



**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)]:** Incorrect (0 marks). Whilst (c) is correct, (b) is not: a liquidator cannot look to the floating charge realisations for the costs of the liquidation (see the *Leyland Daf* case (applied in Hong Kong in *Good Success Catering*

### Question 1.3

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

(a) This statement is true.

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

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

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

### Question 1.4

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

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

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

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

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

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

### Question 1.5

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

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

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

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

(d) All of the above.

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

### Question 1.6

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

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

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

**Commented [RD(DW-H6):** 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.

**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)

## 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.

**Commented [RD(DW-H11)]:** 2 marks out of 3. Should also refer to the restrictions on attachments etc. (s183)

Compulsory liquidation proceedings can result in either a discretionary stay in the intervening period after presentation of the winding up petition, but before the order is made, and/or a compulsory stay after the winding up order is made and the compulsory liquidation is commenced.

Accordingly, if a creditor is already pursuing the company by way of a civil action, the Court has the power to stay or restrain those proceedings at any time after the presentation of the winding up petition (and even before the Order is made).

Furthermore, once a winding up order has been made, or upon the appointment of a provisional liquidator no action may be continued against the company without the leave of the court or subject to such terms that the Court may impose. If the Creditor's 'civil proceeding' is by way of an arbitration, it will also be restrained by way of the compulsory moratorium (Re UDL Contracting Ltd [2000] 1 HKC 390).

Finally, depending on the circumstances and nature of the Creditor's claim, it may be necessary to seek a stay of the liquidation. Pursuant to CWUMPO s. 209(1) the Court has the power to stay a compulsory liquidation, but it must be evidenced, to the satisfaction of the court, that this ought to occur. A Creditor is able to make this application but ordinarily is required to demonstrate that i) there are sufficient assets to pay all creditors and the liquidation expenses, the interests of the members would also be considered, and ii) whether the stay is "conducive or detrimental to commercial morality and to the interests of the public at large"<sup>1</sup>.

### 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.

**Commented [RD(DW-H12)]:** 3 ½ marks out of 4. Should make clear that 228A can only be used where no other mechanism practicable.

<sup>1</sup> Krestite Holdings Pty Ltd v Widdows [1974] VR 689 at 694 to 695

A company can be liquidated by way of either a **voluntary liquidation** or a **compulsory liquidation**.

1. Under a voluntary liquidation process, there are two further methods:
  - a. A **Members Voluntary Liquidation (MVL)**: This procedure is appropriate for the company to pursue where it is solvent and will be able to settle all liabilities within 12 months of commencement of the liquidation. The directors must execute a 'certificate of solvency', and then the shareholders of the company pass a special resolution for winding up and appointing the liquidators. The liquidators then take over control of the company for the purpose of investigating the conduct of the company/directors, realising the assets and settling the liabilities owed to the creditors, shareholders and any other interested parties.
  - b. A **Creditors Voluntary Liquidation (CVL)**: This procedure is appropriate where the company decides to place itself into liquidation but is not solvent. The directors will convene a meeting of the shareholders for a special resolution to be passed to wind up the company, this then triggers the commencement of the CVL. A liquidator is appointed at this point, but has limited powers until his appointment is confirmed at the creditors' meeting. One of the reasons for using a CVL process rather than a court ordered compulsory liquidation (discussed below) is that where the company/ the directors are compliant, a CVL can occur more expeditiously and economically. Further, ad valorem payable on realisations in a compulsory liquidation is not payable in a CVL (or MVL).
    - i. A further sub-category of liquidation to note is by way of a section 228A liquidation (under the CWUMPO) which is a CVL in a case of urgency. This is appropriate to use in circumstances where, in the directors' opinion, the company needs to be wound up with immediate effect. This remains a process that occurs out of court and is affected by way of a directors' meeting, who then deliver a statement to the registrar confirming that a resolution has been passed and certifying various matters as set out under s.228A. often this method of a CVL is suitable where the appointment of the liquidator is needed in an emergency case, for example where perishable goods are involved.
2. A **compulsory liquidation** process occurs when a company is wound-up by order of the High Court and is normally initiated by a creditor presenting a petition on the grounds that the company is unable to pay its debts. The company itself can also present a winding-up petition, as can a shareholder on the grounds that it is 'just and equitable'. When the court orders a liquidation, it also appoints a liquidator to take control of the company and assets. In this circumstance, the company has no influence over the liquidator who is appointed.

Upon the hearing of the petition, the court may i) dismiss it, ii) adjourn it conditionally or unconditionally, iii) make any interim order or iv) make any other order that it thinks fit. It is noted that in considering the petition, the court retains the ultimate discretion as to whether to grant the order and is able to instead allow for a restructuring plan or other solution to be pursued if it appears to be in the best interests of the general body of creditors.

**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?

Pursuant to section 193 of CWUMPO, a provisional liquidator can be appointed by the court in the intervening period between the petition being presented and the winding up order being made, however, only where sufficient circumstances justify such an appointment. One such circumstance may be if there is a risk of the dissipation of assets prior to the winding-up order being granted. The court will also consider commercial realities, the degree of urgency, the need for the order and the balance of convenience.

If appointed, the extent of the provisional liquidator's purpose is to preserve the assets but not actually realise those assets (unless it is to preserve value which will normally require a court order). The Court may also limit his powers in the order of appointment. Further, a provisional liquidator may also be appointed to help facilitate a restructuring proposal, although this cannot be the sole reason for the appointment (as discussed in the answers further below).

An application to appoint a provisional liquidator can only be made after the petition has been presented, although if the need is urgent, it may be made at the same time as the petition.

Finally, it should be noted that although provisional liquidation is a commonly used term, under Hong Kong law it technically does not exist because a company is considered to be in liquidation or not. Nevertheless, section 193 permits that appointment of a provisional liquidator, within the above circumstances as described.

**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.

Corporate rescue in Hong Kong is achieved by way of a scheme of arrangement which is a statutory mechanism conducted pursuant to Part 13, Division 2 of the Companies Ordinance (ss 668 – 677) and then implemented through court procedure pursuant to O. 102, r 2, and r 5 of the Rules of the High Court. Common law principles also have a considerable part to play in the successful formulation and implementation of a scheme. Such restructuring mechanisms are critical to Hong Kong's insolvency practice because the jurisdiction does not have a formal corporate rescue regime such as in the US by way of chapter 11 proceedings, or that found by way of 'administration' in England and Australia. The recent COVID-19 pandemic and the acute effect of this on businesses has again emphasised the need for Hong Kong to implement a more formal corporate rescue regime, however, and as discussed more fully at 3.1.2 below, this is still to occur.

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

Commented [RD(DW-H14)]: 5 marks out of 7. Reference should be made to informal workouts; the court's discretion to not make a winding up order; and more detail on schemes (the need to carefully select classes the majorities required; court's role on sanction; limitations due to the *Gibbs* principle)



One of the first notable disadvantages of the current statutory scheme of arrangement regime, is that the legislation does not provide for a moratorium on creditor actions whilst the scheme of arrangement is being formed. In circumstances where the company is stable and is only restructuring its debts in the usual course of business, with the restructuring not contentious amongst the various stakeholders, the lack of a moratorium may not be an issue, because the business is not necessarily vulnerable to creditor actions. As a scheme of arrangement, however, is often used as an alternative to and a means of avoiding liquidation, a moratorium on creditor actions whilst the scheme is formulated is critical to protecting the company's position, providing some 'breathing space' and the overall success of the scheme.

To fill in this gap, case law has developed different principles over time. For example, and for a time it was common practice to present a petition for winding up of the company and an application made for provisional liquidators with specific powers in the provisional liquidator's order, to investigate the possibility of and if possible, to implement a restructuring of the company's debts. The moratorium was then obtained by way of section 182 of CWUMPO.

This practice was first set down in the decision of *Re Kevview Technology (BVI) Limited*<sup>2</sup> and then affirmed by the Court of Appeal in *Re Luen Cheong Tai International Holdings*<sup>3</sup>. This method was used for a few years until the Court of Appeal decision in *Re Legend International Resorts Limited*<sup>4</sup> declined to appoint provisional liquidators for the purpose of carrying out a scheme of arrangement on the basis that it was not within the Court's jurisdiction to do so. The Court held that the purpose of the appointment of the provisional liquidators was for the winding up of the company and restructuring was effectively the opposite of this. Despite this decision, there still continued to be a wide number of restructurings which used this route to gain the benefit of a moratorium. In 2018, and despite the *Re Legend* decision, the Court in *China Solar Energy Holdings Ltd*<sup>5</sup> effectively reaffirmed the use of the practice by essentially holding that if it could be demonstrated that there was a jeopardy to the assets (that a provisional liquidator is charged with maintaining and protecting) then there was no reason why the powers of the provisional liquidator could not include the power to restructure. In *China Solar Energy*, and on this basis, the Court rejected the application to have the provisional liquidators discharged, allowing them to then continue with the restructuring.

Aside from the gap in the legislative provisions to allow for a moratorium, a scheme of arrangement in Hong Kong is now a well-developed and supported mechanism to restructure a company's debts and as a means of salvaging a company that may have otherwise been liquidated. In addition to the use of the statutory scheme mentioned above, the Hong Kong Court will take guidance from English case law principles as the wording of the legislation across the two jurisdictions is similar (albeit with some distinct procedural differences). An advantage of a scheme of arrangement is that it allows a company to adjust its debts with only a stipulated majority of creditor support, conversely, and absent a scheme of arrangement, a company would ordinarily need 100% creditor support to do so, which in many cases would be a clear impediment to achieving a restructuring. A scheme can also be useful in avoiding the need to rely on a minority of 'hold-out' creditors who may have otherwise required a more advantageous position in order to support the proposed restructuring.

A further advantage of the Hong Kong scheme process (compared with English law and the practice in other jurisdictions) is that the initial application to the Court for leave to convene the meetings of relevant creditors is made *ex partes* originating summons. This means that the applicant is able to apply to the court to initiate the process without alerting all of the other creditors in advance, which may avoid some creditors rejecting or upsetting the process from

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<sup>2</sup> [2002] 2 HKLRD 290

<sup>3</sup> [2003] 2 HKLRD 719

<sup>4</sup> [2006] 2 HKLRD 192

<sup>5</sup> [2018] HKCFI 555

an early stage and the company incurring considerable unnecessary costs in dealing with such challenges. By contrast, and under English there is a requirement for the applicant to first inform the scheme creditors on a confidential basis that it is going to apply to the court to seek the order. The process in Hong Kong still allows for the scheme to be voted upon and rejected by an objecting creditor, as all scheme creditors have the same rights to participate and vote at the creditors' meetings, however, arguably, a scheme under Hong Kong law has a better chance at actually being heard and fully considered by the creditors, given the manner in which it is begun.

A further advantage of a Hong Kong scheme is discussed by the CFA in the leading Hong Kong decision of *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin*<sup>6</sup> ("UDL"), and considers the stage at which consideration is given to the proper constitution of the classes of creditors. In England, this is considered at the convening hearing, however, in Hong Kong, this is not considered until the sanction hearing, being one of the final stages of the process. The disadvantage to this is that the scheme applicant bears the risk that the application could ultimately be dismissed, at that late stage and once considerable cost and effort has been incurred, if the classes of voting creditors are not properly constituted. The court in *UDL* however, held that although on the one hand, this could be perceived as an unhelpful feature of the Hong Kong scheme process, ultimately, it was actually an advantageous approach because as observed by the CFA at paragraph 14 of its judgement "*the only alternative would be to require notice of the initial application to be made inter partes and for notice of the application together with a copy of the scheme to be given to everyone potentially affected by it, with the risk of incurring the costs of a contested hearing and possible appeals before it could be known whether the scheme was likely to attract sufficient support in any event. The present practice ensures that those advising the company take their responsibility seriously, since an error on their part would be fatal to the scheme*". Accordingly, whilst at first glance this process may be a risk to the applicant, it is ultimately an advantage because it forces the applicant to carefully formulate the scheme plan and creditor classes, and gives the scheme a better opportunity of actually being considered and heard, rather than the risk of the process being hijacked by creditor opposition at the early stages.

A final point to highlight about schemes under Hong Kong law, which is ultimately an advantage, is the court's oversight and involvement in the process as the scheme progresses. Once leave to convene the meetings is granted, the court will appoint a chairman of the scheme meeting who is directed to report to the court on the outcome of the meeting(s) prior to the sanction hearing. At the sanction hearing, which is the final stage before the scheme is finally approved, the court retains ultimate discretion as to whether the scheme will be sanctioned or not (although if the statutory majorities approving the scheme are not reached, the court cannot sanction the scheme). Accordingly, this final stage is the point where the court closely considers the scheme and whether it is for a permissible purpose, whether the classes are correctly formed (with sufficiently similar legal rights), whether the meeting was in accordance with the court's directions, whether there has been sufficient information provided to the members, whether the requisite statutory majorities have been achieved, and finally, at the court's discretion, whether the scheme is one that an intelligent and honest man might reasonably approve<sup>7</sup>. Accordingly, the sanction hearing and the careful consideration of the Court at this stage, provides a final safeguard to ensure that the scheme (despite potentially meeting the statutory procedural requirements) is a fair and reasonable scheme that is equitable between the creditors.

### Question 3.1.2 [maximum 2 marks]

<sup>6</sup> (2001) 4 HKCFAR 358.

<sup>7</sup> Per Harris J, in *Re Wheellock Properties Ltd*, [2010] 4 HKLRD 587 (pp 590-591)

**Commented [RD(DW-H15)]:** ½ 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. See also comments below

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

As noted above, Hong Kong does not have a formal corporate rescue regime and instead, reliance is heavily placed on the schemes of arrangement procedure which is found in the Companies Ordinance and developed through common law principles. Whilst for some time, this procedural framework may have provided a sufficient means for a company to restructure and reorganise its debts, in the increasingly more modern and global world, with significant and sudden risks to business such as that presented by the COVID-19 pandemic, it has become increasingly apparent that the current corporate rescue options under Hong Kong law are considerably insufficient for the needs of the commercial market. The acute need to update provisions was summed up by one of Hong Kong's Companies Judges who recently commented:

*"As is well known, other than schemes of arrangement, Hong Kong has no legislation that provides for corporate debt restructuring or rehabilitation. This unsatisfactory state of affairs has been the subject of much invariably adverse comment for two decades now. It is brought into unforgiving focus by the economic problems that Covid-19 is causing... That having been said, it is clearly desirable that some steps are taken immediately to improve the legislative position. Immediate (by which I mean the kind of alacrity shown in other financial centres around the world in the last couple of months) amendment to section 193 of [CWUMPO] to provide expressly for provisional liquidators to be given restructuring powers is desirable".<sup>8</sup>*

Legislation related specifically to corporate rescue has been discussed, developed and debated in Hong Kong for several years and following recommendations by the Law Reform Commission in 1996. Following this, a Corporate Rescue Bill was introduced to the Legislative Council in 2001 which proposed a framework similar to that of the US Chapter 11 proceedings. This, however, did not gain support and the bill lapsed in 2004 after a number of rounds of discussion. Since 2020, further consultation has been sought on the bill, with apparent little enthusiasm because the same kinds of issues with the bill still exist as they did in 2001 when it was first proposed. Accordingly, whilst it appears that the development of a formal corporate rescue regime in Hong Kong may have stagnated, increasing pressure from the judiciary, insolvency practitioners and the current commercial realities of the Covid pandemic, may place much needed pressure on legislators to make some much needed progress in this area.

**Commented [RD(DW-H16):** DIP system has never been seriously considered in Hong Kong

### 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.

There are effectively two routes by which a foreign representative can seek recognition and relief from the Hong Kong Courts, the first is by way of a "ancillary liquidation order" (or a "liquidation order" (where the proceeding is not ancillary to another) or secondly, by way of seeking a "recognition order" through common law principles.

#### Ancillary or 'Free-Standing' Liquidation Order

The only specific legislation that Hong Kong has that deals with cross-border insolvencies is the powers set out under Part X of CWUMPO in relation to the winding up of unregistered companies. The definition of 'unregistered company', being one that is not registered under

**Commented [RD(DW-H17):** 5 ½ marks out of 6. A very good answer. Could also refer to right to bring an action without recognition order.

<sup>8</sup> Re China Oil Gangran Energy Group Holdings Ltd [2020] HKCFI 825

the Companies legislation, is set out in section 326 of CWUMPO. Section 326(2) then states that application of this part also relates to a registered non-Hong Kong company. Aside from this framework, the Hong Kong Courts still have the ability to deal with cross-border insolvency matters, and to this end, have always followed common law principles in order to address such issues.

Firstly, the specific legislation by way of Part X is an important and regularly used tool for the Hong Kong Courts and insolvency practitioners, as a significant amount of the companies actually operating in Hong Kong are not Hong Kong incorporated companies – rather, they are foreign entities. For example, at the 2019, over 52% of the companies listed on the Exchange were Cayman Islands incorporated entities. A foreign company, operating in Hong Kong can be wound up under this legislation in the following circumstances:

1. if the company is dissolved, or has ceased to carry on business, or is carrying on business for the purpose of winding up its affairs.
2. If the company is unable to pay its debts, and
3. If the court is of the opinion that it is just and equitable that the company should be wound up.

The petitioner must also satisfy the court that the company is sufficiently connected to Hong Kong by meeting the “three core requirements” which were set out in *Re Yung Kee*<sup>9</sup> by the CFA, these are:

1. There must be a sufficient connection to Hong Kong.
2. There must be reasonable possibility that the winding up order would benefit those applying for it; and
3. The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

The court went on to hold in *Penta Investment Advisers*<sup>10</sup> that once these three requirements are met, establishing a sufficient connection, then the jurisdiction to wind the company up remains, even if the original connection factors change or cease. This prevents companies from removing assets or rearranging their affairs to try and sever the connection.

The jurisdiction under these provisions, can apply to a ‘free-standing’ Hong Kong liquidation or can be used to commence ancillary liquidation proceedings in Hong Kong where there are principle proceedings elsewhere. This is similar to the concepts of ‘main’ and ‘non-main’ proceedings under the Model Law. As set out in *Re Pioneer*<sup>11</sup> where a liquidation is ancillary the court takes a modified universalism approach which in practice means that the liquidator's functions in the Hong Kong proceeding will be more limited and will be for the purpose of collection of assets, to settle the list of Hong Kong creditors and to transmit the assets and the list to the principle liquidators to enable a dividend to be declared and paid. It should be noted that the “three core requirements” listed above, still need to be met in order for the court to grant an ancillary winding up order<sup>12</sup>. Notably, this would also be the same under the Model Law, as between recognition of main or non-main proceedings, the threshold for recognition remains the same.

### Common Law Recognition Order

<sup>9</sup> Kam Leung Sui Kwan v Kam Kwan Lai and Others (2015) 18 HKCFAR 501

<sup>10</sup> Pentra Investment Advisers v Allied Weli Development Ltd (Unreported, CACV 58/2016, 18 July 2017)

<sup>11</sup> Re Pioneer Iron and Steel Group (Unreported, HCCW 322/2010, 6 March 2013).

<sup>12</sup> Re Pioneer Iron and Steel Group (Unreported, HCCW 322/2010, 6 March 2013).

**Commented [RD(DW-H18):** No; this comment relates only to those listed here, not just operating.

Whilst traditionally, foreign office holders used an ancillary liquidation proceeding as a means to pursue a liquidation of a foreign entity operating in Hong Kong, it is now becoming increasingly more common for a foreign representative to instead seek recognition of their foreign appointment and proceeding in order to exercise powers as a foreign representative in Hong Kong. Recognition is achieved by way of common law principles, which was the case before Handover, and has continued since as confirmed by the CFA in the case of *Chen Li Hung*<sup>13</sup>. There are two further key cases of the Hong Kong Courts, which are regularly followed and set out such principles.

1. Firstly, in *A Co v B* (a 2014 Decision) an application was made by Cayman Islands Liquidators for recognition of their appointment and for a document production order. In that decision, the court agreed that the Hong Kong Court should be adopting a similar approach to that set down by Kawaley J in *Re Founding partners Global Fund Ltd*<sup>14</sup> which is that pursuant to a letter of request obtained by the foreign representatives from their local court (being a common law jurisdiction with a similar insolvency law to Hong Kong) the Hong Kong Court may make an order of the type which would be available to an insolvency practitioner under the Hong Kong regime.
2. The second important decision arose following *A Co v B*, and is a Privy Council decision<sup>15</sup> in *Singularis Holdings v PricewaterhouseCoopers* which gave rise to the the "Singularis Principle". This principle maintains that the common law power of assistance is applicable where the power sought to be exercised (a) exists in the jurisdiction of principle liquidation and (b) the power exists in the assisting jurisdiction. In other words, the foreign applicant party is not getting any additional advantage under the Hong Kong law by way of the relief sought, that he wouldn't already be entitled to in his own home jurisdiction.

Both of these decisions have been significant in promoting modified universalism in Hong Kong and providing a clear, principled basis upon which a foreign representative can seek recognition and certain relief from the Hong Kong Courts (with the presentation of a letter of request from the foreign court being an established requirement). It should be noted however, that the Hong Kong courts have been strict in assessing each application for recognition via this route, and will only grant the relief sought where the type of order sought is actually available in Hong Kong. For example, an application by English administrators was denied because Hong Kong does not have an equivalent administration procedure<sup>16</sup>.

#### **Additional Hong Kong Cross Border Insolvency Procedures**

In addition to recognition, the Hong Kong Courts also have the power to assist foreign insolvencies via further mechanisms which have also been developed through common law principles:

1. Where there are parallel, cross-border proceedings, but with different representatives appointed in each jurisdiction (which is commonly the case), to ensure that the proceedings are carried out consistently, the Hong Kong Court in certain circumstances, will adopt the use of protocols and guideline agreements to help coordinate the multiplate proceedings<sup>17</sup>.

<sup>13</sup> *Chen Li Hung and Another v Ting Lei Miao and Others* (2000) 3 HKCFAR 9.

<sup>14</sup> [2001] Bda LR 22

<sup>15</sup> *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36.

<sup>16</sup> *The Joint Administrators of African Minerals Limited (in administration) v Madison Pacific trust Limited & Shandong Steel Hong Kong Zengli Limited* [2015] 4 HKC 215.

<sup>17</sup> An example of this is in the case of *Re Jinro (HK) International Ltd* [2003] 3 HKLRD 459.

2. Assistance can also be provided to foreign representatives in respect to restructuring and reorganisation procedures, so recognition is not only limited to a liquidation proceeding. To this end, the Hong Kong Courts may permit judgement against a debtor to be obtained in Hong Kong, but will restrain enforcement of that judgement in circumstances where there are restructuring proceedings in respect to that entity occurring elsewhere<sup>18</sup>.
3. Finally, obtaining sanction for a scheme of arrangement by the Hong Kong Court for a non-Hong Kong Company has become an increasingly important and developing area of common law. To obtain sanction of a scheme from the Hong Kong Court the application must show i) that the court has jurisdiction to do so in respect to the company and ii) that the scheme would be effective in that it would be recognised by other relevant jurisdictions. Meeting these requirements has previously created difficulties because a significant number of the relevant companies are foreign and governed by non-Hong Kong Law. In order to deal with the issue of jurisdiction, the Hong Kong Court has held that the test to sanction a scheme is that "*there must be sufficient connection of the foreign company with Hong Kong*"<sup>19</sup> (the 'sufficient connection test'), which is not quite the same as the test for COMI. To this end, the Hong Kong Court has considered sufficiently connecting factors to be matters such as the presence of substantial assets in Hong Kong, a sufficient number of creditors being in Hong Kong (of that foreign company), and/or whether the scheme seeks to discharge or adjust debts governed by Hong Kong Law<sup>20</sup>. As to point ii), and in order to give effect to the scheme, recent cases have sought to show that parallel schemes have been implemented in the place of the company's incorporation, the jurisdiction where the company is listed, and/or in the jurisdiction that governs the debt.

Accordingly, whilst Hong Kong does not have a large body of legislated framework governing cross border insolvency issues, this is compensated for by a considerable and established common law principles. These principles, which have taken influence from English Law and other common law jurisdictions (such as Cayman) mean that the approach taken by the Hong Kong Courts is not dissimilar to some principles found in the UNCITRAL Model Law, even though Hong Kong has not formally adopted these guidelines.

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

##### **Question 4.1 [maximum 4 marks]**

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

The liquidator should be advised that under Hong Kong law, the floating charge holder is a secured creditor and enforcement of the floating charge over those assets occurs outside of the liquidation, accordingly, realisation of those assets in full is not available to the liquidator.

<sup>18</sup> An example of this is the case of *Skillsodt Asia Pacific Pty Ltd v Ambow Education Hold Ltd* [2014] 1 HKLRD 520 (regarding provisional liquidators appointed in Cayman)

<sup>19</sup> *Re LDK Solar Co Ltd* [2015] 1 HKLRD 458

<sup>20</sup> *Re LDK Solar Co Ltd* [2015] 1 HKLRD 458

**Commented [RD(DW-H19):** 3 ½ marks out of 4. A bit confused in part but generally a good answer. See also note below

The exception to this is that preferential creditors will rank ahead of the floating charge holder, so sufficient assets/funds that the receiver may be in possession of need to be provided to the liquidator to make payment for those preferential claims (CWUMPO, s.s 79 and 265(3B)). These are the only assets/realisations that need to be handed over to the Liquidator, as realisations made by the receiver out of the charged assets will not be available to the liquidator for payment of the liquidation expenses<sup>21</sup> ahead of the floating charge-holder. Further, the charge-holder will rank ahead of any unsecured creditors in the liquidation. If the liquidator has sufficient assets to pay the preferential creditors, then the release of some assets by the receiver wouldn't be required, but we are told that the receiver held control of all of the company's assets at the point that PTM went into liquidation.

**Commented [RD(DW-H20):** Strictly, a secured creditor does not 'rank' in the liquidation at all.

The further exception to the above rule, and is a matter that the liquidator should investigate further, is that where a floating charge is created within 12 months prior to the commencement of the liquidation and the company was unable to pay its debts at the time the charge was created or became unable to pay its debts as a result of the charge, then it may be void (section 267 CWUMPO). Furthermore, if the charge-holder is a person "connected with the company", the 12 month period is extended to two years and there is no requirement to show that the company was insolvent at the time (Sections 265A(3) and 265B). We are not told when the floating charge was created over PTM's assets, nor who is the charge-holder, however, this information should be investigated and checked. The liquidator should be advised that if these circumstances are found to exist, then the charge may still be valid to the extent that it was for the provision of "new money" provided to the company at the time of or after the creation of the charge.

Finally, the liquidator should also check whether the floating charge was registered because pursuant to section 334 of Part 8 of the Companies Ordinance (Cap 622) floating charges over a company's undertakings or property need to be registered. Where the floating charge is not registered, then the security will be void.

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

**Commented [RD(DW-H21):** 1 mark out of 4. See notes

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.

**Firstly, and in respect to HF –**

<sup>21</sup> Buchler v Talbot [2004] 2 AC 298 which was applied by the Hong Kong Court in Re Good Success catering Group Ltd [2007] 1 HKLRD 453; Also see CWUMPO s 265(3B)

An assignment or sale and purchase of receivables is a common mechanism used in Hong Kong which is used as a type of security. This appears to be the arrangement that HF is asserting by way of the receivable purchase agreement.

This type of arrangement is where the business, BH gives to the financier (HF) an interest in the receivables that it is entitled to receive from its customers. This type of arrangement sometimes requires the business to notify its customers of the arrangement, but not always, however, the liquidators should check the terms of the arrangement here. The agreement will also usually require that BH make payments back to HF into a specific account and with all receipts from those receivables covered by the security – but it does not appear to have occurred here.

If the arrangement means that HF has an absolute right of sale to the receivables, then no registration of this interest is required because BH will have effectively 'sold' its right of ownership over those receivables to HF. This is not completely clear on the facts however, because in the alternative HF is also asserting that it has a fixed charge over the receivables as an alternative to ownership. If HF's interest is indeed by way of a fixed charge, then this would have needed to be registered at the Companies registry pursuant to section 334 of the Companies Ordinance (Cap 622). Further the charge must have been registered within one month of the date of its execution (s 335(5)(a)). If the fixed charge hasn't been properly registered, it can be void as against HF.

The language used by BH and HF in the agreement appears to be unclear and will not be conclusive. If the liquidator seeks to challenge the agreement, the court will look at the actual effect of the arrangement to determine whether it should have been registered or not<sup>22</sup>.

#### Secondly, and in respect to TC -

Based on the minimal facts provided here, it appears that BH may have entered into a transaction at an undervalue with TC and that the liquidator may be able to avoid the arrangement on that basis. "Undervalue" means a gift or transaction for no consideration, or a transaction where the value is, in money or money's worth considerably less than the consideration provided by the company (CWUMPO, ss 266D, 266E and 266B). The transaction must have also occurred within 5 years of the commencement of the winding up in order to be considered here.

On the facts, TC was "helping" TC to sell cars, so we are not told whether TC is asserting that the benefit is a gift, or the true extent of any consideration that TC was providing BH in exchange for the benefit of ownership of the cars, however, on the face of it, the arrangement appears completely disproportionate and should be further investigated. If the liquidator can demonstrate that the 'help' provided by TC was in no way an equivalent or fair exchange for the value of the cars, then he will be able to apply to the court for an order to restore the company to the position that it would have been in prior to the agreement being entered into.

#### 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

<sup>22</sup> Orion Finance Ltd v Crown Financial Management [1996] BCC 621

**Commented [RD(DW-H22)]:** Given lack of control, likely a floating charge? E.g. *Spectrum Plus*?

**Commented [RD(DW-H23)]:** Yes, but need to apply the facts to give advice. References to the advances being sporadic, and not linked to specific invoices, suggests a security not sale.

**Commented [RD(DW-H24)]:** Anti-deprivation principle is the thing to consider

**Commented [RD(DW-H25)]:** 4 marks out of 7. A lot of the elements here but could also add that JPLs could bring an action (against Chairman, recipients?) – don't need recognition; perhaps take control of the HK subsidiary. Action against the recipients. Get company's own documents using the *Bay Capital* principles.



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.

There are three potential options that the JPLs could consider in respect to seeking information from Mr Pottinger. The options will be, in part, dependent on what route the JPL's previously took in order to effect the Cyberbay restructuring, and in particular, whether a provisional liquidator was appointed or whether the JPLs instead decided to seek a recognition order and in reliance on a letter of request. Further, their decision may also turn on whether they are still seeking to restructure the company or whether they are now looking to wind up, in light of the potential fraudulent practices of the Chairman.

Taking each of these different routes for recognition in turn:

#### 1. Provisional Liquidation.

Firstly, if the JPLs obtained a provisional liquidation order then the provisional liquidator has certain powers of investigation pursuant to that order and can apply to the court for an order that any person whom the court thinks capable of giving information regarding the affairs of the company or the property of that company should attend court and be examined on oath (CWUMPO section 268B). Furthermore, and pursuant to that same provision the court can order the delivery up of documents relating to the affairs or property of the company, which is a useful tool that is frequently used by liquidators in order to recover important company financial information.

#### 2. Recognition Order

If it was the case that the JPL's instead sought a recognition order from the Hong Kong court in order to investigate and promulgate a restructuring in Hong Kong, then the extent of their powers / authority to undertake investigations in Hong Kong will be limited to the terms of that order. Assuming that an existing recognition order may be limited, they could seek a further order which is specific to the powers to investigate and seek disclosure from Mr Pottinger.

The Hong Kong Court dealt with a similar application in the case of *A co v B* (a 2014 decision) which was an application from Cayman Islands liquidators who sought (among other things) an order from the Hong Kong Court for recognition of their appointment and an order for the production of documents from certain persons. In that decision, the court held that where the applicant presents a letter of request from the common law jurisdiction with a similar substantive insolvency law, then the Hong Kong Court has the power to make an order of a type which is available to a provisional liquidator or liquidator, under Hong Kong's insolvency regime. This case was then considered by the Privy Council in the matter of *Singularis Holdings v PricewaterhouseCoopers*<sup>23</sup>. That decision has laid down the principle that the common law power of assistance exists where the power sought to be exercised:

- a) exists in the jurisdiction of principle liquidation, and
- b) the power exists in the assisting jurisdiction

<sup>23</sup> *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36.

**Commented [RD(DW-H26):** If the intention here is to get domestic winding up (with a PL in the interim) then would need a Hong Kong petition and satisfy the core requirements.

This has become recognised and applied as the “Singularis principle”. Accordingly, and in applying this approach to the present facts, the JPLs could seek a letter of request from the Cayman Court and then present this to the Hong Kong court in support of a recognition order that recognises them as foreign provisional liquidators and for an order that Mr Pottinger be required to disclose certain information relating to the business of the company and the actions of Chairman, insofar as it is within Mr Pottinger’s knowledge. As noted above, section 286B CWUMPO provides wide powers for examining Hong Kong based parties with relevant information. However, this option may run into issues because although the Hong Kong Court has granted recognition orders to permit foreign office holders to seek production of documents or examine individuals in Hong Kong<sup>24</sup>, in considering such an application by the Cayman JPLs, the court will compare the scope of the relevant provisions between Cayman and Hong Kong (i.e. s 286B CWUMPO) with the equivalent provision under Cayman law in accordance with the Singularis principle described above.

Whilst a recognition application by Cayman Officeholders is now a regularly encountered application by the Hong Kong Courts and has been regarded as a “standard order” that the Cayman JPLs can expect to obtain (As refined in Pacific Andes matter (HCMP 3560/2016)), such an order is still limited to the Singularis principle in that any powers sought to be exercised exist in Hong Kong, also exist in Cayman. In respect to investigations, which is what the JPLs will be seeking here, it is noted that the Cayman legislation permitting examination is much more restrictive than section 286B (mentioned above).

If upon consideration of the equivalent Cayman Islands disclosure provisions, it is determined that they are in fact commiserate with the provisions in Hong Kong, the JPLs could instead consider seeking an ancillary liquidation order which would then provide them powers of investigation under Hong Kong Law (discussed further below).

One further order that the JPLs could explore including with their recognition application would be a Norwich Pharmacal order which is an order that has arisen at common law and is applied regularly in both Cayman and in Hong Kong. This is an appropriate order where innocent parties (often banks) have become caught up in or have become unknowingly involved in the fraudulent actions of others. Typically, it has been used to seek disclosure from banks who have accepted funds inadvertently, but which were in fact the proceeds of a fraud. Whilst the Hong Kong Court will not grant such an order lightly, and the JPLs will have to provide compelling evidence which demonstrates that wrongful activity has taken place by the chairman, and that Mr Pottinger has specific information in connection with this. The information sought from Mr Pottinger would need to be specific as it is not an order which permits general discovery, but it may well be an order worth exploring.

### 3. Ancillary Liquidation order

A final and further option for the JPLs to consider is whether they instead seek an ancillary liquidation order, this however, will only be appropriate if the JPLs are looking to wind up the company rather than effect the restructuring which was the initial purpose of their appointment as ‘provisional liquidators’ on a ‘light touch’ basis.

The Hong Kong Court has the power pursuant to Part X of CWUMPO, section 326 to grant a winding up order in respect to an unregistered, foreign company in Hong Kong. Section 327 sets out the circumstances in which an unregistered company may be wound up which includes that the company is carrying on business for the purpose of winding up its affairs, that the company is unable to pay its debts, and the court is of the opinion that it would be just and equitable.

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<sup>24</sup> Re BJB Career Education Co Ltd [2017] 1 HKLRD is one such example of this.

The Cayman JPLs will also need to satisfy the court that there is “sufficient connection” of the company to the Hong Kong Jurisdiction and the three core requirements for this test were set out in the case of *Re Yung Kee*<sup>25</sup> (and are listed above at question 3.2). On the basis that Cyberbay has a leased office with several employees (suggesting that business operations take place there) and it has a Hong Kong incorporated subsidiary company, this sufficient connection test would likely be met. Where there is a principle liquidation elsewhere (as in this case, it would be Cayman) then this mechanism can be used to commence an ancillary liquidation in Hong Kong. If the JPLs are appointed here (or local HK liquidators acting on their behalf are appointed) as ancillary liquidators then being ‘ancillary’ to the main proceeding, the court may look to limit their powers to that of the collection of assets, to settle the list of Hong Kong Creditors and to transmit assets back to the principle proceeding in Cayman. However, in certain cases and depending on the circumstances the court will not limit the ancillary liquidators’ powers and it remains open to the court to grant them all of the powers that are exercisable by liquidators under CWUMPO and CWUR. For the purpose of the JPLs they will specifically be looking to be granted the liquidators broad powers of investigation under s 286B CWUMPO which would then permit them to question the Mr Pottinger and seek provision of information from him that he may have in respect to the company’s affairs and the chairman.

**TOTAL: 36 MARKS OUT OF 50**

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**\* End of Assessment \***

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<sup>25</sup> Kam Leung Sui Kwan v Kam Kwan Lai and Others (2015) 18 HKCFAR 501