



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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- 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 [RD(DWH1)].**
- (d) Any of the above.**

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 [RD(DWH2)]).**
- (b) Agent of the lender appointing him (B, in this instance).**
- (c) Agent of the Official Receiver.**
- (d) An officer of the court.**

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^[RD(DWH3)].

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^[RD(DWH4)]).

(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^[RD(DWH5)].

(c) the date of the winding-up order.

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

Question 1.6

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

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

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

(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^[RD(DWH6)].

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^[RD(DWH7)].

(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^[RD(DWH8)].

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 [RD(DWH9)].

(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 [RD(DWH10)].

(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] [RD(DWH11)]

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

In selling the assets the receiver will owe fiduciary duty to the owner of the debenture or charge holder. (Note from appointment the receiver owes the primary duty to the debenture or charge holder). [RD(DWH12)] ***The receiver must act in good faith and act within the powers conferred to the receiver in the debenture or charge. Therefore, in selling the assets the receiver act in a way that is to the best interest of the debenture or charge holder.***

Question 2.2 [maximum 3 marks] [RD(DWH13)]

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 liquidator must show that there was unfair preference. Unfair preference means 1) the person receiving the preference fits into the following categories: creditor, holds a surety or is a guarantor; and 2) the debtor has done something that places the above mentioned in a place that is better than they would have been were it not for the unfair preference.

The liquidator must also show that when the unfair preference was given the debtor become unable to pay its debt as a result or that the debtor at that time was unable to pay its debt already.

Question 2.3 [maximum 4 marks_{RD(DWH14)}]

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 liquidator must use the records meeting _{RD(DWH15)} which provides:

- i) The designated area should be among the following: Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province.*
- ii) That the liquidation should fit in what is described as 'Hong Kong Insolvency Proceedings' which include compulsory and creditor voluntary liquidation.*
- iii) The debtors Centre of Main Interest must be in Hong Kong. COMI usually means the place of incorporation of the debtor but other exemption can apply such as place of principal office, business or principal assets.*
- iv) A letter of request from the Hong Kong court*

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

Question 3.1 [maximum 4 marks_{RD(DWH16)}]

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.

Hong Kong is one of the business hubs in Asia where international companies do business.¹ In the doing business, international companies can fall into financial trouble and require to be wound up in Hong-Kong. For international companies to be wound-up in Hong Kong there are both statutory and common law principles which must be

¹ Erik Baark and Naubahar Sharif, 'From trade hub to innovation hub: The role of Hong Kong's innovation system in linking China to global markets' (2005) 8(1-2) Taylor and Francis 193.

satisfied. The aim of this short essay is to discuss the requirements which non-Hong Kong companies must show in order to be wound up in Hong Kong.

Non-Hong companies can be wound-up in Hong Kong despite the facts that they have not been incorporated or registered in Hong Kong.² The non-Hong companies must fit into the definition of unregistered companies under s 326 of the CWUMPO.³ The definition of unregistered companies does not include companies incorporated in Hong Kong. It should be noted that foreign companies with places of business in Hong Kong are required to be registered⁴ but despite the registration are still considered unregistered companies for the purposes of winding up.⁵ Therefore, the 1st requirement for winding up of non-Hong Kong companies is that they must fit in the definition of unregistered companies.

The next requirement for non-Hong Kong companies is to show that the companies fit into any of 3 circumstances.⁶ The first circumstance is the non-Hong Kong company is dissolved, stopped carrying on business or is carrying on business for the sole purpose of winding up.⁷ In certain circumstances the non-Hong Kong company might be dissolved in other countries but there are assets or functions still in Hong Kong that have to be dealt with. The second circumstance is the non-Hong Kong company is unable to pay its debt.⁸ Unable to pay its debt means that a creditor has served written notice for demand of money that is equal, or more than specific amount and the company has failed to pay it with 3 weeks of notice.⁹ The final potential circumstance the non-Hong Kong companies can use to wind up in Hong Kong is the court believes it is just and equitable to wind the company.¹⁰ For non-Hong Kong companies the circumstance for requesting winding up in Hong Kong must fit any of the above mentioned circumstances in order for the next stage to apply.

Once the non-Hong Kong companies fulfil statutory requirements it is not automatic for the non-Hong Kong companies to be wound -up in Hong Kong. The courts must determine where the non-Hong companies should be wound up in Hong-Kong on a case-to-case basis. The factors that guide the courts to make the decision are in common law. The first factor is whether there is the non-Hong Kong company sufficient connection to Hong Kong.¹¹ The definition of sufficient connection is broad. One way to establish sufficient connection is for the non-Hong Kong Company to show any type assets in Hong Kong.¹² There is no value attached to the assets, but the assets can be

² Companies (Winding Up Miscellaneous Provisions) Ordinance, Part X.

³ Companies (Winding Up Miscellaneous Provisions) Ordinance.

⁴ Companies (Winding Up Miscellaneous Provisions) Ordinance, Part 16

⁵ Companies (Winding Up Miscellaneous Provisions) Ordinance, s 326(2).

⁶ Companies (Winding Up Miscellaneous Provisions) Ordinance.

⁷ Companies (Winding Up Miscellaneous Provisions) Ordinance, s.327(3)(a).

⁸ Companies (Winding Up Miscellaneous Provisions) Ordinance, s.327(3)(b).

⁹ Companies (Winding Up Miscellaneous Provisions) Ordinance, s.327(4).

¹⁰ Companies (Winding Up Miscellaneous Provisions) Ordinance, s.327(3)(c).

¹¹ *Kam Leung Sui Kwan v Kam Kwan Lai and Others* (2015) 18 HKCFAR 501.

¹² *Re Irish Shipping Ltd* [1985] HKLR 437.

used to show a commercial or other connection to Hong Kong.¹³ Business activities can also be used to establish sufficient connection.¹⁴ Additionally, recently courts have used centre of main interest (COMI) to establish sufficient connection.¹⁵ Sufficient connection is broadly defined and thus non-Hong Kong companies can use various evidence to establish it for the purposes of winding up.

The next factor that the courts consider for the purposes of winding up non-Hong Kong companies is whether there is a reasonable possibility that the winding up order will benefit those applying for it.¹⁶ The benefit should be a real possibility and it does not rely on the existence of assets in the jurisdiction.¹⁷ The enforceability of the Hong Kong winding up order in other jurisdiction cannot be used to show that there is no benefit. The bare minimum to show benefit is there is some useful purpose for the benefit of the interest of the petitioner of the winding up of the non-Hong Kong companies.¹⁸

The final factor that the courts will consider on whether to wind-up non-Hong Kong companies is the courts ability to exercise jurisdiction over one or more persons interested in the distribution of the non-Hong Kong's assets.¹⁹ Creditors other than the petitioner of the winding up must be subject to Hong Kong law.²⁰ Other creditors of the non-Hong Kong companies not subject to Hong Kong law will not be able to satisfy the 3rd factor in order to petition the court to commence winding up proceedings. The exemption to the norm is that if it can be proved there is a sufficient connection to Hong Kong and thus the winding up order will substantially benefit the creditors. Evidence of Hong Kong court's jurisdiction over involved parties is a key factor that courts consider when deciding whether to wind up non-Hong Kong companies.

In conclusion, non-Hong Kong companies must satisfy both the statutory requirement and the courts consider the common law factors before a winding up order can be given.

Question 3.2 [maximum 5 marks_[RD(DWH17)]]

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

In Hong Kong when companies are in financial trouble most of the options available to them lead to closing of the business. However, statute has developed a corporate rescue mechanism to save financially troubled companies through what is referred to

¹³ *Re Zhu Kuan Group Co Ltd* [2004] HKCU 1047.

¹⁴ *Re China Medical* [2014] 2 HKLRD 997.

¹⁵ *China Huiyuan Juice Group Limited* [2020] HKCFI 2940.

¹⁶ *Excellent Asia (BVI) Limited v Mas Media Group Ltd* [2021] HKCFI 3605.

¹⁷ *Shandong Chenming Paper Holdings Ltd v Arjowiggins Ltd* [2022] HKCFA 11.

¹⁸ *Shandong Chenming Paper Holdings Ltd v Arjowiggins Ltd* [2022] HKCFA 11.

¹⁹ *Excellent Asia (BVI) Limited v Mas Media Group Ltd* [2021] HKCFI 3605.

²⁰ *Excellent Asia (BVI) Limited v Mas Media Group Ltd* [2021] HKCFI 3605.

as schemes of arrangement.²¹ The aim of the short essay is to describe what is a scheme of arrangement and the pros and cons of using them.

Schemes of arrangement is court sanctioned compromise regarding the company which is presented to the creditors and the shareholders.²² One advantage of a schemes of arrangement it enables for compromises to be made to all the creditors or classes of creditors and/or shareholders at the same time rather than approaching them individually.²³ The company can apply to the court to convene a meeting for relevant creditor and/ or shareholders.²⁴ The meeting is attended by the creditors and shareholders that will be affected by the proposed schemes of arrangement whether or not they are Hong Kong or non-Hong Kong. The role of the relevant creditors and/ or shareholders is to vote on the proposed schemes of arrangement.²⁵ Before any voting can take place, the scheme and its effect must be explained to the voters and the courts satisfied of this.²⁶ Relevant creditors and/or shareholders are entitled to attend the meeting and ask questions regarding the proposed scheme.²⁷ 75% of the relevant creditors [RD(DWH18)] and/ or shareholders in attendance of the meeting and representing more than 50 % of the relevant creditors must vote for the scheme. This is a pro for the scheme of arrangement where in normal circumstance the company would need 100% approval. Without the scheme some creditors or shareholders may hold out and refuse to any proposal to readjust their rights, but the scheme deals with that situation. The scheme provides a situation where majority of the relevant creditors and shareholders can approve it rather than 100% of relevant parties and all others are bound to the approved terms. Once the scheme is approved by the relevant parties it is presented to the court to be sanctioned.

One con of a schemes of arrangement is the procedure does not have a moratorium²⁸. However, one way to bypass the limitation of not having an automatic stay is before the scheme of arrangement can be entered into a provisional liquidator can be appointment. The provisional liquidator has the power to investigate whether the company can be rescued or not and during that period of investigation a moratorium is applicable.²⁹ The provisionally liquidator power to investigate for the purposes of rescuing the company are not automatic.³⁰ Once the provisional liquidator is appointed, they have to apply to the court to get permission to see if the business can be rescued.³¹ Therefore, in practice the development of use of a provisional liquidator in order to access a moratorium during schemes of arrangement is not an automatic

²¹ Companies Ordinance (Cap 622), ss 668 – 677; and The Rules of the High Court, O.102 r 2 and r 5.

²² UDL, para 27.

²³ Companies Ordinance (Cap 622), s 668.

²⁴ Companies Ordinance (Cap 622), s 670.

²⁵ Companies Ordinance (Cap 622), s 674.

²⁶ *Kansa General International Insurance Co Ltd* [1999] 2 HKLRD 429.

²⁷ Companies Ordinance (Cap 622), s 674.

²⁸ *Eastman Chemical Ltd v Heyro Chemical Co Ltd* [2012] HKEC 272.

²⁹ Companies (Winding Up Miscellaneous Provisions) Ordinance, s.186; *Re Review Technology (BVI) Limited* [2002] 2 HKLRD 290.

³⁰ *China Solar Energy Holdings Ltd* [2018] HKCFI 555.

³¹ *China Solar Energy Holdings Ltd* [2018] HKCFI 555.

right. The courts have been known to deny the use of provisional liquidator for the purposes of rescue and in turn the use of the moratorium.

Question 3.3 [maximum 6 marks^{RD(DWH19)}]

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?

Foreign companies operating or having assets in Hong Kong may go into liquidation in other jurisdiction. The question that arises is can foreign liquidators appointed in other jurisdiction request assistance from Hong Kong courts. Common law has developed principles that allow assistance to foreign liquidators which will be discussed below.

Foreign liquidators can seek assistance from Hong Kong courts. For assistance to be granted a formal letter of request to provide assistance must be provided by the appointing jurisdictional court.³² Hong Kong courts upon receiving the letter have a discretion to assist the foreign liquidator or not. The request for assistance is simple enough that only a letter is required for the provision of assistance to be considered.

As stated earlier, assistance by Hong Kong courts is not automatically afforded to foreign liquidators. Hong Kong courts have adopted modified universalism. On adoption of modified universalism Hong Kong courts are of the opinion that liquidation of a company should be dealt by a single court and assets and other issues of the company in Hong Kong can be dealt with the assistance from Hong Kong courts. In deciding whether to offer assistance, Hong Kong courts consider whether the type of assistance requested is a type provided by Hong Kong law.³³ This is a limitation assistance can only be provided if the law in both jurisdiction as similar.

Common law has further developed that foreign liquidators will be offered assistance to jurisdiction with centre of main interest (COMI).³⁴ Foreign liquidators from the company's place of incorporation or commercially most relevant jurisdiction are treated as COMI by Hong Kong courts and the courts offer assistance. A con is that the place of incorporation and where the company carried out commercial activities may not be the same. Hong Kong courts in that instance may be approached by foreign liquidators from either of those jurisdictions for assistance. In cases where COMI is not easily identifiable, Hong Kong is not bound to offer full assistance to foreign liquidators. Partial assistance may be offered instead.

³² The Joint Official Liquidators of A Company v B & C [2014] 4 HKLRD 374.

³³ *The Joint Administration of African Minerals Ltd v Madison Pacific Trust Ltd* [2015] HKEC 641; *The Joint Official Liquidators of A Company v B & C* [2014] HKCU 1731; and *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36.

³⁴ *Re Global Brands* [2022] HKCFI 1789.

QUESTION 4 (fact-based application-type question) [15 marks]

Question 4.1 [maximum 4 marks_[RD(DWH20)]]

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 general rule is that the floating charge makes Sea Breeze Inc a secured creditor that ranks higher in the list of priority than the unsecured creditors. In the list of priority, a secured creditor would be paid first from the realised assets before the unsecured creditors. However, s79 CWUMPO in the case of the floating charge, certain preferential creditors must be paid from the realisation if there is a short fall of the available 'uncharged' assets to pay them according to s265(3B). The payment to the preferential creditors must be made before the floating charge holder is paid. The preferential creditors are unsecured but preferred. The preferred creditors under s 265 include the liquidation costs_[RD(DWH21)] and employees who will be paid first from the realised assets before the Sea Breeze can be paid if there is not enough 'uncharged' assets.

Sea Breeze should be aware that the floating charge may not be valid. The validity of the floating charge depends of the time it was granted and whether Palm Beach Ltd was unable to pay its debt at the time of granting the floating charge or as a result become unable to pay its debt due to granting the floating charge, s.267 CWUMPO. The questions that must be answered are : i) was the floating charge granted within a period of 12 month prior to commencement of the liquidation? ii) At the time of creating the floating charge was Palm Beach Ltd unable to pay its debt or did the floating charge result in the Palm Beach Ltd being unable to pay its debt? If_[RD(DWH22)] the answer is yes, to all the questions above, then the floating charge is not valid and the assets with the floating charge can be realised to pay the creditors according to the list of priority under s37 and 38 of the Bankruptcy Ordinance_[RD(DWH23)]the liquidation costs rank higher than unsecured creditors (not preferential creditors are higher than other unsecured creditors).

Question 4.2 [maximum 6 marks_[RD(DWH24)]]

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.

In order to get recognition and assistance in Hong Kong, L requires to present a letter of request to Hong Kong Court.³⁵ The letter of request must be produced by the Cayman court requesting that the Hong Court to recognise L’s appointment and seeking an order to obtain documents from SKL’s bank in Hong Kong. Additionally, the order to request document from the bank by [RD(DWH25)] L per Cayman Law (s 103 of the Companies Law) should also be something that is facilitated in Hong Kong which is the case under s [221(3) of the Companies Ordinance] [RD(DWH26)] in a domestic liquidation.³⁶

*In relation to the stay, Hong Kong courts will not automatically grant a stay of proceedings once recognition of L as a foreign liquidator.³⁷ Hong Kong courts will consider whether there is a stay on proceedings available in Hong Kong. As identified in the case of *The Joint Administrations of African Minerals Limited (in administration) v Madison Pacific Trust Limited & Shandong Steel Hong Kong Zengli Limited* [2015] 4 HKC 215, there is no similar stay in Hong Kong that can automatically prevent enforcement of rights by creditors in Hong Kong [RD(DWH27)]. Therefore, the stay may be refused by the courts.*

L may be granted the powers to examine the Hong Kong auditors of SKL by the courts.³⁸ Hong Kong courts will assess whether Cayman Law dealing with examining of auditors is similar to Hong Kong law of the same.³⁹ Hong Kong courts are likely not to grant a ‘standard order’ to examine the actions of the Hong Kong auditors because Cayman law in this area is more strict than the Hong Kong equivalent.⁴⁰ An auxiliary liquidation proceeding can be commenced in Hong Kong to deal with the issue in Hong Kong which will give L similar powers as domestic liquidators which include to examine the actions of the auditors.⁴¹

The courts will also look at if Cayman is the COMI in deciding to give assistance.

Question 4.3 [maximum 5 marks [RD(DWH28)]]

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

³⁵ *The Joint Official Liquidators of A Company v B & C* [2014] HKCU 1731.

³⁶ *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36.

³⁷ *FDG Electric Vehicles Limited* [2020] HKCFI 2931.

³⁸ *Re BJB Career Education Co Ltd* [2017] 1 HKLRD.

³⁹ *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36.

⁴⁰ Companies (Winding Up Miscellaneous Provisions) Ordinance, s 286B and *Joint Provisional Liquidators of CECEP Costin New Materials Group Limited v RSM Nelson Wheeler* [2021] HKCFI 794.

⁴¹ *Re GITIC* (unreported, HCMP 2638/2017, 10 October 2018).

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?

To be able to wind up Lapwing there are certain conditions that must be fulfilled under s 6(2) of the Bankruptcy Ordinance. For the requirements to be fulfilled the following information is required:

- a) Is the debt owed by Lapwing Ltd equal or more than HKD 10000? The unpaid invoices require to be added up not see if this threshold is met.**
- b) Is the debt owed to Harrier for the invoices due immediately, or sometime in the future and has it been secured? The terms of the ongoing contract in relation to when the money is due should be assessed. Has the ongoing contract made a provision to secure the debt incurred under the contract for the supply of the software?**
- c) Does it appear that Lapwing is unable to pay the debt or Lapwing has no reasonable prospect of being able to pay? More information is required on the comment by Lapwing director of the ability of Lapwing to pay the invoices.**
- d) Is there an outstanding application to set aside a statutory demand^[RD(DWH29)]? Firstly has a statutory demand been made to Lapwing by Harrier to request the amount that is owed? If there is a statutory demand that has been made were the correct procedures carried out?⁴² Was the statutory demand of the proscribed form by the Bankruptcy Rules? Was the statutory demand served personally to Lapwing? If the serving of the statutory demand was not successful, did Harrier bring the statutory demand to the attention of the lapwing via other accepted means such as advertising in the newspaper?**

It is important to determine if there a statutory demand has been issued to Lawing as failure to pay the statutory demand is one ay for Harrier, as a creditor, to commence bankruptcy proceedings. Lupwing can use the defense that the statutory demand was has not been served to prevent the commencement of proceedings against it.

*** End of Assessment ***

TOTAL MARKS: 28 OUT OF 50

⁴² Bankruptcy Ordinance and Practice Direction 3.1