



**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)]:** 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)]:** 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.

**Commented [RD(DW-H7)]:** Correct (1 mark). It should be remembered that the receiver also owes duties to the charge-holder (here, B), but acts as agent of the chargor

**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.

Upon presentation of the winding up petition, the court has discretion to stay certain proceedings against the company. Such discretionary stay may or may not affect the creditor. Upon entry of the winding up order by the court, mandatory stay comes in force, so the proceedings will be stayed.

The creditor will not be able to further pursue the litigation after the liquidation proceedings are commenced and will not be able to submit a claim for a recovery at this point.

##### 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.

A company in Hong Kong can go into either voluntary or compulsory liquidation. Voluntary liquidation can take a form of members voluntary liquidation ("MVL") or creditor voluntary liquidation ("CVL").

MVL is appropriate when the company is expected to be able to pay its debts within 12 months and petitions its own winding up. In this case the liquidator will pay off the creditors in full, with any surplus after liquidation costs available to shareholders.

CVL is appropriate when the company is unable to pay its creditors in full and petitions its own winding up. This procedure is more quick and less expensive than compulsory liquidation. It also provides the benefit of *ad valorem* tax not being payable on realizations of assets. In addition, Section 228A sets out the procedure for a speedy CVL with immediate effect of winding up. This process is typically appropriate when the company's assets are perishable and should therefore be realized quickly to maximize value.

Compulsory liquidation is an alternative to voluntary liquidation, typically initiated by a creditor if the company is unable to pay its debts. This process is more expensive and court-regulated

**Commented [RD(DW-H10)]:** Incorrect (0 marks). Although a foreign liquidator may need to get a recognition order to carry out certain tasks, commencing litigation in the name of the company is not one of them (see the *Irish Shipping* case)

**Commented [RD(DW-H11)]:** 1 ½ marks out of 3. Should also refer to mandatory stay after a provisional liquidator appointed; and to the restrictions on retaining enforcement proceeds (s.183)

**Commented [RD(DW-H12)]:** 3 ½ marks out of 4. When referring to s228A, should make clear that can only be used if no other mechanism is practicable.

than voluntary options. Companies are also able to petition its own compulsory liquidation, but it is less common.

**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?

During the time between the creditor petition is presented and the court hearing, it is possible to appoint a “provisional liquidator” pursuant to section 193 of CWUMPO, for them to help preserving the assets and developing a restructuring plan proposal.

However, such appointment is subject to being justified by circumstances requiring such appointment, such as the risk of assets being dissipated, commercial considerations and urgency, among others. The powers of such provisional liquidator are also limited by the court and appointment may be terminated. For example, the provisional liquidator can only sell assets with approval from the court.

The application for appointment of a provisional liquidator can be made any time after the petition (including same day), but one should not request appointment of a private provisional liquidator with the purpose of avoiding the appointment of Official Receiver instead.

**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.

Hong Kong does not have a formal statutory system for corporate rescue. Instead, corporate restructurings in a form of schemes of arrangement are possible under the provisions under the common law. The statutory mechanism for the Hong Kong Schemes of Arrangement (the “Schemes”) is laid out in Part 13, Division 2 of the Companies Ordinance, the court procedures are governed by O.102 r 2 & 5 of the Rules of the High Court, and court decisions rely on precedent guidance, primarily from English law cases.

The purpose of the Scheme in Hong Kong is to adjust or reduce its liabilities through a negotiation with creditors, with only majority consent of each creditor class required for the court to approve the Scheme and make it binding for all creditors. The general principles and procedures for corporate rescue Schemes in Hong Kong are the following:

- The debtor makes an application to the court to convene creditor meetings
- The debtor puts forward the Scheme in creditor meetings; the number of meetings depend on the number of creditor classes, based on the common economic interest of various creditor groups
- Creditors vote on the proposed Scheme, with 50% by number and 75% by value of claims approval required in each class for the scheme to be accepted
- The debtor may offer consent payments to creditors to seek their support, so long as those offered fairly to all creditors

**Commented [RD(DW-H13)]:** 2 ½ marks out of 3. Only point missing is that a PL cannot be appointed for restructuring purposes only.

**Commented [RD(DW-H14)]:** 5 ½ marks out of 7. A good answer (albeit with one misunderstanding as below). Could also mention informal workouts, and limitations on schemes from the Gibbs principle

**Commented [RD(DW-H15)]:** Schemes are not a product of common law but of statute

- The debtor provides the results of the vote with a petition to sanction the Scheme
- The court decides if it can petition the Scheme, based on satisfaction of creditor approval conditions, as well as appropriateness of procedures, notices, etc.
- The fairness of the Scheme is also evaluated with respect to alternative outcome for the creditors in case of a liquidation, and cannot be less favourable than that
- If the Scheme is sanctioned, it is effective against every creditor subject to Hong Kong law, as well as creditors participating in the Scheme. Third party releases are also available

Under common law, the scheme of arrangement does not offer the debtor the benefit of stay. However, debtors may be able to achieve a temporary moratorium on creditor action by petitioning winding-up procedures and appointing a provisional liquidator, pursuant to section 193 of CWUMPO. Such approach has been common in recent years, although in a recent case *Re Legend International Resorts Limited*, the Court of Appeals ruled against the appointment of a provisional liquidator with an ultimate purpose of corporate rescue. Recent discussions around Hong Kong insolvency law reforms have mentioned the explicit inclusion of the possibility of corporate rescue under a provisional liquidator, given the benefit of stay for negotiation of a Scheme and preservation of the business.

Generally, the flexibility of common law and the ability of companies and courts to use its provisions to effectuate corporate rescue is advantageous for the system. Thus, despite the lack of comprehensive legislation and the difficulties in negotiating one, Hong Kong's legal system allows for corporate restructurings and reduction/amendment of liabilities. Certain creditors may also see the system as advantageous, as it protects their rights. In terms of disadvantages, many advanced economies have recognized the benefit of a comprehensive statutory corporate rescue system, focused on preservation of economic activities and employment, and not subject to uncertainty from specific court decisions, like the *Legend* case ruling with respect to stay. In addition, the Hong Kong system does not include the concept of cram down of dissenting creditor classes, that exists in some other jurisdictions, which potentially makes corporate rescue more lengthy and costly than it may be necessary.

**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 insolvency system is generally creditor-friendly, with no formal system, for corporate rescue, which differs from other legal systems in advanced economies, such as the U.S. with its chapter 11. Therefore, attempts to introduce such legislation have been made in the past, including the introduction of the Corporate Rescue Bill (the "Bill") into the Legco back in 2001. Although the discussions around the Bill have ceased in 2004, comments about it have been made, and the need for a corporate rescue system, allowing for regulated reorganization of the companies have been discussed again in recent years. In 2020, with the onset of the COVID-19 pandemic, such discussions gained further relevance, given a rising number of insolvencies and the socio-economic benefits of reorganization over liquidation. Some amendments, such as one of section 193 to explicitly allow restructuring powers for provisional liquidators can be desirable fixes that can have immediate impact.

**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.

**Commented [RD(DW-H16):** supervisor

**Commented [RD(DW-H17):** 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-H18):** 5 marks out of 6. Full marks if mention right to bring an action or get own documents without recognition; protocols. Also there is one misunderstanding, noted below



Since Hong Kong has not adopted the UNCITRAL Model Law and local insolvency law has limited provisions dealing with cross-border restructurings, common law is the main source of guidance for cross-border cases involving Hong Kong.

First, in many precedents, Hong Kong court has given recognition of a foreign liquidator. The principles and the procedure for such recognition is primarily based on judgements from common law, including from *A Co v B* (2014) and *Singularis Holdings v PricewaterhouseCoopers* (2014) in England. The key requirement is the existence of the power requested by the foreign representative in both the jurisdiction of principal liquidation and assisting jurisdiction. Thus, certain schemes of arrangement not applicable in Hong Kong cannot be permitted. Another development based on precedent law is the requirement for a "letter of request" from the foreign court, not otherwise required in common law. While most precedents also required the foreign jurisdiction to be using English common law, similar recognition orders have been entered with respect to PRC proceedings, subject to reciprocity. This approach is consistent with the principle of modified universalism adopted by Hong Kong.

Second, once recognition is obtained, Hong Kong courts typically support cooperation with foreign representatives in foreign proceedings. Examples of cooperation include the ability to seek documents and examine witnesses in Hong Kong, dealing with Hong Kong assets. Such powers, however, are limited to the extent they are available in the foreign jurisdiction too. In addition, the court can also cooperate with a foreign proceeding through staying Hong Kong garnishee orders or assisting rehabilitation procedures.

Third, common law principles are applied in recognition of foreign judgements that cannot be recognized by statute.

Finally, based on common law, Hong Kong also allows for the use of Hong Kong scheme of arrangement by foreign proceedings, subject to jurisdiction (substantial connection to Hong Kong) and such scheme being recognized by foreign jurisdictions.

One element of cross-border insolvency covered by Hong Kong legislation is the winding up of non-Hong Kong companies, governed by section X of CWUMPO. Conceptually, it is sufficient to prove the company's substantial connection to Hong Kong for a winding up order to be entered. Two additional requirements are for that order to be beneficial to the party applying for it and the Hong Kong court having jurisdiction over the parties interested in distribution of the assets. The requirements apply for both Hong Kong only proceedings and ancillary proceedings opened in Hong Kong.

Hong Kong's approach to cross-border insolvency has its own benefits and limitations. On the one hand, it is consistent with the principles of modified universalism, cooperation and comity, applied by many other cross-border regimes, including the UNCITRAL model law. On the other hand, reliance on common law and precedent case guidance may lead to uncertainty arising from potentially conflicting pieces of guidance or courts taking a new approach to an issue in a new case. The existence of specific legislation for issues like winding up a non-Hong Kong registered company or the use of Hong Kong scheme of arrangement by non-Hong Kong companies.

#### **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

**Commented [RD(DW-H19):** This mixes 2 concepts: the *Singularis* principle would not usually be looked at re schemes

**Commented [RD(DW-H20):** 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.

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 appointment of the liquidator does not have the impact on the receiver's right to hold and realise the assets that are subject to the charge. These assets and realisations from the assets subject to the charge are not available for the payment of the costs of liquidation or distributions to creditors, so cannot be returned for that purpose.

However, realisations from these assets are required to fund recoveries for preferential creditors to the extent there is a shortfall in uncharged assets to satisfy these claims. Therefore, the liquidator may only require the return of the assets and realisations from the receiver to the extent such shortfall exists.

**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.

Generally, asset realizations on behalf of secured creditors should be performed by receivers appointed in relation to the specific charges and not by the liquidator. However, given the liquidator's interest in evaluating the assets available to preferred and unsecured creditors, they should evaluate HF's and TC's claims and securities.

The liquidator should distinguish between various types of securities granted by BH to HF and TC and their treatment in liquidation. While companies are allowed to draft any form of security under Hong King law, bespoke agreements may be difficult to enforce in case of a liquidation, which seems to be an issue in this case.

First, "receivables purchase agreement" appears most similar to an assignment of receivables mechanism. It also appears that BH has notified its customers of its existence, since certain invoices were paid directly to HF. The liquidator should investigate if the agreement was a sale of the right to receivables or a secured loan assignment. In case of the latter, such agreement would require registration. If registration does not exist, the agreement can be void.

Second, the assertion of HF receiving a fixed charge over receivables as an "alternative" resembles the situation where a floating charge crystallizes upon insolvency. If the bespoke agreement drafted by the creditor outlines the concept and considers insolvency a triggering event, the creditor may be able to prove their fixed charge claim on the asset. The court will

**Commented [RD(DW-H21)]:** 3 marks out of 4. This correctly identifies that the transactions should be looked at on their terms and in the context of their creation to determine whether hold up as against the liquidator, and addresses whether the HF arrangement a 'real' sale or in fact security? Likely the latter on the facts. Therefore, is it valid against a liquidator (registered? Within 12 months – s.267 etc (touched upon in the answer but not directly). For TC, the clue is the "if BH goes into liquidation" trigger, hence the anti-deprivation principle should be considered and dealt with. The final paragraph is good: not many people mentioned this point.

likely consider the overall effect of the arrangement, despite it not being structured as a typical floating charge. However, registration of the charge may be required.

Third, TC claims to have an agreement that grants them a security over the cars. The assets appear to be in possession of BH, so may be difficult for TC to foreclose on, unless the agreement is structured as a mortgage or a fixed charge.

The challenge with the case is the fact that all securities have been established pursuant to bespoke agreements that may be deemed invalid in liquidation if the security is not properly registered. In case the securities were registered and are not void, the creditors should appoint respective receivers to foreclose and realize assets subject to security. The liquidator should not deal in these assets, unless there is a shortfall in assets available for payment to preferred creditors. Otherwise, the liquidator is not responsible for assisting a recovery for secured claims.

Finally, to an extent the claims are under-secured, the creditors would then have to submit proofs of the unsecured portion of their claims to the liquidator. Given the issue with inconsistent invoices and payments to and from HF, this may present additional issues to the creditors and the liquidator reconciling the claims.

#### 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.

While Hong Kong has limited legal statutes applicable to a cross-border insolvency, the JPLs may be able to receive powers for examination of Hong Kong based witnesses, to an extent such powers are available in the jurisdiction when litigation takes place. Since Cayman law only allows for limited examination powers, they may instead open an ancillary proceeding in Hong Kong, to extend these powers to those available under Hong Kong law.

To pursue the first path, the JPLs will need to have the Cayman proceeding get recognized in Hong Kong. To do that they should provide a letter of request from the Cayman court, requesting a Hong Kong recognition order. The court would likely grant that, on the basis of common law principles and Hong Kong courts following the principles of comity, cooperating with foreign courts. As discussed, the JPLs will be able to pursue examination of the witness, but only to the extent that is allowed under both legal systems, which would be restrictive under Cayman law.

If the JPLs would like to extend their examination powers to those available in Hong Kong, they may open an ancillary litigation in Hong Kong pursuant to Part X CWUMPO. To get a

**Commented [RD(DW-H22)]:** 5 ½ marks out of 7. For more complete marks, you could have added, e.g., the ability to sue or get the company's own documents without recognition order; consideration of whether any progress can be made by taking control of (or winding up) the Hong Kong subsidiary. Actions against recipients?

**Commented [RD(DW-H23)]:** ?

winding up order in Hong Kong, it has to be first established that the company is unable to pay its debts and that it is equitable that it should be wound up. Second, they would need to establish a substantial connection to Hong Kong, that the winding up order would benefit the petitioner, and that the Hong Kong court has jurisdiction over recipients of the distribution. Since Cyberbay has defaulted on certain notes, it can be established that it is unable to pay its debts. The existence of Hong Kong registration, office and local employees proves a substantial connection to Hong Kong. It is not entirely clear from the question where the company's creditors are based, but the existence of local employees may qualify it, assuming they would be entitled to a recovery from the liquidation. It may also be questioned if the Hong Kong court agrees that the proceeding is beneficial to the JPLs themselves or if they would need a creditor to support the petition.

Finally, while a Hong Kong scheme of arrangement is another process available to non-Hong Kong registered companies, it is likely not the appropriate tool in the case where examination is the main purpose for a Hong Kong proceeding, since the powers of a provisional liquidator would be limited by the court and the court may not open proceedings where neither winding up nor a reorganization of Hong Kong debts is the main reason.

Generally, a recognition order would be the simplest process for the JPLs, but it may limit the success of the examination. The ancillary proceeding in Hong Kong would likely be more productive but also more costly and complicated, especially given the fact that the main proceeding is aimed at reorganization and not a liquidation. Therefore, the JPLs should consider the cost/benefit of pursuing this path with the main purpose being the examination of Mr Pottinger, rather than a recovery for the creditors.

**TOTAL: 38.5 MARKS OUT OF 50**

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