



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)]: 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.

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

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.

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?

First, the debtor is domiciled in HK

Second, the debtor is personally present in HK on the day on which the petition is presented; or

At any time in the period of 3 years ending with that day:

- have been ordinarily resident, or have had a place of residence, in HK; or
- have carried on business in HK

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?

First, there must be sufficient connection with HK. Sufficient connection means the presence of assets; it is listed in HK stock market; Its COMI is in HK or other ways.

Second, there must be a reasonable possibility that the winding up order would benefit those applying for it.

Third, the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets. The connection with HK should be strong and the benefits to creditors are sufficiently substantial.

Question 2.3 [maximum 4 marks]

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

A provisional liquidator could be appointed at any time after the petition is presented but before any order is made.

The provisional liquidator is appointed to preserve the value of the assets of the debtor upon application to court. There must be sufficient circumstances justifying the appointment, for example there must be a risk that assets will be dissipated, or otherwise be in jeopardy, before a winding up order is made.

The provisional liquidator could also be appointed to help facilitate a restructuring proposal.

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

Question 3.1 [maximum 5 marks]

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

Commented [RD(DWH11)]: (2.5 marks). Should include the source (s.4 of Bankruptcy Ordinance) given a specific reference to jurisdictional requirement

Commented [RD(DWH12)]: (3 marks). Would have been preferable to include source (CFA's decision in Yung Kee)

Commented [RD(DWH13)]: (3 marks). Would be better to mention need for urgency, and that powers are as prescribed by the court. Should also mention the Legend Resorts 'restriction' that PL cannot be appointed solely for restructuring

Commented [RD(DWH14)]: (4 marks). Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves

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.

In principle, an “unfair preference” occurs when an insolvency acts to place a creditor in a better position than it would have been upon the company’s insolvency. The following facts must be shown by the liquidator to set aside such transactions.

1. The transaction happened within 6 months prior to the commencement of winding up, or 2 years where the beneficiary was a person connected to the company.
2. The transactions include granting of security as well as payments.
3. At the time of the unfair preference is given, the company was unable to pay the debts or became unable to pay other debts.
4. The liquidator must prove that the company was influenced by a desire to improve that person’s position in the event of a liquidation.

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.

It is true that the Mainland has limited formal arrangements as well. But though the HK and Mainland are one country. They have totally different legal system. HK is the former colony of UK, so it uses the common legal system. Even though the transfer of sovereignty in 1997. The laws of commonwealth countries still play an important rule in HK, more important than the influence of courts in mainland.

Though both jurisdictions have limited formal arrangements, there is a new arrangement between them published in 2021 to set several pilot cities to build mechanism of cooperation and recognition on 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.

There is not formal legislation on corporate rescue in AU law. But scheme of arrangement mechanism has been used for several years to effect restructuring. It is developed out of common law system. Based on UDL decision, HK court has established 3 steps of scheme of arrangement.

- First, an application is made for leave to convene meetings of the creditors.
- Second, the scheme meetings take place and the result is reported to the court.
- Third, application is made by petition for court to sanction the scheme.

The benefit of scheme of arrangement is that the debtor does not need 100% approval of all creditors to contractually vary the debt. The scheme is considered approved by the scheme creditors’ meeting only if it is supported by a majority in number representing at least 75% by value of the creditors present and voting.

One disadvantage of scheme of arrangement is the lack of moratorium. But in practice, the use of provisional liquidator helps solve this problem, though there are some limitations. The reform of scheme of arrangement is underway but it may take quite long time.

Commented [RD(DWH15): “insolvent company”?

Commented [RD(DWH16): (1 mark) Not a very full answer

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)

Commented [RD(DWH17): (2.5 marks) a more complete answer would score better

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)

Commented [RD(DWH18): ??

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.

Mr Chan could talk with the creditor try to restructure the company out of court. If they do not agree, there are several ways to wind up the company without too much intervene of the court.

If the company go to liquidation through MVL or CVL, the liquidator shall be appointed or recognized the shareholders or meeting of creditors, so even the directors appoint a “friendly” liquidator, the liquidator could be denied by the shareholders and meeting of creditors. Normally the court will not intervene in the procedures above. The court play more important rules in Compulsory liquidation.

Wind up the company is an option, but he could also choose the scheme of arrangement to make scheme to rearrange the debts to rescue the company. He could also use the chance to introduce new investors to give fresh blood to the company.

Liquidators are required to report to the Official Receiver the conduct of director of the company, it is their statutory litigation. So, the liquidator will break the law if he/she does so to cover the issues of the company’s affairs.

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

Commented [RD(DWH19): (2 marks) Correct to identify voluntary liquidation as the preferred option

Should also advise it is not correct that Mr. Chan “must” go to court. (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(DWH20): (3 marks) correctly identifies main principle (Leyland Daf) and that L needs to consider whether charge valid.

Should also advise that given way account was operated, likely a floating charge (Spectrum Plus)

An outline of the thought process for the main points of the advice that should be given to the liquidator:

>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

According to the Leyland Daf case, the realizations made by the receiver out of the assets charged under which he is appointed are not available to the liquidator for payment of the liquidation expenses, unless there is surplus in the realization.

However, there are still chances that the liquidator challenge the receiver.

First, the liquidator shall examine whether the charge is registered. According to Section 334, book debts charge shall be registered.

Second, the liquidator shall examine whether it is a fixed charge:

- If it is a fixed charge, it means the asset, the receivables, become specific when the charge was executed. So, the receivable happened after the date of execution would be out of the scope of charge and could be used to pay the expenses of liquidator and unsecured creditors.
- If it is a floating charge, the liquidation may claim that it is not valid because it is entered into within a period of 12 months prior to the commencement of the liquidation.

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;
- (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;

Commented [RD(DWH21): Only if no new money

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 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

- (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.

First, the BVI liquidator must decide the approach to have seek cooperation of HK court. Generally, it has two options: seek for a recognition order to exercise the power as a foreign insolvency representative or commence an ancillary liquidation in HK.

Though the HK court has been keen to assist foreign representatives by relying on common law principle, but there are some disadvantages.

For example,

- the power sought to be exercised in HK must be subject to the powers available to the liquidator in BVI;
- The liquidator needs to get a specific recognition from HK court to deal with the HK assets.
- There may be more difficulties for liquidator to deal with assets in Mainland without the ancillary liquidation.
- The powers exercisable will be more restricted, The BVI liquidator will have more troubles in issues liking confirming whether Mr Qi is a Hong Kong resident, finding ways to get in contact with the book-keeper and other directors or having the transaction between the shareholder and the company avoided.

To sum up, I recommend the BVI liquidator take the first step to initiate an ancillary liquidation proceeding in HK. Because the company was set up in BVI, the liquidator shall prove the three core requirements of courts to wind up an unregistered company in HK: there are sufficient connections; the liquidator will benefit from the application and the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Second, the liquidator shall research into assets, liability, and company affairs in HK, especially about the validity of the loan between Mr Qi and the debtor. The liquidator could seek the hand over of book and records to research whether Mr Qi has broken his duty as the director.

Third, the liquidator shall apply for an order from the court to deal with the debtor's bank account in HK.

Forth, if the following requirements are met, the liquidator could seek recognition of HK liquidation proceeding in the Mainland.

- The HK proceeding is a collective one;
- The debtor's COMI is in HK;
- The debtor's principal assets, place of business or a representative office are in a pilot area.

If the liquidator has no idea where the assets locate in the Mainland, it could ask the HK court to send a letter of request to initiate the co-operation mechanism.

Commented [RD(DWH23)]: First should deal with L's question about Xu's standing because of the FA provision: anti-deprivation principle

Commented [RD(DWH24)]: good

Commented [RD(DWH25)]: Not really; could enlist help of HK-based professionals

Commented [RD(DWH26)]: But could seek bank docs without an order (Bay Capital)

Commented [RD(DWH27)]: No; court will not investigate. L will need to do that. Can only take advantage of the mechanism if can identify assets in pilot area

*** End of Assessment ***

TOTAL MARKS: 32 out of 50

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(2 marks)

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

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

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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].