



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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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)]: 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)]: 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

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.

[Type your answer here]

ANSWER: -

The section 177 of Companies (winding up and Miscellaneous Provisions) Ordinance (cap32) CWUMPO in short provides the circumstances in which a company may be wound up by the court compulsorily by the Court. It can be done by the order of the High Court. The liquidation proceedings under the above circumstances may result in grant of discretionary stay after presentation of the petition but before an order is made, and a compulsory stay after the winding up order is made. It has been held by the court in case of *Cheung Ying Lun V Legal Way Ltd* [2013] HKCU 2651 the court's power includes power to allow an application for stay of proceedings against the company.

If a creditor is pursuing the company by way of a civil action in any court or tribunal other than the Court of First instance or the Court of Appeal, the Company or any creditor or contributory at the time after presentation of a winding up petition and before a winding up order has been made, may apply to the Court of First instance under section 181(b) of CWUMPO for an order of stay or restraint which the Court may allow on such terms as it thinks fit. If the civil action is being pursued in the Court of First Instance or the Court of Appeal the application can be made to such respective Court for stay of the pending proceeding under section 181(a) of CWUMPO.

Section 186 of CWUMPO provides for mandatory stay of the existing proceedings and commencement of any fresh proceeding, when a winding up order has been made, or a provisional liquidator has been appointed. The existing proceeding can be continued or a fresh proceeding can be commenced only with the leave of the court subject to such terms as the court may impose. Accordingly, the creditor pursuing the company by way of a civil action can do so only after obtaining leave of the Court making the winding up order.

As per the provisions of section 187 of CWUMPO, an order of winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if made on

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

Commented [RD(DW-H11): 2 ½ marks out of 3. Should mention s.183 restrictions on attachments directly, but the contextual reference to s.187 at end gets ½ for this.

joint petition of a creditor and a contributory. Consequently, the creditor pursuing the company by way of civil action will be prevented from obtaining an order favouring his own interest only.

Question 2.2 [maximum 4 marks]

Commented [RD(DW-H12)]: 4 marks out of 4.

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.

[Type your answer here]

ANSWER: -

A company can go into liquidation in Hong Kong broadly by two methods i.e, voluntary and compulsory liquidation. There are two types of voluntary liquidation: (i) members' voluntary liquidation (MVL) and (ii) creditors' voluntary liquidation (CVL). In addition to creditors' voluntary liquidation, there are provisions for CVL in case of urgency.

Members' Voluntary Liquidation (MVL):

The circumstances in which the MVL would be implemented are as follows. Section 228(1)(a) of CWUMPO provides that a company may be wound up voluntarily when (i) the period fixed for the duration of the company in the articles expires, (ii) any event, which articles provide, occurs requiring the company to be dissolved and (iii) a resolution requiring the company to be wound up voluntarily is passed in a general meeting of the members of the company. Section 228(1)(b) provides that a company would be voluntarily wound up if the company resolves by special resolution that the company be wound up voluntarily. If the company is wound up pursuant to its Articles, only an ordinary resolution is passed. If the majority of the directors in a meeting issue a certificate of solvency declaring that the company would be able to pay its debt within a period not exceeding 12 months from the commencement of winding up, followed by passing of a special resolution for winding up and appointing a liquidator by the company and delivery to the Registrar for registration under sub- section (1) and (2) of section 233, the winding up is referred as a members voluntary winding up [Section 233(4)]. The MVL commences on the date of resolution for winding up is passed. The MVL gets converted to CVL when liquidator is of the opinion the company will not be able pay its debt in full within the period stated in the certificate of solvency and summons a meeting of the creditors under section 237B of CWUMPO.

Creditor's Voluntary Liquidation (CVL):

A winding up in case of which a certificate of solvency has not been issued and delivered to the Registrar is referred to as a creditors' winding up [Sec.233(4)] or Creditors' Voluntary Liquidation (CVL). The directors will convene a meeting of the shareholders at the request of shareholders or of their own volition for passing a special resolution for winding of the company and appointing a liquidator. As per section 230 of the CWUMPO, the CVL commences on the date of passing of the resolution by the shareholders. The appointment of the liquidator is required to be confirmed or a fresh nomination of liquidator made in the meeting of the creditors which is to be convened not later than 14 days after the meeting of the shareholders in accordance with section 241(a) of CWUPMO. The directors are duty bound to protect the assets of the company pending meeting of the creditors. The CVL is preferred to compulsory liquidation by courts for saving cost and time.

CVL in Urgency:

The Creditors' Voluntary Liquidation in case of urgency under section 228A of CWUMPO is implemented in the circumstances in which the directors are of the opinion that the company

should be wound up with immediate effect. Under section 228A (1) (a) of CWUMPO, the directors of a company (majority directors having more than 2 directors) may resolve to wind up a company, and deliver to the Registrar a statement certifying that a resolution has been passed to the effect that: (i) that the Company cannot by reason of its liabilities continue its business; (ii) It is necessary as per their consideration that the company be wound up and that the winding up should be commenced under this section because it is not reasonably practicable for the winding up to be commenced under another section; (iii) meetings of the company and of its creditors will be summoned for a date not later than 28 days after the delivery of a winding -up statement to the Registrar. The directors also resolve to appoint a person as the provisional liquidator (with his/her consent) in winding up of the company with effect from the commencement of winding up [Section 228A (1) (c)]. The winding up of the company shall commence at time of delivery of the winding-up statement to the Registrar as per Section 228a (5) (a) of CWUMPO. A winding -up statement shall have no effect unless delivered to the Registrar for registration within 7 days after the date on which it is made [Section 228A (3)]. The directors face stiff penalty when they choose to proceed under section 228A without any urgency or special reason.

Compulsory Liquidation:

Section 177 of CWUMPO provides the circumstances in which Compulsory Liquidation of a company is ordered by the court. In Hong Kong it is ordered by the High Court. Under sub-section (1) of section 177 a company may be wound up by the court if –

- (a) the company has by special resolution resolved that the company be wound by the court;
- (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (c) the company has no members;
- (d) the company is unable to pay its debts;
- (e) the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved;
- (f) the court is of the opinion that it is just and equitable that the company should be wound up.

The most common circumstances in which accompany is wound up by the court is when a petition is presented to the court by a creditor on the ground that the company is unable to pay its debts. The court has the jurisdiction to wind up a company on the petition of a shareholder of the company on the ground that it is just and equitable to do so.

Sub- section (2) of Section 177 provides the circumstances under which the court may order winding up of a company on application of the Registrar. For example, if it appears to the court that the company is being carried on for unlawful purpose or for any lawful purpose which cannot be carried out by the company.

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?

[Type your answer here]

ANSWER: -

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

Hong Kong law permits appointment of an officeholder during the interim period of presentation of a petition by a creditor for compulsory winding up of accompany and hearing of the petition by the Court. The relevant provisions law applicable are section 193 of CWUMPO and Rule 28 of Cap. 32H Companies (Winding -up) Rules (CWUR).

Section 193(1) provides that subject to sub-section (2) to sub- section (7) of Section 193, a court may appoint a liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding-up order in respect of the company. Rule 28(1) of CWUR requires that upon application by creditor in the present case accompanied by proof by affidavit of sufficient grounds for appointment of a provisional liquidator, the court may make the appointment on such terms as in the opinion of the court shall be just and necessary. Rule 28(2) of CWUR provides that the order appointing the provisional liquidator shall state the nature and short description of property of which the provisional liquidator is ordered to take possession, and the duties to be performed by the provisional liquidator.

The provisions applicable Rules to the manner appointment as above are indicative of the circumstances under which the appointment of provisional liquidator is made. The Court must be satisfied that there are sufficient circumstances justifying the appointment of the provisional liquidator. For example, if there is a risk that assets will be dissipated, or otherwise be in jeopardy, before the winding-up order is made, the court may order appointment of a provisional Liquidator. Other factors taken into account include commercial realities, the degree of urgency, the need for the order and the balance of convenience. Thus, the provisional liquidator is entrusted with the responsibility of preserving the value of the assets. On specific application being made, the court may permit the liquidator to realise or sell the assets to preserve their value.

A provisional liquidator can be appointed to help facilitate a restructuring proposal, though cannot be the sole reason for his appointment as has been held in case of *Re Legend International Resorts Ltd* [2006] 3 HKC 565 at 577.

An application is permissible to be made any time after the petition has been presented, although in urgent cases the application may be made at the same time as the petition. It has been held in case of *Re Kong Wah Holdings Ltd & Anor* [2001] HKCU 423 that it is wrong to apply for a private provisional liquidator under section 193 immediately prior to the winding up to avoid having the Official receiver as provisional liquidator upon the winding up order being made. This is an instance of policy reason for not permitting appointment of provisional liquidators.

On passing of a winding-up order a provisional liquidator is also appointed with a different role pending holding of creditors' meeting. Further the court has jurisdiction to appoint provisional liquidator despite the appointment of voluntary liquidator.

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.

[Type your answer here]

ANSWER: -

There is no Hong Kong law as it applies to corporate rescue except to the extent the schemes of arrangement can be considered as a corporate rescue tool. But informal work-outs were not uncommon in Hong Kong. Following the Asian financial crises in 1997/1998, the steering committee of banks was established to formulate restructuring plan consisting of debt re-scheduling and sometimes, debt-to-equity swap arrangements. The practice broadly followed the so called "London Approach". A "formal but non-statutory" guidelines (Hong Kong Approach to Corporate difficulties) jointly issued by the Hong Kong Monetary Authority (HKMA) and Hong Kong Association of Banks (HKAB) promoted the principle that bank creditors should give support to borrowers in difficulty, and not hastily withdraw facilities, issue writs or appoint receivers, but instead provide additional capital and/or re-schedule existing debts.

Growth of alternative finance providers such as private equity and hedge funds and alternative methods of raising capital by issue of debt securities combined with the growth of trading in distressed debt (particularly by funds with substantial amounts of capital to invest) changed the landscape and the position became more complex. The guidelines could not succeed as it could not bind the other non-bank financial creditors such as bond holders. Absence of legislation permitting bank creditors to obtain priority by providing working capital during restructuring also contributed to its lack of success.

Notwithstanding the lack of corporate legislation, the flexibility of the common law, combined with the creativity of Hong Kong practitioners and the support of the Hong Kong courts to assist if practical solutions has resulted in use of scheme of arrangement mechanism which has been used to effect restructuring to achieve similar aims. Lack of any moratorium in the scheme of arrangement mechanism was a weakness which was addressed by developing a practice of appointing a provisional Liquidator under section 193 of CWUMPO with specific powers to investigate the possibility of restructuring of Company's debts. The moratorium was then obtained as per the provisions of section 182 of CWUMPO. The use of court's discretion to allow winding up order is vital to this method of corporate restructuring. It is also important to consider whether the appointment of provisional liquidator would "scare off" stakeholders (including potential "white Knight" investors) from taking part in the restructuring.

This method was held to be legitimate power to appoint a provisional liquidator was affirmed by the Court of Appeals in case of *Re Leun Cheong Tai International Holdings Ltd* [2003]2 HKLRD 719. But in case of *Re Legend International Resorts Limited* reported in [2006] 2 HKLRD 192, the Court of Appeal refused to appoint a provisional liquidator only for the purpose of carrying out a restructuring on the basis that it was not within the jurisdiction of the court to do so. As the court never said that it was illegitimate to give provisional liquidator the power to explore and promulgate restructuring if the applicant has established that there was a jeopardy of assets, then there was no reason why the power of provisional liquidator so appointed could not include a power to restructure. This was confirmed by the Court, facing an application to discharge the liquidator (the assets in jeopardy, which had permitted their appointment, having then being secured) in case of *China Solar Energy Holdings Ltd* [2018] HKCFI 555 in which the provisional liquidator was allowed to continue for completing restructuring. The above discussed formal innovative practice accepted by stakeholders continues to exist.

Commented [RD(DW-H14)]: 6 ½ marks out of 7. An excellent answer. See comments below

Commented [RD(DW-H15)]: Should be s. 186

The current applicable statutory regime for scheme of arrangement in Hong Kong is contained in Part 13, Division 2 of the Companies Ordinance (section 668 to 677) which was promulgated in 2012. The court procedure relating to the applications necessary for a scheme of arrangement is governed by O.102 r 2 and r 5 of the Rules of High Court (RHC). No comparable legislation to the Chapter 11 procedure of US, administrative procedure of UK and the voluntary administration procedure of Australia is available in Hong Kong.

The scheme of arrangements acts as a court sanctioned compromise or arrangement which binds members and /or all creditors (or any class of them) including those who voted against it. The procedures or stages which are required to take place in order for a scheme of arrangements to become effective, are as under:

- (a) an application accompanied by an affirmation, draft explanatory statement, draft scheme document, a copy of the notices of the scheme meetings, a copy of the proxy forms, and draft advertisement to be published is made to the court for leave to convene meetings of the relevant creditors to consider, and if thought fit, approve the schemes;
- (b) the scheme meeting takes place and the results of such meeting or meetings are reported to the court;
- (c) an application is made by petition for the court to sanction the scheme.

The above stated three- stage are confirmed in the decision of Court of Final Appeals (CFA) in case of UDL Argos Engineering & Heavy Industries Co Ltd V Li Oi in reported in (2001) 4 HKCFAR, 358.

At the Convening hearing the court considers the jurisdiction (where the debtor is not registered in Hong Kong) and the appropriateness of the explanatory statement, scheme document and notices. The issues that are considered at the Sanction hearing summarised in Re Wheelock Properties Ltd [2010] 4 HKLRD and repeated in Mongolian Mining Corp [2018] HKCFI 2035 are: (a) whether the scheme is for a permissible purpose; (b) whether members who are called on to vote as a single class have sufficiently similar rights that they can consult together with a view to their common interest at a single meeting; (c) whether the meeting was duly convened in accordance with court's directions; (d) whether the members are given sufficient information about a scheme so as to enable them to make an informed decision whether or not to support it; (e) whether a majority in number representing 75% in value of the members [or creditors] present and voting agree to the arrangement; and (f) the discretionary element of the sanctioning process and in particular whether the court is satisfied that a scheme is one that an intelligent an honest man acting in respect of his interests as a member of the class within which he votes, might reasonably approve.

Advantages of the Current System:

- (1) Since the Scheme allows the company to continue as a going concern, a potentially higher recovery rate is available to the Creditors. In comparison, liquidation proceedings, often, result in diminution in asset value of the company and provide limited return to the creditors.
- (2) As compared to liquidation, Hong Kong statutory scheme of arrangements is less time consuming and hence, more cost effective.
- (3) The adjudication process under the Scheme of arrangements and the binding effect of the approval by the majority of the creditors on the minority dissenting creditors also helps the scheme in saving time and cost which would otherwise be incurred in a winding- up process in relation to the determination and settlement of the claims of the creditors.
- (4) Finally, the scheme arrangement enables companies and their creditors to compromise or adjust debts if stipulated majority of relevant creditors vote in favour

of such compromise or arrangement and the court sanctions such arrangement. Without a scheme of arrangements, a company would need to obtain the approval of 100% of the relevant creditors to contractually vary the debt.

Disadvantages of the Current System:

- (i) One major disadvantage of the Scheme of arrangement is the lack the statutory provisions to impose a moratorium on creditor's action.
- (ii) Creditors will not be entitled to make claims in relation to any claims made after the cut-off date.
- (iii) Upon the scheme becoming effective, creditors discharge all of its claims against the company and lose the benefits of such claims against the company's assets.
- (iv) Creditors will lose the right to commence proceedings and to appeal to the courts after their claims have been determined by the adjudicator. Although this might be seen as a disadvantage, the company considers that this will result in time and cost saving which will benefit all creditors.
- (v) On application of the common law principles, a scheme of arrangement seeking to compromise and vary a debt will only have real and substantive effect if the debt is discharged under the law governing the debt. A scheme will also be effective as any creditor participating and voting on the scheme. It means debt governed by the law of a foreign country; the creditor having not participated in the Scheme will not be discharged by the sanction of the scheme by the HONG Kong court.

Commented [RD(DW-H16): Not really disadvantages of the Hong Kong system – these are essentially by-products of any restructuring mechanism – what such a mechanism seeks to achieve so the company can continue

Question 3.1.2 [maximum 2 marks]

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

[Type your answer here]

ANSWER: -

Unlike many other common law jurisdictions, Hong Kong still lacks a statutory corporate rescue regime, despite a proposal for one having been made by the Law Reforms Commission in 1996 and a proposed bill subsequently being introduced in the Legislative Council (Legco) in 2001. After a number of rounds of discussion, the Bill formally lapsed from Legco's schedule in 2004. The 2001 Bill was dusted off and the Financial Services and the Treasury Bureau (FSTB) launched a public consultation with a view to introducing a new corporate rescue bill into the Legislative Council in late 2010 or early 2011 but it did not happen. Despite various comments about revival and reintroduction of the Bill in Legco, it did not happen till the end of the legislative year 2018/2019.

Further consultation was sought during 2020 and on 2 November 2020, the Government tabled the Companies (Corporate Rescue) Bill to formally implement a statutory corporate rescue procedure (CRP) and insolvent trading provisions in Hong Kong. The bill is expected to be presented to the Legco in the first quarter of 2021, together with subsidiary legislations concerning the operational and logistical matters associated with the CRP (e.g., holding of creditors meetings, organisation of committee of creditors etc.).

The broad thesis of the Bill is that the CRP would be creditor focused. The CRP is commenced upon appointment of a Provisional Supervisor (PS) by the company itself by a resolution of its

Commented [RD(DW-H17): 1 mark out of 2. The answer should refer to and examine briefly the reasons for failure of the Corporate Rescue Bill – how a possible reform failed can be a good indicator as to the direction a jurisdiction is likely to take. It also appears some of this was copied and pasted from an article on the Internet (on website of Hong Kong firm, Gall)

members and directors or the liquidator or provisional liquidator, if the company has entered into winding-up or subject to a winding -up application. The company's major secured creditors (MSC) are required to be given notice in writing of the company's intention to appoint PS. The MSC will be given 5 business days to object to the Provisional Supervision in writing, failing which the process will be initiated by the company.

The provisional supervision period will initially last 45 business days which can be extended up to 6 months with consent of creditor and more than 6 months with the approval of the court. During the Provisional Supervision, the company is also placed into a moratorium. The PS displaces the directors and vested with an array of powers for the management of the of the company.

At the end of the Provisional Supervision, the PS is required to recommend for the creditor's consideration whether (1) the company should enter into a Voluntary Arrangement (VA), (2) it should be wound up, or (3) the Provisional Supervision should end. The terms of the CRP are subject to change by the Legco.

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.

[Type your answer here]

ANSWER: -

"Although Hong Kong has little specific legislation dealing with cross-border insolvency, the Hong Kong courts have supported foreign insolvencies through the common law" appropriately presents the manner in which the cross-border insolvency cases are dealt with in Hong Kong. The clause "Although Hong Kong Has little specific legislation dealing with cross-border insolvency" refers to the winding up of foreign incorporated unregistered companies.

Legislation dealing with cross-border insolvencies:

The applicable law providing for winding up of foreign incorporated unregistered companies are available in the section 326 to 331A of Part X of CWUMPO which is titled "winding up of unregistered companies. Section 326(2) clarifies that "unregistered company" in sub-section (1) of Section 326 includes a "registered non- Hong Kong Company" which is defined in section 2 of CWUMPO "means non-Hong Kong company that is registered in the Companies Register as a registered non- Hong Kong company". "Non- Hong Kong Company" is also defined under section 2 to mean a company incorporated outside Hong Kong that establishes a place of business on or after the commencement date of Part 16 of the Companies Ordinance (Cap. 622) or has established a place of business before that commencement date and continues to have a place of business after that commencement date.

The circumstances in which an unregistered company may be wound up are provided under sub-section (3) of section 327 of CWUMPO which are as under:

- (a) If the company is dissolved, or has ceased to carry on business only for the purpose of winding up its affairs;
- (b) If the company is unable to pay its debts;
- (c) If the court is of the opinion that it is just and equitable that the company should be wound up.

Commented [RD(DW-H18): 5 marks out of 6. A good answer but some seems to be copied and pasted from the guidance text. Also, see note below

The petitioner who intends to get an unregistered company wound up, must satisfy the court that the company in question is sufficiently connected to Hong Kong by satisfying “three core requirements” the set out in CFA’s decision in case of Kam Leung Sui Kwan V Kam Kwan Lai and others (2015) 18 HKCFAR 501. The three requirements are;

- (a) there must be sufficient connection with Hong Kong,(not necessarily meaning the presence of assets with the in the jurisdiction);
- (b) there must be a reasonable possibility that the winding up order would benefit those applying for it; and
- (c) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets.

It has also been held in an unreported case that if sufficient connection is established via the three core requirements, the jurisdiction to wind up will remain even after the matters giving rise to that original connection have ceased to exist.

The jurisdiction to wind up of an unregistered non-Hong Kong Company can apply to “free standing” Hong Kong liquidation or Hong Kong can be used to commence an ancillary liquidation in Hong Kong where there is a principal liquidation most likely in the place of incorporation or rarely in the jurisdiction with which the company has sufficient connection. On application of “modified universalism”, the liquidation in Hong Kong is generally treated as ancillary in the sense that the functions of the liquidator would be to collect assets located in Hong Kong, to settle a list of Hong Kong creditors and to transmit the assets to the principal liquidator to enable a dividend to be declared and paid. However, in appropriate cases the court will not limit the powers of the Hong Kong “ancillary” liquidator to dealing with only Hong Kong assets. The courts have granted an ancillary winding up order after being satisfied that the “three core requirements” have been met.

Support to foreign insolvencies through the common law:

Hong Kong has neither adopted UNCITRAL Model Law nor is a party to any international treaties or bilateral agreements dealing with cross-border insolvencies. It has always followed common law principles to recognise and assist foreign insolvency procedures and continued to do so after Handover.

A foreign liquidator’ right to bring an action in Hong Kong in the name of the company even without obtaining a formal order recognising the foreign liquidator, has long been recognised. Hong Kong has assisted foreign rehabilitation proceedings by refusing to allow enforcement of judgement against Hong Kong assets of such company. In this regard the court followed 2-stage approach by which it dealt with the issues of liability and enforcement separately. If liability is established and if the court considers, through comity, that it should assist the foreign rehabilitation proceedings, the court will refuse enforcement against assets situated in Hong Kong.

In order to obtain a recognition order, a foreign representative must present a “letter of request” issued by the foreign court to the Hong Kong court requesting assistance. In A Co v B (a 2014 decision) it was held by the Hong Kong Court that “The companies court may pursuant to a letter of request from a common law jurisdiction with similar insolvency law make an order of the type which is available to a provisional liquidator or liquidator under Hong Kong’s insolvency law”. Accordingly, the Hong Kong Court allowed an application filed by the liquidator appointed in Cayman Islands who sought, *inter alia*, a Hong Kong order to recognise their appointment and an order for the production of documents from certain (unnamed) respondent by reason of the confidentiality of the nature of the application. Shortly after the A Co v B decision, the Privy Council in Singularis Holdings v PricewaterhouseCoopers clarified that the common law power of assistance exists where the power sought to be exercised: (a) exists in the jurisdiction of principal liquidation; and (b) the power exists in the assisting jurisdiction (the Singularis Principle).

On careful consideration of the underlying principles, Hong Kong court refused an application by administrators appointed in England seeking an order to recognise their appointment and extend the moratorium imposed in England in order to prevent certain security being enforced in Hong Kong on the ground that no equivalent administration process and equivalent moratorium was available in Hong Kong. That happened in case of the Joint administrators of African Mineral Limited (in administration) V Madison Pacific trust limited & Shandong Steel Hong Kong Zengli Limited [2015] 4 HKC 215.

As per rulings by the Hong Kong courts, banks in Hong Kong should readily assist foreign representatives by providing documents in relation to the company's own accounts even without the foreign representative having to first obtain a Hong Kong court order. But, if the foreign representatives wish to exercise power to deal with Hong Kong assets such as balances in Hong Kong bank accounts, the court has said that the representative should apply for a specific recognition order for this purpose. This is required for balancing the foreign representative's need for convenience and the need for court supervision which the creditors may expect.

Hong Kong courts have also granted recognition orders to permit foreign office holders to then seek production of documents or examination of individuals in Hong Kong. The courts have compared the scope of the relevant provisions of between Hong Kong and the requesting jurisdiction in accordance with Singularis Principle for this purpose. The Cayman Islands and British Virgin Islands are two most commonly encountered jurisdiction for which a "standard order" that a foreign representative should expect to obtain has been developed, although this order can be departed from were considered appropriate.

The ability of the Hong Kong Office Holder to be recognised in other jurisdictions is also important. Recognition in PRC remains a common difficulty for Hong Kong office holders. But the Hong Kong office holders are assisted by the English Courts with the help of section 426 of the Insolvency Act 1986 as one of the Commonwealth Countries in one case even after the Handover in 1997.

In case of parallel proceedings for the same company commenced in different jurisdictions with appointment of different officeholders, Hong Kong Courts have adopted the use of protocols to help coordinate the activities of the parallel proceedings. The protocol will provide guidelines agreed between different office holders in different jurisdictions. Liquidators in Hong Kong are entitled to make application to seek authorisation from the court to enter into and implement a cross-border protocol with foreign officeholders in which the court takes a "supervisory role".

The use of scheme of arrangements in respect of non-Hong Kong companies is another important consideration in relation to cross-border insolvencies. This is a recurring issue in practice given the fact that many foreign companies are listed in the Hong Kong stock exchange and also because contracts of debt can be governed by non-Hong Kong laws. For obtaining sanction of a scheme of arrangement in Hong Kong the applicant must show that (i) that the court has jurisdiction to do so in respect of that company; and (ii) that the scheme would be effective in the sense that the scheme would be recognised in other relevant jurisdiction. The test for jurisdiction to sanction of scheme in respect of company not incorporated in Hong Kong is that "there must be sufficient connection of the foreign company with Hong Kong (but this does not necessarily mean presence of assets within the jurisdiction).

In LDK for instance, the Hong Kong court applied rule stated in an English decision in case of Re Magyar Telecom BV [2013] EWHC 3700 (Ch) noting that "principal concern of the court should be whether there are connecting factors with the jurisdiction so that the scheme, if approved, will have a substantive effect". The examples of connecting factors are:

Commented [RD(DW-H19): Should note here the Gibbs principle and fact that Scheme does not address this.

- (a) the presence of substantial assets belonging to the company proposing a scheme with its creditors, such as Hong Kong subsidiaries, and Hong Kong bank accounts;
- (b) the presence of sufficient number of creditors in the jurisdiction subject to personal jurisdiction of the court; and
- (c) whether the scheme seeks to discharge or adjust debts governed by Hong Kong law.

Other criteria considered to establish sufficient connection for the purpose of effecting a scheme of arrangements are;

- (a) registration in Hong Kong as a non-Hong Kong company under the relevant part of the Companies Ordinance;
- (b) the presence of directors, resident in Hong Kong;
- (c) dealing with shareholders in Hong Kong, such as the holding of annual general meetings in Hong Kong; and
- (d) board meetings of the debtor (and perhaps its subsidiaries) are held in Hong Kong and all the administrative matters relating to the debtor are discussed and decided in Hong Kong.

In order to give full effect to a Hong Kong scheme (recent scheme of arrangement cases) parallel schemes have been promulgated in multiple jurisdictions, such as:

- (a) The place of incorporation of the company;
- (b) In the case of public companies, the jurisdiction in which they are listed; and
- (c) The jurisdiction of the governing law of a debt.

Though Hong Kong court has followed the developments in English cases closely in respect of scheme of arrangements, the need for a parallel scheme in the place of incorporation has been questioned by Hong Kong courts with the observation that this "is the very antithesis of cross-border insolvency cooperation"

In relevant situations, where schemes of arrangements are not available in a foreign jurisdiction, for seeking of the Hong Kong scheme expert evidence would be required to be produced in Hong Kong Courts to address how the foreign jurisdiction would give effect to the Hong Kong Scheme despite not having a formal recognition procedure or if there are such procedures, that they would likely to be given effect in relevant circumstances.

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?

[Type your answer here]

ANSWER: -

Commented [RD(DW-H20)]: 3 ½ marks out of 4. Makes good points but is too long and repetitive for a client advice.

As per the given facts, a receiver is appointed pursuant to a floating charge over all the assets and undertakings of PTM. Shortly after the receiver's appointment, PTM is put into liquidation. The liquidator writes to the receiver to handover all assets (or realisation from assets) of PTM under the receiver's control so that liquidator can pay the costs and expenses of liquidation and make a distribution to PTM's unsecured creditors. The liquidator is to be advised about what, if any, assets or realisations should be handed over by the receiver.

An instrument creating a floating charge will invariably include provisions that insolvency is a crystallising event. The appointment of a receiver pursuant to a floating charge over all assets and undertakings of PTM has the effect of crystallising of the floating charge, but the security is not absolute in the same way as a fixed charge. When the secured creditor holds a fixed charge, he is entitled to look to the asset for repayment irrespective of the interest of other creditors. However, as provided under section 79 and 265(3B) where realisation is made out of assets covered by the floating charge, and those realisations must first be used to meet claims of preferential creditors specified under section 265 of CWUMPO (unless there are sufficient assets to make those payments out of the general estate).

The type of charges that require registration are identified under section 334 of Part 8 of Companies Ordinance (Cap622) which includes floating charges over company's undertakings and property. As prescribed under section 335(5)(a), a charge requiring registration must be registered within one month of the date of its execution. If the charge is not registered in time, it is void against a liquidator or a creditor of the company. So, the liquidator will be advised to ascertain whether in the instrument of floating charge is registered and whether registered in time or not. Since a receiver has been appointed pursuant to a floating charge over all the assets and undertakings of PTM, section 334 and 335(5)(a) are relevant.

The validity of the floating charges is also required to be examined by the by the liquidator by application of the provisions of section 267 of CWUMPO pursuant to which a floating charge will not be valid if it is entered into within a period of 12 months prior to the commencement of liquidation and the company was unable to pay its debts at the time of the chargee was created, or became unable to pay its debts as a consequence of the charge. If the charge is a person "connected with the company" [section 265A(3) and 265B], the 12month period is extended to two years(section 267A) and there is no requirement to show that the company was insolvent at the time of creation of the charge or as a result of its creation. In either case the floating charge will still be valid to the extent of any "new money" provided to the company at the time of, or after, the creation of the charge (in consideration for it).

The floating charge entered into by PTM should also be examined from the angle of unfair preference given by the company for putting the chargee in an advantageous position than other creditors. It will be a fraud on the insolvency law if floating charge was created to put one creditor in an advantageous position than he would, otherwise, have been without such creation of floating charge. It is against the collective interest of all creditors.

If the floating charge has been validly created and are not void or fraudulent as per the foregoing discussions, the liquidation of PTM will not affect the receiver's right to hold/or sell the property and assets secured by the floating charge under which he is appointed. The cost and expenses of liquidation cannot be paid from the realisation made by the receiver, if made available to the liquidator as has been held in case *Buchler v Talbot* [2004] 2 Ac 298 (the "Ley Land Daf" case), as applied in Hong Kong in *Re good Success Catering group Ltd* [2007] 1 HKLRD 453. Section 265 (3B) prioritises payment of preferential debts over the claims of floating charge holders when assets of the company available for payment of general creditors are insufficient to meet those debts. Section 265 (4) provides that subject to retention of such sums as may be necessary for the costs and expenses of winding up, the foregoing debts [As

under section 265(1)] shall be discharged forth with as far as the assets are sufficient to meet them.

If the floating charge is found invalid and void, and the assets and realisations are handed over to the liquidator and there is availability of sufficient funds, the liquidator may be in a position to pay the cost and expenses of liquidation and make distribution to PTM's unsecured creditors as per the priority of claims as provided under the statute. The liquidator should be advised in the light of the above discussions.

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.

[Type your answer here]

ANSWER: -

The arrangement arrived at by Billion Happy Limited (BH) with Hammerhead Finance Co Limited (HF) is an absolute sale/purchase of the right to receivable with an alternative of grant of loan against assignment of receivables as a floating charge converted to fixed charge, obviously on occurrence of the "crystallisation event" of insolvency. But the arrangement with Telford co Limited (TC) is a case of floating charge of running stock of assets i.e., luxury cars given by the debtor BH to creditor TC with the provision of transfer of ownership of all cars held at BH's showrooms to TC in the event of the "crystallisation event" of liquidation. Here also the floating charge becomes a fixed security at time of crystallisation. As per the given facts the issues, the liquidator after his appointment over luxury car dealer Billion Happy Limited (BH), should be advised to consider are:

- (a) Whether the recent grant of a facility by HF to BH was an outright sale or an arrangement of a valid security; If the arrangement is truly by way of sale, then no registration is required under section 334 of Part 8 of Companies Ordinance (Cap622), because BH has sold the right to be paid by its customers without creation of any security. If the arrangement is in fact a secured financing arrangement, the relevant instrument would need to be registered under section 335(5)(a) within one month of the date of its execution and, if it is not, the arrangement would be void against the liquidator.

Commented [RD(DW-H21)]: 2 marks out of 4. A bit confused in parts and not a very clear application of the facts given. Need to consider whether, on its operation, the document is in fact a sale (outright) or in fact security. If latter, is it valid? Is it in fact floating even though says is fixed (lack of control: *Spectrum*).

In the present case HF has shown the liquidator a single document asserting "Receivable purchase agreement" and creation of a fixed charge over the receivables as an alternative to ownership of the receivables. Hence, the liquidator should be advised to examine whether the document has been registered within one month of its execution.

The agreement produced by TC, asserting creation of a floating charge on the inventory of luxury cars immediately before the liquidation must also be shown to have been registered within one month of its execution.

- (b) Whether the floating charges claimed to have been created by BH with HF and TC are valid in accordance with the provisions of section 267 and 267A of CWUMPO;

The validity of the floating charges is also required to be examined by the liquidator by application of the provisions of section 267 of CWUMPO pursuant to which a floating charge will not be valid if it is entered into within a period of 12 months prior to the commencement of liquidation and the company was unable to pay its debts at the time of the charge was created, or became unable to pay its debts as a consequence of the charge. If the beneficiary of the charge is a person "connected with the company" [section 265A(3) and 265B], the 12month period gets extended to two years(section 267A) and there is no requirement to show that the company was insolvent at time of creation of the charge or as a result of its creation. In either case the floating charge will still be valid to the extent of any "new money" provided to the company at the time of, or after, the creation of the charge (in consideration for it).

Since advances paid by HF to BH are sporadic and could not necessarily be matched to invoices, the document creating the floating charge will be invalid under section 267(2) of CWUMPO and cannot satisfy the requirements of payment of money to the company or at the direction of the company or supply of property or services to the company as consideration of the creation of the charge to be made "at the same time as, or after, the creation of charge" as provided under section 267(3)(a)(i) ,267(3)(a)(ii) & 267(3)(a)(iii).The liquidator will be advised to examine the validity of the agreement creating the floating charge by BH in favour of HF and TC in the light of the aforesaid discussions as per the provisions of section 267 &267A of CWUMPO.

- (c) Whether the recent grant of a facility by HF to BH and agreement of Telford co Limited (TC) with BH are hit by the anti-deprivation principles or not; If HF has been put in a better position than other creditors by grant of such facility, it will be considered a "fraud on the insolvency laws".

Similarly, if the contractual agreement made prior to insolvency of BH was intended to give an advantage to TC in the event of insolvency of BH it will be the against the collective interest of all creditors. However, if the contractual arrangement is part of a genuine commercial transaction and not entered into with the intention of creating an advantage on the insolvency of one of the parties, the agreement may not be struck down as a consequence of the anti- deprivation principle.

The issue of some customers of BH making payment of certain invoices to an account with HF which was then operated by BH for working capital purpose, if facilitated deliberately by BH in connivance with the customer, is required to be examined by the liquidator as an unfair preference given to HF to inflate the amount of credit transactions. If the payment is made because of some mistake the liquidator can reject the proof of debt to that extent on the ground that debt is not

proved to his/her satisfaction. The possibility of the creditor submitting double proof of one debt in such circumstances should also be ruled out.

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.

[Type your answer here]

ANSWER: -

The Joint provisional liquidators (JPLs) having uncovered suspected link of the disappearance of the founder chairman of Cayman Island company Cyberbay MedTech limited (Cyberbay) listed in Hong Kong to the accounting irregularities, want to carry on further investigation and examine an individual in Hong Kong, Mr. Pottinger, a friend and business associate of the Chairman. The accounting irregularities relate to payment of large sum of money raised from issue of Notes and bank borrowing from banks, to entities with no apparent business with Cyberbay in its Mainland operations. Mr. Pottinger is believed to be having information that will shed light on the payments. The issue is to advise if there is anything the JPLs can do to obtain an order from Hong Kong court for summoning Mr. Pottinger for examination on oath for obtaining information about payments made by Cyberbay in their Mainland operations.

The Hong Kong High Court heard a similar application in case of The Joint Official Liquidators of A Company V B and Anor [2014] 4 HKLRD 374, where liquidators appointed in the Cayman Islands sought information from the parties in Hong Kong which might have assisted them to determine whether money had been paid as part of a fraudulent scheme. It was held that the companies court pursuant to a letter request from a common law jurisdiction with similar substantive insolvency law made an order "of the type which is available to a provisional liquidator or liquidator under Hong Kong's insolvency regime". The common law power of assistance was further clarified in *Singularis Holdings V PricewaterhouseCoopers* [2014] UKPC 36 by the Privy Council by arriving at the conclusion that the common law power of assistance exists where the power sought to be exercised: (a)exists in the jurisdiction of the principal liquidation; and (b) the power exists in the assisting jurisdiction. In the light of the subsequent decision in *Singularis*, the approach of *A Co v B* might not be followed in future. Privy Council having noted that local statutory provisions could not simply be applied "as if" the foreign liquidators are appointed in Hong Kong. However, the result would ultimately be the same given the finding in *Singularis* that a common law power exists. The Hong Kong Court

Commented [RD(DW-H22)]: 3 marks out of 7. A lot of the elements are included but the answer does not show a clear thought process/proper understanding. Also, no need to repeat the question. See also notes below

Commented [RD(DW-H23)]: ? A v B does not go against *Singularis*; the latter a refinement. Both are regularly referred to. You later refer to *Singularis*

has granted recognition orders to permit the foreign officeholders to then seek production of documents or examination of individuals in Hong Kong as in case of RE BJB Career Education Co Ltd [2017] 1 HKLRD; and Re Centaur Litigation SPC (unreported, HCMP 3389/2015, 10 March 2016). But in doing so, the Hong Kong Court compared the scope of the relevant provisions between Hong Kong and the requesting jurisdictions in accordance with the Singularis Principle. It is important to note that the power sought to be exercised by the foreign officeholders in Hong Kong must be subject to powers available in their “home” jurisdiction. This brings us to a position of making a comparison of the legislation of HONG Kong and Cayman Islands permitting examination in course of investigation.

The provisions of section 103(3) of Cayman Island Companies law (2018 revision) permitting examination of persons in the context of investigation is much more restrictive than that of the section 286B of the CWUMPO of Hong Kong.

For example, the official liquidator of Cayman Island may make an application to the court for examination of the relevant person, if he is requested in accordance with rules to do so by one-half, in value, of the company’s creditors or contributories under sub-section (4) of section 103. There is no such provision under 286B of CWUMPO.

Commented [RD(DW-H24)]: Relevance?

Section 103(7) of Cayman Island companies law provides that the court has jurisdiction to make an order against a relevant person resident outside the Islands; and issue a letter of request for the purpose of seeking assistance of the foreign court in obtaining the evidence of the relevant person resident outside the jurisdiction. The JPLs seeking examination of Mr Pottinger in Hong Kong court may have to answer why they did not make use of section 103(7) of Cayman Island companies Law.

Commented [RD(DW-H25)]: Doesn’t appear Pottinger is in Cayman; what effect would this have?

Sub-section (4)(d) of section 286B of CWUMPO empowers the Hong Kong Court to order attendance of a person whom the court thinks capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company before the court. The JPLs are inclined to use the above provisions of law. But similar provision is not available under the Cayman Island companies law section 103.

In view of the non-availability of Hong Kong like provisions in the Cayman Island companies law, the JPLs of Cayman Island may be advised to seek an “old fashioned” ancillary order by use of the scheme of arrangement procedure in respect of non-Hong Kong companies rather than a recognition order. The JPLs would negotiate with creditors in Hong Kong and put forward a scheme of arrangement with a letter of request from the Cayman Island Court requesting for assistance. Although a provisional liquidator cannot be appointed in Hong Kong on a “light touch” basis only to pursue a restructuring, conducting a restructuring is still a power that a Hong Kong appointed provisional liquidator can have as has been held in case of Re Z-Obee Holdings Ltd [2018] 1 HKLRD 165.

Commented [RD(DW-H26)]: Mixes concepts: ancillary liquidation a very different thing to a scheme of arrangement

While granting an ancillary order the court will still have to be satisfied that the “three core requirements” are met for establishing the connection with Hong Kong. The court will have to be further satisfied that the scheme will be would be effective and recognised in Caymans Islands jurisdiction. Given the facts of listing in the Hong Kong stock exchange, existence of head office with employees and the Hong Kong incorporated subsidiary in the related self-assessment question, the court will be satisfied to be having jurisdiction to allow an ancillary order. Since the JPLs have been appointed to investigate and promulgate a restructuring by the Caymans Island court, there is reason to believe that the scheme, if approved will be effective under Cayman Island jurisdiction. The JPLs of Caymans Island, in this way, would enjoy powers under CWUMPO and CWUR.

TOTAL: 40.5 MARKS OUT OF 50

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*** End of Assessment ***