



**Style Definition:** INSOL style heading 4

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

**Commented [INS 11]:** UPDATED MARK: 26/50 = 52%  
The marker has flagged an instance of plagiarism and marks have been deducted accordingly. Please be reminded of the instructions pertaining to plagiarism contained in the Course Handbook as well as in the assessment itself.  
Course Leader

***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(DWH2)]:** 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(DWH3)]:** Incorrect (0 marks) – although a receiver's duty is owed primarily to the lender appointing him, at law he is an agent of the company (see text at 6.4.1)

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(DWH4):** 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(DWH5):** 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(DWH6):** 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(DWH7): 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(DWH8): 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(DWH9): 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 primary duty is owed to the debenture or charge holder although the receiver is an agent of the company. They put the interest of them first despite being disadvantageous to the borrowing company. When selling property charges, residual duty owed to the borrower to act with reasonable skill and care and answer to the company if they do not exercise this. Obviously good faith as well as in accordance with the powers given to him under the debenture or charge when selling a secured asset.<sup>1</sup>

<sup>1</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023, p 55

Commented [RD(DWH10)]: Correct (1 mark) – see section 244 of CWUMPO

Commented [RD(DWH11)]: 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(DWH12)]: (3 marks)  
Good answer

Question 2.2 [maximum 3 marks]

**In a compulsory liquidation, what elements must a liquidator satisfy in order to successfully demonstrate a transaction (with a non-associate) amounted to an unfair preference? Please provide an outline only.**

The elements the liquidator must satisfy for an unfair preference under section 266 of CWUMPO are as follows:

1. "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 debts because of the transaction concerned.
2. Liquidator must show that the company was influenced by a desire to improve the person's position in the event of a liquidation."<sup>2</sup>

Unfair preferences are also given in instances where (1) The person being preferred is the debtor's creditor or guarantor for any of his debts or liabilities; and (2) The debtor does anything or suffers anything to be done which will put the person into a better position than he would have been in the event of the company's insolvency had it not been done.<sup>3</sup>

Transactions will not be set aside unless it was seen that the company made an attempt to positively improve the creditor's position just in the event of its own insolvent liquidation and the person isn't desirous of all of the necessary consequences of his actions.<sup>4</sup> However, the desire to prefer is not to be assumed for a non-associate. This is only presumed in instances where an associate is involved as defined in section 51 B of the Bankruptcy Ordinance (like a spouse, relative or spouse of the relative). Hence, if the liquidator is successful in satisfying this criteria, the company would be restored to the position it would have been in had the unfair preference not occurred, as per section 50 of the Bankruptcy Ordinance. However, an unfair preference is difficult to succeed with in Hong Kong because of the defence that genuine pressure was exerted on the debtor and that it was for this reason it acted as it did which had the potential of justifying such action.<sup>5</sup>

Question 2.3 [maximum 4 marks]

**What are the key elements needed for a Hong Kong liquidator to make use of the mechanism for co-operation between Hong Kong and the Mainland? Please provide an outline only.**

The key elements needed for recognition and assistance are as follows: Foreign proceedings need to be collective insolvency proceedings (commenced in Hong Kong under CWUMPO or the CO);<sup>6</sup>

- Opened in the company's place of incorporation;<sup>7</sup>
- Debtor's COMI is in Hong Kong continuously for at least 6 months – this being a key factor for determination;

<sup>2</sup> Ibid. p 47

<sup>3</sup> Ibid. 27

<sup>4</sup> Re MC Bacon [1990] BCLC 324; Hong Kong Osman Mohammed Arab v Cashbox Credit Services Ltd [2017] HKEC 2435

<sup>5</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023, p 46

<sup>6</sup> Ibid. p79-83

<sup>7</sup> Ibid.

**Commented [RD(DWH13)]:** (1.5 marks)

Most of the elements are there but (a) need to state that the transaction was at a relevant time (within 6 months of commencement as non-associate); and (b) see below re confusion between bankruptcy and liquidation

**Commented [RD(DWH14)]:** This is for bankruptcy - here the question is about a liquidator so should refer to sections 265, 266 etc of CWUMPO

**Commented [RD(DWH15)]:** (1.5 marks)

Some of the elements are there (collective insolvency process, assets/office in a pilot area) but the answer confuses the mechanism with certain elements of recognition generally

**Commented [RD(DWH16)]:** Hong Kong, not foreign

**Commented [RD(DWH17)]:** This is not part of the HK/Mainland cooperation mechanism

- There must be a connection between the debtor company and the pilot area in that company's assets are located there or place of business;
- Court could utilised common law principles suited for circumstances if necessary; and
- Hong Kong liquidators apply for a letter of request from the Hong Kong court and submit application to the court in mainland with affidavit in support of such application.

**Commented [RD(DWH18):** Yes, but again not part of the mechanism

This arrangement provides a mechanism for Hong Kong office holders to obtain recognition and assistance in those areas of mainland and for mainland office holders to obtain recognition and assistance in Hong Kong. The new cooperation mechanism demonstrates that the mainland has moved towards recognition based on a COMI Test.<sup>8</sup> Also the court considered that a debtor's place of incorporation should not be the exclusive criterion for recognition but instead, in future, the court should first determine whether the foreign liquidation takes place in the jurisdiction of the company's centre of main interest (COMI) at the time of the application for recognition and assistance.

In seeking recognition and assistance going forward, a foreign liquidator would need to show the liquidation is happening in the company's COMI and the court will give assistance if the application is for:

1. Recognition limited to recognition of the liquidator's authority to represent the company and managerial assistance is necessary; or
2. Recognition that doesn't fall within the above, but assistance required by liquidator appointed in the place of incorporation as a matter of practicality.<sup>9</sup>

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

Question 3.1 [maximum 4 marks]

**Commented [RD(DWH19):** (3 marks)  
The relevant elements are present but the notes below indicate a misunderstanding of the subject matter of the question

***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.***

In part X of CWUMPO, section 326(2) makes clear that registered non-Hong Kong companies can be wound up by the court. Under section 327, the company may be wound up in the following circumstances:

1. if the company is dissolved or does not carry on business or is carrying on business for the sole purpose of winding-up its affairs;
2. if the company is unable to pay its debts; and
3. if the court is of the opinion that it's just and equitable that the company should be wound up.<sup>10</sup>

However, under sections 327(1) and (3) CWUMPO provides the legislative basis for winding-up a non-Hong Kong company with the following 3 core requirements set out in the case of Yung Kee having to be satisfied:<sup>11</sup>

1. "Sufficient connection with Hong Kong but this does not necessarily have to consist of the presence of assets within the jurisdiction (could be carrying out business in Hong Kong);

<sup>8</sup> ***Yao Weitang v China Creative Global Holdings Ltd [2021] HKCFI 2814***

<sup>9</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023. pp 80 - 83

<sup>10</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023<sup>69</sup>

<sup>11</sup> Kam Leung Sui Kwan v Kam Kwan Lai and Others (2015) 18 HKCFAR 501



2. 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."

One of the circumstances in which a foreign company may be wound up is if the company is unable to pay its debts. It would be in breach of comity if a Hong Kong court exercised insolvency jurisdiction over the appellant in absence of sufficient connection with Hong Kong. The court applies the modified universalism approach<sup>12</sup> in exercising jurisdiction over a free standing liquidation in Hong Kong or to commence an ancillary liquidation for liquidator to be able to collect assets in Hong Kong and deal with creditors accordingly.<sup>13</sup> The common law principles still exist for the court to assist foreign representative and recognise foreign insolvency procedures.

Letters of request from common law jurisdictions can be made to the court like how it's done for those seeking assistance and recognition in Hong Kong. Also, the common law power was clarified in the case of Singularis Holdings<sup>14</sup> which stated that the common law power of assistance exists where the power sought to be exercised exists in the jurisdiction of principal liquidation and assisting jurisdiction. The Hong Kong court will compare the relevant provisions between Hong Kong and the requesting jurisdiction – any power sought to be exercised in Hong Kong must be a power one can exercise in its own jurisdiction. The need for the proceedings to be collective insolvency proceedings is imperative when seeking assistance. The principle of comity also allows the Hong Kong court to assist other insolvency proceedings where appropriate to do so. This has developed to the point of previously giving primacy to a company's place of incorporation to now considering a company's COMI to be the key factor for dealing with how a Hong Kong court can assist and recognise foreign liquidations.

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 is a legal mechanism that allows financially distressed companies to restructure their debts and obligations with approval from creditors and shareholders by virtue of some arrangement or compromise agreed between the parties. An application by originating summons made to the court for leave to convene meetings of creditors to consider and approve the scheme and the court will order certain directions for advertisement. The statutory regime for schemes can be found under Part 13, Division 2 of the Companies Ordinance (Cap 622) (sections 668-677). The court procedure is governed by O.102 r 2 and r 5 of the Rules of the High Court which sets out the procedure relating to applications necessary to effect a scheme of arrangement. Schemes are court sanctioned one the court sees that the relevant majorities have voted in favor of the proposed compromise which then will be binding all creditors of relevant classes. For the court to sanction such scheme, the applicant needs to show that the court has jurisdiction to do so and it's an effective scheme that would be recognised by other jurisdictions.

Explanatory statement setting out background of scheme is prepared and explains why such scheme is necessary. Then an application is made to court to convene meetings of the scheme creditors and once given, notice is given to all creditors in respect of the proposed

<sup>12</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/202372-73

<sup>13</sup> Ibid.

<sup>14</sup> Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36

Commented [RD(DWH20)]: ??

Commented [RD(DWH21)]: This is a different point

Commented [RD(DWH22)]: None of this is relevant to this question

Commented [RD(DWH23)]: (3 marks)  
A pretty good answer but is a bit jumbled in parts. How are classes constituted?  
Also, see note below re majorities required.

Commented [RD(DWH24)]: You should state what the majorities are

Commented [RD(DWH25)]: This is already stated above

arrangement. At the meeting the classes of creditors would vote on the proposed scheme and once the requisite majority is met (at least 75% of those present and voting) and voted in favor, this is reported to the court and the court will thereby sanction if it is seen to be one which an intelligent and honest creditor might reasonably approve.<sup>15</sup>

**Commented [RD(DWH26)]:** No. the statutory majority is 75% in value and a majority in number of those present and voting

**The Pros of this process are:**

- Flexibility – scheme allows company to negotiate a compromise with creditors to restructure debt on terms agreed between parties;
- Binding effect- once the scheme is approved by the relevant majorities (75% by value of creditors present and voting) and obviously the court sanctions, it becomes binding on all parties including the dissenting creditors. This essentially ensures fairness and a comprehensive restructuring.
- Cross-class cram down – if one classes votes against the scheme, it can still be approved and go ahead if the necessary percentages of votes in favour of the scheme have been achieved. This will be binding on the majority as well which prevents them from messing up the restructuring and

**Commented [RD(DWH27)]:** This is a pro but is not 'cross-class' - each class needs to vote etc. separately

**Cons –**

- Lack of moratorium – legislation doesn't automatically provide for a stay of proceedings.
- Time consuming process- the various steps involved in a scheme of arrangement and approvals needed may delay the restructuring process.
- Court involvement - due to the court having a significant role in approving, overseeing and sanctioning the scheme process, this could increase costs and delays as well. If the court finds it unfair, it could ever prevent the scheme from going ahead by not approving such.
- Uncertainty of the process – often times the scheme may be successfully completed and other times it may become impossible to complete depending on the approval from the relevant parties and reaching a consensus among different stakeholders can pose problems for the company involved. If a compromise cannot be agreed, it has the potential of leaving the company worse off as no court would approve for it to still be conducted.

**Question 3.3. [maximum 6 marks]**

**With no legislation to deal with cross-border insolvencies, how has the common law developed to assist foreign liquidations where steps need to be taken in Hong Kong? What are the pros and cons of developing the law in this way?**

**Commented [RD(DWH28)]:** (1 mark)  
A mark is given for the second paragraph and some of the pros/cons; but generally shows a misunderstanding and the reference to UNCITRAL is a significant error.

Need to give some explanation of the developments, based largely on the Privy Council's decision in *Singularis* and the principles that apply (cannot do something in HK that would not have power to do in home jurisdiction). Court had developed an almost 'standard order' that was then whittled away, in part due to the use (misuse?) of the provisions to assist 'debtor-led' processes in certain offshore jurisdictions.

Global Brands – court will be reluctant to give any recognition/assistance to a liquidator from somewhere that is not the company's COMI (even if it is the place of incorporation)

There has been development through the new May 2021 arrangement between Hong Kong and certain areas of the Mainland PRC for a new co-operation mechanism between the jurisdictions. The advantage of this is that Hong Kong liquidators are able to obtain recognition and assistance in those areas of the mainland and the officeholders from those areas are also able to seek recognition and assistance from Hong Kong if necessary to assist with liquidations.<sup>16</sup> Hong Kong has recognized the need to facilitate cross-border insolvency proceedings efficiently and has adopted several mechanisms to assist.

**Commented [RD(DWH29)]:** Yes, but the question is aimed at common law developments

The common law principles have helped Hong Kong and other jurisdictions with things like recognition of a foreign liquidator or even allowing them to bring an action in Hong Kong in the

<sup>15</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023 p 108

<sup>16</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023, p67

name of the Company. No formal order for such recognition is needed for this as Hong Kong take the approach that it should recognise that law of the company's incorporation should govern who is entitled to represent/bring actions on behalf of the company. Hong Kong providing foreign representatives is advantageous in protecting any assets belonging to a company in financial distress.

One significant development is the enactment of the Companies (Winding Up and Miscellaneous Provisions) Ordinance which incorporates the UNCITRAL model law on cross-border insolvency and helps with the courts recognising and assisting foreign proceedings and allowing foreign liquidators to apply for recognition in Hong Kong.

Pros:

- Develops efficiency: the recognition and assistance of foreign liquidations allow for a coordinated approach to cross-border insolvency proceedings which prevents duplicating efforts and increases the likelihood of maximising recovery for creditors.
- Protection of assets and creditors' interests: by recognising foreign liquidation, the assets of the insolvent company can be protected ensuring fair treatment of all creditors and facilitating equitable distribution of assets.
- International cooperation: developing common law promotes international cooperation and communications amongst courts in various jurisdictions and aligns Hong Kong with international best practices. It encourages collaboration between different jurisdictions, fostering a more harmonious and efficient global insolvency regime.

Cons:

- Complexity and costs: implementing such mechanism to assist foreign insolvency proceedings require additional resources and expertise. This could result in increased complexity and costs for parties involved in the liquidation.
- Potential conflict of laws: always the risk of laws from different jurisdictions conflicting which means that a foreign representative may not always be afforded recognition or assistance. Harmonizing conflicting laws is a challenge in itself which may result in severe delays to proceedings and uncertainties in resolutions of cross-border insolvency cases.
- Sovereignty concerns: some may believe developing law in this way could compromise national sovereignty as it requires acknowledging and applying foreign laws within the local legal framework. Hence, striking the right balance between international cooperation and protecting national interests can be an uphill task.

#### 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.**

As per section 79 of CWUMPO, preferential claims must be met realisations of a floating charge even if there isn't any liquidation at the time. However, where there is a liquidation, under section 265(3B), the preferential claims are paid out of the floating charge realisation so far as there is sufficient uncharged assets available to the liquidator. A floating charge

**Commented [RD(DWH30)]:** No, CWUMPO does not incorporate UNCITRAL

**Commented [RD(DWH31)]:** (2 marks)

Some good points there but a bit muddled/repetitive. See comments below

Also does not address the direct question of liquidation costs (if charge valid, realisations will not be used for those : Leyland Daf case)

Should mention that the charge could be challenged as an unfair preference

**Commented [RD(DWH32)]:** insufficient

created within a certain period before the commencement of liquidation which is the case here may be voidable.<sup>17</sup> Section 334 of Part 8 of the Companies Ordinance (Cap 622) requires registration of floating charges over the company's undertaking or property. If charge isn't registered then it's void against a liquidator or creditor of the company. Where realisation are made out of assets covered by a floating charge, those realisation must be first used to meet claims of preferential creditors. Floating charge not valid if it is entered into within a period of 12 months prior to the commencement of the liquidation and the company is 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.<sup>18</sup> But it could be valid for any new money provided to company at time of or after creation of charge.

Security ranks behind all fixed charges and rights of preferential creditors. Charge invalid unless invalid unless it is shown that the charger was solvent immediately after the creation of the floating charge. However, contractual protections can be included in security documents to control and to mitigate against these types of risks, including the ability to automatically crystallize a floating charge into a fixed charge immediately on the occurrence of certain events (e.g., where insolvency proceedings against the chargor have commenced or where the lender considers that the assets subject to the floating charge may be in danger of being seized or otherwise be in jeopardy). On crystallization, a floating charge becomes a fixed charge and ranks as a fixed charge. This means that it would rank behind an earlier fixed charge but it would have priority over subsequent fixed charges and floating charges and certain rank above unsecured creditors.

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.***

The court has the power to help the Cayman Liquidator to seek production of documents and order the examination of the auditor in Hong Kong.<sup>19</sup> Once an ex parte application (letter of request) for a standard order of assistance or recognition is submitted, the Hong Kong court will consider it and be mindful of the fact that it would not order powers beyond what the foreign liquidator will get and be able to do in the requesting jurisdiction. However, this order can be departed from if the court finds it appropriate to do so. Due to the strict rules surrounding examination in Cayman Islands, I would advise the Cayman (L) to seek an old fashioned ancillary order rather than a recognition order. Despite any conflict which may appear between Hong Kong and Cayman Islands, this shouldn't deter the Hong Kong court from assisting the Cayman (L) because the court, in certain circumstances, will permit a foreign liquidator to deviate from certain requirements with which a Hong Kong liquidator would have to comply with to achieve the objective. Since these proceedings appear to be collective proceedings dealing with the insolvent company and they were opened in Cayman which is the company's

<sup>17</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023, p15

<sup>18</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023, p 49

<sup>19</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023, p75

**Commented [RD(DWH33)]:** This is already stated above

**Commented [RD(DWH34)]:** or within 2 years if Sea Breeze connected and then no need to show insolvency

**Commented [RD(DWH35)]:** This would not protect against the 'risk' of realisations being used for preferential creditors

**Commented [RD(DWH36)]:** (2 marks)

Some of the broad concepts are here (e.g. Singularis principle) but the advice is a bit muddled and does not address, for example:

Should not need an order to get documents from the bank (the wording suggests it is SKL's own account) – Bay Capital; Seahawk; (Global Brands explanation of "recognition" proper being acknowledgment of the liquidator's authority to represent the company)

Up Energy holds that cannot "give" powers, so even if would assist, would not be the "full suite" hoped for by L. Further and in any event Global Brands says must look at COMI, being examples: Location of directors, officers, board meetings; Location of operations, assets, bank accounts (here – the listing?). You mention COMI but do not explore the same

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.

However, and 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 properly with client's question about a stay (should not just say 'will make submissions', should say what principles should be covered by those submissions: e.g. no automatic stay (FDG) but court may be persuaded if genuinely needed.

**Commented [RD(DWH37)]:** The ex parte application is not the same as the letter of request. The letter of request must come from the originating court (Cayman), the ex parte application will be made to the HK Court

**Commented [RD(DWH38)]:** Cannot depart from the Singularis principle, no

place of incorporation or COMI (more recently used), so assistance will be granted by Hong Kong by virtue of the principal of comity which will give the Cayman (L) powers to obtaining the documents requested from the bank and examining the auditor for the purposes of preserving the assets of [company] or investigating or progressing the liquidation. Once that order is made those auditors will be ordered to cooperate with the examination (applying the case of Joint Provisional Liquidators of CECEP Costin new Materials Group Ltd v RSM Nelson Wheeler [2021] HKCFI 794)

Given this latest decision ([2022] HKCFI 1329), a foreign insolvency officeholder intending to seek recognition and assistance in Hong Kong should be prepared to make submissions to satisfy the court that it has the power to grant the relief sought whether that include stay of any action that creditors of SKL may bring in Hong Kong.

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?**

How much debt is owed?- if 10k or more (most likely it is) then this is justification that Lapwing Limited can be wound up as it is unable to pay its debt as they fall due. Petition can be presented by Harrier Limited in respect of the amount owed and as a creditor of the debtor company.

Undisputed debt – can wind up company on ground that it's unable to pay its debts. There is no disputer in relation to the money owed to Harrier Limited. Debtor must show bona fide dispute on substantial grounds. Debtor should be cautious about seeking to oppose a petition solely on the grounds of existence of an arbitration clause. This will be hard for Lapwing as it in fact does owe the money for the supplies provided under contract. Lapwing may apply to restrain petition from being presented but it must provide evidence of solvency and not merely make assertions of a dispute.<sup>20</sup>

Is the debt under the contract subject to an arbitration clause? If so petition would be stayed in favour of arbitration unless debt was actually admitted by the debtor. "lasmos approach" would be relevant for these purposes but it doesn't appear from the facts that the contract agreement was subject to any arbitration clause.

Are there any contractual terms for dealing with non-payment in the contract? Perhaps if there are that's the first avenue that should be explored as an alternative to winding up the company.

Any communications or negotiations have taken place between the parties to resolve the non-payment issue? Perhaps Lapwing may be in a position to commit to pay less than the agree instalment price until its financial position improves or to come up with a different payment

<sup>20</sup> Robin Darton, Module 8C Guidance Text, Hong Kong 2022/2023, p37

**Commented [RD(DWH39)]:** Good to note need for COMI but why is Cayman the COMI here.....?

**Commented [RD(DWH40)]:**  
Updated: 0 marks

Marker raised issue of copying from a website (bbcincorp.com)  
Course Leader

(1 mark)

Makes the point about HK\$10,000 threshold and need for a debtor to show bona fide dispute. Is confused about the arbitration clause effect (see notes below). Should 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.

Statutory demand procedure – prescribed form needed for example.

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

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

**Commented [RD(DWH41)]:** Your previous paragraph says debtor should be cautious about relying on such a clause....

plan. Encourage open and transparent communication between parties to gain a better understanding and avoid ruining the business relationship.

The Court may appoint a liquidator to wind up the company's affairs. The appointed liquidator is liable for investigating the company and giving instructions on the statement of affairs. The liquidator also takes control of your company assets and accounting records and proceeds with investigations which may result in Harrier Limited as a creditor recovering some of the money it's owed for the supplies provided to Lapwing. It should be noted that the cost of insolvency proceedings are potential consequences which may result in the creditor getting less than they bargained for and obviously could affect all parties' reputations.

Once your company's affairs are completely wound up, it will be dissolved.

**\* End of Assessment \***

**TOTAL MARKS: 27 OUT OF 50**

**Commented [RD(DWH42):** "your company"????

**Commented [RD(DWH43):** This does not read as if it is part of the answer

**Commented [INS 144]:** Final mark updated to 26/50 = 52%

Course Leader