



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.**

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.

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.

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).

Commented [RD(DWH2)]: Correct (1 mark) – s.49 and s.51(1)(a) Bankruptcy Ordinance (section 6.2.10.1 of text). 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. For some provisions, the time period changes depending on whether the other party to the transaction is connected to the bankrupt, but not for transactions at an undervalue.

(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.

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

Commented [RD(DWH5): Incorrect (0 marks) – see s.230 CWUMPO (section 6.3.3 of text); when members pass resolution

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.

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.

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.

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

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

Commented [RD(DWH9)]: Incorrect (0 marks) - 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)

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?

For the Hong Kong Court to be able to exercise its bankruptcy jurisdiction the person must:

Be domiciled in Hong Kong;

Be personally present in Hong Kong on the day on which the petition is presented;

At any time in the period of three years ending in that day-

Have been ordinarily resident, or have had a place of residence, in Hong Kong;
or

Have carried out business in Hong Kong.

Commented [RD(DWH11): (2 marks). The answer does not make clear whether the criteria stated all need to be present or whether one will suffice. (It is the latter). Also, should include the source (s.4 of Bankruptcy Ordinance)

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?

The three core requirements needed to establish that a company is sufficiently connected to Hong Kong (as set out in *Re Yung Kee*) are:

A sufficient connection with Hong Kong (but not necessarily the presence of assets in the jurisdiction);

A reasonable possibility that the winding up order would benefit those applying for it; and

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

Commented [RD(DWH12): Correct, 3 marks

Question 2.3 [maximum 4 marks]

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

The term "provisional liquidator" is not a legitimate term as a matter of Hong Kong law. However, an insolvency practitioner with a role similar to that of a provisional liquidator (as known in other jurisdictions) can be appointed under section 193 of CWUMPO for the purposes of preserving the assets of the company in the period after the petition is presented (including realizing assets when necessary to preserve value) and sometimes facilitating a restructuring proposal (although this cannot be the sole reason for the appointment).

Commented [RD(DWH13): (3 marks). This has most of the elements, but should specifically refer to the fact that ordinarily will need to show jeopardy to assets. See also note below

Commented [RD(DWH14): Not correct. The term "provisional LIQUIDATION" is not, strictly, correct (even though commonly used)

An application to appoint a provisional liquidator can be made after the time that the winding up petition is filed or at the same time in urgent cases.

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.

Under sections 266, 266A and 266B of the CWUMPO an unfair preference occurs when an insolvent company does something that puts a creditor or guarantor in a better position than it would have been upon the company's liquidation. A liquidator (in a voluntary or compulsory winding up) can apply to set aside/ claw back the unfair preference.

This is an importing power because it works to prevent directors siphoning out company assets shortly before a company is liquidated for the benefit of some creditors over others, allowing for a fairer distribution of the company's assets.

In order to succeed on an application to set aside an unfair preference a liquidator must show that:

At the time of the alleged unfair preference, the company was unable to pay its debts as the fell due (or became unable to as a result of the transaction). There is a rebuttable presumption of this where the transaction was to a person who is connected to the company (i.e. a person who is an associate of the company or a director (including shadow director));

The company was influenced by a desire (or positive wish) to improve the recipient's position in the event of an insolvent liquidation of the company, which can be difficult to establish.

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.

This statement is correct.

Hong Kong and Mainland China are not part of any international treaties on cross border insolvency, nor have they adopted the UNCITRAL Model Law. In May 2021 an arrangement was made between Hong Kong and certain areas of mainland PRC that is being run as a pilot and allows for Hong Kong officeholders to obtain recognition and assistance in those areas of mainland PRC (and visa versa).

Both Hong Kong and mainland China have limited arrangements to deal with cross border insolvency. Insolvency is not included in the civil and commercial judicial assistance conventions that the PRC has entered into with other jurisdictions. In the PRC the giving of assistance to other courts in relation to insolvencies is based mainly on reciprocity, which is provided for in the PRC Enterprise Bankruptcy Law. In Hong Kong, there is no statutory

Commented [RD(DWH15): (3.5 marks) Should also state time limits and distinction between connected and unconnected parties; and requirement that party 'preferred' is a creditor (or surety); and see below

Commented [RD(DWH16): This particular presumption only applies to transactions at an undervalue (s.266B(3))

Commented [RD(DWH17): (2.5 marks) Should mention that there is the statutory provision permitting the HK court to wind up foreign companies (s.327 CWUMPO)

Should mention that HK court has assisted in PRC insolvencies (e.g. CEFC Shanghai)

Should mention some of the main elements that are needed to use the new mechanism as is not a wholesale provision (e.g. COMI for 6 months in Hong Kong, need for letter of request)

framework- the Hong Kong Court has followed common law principles when dealing with cross border insolvency issues.

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.

At Hong Kong law, a scheme of arrangement a statutory mechanism (with similar wording to the English equivalent) which allows a company to make a binding compromise/arrangement with its members and/ or creditors if the required majorities are met when the scheme is voted on. This includes agreements to adjust debt and reduce share capital. The process includes i) a period of negotiation between the company and its members/ creditors in which the parties attempt to agree an arrangement (sometimes culminating in relevant creditor/ member group signing an agreement to support the scheme); an application to convene meetings of the relevant creditors to consider and (if thought fit) approve the scheme; and then an application to sanction the scheme.

Pros of using a scheme of arrangement as a corporate rescue tool include:

The scheme of arrangement process allows for the compromise to be pushed through / dissenters "crammed down" with less than 100% support;

It reduces the difficulty associated with hold out creditors who seek additional payments or impossible compromises;

The appointment of an insolvency practitioner and use of a court process provides credibility to the restructuring;

It allows viable companies to be rescued and continue trading, rather than going into liquidation (where creditors/ members often recover less);

It allows for practical solutions; and

It allows for third party releases.

A con of using a scheme of arrangement is that there is no moratorium on claims against the company (unless a winding up petition is made/ provisional liquidators are appointed and a stay is imposed by way of section 182 of CWUMPO).

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.

Commented [RD(DWH18): (3 marks) Should also mention that due the 'Gibbs' principle, a Hong Kong Scheme will only compromise debts arising from obligations governed by Hong Kong law. This is a possible downside in the modern environment where a sophisticated debtor is likely to have debts due under other governing laws

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

The answer should also identify the majorities needed

Commented [RD(DWH19): It is not essential to have an IP for a scheme

Commented [RD(DWH20): (3 marks) Clear answer but should also deal with the fact that the 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) Importantly, should also advise Mr. Chan that Liquidators should be neutral and carry out their duties (including investigation of how the company has been run/conduct of directors) irrespective of who appoints/nominates them

It is good that Mr Chan is being proactive as it allows the company options and gives him an opportunity to manage his own risk.

If Mr Chan considers the company to be solvent and able to settle all liabilities within 12 months of the commencement of the liquidation, he should consider a members' voluntary liquidation. This would require the directors to sign a certificate of solvency and for the shareholders to sign a special resolution appointing liquidators. The liquidators would then take control of the business and liquidate it.

If Mr Chan and the other directors cannot/ will not sign a declaration of solvency, a creditor's voluntary liquidation should be considered, where the company puts itself into liquidation voluntarily.

These voluntary processes entail less court involvement and costs, and are usually faster when compared to a compulsory court liquidation by a creditor (which may take place if Mr Chan and the other directors are not proactive).

If a winding up petition is filed and Mr Chan and the other directors think that the company is salvageable, consideration should be given to making an application to appoint a "provisional liquidator" after the winding up petition is filed (or at the same time in urgent cases) under section 193 of CWUMPO. A secondary purpose (to preserving assets) of a provisional liquidator can be to facilitate a restructuring proposal. This could allow for the company's debts to be restructured such that it can continue trading, which may in fact also result in a better return to the company's creditors. Thought should also be given to whether a scheme of arrangement can be entered into with the company's creditors.

In his position as a director, Mr Chan should take all steps necessary to comply with his fiduciary obligations. Mr Chan should keep in mind that when a Hong Kong company is insolvent, a director's duties to the company require them to consider the interests of the creditors of the company (rather than the shareholders, as the case is while the company is solvent). Mr Chan should also be aware of the Hong Kong laws around unfair preference and should avoid making any transactions that could be categorized as an unfair preference.

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

Commented [RD(DWH21): (1.5 marks) for reference to general position (Liquidators cannot get, but may be able to receive for preferential creditors if a floating charge).

However, unfortunately, the answer misses the main points of the advice that should be given to the liquidator. These are:

>First step in any such situation is to check the validity of the charge – execution, registration etc

>Say 'fixed charge' but court will look at substance : Spectrum. Here, can use the receivables so floating charge more likely

>When entered into? Within time period that means may be void against liquidator unless new money (s.267, 267A)

>If any of the above, L can ignore and insist on being handed all of the receivables

>Next to consider: was it an unfair preference (security can be UP – see Sweetmart)? If so, L may also be able to get receivables. Say 'may' because would need to make application and notoriously difficult to show company was influenced by desire to prefer.

>If charge is valid (as floating charge), L cannot lay claim to the receivable (Leyland Daf case) except for preferential creditors (s.265(3B)) – note only asset so there will not be any 'free assets' in estate to meet those

advice on whether she can insist that the receiver hand over realisations he makes in order that the costs and expenses of the liquidation can be met and the unsecured creditors paid at least a partial dividend.

The realisations made by the receiver are not available to the liquidator(s) for payment of liquidation expenses, so the liquidator cannot insist that realisations from the assets subject to the charge be transferred to the liquidation estate to pay liquidation expenses. See s 265(3B) CWUMPO and *Re Good Success Catering Group Ltd* [2007] 1 HKLRD 453.

Nor can the liquidator insist that realisations from the assets subject to the charge be transferred to the liquidation estate to pay at least a partial dividend to the unsecured creditors.

If the charged assets were subject to a floating charge rather than a fixed charge, the liquidator could have insisted that the realisations first be used to meet the claims of preferential creditors (ss 265(3b) and 79 CWUMPO).

The liquidator may however wish to investigate whether the charge given to GFL was an unfair preference and should therefore be void. It will meet this test if the liquidator can show that:

At the time of the alleged unfair preference, the company was unable to pay its debts as they fell due (or became unable to as a result of the transaction); and

The company was influenced by a desire (or positive wish) to improve the recipient's position in the event of an insolvent liquidation of the company, which can be difficult to establish.

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(DWH22)]: (2 marks)

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 makes it clear that the COMI of the debtor (COMI of

(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.

There are issues around standing and how the liquidators were appointed. The major issue is that SPL was not a party to the FA and (as far as the above facts state) never agreed to pay Mr Xu any of the USD 20 million back (or pay him an addition USD 2 million). For Mr Xu to have a claim in the liquidation/ against SPL, he will need a court judgment (and if he does not already have this, will now also need to apply for the automatic stay to be lifted so that he can bring this claim).

The co-operation mechanism referred to stems from a meeting between the PRC Supreme Court and the Hong Kong Government in May 2021. It is a pilot and applies to Hong Kong and certain areas of the Mainland (Shanghai, Xiamen and Shenzhen). It provides a mechanism for the liquidator to obtain recognition and assistance in the parts of the mainland that are subject to the agreement, so whether or not the liquidator can use this mechanism will depend on when the assets are located. If the liquidator cannot use this mechanism, they may still be able to obtain assistance from the PRC courts as they have previously given assistance to other courts based on the principle of reciprocity.

*** End of Assessment ***

TOTAL MARKS: 31.5 out of 50

Commented [RD(DWH23): Mainly for BVI advice but under HK law the FA provision would almost certainly be void due to the anti-deprivation principle

Commented [RD(DWH24): Facts are in outline. Also, given L is a liquidator of SPL he will still need to investigate what happened to the US\$20m. What he then does with it is a different matter

Commented [RD(DWH25): To a BVI liquidator?

(2 marks)

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 – 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].

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