



**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).
4. You must save this document using the following format: **[studentnumber.assessment8C]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 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)]:** Correct (1 mark). The decision would be persuasive

#### **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)]:** Incorrect (0 marks). A liquidator cannot look to the floating charge realisations for the costs of the liquidation (see the *Leyland Daf* case (applied in Hong Kong in *Good Success Catering*))

### 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)]:** Incorrect (0 marks). This other option is 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.

**Commented [RD(DW-H7)]:** Incorrect (0 marks). Although a receiver can be appointed by the court, and thereby becomes an officer of the court, an appointee under a charge does not do so.

**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.**

**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.

**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).

**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

**Question 1.10**

Select the **correct** answer:

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.

A creditor must first prove his debt by the company in liquidation by submitting a prescribed form and paying a fee. He must state whether there is any security and the date that security was granted (if the security is not registered then it is deemed waived).

If the creditor successfully proves the above, then he is entitled to his share of claim against the bankrupts assets.

##### 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

A members voluntary liquidation is only possible when a company is solvent – the directors of the company must make a declaration of solvency to state this.

The shareholders (“members”) of the company pass a resolution to place the company in to liquidation and to appoint the liquidator(s).

Any surplus of funds after payment of the liquidators fees and relevant creditor claims is distributed to the members within 12 months from the commencement of the liquidation.

###### Creditors Voluntary Liquidation

Like a members voluntary liquidation, there is no value threshold for a creditors voluntary liquidation. It commences when a company places itself in to liquidation by convening and holding a meeting of members where the same is resolved; the liquidator has limited powers

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

**Commented [RD(DW-H11):** 0 marks out of 3. Unfortunately ,this misses what the question is aimed at, which is the discretionary and mandatory stay (ss. 181 and 186) and the restriction on retaining benefits of enforcement (s.183)

**Commented [RD(DW-H12):** 3 ½ marks out of 4. This gets the main points for the question but makes some points below that not quite right

**Commented [RD(DW-H13):** Not quite; the surplus will not be distributed within 12 months – the debts must be paid within 12 months

until a meeting of creditors is held which will be convened not more than 14 days after the meeting of members where a statement of affairs is presented and creditors can vote for or against the liquidators appointment.

The Directors must act in the best interest of the company and protect the assets in the interim period between the company going insolvent and the appointment of a liquidator.

The creditors meeting must be advertised 7 days before in the following places:

- Hong Kong Gazette;
- English Language Newspaper; and
- Chinese language newspaper circulating in Hong Kong.

Letter must also be sent to known creditors via post.

The main reason for a creditor's voluntary liquidation is that the costs are less. This is due to limited to no court involvement which takes a significant amount of time to seek approvals, which potentially involves legal action and lawyers, incurring more costs.

### Section 228A Liquidation

In this example, a company can be wound up as a matter of urgency by its directors. The reason for this must be legitimate, and is normally used in circumstances where perishable goods are at risk of becoming obsolete. False use of this section will lead to fines of the director.

The following circumstances must be present when delivering the resolution of the directors to the Registrar to the effect that:

- The company cannot by reason of its liabilities continue its business;
- They consider it is necessary that the company be wound up and that it is not reasonably practicable for the winding up to be commenced under another section; and
- Meetings of the company's shareholders and its creditors will be summoned to be held not later than 28 days from filing the winding up statement.

Only a solicitor or professional accountant can be appointed as a liquidator in this scenario.

### Compulsory Liquidation

The High Court can order for a company to be placed in to liquidation. In this circumstance, normally, a creditor will have approached the court and requested the company be placed in to liquidation because the company is unable to pay its debts. The court can either adjourn a hearing, make an interim order, or dismiss the request.

The company can resolve to be placed under liquidation by its directors and members.

Assuming it goes ahead, the Court will appoint a liquidator who will take over the operation of the company.

This a costly and complicated process, and there alternatives to this as mentioned above, which are more efficient and less costly, if the option is available.

### Question 2.3 [maximum 3 marks]

**Commented [RD(DW-H14)]:** No; a directors' resolution cannot initiate winding up (*Emmadart*)

**Commented [RD(DW-H15)]:** 1 ½ marks out of 3. Should reference the powers of a provisional liquidator and the fact that although a PL can have restructuring powers but that cannot be the only reason for the appointment (*per Legend*). Also, a couple of points indicate a misunderstanding of the type of office holder being appointed here.

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?

There is a term for an interim office holder, which is “provisional liquidator” within section 193 of CWUMPO. A provisional liquidator preserves the assets during the period after the petitions made but before the order is made. The court tends to appoint a liquidator.

A provisional liquidator will only be appointed in extraordinary circumstances where it is entirely necessary and, for example, assets within the company are at risk of being dispelled before the hearing is had. In a compulsory liquidation, the official receiver is usually automatically appointed as the provisional liquidator until a meeting of the company’s creditors and contributories is convened and the court has ordered the appointment of a liquidator. The liquidator must advertise his or her appointment.

A final liquidator will be appointed during the hearing.

When a company is placed in compulsory liquidation (and the court order has been made), or when a provisional liquidator has been appointed, no action or proceeding may be started or proceeded with against the company or its property without the permission of the court (section 186 of the C(WUMP)O).

### 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.

Despite attempts to create legislation in 2000-2001, 2008-2009 and 2014, there is still no formal law on Corporate Rescue in Hong Kong, however, the Hong Kong government plans to relaunch the Companies (Corporate Rescue) Bill in 2021. The closest form of guidance is the “Hong Kong Approach to Corporate Difficulties” which is a guideline published by the Hong Kong Monetary Authority, or originally by the Hong Kong Association of Banks in 1999. The guidelines are non-statutory.

Under the current law, one of the major benefits is that a company may enter an informal workout with its creditors which is an out of court process that can be done at any time. The process is highly flexible and amendments and/or extensions of the company’s debts may be made. The aim is to achieve the continuation of the company’s business without the need to commence winding-up proceedings. Examples of this can be pulled from 1997/1998 during the Asian Financial Crisis where banks would work to formulate a restructuring plan by debt re-scheduling and entering in to debt-to-equity swap arrangements which was later known as the “London Approach”.

Because of the lack of legislative guidance, or statutory requirements, when it comes to corporate rescue, the flexibility of common law and creativeness of Hong Kong practitioners, allowed them to create tools that have been used to achieve similar outcomes, such as the Scheme of Arrangement.

Commented [RD(DW-H16)]: ?

Commented [RD(DW-H17)]: This is a different type of office (s.194 etc.) albeit (confusingly) with the same label, provisional liquidator

Commented [RD(DW-H18)]: 4 marks out of 7. A bit confused in parts. For fuller marks, you could have referred to some of the detail of how a scheme works (the majorities required, need to identify classes, limitations due to the *Gibbs* principle for example). Also, when referencing use of common law, could refer to the use of provisional liquidators (to get the moratorium) and schemes (to compromise) together

Commented [RD(DW-H19)]: In this period, the s.193 provisional liquidator restructuring was more popular than ‘London Approach’ consensual restructurings.

Commented [RD(DW-H20)]: Bit confusing: a scheme is a statutory mechanism (per your next para)



Alternatively, a company may enter in to a 3-step Scheme of Arrangement which is a court sanctioned compromise with all of (or a class of) its creditors. One major drawback is that initiation of a scheme process does not activate any moratorium on creditors' unless and until a scheme has been sanctioned by the court. Depending on the size and type of company, sanctioning could take months and until it is sanctioned, no member or creditor will be bound by the terms of the scheme and the company is not protected from new proceedings.

Another drawback is that there is no clear release in favor of third parties in such a scheme mechanism. As the scheme has developed, a company may release of its creditors' claims under guarantees provided by third parties provided the guarantees are compromised under the scheme.

**Question 3.1.2 [maximum 2 marks]**

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

The Hong Kong government is considering implementing a statutory corporate rescue procedure by relaunching the Companies (Corporate Rescue) Bill in 2021. The number of corporate failures is expected to increase due to the impact of the COVID-19 pandemic, such so that in March 2020, the Hong Kong progressed the drafting of a new bill, which is currently in its final stages.

A significant feature of the proposed legislation is the introduction of a formal moratorium once the provisional supervision process commences. During the moratorium, no application for winding-up can be commenced or continued, receivers cannot be appointed and no proceedings or other process may be commenced or continued.

The idea behind the legislation is to give companies breathing space to sort out their affairs without having the impending threat of creditors instigating litigation proceedings.

**Question 3.2 [maximum 6 marks]**

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 has not adopted the Model Law (UNITRAL Model Law regarding cross-border insolvency) and nor does it have any other legislation which give Hong Kong courts power to recognise foreign proceedings and make orders to assist in liquidations. Common law applies in Hong Kong.

The Joint Liquidators of A Co v B & C where the Hong Kong Companies Court said that if they were issued with a formal letter of request to provide assistance from a foreign court, and in accordance with modified universalism, may recognise foreign insolvency proceedings and provide assistance at their discretion. There are three core requirements for a foreign liquidation to gain recognition in Hong Kong which are:

- the company has a sufficient connection to Hong Kong\*;
- there is a reasonable possibility that the winding-up order will be of some benefit to the petitioner; and
- the Hong Kong Courts will be able to exercise jurisdiction over one or more persons who have an interest in distribution of the assets.

**Commented [RD(DW-H21)]:** 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-H22)]:** 1 ½ marks out of 6. There are other elements that should also be dealt with. E.g. the legislation permitting winding up of foreign companies and the *Yung Kee* core requirements. The answer should also deal with, for example, a foreign liquidator's right to sue and obtain the company's own documents (without a recognition order); assistance to rehab proceedings by preventing enforcement; the fact principles extend to schemes. Protocols. Also see below

**Commented [RD(DW-H23)]:** This goes to jurisdiction to wind up a foreign company, not for recognition of a foreign appointment

\* Sufficient connection can be established by:

- a presence of substantial assets belonging to the company proposing a scheme with its creditors, such as Hong Kong subsidiaries, and Hong Kong bank accounts;
- the presence of a sufficient number of creditors in the jurisdiction subject to the personal jurisdiction of the court;
- whether the scheme seeks to discharge or adjust debts governed by Hong Kong law;
- registration in Hong Kong as non-Hong Kong company under the relevant part of the Companies Ordinance;
- the presence of directors resident in Hong Kong;
- dealings with shareholders in Hong Kong, such as the holding of annual general meetings in Hong Kong; and
- board meetings of the debtor are held in Hong Kong and all administrative matters relating to the debtor are discussed and decided in Hong Kong.

The above said, the Hong Kong Companies Court will not provide assistance unless the orders sought would be available to an insolvency representative under Hong Kong's local laws.

In the case of *African Minerals Ltd v Madison Pacific Trust Ltd* the English Court wrote such a letter and were declined on the basis that in the absence of an administration regime in Hong Kong, granting the requested orders would enable the administrators to exercise powers not available to a liquidator appointed to an insolvent company in Hong Kong.

The common law recognition, however, has resulted in positive outcomes for foreign officeholders and have granted the following authorities:

- the freezing and/or seizure of assets, books and accounts of a foreign company located in Hong Kong (*Centaur Litigation SPC 2016 HKEC 576*; *Rennie Produce (Aust) Pty Ltd 2016 HKEC 2012*);
- the oral examination of officers and other parties located in Hong Kong in relation to the affairs of the foreign company (*Centaur Litigation SPC 2016 HKEC 576*; *BJB Career Education Co Ltd 2017 1 HKLRD 113*); and
- the production of documents and information by creditors of the foreign company and other parties located in Hong Kong (*Pacific Andes Enterprises (BVI) Ltd 2017 HKEC 146*).

In conclusion, there are no specific regulatory or statutory guidelines as regards to cross border insolvency and there have been no announcements that indicate Hong Kong will be adopting UNCITRAL and the Model Law, however, common law enables the court to assist in some cases, where their discretion can still be applied.

#### **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?

Firstly, it is important to note that the realisations made by the receiver from the assets held under the floating charge cannot be made available to the liquidator for liquidation expenses.

**Commented [RD(DW-H24)]:** 1 ½ 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. Also, see note below

Following the realisation of the assets, the receiver can make a distribution to the company (or the liquidator) once the preferential creditor claims have been settled and there is a surplus.

A receiver's duty is to collect in the assets for the charge holder, and once the company enters into liquidation, the receiver must pay the borrower's preferential creditors out of the realisation.

As such, no assets or realisations should be handed over to the liquidator prior to the settlement of the preferential creditors.

**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.

In Hong Kong, secured creditors are not dealt with in the ordinary process of the liquidation, and neither are the assets that they are secured over. As such, the liquidator should do a reconciliation of value and consider the value of their claim over the receivables.

The amounts paid directly the HF should be netted off any amounts paid to BH by HF. The remaining amount will be the preferential creditor claim which is essentially untouchable by the liquidator.

As regards to TC, this would be considered an unfair preference (assuming they even have a claim against the company which is not clear), as unfair preferences apply to charges as well as money.

The liquidator may apply to the court to restore the position of the company to what it originally was prior to the company taking charge over the vehicles in their showroom.

**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.

**Commented [RD(DW-H25):** Only insofar as there are insufficient uncharged assets to do so (s.265(3B))

**Commented [RD(DW-H26):** ½ mark out of 4. Reference to possible unfair preference gets the ½ mark, but the rest misses the aim of the advice needed. The elements to consider are whether it is a sale or security and if security (most likely on the facts – sporadic, not matched to invoices etc.) whether it is valid (registration, timing if a floating charge (s.267 – reference to 'recent' etc.)). For TC, the point to consider is the anti-deprivation principle – the undervalue/unfair preference elements are things a liquidator considers but does not fit these facts

**Commented [RD(DW-H27):** 1 mark out of 7. Some ideas along the right lines but misses the point of the question, particularly bearing in mind the answer should be an advice. The answer should consider recognition; taking control of the subsidiary; possible ancillary winding up; taking action (without the need for recognition). See other comments below.

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.

Given that it is likely that the JPLs are likely to be able to exercise their powers in Hong Kong given its listing in Honk Kong and Hong Kong Subsidiary, the can undertake to fulfil their role by:

- taking control over the company including its assets and accounting records and investigate the causes of the company's failure and the conduct of those concerned in its dealings and affairs.

This particular role means that the liquidator has a duty to the general public to enable the authorities to take measures and potential legal action against negligent or acts done in ill faith. In joint and several liquidators of Kong Wah holdings v Grande Holdings Ltd whereby the liquidators revealed that substantial assets were missing in unusual or suspicious circumstances.

Under s221 CO, the court may summon before it officers of the company, persons known or suspected of having property of the company or being indebted to the company, or any person deemed capable of giving information concerning the company. Such a person may be examined on oath and/or required to produce books and papers relating to the company under this section. The request, however, may be denied if it is too onerous.

As such, the provisional liquidator can apply to the court for an examination by oath of Mr Pottinger, as he may be capable of giving information regarding the affairs of the company.

Further, a provisional liquidator has a duty to:

- investigate transactions or payments made by the company within a certain period prior to the date of winding up to determine whether these transactions should be avoided.

Upon investigation, the liquidator has uncovered that large sums of money were moved seemingly fraudulently, and unnecessarily for other purposes than for the business. It would appear that the Chairman was defrauding creditors, and mysteriously disappearing indicates that the Chairman knew what he was doing. The court may declare the Chairman, and Mr. Pottinger as a knowing party, as personally liable for the shortcomings of the Notes.

The section of fraudulent trading provides for both civil and criminal proceedings which include but are not limited to the disqualification of the directors, fines, and imprisonment.

"Accounting Irregularities" indicates that manipulation of the accounting records have taken place which alone, is grounds for disqualification of a director (*Idem S 282*).

In conclusion, the JPLs should apply to the Hong Kong court to interrogate Mr. Pottinger, and seek action against the Chairman and/or Mr. Pottinger for the misappropriation of company assets in an attempt to defraud creditors.

**Commented [RD(DW-H28):** Wrong section, wrong Ordinance. Should be s.286B of CWUMPO.

**Commented [RD(DW-H29):** Describes function of a liquidator more so

**TOTAL: 21.5 MARKS OUT OF 50**

**Formatted: Font: Bold**

**\* End of Assessment \***