**Text, logo, company name

Description automatically generated**

**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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**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**

A petition to wind up a company on grounds of insolvency can be presented when a company is unable to pay its debts. Section 178 of CWUMPO provides three circumstances in which a company shall be deemed to be unable to pay its debts. Which one of the following is one of those circumstances?

1. A creditor has properly served a statutory demand in the prescribed form and the company has, more than three weeks after service, neglected to pay the sum demanded.
2. Where the statutory definition of “insolvency” (appearing elsewhere in the same Ordinance) is satisfied.
3. Where the company is insolvent according to its balance sheet.
4. Where a judgment has been made against the company.

**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:

1. Agent of the company granting the charge (A, in this instance).
2. Agent of the lender appointing him (B, in this instance).
3. Agent of the Official Receiver.
4. 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:

1. All of the below apply.
2. At least one of the directors must be a Hong Kong resident.
3. The petitioning creditor must be a Hong Kong company or a Hong Kong resident.
4. There must be a reasonable possibility that the winding-up order would benefit those applying for it.

**Question 1.4**

Between them, CWUMPO and the Companies Ordinance (Cap 622) (CO) provide a comprehensive statutory regime relating to corporate rescue.

Choose the correct statement:

1. This statement is true: the provisions of these two statutes provide a comprehensive package of provisions relating to corporate rescue.
2. This statement is untrue: CWUMPO alone provides a comprehensive regime for corporate rescue as well as for liquidations.
3. This statement is untrue: the CO alone provides for such a regime.
4. This statement is untrue: Hong Kong has no comprehensive statutory regime for corporate rescue.

**Question 1.5**

As a lawyer practising Hong Kong law, you are asked to advise a client on a tricky legal issue. There are no Hong Kong authorities dealing with the issue but there is a 1985 decision from the English House of Lords more or less directly on point. It has not been cited in the Hong Kong court. Is it binding in Hong Kong?

1. Yes, because it is a House of Lords decision pre-dating the Handover in 1997 so it is binding on the Hong Kong court.
2. No, because all decisions from England ceased to have any relevance in Hong Kong after the Handover in 1997.
3. Yes, because it is directly on point.
4. No, because the decision is from the House of Lords and is not a Privy Council decision made on an appeal from Hong Kong (only those decisions were ever binding in Hong Kong, and they remain so).

**Question 1.6**

After a winding up order is made against a company, which one of the following can a creditor of that company still do?

1. Issue a writ to pursue its claim in the usual way.
2. Continue to enforce against the assets of the company if it already has a judgment.
3. Apply to the court to appoint a receiver over the assets of the company so that the receiver can collect in assets for the creditor’s own benefit.
4. Retain the proceeds of enforcing a judgment where such proceeds were received by the creditor one month before the date of the petition on which the winding up order was made.

**Question 1.7**

Which one of the following statements is correct in relation to cross-border insolvency law in Hong Kong?

(a) Part X of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) gives the Hong Kong court jurisdiction to wind up foreign companies.

(b) The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) gives the Hong Kong court jurisdiction to make a winding up order against a foreign company if the creditor has a judgment in the company’s country of incorporation.

(c) The UNCITRAL Model Law on Cross-Border Insolvency as adopted in Hong Kong provides a complete code as to cross-border insolvency law in Hong Kong.

(d) The only jurisdiction in respect of which the Hong Kong court can give any recognition or assistance to non-Hong Kong liquidators is the Mainland of the PRC due to the 2021 Co-operation Mechanism.

**Question 1.8**

Which of the following statements can accurately complete this phrase: “A voluntary liquidation of a Hong Kong company…”

1. can only be commenced by the company’s creditors.
2. is commenced by the shareholders passing a special resolution to wind up the company voluntarily.
3. can only be commenced if all debts can be paid within 12 months.
4. is commenced by the directors advertising a notice in the Hong Kong Gazette.

**Question 1.9**

Which of the following statements can accurately complete this phrase: “Where there is a valid floating charge over certain of a company’s assets and the company goes into compulsory liquidation five years later, and the charge-holder has appointed a receiver…”

1. the liquidator takes control of the charged assets but pays the expenses of the receivership.
2. the receiver must have his appointment confirmed by the court and then takes control of the company.
3. the receiver realises the charged assets for the benefit of the charge holder, only remitting to the liquidator any sums necessary to pay preferential creditors in the liquidation if the liquidator has no uncharged assets to do so.
4. no winding up order can be made because the company is already in receivership.

**Question 1.10**

Which of the following ingredients is required for a creditor’s scheme of arrangement to be sanctioned?

1. At least 75% of the creditors of the relevant class who are entitled to vote must attend the meeting.
2. A majority in number representing at least 75% by value of the creditors attending and voting must vote in favour of the scheme.
3. The company is a Hong Kong incorporated company.
4. None of the above describe any of the ingredients required.

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

**Question 2.1 [maximum 3 marks]**

What is the role of the Official Receiver?

The Official Receiver (**OR**), who is a government officer who heads the HK Government's Official Receiver’s Office, plays an important role and carries out a number of functions in the context of a Hong Kong (**HK**) insolvency.[[1]](#footnote-1) In particular:

1. The OR acts as liquidator or trustee in bankruptcy in in circumstances where a private practice liquidator or trustee hasn’t been appointed. This can include acting as an interim provisional liquidator after a winding-up order has been made but before a liquidator is appointed, and where no private practice liquidator will be appointed.
2. The OR may still play a role in a court-ordered liquidation as they must be served with any application that is made to the Court. In simple cases, the OR will typically seek and obtain the Court's permission not to attend. However, if the matter is more complex or there are bigger picture policy issues at play, the OR will attend and participate in what might be described as an oversight type role.
3. The OR and the OR's Office also play an oversight role whereby they *"monitor the conduct of private sector insolvency practitioners to ensure they properly carry out their duties and will follow up on complaints made by creditors"*.[[2]](#footnote-2)
4. The OR also deals with the prosecution of insolvency offences (such as a bankrupt failing to deliver up assets) and with reports from liquidators in relation to the disqualification of directors.
5. The OR maintains and operates the HK Government's Company Liquidation Account (the **CLA**) which is used to deposit realisations made by a liquidator in a compulsory liquidation. The OR is responsible for taking collections and also making payments out of the CLA.
6. The OR is also involved with monitoring HK legislation relating to insolvency matters and is actively involved in its review including for the purpose of any reforms.

Question 2.2 [maximum 3 marks]

A creditor is pursuing a company by way of a civil (writ) action. What effect could liquidation steps taken by another creditor have on the first mentioned creditor’s action?

The effect of liquidator steps taken by another creditor will depend on their stage. If the creditor presents a winding-up petition, but a winding-up order has not yet been made, the HK Court can order a stay or restrain other proceedings against the company pursuant to its power under section 181 of the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap 32) (**CWUMPO**). This is known as a discretionary stay and such a stay will not be imposed automatically, and an application must be made by either the company, or any creditor or contributory.[[3]](#footnote-3) As such, in this scenario the civil writ action may be able to continue, unless an application for a stay is made and granted.

If the other creditor's action has resulted in a winding-up order being made, or if a provisional liquidator has been appointed, a mandatory stay is imposed and no action or proceeding may be proceeded with or commenced against the company, except with leave of the Court and subject to such terms as the Court may impose pursuant to section 196 of CWUMPO. As such, in this scenario, the civil writ action would be stayed automatically without the need for any application. The creditor in the writ action could, however, apply to the Court for permission to continue with its action and would likely need to establish that the claim is one which could not properly be brought by proving its claim in the liquidation.[[4]](#footnote-4)

Finally, the only other recourse available to the creditor in the civil writ action would be to make an application to stay the liquidation itself, pursuant to section 192(1) of CWUMPO. Such an application, which may be made by the liquidator, the Official Receiver, or any creditor or contributory (but not the company)[[5]](#footnote-5) requires *“proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed”*. Upon considering such an application, the court will consider:

*"(a) where there are sufficient assets to pay all the creditors and the expenses of the liquidation, the interests of the members, in addition to those of the creditors and the liquidator, would be considered;[[6]](#footnote-6) and*

*(b) whether the stay is “conducive or detrimental to commercial morality and to the interests ofthe public at large”."[[7]](#footnote-7)*

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.

In May 2021, a new co-operation mechanism was introduced between HK and certain areas of mainland PRC being Shanghai, Xiamen and Shenzhen. The mechanism arose from a Record of Meeting between the PRC Supreme Court and the HK Government and provides for HK officeholders to obtain recognition and assistance in those areas of the Mainland, and for Mainland office-holders to obtain recognition and assistance in HK.[[8]](#footnote-8)

The Record of Meeting is supplemented by an opinion of the Supreme Court which:

1. confirms the above-mentioned designated areas; and
2. defines “*Hong Kong Insolvency Proceedings”* as any collective insolvency proceedings commenced under CWUMPO or the Companies Ordinance (Cap 622) (the **CO**) and includes compulsory liquidations, creditors’ voluntary liquidations and schemes of arrangement which are promoted by a liquidator or provisional liquidator.

The Record of Meeting also makes clear the key elements that are necessary in order for a HK liquidator to make use of the arrangement. In particular, it specifies that:

1. the debtor’s centre of main interest (**COMI**) must be in HK, with the Supreme Court Opinion's specifying that COMI generally means the place where the debtor is incorporated but that the *"the people’s court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor."*;
2. when a HK administrator applies for recognition and assistance, the debtor's COMI must have been in one of the specified regions for at least six months;
3. the HK administrator may apply for recognition and assistance if the debtor’s principal assets in the Mainland are in one of the specified areas, or it has a place of business or a representative office in those areas;
4. a letter of request from the HK court is required.[[9]](#footnote-9)

Since its introduction, the HK Court has made various orders for the issue of a letter of request to courts in the Mainland and the mechanism is seen as a significant positive development for the conduct of cross-border insolvencies.

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

Question 3.1 [maximum 4 marks]

Where a creditor makes a statutory demand against a debtor and the debtor disputes the debt, what steps can it take to counteract the statutory demand? Your answer should deal with the position both for an individual debtor and a corporate debtor.

Individual debtor

In circumstances where a creditor has issued a statutory demand to an individual debtor for an unpaid debt, and that individual disputes the debt, then the individual debtor may apply to set aside the statutory demand under section 6A of the Bankruptcy Ordinance (the **BO**). The application may be made within 18 days from the date that they were served with the statutory demand pursuant to rule 47 of the Bankruptcy Rules (Cap 6A) (the **BR**). The application should include evidence which shows that there is a *bona fide* dispute on substantial grounds in respect of the debt and that the debtor actually has a defence of substance, not just a probable defence.[[10]](#footnote-10)

Whist there is an outstanding application to set aside the statutory demand, the creditor will be prevented from presenting a petition with respect to the alleged debt hence the tool is a powerful one. When considering the application to set aside the statutory demand, the Court will consider whether there is an actual dispute in relation to the debt by reference to the evidence that has been filed. The debtor carries the burden of proving this to the Court.[[11]](#footnote-11) For example, if the debt relates to the provision of services under a contract, but there is a dispute between the parties regarding whether the services have been rendered and payment has been withheld, then the debtor would need to provide evidence of the contractual terms and an explanation of what has occurred and why that demonstrates that there is a true dispute regarding whether the amounts are due and payable.

In general, another avenue that debtors should explore is whether the creditor has complied with the specific rules in the BO and the Court's Practice Direction 3.1 regarding the prescribed form of the statutory demand and whether it has been properly personally served. Proper service is a pre-requisite for the commencement of bankruptcy proceedings, therefore if the debtor has not been properly served then that is another basis to counteract the statutory demand. It is worth noting that there are ways to avoid the need for personal service if it is not possible, creditors need to take all reasonable steps to bring the demand to the attention of the debtor, including advertising the statutory demand in a newspaper.[[12]](#footnote-12)

Corporate debtor

Unlike the process that is available to an individual debtor, whereby they can apply to set aside a statutory demand, there is no equivalent provision available to a corporate debtor facing a statutory demand. As such, if a company disputes a debt upon which a statutory demand is based, it should promptly prepare to dispute the debt by placing the debtor on notice of the dispute in relation to the demand and the petition once filed.[[13]](#footnote-13) If the dispute is clear, then the petitioner should withdraw, however, if it does not do so, then the only remaining recourse to the corporate debtor is to apply for an injunction to restrain the petitioner from presenting a petition or, if it has already been presented, from advertising it.[[14]](#footnote-14)

In making such an application, similar to the individual who must show that there is a bona fide dispute with respect to the debt, the company must adduce evidence to prove that there is a dispute with respect to the debt and also provide proof of its solvency. In *Alco Holdings Limited v World Crown Investments Limite*d [2022] HKCFI 3669, the HK Court has stated that, *“it is not sufficient to demonstrate that if a petition were to be issued, the debtor would be able to adduce evidence that at trial it is arguable it would demonstrate a bona fide defence on substantial grounds.”* On the contrary, the corporate debtor essentially needs to show that the presentation of a petition would be an abuse of process, and that the creditor knows or should know that there is a genuine defence.[[15]](#footnote-15) This is a high threshold and demonstrates a burden of proof that is greater than what is needed to defeat a summary judgment application.[[16]](#footnote-16) This shows the public policy interest in protecting corporate creditors and acknowledges the sophistication of corporate debtors as opposed to individuals who are afforded a more flexible regime to dispute a debt before a petition is presented.

It is also worth noting that if the debt arises from a contract which contains an arbitration clause, then there may well be further scope to challenge the statutory demand. Although it concerned a petition and not a statutory demand, in a case now commonly known as *Lasmos* the Court held that the petition should generally be dismissed where (a) the debtor company disputes the debt, (b) the contract under which the debt it said to arise contains an arbitration clause covering any dispute with respect to the debt, and (c) the steps required under the arbitration clause as to the mandated dispute resolution process have commenced. Following this case, there have been a string of other cases dealing with arbitration clauses and exclusive jurisdiction clauses which relate to the question of whether there is a bona fide defence, however, the area is still developing as such that it would be worth making the challenge on this basis.[[17]](#footnote-17)

Question 3.2 [maximum 6 marks]

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

In circumstances where HK does not have a formal corporate rescue regime such as the Unites States' (**US**) Chapter 11 process, the only mechanism available to a company seeking to restructure its debts is via a scheme of arrangement (**SoA**).

A SoA is a statutory mechanism provided for by sections 668 – 6777 of Part 13, Division 2 of the CO (Cap 622) "w*hich allows companies to make binding compromises or arrangements with their members and / or creditors (or any class of them), including adjustment of debts owed to its creditors or reduction of share capital.*"[[18]](#footnote-18) As per usual any SoA needs to be approved by the HK Court and the rules which govern the process to effect an SoA are at order 102, rules 2 and 5 of the RHC. The court procedure relating to the applications necessary to effect a scheme of arrangement is governed by O.102 r 2 and r 5 of the RHC.

As approved by the HK Court in *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* (***UDL***) (2001) 4 HKCFAR 358, the procedural steps for a SoA include the following steps. Firstly, an application by an *ex parte* originating summons is made by a member, creditor or liquidator of the company for leave to convene a meeting of the relevant creditors to consider, and if thought fit, vote to approve the SoA. The summons must identify the class(es) of creditors whose rights are proposed to be altered by the SoA. The applicant will need to consider whether there are different classes of creditors such that their differing interests require multiple meetings.[[19]](#footnote-19) The application must be accompanied by certain documents including an affirmation to explain the background of the SoA and exhibit a copy of the draft explanatory statement, a copy of the draft SoA document, a copy of the notices of the SoA meetings, a copy of the proxy forms, and the draft advertisement to be published.[[20]](#footnote-20)

At the hearing of the summons, the Court will provide directions for giving notice of and advertising the SoA meetings. A potential weakness of the process is that the Court will not consider the composition of the creditors and the appropriateness of the proposal for SoA meetings at the convening hearing. The result of this is that the SoA could potentially not be approved by the Court at the final hearing due to issues that were not considered by the Court and are in the applicants control at this earlier stage.[[21]](#footnote-21) This represents a difference to the system for SoA's in England where the English Court will consider class composition of creditors at the first stage, hence ironing out any issues regarding meetings and classes before it's too late.

Secondly, the SoA meeting(s) occurs and the outcomes of the same are reported to the Court. The creditors whose rights are to be affected are entitled to attend the meeting and ask questions regarding the proposed SoA. A SoA can only be approved at the SoA meeting by the creditors if a majority in number, representing at least 75% by value, of the creditors present and voting, vote in favour of the scheme.[[22]](#footnote-22) Creditors who vote against the SoA can still be bound by the terms of the SoA if they are within a class where the requisite majorities of scheme creditors have voted to approve the SoA.

Third, if the requisite approvals are obtained at the creditor's meeting(s), a petition is filed which seeks the Court's sanction of the SoA.[[23]](#footnote-23) The petition should include details of the company, an explanation as to why the SoA has been proposed, and the results of voting at the SoA meeting(s). The petition should also be supported by an affirmation proving the posting of the notices convening the meeting, the form of proxy and affirming to the contents of the petition.[[24]](#footnote-24) At the sanction hearing the Court will consider; 1) whether a scheme is for a permissible purpose; 2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting (i.e. the composition of creditors); 3) whether the meeting was duly convened in accordance with the Court’s directions; 4) whether creditors have been given sufficient information about the scheme so as to enable them to make an informed decision whether or not to support it; 5) whether the necessary statutory majorities have been obtained; 6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and 7) in an international case, whether there is sufficient connection between the SoA and HK, and whether the scheme is effective in other relevant jurisdictions.[[25]](#footnote-25) If the HK court sanctions the scheme, it will take effect in HK once a certified copy of the Court’s order has been registered by the Registrar of Companies for HK.[[26]](#footnote-26)

In the scenario of a company wishing to restructure its debts, a creditor's SoA is designed to allow a company to propose a restructuring plan to its creditors which may include a compromise or adjust debts if the requisite majority of creditors approves the proposal in the SoA and the Court subsequently approves the arrangement. Another benefit of SoA's is that it gives the company an opportunity to propose and proceed with a restructure without obtaining the approval of 100% of the relevant creditors in order to vary its contractual arrangements. This can be important in circumstances where it might not be possible to obtain unanimous consent of all creditors considering their different positions including where there might be certain creditors that are holding out in order to obtain an advantage over other creditors.[[27]](#footnote-27)

One of the main weaknesses with a SoA is that HK does not provide for a stay or moratorium on creditor actions whilst the SoA is underway[[28]](#footnote-28) and the HK Courts have previously refused applications for a stay.[[29]](#footnote-29) However, it seems that that the HK Court's would take a more flexible approach now following recent amendments to the Rules of the High Court (the **RHC**), which now specify that the Court's case management powers include a specific power to stay proceedings.[[30]](#footnote-30) Specifically, in *Citicorp International Ltd v Tsinghua Unigroup Co Ltd* [2022] HKCFI 1558 the HK Court recognised that where a reorganisation is underway, it may stay a proceeding, although it declined to do so in that particular case.

Given the lack of an automatic stay following the commencement of a SoA, a practice developed in HK whereby a winding-up petition (**WUP**) would be presented concurrently with the SoA and within the WUP an application made for the appointment of provisional liquidators (**PLs**), with specific powers to investigate the possibility of and, if viable, promulgate a restructuring of the company’s debts.[[31]](#footnote-31) This approach allowed Companies to obtain the benefit of the stay on creditor actions by virtue of the WUP process set out in section 186 of CWUMPO.

This procedure was first reported as being utilised in *Re Keview Technology (BVI) Limited* [2002] 2 HKLRD 290 and the legitimacy of such an approach was affirmed by the Court of Appeal in *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719. Following these decisions, the process was fairly commonly used, however, in 2006 in *Re Legend International Resorts Limited* [2006] 2 HKLRD 192 (***Legend***) the HK Court of Appeal threw the concept into a state of uncertainty when it refused to appoint PLs for the purpose of carrying out a restructuring, on the basis that it was not within the Court's jurisdiction to do so as the relevant legislation only permitted the appointment of PLs “for the purpose of winding-up” a company. Interestingly and despite the Court of Appeal's decision in *Legend* the practice of PL led SoA's continued, primarily because the Court of Appeal did not say that it was illegitimate to give PLs the power to investigate and promulgate a restructuring by way of a SoA if it could be established that there was good reason to appoint PLs on the grounds of there being jeopardy to the Company's assets.[[32]](#footnote-32) Typically this would mean that the PLs are not empowered to restructure per se, however, they would be empowered to preserve the Company's assets and if needed return to the Court to seek a specific power to restructure. However, more recently in *China Solar Energy Holdings Ltd* [2018] HKCFI 555, the HK Court allowed PLs to continue in circumstances where their only remaining power was to restructure after the asset in jeopardy which allowed their appointment had been secured.

Another approach which has been used as a workaround if the relevant company is incorporated in another jurisdiction is to appoint officeholders in the country of incorporation and seek recognition. Although this may sometimes be done to address a potential gap in HK law, it is also considered a positive sign of the flexibility of HK's regime.[[33]](#footnote-33)

Question 3.3 [maximum 5 marks]

Describe (briefly, in overview) what security can be created over assets of a Hong Kong company and the effect of such security on the liquidation of the company.

There are various forms of security that can be created over the assets of a HK company. An overview of those forms of security is explained below. In addition, this essay considers the effect of a creditor's security interest in the event of a liquidation of the company.

There are four main forms of security including 1) pledges; 2) liens; 3) mortgages and 4) charges. Each of these four forms of security are summarised below.

Pledge

A secured creditor by way of a pledge holds actual or constructive possession of the asset. By way of example, a lender financing the importation of goods may obtain security by way of a trust receipt being delivered to them.[[34]](#footnote-34) A pledge carries an implied power of sale with respect to the asset to which it relates.

Lien

Typically, liens arise where the asset is retained by the creditor until payment is made. For example, if a person delivers their car to a garage for repairs, the garage owner may be entitled to exercise a lien over the car until the costs of the repairs have been paid.[[35]](#footnote-35) Unlike a pledge, there is no implied power of sale, only a power to retain the property pending payment of the indebtedness.

Mortgage

Mortgages involve a transfer to the creditor of ownership of the asset by way of security, with the debtor having the right of redemption by discharging the debt owed and thus being entitled to a re-transfer of ownership.[[36]](#footnote-36)

Charge

When it comes to charges, they can be fixed over a particular asset, or floating over a pool of assets. With respect to floating charges, the debtor is permitted to keep using the assets and the charge operates as an immediate security interest but, until a “crystallisation event” occurs, no specific asset is attached, hence the ability of the debtor to continue using assets within the relevant class.[[37]](#footnote-37) Often the instrument creating a floating charge will specify that insolvency is a crystallisation event. Charges are different to mortgages in that ownership of the charged asset remains with the chargor, and the charge operates as an incumbrance over the asset, giving the creditor the right to seek recovery of the indebtedness owed by enforcing against the asset charged.[[38]](#footnote-38)

Floating charges are often given the meaning as per Romer LJ judgment in *Re Yorkshire Woolcomber’s Association Limited* and stated: *“…I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.”[[39]](#footnote-39)*

Another important point is that certain types of security, including charges, require registration in order to be valid. With respect to charges created by companies, Part 8 of the CO (Cap 622) governs registration and section 334 identifies which charges that require registration including land and book debts, and floating charges over the company’s undertaking or property.[[40]](#footnote-40) Pursuant to section 335(5)(a) of the CO, a charge that requires registration must be registered at the Companies Registry within one month of the date of its execution and if a charge is not registered or is not registered within time, then it is void against a liquidator or a creditor of the company.[[41]](#footnote-41) In addition, any mortgage or charge in relation to real property in HK must be registered with the Land Registry pursuant to the Land Registration Ordinance (Cap 128).

Security interests in a liquidation context

In the context of a liquidation, generally secured creditors (and the security they hold) in HK will not be dealt with as part of the insolvency process. This is because, like other jurisdictions, the insolvency process in HK is intended to be a collective process for the benefit of unsecured creditors where the liquidator is responsible for realising assets for the benefit of all unsecured creditors.[[42]](#footnote-42) The rights of secured creditors are very different, and they have their own protection which is afforded by the terms that govern the security interest. Ordinarily, secured assets are not available to the liquidator in a liquidation context, however, there are some exceptions. By way of example, a) if a security should have been registered but was not, then the security will be void as against the office-holder; b) preferential creditors must be paid out of assets that are subject to a floating charge before such assets can be used to satisfy the holder of the floating charge (unless, if the company is in liquidation, there are sufficient assets to make those payments out of the general estate);[[43]](#footnote-43) c) a floating charge that is created within a certain period before the commencement of the liquidation may be voidable.[[44]](#footnote-44)

As it can be seen, the form of security and its governing documents is critical when it comes to determining the secured creditor's rights. Typically secured creditors interests will be dealt with outside of the liquidation process with the exception of floating charges or security interests that haven’t been properly registered.

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

Question 4.1 [maximum 5 marks]

A receiver is appointed pursuant to a floating charge over all the assets and undertaking of Pacific Tin Mines Limited (PTM), a Hong Kong company. Shortly after the receiver’s appointment, PTM is put into liquidation. The liquidator writes to the receiver and asks her to hand over all assets (or realisations from assets) of PTM under her control so that the liquidator can pay the costs and expenses of the liquidation and make a distribution to PTM’s unsecured creditors. What (if any) assets or realisations should be handed over by the receiver?

In this scenario, the first thing to consider is the timing of the receiver's appointment over all the assets and undertaking of PTM. This is important because the floating charge will not be valid if it was entered into within 12 months prior to the commencement of the liquidation and PTM was unable to pay its debts at the time the charge was created, or became unable to pay its debts as a consequence of the floating charge.[[45]](#footnote-45) We are told that PTM went into liquidation shortly after the receiver's appointment which suggests that it may well have been within 12 months. If it was, the next question to consider if whether PTM was unable to pay its debts at that time, or if it became unable to pay its debts as a consequence. If either of those scenarios is met, then the floating charge will be voidable, and the receiver would not be entitled to retain the assets or any realisations.

In addition, we would need to find out whether the receiver is a person “connected with"[[46]](#footnote-46) PTM. If they are, then the 12-month period is extended to 2 years and there is no need to show that PTM was insolvent at the time that the floating charge was created or became insolvent because of it, in order for it to be voidable.

Even if the floating charge is voidable for either of the above reasons, it would remain valid to the extent that any new money is provided to PTM at the time of, or after, the creation of the charge (in consideration for it). The receiver would not have to hand over these funds to the liquidator, unless there are insufficient assets to meet the claims of preferential creditors (see below).

If the floating charge was created prior to 12 months before the liquidation commenced and PTM was not insolvent at the time or as a result, and the receiver is not known to PTM, then the liquidation will not impact the receiver’s right to hold and / or sell the assets secured by the floating charge. In particular, any realisations that are made by the receiver out of the assets charged are not available to the liquidator for payment of the liquidation expenses.[[47]](#footnote-47) As such, the receiver would be within their rights to refuse to hand over any assets or realisations in response to the liquidator's request to pay the costs and expenses of the liquidation.

However, with respect to the liquidator's request for any assets or realisations to pay PTM's unsecured creditors, if the liquidator can show that there are insufficient assets to meet the claims of any preferential creditors in the liquidation, then those assets would need to be made available to the liquidator. This is because preferential creditors must be paid out of assets that are subject to a floating charge before such assets can be used to satisfy the holder of the floating charge unless PTM has sufficient assets to make those payments out of the general estate.[[48]](#footnote-48)

Question 4.2 [maximum 5 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. SKL 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 to obtain orders to examine the auditors who are in Hong Kong and who will not co-operate 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.

Firstly, it will be necessary to advise L that recent decisions of the HK Court have changed the position considerably and it is no longer straightforward to obtain a standard order from the HK 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 HK.

The HK court will recognise L's ability to take steps in the name of SKL in view of the fact that he has been appointed by the Cayman Court, being the jurisdiction of SKL's incorporation, however, the HK Court may refuse to give substantive assistance if it appears that that Cayman is not the place of SKL's centre of main interest (**COMI**). The HK Court previously gave primacy to a company's place of incorporation when considering how foreign liquidations should be assisted, however, following the decision in *Re Global Brands* [2022] HKCFI 1789 where the Court stated that *“in future, the criteria for recognition should primarily be determined by the location of a company’s centre of main interests…Treating the place of incorporation as the natural home or commercially most relevant jurisdiction for the purpose of determining which jurisdiction was the appropriate place for the seat of a principal liquidation was highly artificial"*  the position is that COMI is a key factor.

In addition, and to specifically address L's comments regarding the "standard order" it will be helpful to draw his attention to the decision of *Re Up Energy Development Group Ltd* [2022] HKCFI 1329. In that case, the company was incorporated in Bermuda and listed in HK and a HK creditor applied to wind up the company. The Bermudan liquidators opposed the winding up, partly given the exiting winding up order in Bermuda which they suggested could form the base of an application for recognition and assistance in HK to the extent that that was required. The Court disagreed and wound up the company in HK and said that *“[u]nless and until the court makes a [Hong Kong] winding up order against the company, there is no basis to bring into operation the statutory scheme for winding-up under [CWUMPO]. Nor is there any basis for the court to confer any of the powers or provisions under [CWUMPO] to the Bermuda Liquidators or the Company”.* The HK was essentially saying that the powers contained in CWUMPO only apply to HK appointed liquidators and the Court does not have any jurisdiction to give any actual powers which had commonly been referred to in the ‘standard order’ to foreign liquidators.

If L requires further background, in the 2014 case of *A Co v B*, the HK court made an order to recognise the appointment of Cayman Islands liquidators and an order for the production of documents from certain (unnamed) respondents and said at [18]: *"In my view the Hong Kong Companies court can and should adopt a similar approach to applications for recognition and assistance to that described in paragraph 60 of Kawaley J’s judgment. The Companies court may pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law make an order of a type which is available to a provisional liquidator or liquidator under Hong Kong’s insolvency regime. For this reason I granted the orders referred to at the beginning of this decision.”*

Not long after the *A Co v B* decision which endorsed using a letter of request, the Privy Council delivered its judgment in *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36 (***Singularis***) which clarified that the common law power of assistance exists where the power sought to be exercised exists in both (a) the jurisdiction of principal liquidation, and (b) the assisting jurisdiction (the **Singularis Principle**). Following *Singularis "it became common for the court to grant recognition and assistance orders to permit foreign officeholders to, for example, seek production of documents or examination of individuals in Hong Kong."*[[49]](#footnote-49)However, even this older approach could be problematic for L because in the context of investigations, the Cayman legislation permitting examination[[50]](#footnote-50) is much more restrictive than its Hong Kong equivalent.[[51]](#footnote-51) Even in the context of letters of request, the HK court would limit the type of order by reference to what would be available in HK. L mentions that he wants a stay, which would be automatic in the Cayman Islands, however the equivalent moratorium is not available in HK.

Returning to the concept of COMI, the HK Court has provided guidance on the factors that it would consider in determining a company's COMI and those include: (a) the location of the company's directors, principal officers and board meetings; (b) the location of the company's operations, assets, bank accounts, books and records; and (c) where any restructuring activities took place. In the present scenario, L should be advised that SKL's COMI is likely in China in circumstances where it is listed on the HK Stock Exchange, has assets and a representative office in Shenzhen in mainland China, does its main banking in HK and has its auditors in HK. The fact that it is incorporated in Cayman would be considered but is unlikely to be determinative in view of these other factors.

In these circumstances, and particularly given that there are assets in Shenzhen which are unlikely to be accessible to L, L may wish to consider whether it is preferable for SKL to be wound up in HK in an ancillary liquidation. The HK Court has a foreign liquidator’s right to bring an action in HK (in the name of the company)[[52]](#footnote-52) and no formal order recognising the foreign liquidator is necessary for such purpose in recognition that HK should recognise that the law of the place of incorporation should govern who is entitled to represent/direct the actions of a company.[[53]](#footnote-53)

Following the HK court's decision in *Re Silver Base Group Holdings Ltd* [2022] HKCFI 2386, it seems that ancillary liquidation in HK would be endorsed by the HK Court. In that case the HK Court said: *“It is commonly assumed that if a company is in liquidation in its place of incorporation and wound up in another jurisdiction, the latter is to be treated as an ancillary liquidation. Should this be the case if the place of incorporation is not the COMI and the reality is, as is commonly the case with letter box jurisdictions, that a company’s connection with it is formal and it has no assets, creditors or debtors located there? There is no practical reason for requiring realisations to be transferred to the liquidators appointed in the place of incorporation if all the creditors, or the large majority, are located in Hong Kong and the Mainland…”* Ancillary liquidation in HK may useful for a number of reasons including that (i) if the majority of SKL's creditors are in HK then it will be easier to distribute any realisations; and (ii) a HK liquidator would be empowered to make use of the recognition arrangement which provides a mechanism for HK officeholders to obtain recognition and assistance in specific areas of the Mainland China, including Shenzhen where SKL has assets.

Part X of CWUMPO does provide for the HK Court to wind up companies that are not incorporated or registered in HK such as SKL. Pursuant to section 327 of CWUMPO, one reason that a non-HK registered company may be wound up is if it is unable to pay its debts. SKL would meet this condition on the basis that it has already be shown to be insolvent in the Cayman Islands. However, in order to carry out an ancillary winding up in HK, the HK court must also be satisfied that HKL is sufficiently connected to HK by satisfying the “three core requirements” set out in the CFA’s decision in *Kam Leung Sui Kwan v Kam Kwan Lai and Others* (2015) 18 HKCFAR 501, namely that:

(a) there is a sufficient connection with HK, (not necessarily meaning the presence of assets within the jurisdiction);

(b) there must be a reasonable possibility that the winding-up order would benefit those applying for it; and

(c) the Court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets.

The first core requirement, SKL's listing on the HK stock exchange will likely suffice as long as it can be shown that *“that there is a real, not hypothetical, prospect of the listing being realised for an amount that produces a meaningful return to creditors”*.[[54]](#footnote-54)

As to the second requirement, that liquidation would benefit the petitioner, relevant factors are the fact of the need to obtain documents from SKL’s bank in HK, the fact that there are uncooperative auditors with respect to whom orders are required to conduct an examination and a stay against other creditor action in HK. As to the latter, although it wouldn’t be automatically applied, the fact of the liquidation proceedings in HK would allow for an application for a stay which would be extremely beneficial. In addition, and as previously mentioned, a HK liquidation would allow access to the Shenzhen based assets thought the recognition mechanism between HK and specific areas of Mainland China. It is noteworthy that in *Re Solar Touch Ltd* [2004] 3 HKLRD 15the Court would not recognise an order for liquidators to carry out investigations in the PRC. However, it is suggested that that case may now be determined differently if the assets were in one of the pilot areas of the Mainland to which the new co-operation mechanism between Hong Kong and the Mainland applies.[[55]](#footnote-55)

As to the third requirement, even if there isn’t a person with sufficient connection with HK who would have sufficient economic interest in the winding-up of SKL, the Court of Appeal in *Re China Medical* [2018] HKCA 111 confirmed that it may be appropriate to make a winding-up order if the connection with Hong Kong is sufficiently strong and the benefits to creditors are sufficiently substantial.

Question 4.3 [maximum 5 marks]

L has been appointed in Hong Kong as a liquidator of Lobster Investments Ltd (Lobster), a Hong Kong company against which a winding-up order has been made.

In conversations with former employees, L has been told that Lobster has a valuable property on the Peak but there is no reference to this in the books and records.

On investigation, it seems the property is owned by another Hong Kong company called Continental Limited (Continental). L learns that until about one and a half years before the liquidation, Lobster held all the shares in Continental but the main director and shareholder of Lobster (a Mr Aubrey) then executed share transfer documents to transfer the shares in Continental to Verandah Limited (Verandah), a BVI company. L then learns that the sole director / shareholder of Verandah is Mr Aubrey’s wife. There is no indication that Lobster received any consideration upon the shares transfer.

Outraged, L confronts Mr Aubrey who tells L that the former employees are mistaken, and the property never belonged to Lobster as Lobster had only ever held those shares on trust for Mrs Aubrey for convenience and because she had lent money to Lobster, but, as they were going through some matrimonial issues a couple of years ago, she insisted that the shares be transferred to her own name.

L asks you what she could do to pursue the matter. Relevant statutory provisions should be referred to.

In this scenario there are a number of avenues that L could explore to pursue the matter.

Investigation

Firstly, it seems that L needs further information about the situation so she should consider applying to the Court for orders pursuant to section 286B of CWUMPO that:

1. certain individuals who may have information regarding the affairs or property of Lobster should attend Court and be examined on oath. Based on the facts, it appears that this may include, the former employees of Lobster, Mr Aubrey and Mrs Aubrey, however, L should consider if there are any others; and
2. any documents relating to Continental, the share sale, the alleged trust arrangement and Verandah are delivered up to L.

The testimony and documents should allow L and her advisors to piece together what has actually taken place in order to determine the next steps including what claims could be made.

Given that Verandah is a BVI registered Company, L may also consider whether to seek recognition of her appointment in the BVI in order to obtain assistance and gather more information about Verandah.

Subject to the information that L uncovers, based on the facts there appear to be a number of claims that L may consider pursing.

Unfair preference

Lobster's sale of its shares in Continental to Verandah, appears that it may be an unfair preference pursuant to section 266 of CWUMPO if Verandah is a creditor or guarantor of Lobster. L may be able to apply to set aside the share sale to Verandah given where it allegedly occurred one and a half years prior to the liquidation and in circumstances where the beneficiary to the transaction was a person connected to Lobster being the director, Mr Aubry's wife.[[56]](#footnote-56) In order for L to make such an application, L will need to be able to establish that:

1. at the time of the share sale, Lobster was unable to pay its debts or became unable to pay its debts as a result of the share sale;
2. Lobster was *“influenced by a desire”* to improve Verandah / Mrs Aubry's position in the event of a liquidation of Lobster (if a creditor of Lobster). *Re MC Bacon* [1990] BCLC 324; and in *Hong Kong Osman Mohammed Arab v Cashbox Credit Services Ltd* [2017] HKEC 2435 stand for the proposition that a transaction will not be set aside as an unfair preference unless *“unless the company positively wished to improve the creditor’s position in the event of its own insolvent liquidation”* and a person does not *“desire”* all of the *“necessary consequences of his actions”*. This can be difficult, however, in this situation, the fact of the close personal connection and that Mr Aubry would also benefit from the transaction due to the personal relationship / marriage might make it easier to prove if the other facts can be established.

If the share sale is proved to be an unfair preference, L should be advised that the Court may order that the shares in Continental are vested in L or Verandah is required to pay L any benefits received from Lobster. These remedies may require recognition of the relevant order(s) in the BVI.

Transaction at an undervalue

On the basis that there is no indication that Lobster received any consideration from Verandah upon the shares transfer, L should also be advised that the transaction may be capable of being set aside as it was a transaction at undervalue and Lobster is now being wound-up.

Pursuit of this application may depend on the determination of Mr Aubry's claim that the property was never owned by Lobster and that it only ever held the shares in Continental on trust for Mrs Aubry, however, if that can be disproven and the fact that there was no consideration proven then it seems highly likely that this transaction could be capable of being set aside. In this scenario, L should be advised that the Court has a wide discretion to make any order it thinks fit to restore the company to the position it would have been in if the transaction had not occurred.[[57]](#footnote-57)

Given that the share sale occurred one and a half years prior to the liquidation, it would fall in the relevant time being five years[[58]](#footnote-58) before the commencement of the winding-up and if at the time Lobster was unable to pay its debts or became unable to pay its debts as a result of the transaction. In the context of this scenario, where the transaction involved Verandah and Mrs Aubury, the insolvency is presumed on the basis that the transaction involves “a person connected with the company”.[[59]](#footnote-59) This presumption may be challenged by Lobster / Mr Aubry. It is also a defence if Lobster can show that it entered into the transaction in good faith and for the purposes of carrying out its business and at the time there were reasonable grounds for believing that the transaction would benefit Lobster.[[60]](#footnote-60)

Director's duties

Another avenue for L to consider is whether Mr Aubury is in breach of any of his fiduciary duties as a director of Lobster which may entitle L to bring a claim against Mr Aubury. Pursuant to section 271 of CWUMPO Mr Aubury has a duty to:

1. act in good faith for the benefit of Lobster as a whole;
2. use powers for a proper purpose for the benefit of members as a whole and creditors if L is insolvent or bordering on insolvency;
3. not to delegate powers without proper authorisation and to exercise independent judgment;
4. exercise care, skill and diligence;
5. avoid conflicts between personal interests and interests of the company;
6. not gain advantage from the position as director;
7. not make unauthorised use of the company’s property or information;
8. observe the memorandum and articles of association of the company; and
9. keep proper books of account.

Based on the facts, there is reason to believe that Mr Bury may be in breach of the duties in 1, 2, 4 5, 6 7 and 9 if the share sale was an unfair preference or undervalue and because it appears that proper books and records have not been kept as there is missing information.

**\* End of Assessment \***

1. Module 8C Guidance Text, Hong Kong (**Guidance Text**), page 10. [↑](#footnote-ref-1)
2. Guidance Text, page 11. [↑](#footnote-ref-2)
3. Guidance Text, page 42. [↑](#footnote-ref-3)
4. Guidance Text, page 43. [↑](#footnote-ref-4)
5. *Bank Negara Indonesia 1946 v Interasian Traders Finance Ltd* [1980] HKLR 622 (CA). [↑](#footnote-ref-5)
6. *Re Calgary and Edmonton Land Co Ltd* [1975] 1 All ER 1046, at 360C to G. [↑](#footnote-ref-6)
7. *Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 at 694 to 695; *Re Hua Hin (S) Co Ltd*, HCMP No 3965 of 1999, 6 December 1999, Yuen J. [↑](#footnote-ref-7)
8. Guidance Text, page 73. [↑](#footnote-ref-8)
9. Guidance Text, pages 86 – 87. [↑](#footnote-ref-9)
10. *Re Tsang Wai Shan*, ex p Standard Chartered Bank (Hong Kong) Ltd [2022] HKCFI 2692, citing *Re Leung Cherng Jiunn* [2016] 1 HKLRD 850 and *Re Soetrisno Farida* [2019] HKCFI 2756. [↑](#footnote-ref-10)
11. BR, r 47. [↑](#footnote-ref-11)
12. BR, r 46(2) and Guidance Text, page 21. [↑](#footnote-ref-12)
13. Guidance Text, page 38. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. H*ung Yip (HK) Engineering Co Ltd v Kinli Civil Engineering Ltd* [2021] HKCFI 153. [↑](#footnote-ref-16)
17. Guidance Text, pages 40 – 41. [↑](#footnote-ref-17)
18. Guidance Text, page 64. [↑](#footnote-ref-18)
19. UDL at paragraph [27]. [↑](#footnote-ref-19)
20. HKCP, H5B/2 p 378; O.38 r 2, O.41 RHC; and Guidance Text, page 66. [↑](#footnote-ref-20)
21. Guidance Text, Page 67. This [↑](#footnote-ref-21)
22. CO, s 674(1)(a)-(b). [↑](#footnote-ref-22)
23. Guidance Text, page 65; O.102 r 5 RHC and HKCP, Part H Extract, H5B/2. [↑](#footnote-ref-23)
24. O. 102 r 5 RHC, HKCP. [↑](#footnote-ref-24)
25. *Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 467, at paragraph [7]. [↑](#footnote-ref-25)
26. CO, s 674(6). [↑](#footnote-ref-26)
27. Guidance Text, page 65. [↑](#footnote-ref-27)
28. Guidance Text, page 42. [↑](#footnote-ref-28)
29. *Credit Lyonnais v SK Global Hong Kong Ltd* [2003] HKCU 904 (unreported, CACV 167/2003) [↑](#footnote-ref-29)
30. RHC Order 1B, r 1(2)(e). [↑](#footnote-ref-30)
31. Guidance Text, page 63. [↑](#footnote-ref-31)
32. Ibid. [↑](#footnote-ref-32)
33. Guidance Text, page 64. [↑](#footnote-ref-33)
34. Guidance Text, pages 12 – 13. [↑](#footnote-ref-34)
35. Guidance Text, page 13. [↑](#footnote-ref-35)
36. Guidance Text, page 13. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)
38. Ibid. [↑](#footnote-ref-38)
39. [1903] 2 Ch 284. [↑](#footnote-ref-39)
40. Guidance Text, page 16. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. Guidance Text, page 14. [↑](#footnote-ref-42)
43. CWUMPO, ss 79 and 265(3B). [↑](#footnote-ref-43)
44. Guidance Text, page 16. [↑](#footnote-ref-44)
45. CWUMPO section 267. [↑](#footnote-ref-45)
46. CWUMPO ss 265A(3) and 265B. [↑](#footnote-ref-46)
47. See *Buchler v Talbot* [2004] 2 AC 298 (the “Leyland Daf” case), as applied in Hong Kong in *Re Good Success Catering Group Ltd* [2007] 1 HKLRD 453; CWUMPO, s 265(3B). [↑](#footnote-ref-47)
48. CWUMPO, ss 79 and 265(3B). [↑](#footnote-ref-48)
49. Guidance Text, page 80. [↑](#footnote-ref-49)
50. Cayman Companies Law (2018 revision), s 103. [↑](#footnote-ref-50)
51. CWUMPO, s 286B. [↑](#footnote-ref-51)
52. *See Re Irish Shipping* [1985] HKLR 437 and, more recently, Re BGA Holdings Ltd [2021] HKCFI 3433. [↑](#footnote-ref-52)
53. *Re Seahawk China Dynamic Fund* [2022] HKCFI 1994. [↑](#footnote-ref-53)
54. *China Huiyuan Juice Group Limited* [2020] HKCFI 2940. [↑](#footnote-ref-54)
55. Guidance Text, page 76. [↑](#footnote-ref-55)
56. CWUMPO, section 266B. [↑](#footnote-ref-56)
57. Guidance text, page 52. [↑](#footnote-ref-57)
58. CWUMPO, s 266B(3). [↑](#footnote-ref-58)
59. Ibid. [↑](#footnote-ref-59)
60. Ibid. [↑](#footnote-ref-60)