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INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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).***

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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.

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

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

Question 1.6

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

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

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

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

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

Commented [RD(DWH6]: Correct (1 mark)

Question 1.7

Select the correct ***answer as to whether the following statement is true or untrue:***

Hong Kong legislation provides a comprehensive statutory regime ***relating to corporate rescue.***

(a) This statement is true because of the combined effect of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and the Companies Ordinance (Cap 622).

(b) This statement is true because of recent legislation called the Companies (Corporate Rescue) Bill.

(c) This statement is untrue, as Hong Kong has no comprehensive statutory regime for corporate rescue.

Commented [RD(DWH7]: Correct (1 mark)

(d) This statement is true because of the recently enabled Cooperation Mechanism for cooperation in relation to insolvency matters as between Hong Kong and the Mainland, People's Republic of China.

Question 1.8

Select the correct ***answer as to whether the following statement is true or untrue:***

Since the Handover ***in 1997, no decisions of any United Kingdom (UK) court are binding in Hong Kong.***

(a) This statement is untrue as decisions of the UK Privy Council on appeals from Hong Kong remain binding.

(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]: 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.

A contractual receiver owes duties to both the borrower and the charge holder, although they are entitled to put the interests of the charge holder first when making decisions in respect of the charged asset. This applies even where the course of action chosen prefers the charge holder to the detriment of the borrower, but subject always to the receiver's duty to use reasonable skill and care in the performance of their duties and the disposal of the charged asset. The receiver must also act in good faith and in accordance with the powers permitted under the security document.

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)
Good answer but should identify that R is at law agent of the borrower but owing primary duty to chargeholder and residual duty to chargor.

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 order to prove that a transaction amounted to an unfair preference under ss 266, 266A and 266B CWUMPO, the transaction must be within 6 months prior to the commencement of the liquidation, and the liquidator must first prove that at the time the transaction was made, the company was unable to pay its debts as they fell due, or that, a consequence of the transaction was that the company became unable to pay their debts. In addition, the liquidator must also prove that the company, in completing the transaction, was motivated by a desire to improve the recipient's position in the event of a liquidation. This second element can be difficult to prove. Case law has shown that in order to succeed in having a transaction set aside it must be shown that "the company positively wished to improve the creditor's position in the event of its own insolvent liquidation" (Re MC Bacon [1990] BCLC 32 and Hong Long Osman Mohammed Arab [2017] HKEC 2425). The granting of new security can also be deemed an unfair preference unless additional funds are advanced at the time the security is granted.

Commented [RD(DWH12]: (2 marks)
Should mention that the effect of the transaction is to actually put the creditor/guarantor in a better position
Also, need to mention that the person 'preferred' must be a creditor or guarantor

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.

A Hong Kong appointed liquidator can avail of the mechanism for co-operation between Hong Kong and the Mainland and apply for recognition in any of the pilot areas on the Mainland which are designated as Shanghai, Xiamen and Shenzhen. The other requirements and considerations when seeking cooperation in Mainland China are:

- *The Hong Kong Insolvency proceedings must be collective proceedings commenced under the CWUMPO or CO.*
- *The debtor's COMI must be Hong Kong – with the Supreme Court guidance opinion stating that this means place of incorporation of the debtor, although also permitting the Mainland court take other factors into account.*
- *If the debtor's principle Mainland assets are in one of the pilot areas, or it has a place of business or offices in a pilot area, then the Hong Kong representative can seek recognition.*
- *The Hong Kong representative must provide a letter from the Hong Kong court.*

Accordingly, a Hong Kong liquidator appointed under the CWUMPO would satisfy the first bullet point requirement, and, so long as the company's COMI was in Hong Kong and the company had assets in one of the pilot areas, then the liquidator would have

Commented [RD(DWH13]: (3.5 marks) Good answer but misses one small potin: that the COMI must have been in HK for 6 months

to seek a letter of request from the Hong Kong court in order to apply for recognition on the Mainland (provided he is attempting to seek recognition in one of the pilot areas). A number of recent Hong Kong decisions have lauded this new development and have stated that the Hong Kong court should grant liquidators the letter of request where requested so that they can avail of the ability to seek recognition (Lai Kar Yan and Ho Kwok Leung Glen as joint liquidators of Samson Papers Company Limited (in creditors voluntary liquidation) [2021 HKCFI 2151).

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH14]: (4 marks)
Good answer

Discuss the statutory basis enabling the Hong Kong court's jurisdiction to wind-up a non-Hong Kong company, and the common law principles that the Hong Kong court will consider when deciding whether to exercise that jurisdiction.

Part X of the CWUMPO provides for the winding up of "unregistered companies" which are defined in s326 of CWUMPO as companies not registered under companies legislation. Such companies can be wound up by the Hong Kong court if any of the following can be shown:

- *That the company is dissolved or no longer carries on business, or is only carrying on business to wind up its affairs;*
- *The company is unable to pay its debts; or*
- *The court is of the opinion that it is just and equitable to wind up the company.*

However, in order to accept that it has jurisdiction to wind up such a company in Hong Kong, the petitioner must satisfy the "three core requirements" established in RE Yung Kee ([2015] 18 HKCFAR 501) which are:

1. *there must be sufficient connection to Hong Kong;*
2. *there must be a reasonable possibility that the winding up order would benefit those applying for it;*
3. *the Hong Kong court must have jurisdiction over one or more persons with an interest in the distribution of the company's assets.*

Regarding 1, this doesn't necessarily mean there must assets in the jurisdiction, although this will obviously help. Assets can also be assets of any nature and a Hong Kong listing has been found to constitute an asset in the jurisdiction (although recent cases have required evidence to demonstrate how listing achieves value for creditors – e.g. China Huiyan Juice Group). If there are no assets other links such as business activities will be considered, although the Hong Kong court are increasingly applying COMI considerations when evaluating 1 and 2 above.

Regarding 2, this will be easier to prove if the company has assets in the jurisdiction which would serve to benefit the petitioner in a liquidation. However, although this is

an essential test in order to have standing to bring a petition, the Hong Kong courts have been willing to apply a low threshold and find that it is satisfied so long as "the benefit can be said to be a real possibility, rather than just a technical one" (Re Carnical Group International Holdings [2022] HKCFI 2668, as endorsed by the CFA in Shandong Chenming Paper Holdings Ltd)).

Regarding 3, the petitioner has to show there are people with a Hong Kong connection who have an economic interest in the winding up of the company such that they will engage in the winding up process (as per RE China Medical [2014] 2 HKLRD 2361). Essentially there must be a creditor who is subject to the court's jurisdiction. However, the Court of Appeal has stated that even though this test should be applied, there may be circumstances where the Hong Kong court can make a winding up order if the connection with the jurisdiction is sufficiently strong and the benefits to the creditors of making such an order are substantial (Re China Medical [2018] HKCA 111).

Question 3.2 [maximum 5 marks]

Commented [RD(DWH15]: (5 marks)
A good answer

The scheme of arrangement is, in essence, Hong Kong's only statutory tool for corporate rescue. Describe it, listing the pros and cons.

The Hong Kong scheme of arrangement is Hong Kong's only statutory tool to facilitate corporate rescue but can be flexibly applied in order to effect corporate restructurings. The scheme enables a company to make legally binding compromises with members, creditors and other stakeholders, including reduction of debts or changes to share capital. It is based mainly on the old UK legislation, although there are some important differences, particularly relating to when the court can deal with the composition of the classes of creditors (see below).

One obvious omission in the scheme of arrangement procedure, is that there is no moratorium or payment holiday, meaning the debtor company is at the mercy of any dissenting or uncooperative creditors who may file a petition to wind the company up when restructuring negotiations are ongoing (or bring any other action or proceeding). In an effort to address this, a practice developed whereby a winding up petition was filed and an application for a provisional liquidator (PL) made who would have powers to investigate a restructuring of the company's business. The PL could then benefit form a moratorium under s186 CWUMPO and, if the scheme was successful, the winding up petition would be dismissed. This was first applied in Re Keview Technology (BVI) Limited and affirmed by the Court of Appeal in Re Leung Cheong Tai International Holdings Ltd. The position changed following Re Legend International Resorts Limited where the Court of Appeal refused to appoint PLs on the basis that the purpose of the petition was to wind up the company and any appointment solely for the purpose of restructuring the company was not permitted by the legislation. However, subsequent cases did employ the use of PLs and the process was still used where it could be shown there was a real risk to creditors or the assets of the company. In such cases the PL could be appointed and, if after gathering and examining the assets of the company, he deemed a scheme may be viable, he

could then request restructuring powers from the court. This approach was affirmed in China Solar Energy Holdings Ltd [2018] HKCFI 555.

In order to effect a scheme, the company must make an ex parte application for leave to convene meetings of all relevant creditors in order to consider the scheme. This must be accompanied by a verifying affirmation explaining the background of the scheme, exhibiting a copy of the draft explanatory statement and scheme document, and copies of the notices, advertisement, draft proxy forms etc. At the hearing of the application, the court will give directions for the provision of notice and advertisement of the scheme meetings. One obvious weakness in the Hong Kong scheme, is that, unlike the UK, the court cannot make any determination or finding in relation to the composition of the classes of creditors at the initial scheme hearing. This means that the applicant could go through the time and expense of convening and holding the meeting to approve the scheme only to be told that the scheme will not be sanctioned because the classes of creditors were not properly constituted for voting purposes (e.g. S Megga Telecommunications Ltd).

The main items the court will consider at the convening hearing are if there is jurisdiction to implement the scheme and if the explanatory statement is and supporting documentation is fit for purpose. The explanatory document must adequately describe the scheme and its affects and include the participants likely outcome were the scheme not to occur and the next most likely alternative occurred. This comparator will often be liquidation. If the court grants leave to convene a meeting it must be done in accordance with the court's orders and, at the scheme, all creditors whose rights are affected will be entitled to attend and vote. The scheme must be approved by a majority in number representing at least 75 per cent by value of each class of creditors voting. If passed, the scheme will bind even dissenting creditors.

If approved at the scheme meeting, the applicant must file a petition seeking the court's sanction of the scheme. It must be supported by an affirmation setting out how the voting and how all previous conditions re notice etc. were complied with. In deciding whether to sanction the scheme the court will, at that stage, consider the composition of the classes of creditors voting in every class, as well as, inter alia, if the scheme is permissible, and whether it is satisfied that an intelligent and honest man acting in accordance with his interest would have been reasonably expected to vote for the scheme (RE China Singyes Solar Technologies Holdings Ltd).

Modification may be allowed provided they do not materially alter the scheme (Re Samson Paper Holdings Ltd). The scheme will take effect once a certified copy of the court order is filed with the Hong Kong Registrar of Companies. Applicants also need to consider the Gibbs rule when considering the effect of the scheme on foreign law governed debt.

Question 3.3 [maximum 6 marks]

Commented [RD(DWH16]: (6 marks)
A good, comprehensive, answer

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?

As there is no legislation addressing cross border insolvencies and cooperation, decisions of the Hong Kong courts have developed the law in a piecemeal and patchwork fashion, building on the decisions made in previous cases and, in certain instances, overriding them and changing course. Although this means the Hong Kong courts can be flexible in their application of the law and respond to trends and needs as they arise, it also means that there is a lack of certainty for litigants who can find that there are competing decisions which make it difficult to know which course of action to take, which can serve to increase costs.

The Hong Kong courts recognise foreign liquidators right to bring actions in the name of the company in Hong Kong without the need for an order or other form of recognition. Traditionally, the Hong Kong courts have been receptive to assisting foreign representatives. They have been willing to open 'ancillary' liquidations where the principle liquidation is somewhere else, and have applied a 'modified universalism' approach when doing so, such that the function of the Hong Kong liquidator would primarily be to collect the Hong Kong assets and deal with the Hong Kong creditors etc. to assist the liquidator in the primary liquidation. In order to grant a petition for an 'ancillary' winding up the 'three core concepts' discussed above will need to be satisfied. If granted, the existence of the 'ancillary' liquidation is a useful tool to give foreign representatives necessary powers under Hong Kong law. However, another approach was for foreign representatives to simply seek recognition of their appointment and to then seek assistance on that basis without the powers which would stem from being appointed in an 'ancillary' liquidation. This was permitted in A Co -v- B, and, soon afterwards the Privy Council decision in Singularis was delivered which clarified the common law in this area.

Hong Kong courts have however proven that they will not blindly accept a letter of request from a foreign court and will consider the purpose of the letter and assistance sought. In The Joint Admins of African Minerals Ltd, the Hong Kong court refused the letter of request in circumstances where the administrators were seeking a moratorium which was not available under Hong Kong law. They determined that the recognition of foreign insolvency proceedings is limited by the extent to which such relief is available in Hong Kong. This principle is also applied in the opposite direction, whereby the relief sought in Hong Kong should also be available under the laws of the home liquidation. However, these restrictions may apply where an 'ancillary' liquidation was commenced. The Hong Kong courts have also found that if the foreign representatives wishes to go further than simply obtaining information and to actually deal with assets in Hong Kong, they should apply for a specific recognition order or initiate an 'ancillary' winding up proceedings (Re China Lumena New Materials Corp (In PL).

Commented [RD(DWH17]: May not apply ?

As well as liquidations involving the termination of an undertaking, the Hong Kong courts have also been willing to assist foreign representatives overseeing restructuring processes. Often this is done by the appointment of 'light touch' PLs tasked with implementing a restructuring. These were traditionally granted recognition in Hong Kong following the Z-Obee decision. However, it became evident that the this process was being used as a defensive tool to prevent winding up proceedings where they might otherwise be legitimately brought. Accordingly, recent decisions have shown that Hong Kong court will carefully scrutinise the reason behind the appointment of the PLs and the nature of the restructuring they are trying to implement.

This has led to a further development of the application of common law in applications for recognition and assistance in Hong Kong, with one of the first case to re-assess this, Joint Provisional Liquidators of CECEP Costin New Material Group Ltd. The court applied a more granular analysis of the relief sought by the foreign PLs and determined that they did not have the power to make the order sought (re the production of documents) as the power conferred in the CWUMPO to do the action is confined to a company, as defined in the CWUMPO, and therefore this does not extend to foreign companies. In Re Up Energy, the Bermudian PLs sought to restrain the bringing of winding up proceedings in Hong Kong on the grounds that they were not necessary as there were already winding up proceedings in existence in Bermuda and, where any steps needed to be taken in Hong Kong, the PLs could just apply for recognition and seek assistance. The court disagreed and granted the petition stating that the court has no authority to grant foreign liquidators any powers unless the applicable local legislation was effected and an application was made under CWUMPO. Very soon afterwards, in the Re Global Brands case, the Hong Kong court stated that it was open to it to develop and apply the common law principles based on their experience in the jurisdiction, and that this would more often than not require them to determine a company's COMI with a view to deciding how foreign liquidations should be assisted.

Given the recency of this decision, foreign representatives will no doubt be carefully monitoring future decisions of the Hong Kong courts before deciding to seek recognition and assistance, or to open 'ancillary' proceedings.

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.

The creation of new security a few months before the company entered liquidation could constitute an unfair preference under ss 266, 266A and 266B CWUMPO. If the

Commented [RD(DWH18]: (2 marks)

See comments below.

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).

transaction occurred within 6 months of the winding up order, and if new finance or funds were advanced on foot of the security then it certainly warrants further investigation. If it can be shown that (i) at the time the security was given the company was unable to pay to pay its debts, and (ii) the company was influenced or motivated by a desire to prefer Sea Breeze and improve the position in a liquidation. As noted above, this can be difficult to proof.

As regards the receiver and whether their realisations, can be used to mee the liquidation costs and expenses, this is unlikely. Generally speaking, absent fraud or other compelling reasons, the realisations made by a receiver from the charged asset are not available to the liquidator for the payment of liquidation expenses. This was established in Butcher -v- Talbot [200] 2 AC 298 and affirmed in Hong Kong in Re Good Success Catering Group Ltd [2007] 1 HKLRD. However, s265(3B) of CWUMPO states that "the debts specified in subsection (1)[preferential debts] shall, so far as the assets of the company available for payment of general creditors are insufficient to meet those debts, have priority over the claims of holders of debentures under any charge created as a floating charge by the company, and shall be paid accordingly out of any property comprised in or subject to the charge."

Accordingly, the floating charge receiver's realisations could be used to pay any preferential creditors such as employee wages etc, but not to meet liquidation costs or unsecured creditors' claims which would rank behind the floating charge security.

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.

As outlined in my response to question 3.3 above, the process of seeking cross border recognition and assistance form the Hong Kong courts can be quite tricky and has become far stricter in recent times.

The first thing to make sure of and which L will need to be aware of is that we need to ensure that any powers we are seeking to have the Hong Kong court confer on us in Hong Kong must also be a power which L is entitled to exercise in Cayman. In this instance L is seeking to obtain documents from SKL's bank and to examine the auditors. As regards the latter, s103 of the Cayman Companies Act is quite restrictive when compared to the Hong Kong provision permitting examination (s286B, CWUMPO).

Commented [RD(DWH19]: Do you mean "no" new finance etc.?

Commented [RD(DWH20]: Preferential creditors paid out of floating charge realisations only if insufficient uncharged assets

Commented [RD(DWH21]: (5 marks)

Good answer that only misses one key point:

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

We will also need to correct L's understanding that it is easy to obtain the 'standard order' recognising the liquidators appointment and giving him a full suite of powers in Hong Kong which would include a stay. This may have been closer to the situation a few years ago but recent case law has shown a marked change in approach by the Hong Kong courts. Following Up Energy and, in particular, Global Brands, the Hong Kong court will look far mor closely at a company's COMI That may cause issues here given the company is listed on the Hong Kong exchange and has assets and a representative office in Shenzhen. However, in this instance, even if the Hong Kong court decide that SKL's COMI is not in Cayman, they would in all likelihood be minded to offer the assistance sought if L's primary objective was obtaining documents from the Hong Kong bank and an examination of the auditors (subject to the above issue) as this could be deemed more 'managerial assistance'.

Commented [RD(DWH22]: Note that for bank docs, no order should be necessary (Bay Capital v DBS)

However, given the potential issues obtaining recognition and, in particular, examining the auditors on the basis of a recognition order, it may be more prudent to seek an 'ancillary' winding up of SKL as an unregistered company under Part X of CWUMPO. In order to do so it would have to satisfy the 'three core requirements' listed above. SKL's listing on the Hong Kong exchange should be enough to show that it has a sufficient connection to Hong Kong when coupled with fact that it has bank accounts in Hong Kong and its auditors are based there. As regards criteria 2, the winding up order would benefit L as it would mean that no proceedings could be initiated against SKL in Hong Kong and it would also allow him to oversee any Hong Kong assets and take any action required in Hong Kong (such as examining the auditors). Finally as regards the third criteria, there must be persons with sufficient connection to Hong Kong who would engage in the winding procedure (persons, other than the petitioner subject to the jurisdiction of the Court). This is not as clear from the facts above, although if SKL has auditors and bank accounts in Hong Kong it is likely it will have some creditors also based in Hong Kong. In addition, the Court of Appeal held that it may still make a winding up order in the absence of this requirement if the connection to Hong Kong is sufficiently strong (which it would likely be here given the Hong Kong listing / bank accounts etc.).

Question 4.3 [maximum 5 marks]

Commented [RD(DWH23]: (3 marks)

A good answer but misses a few points:

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

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

Any arbitration or EJC clause?

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

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?

Harrier will need to consider what its primary objective is in order to receive payment. It is possible that, as Lapwing have indicated they are unable to afford the services,

they could be in financial difficulty and Harrier may receive less than they are owed were they to seek to have Lapwing wound up.

It seems clear that there is contractual terms governing the relationship and that Lapwing are in breach of the contract by not paying Harrier's invoices. Furthermore, they have not indicated that there are any issues with Harrier's supplies and instead intimated that they simply can't afford to pay the invoices. In those circumstances, given Lapwing are clearly experiencing some sort of cash flow difficulty and the debt remains owing, it would be open to Harrier to serve a statutory demand and, if not paid, to seek to have Lapwing wound up. However, this can be an expensive process, particularly given that Lapwing have indicated they will fight it. Furthermore, a liquidation is conducted on behalf of all creditors, so Harrier, as an unsecured creditor (I assume) will be in no better position than any other creditor, and if the company is insolvent and wound up, may receive nothing or less than the full amount of their original debt (depending on the level of Lapwing's indebtedness).

In light of this, a more cost effective method of pursuing the debt may be outside of the Hong Kong insolvency regime. The claim could be brought in the District or High Court (depending on the size of the claim) and would have to commenced by writ. Given the nature of the debt, Harrier would be best advised to apply for summary judgment against Lapwing. Once served, Lapwing would need to file an acknowledgment of service, failing which Harrier could obtain a default judgment. Proceedings seeking summary judgment are based on affidavit evidence and, if Harrier can adequately prove their claim and Lapwing cannot demonstrate that it has realistic defence, then Harrier should be awarded judgment. Based on the facts outlined above, that seems plausible. If judgment is granted, Harrier can seek to enforce it in a number of ways such as, for example, by way of a garnishee order, or by a charging order. These methods of obtaining and enforcing a judgment against Lapwing could be more likely to result in a return to Harrier than any potential return in a liquidation. They may also be more cost effective.

*** End of Assessment ***

TOTAL MARKS: 41 OUT OF 50