



**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 font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

## **ANSWER ALL THE QUESTIONS**

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

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

**Any reference to “CWUMPO” in the questions below means the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).**

#### **Question 1.1**

Select the **correct answer** to the question below:

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. Can you rely on it in forming your advice?

- (a) Yes, because it is a House of Lords decision pre-dating the Handover in 1997 so is binding on the Hong Kong court.
- (b) No, because all decisions of the English court ceased to have any relevance in Hong Kong after the Handover in 1997.
- (c) Yes, it is not binding as such but the decision will form part of the common law as at the date of the Handover in 1997 and would be persuasive as the common law at that date forms part of Hong Kong law.
- (d) No, because the decision is from the House of Lords and not a Privy Council decision on appeal from Hong Kong.**

**Commented [RD(DW-H1)]:** Incorrect (0 marks). As it pre-dates 1997, the decision would have formed part of the common law as at the date of the Handover

#### **Question 1.2**

Realisations from a floating charge will always be paid in full to the holder of that charge, even if the company granting the charge goes into liquidation. (You may assume that the floating charge is not open to challenge by the liquidator).

- (a) This statement is true because a creditor by way of a floating charge will always stand entirely outside of the liquidation.
- (b) This statement is untrue because all of the costs of the liquidation must always be paid first out of those realisations.
- (c) This statement is untrue because creditors with a statutory preferential claim must first be paid out of those realisations (unless the same can be paid out of uncharged assets).**
- (d) This statement is untrue because **both (b) and (c)** are correct (that is, the costs of the liquidation must always be paid first out of those realisations and thereafter creditors with a statutory preferential claim must first be paid out of the realisations).

**Commented [RD(DW-H2)]:** Correct (1 mark). Option (a) is not correct due to the rules on payment of preferential creditors; (b) is not correct because the charged assets are not available to the liquidators

### Question 1.3

Upon a bankruptcy order being made against an individual, that individual remains free to deal with his assets provided he reports to his trustee in bankruptcy after doing so.

(a) This statement is true.

(b) This statement is untrue because upon bankruptcy the bankrupt's assets are vested in the trustee.

(c) This statement is untrue because although the assets remain the bankrupt's own he must obtain permission from the trustee before dealing with those assets.

**Commented [RD(DW-H3):** Correct (1 mark). Bankruptcy differs in this regard from corporate insolvency in Hong Kong. In the latter, the company remains the owner and there is no automatic vesting.

### Question 1.4

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?

(a) A creditor has properly served a demand (statutory demand) in the prescribed form and the company has, for three weeks after service, neglected to pay the sum demanded.

(b) Where the statutory definition of "insolvency" (appearing elsewhere in the same Ordinance) is satisfied.

(c) Where the company is insolvent according to its balance sheet.

(d) Where a judgment has been made against the company.

**Commented [RD(DW-H4):** Correct (1 mark). The key thing to remember is that there is no statutory definition of "insolvency" in the relevant Hong Kong legislation

### Question 1.5

When a company goes into liquidation, the role of the liquidator is to:

(a) Realise the company's assets, adjudicate the proofs of debt submitted by those claiming to be creditors and distribute dividends to creditors.

(b) Investigate transactions entered into by the company to determine whether there are any that can be impeached pursuant to the legislation (or otherwise).

(c) Investigate the cause(s) of failure of the company and the conduct of the directors.

(d) All of the above.

**Commented [RD(DW-H5):** Correct (1 mark). The role of the liquidator is a broad one.

### Question 1.6

A winding up Petition was presented on 1 April 2019 and the winding up order was made on 5 June 2019. After her appointment the liquidator discovers that a payment was made by the company to a third party on 5 April 2019. Which of the following provisions is **most likely** to be considered by the liquidator (and should be her **first** consideration)?

(a) Void dispositions after the commencement of winding up - pursuant to section 182 of CWUMPO.

(b) Unfair preferences - pursuant to sections 266, 266A and 266B of CWUMPO.

**Commented [RD(DW-H6):** Correct (1 mark). The other options are also possible but (a) should easily be the first option to look at because the legislation deems the transaction to be void (the commencement of the winding up being 'backdated' to the date of the petition). It would be for the recipient to persuade the court that the payment could be retained. For the others, the liquidator would have to prove certain elements.

(c) Transactions at an undervalue – pursuant to sections 266B, 266D, 266E of CWUMPO.

(d) Fraudulent trading – pursuant to section 275 of CWUMPO.

#### Question 1.7

Select the **correct** answer:

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

(a) Agent of the company granting the charge – in this case A.

**(b)** Agent of the company appointing him – in this case B.

(c) An officer of the court.

(d) An employee or officer of the Official Receiver's Office.

#### Question 1.8

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

(a) This statement is true – the provisions of these two statutes provide a comprehensive package of provisions relating to corporate rescue.

(b) This statement is untrue – CWUMPO alone provides a comprehensive regime for corporate rescue as well as for liquidations.

(c) This statement is untrue – CO alone provides for such a regime.

**(d)** This statement is untrue – Hong Kong has no comprehensive statutory regime for corporate rescue.

#### Question 1.9

Select the **correct** answer:

Part X of CWUMPO gives the Hong Kong court jurisdiction to wind up non-Hong Kong companies in certain circumstances. Aside from this section, other provisions relating to cross-border insolvencies are contained in:

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

(b) Parts of CWUMPO other than Part X.

**(c)** Guidance in common law judicial decisions.

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

#### Question 1.10

Select the **correct** answer:

**Commented [RD(DW-H7)]:** Incorrect (0 marks). The receiver owes a duty to the charge holder, but acts as agent of the charge-giver

**Commented [RD(DW-H8)]:** Correct (1 mark). Although the CO contains provisions for schemes of arrangement, those provisions could not be said to be "a comprehensive statutory regime relating to corporate rescue". As one example, there is no moratorium.

**Commented [RD(DW-H9)]:** Correct (1 mark). Hong Kong has not enacted the Model Law; part X is the only part of CWUMPO dealing with the subject matter; and Cap 319 deals only with enforcement of foreign judgments

A liquidator appointed by the Cayman Islands court over a Cayman incorporated company believes that the company has a legal action it should pursue against defendants in Hong Kong. Leaving aside any potential jurisdictional challenges as regards the action itself (for example, the presence of an arbitration clause), the liquidator:

- (a) must first obtain an ancillary winding up order in Hong Kong.
- (b) can commence the litigation in the name of the company without further order in Hong Kong.
- (c) Must first seek a recognition order in Hong Kong and must obtain a letter of request from the Cayman court for such purpose.
- (d) Must first seek a recognition order in Hong Kong and can do so based solely on the Cayman winding up order and without a letter of request.

#### QUESTION 2 (direct questions) [10 marks]

##### Question 2.1 [maximum 3 marks]

Describe the effects of the compulsory liquidation of a company upon a creditor who is pursuing the company by way of a civil action.

The creditor's civil action will be subject to a discretionary stay at the behest of the court, before it (i.e., the court) passes a winding up order. Whereas, the creditor's civil action will be compulsorily stayed after the court passes the winding up order.

##### Question 2.2 [maximum 4 marks]

Identify each method by which a company can go into liquidation in Hong Kong and briefly describe the circumstances in which each method would usually be implemented.

- **Members' Voluntary Liquidation-** Members' Voluntary Liquidation ("MVL") procedure is usually used when the debtor company is in a position to honor/settle all its pending liabilities and obligations within a period of 12 months from the commencement of the MVL. The MVL commences as on the date of the resolution in support of the winding up is passed.
- **Creditors' Voluntary Liquidation-** Creditors' Voluntary Liquidation ("CVL") occurs in a scenario wherein the debtor company (who is not solvent), itself passes a special resolution for initiating voluntary winding up proceedings against itself. The CVL commences as on the date of the special resolution in support of initiation of the CVL.
- **Section 228A Liquidation-** When the directors of a company are of the view that the company is required to be wound up with immediate effect, they can initiate a liquidation pursuant to Section 228A of the CWUMPO. The directors of the company will be required to demonstrate special circumstances/reasons for liquidating a company pursuant to Section 228A of the CWUMPO.
- **Compulsory Liquidation-** A company undergoes compulsory liquidation, when the High Court passes a winding up order against the company to that effect. The most common ground for initiating compulsory liquidation against the company is when the creditors of the company present a petition that states that the company is unable to

**Commented [RD(DW-H10):** Correct (1 mark). See for example the *Irish Shipping* case

**Commented [RD(DW-H11):** 1 mark out of 3. Should mention restrictions on retaining benefits of enforcement (s.183); mandatory stay when provisional liquidator appointed. Also, the discretionary stay is not exactly at the 'behest of the court' – an application must be made.

**Commented [RD(DW-H12):** 4 marks out of 4. Good, concise.

pay its debts as they are becoming due. However, the company itself can file a petition for compulsory liquidation, or it can also be filed by a shareholder, or even the court itself can wind up a company when it deems it fair and equitable.

### Question 2.3 [maximum 3 marks]

Where a creditor presents a petition for the compulsory winding up of a company, a court hearing date is fixed approximately two (2) months after the date of presentation. Does Hong Kong law permit an officeholder to be appointed in the meantime (that is, during this interim period of two months before the petition is heard)? If "yes", in what circumstances? If "no", what is the policy reason for not permitting such appointment?

The terms "Provisional Liquidator" and "Provisional Liquidation" technically don't exist under Hong Kong law. As per Hong Kong Law, a company is either in liquidation or its not. However, the term "Provisional Liquidation" has been defined under Section 193 of the CWUMPO.

Pursuant to Section 193 of the CWUMPO, a provisional liquidator can be appointed in the following circumstances:

- For the purpose of preservation of the assets of the debtor during the intervening period between filing of the winding-up petition and adjudication thereon. However, upon application, the court might also permit the provisional liquidator to realise the debtor's assets in order to preserve value.
- For assisting in the facilitation and preparation. of a restructuring proposal (however, this cannot be the sole reason for the appointment of the provisional liquidator).
- Other sufficient exigencies/relevant circumstances that justify the appointment of a provisional liquidator; e.g., an imminent risk of dissipation of the debtor's assets or them otherwise being jeopardized prior to the court entering a winding up order.

The considerations that a court typically takes into account prior to appointing a provisional liquidator are: (i) business/commercial aspects; (ii) the degree of urgency/exigency; (iii) the basis/requirement for passing an order appointing a provisional liquidator; and (iv) the balance of convenience.

## QUESTION 3 (essay-type questions) [15 marks in total]

### Question 3.1 [maximum 9 marks]

#### Question 3.1.1 [maximum 7 marks]

Describe Hong Kong law as it applies to corporate rescue, discussing any advantages / disadvantages to the current system.

There is presently no legislation governing corporate rescue in Hong Kong. Nonetheless, courts in Hong Kong have still enabled multiple corporate rescues over the years by simply applying the common law principles. Additionally, there are other options such as schemes of arrangements can be potentially considered to be as corporate rescue tools. Below are the advantages and disadvantages of the corporate rescue system as it exists in Hong Kong as of date:

#### Advantages

Commented [RD(DW-H13)]: 2 ½ marks out of 3. Good answer

Commented [RD(DW-H14)]: Not quite. "Provisional liquidator" is a term even though "provisional liquidation" is not.

Commented [RD(DW-H15)]: 4 ½ marks out of 7. Should mention informal workouts, and given importance, some detail on schemes (majorities for example).

- By applying the common law principles, courts in Hong Kong have demonstrated a great degree of flexibility that have permitted multiple corporate rescues to happen over the years.
- The ingenuity of Hong Kong practitioners coupled with the court's common law-backed flexibility has created room for multiple practical solutions on the corporate rescue front.
- Schemes of arrangement are useful when a company seeks to restructure its debts from multiple creditors at the same time, and also anticipates not being able to secure unanimous consent and support from all its creditors to the proposed restructuring.
- Schemes of arrangements also equip the stakeholders to deal with certain miscreants such as hold-out creditors for instance, that might try to secure some sort of an unfair advantage.

#### Disadvantages

- The Hong Kong Approach to Corporate Difficulties ("HKADC") did not apply to non-banking creditors such as bondholders, that often gave rise to multiple conflict of interest situations with other bank creditors.
- Financial Advisors that were appointed pursuant to HKADC were chosen by the banks, but their costs were borne by the debtors. This often led to the debtors complaining their lack of autonomy and independence in the restructuring process.
- There is presently no legislation in Hong Kong that accords priority to lenders that extend finance to the debtor during the restructuring. Although the HKADC categorically recognizes the need for such a legislation, it actually to the detriment of prospective priority lenders states that all secured creditors are required to consent to priority being accorded to a priority lender.
- The HKADC does not provide for any mechanism to deal with dissenting minority creditors.
- A scheme of arrangement does not provide for a moratorium, and stakeholders would have to resort to other "creative" means for obtaining a moratorium; e.g. *In Re Keview Technology (BVI) Ltd.*

#### Question 3.1.2 [maximum 2 marks]

Discuss the possible reforms that have been (or are) under consideration with regard to corporate rescue.

Basis the 1996 recommendations of the Law Reform Commission, the Corporate Rescue Bill ("Bill") was introduced in Hong Kong's Legislative Council in 2001. The Bill broadly provided for- (i) a creditor-controlled legislative machinery to address insolvencies/special situations; (ii) a provisional supervisor to explore the scope of restructuring/rehabilitating the debtor; (iii) a moratorium/automatic stay for the duration of restructuring/rehabilitation. However, following multiple rounds of discussion, and owing to numerous anticipated operational issues, the Bill lapsed in 2004.

However, the Secretary of Financial Services and the Treasury Bureau subsequently revived the Bill in 2017 with additional comments. Further, the Legislative Council's Panel on Financial Affairs ("LCPFA") also added its further comments to the Bill in March 2018. The LCPFA further suggested reintroducing the Bill in 2018/2019 legislative session, but that did not materialize. Some limited movement occurred in 2020 on the Bill front, but that wasn't met with much enthusiasm either.

#### Question 3.2 [maximum 6 marks]

**Commented [RD(DW-H16)]:** 1 mark out of 2. The answer should also examine briefly the reasons the Corporate Rescue Bill floundered – how a possible reform failed can be a good indicator as to the direction a jurisdiction is likely to take.

**Commented [RD(DW-H17)]:** 4 marks out of 6. In respect of Part X winding up should mention the core requirements. Also, that no recognition required for obtaining own documents (*Bay Capital*); that letter of request needed for recognition application. That recognition concepts extend to schemes

Although Hong Kong has little specific legislation dealing with cross-border insolvency, the Hong Kong courts have supported foreign insolvencies through the common law. Discuss.

Hong Kong courts have historically addressed cross-border insolvencies with the assistance of common law principles. For instance, courts in Hong Kong have for long recognized the right of a foreign liquidator to bring an action in Hong Kong in the name of the debtor company, without the need for the liquidator to first obtain a formal court order to that effect.

Hong Kong courts have also previously extended significant assistance to foreign representatives by relying upon common law principles. For instance, once a Hong Kong court refused to enforce a judgment against the Hong Kong assets of a company in order to support the foreign insolvency proceedings. The Hong Kong court, in this instance, developed a two-prong approach that dealt with the issues of liability and enforcement separately.

In *A Co. v B*, a Hong Kong court, while granting the prayers of Cayman Islands liquidators, noted that Companies Courts in Hong Kong “[should] 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 insolvency regime.”

Further, Privy Council’s decision in *Singularis Holdings v PricewaterhouseCoopers* (“**Singularis**”) shortly followed the Hong Kong court’s decision in *A Co. v B*. The *Singularis* court clarified that the common law power of rendering assistance to a court in a foreign jurisdiction exists so long as the both the courts in the “principal jurisdiction” as well as the “assisting jurisdiction” have the same powers. The decisions in both *A Co. v B* as well as *Singularis* have promoted the cross-border insolvency tent of modified universalism in Hong Kong.

However, Hong Kong courts’ general flexibility should not be interpreted as a blanket approval for any foreign proceeding. In *The Joint Administrators of African Minerals Ltd (in administration) v Madison Pacific Trust Ltd. & Shandong Steel Hong Kong Zengli Ltd.*, (“**African Minerals**”) a Hong Kong court refused the application of English administrators to recognize their appointment and recognize the English moratorium enforced pursuant to an administration. The *African Minerals* court reasoned that it could not recognize the English moratorium pursuant to the administration in Hong Kong as Hong Kong insolvency law itself did not provide for an administration process.

Another interesting recent trend in Hong Kong’s cross-border insolvency jurisprudence is the recognition of insolvency proceedings from China (which is not a common law jurisdiction) in *Re CEFC Shanghai International Group Ltd (Mainland Liquidation)* (“**CEFC**”) and *Re Liquidator of Shenzhen Everich Supply Chain Co. Ltd.* (“**Shenzen**”). This is notwithstanding the fact that the Hong Kong court in *A Co. v B* ruled that insolvency proceedings pursuant to a letter of request will be recognised if they originate in a jurisdiction that has a similar substantive insolvency law to that of Hong Kong. The court in both *CEFC* and *Shenzen* was satisfied that PRC’s insolvency law redressal procedure is a collective process.

Additionally, Hong Kong Courts in the matters of *Re BJB Career Education Co. Ltd.* and *Re Centaur Litigation SPC* also granted the foreign representatives’ recognition requests seeking production of documents and examination of witnesses in Hong Kong. While granting the recognition requests in both the aforementioned matters, the Hong Kong court carried out the *Singularis* analysis.

Interestingly, in *In Re China Lumena New Materials Corp (in Provisional Liquidation)*, the Court held that foreign representatives are required to make a separate application should they desire to exercise power over Hong Kong assets (such as Hong Kong bank accounts).

Lastly, in addition to recognizing foreign liquidations, courts in Hong Kong (pursuant to the principle of comity), also extend assistance in recognizing other insolvency procedures, including rehabilitation proceedings. For instance, in *Aoki*, the Hong Kong court provided assistance in relation to rehabilitation proceedings that were initiated in Japan.

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

##### Question 4.1 [maximum 4 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. You are asked to advise the liquidator. What (if any) assets or realisations should be handed over by the receiver?

The receiver is not required to hand over any assets/realisations to the liquidator.

Per Hong Kong's insolvency law, the liquidation of the debtor company has no impact on a receiver's right to possess/liquidate any assets that are secured by the charge pursuant to which they (i.e., the receiver) are appointed.

Additionally, any realisations that the receiver might have made from the sale of the assets are unavailable to the liquidator to meet the costs and expenses pertaining to the liquidation.

Further, pursuant to Section 265 (3B) of the CWUMPO, in an event of liquidation, the liquidator is required to honor preferential claims from any floating charge realisations to the extent that any realisations from the uncharged assets are insufficient.

##### Question 4.2 [maximum 4 marks]

A liquidator is appointed over luxury car dealer Billion Happy Limited (BH) and learns that BH has recently been granted a facility by Hammerhead Finance Co Limited (HF). HF has shown the liquidator a document entitled "Receivables Purchase Agreement", claiming that all accounts receivables due from BH's customers therefore belong to HF. The document also asserts that as an alternative to ownership of the receivables, HF has a fixed charge over the receivables. Advances from HF to BH were sporadic and could not necessarily be matched to invoices. Further, some customers of BH had paid certain invoices to an account with HF, but which account BH then operated for working capital purposes.

Telford Co Limited (TC) contacts the liquidator of BH to say that TC had been helping BH sell its cars to wealthy businessmen on the Mainland. TC shows the liquidator an agreement asserting that if BH goes into liquidation then it is deemed that immediately before the liquidation, all cars held at BH's showrooms belong to TC.

The liquidator asks for your thoughts on what issues she should consider when dealing with HF and TC.

#### Issues to be Considered by the Liquidator While Dealing with HF

**Commented [RD(DW-H18):** 2 marks out of 4. The first step is to examine validity of the charge. For example, s.267; registration. A liquidator can also recoup costs reasonably incurred in realizing charged assets, but in reality only if does so before being aware of the receiver or with the receiver's consent.

**Commented [RD(DW-H19):** Remember requirements re preferential creditors.

**Commented [RD(DW-H20):** 1 ½ marks out of 4. The main point here is wither a sale or security. If security, is it valid? Document says a fixed charge but lack of control (apply *Spectrum Plus*) suggests otherwise. You then get one of the main points (that realisations out of the floating charge cannot be used for the liquidation expenses), but miss a key element (and its particulars), namely the need to examine validity of the charge (e.g. was it within the period it could be attacked by a liquidator, was it registered, could it be a preference). For full marks, refer to s.265(3B): preferential debts to be met unless sufficient assets in liquidation estate. NB, s.79 provides that assets recovered under a floating charge, where there is no winding up, must first be used to pay what would be preferential debts if there is a winding up.

- **Enforceability of a Fixed Charge in a Liquidation-** As per Hong Kong insolvency law, a fixed charge is enforceable wholly outside of the liquidation proceedings. A creditor that has a fixed charge over an asset can realise that particular asset disregarding the claims of the other creditors.
- **Extortionate Credit Transactions-** If the terms of a credit transaction require the making of “grossly exorbitant” payments or if they “grossly contravene” the generally-accepted principles of fair dealing, then a liquidator may petition the court to: (i) set aside the credit transaction either wholly or partially; (ii) vary the terms of the credit transaction; (iii) requiring the parties to the credit transaction to repay the monies; (iv) surrendering property or for the accounts to be taken.

#### Issues to be Considered by the Liquidator While Dealing with TC

- **Anti-Deprivation Principle-** It is unlikely that in a liquidation scenario a court will uphold a contractual term/clause that will cause the creditors to be deprived of an asset, that, in the absence of the purported contractual term/clause would make that asset available to the creditors to satisfy their debts. Courts will consider the following factors while determining whether the anti-deprivation principle has been violated: (i) whether there is an intent to evade/skirt insolvency laws; (ii) whether the purported clause operates in non-insolvency scenarios; (iii) whether there is a flaw in the concerned asset.

#### Question 4.3 [maximum 7 marks]

Cyberbay MedTech Limited (Cyberbay) is a Cayman Islands company listed on the Stock Exchange of Hong Kong. This company appeared in the self-assessment questions in your guidance text, where you were asked to consider the steps that the Cayman-appointed officeholder might take in an effort to restructure the company’s indebtedness due to holders of certain Notes. The joint provisional liquidators (JPLs) have now uncovered concerns about accounting irregularities in its Mainland operations and there are also press reports that the founder and Chairman has disappeared in the Mainland and cannot be contacted.

Upon further investigation, it appears that the Chairman’s disappearance certainly looks as if it is linked to the “accounting irregularities” with large sums of money (raised from the issue of the Notes and the bank borrowing) being paid to entities with no apparent real business with Cyberbay. There is an individual in Hong Kong, Mr Pottinger, who is a friend and business associate of the Chairman. It is believed that Pottinger has information that will help shed light on the payments. The JPLs ask you if there is anything they can do in Hong Kong in this regard. Advise them.

The JPLs may petition the Hong Kong courts by means of an application to seek production of documents from and examine Mr. Pottinger. Hong Kong courts regularly encounter recognition applications from the Cayman Islands and the British Virgin Islands in cross-border insolvency scenarios. Hence, over the course of the years, courts in Hong Kong have developed “standard orders” to enter in favor of foreign representatives from Cayman Islands and the British Virgin Islands.

However, it is also important to note that as per the Hong Kong common law governing cross-border insolvencies, any power that the JPLs intend to exercise in Hong Kong should also be available to them in the Cayman Islands. This common law tent assumes greater significance in light of the fact that the Hong Kong legislation on examination is not as restrictive as Cayman Islands’ legislation on examination (Cayman Islands’ examination legislation is very restrictive when it comes to the examination of persons that are not directly connected with the company).

**Commented [RD(DW-H21)]:** 3 marks out of 7. Should also have mentioned: letter of request needed; ability to get documents that belong to the company (*Bay Capital*), or sue if enough evidence, without any order. Consider whether could take control of the Hong Kong subsidiary (either by winding up or using powers as shareholders to change board). You mention ancillary liquidation so should discuss core requirements. Actions against recipients?

Thus, while the JPLs can certainly petition the Hong Kong court to examine Mr. Pottinger, however, there is no certainty about the practical results that their application might generate as the Cayman Islands' legislation on examination is far more restrictive as opposed to its counterpart in Hong Kong.

**TOTAL: 31.5 MARKS OUT OF 50**

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