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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.***
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3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
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6. ***The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***
7. ***Prior to being populated with your answers, this assessment consists of 8 pages.***

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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.**

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.*

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.*

Commented [RD(DWH1): Incorrect (0 marks) - 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

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

(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.

Commented [RD(DWH4): Incorrect (0 marks) – see text at 6.4.1 and the "Leyland Daf" case cited there

(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).

(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.

A receiver selling the charged asset owes several duties. He firstly owes a duty to his appointer, usually the lender. This duty is to the lender to realise the security and to apply same to the outstanding debt in a proper manner consistent with his position as the lender's agent.

He is also the agent of the company to the extent that he has a duty to act according to law and in good faith in the sale of the charged asset and a fiduciary duty to obtain the

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)]: (3 marks)
Good answer

best price in the circumstances. He also owes a duty to the company to use reasonable skill and may be liable if he does not.

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 underlying rationale in the rule against preference is that the assets of an insolvent company should be held for the benefit of its creditors and no one creditor ought to be allowed to obtain an advantage over and beyond that which he is entitled to in the ordinary course of the insolvency.

In determining whether a transaction has been conducted on a preferential basis, the following test is applied:

- (1) The liquidator must establish that the transaction was entered into at a time when the company was unable to pay its debts as they became due or as a result of the transaction, the company became unable to pay its debts as they fell due; and*
- (2) The liquidator must establish the purpose of the transaction was to afford the particular creditor an advantage which he would not have had in the event of litigation.*

These requirements are in practice, particularly the second one, very difficult to prove save for the most obvious of cases.

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 Hong Kong liquidator will be able access the arrangements for mutual recognition and assistance of insolvency proceedings with Mainland China. While this initiative is currently still in the pilot stage it represents a tangible benefit to Hong Kong.

In order to make use of this mechanism, the Hong Kong liquidator must ensure that:

- (a) The insolvency proceedings in Hong Kong have been commenced or are to be enforced in one of the pilot areas of the Mechanism which should also be where the debtor's principal assets are located.*

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

Commented [RD(DWH13): Company must have been "influenced by a desire" to achieve the result; which is a bit different to the language used here

Commented [RD(DWH14): (2.5 marks)

See points below; also, does not identify the pilot areas

Commented [RD(DWH15): Could also be a place of business or rep office

(b) That the insolvency proceedings underway in Hong Kong meet the definition of Hong Kong Insolvency Proceedings. Given the fairly expansive definition, it is likely that this will not be a difficult hurdle to achieve.

Commented [RD(DWH16)]: Must be a 'collective insolvency process'. What if our liquidator is appointed in a MVL...?

(c) The debtor's centre of main interests must be located in Hong Kong and must have been so located for at least 6 continuous months prior to the application. This may or may not be the same place where the company had been incorporated. The court will also consider other factors such as the place of the principal office, the principal place of business and the location of assets in determining this question.

(d) He must provide a letter of request from the Hong Kong court in which recognition and assistance is sought

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

Question 3.1 [maximum 4 marks]

Commented [RD(DWH17)]: (3.5 marks)
A good answer; better if had also mentioned s.326 and the companies the legislation applies to

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.

Pursuant to section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, the Hong Kong High Court has the jurisdiction to wind up a foreign corporation.

Commented [RD(DWH18)]: And s.326

That section vests the court with the jurisdiction to make the winding up order once three situations occur:

(a) The company has been dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(b) The company is unable to pay its debts as they fall due;

(c) If the court considers it just and equitable to do so.

*Despite having the clear jurisdiction to do so, in practice the court will only exercise its discretion in appropriate cases. The circumstances in which the Hong Kong court would do so was considered in the case of *Re Kung Yee*. In that case, the court had to consider whether to grant a winding up order in respect of a company which was not registered in Hong Kong in the absence of statutory rules permitting this winding. The Court found that it could do so and implemented three requirements:*

Commented [RD(DWH19)]: ?

i. Sufficient connection to Hong Kong

- ii. Reasonable possibility of the winding up order benefiting the persons applying for it
- iii. The court must be able to exercise jurisdiction over one or more of the persons interested in the distribution of the company's assets.

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.

It is accurate to describe a scheme of arrangement as the only tool for corporate rescue in Hong Kong. The scheme is designed to work by allowing a company to enter into legal arrangements with its members or creditors for the settlement or restructuring of their financial obligations.

The scheme works in a three-stage manner commencing with an application is made by originating summons seeking leave to call a meeting of creditors to consider and approve a previously circulated scheme of arrangement. Upon that application, the court gives consequential directions regarding the place and time for various meetings together with directions for advertisement and the giving of notices to concerned parties. Usually, the application is made by the company itself as it would prefer to enter into a scheme than face compulsory winding up. However, it may also be made by a creditor or any other interested person.

The next stage of the scheme is to arrange a meeting with the creditors who will consider and approve the scheme. The results of the scheme at this point are recorded and transmitted to the court.

The final stage occurs with the applicant returning back to the court for an official sanction of the scheme as approved by the creditors. Once that is done, the scheme takes effect in accordance with its terms

As can be seen, the scheme works by allowing for compromise between a company and its creditors once a certain number of creditors have approved that compromise. It is very helpful in removing the need to enter into unanimous agreement with all creditors, a feat which might very well prove to be incredibly difficult if not impossible.

There are two main advantages of the scheme of arrangement:

- (a) *In light of the fact that it is the only corporate rescue mechanism, the court has applied it flexibly to overcome the gap created by the absence of a legislative framework.*
- (b) *the scheme is particularly effective in reducing the likelihood that insubstantial creditor could frustrate a wide-ranging agreement with the other creditors in the hopes of improving their position down the line.*

Commented [RD(DWH20): (2.5 marks)

The question calls for a description, but the answer does not include, for example, the role of the explanatory statement; how classes are constituted; the statutory majorities needed; the court's role on sanction. Why it may not be effective in other jurisdictions (eg. Gibbs).

See also notes below

Commented [RD(DWH21): No; see ss.668 et seq of Cap 622

Commented [RD(DWH22): Should identify the majorities needed: majority in number representing 75% in value (present and voting in each case)

The main and considerable disadvantage of the scheme of arrangement is the lack of a moratorium. Essentially, creditors may still take action against the company for their own individual benefit. This undermines the appeal of schemes in a way not seen in other jurisdictions.

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 have had to resort to use the common law in order to close the substantial gap created by the lack of a statutory framework to assist foreign liquidations. In doing so, the Hong Kong court have tapped into the responsiveness of the common law to deal with vexing procedural issues which have gone under the radar of the legislature.

*The first way in which the Hong Kong courts have done is by the application of common law test in relation to recognising foreign insolvency proceedings. In doing so, the Hong Kong court has modified three core requirements test as set out in the case of *Re Kung Yee*. The adoption of this test allowed the court to streamline the common law position in order to offer more meaningful obligations to litigants engaged in foreign insolvency.*

This test has been held to apply to circumstances where a foreign representative wishes to obtain a recognition order in Hong Kong in respect of either "main" or ancillary insolvency proceedings. In demonstrating its flexibility, the Hong Kong court has modified the three core test allowing the court to grant recognition and open ancillary proceedings in Hong Kong by relying on strong evidence of the first two factors. Once a recognition order is obtained, the ancillary proceedings in Hong Kong are then able to utilise the full suite of powers which are ordinarily available in local insolvency proceedings in Hong Kong.

There are of course pros and cons on the law developing in this way. On the positive side, the application of the three tier test shows that the common law is likely to be far more responsive than a legislative framework which would require frequent updating and amendment. Courts are likely to decide the principled questions as they arise rather than waiting on legislative amendment. Additionally, in developing the common law principles courts are most likely focused on achieving substantive justice between the parties rather than focusing on procedural hurdles. This can be seen with the common law rule in Hong Kong that banks and other persons with assets must provide that information to foreign representatives without a court order being necessary. This is likely to have a positive impact on foreign insolvency proceedings by reducing the costs of that would normally be require to obtain that information while increasing the convenience factor.

Commented [RD(DWH23)]: (0 marks)

Although there are references to recognition, and the need for a letter of request, the answer appears to misunderstand the question as it does not discuss how a foreign office-holder may seek recognition and assistance in Hong Kong.

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.

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

On the negative side, this development of the common law is likely to be haphazard and incongruent as cases would be decided based on the individual judges' interpretation of the common law rules as opposed to paying regard to a single source of law. This gives rise to inconsistency and tension between decisions of the court and the actual practice. This is evident when once considers that although the common law principles arguably do not require a letter of request from a foreign court, the practice has been to present such a letter and it is doubtful whether the court would grant a recognition order in its absence. Another con is the fact that the common law development has impacted the ability of non-lawyers which would include insolvency practitioners from accessing in a clear and direct way the legal position in areas of their work. They invariably rely on lawyers to sift through common law decisions and advise them on the law.

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.

Sea Breeze is entitled to appoint a receiver in accordance with the terms of the floating charge. Once a breach of the terms of the debenture occurred and Sea Breeze appointed the receiver then the floating charge became crystallised.

It should be noted that the duties and powers of the receiver would be set out in the instrument of appointment and must be in accordance with the terms of the debenture. When the receiver therefore purports to deal with Palm Beach's assets is does so subject to an implied fiduciary obligation deal with the assets in such a manner as would result in the best return in circumstances which would be applied to the satisfaction of the debt owed.

The receiver would be entitled to the payment of his own remuneration together with the costs occasioned by the receivership including the costs of the sale of any assets.

He would then hold the balance of any sale proceeds on trust for Palm Beach. This sum would qualify as an asset of the company which should be realised by the liquidator and distributed for the benefit of the creditors as a whole in the order of priority. This would see the sum being applied in the following order:

- a. Expenses of the winding up including the remuneration of the liquidator
- b. Preferential debts including statutory payments etc

Commented [RD(DWH24)]: (0.5 marks)

0.5 marks for implying that receiver keeps realisations but it is not very clear and does not specifically refer to the direct question about liquidation costs (not payable - Leyland Daf case).

Also, should mention that preferential creditors are paid out of floating charge realisations (if insufficient uncharged assets).

More importantly, the answer does not address whether the charge can be challenged:

Registered?

Section 267?

Unfair preference?

Commented [RD(DWH25)]: ?

- c. Preferential charges on distrained goods
- d. Payment of general and unsecured creditors
- e. Interest on debts ranking *pari passu*
- f. Payments to the shareholders in accordance with the extent of their rights and interests.

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.

What L appears to be seeking is a recognition of the Cayman liquidation proceedings in Hong Kong. Unfortunately, Hong Kong does not have a statutory framework which governs cross border insolvency. Such recognition will only be possible at common law. While it had been the law for some time that no formal order was necessary to access the Hong Kong procedures, in light of the decision of *Re China Lumena New Materials*, L is advised out of an abundance of caution to apply to the court for recognition. It is also noted that SKL's bank should provide all necessary information to L. However, its refusal or unwillingness can likely only challengeable by instituting proceedings in Hong Kong.

In order to avail itself of this procedure, L would need to establish that there are principal insolvency proceedings afoot in another jurisdiction which the Hong Kong proceedings are required to support. This can be established fairly straightforwardly since the Cayman liquidation proceedings are ongoing and it is reasonable, insofar as the work of the liquidation depends on it, for the Hong Kong court to assist in providing judicial assistance.

The Hong Kong court's permission would serve to allow the Cayman liquidator to collect assets in Hong Kong, settle the list of Hong Kong creditors, and transmit the list of assets and otherwise deal with the assets in such a way as to allow them to be realised and distributed to the creditors. In order to receive this order, L would have to meet the following requirements which have been set out in the case of *Re Kung Yee*. Here the Hong Kong court have applied the core requirement test usually applicable to winding up of companies which are not Hong Kong companies. These requirements are as follows

Commented [RD(DWH26)]: (0.5 marks)

The answer mixes up winding up a foreign company in HK and recognition per se, and indicates a misunderstanding.

The elements the answer should address 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(DWH27)]: This cases just distinguishes between getting information from a bank on the company's accounts (no order needed) and getting the assets from the bank (order needed)

Commented [RD(DWH28)]: What about the Global Brands decision and need to address COMI?

Commented [RD(DWH29)]: Rest of this paragraph goes to an ancillary liquidation, not recognition

- (a) *There must be a sufficient connection with Hong Kong. L is able to meet this requirement easily since it is clear that has SKL assets which ought to be dealt with a part of the overall Cayman liquidation process for ease and finality.*
- (b) *There must be a reasonable possibility for order would benefit those applying for it. Again, this can be established on the evidence since it would accord with a speedy, cost effective and conclusive liquidation for all of the assets belonging to SKL to be dealt with at once by the same liquidator. It would clearly benefit the liquidator since it allows him to meet his overall goal of realising and distributing the company's assets to the creditors.*
- (c) *The third requirement is that the Hong Kong Court must be able to exercise jurisdiction over one or more of the persons interested in the distribution of the company's assets. This requirement is less straightforward since it is noted that L is mainly seeking additional information by way of letters from SKL's Hong Kong bank as well as by examination of SKL's auditors. However, the Hong Kong court is clearly empowered to grant this relief as was done in the case of *Re China Lumena New Materials* case in which the Hong Kong court found that there was a need to balance the ability to exercise jurisdiction over the persons charged with the conduct of the insolvency against the broader desire to grant assistance to foreign insolvency proceedings.*
- (d) *In those circumstances, it could be shown that satisfaction of the first two factors was sufficient. We foresee that this approach will be utilised by the Hong Kong court and that the order recognising the Cayman liquidation proceedings will be order.*
- (e) *It should be noted that in order to access this jurisdiction, L would need to present a letter of request to the Hong Kong Court. Once recognition is received, then L would be able to access the full suite of benefits applicable including stays of enforcement of the type described.*

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?

In dealing with these issues, the main thing which arises is whether Lapwing would be able to successfully fend off a winding up petition if one is brought by Harrier.

Commented [RD(DWH30)]: (3.5 marks)

Good to refer to stat demand procedure and checking for presence of arbitration clause, and also the threshold required. However, should also advise:

Harrier needs to know that if winds up then is treated same as other creditors

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

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

Based on the applicable common law rules, Lapwing would be able to defeat a winding up petition if it can show one of the following:

- a. The debt in respect of which the petition has been brought is below the minimum statutory amount of HK\$10,000.00. Harrier therefore has a duty to compute the debt owed by Lapwing inclusive on interest in order to ensure that the debt at least meet this amount based on the outstanding invoices etc.*
- b. The debt is disputable on genuine and substantial grounds. In this case, Harrier must ensure that Lapwing's obligation to pay for the invoices is clearly set out in writing since any issues requiring further oral evidence is likely to cause the court to take the view that there is a genuine dispute. Similarly, the calculations must also be correct since a genuine dispute as to the quantum of the debt will also defeat a winding up petition. It must be stated that in the absence of cogent evidence the court is unlikely to take the view that a debt is genuinely disputable. The subjective belief of Lapwing no matter how strongly held is insufficient to establish a genuine and substantial dispute.*
- c. Harrier also needs to consider whether the underlying delivery or other contract creating the debt is subject to an arbitration clause. The presence of an arbitration clause may cause the court to grant a stay of the winding up petition on the grounds that it undermines the agreement of the parties to resort to arbitration in relation to the performance of their obligations under the contract.*
- d. Even if Harrier proves that based on the foregoing it is entitled to the winding up order, the court would have a residual jurisdiction to determine whether it would be in the best interests of the company to allow rehabilitation or to grant the winding up order.*

Based on what has been disclosed by lapwing's director, it does not appear that there is any genuine basis on which it can properly contest a winding up application should one be brought. Further, the indication that the company cannot make the payment is evidence of its insolvency insofar as it is unable to pay its debts as they fall due. In line with that, Harrier is advised as follows:

- a. Prepare and serve a statutory demand on Lapwing. This demand must set out its full debt together with interest payable. It must also set out clearly the due date for payment which is 21 days after service.*
- b. In the event that the statutory demand remains unpaid after 21 days, then Harrier may properly be entitled to apply for a winding up order since the non-payment of or the failure to set aside a statutory demand creates an inference of insolvency.*

Commented [RD(DWH31)]: Likely the same for exclusive jurisdiction clauses

* End of Assessment *

TOTAL MARKS: 24.5 OUT OF 50

MARK ADJUSTED TO 25 = 50%
COURSE LEADER