Style Definition: INSOL style heading 4: Justified

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).***

4. ***You must save this document using the following format:*** [studentID.assessment8C]***. An example would be something along the following lines: 202223-336.assessment8C.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked**.**

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.**

6. ***The final submission date for this assessment is*** 31 July 2023***. The assessment submission portal will close at*** 23:00 (11 pm) BST (GMT +1) on 31 July 2023***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 8 pages**.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

***Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

***Which of the following is / are among the jurisdictional criteria required to be satisfied for the Hong Kong court to make a bankruptcy order against an*** individual***?***

***(a) The individual must hold a Hong Kong permanent identity card.***

***(b) The individual must be ordinarily resident in Hong Kong at the date of the hearing of the petition.***

***(c) The individual is domiciled in Hong Kong.***

***(d) Any of the above.***

Commented [RD(DWH1]: Correct (1 mark) – choices (a) and (b) do not appear in section 4 of the Bankruptcy Ordinance (Cap 6). Note that (b) would have been correct if it referred to the debtor being present in Hong Kong on the date of the petition

Question 1.2

***A*** receiver ***appointed pursuant to a charge created by a company (A) over its assets in favour of its lender (B) acts as:***

***(a) Agent of the company granting the charge (A, in this instance).***

***(b) Agent of the lender appointing him (B, in this instance).***

***(c) Agent of the Official Receiver.***

***(d) An officer of the court.***

Commented [RD(DWH2]: Correct (1 mark)

Question 1.3

***Which of the following is a correct statement as to the*** core requirements ***which need to be satisfied before the Hong Kong court will wind-up a foreign company:***

***(a) All of the below apply.***

***(b) At least one of the directors must be a Hong Kong resident.***

***(c) The petitioning creditor must be a Hong Kong company or a Hong Kong resident.***

***(d) There must be a reasonable possibility that the winding-up order would benefit those applying for it.***

**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.***

**Commented [RD(DWH5]:** Correct (1 mark) – section 184 CWUMPO

***(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.***

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

Question 1.7

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

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

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

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

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

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

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

Question 1.8

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

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

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

**Commented [RD(DWH8]:** Correct (1 mark) – The *China Field decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text)*

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

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

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

Question 1.9

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

***(a) cease completely, with no exceptions.***

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

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

***The receiver's primary duty is to the charge holder who appointed him. Upon sale of the asset there is also a duty of acting in good faith, the same as if he were the mortgagee. The receiver will also have a duty to preferential creditors, if their claims cannot be covered by the uncharged assets of the company, and to notify the Registrar of Companies of his appointment.***

Question 2.2 [maximum 3 marks]

**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 but should mention that is agent of borrower (at law) and thus has residual duty to that debtor on sale

**Commented [RD(DWH12]:** (1.5 marks)
Slightly wrong test (per note below). Also, should mention that the effect of the transaction is to actually put the creditor/guarantor in a better position, and that the person 'preferred' must be a creditor or guarantor; and that for a non-associate the transaction must have been within 6 months

***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 successfully prove a transaction was an unfair preference the liquidator must show that the company was unable to pay its debts at the time of the transaction or that the transaction caused the company to be unable to pay its debts.*

*If the transaction is with a non-associate of the company, the transaction must have taken place within 6 months prior to the commencement of the liquidation.*

*The liquidator must also demonstrate that the company purposefully entered into the transaction in order to improve the creditor's position should the company become insolvent.*

**Commented [RD(DWH13]:** "influenced by a desire" to achieve this - slightly differnt

**Question 2.3 [maximum 4 marks]**

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

***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.***

*For a Hong Kong liquidator (or provisional liquidator) to apply for recognition in one of the three pilot municipalities of Shanghai, Xiamen or Shenzhen the key elements needed are:*

- *The debtor must have principle assets, place of business or a representative office in one of the three areas,*
- *The debtor's COMI must be in Hong Kong and been so for at least 6 continuous months prior to the application, (COMI being principally the place of incorporation but could also be principle office, principle place of business or other factors the people's court may take into account.)*
- *The Hong Kong proceeding may be any collective insolvency proceeding commenced under CWUPO or the CO and includes compulsory winding-up, creditors voluntary winding-up or a scheme of arrangement promoted by the liquidator, and*
- *A letter of request from the High Court of the Hong Kong Special Administrative Region.*

*The PRC courts could refuse recognition if:*

- *The COMI is not as above,*
- *The debtor does not satisfy an insolvency test under Article 2 of the Enterprise Insolvency Law of the PRC,*
- *Mainland creditors may be treated unfairly, or*
- *There is fraud.*

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

**Question 3.1 [maximum 4 marks]**

**Commented [RD(DWH15]:** (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.***

*The statutory basis giving the Hong Kong Court (the "Court") jurisdiction is Part X of the CWUMPO. Although the section is titled Winding Up of Unregistered Companies section 326 subsection 2 ("s326(2)") states that this includes registered non-Hong Kong companies.*

*S327 sets out the circumstances under which an unregistered company may and may not be wound up, first stating that it may not be wound up voluntarily. It may be wound up if it is dissolved, ceased trading or is only continuing in order to wind up its affairs, it is unable to pay its debts or the court deems it just and equitable to do so. The 'just and equitable' meaning is broad but is most often used when the business can no longer be carried on effectively due to shareholder disputes.*

*The common law principles set out by the Court of Final Appeal (the "CFA") in Re Yung Kee in 2015. Before the Court will exercise its jurisdiction to windup a foreign company it must be shown that the Company satisfies three core requirements:*

- *There must be sufficient connection to Hong Kong,*
- *A reasonable possibility that the applicant would benefit from the winding up; and*
- *The Court can exercise jurisdiction over person(s) interested in the distribution of assets.*

*These requirements have been considered extensively by the Courts and below are just a few of the decisions that have been made.*

*Sufficient connection may be established by the presence of assets in Hong Kong and these assets may be of any nature (Re Irish Shipping Ltd HKLR 437) so a listing on the Hong Kong stock exchange can be considered as an asset. However, it was also noted in Re Yung Kee that in a shareholder dispute the presence of the shareholders in Hong Kong was the most important factor for determining connection.*

*A reasonable possibility of a benefit must be a real one rather than a theoretical one (Re Carnival Group International Holdings Limited [2022] HKCFI 2668) and, depending on the specific case circumstances, does not necessarily have to be monetary or come directly from the making of the winding up order (in Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd [2022] HKCFA 11.*

*The jurisdiction over interested persons in the third requirement must be more than the petitioner presenting a petition (Re China Medical [2014] 2 HKLRD 997) but where*

*the connection to Hong Kong is strong enough and there is likely to be substantial benefit to creditors then it is possible that the Court will find it appropriate to make the winding up order without this requirement being satisfied (Re China Medical [2018] 2 HKCA 111).*

**Question 3.2 [maximum 5 marks]**

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

*A Scheme of Arrangement ("SOA") is a court approved agreement between a company is its creditors or shareholders or both and may with a class of creditor or shareholder. I shall just use the term creditors for all parties from now on.*

*As it is not an insolvency procedure it can be used by solvent and distressed companies to make any kind of arrangement or compromise it wishes to propose. Although it can be initiated by creditors, it is more common for it to be initiated by the company and, if the company is being wound up, the liquidator may also propose a SOA.*

*There are three stages to entering into a SOA:*

- *An application to Court for leave to call meetings of creditors (Convening Hearing),*
- *The holding of those meetings for the creditors to consider the proposals (Scheme Meetings), and*
- *Where the arrangement has been agreed, an application to the court to sanction the SOA (Sanction Hearing).*

*At the Convening Hearing, the Court will consider the jurisdiction and whether the creditors have been given enough information in the SOA documentation to make a properly informed decision.*

*For the Scheme Meetings the Court will appoint the chair and those creditors affected by the SOA are entitled to attend and vote and the resolution to approve is passed if the majority in number representing at least 75% (present & voting) agree. If the creditors are split into cases, each class will hold a meeting and each meeting must agree for the SAO to be binding on that class. There is no cross-class cramdown available in Hong Kong.*

*The results of the voting will then be submitted to the Court for consideration at the Sanction Hearing. The other considerations of the Court, which were summarised in Re China Singyes Solar Technologies Holdings Ltd, include whether then SOA was for a permissible purpose, if the creditors within classes were similar enough to consult together, and whether the creditors were given enough information to make an informed decision.*

**Commented [RD(DWH16]:** (4.5 marks)
A good answer. Full marks if had mentioned how classes must be carefully selected (for composition of classes, the test is based on "similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights") particularly given no jurisdiction to sanction if not

*If sanctioned the SOA will be binding on all creditors covered by the scheme even if they did not attend a meeting. The company will likely appoint a scheme administrator to implement the terms of the SOA. In case it is necessary to vary the terms of the SOA the scheme documents will often include clauses on allowing modifications.*

*The advantages of a SOA is that the purpose is the rescue of the company and it can make arrangements with creditors to facilitate this without having to get consent from 100% of them. It allows the company to get the support of a majority and avoid any creditors that may refuse to consent to attempt to get a more favourable outcome. They can also trade through the process and the directors stay in control of the company.*

*The disadvantages include the facts that it can be cumbersome and expenses. The lack of moratorium to protect the company before any SOA can be sanctioned is also a disadvantage compared to some rescue processes in other jurisdictions. The solution that Hong Kong has used is the appointment of a provisional liquidator (the "PL"), which automatically creates a moratorium, and then the PL will propose the SOA. This cannot be a guaranteed success though because in Re Legend International Resorts Limited the CFA refused to appoint the PL because the appointment was not for the "purpose of winding up the company".*

**Question 3.3 [maximum 6 marks]**

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

*The development of assistance to foreign liquidations has developed out of the principle of modified universalism (whereby the foreign officeholder can be recognised and cooperated with but the Court retains discretion as to how matters are applied in their jurisdiction) and the spirit of international comity.*

*In A Co v B (2014) the Court agreed to the approach of a Bermudan case where the judge was willing to recognised the Joint Liquidators ("JLs") where the foreign substantive law was broadly similar to local insolvency law and if the relief sought by the JLs would have been available under local law. The opinion given in Singularis Holdings v PriceaterhouseCoopers clarified that the power sought needed to be available in both the foreign and local jurisdictions.*

*Following a number of similar cases the Court established standard procedures and standard form of order and the importance of their use was highlighted in Re Agritrade Resources Ltd [2020] 4 HKLRD 616 where Justice Harris asked his clerk to write to the petitioning solicitors saying that he would be willing to grant an order in standard form.*

**Commented [RD(DWH17]:** (3.5 marks)

A good answer that could also have added these points:

Court will usually recognise a liquidator appointed in place of incorporation as having authority to represent the company (for example, Irish Shipping, Seahawk)

Will assist, e.g. foreign rehabilitation proceedings by refusing to allow enforcement of a judgment

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)

Up Energy shows that court recently taking a more 'strict' legal approach to what the HK court can or cannot do.

**Commented [RD(DWH18]:** But later cases move away from a standard order

*Hong Kong has also started to move away from only recognising proceedings in the jurisdiction where the company is incorporated to considering the company's COMI if the connection is strong enough. (Lamtex Holdings Limited [2021] HKCFI 622 and Re Global Brands [2022] HKCFI 1789). These cases also highlight Hong Kong's willingness to wind up a company in Hong Kong if it is justified to do so and not withstanding that a liquidator has been appointed in a foreign jurisdiction. Hong Kong's distaste for the debtor-in-possession process and therefore the use of the "light-touch" provisional liquidation to facilitate it is likely to result in the granting of a winding up in Hong Kong on a creditor petition.*

*Another important development with respect to recognition is the Hong Kong / Mainland Co-operations Mechanism. In A Co v B (2014) the court was clear that the decision on recognition would be based on the request coming from a common law jurisdiction, which PRC is not, but the new arrangement provides a mechanism for recognition of officeholders in Hong Kong and 3 pilot areas in PRC.*

*The benefits of a common law system include its flexibility. It can be more reactive to situations that were unforeseen when the statutory law was written. It can more quickly take in to account changes in social values or community expectations. There is also a certain level of consistency when a precedent has been set and can then be applied to later cases.*

*The downside of relying on precedent is that you do not have that in a new situation which brings unpredictability on how it may be dealt with by the Courts. Even a slightly different situation can result in an unexpected decision. The downside of the adaptability is that changes in attitude can also lead to unexpected outcomes.*

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 receivers realisations are not available for the liquidation expenses nor for the unsecured creditors unless there is a surplus after paying for the receivers fees and expenses and the secured debt in full.*

*However, under s267 of the CWUMPO the charge may be invalid. If the charge was granted in favour of a party connected to the company within 2 years of the winding up commencing it may be challenged by a liquidator as invalid unless new money,*

**Commented [RD(DWH19]:** (3 marks)

A good answer re s.267 but does not identify that if insufficient uncharged assets then preferential creditors will need to be paid out of floating charge realisations (s.265(3B))

Could also explore whether the charge constituted an unfair preference

*property or services were supplied to the company or at the direction of the company at the same time or after the making of the charge.*

*If it was made in favour of a party that is not connected to the company then the timescale is 12 month prior to the commencement of the winding up and it would have to be shown that the company was insolvent at the time or became insolvent because if the making of the charge.*

*A floating charge over the company's property or undertaking (amongst other securities) will also be void against a liquidator if it was not properly registered within 1 month of creation as per sections 333 to 356 of the Companies Ordinance (Cap 622).*

**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.***

*In order to get a "standard order" of recognition and assistance the Court will require a letter of request issued by the Cayman Court and drafted in a manner consistent with Hong Kong procedure (Re Agritrade Resources Ltd). The powers granted to an overseas liquidator in the standard order may not be considered a full suite but do include powers such as proposing a restructure or SOA, submitting a proposal to the Hong Kong stock exchange to resume trading, seeking out finance, terminating or perfecting transactions and employing staff or agents.*

*The provisions round bank accounts allow the liquidator to open and operate bank accounts on behalf of the company to pay the expenses of liquidation. To operate, open or close bank accounts in the name of the company requires the company's consent. Hong Kong does however recognise a liquidator's authority to represent the company when appointed in the jurisdiction of incorporation and this should allow the bank to readily provide the documents required without the requirement of a recognition order.*

*In applying for the recognition order L could also request an order to examine the auditors however he will only be able to do so in the manner allowed by s103 of the Cayman Islands Companies Act because the order will be limited to the powers available to L in his own jurisdiction. L will also take into consideration the form in which he summons the auditors for examination as he cannot use s286B of the*

**Commented [RD(DWH20]:** (1.5 marks)

Not a very comprehensive answer. Should include:

Things will not be as straightforward as L believes

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)

Examinations may go beyond what SKL (as a company) is entitled to. It is, however, information in respect of which a Hong Kong liquidator could seek an examination order (section 286B of CWUMPO) – note CECP Costin v RSM case as to the nature of an examination order by way of assistance

BUT: can L get "recognition and assistance"? On the facts given, likely to be difficult in light of recent cases. 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?).

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.

If an application is to be made: Need letter of request from Cayman; there are still the Singularis principles – with narrower examination powers in Cayman this could be problematic; granting of a stay not "automatic" (FDG Electric Vehicles; Nuoxi v Peking University); may be that enforcement would be stayed (for example, Ambow Education) – recent cases have not dealt with this

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

**Commented [RD(DWH21]:** Should mention that court has moved away from a standard order being given

*CWUMPO as this part only applies to Hong Kong companies, not foreign companies. (CECEP Costin New Materials Group Ltd v RSM Nelson Wheeler)*

*The standard order does include a provision that while the company remains in liquidation no action may be proceeded with without the leave of the Court. In FDG Electrical Vehicles Limited [2020] HKCFI 2931 the Court commented that the provision was to ensure awareness of the foreign proceeding by relevant parties and did not impose an automatic stay on proceedings already underway or unidentified prospective proceedings. In Nuoxi Capital v Peking University Founder Group [2021] HKCFI 3817 the Court refused to stay the proceedings in Hong Kong because the deeds issued in favour of the plaintiffs provided for exclusive Hong Kong jurisdiction. So the Court will examine the nature of the proceedings sought to be stayed before grating or refusing applications.*

**Commented [RD(DWH22]:** No, FDG etc. say no automatic stay

**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?***

**Commented [RD(DWH23]:** (1.5 marks)

Good to mention arbitration clause and that Lapwing would need actual evidence to dispute (but you do not mention the tests applied….).

Also, should advise following elements:

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)

*The first key question is whether the contract between the two companies contains an arbitration clause. Since 2018 the Companies Judge has been more pro-arbitration and would be likely to stay a petition to wind up the company in favour of arbitration unless Lapwing admitted the debt, removing any question of dispute and the basis where they could object to the petition. This pro-arbitration approach, referred to the Lasmos approach (Lasmos being the petitioner in Re Southwest Pacific Bauxite (HK) Ltd [2018] HKCFI 426) has led to a number of decisions which have expressed doubt over allowing a debtor to oppose a petition solely on the grounds of there being an arbitration clause. In Re Asia Master Logistics Ltd [2020] HKCFI 311 the Court concluded the debtor must show there is a bona fide dispute on substantial grounds.*

**Commented [RD(DWH24]:** And exclusive jurisdiction clause?

*If Lapwing disputes the debt, they should put Harrier on notice of the dispute and put together the relevant evidence to support that. If the dispute is clear, Harrier may consider withdrawing their petition. However, if it not clear or if Lapwing do not act quickly enough they will then have to apply for an injunction to prevent Harrier submitting the petition, or if already done so, advertising it. Lapwing will have to present evidence of both the dispute and their solvency and rule 32 of the Court Winding Up Rules gives then only 7 days after applying for the injunction to submit it.*

* End of Assessment *

**TOTAL MARKS: 36 OUT OF 50**