



Style Definition: INSOL style heading 4: Justified

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.

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

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

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

Question 1.6

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

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

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

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

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

Commented [RD(DWH6): Incorrect (0 marks) – see text 6.5.1 (no moratorium on claims in the scheme procedure)

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.**

Commented [RD(DWH9)]: Incorrect (0 marks) - see section 244 of CWUMPO

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).**

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

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 receiver appointed pursuant to a charge has a primary duty to the debenture or charge holder and not to the company despite being an agent of the company.]

- *When selling a charged asset, a receiver owes the same duty as a selling mortgagee:
To act in good faith and in accordance with the powers given to the receiver under the debenture or charge.*

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

- *A receiver is allowed to put the interest of debenture or charge holders first when making decisions on the direction the receivership will take. Even where this may result in a disadvantage to the borrowing company.*
- *Where receivers are implementing their decisions in relation to the management disposal of charged assets, receivers should use reasonable skill and care and will be answerable to the company in case they do not exercise reasonable skill and care]*

Question 2.2 [maximum 3 marks]

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

[The liquidator must show that, at the time that the unfair preference was given, the company was:

- *Unable to pay its debts; or*
- *As a result of the transaction concerned, became unable to pay its debts.*

A liquidator must prove that the company was "influenced by a desire" to improve a person's position in the event of a liquidation.

A transaction will not be set aside "unless the company positively wished to improve the creditor's position in the event of its own liquidation, and a person does not desire all of the necessary consequences of his actions.]

Question 2.3 [maximum 4 marks]

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

[The key elements needed for a Hong Kong liquidator to make use of the mechanism for co-operation between Hong Kong and the Mainland are provided in a record of meeting between representatives of the Supreme Court in the Mainland and of the Hong Kong Government. The report of meeting is supplemented by an opinion of the Supreme Court which outlines that:

- *The pilot areas in the Mainland for recognition will be*
 - o *Shanghai Municipality*
 - o *Xiamen Municipality of Fujian Province; and*
 - o *Shenzhen Municipality of Guangdong Province*

Commented [RD(DWH12)]: (2 marks)

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

Commented [RD(DWH13)]: (3.5 marks)

Good answer but misses one small point: that the COMI must have been in HK for 6 months

- *Hong Kong Insolvency proceeds are taken to mean any collective insolvency proceedings commenced under CWUMPO or the CO and includes compulsory liquidations, creditors' voluntary liquidations and schemes of arrangement*
- *The debtor's COMI must be in Hong Kong. The Supreme Court has noted that in this case, COMI is the place of incorporation but at the same time, the people's court may take into account the place of principal office, the principal place of business, the principal place where assets are held.*
- *If a debtor's principal assets in the Mainland are in a pilot area, or it has a place of business or a representative office in the pilot area*
- *A letter of request from the Hong Kong Court*
-]

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

Question 3.1 [maximum 4 marks]

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

[According to Section 327(4)(d) of the Companies (Winding up and Miscellaneous Provisions) Ordinance, an unregistered company shall not be wound up in Hong Kong. The circumstances that an unregistered company may be wound up are:

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

An unregistered company is deemed to be unable to pay its debts if:

- *A creditor, by assignment or otherwise, to whom the company is indebted has served on the company a written demand*
- *The company has for three weeks after notice of the service neglected to pay the sum*
- *If any action or proceeding has been instituted against any member for any debt or demand due, or claimed to be due;*
- *If execution or other process issued on a judgment or order obtain in any court in favour of a creditor against the company, or any member, is returned unsatisfied.*
- *If it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts.*

With respect to common law, there are three core requirements that will be considered:

Commented [RD(DWH14)]: (3.5 marks)
A good answer let down by the opening sentence; hence deduction of 0.5 marks

Commented [RD(DWH15)]: S. 327(4)(d) does not say this; and the statement is inconsistent with the rest of the answer which describes how such a company can be wound up

- There must be sufficient connect with Hong Kong (not necessarily assets in the jurisdiction) - these can be assets of any nature. For example, listing on the Hong Kong stock exchange will be considered an asset as it may be possible to realize value from the listing
- There must be a reasonable possibility that the winding up order would benefit those applying for it - the liquidation should be of benefit to the petitioner. This has been decided on multiple cases such as the *Re Solar Touch Re* case, where the petitioner wanted to appoint liquidators to carry out investigations in the PRC and the court noted that the PRC court would not recognize the winding up order and the petition would therefore not satisfy the requirement.
- Court must be able to exercise its jurisdiction over one or more person interest in the distribution of the Company's assets - the petitioner would need to show that there are parties with sufficient connection with Hong Kong that would have sufficient economic interest in the winding up of the company to justify making an order which will engage the Hong Kong winding up regime.

The petition should state how these three core requirements are satisfied.

]

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.

[The Scheme of arrangement in Hong Kong acts as a court sanctioned compromise or arrangement and binds all the creditors of a relevant class even where they may vote against it. A scheme can cancel existing instruments and be used to replace them with new instruments. Creditors must be in the same class of creditors, otherwise, the court will not have any jurisdiction to sanction creditors. In a scheme of arrangement, a consent fee is also applied, but must offered to all creditors.

The procedure for a scheme of arrangement is as follows:

- An explanatory statement is prepared explaining:
 - o the background to the company
 - o setting out why a scheme is needed
 - o the proposed scheme itself
- An application is made to the court for permission to convene meeting of scheme creditors
- Where leave is given, notice of the meeting must be given to all creditors in the relevant classes
- At the meeting, the scheme needs to be supported by a majority in number representing at least 75% in value of the creditors attending (in person or by proxy) and voting
- The result of the meeting is reported to the court and a sanction hearing is held
- The correct comparator needs to be determined (i.e. rights before the scheme and the righters after the scheme, as well as the rights without a scheme)

Commented [RD(DWH16): (4.5 marks)

A very good answer that just misses a description of how classes must be composed: 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"

Commented [RD(DWH17): Not necessarily

- The court will sanction a scheme if it is satisfied that the classes as property constituted and it is considered that the scheme is one which an "intelligent and honest creditor might approve;
- The scheme takes effect when registered at the Companies registry;
- In Hong Kong, a scheme can only bind creditors if the debt is governed by Hong Kong law or the relevant creditor takes part in the scheme

The pros and cons of a scheme are:

Pros

- The lack of corporate rescue legislation makes it easier for the Hong Kong Court to be more flexible and adopt creative approaches and practical solutions. The courts are then able to use tools that would achieve similar aims.
- A scheme of arrangement can be used to effect restructurings
- A scheme can be "promulgated" where the petition can be dismissed upon the successful implementation of a scheme.
- A scheme enables a company to compromise or adjust debts if majorities of the relevant creditors approve the compromise or adjustment and the court sanctions such an arrangement.
- Schemes are useful to hold-out creditors who seek an unfair advantage as against a substantial majority of similarly ranked creditors

Cons

- One of the cons of a scheme of arrangement is the lack of a moratorium
- Failure to disclose relevant information may result in a scheme not being approved, unless the failure was not sufficiently material
- If the statutory majorities approving a scheme are not attained, the court has no jurisdiction to sanction a scheme.]

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 Hong Kong court has always followed common law principles in cross border insolvency. This approach provides the courts with some degree of flexibility and ability to handle complex matters. For example in Hong Kong, a foreign liquidation can bring an action in Hong Kong without a formal order recognizing the liquidation. The rationale for this is that Hong Kong should recognize the law of the place of incorporation which should govern the parties that can represent/direct the actions of a Company.

One of the drawbacks of this situation is that it introduces requirements that practitioners might not be clear about, for example the need to have a letter from the court in order to request assistance from the court.

Commented [RD(DWH18)]: (3 marks)

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

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

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

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

It is also not seemingly always clear from the decisions that have been made, the decision that the Hong Kong court will finally settle on.

The adopting of common law assists practitioners to have an idea of the framework and what they should expect from the courts in a jurisdiction

The Hong Kong courts have also been willing to provide assistance to companies and to bank and foreign representatives in order to assist with foreign recognition.

The judgements in Hong Kong do not necessarily apply the rules in the same way in each case which may be taken to result in confusion for some practitioners who might expect one this from the laws only to be treated to another.]

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.

[A receiver out of Court is a remedy that is available to a secured creditor. The power to appoint a receiver will be in the debenture or charge between the borrower and the lender. If a debt is payable on demand, demand must first be made and the debtor company be given time to make payment before a receiver is appointed. One of the key considerations for discussion with the liquidator will be whether this was met.

The appointment of a receiver will be by way of deed and the appointment takes effect when the document of appointment is received and accepted in writing by the receiver.

In the discussions with the liquidator, the receiver would also inform them that the liquidation of a borrowing company does not affect a receiver's right to hold and / or sell the property or assets secured by charged under which he is appointed.

Further, the assets will not be available to the liquidator for the payment of liquidation expenses. These assets must be used to settle the claims of preferential creditors in the event there are insufficient assets to meet those claim from the uncharged assets available to a liquidator.

]

Commented [RD(DWH19): ??

Commented [RD(DWH20): Inconsistent findings can be a con of common law developments, but it is a common misunderstanding that this is the case in HK

Commented [RD(DWH21): (1.5 marks)

Marks for recognising liquidation costs cannot be paid from those realisations but preferential creditors can.

However, does not explore whether charge is valid:

Registration?

Section 267?

Unfair preference?

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.

[It is relatively straight forward to obtain recognition in Cayman. Hong Kong does not have a statutory framework to deal with cross-border insolvency. The Hong Kong court has been following common law principles in this regard.]

It is relatively common for a practitioner to seek and obtain recognition and assistance in Hong Kong, However, the powers that they can exercise will be relatively restricted that those that a "Hong Kong" liquidator will enjoy. As a result of the above, the liquidator might want to consider ancillary proceedings if the three core requirements for winding up in Hong Kong are met.

The foreign representative will also be required to present a letter to request issued by the court in Cayman to the Hong Kong court requesting assistance. Whereas common law does not require a formal request, Hong Kong practice requires that the request be obtained.

The Shenzhen Municipality is one of the pilot areas in the mainland where Hong Kong appointed liquidators are entitled to apply for recognition. As such the liquidator might be able to take some steps in Shenzhen, of if they can identify a Hong Kong appointed liquidator. The liquidator might be able to also seek recognition in Schenzhen.

The liquidator will also need to ensure that the company meets the requirements to be wound up in Hong Kong if they will initiate ancillary proceedings]

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.

Commented [RD(DWH22)]: (1.5 marks)

Not very comprehensive. The elements 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 CECF 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(DWH23)]: The question is about recognition in Hong Kong, not Cayman

Commented [RD(DWH24)]: This is only half the Singularis test: for assisting court to give assistance, the act requested must be within the powers of the liquidator in the originating jurisdiction (here, Cayman) and one available to a liquidator in Hong Kong

Commented [RD(DWH25)]: This would need a Hong Kong appointment so would need to consider Part X CWUMPO and core requirements, then the cooperation mechanism requirements

Commented [RD(DWH26)]: (1 mark)

A mark for raising questions as to status of Lapwing and how this may affect Harrier's options, but does not deal with the client's specific requests. Advice to Harrier should include:

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.

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?

[The key questions and comments for consideration will be:

- *Has Lapwing filed a petition for the winding up or the Company or liquidation where it's COMI is?*
 - o *A winding up petition will put in a stay/moratorium on all litigation against the Company and a winding up petition cannot be presented if one is already in place*
- *Where is Harrier's COMI and can Lapwing file a petition in that jurisdiction*
 - o *Lapwing will need to ensure that it files its winding up petition in the correct jurisdiction as Harrier might say that the winding up petition was presented in the wrong jurisdiction*
- *Has Harrier commenced any proceedings to restructure*
 - o *Lapwing will need to confirm whether Harrier has commenced any proceedings to restructure, as depending on the type of restructuring proceedings that have been initiated, there might be a moratorium on proceedings which will then make it difficult for the Lapwing to present a winding up petition*
- *Has Lapwing issued a statutory demand that has not been settled*
 - o *If Lapwing has not yet issued a statutory demand, then it might not be in a position to bring a winding up petition*
- *Is Harrier unable to pay its debts?*
 - o *The director suggests that the company is having challenges making payments, however, more information will be required on the insolvency status of the Company]*

Commented [RD(DWH27): Given the facts (Lapwing's director saying it will fight a winding up petition) it is perhaps unlikely that Lapwing has filed for its own winding up

Commented [RD(DWH28): May go to discretion, but foreign moratorium will not be binding per se (and there is no moratorium in a scheme situation in Hong Kong)

* End of Assessment *

TOTAL MARKS: 29.5 OUT OF 50