



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

This is the **summative (formal) assessment** for **Module 8C** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 8C. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment8C]**. An example would be something along the following lines: 202122-336.assessment8C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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:

A receiver can be appointed –

- (a) only pursuant to a charge over shares.
- (b) only by the court.
- (c) only pursuant to a legal mortgage over land.

(d) any of the above.

Commented [RD(DWH1)]: Correct (1 mark) – A ‘receiver’ can be appointed by the court or under a charge document (whether over shares or land, or indeed other assets)

Question 1.2

When a trustee in bankruptcy is appointed, she may seek to unwind a transaction of the bankrupt if the transaction was entered into at an undervalue. **What is the “look-back” period** for such actions (that is, what are the oldest transactions that the trustee can look at in order to be able to take such action):

- (a) It depends on whether the person with whom the bankrupt transacted is an associate of his or not.
- (b) Two (2) years before the date of the bankruptcy order.
- (c) Five (5) years before the date of the petition on which the bankruptcy order was made.

(d) Five (5) years before the date of the bankruptcy order.

Commented [RD(DWH2)]: Incorrect (0 marks) - Although the commencement of a bankruptcy is the date of the order, most of the provisions dealing with the trustees’ ability to challenge earlier transactions use the date of the petition as the starting point of the ‘relation-back’ period (see 6.2.2 of text) and s.51(1)(a) Bankruptcy Ordinance

Question 1.3

Which of the following **is correct** in describing whether the Hong Kong court can make a winding up order against a company that is not incorporated in Hong Kong:

- (a) The Hong Kong court can wind up such a company only if a director resides in Hong Kong.
- (b) The Hong Kong court has no jurisdiction to wind up such a company.

(c) As a matter of common law, the Hong Kong court has the right wind up such a company.

(d) The Hong Kong court has a statutory jurisdiction to wind up such a company, and can exercise that jurisdiction if certain requirements are met.

Commented [RD(DWH3): Correct (1 mark) – s.327 CWUMPO (section 7 of text)

Question 1.4

Select the **correct** answer:

A receiver is appointed over the entirety of a company's assets and the company goes into liquidation. Assuming the charge under which the receiver is appointed (and the receiver's appointment cannot be challenged), realisations made by the receiver:

(a) must first be used to satisfy the costs and expenses of the liquidator.

(b) must first be used to satisfy the whole of all claims by employees but no other claims.

(c) must first be used to satisfy the claims of preferential creditors as described in the relevant section of CWUMPO.

(d) will be kept entirely by the receiver for the benefit of the charge holder irrespective of what claims, preferential or otherwise, exist against the company.

Commented [RD(DWH4): Correct (1 mark) – see section 6.4.1 of text. Note the question refers to the charge being over all of the company's asset, such that there would be no uncharged assets for the liquidator to meet the preferential claims out of uncharged assets

Question 1.5

Select the **correct** answer:

The date of commencement of liquidation for a Creditor's Voluntary Liquidation is:

(a) the date on which the creditors pass a resolution to wind up the company.

(b) the date on which the court approves the appointment of liquidators.

(c) the date on which the members pass a special resolution to wind up the company.

(d) the date on which notice of the liquidator's appointment is registered at the Companies Registry.

Commented [RD(DWH5): Correct (1 mark) – s.230 CWUMPO (section 6.3.3 of text). Note, however, that a liquidator has limited powers pending the creditors' meeting

NB: for distinction between members' resolution and creditors' resolution in this context see sections 228(2) and 230 CWUMPO.

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

(b) the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

(c) the Companies (Winding Up) Rules (Cap 32H).

(d) none of above.

Commented [RD(DWH6): Correct (1 mark) – see section 6.3.1 of text

Question 1.7

Select the **correct** answer:

In a compulsory winding up, there is a mandatory stay of litigation claims against the company:

- (a) from the date on which the petition is presented.
- (b) from the date of commencement of the liquidation.
- (c) from the date of the winding up order.
- (d) There is no statutory provision for a mandatory stay; whether the claimant can continue is a matter for the court's discretion.

Commented [RD(DWH7): Correct (1 mark) – s.186 CWUMPO (section 6.3.7 of text); the mandatory stay also applies if a provisional liquidator is appointed

Question 1.8

Select the **correct** answer:

In a compulsory winding up, at the first meeting of creditors where a resolution is proposed for the appointment of a liquidator, a creditor holding security from the company:

- (a) is not allowed to vote.
- (b) can vote and the whole amount of its claim is counted.
- (c) can vote if it has valued its security and the amount that is counted is the difference between its claim and that value.
- (d) must get special permission from the chairperson of the meeting to vote.

Commented [RD(DWH8): Correct (1 mark) – Rule 84 CWUR (section 5.5 of text)

Question 1.9

In considering what previous court decisions are binding on the Hong Kong courts, which of the following statements **is correct**?

- (a) A 1995 decision of the English House of Lords is binding.
- (b) A 1993 decision of the UK Privy Council on an appeal from Hong Kong is binding.
- (c) A 1996 decision of the UK Privy Council on an appeal from the Cayman Islands is binding.
- (d) None of the above because they all pre-date the Handover in 1997.

Commented [RD(DWH9): Correct (1 mark) – The *China Field* decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text)

Question 1.10

A liquidator appointed in another jurisdiction wants to seek Hong Kong recognition of his appointment. Which of the following **is correct**?

- (a) He must make an application to the High Court of Hong Kong using the provisions of the UNCITRAL Model Law.
- (b) He must first seek permission from the Ministry of Justice in Beijing.
- (c) No recognition is possible.
- (d) None of the above.

Commented [RD(DWH10): Correct (1 mark) – Hong Kong has not enacted UNCITRAL; the Ministry of Justice in Beijing would not be involved (“1 country, 2 systems”); the courts have developed a practice of giving recognition to foreign office holders in certain circumstances

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

What are the jurisdictional requirements as regards a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over that person?

A debtor must live in Hong Kong, be in Hong Kong on the day the petition is presented or have lived, have had a residence, or have carried on business in Hong Kong within the last three years.

Commented [RD(DWH11): (2 marks). Should include the source (s.4 of Bankruptcy Ordinance) given a specific reference to jurisdictional requirement. Also see note below

Commented [RD(DWH12): From when? Should say is from date of petition being presented

Question 2.2 [maximum 3 marks]

What are the "core requirements" that enable the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company?

For the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company, the company must have a meaningful connection with Hong Kong, it must be reasonable to believe that the order will benefit the applicant, and the court must be able to exercise its jurisdiction of at least one of the parties interested in the company's assets' distribution.

Commented [RD(DWH13): (3 marks). Would have been preferable to include source (CFA's decision in Yung Kee)

Question 2.3 [maximum 4 marks]

When can a provisional liquidator be appointed, and in what circumstances and for what purposes?

A provisional liquidator can be appointed following a petition, or in special circumstances simultaneous with the petition. The purpose of the provisional liquidator is to preserve the assets between the petition and the winding up order. A provisional liquidator can be appointed when there is concern that the assets' value will be diminished or assets are at risk of disappearing or for other justifiable reasons. A provisional liquidator can also help in the facilitation of a restructuring.

Commented [RD(DWH14): (3.5 marks). Good, concise answer but would be better to add (last part) that cannot be appointed solely for restructuring. Also, could have mentioned that powers are prescribed by the court;

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

Question 3.1 [maximum 5 marks]

Describe why you think a liquidator is able take action to challenge an unfair preference and set out what a liquidator must show to succeed in such a claim.

Liquidators require certain powers to ensure that creditors and stakeholders are treated fairly. This includes attacking fraudulent transactions such as an unfair preference. In insolvency proceedings, all creditors (of a class) are meant to be treated equally and a preference goes against this principal. If a liquidator can successfully attack a preference, the overall body of creditors are in a better position because the preference is remedied and hence there will be a greater distribution to creditors by the end of the liquidation.

Commented [RD(DWH15): (2.5 marks). See below. As to presumption, for U/P that relates to the desire to prefer (where connected party). Should also clarify that the counterparty must be a creditor or guarantor.

Commented [RD(DWH16): Although it could be said an unfair preference is a 'fraud on the insolvency laws' and there may even be dishonesty involved, it is not necessary to show dishonesty and U/P would not normally be referred to as a fraudulent transaction

A liquidator must show that the preference occurred within 6 months of the winding up order or within 2 years of the winding up order if the beneficiary of the preference was connected to the company. A liquidator must also show that the preference occurred at a time when the company was insolvent or that the company was rendered insolvent by the preferential transaction unless the beneficiary of the preference was connected to the company (preference assumed in this case). A liquidator must also show that the company intended to provide a preference to the beneficiary so that they would be in a better position should a liquidation occur.

Commented [RD(DWH17): No, starting point is commencement of liquidation (the petition date) (s.180)

Commented [RD(DWH18): Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

Question 3.2 [maximum 5 marks]

Hong Kong has limited formal arrangements to deal with cross-border insolvency. Given that Hong Kong and the Mainland are one country, does this statement stand correct for the Mainland? Discuss.

Commented [RD(DWH19): (4.5 marks) Should mention that there is the statutory provision permitting the HK court to wind up foreign companies (s.327 CWUMPO)

The statement did stand correct prior to May 2021. At this time there is a new arrangement that was set up as a pilot project. The arrangement only applies to certain areas of the mainland (Shanghai, Xiamen, and Shenzhen). The arrangement allows for recognition of office holders in the applicable jurisdiction subject to conditions including a letter of request from the Hong Kong court. The company's comi must be in Hong Kong. A Hong Kong office holder can apply for recognition in an applicable area if the company has assets in that area. Office holders from the mainland can also seek recognition in Hong Kong (if from the applicable areas).

Obtaining recognition in many areas of the mainland is still challenging. Common law has been used by the Hong Kong court to deal with these challenges even though the mainland is not a common law jurisdiction. Difficulties with reciprocity still exist. Despite being 'one country', the laws of Hong Kong and PRC are different, including insolvency provisions. With no overarching agreement, this leads to discrepancies in attempting to meld insolvency proceedings that impact both Hong Kong and PRC. Further work will need to be done to accommodate both systems.

Question 3.3 [maximum 5 marks]

The scheme of arrangement is, in essence, Hong Kong's only statutory tool for corporate rescue. Describe it, listing the pros and cons.

Commented [RD(DWH20): (3 marks) Should reference the court involvement, scrutiny of explanatory statement etc.

Also, as classes are important, should outline requirements (similarity of legal rights, not interests)

A scheme of arrangement is an opportunity for a company facing financial distress to make a proposal to its creditors and stakeholders which includes compromising debts, etc. in order to attempt to avoid winding up the company. A scheme of arrangement is governed by Part 13, Division 2 of the Companies Ordinance. A majority of creditors with at least 75% of the debt and the court must approve a scheme of arrangement.

Pros: -the company can restructure and survive following the implementation of a successful scheme

-some creditors who do not support the scheme can be crammed down if they are in a class that approved the scheme by the necessary majority

-possible to compromise third party guarantees related to debts that are compromised in the scheme

Cons: -no automatic stay and applications for stay are typically unsuccessful (possible to combine a scheme with a provisional liquidator to have stay)

-only can bind debts governed by Hong Kong or if creditor participates in scheme

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

Question 4.1 [maximum 4 marks]

Mr Chan is the sole director of Mountainview Limited, which is a Hong Kong incorporated company. Mr Chan comes to you and tells you that the company has financial difficulties and is unlikely to be able to continue in business. A friend has told him that his only option is that he must go to court to wind up the company, and that he should ensure he appoints a "friendly" liquidator who will not investigate the company's affairs too closely. Mr Chan asks whether his friend is correct and to advise him generally on what he should do and his position as a director.

If Mr. Chan believes the company cannot be saved and the company is not able to pay its debts, a winding up order is a possible option. Mr. Chan, as sole director could enter into a members' voluntary liquidation if the company is solvent. If the company is insolvent, Mr. Chan would have to have a shareholders meeting to pass a special resolution to wind up the company. Or the company can apply to court for a winding up order. An alternative would be a scheme of arrangement to try to restructure the company by offering a proposal to creditors which can compromise some debts. This could allow the company to survive a successful scheme.

The liquidator can be connected to the company in a voluntary liquidation, as the liquidator is chosen by the company's directors and/or shareholders. Therefore, it is possible to select a friendly liquidator. However, a liquidator is obligated to investigate the company's affairs and is obligated to take action against fraudulent transactions such as preferences. A liquidator is also obligated to investigate a director's conduct to ensure that the director was meeting its duties and not committing fraud. As a director, he may be liable if he has committed fraudulent transactions and he should remedy these/be prepared to have to remedy these as part of a liquidation.

Question 4.2 [maximum 5 marks]

Kite Limited is a Hong Kong incorporated company involved in an import / export business. It buys goods on its own account from suppliers in Mainland China, then sells them on to buyers in Europe at a mark-up. The company has been in difficulty for some time, for example due to reducing margins; unfavourable credit terms leading to a mis-match between the dates on which Kite must pay its suppliers and the dates on which it gets paid by its buyers, thus affecting Kite's cashflow; European buyers going straight to Mainland suppliers, etc.

Goshawk Financial Limited (GFL) is one of Kite's lenders. Having been troubled by the way Kite's business has been heading, some months ago GFL insisted that Kite execute a charge over its receivables, also insisting that the charge was stated to be a "fixed charge". Kite agreed and executed the document. No separate account was opened and Kite continued to trade with its customers as before, with money being paid into and out of its normal operating account (not held with GFL).

Recently, GFL appointed a receiver pursuant to the charge executed in its favour. The company has also been wound up on a petition presented by another creditor and a liquidator appointed. The receivables appear to be Kite's only assets. The liquidator asks for your advice on whether she can insist that the receiver hand over realisations he makes in order

Commented [RD(DWH21)]: (1.5 marks) mentions voluntary liquidation but not very clear/full answer

First piece of advice is that it is not correct that Mr. Chan "must" go to court. The voluntary liquidation options should be discussed. (For completeness, could add that a company cannot petition on the basis of a resolution by directors alone (Emmadart) and there is no indication that Mr. Chan is (necessarily) the only shareholder)

No indication in the question of shareholding structure so should add that a voluntary liquidation will need a special resolution (at least 75% of shares)

Should also advise that if company is insolvent owes duties to creditors ahead of the company

Commented [RD(DWH22)]: MVL needs shareholder vote; not a director's resolution

Commented [RD(DWH23)]: a company cannot petition on the basis of a resolution by directors alone (Emmadart) and there is no indication that Mr. Chan is (necessarily) the only shareholder)

Commented [RD(DWH24)]: Only members - but still has duty to act independently

Commented [RD(DWH25)]: (4.5 marks) Full marks if also mentioned considering whether unfair preference; and the new money point mentioned below

that the costs and expenses of the liquidation can be met and the unsecured creditors paid at least a partial dividend.

Even if a liquidator is appointed, a receiver is still allowed to hold assets under the secured creditor's charge and sell them for the benefit of the secured creditor, subject to preferential claims being paid should a floating charge exist. The liquidator cannot get the receiver to provide funds from the realization of secured assets to cover costs of the liquidation or to provide unsecured creditors with a dividend.

However, there are some issues with GFL's security. Namely, if everything remained status quo, it can be argued that no fixed charge over the receivables exist. The facts describe a floating charge and the floating charge would have been perfected by the receiver's appointment. Given this, the liquidator could potentially attack the security as not valid and enforceable, i.e. if the security is not registered. If the security is invalid, then the liquidator could require the receiver to provide the realization of the assets to the liquidator as the security would be void. Note: if it is just deemed to be a floating charge which is valid and enforceable, the receiver is required to pay preferential claims first.

Similarly, given the timing of the creation the charge so close to the liquidation, it could be considered void. Floating charges entered into within 1 year of liquidation are void if the company was unable to pay its debts at the time of the charge. As stated above, while GFL wants this to be a fixed charge, it appears to be a floating charge. In addition, it appears the charge was entered into within 1 year of liquidation and at a time when the company was already experiencing financial difficulties. Hence, the liquidator could argue this was a floating charge that should be void for all assets existing prior to the charge.

Question 4.3 [maximum 6 marks]

Mr Xu entered into a Framework Agreement (FA) with his business associate, Mr Qi. The FA is governed by Hong Kong law. The idea was to develop a resort project in Fiji. The FA provided that Mr Qi would incorporate a BVI company to purchase a 100% interest in the project from its original owners. To this end, Mr Qi incorporated Sunrise Pacific Limited (SPL) in the BVI. He was (and remains) the sole director and shareholder of SPL, telling Mr Xi that this was necessary because the original developers of the resort trusted him and him alone. The FA provided that Mr Xu would inject USD 20 million into the project by advancing that sum to SPL. The FA also provided that if the project could not be developed and sold on to a buyer within a period of two (2) years from the date of the FA, then SPL will pay a sum of USD 22 million to Mr Xu (representing a return of his investment plus USD 2 million to represent interest).

Mr Xu remitted the USD 20 million to SPL but over the months that followed became concerned that the project was not progressing, with many excuses coming from Mr Qi. He subsequently discovered that the project had not even started (and may be a scam entirely). More than two (2) years has passed since the date of the FA and SPL did not pay any money to Mr Xu. Mr Xu therefore obtained a winding up order over SPL in the BVI.

The BVI liquidator appointed has identified:

- (a) There is a clause in the FA that states that if SPL becomes insolvent then all other provisions (including the requirement to pay Mr Xu) are void, and all assets automatically and immediately vest in Mr Qi in order to repay shareholder loans Mr Qi has made;

Commented [RD(DWH26):

Commented [RD(DWH27R26): Except to extent of new money

Commented [RD(DWH28): (1 mark) for mentioning recognition in passing, but not a very full answer

Outline of elements should be included is as follows (not all would be needed for full marks):

Question asks that advice be given to L; answer should be written accordingly

The FA clause that all provisions (including repayment to Xu) are void if SPL insolvent is almost certainly void due to the anti-deprivation principle

Whether L is properly appointed would be a matter for BVI law L will be able to take certain steps in Hong Kong without a formal recognition order

Obtain documents from the company's bank (Bay Capital) Bring an action against Mr. Qi (perhaps for breach of fiduciary duty) (Irish Shipping – but see recent decision of Nuoxi Capital which creates some uncertainty)

IF can find him; also query if has assets (litigation worthwhile?). Need to investigate

L should obtain a recognition order to take other steps that 'belong' to an office-holder as opposed to the company itself (e.g. examination of individuals):

The Hong Kong court is receptive to such applications from legal systems similar to Hong Kong (BVI is one)

The Hong Kong court will need the originating court (BVI) to make a letter of request

The powers that the liquidator can then exercise in Hong Kong must be powers that he has as a liquidator in the home (i.e. BVI) jurisdiction and that he would have if appointed as a liquidator here in Hong Kong (the Singularis principle)

Note that although the jurisdiction to examine in Hong Kong's legislation is a broad one (s.286B), some jurisdictions restrict the power to examine to officers or closely related parties, so this should be checked carefully, certainly as regards Mr. Wong (no suggestion he is an officer). Need to check with BVI lawyers. [nb, some development in more recent cases re basis on which examination powers are exercised]

Re possible assets in the Mainland and the new "co-operation mechanism":

o -> The location of the assets should be identified: at present the mechanism only applies if the debtor's (SPL's) principal assets in the Mainland are in a pilot area or it has a place of business in such an area. The pilot areas are Shanghai, Xiamen and Shenzhen

o -> In any event, the mechanism only applies to proceedings commenced under the specifically identified Hong Kong legislation (CWUMPO, CO etc.). It is therefore unlikely that the liquidator could use the mechanism via a recognition application (i.e. he is 'only' a BVI liquidator which the Hong Kong court has recognised for the purpose of taking certain steps in Hong Kong; he is not appointed under a proceeding commenced under CWUMPO or CO).

o -> However, the Hong Kong court does have jurisdiction to wind-up non-Hong Kong companies (s.327) if the core requirements are satisfied. These are:

☒ - there must be sufficient connection with Hong Kong, (not necessarily meaning the presence of assets within the jurisdiction);

☒ - there must be a reasonable possibility that the winding up order would benefit those applying for it; and

☒ - the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

o -> The liquidator could therefore make an application for an ancillary liquidation and it may then be possible that the new mechanism can be utilised (subject to the other criteria being met) – the mechanism making it clear that the COMI of the debtor (COMI in Hong Kong being a requirement) does not necessarily require the company to be incorporated in Hong Kong. [the answer is may be because where, as here, the company is already in liquidation in its jurisdiction of incorporation, the liquidation here would be ancillary]

- (b) SPL has a (supposedly independent) director, Mr Zhang, who lives in Hong Kong; and SPL also has a book-keeper, Mr Wong, who lives in Hong Kong. Neither Mr Zhang nor Mr Wong are replying to emails from the liquidator;
- (c) SPL has a bank account at a bank in Hong Kong;
- (d) It is not known where Mr Qi is currently, but it is believed he is a Hong Kong resident;
- (e) SPL is believed to have assets in the Mainland, but the liquidator is not sure where these assets are located.

The liquidator asks for your advice on what steps he can take in Hong Kong, including as regards a concern he has that Mr Xu in fact had no standing to bring the winding up proceedings in the first place given the clause in the FA at (a) above. The liquidator has also read about a new “co-operation mechanism” between Hong Kong and the Mainland that he would like to use in respect of (e) above.

Mr. Xu appears to be the victim of fraud.

Given that Mr. Zhang and Mr. Qi live in Hong Kong and that SPL has a bank account in Hong Kong, the Hong Kong courts do have jurisdiction. Mr. Xu may not have had standing to apply for the winding up order, so the liquidator may need to apply to the court for a justified winding up order in Hong Kong by obtaining recognition of the foreign proceeding in BVI or have a joint proceeding opened in Hong Kong. While there are no formal agreements, the court could recognize the foreign proceeding under common law. Alternatively, the liquidator could find a creditor to petition for a winding up order in Hong Kong where a Hong Kong liquidator could be appointed.

Commented [RD(DWH29): A recognition application could not deal with whether Xu had standing in BVI

The new co-operation mechanism between Hong Kong and the Mainland only applies in certain areas: Shanghai, Xiamen, and Shenzhen. If the assets are outside of these areas, there is no co-operation. If the assets are in these areas, the liquidator could apply for recognition and assistance in these jurisdictions and attempt to have the assets secured and sold for the benefit of the creditors.

*** End of Assessment ***

TOTAL MARKS: 34.5 out of 50

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Outline of elements should be included is as follows (not all would be needed for full marks):

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The FA clause that all provisions (including repayment to Xu) are void if SPL insolvent is almost certainly void due to the anti-deprivation principle

Whether L is properly appointed would be a matter for BVI law

L will be able to take certain steps in Hong Kong without a formal recognition order

Obtain documents from the company's bank (Bay Capital)

Bring an action against Mr. Qi (perhaps for breach of fiduciary duty) (Irish Shipping – but see recent decision of Nuoxi Capital which creates some uncertainty)

IF can find him; also query if has assets (litigation worthwhile?). Need to investigate

L should obtain a recognition order to take other steps that 'belong' to an office-holder as opposed to the company itself (e.g. examination of individuals):

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Note that although the jurisdiction to examine in Hong Kong's legislation is a broad one (s.286B), some jurisdictions restrict the power to examine to officers or closely related parties, so this should be checked carefully, certainly as regards Mr. Wong (no suggestion he is an officer). Need to check with BVI lawyers. [nb, some development in more recent cases re basis on which examination powers are exercised]

Re **possible assets in the Mainland** and the new "co-operation mechanism":

o The location of the assets should be identified: at present the mechanism only applies if the debtor's (SPL's) principal assets in the Mainland are in a pilot area or it has a place of business in such an area. The pilot areas are Shanghai, Xiamen and Shenzhen

o In any event, the mechanism only applies to proceedings commenced under the specifically identified Hong Kong legislation (CWUMPO, CO etc.). It is therefore unlikely that the liquidator could use the mechanism via a recognition application (i.e. he is 'only' a BVI liquidator which the Hong Kong court has recognised for the purpose of taking certain steps in Hong Kong; he is not appointed under a proceeding commenced under CWUMPO or CO).

o However, the Hong Kong court does have jurisdiction to wind-up non-Hong Kong companies (s.327) if the core requirements are satisfied. These are:

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☐ the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

o The liquidator could therefore make an application for an ancillary liquidation and it may then be possible that the new mechanism can be utilised (subject to the other criteria being met) – the mechanism making it clear that the COMI of the debtor (COMI in Hong Kong being a requirement) does not necessarily require the company to be incorporated in Hong Kong. [the answer is may be because where, as here, the company is already in liquidation in its jurisdiction of incorporation, the liquidation here would be ancillary – it is yet to be tested whether the Mainland courts will take issue with this. However, for the purpose of this assessment, marks will be awarded for identifying a s.327 winding up as a possible method of accessing the new cooperation mechanism].