only refers to the process itself)

- c) *The debtor's centre of main interests ("COMI") must be in Hong Kong;*
- d) *If the debtor's principal assets in the Mainland are in a pilot area, or it has a place of business or a representing office in a pilot area, the Hong Kong Administrator may apply for recognition of and assistance to the Hong Kong Insolvency Proceedings in accordance with this opinion; and*
- e) *A letter of request from the Hong Kong court is required.*

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.

If certain requirements are met, the Hong Kong court can exercise its jurisdiction to wind-up companies that are not incorporated or registered in Hong Kong. Part X of CWUMPO is titled, "Winding up of unregistered companies" and an "unregistered company" is defined in s.326.

Under s.327 of CWUMPO, an unregistered company may be wound up by the Hong Kong court:

- a) *If the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;*
- b) *If the company is unable to pay its debts; and*
- c) *If the court is of the opinion that it is just and equitable that the company should be wound up.*

*To wind-up an unregistered company in Hong Kong, the petitioner must satisfy the court that the company in question is sufficiently connected to Hong Kong by satisfying the three core requirements set out in the CFA's decision in *Re Yung Kee* (2015) 18HKCFAR 501, namely:*

- a) *There must be sufficient connection with Hong Kong (not necessarily meaning the presence of assets within the jurisdiction);*
- b) *There must be a reasonable possibility that the winding-up order would benefit those applying for it; and*
- c) *The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.*

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

The petition should state how the three core requirements are satisfied, per *Excellent Asia (BVI) Ltd -v- Mas Media Group Ltd* [2021] HKCFI 3605.

If sufficient connection with Hong Kong is established via the three core requirements, the jurisdiction to wind-up will remain even after the matters giving rise to the original connection have ceased to exist, per *Penta Investment Advisers -v- Allied Well Development Ltd* [2017] HKEC 1475.

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 allowing 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. The statutory regime in Hong Kong for schemes of arrangement is contained in Part 13, Division 2 of the Companies Ordinance (Cap 622) (sections 668 to 677). The court procedure necessary to effect a scheme of arrangement is governed by O.102 r.2 and r.5 of the Rules of the High Court.

Without a scheme of arrangement, a company would need to obtain the approval of 100% of the relevant creditors to contractually vary the debt. Schemes are, therefore, necessary where a company seeks to adjust debts with many creditors at the same time in circumstances where it would be difficult or impossible to seek unanimous consent of all creditors. Schemes are also useful where there may be hold-out creditors who seek an unfair advantage as against a substantial majority of similarly ranked creditors.

For a scheme of arrangement to become effective, the following stages are required to take place:

- a) **an application is made for leave to convene meetings of the relevant creditors to consider, and if thought fit, approve the scheme. Such application is heard by the court whereby the court will give directions for giving notice off and advertising such meetings;**
- b) **the scheme meetings take place and the results are reported to the court; and**
- c) **an application is made by petition for the court to sanction the scheme.**

If the Hong Kong court sanctions a scheme, it will take effect in Hong Kong once a certified copy of the Hong Kong court order sanctioning the scheme has been registered by the Registrar of Companies for Hong Kong. The scheme will then apply to (and be binding according to its terms upon) all the scheme creditors in the relevant class or classes.

Commented [RD(DWH16)]: (3 marks)

A good answer that should also add: the role of the explanatory statement; how classes are constituted; the statutory majorities needed (important); the court's role on sanction (i.e. not just a rubber stamp)

A major weakness for using a scheme of arrangement, however, is the lack of any moratorium. It remains to be seen whether the type of principle mooted in *Eastman Chemical Ltd -v- Heyro Chemical Company Ltd* [2012] HKEC 272, permitting a stay under the court's case management powers, will be further developed in the context of schemes of arrangement.

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?

The strength of the common law is its flexibility to adapt and develop. However, this presents its own difficulties. For example, in the absence of legislation and reliance only on the common law, it can be more difficult to predict how many situations will be dealt with, particularly, in connection with the Hong Kong court's recognition of "light touch" provisional liquidators and whether it could recognise foreign insolvency proceedings where the relevant foreign jurisdiction is not the country of incorporation of the company.

In *Lamtex Holdings Limited* [2021] HKCFI 622, the court stated that there is "nothing in principle preventing recognition of liquidators appointed in a company's [COMI] or a jurisdiction with which it had a sufficiently strong connection to justify recognition."

Following the decision in *A Co -v- B* (a 2014 decision), it had become fairly routine practice for a liquidator appointed elsewhere to obtain a standard order stating that the liquidator had powers to take steps in Hong Kong provided the relevant power was available to a liquidator in both the originating jurisdiction and in Hong Kong. In the case of *Joint Provisional Liquidators of CECEP Costin New Materials Group Ltd -v- RSM Nelson Wheeler* [2021] HKCFI 794, provisional liquidators appointed in the Cayman Islands obtained a recognition order which they used to issue a summons seeking the production of documents from the company's former auditors. The application was made under s.286B of CWUMPO, which was the common practice at the time. However, as the court explored in its decision, that could not be correct since s.286B gives power to order production of information "in respect of a company" and the definition of "company" in the legislation did not include a foreign company.

In *Re Up Energy Development Group Ltd* [2022] HKCFI 1329, the relevant company was incorporated in Bermuda and listed in Hong Kong. Attempts to facilitate a restructuring failed and the company was wound up in Bermuda. A creditor sought a winding up in Hong Kong but the provisional liquidators appointed in Bermuda opposed the petition. It was argued that in so far as the provisional liquidators needed to take any steps in Hong Kong, an application for recognition and assistance could be made. The court disagreed and wound-up the company, commenting that "unless and until the court makes a [Hong Kong] winding up order against the company, there is

Commented [RD(DWH17)]: (4 marks)

Good answer, but need to refer to Singularis and the principles that apply (cannot do something in HK that would not have power to do in home jurisdiction). Need letter of request from foreign court. The 'standard order' has been whittled away, in part due to the use (misuse?) of the provisions to assist 'debtor-led' processes in certain offshore jurisdictions.

no basis to bring into operation the statutory scheme for a winding up. Nor is there any basis for the court to confer any of the powers or provisions under to the Bermuda liquidators or the company."

*Very soon after the **Up Energy** case, the Hong Kong court handed down its decision in **Re Global Brands [2022] HKCFI 1789**, which furthered a point raised in **Lamtex** regarding the recognition of liquidation being linked to the jurisdiction of a company's COMI rather than giving primacy only to a liquidation in the place of the company's incorporation. In its decision, the court acknowledged that (to date) the criteria for granting recognition and assistance had been that foreign insolvency proceedings were (a) collective and solvency proceedings, and (b) open in the companies please open corporation. The court went on to explain that it was open to the court "to develop the common law principles in their manner better suited to the circumstances in which transnational insolvencies currently arose in Hong Kong" and that, consequently, "in future, the criteria for recognition should primarily be determined by the location of a company's [COMI] ... treating the place of incorporation as the natural home or commercially most relevant jurisdiction for the purpose of determining which jurisdiction was the appropriate list for the seat of the principle liquidation was highly artificial."*

In summary, judges have developed Hong Kong law in the context of how foreign liquidations should be assisted, from previously giving primacy to a company's place of incorporation to now considering a company's COMI to be the determining factor.

An obvious issue in the Hong Kong context is the ability of an officeholder to take steps in the Mainland. Whilst there have been some successes, and certain assistance from the Mainland courts, recognition in the Mainland has been a common difficulty for Hong Kong officeholders over the years. However, the Hong Kong court addressed certain of these issues by way of common law development and there is now the co-operation mechanism between Hong Kong and the Mainland.

*In terms of the common law developments, following the decision in **Re CEFC Shanghai International Group Ltd (Mainland Liquidation) [2020] HKCFI 167** and similar cases, the court has now recognised the appointment of officeholders appointed in Mainland notwithstanding that the PRC is not a common law jurisdiction. The court was nevertheless satisfied that PRC insolvency law provided for a collective process.*

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

Commented [RD(DWH18)]: (1.5 marks)

A good answer on the point made but should also examine/advise:

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

Whether the charge is vulnerable pursuant to s.267 (charge given within 12 months and company insolvent at time or became insolvent; or within 2 years if Sea Breeze connected and then no need to show insolvency - in either case except as to new money advanced).

If charge is valid, floating charge realisations must be used to pay preferential creditors in the winding up if insufficient uncharged assets to do so

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.

The liquidation of Palm Beach Limited ("PB") does not prevent the receiver of Sea Breeze Incorporated ("SBI") from exercising his/her right to hold and/or sell the property or assets secured by the floating charge under which he/she was appointed. The realisations made by the receiver out of the assets charged are not available to the liquidator of PB for payment of the liquidation expenses (*Buchler -v- Talbot* [2004] 2 AC 298, as applied in Hong Kong in *Re Good Success Catering Group Ltd* [2007] 1 HKLRD 453; *CWUMPO*, s.265(3B).

The appointment of a receiver has the effect of crystallising the floating charge. However, the liquidator of PB may be able to make an application to set aside the granting of the floating charge to SBI by PB if it can be shown that the granting of the security was an unfair preference. This power is exercisable by the liquidators appointed in compulsory liquidation proceedings where such transactions were entered into during the period of six months prior to the commencement of the liquidation, or two years where the beneficiary under the relevant transaction was a "person connected to the company." Given the floating charge was granted to SBI by PB "a few months" before the liquidation, there may be scope to argue that the transaction is open to attack.

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.

Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, and Hong Kong is not a party to any international treaties that deal with cross-border insolvency. There are also no bilateral agreements with other countries. Although Hong Kong lacks a statutory framework in this regard, the Hong Kong court has always followed common law principles and has recognised a foreign liquidator's right to bring an action in Hong Kong (in the name of the company) (*Re Irish Shipping* [1985] HKLR 437; *Re BGA Holdings Ltd* [2021] HKCFI 3433).

Traditionally, foreign officeholders usually commenced ancillary liquidation proceedings in Hong Kong if steps needed to be taken there in relation to the main liquidation proceedings (here, in the Cayman Islands). However, in *A Co -v- B* (a 2014 decision), the court dealt with an application by liquidators appointed in the Cayman

Commented [RD(DWH19)]: (2.5 marks)

A good answer on Singularis principle and no need for order for certain things, but should also address:

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

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

Court may give "managerial assistance" for practicalities (for example, if the bank does not co-operate) but beyond that is perhaps unlikely. Based on recognising that law of incorporation will govern who can properly act in the name of the company.

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

Does not deal with client's question about a stay

Islands who sought, inter alia, a Hong Kong order recognising their appointment and an order for the production of documents from certain respondents. The court held that the Hong Kong court may "...pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law make an order of a type which is available to a ... liquidator under Hong Kong's insolvency regime."

Shortly after the *A Co -v- B* decision, the Privy Council gave its opinion in *Singularis Holdings -v- PricewaterhouseCoopers* [2014] UKPC 36, which clarified that the common law power of assistance exists where the power sought to be exercised exists in (i) the jurisdiction of the principal liquidation (here, the Cayman Islands); and (ii) assisting jurisdiction (here, Hong Kong). To obtain a recognition and assistance order in Hong Kong, the liquidator in the Cayman Islands must present a "letter of request" issued by the Cayman Islands court to the Hong Kong court requesting assistance.

Banks in Hong Kong should readily assist the Cayman Islands liquidator foreign by providing documents in relation to SKL's own accounts even without the Cayman Islands liquidator having to first obtain a Hong Kong court order (*Bay Capital Asia Fund LP (In Official Liquidation) -v- DBS Bank (Hong Kong) Unreported, HCMP 3104/2015, 2 November 2016*).

In considering whether to grant orders permitting the Cayman Islands liquidator to obtain the documents from the Hong Kong banks and examine the auditors, a "standard order" could be expected to be obtained by the Cayman Islands liquidator. However, this practice is likely to become less common given recent developments. In the context of investigations, the Cayman Islands legislation permitting examination is much more restrictive than is Hong Kong equivalent. As such, the Cayman Islands liquidator may be best advised seeking an "old fashioned" ancillary liquidation rather than a recognition order.

Question 4.3 [maximum 5 marks]

Harrier Limited supplies software products to Lapwing Limited pursuant to an ongoing contract signed between the two. Lapwing has stopped paying Harrier's invoices. It has not made any complaint about the supplies but in a conversation a Lapwing director told a Harrier director "sorry, we just can't afford it right now". The Harrier director said he may therefore have no option but to wind-up Lapwing, to which the Lapwing director replied "try that and I'll fight it" but he does not say on what grounds. Harrier come to you and ask you to talk them through the issues. What key questions do you need to ask and what comments can you give?

In considering whether Harrier Limited ("HL") may present a petition seeking the winding up of Lapwing Limited ("LL"), it should first be established whether HL have satisfied the statutory requirements under s.178 of CWUMPO. That is:

- (a) whether the outstanding sums due equal or exceed HKD 10,000 - the specified amount;

Commented [RD(DWH20)]: No; as per text, court has moved away from a 'standard order' being granted

Commented [RD(DWH21)]: (1 mark)

You refer to s.178 but do not, for example, address statutory demand. Should also advise client:

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

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

Statutory demand procedure – prescribed form needed for example.

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

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

(b) whether the contract under which the debt arises contains an arbitration clause; until relatively recently, a creditor in Hong Kong could still petition seeking a winding up order against the debtor company in favour of arbitration. However, it is now arguable that a more "pro-arbitration" approach may be favoured by the Hong Kong court (the "Lasmos approach") which aims to give primacy to contractually agreed dispute resolution mechanisms;

Commented [RD(DWH22)]: This is not a requirement of s.178
Should also mention exclusive jurisdiction clauses

(c) whether HL is a contributory or contingent creditor - if so, certain restrictions on a winding up petition potentially being presented by HL against LL apply (s.179(1)(a)-(e), CWUMPO).

Commented [RD(DWH23)]: Correct but not relevant where dealing with position as actual creditor (unpaid invoices)

* End of Assessment *

TOTAL MARKS: 32.5 OUT OF 50