INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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.

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3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

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6. The final submission date for this assessment is **31 July 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.

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.

(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.

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.

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.

(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.

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]

Commented [RD(DWH11]: (3 marks). Good complete answer with source

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?

The debtor must be an individual and, pursuant to section 4 of the BO, must:

(1) Be domiciled in Hong Kong;
(2) Be personally present in Hong Kong on the day on which the petition is presented; or
(3) At any time in the period of three years ending that day:-
    a. Have been ordinarily resident, or have had a place of residence in Hong Kong, or
    b. Have carried on business in Hong Kong.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12]: (3 marks). Good complete answer with source

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

In order to wind up an unregistered company in Hong Kong (which includes a "registered non-Hong Kong company"), the petitioner must satisfy the court that the company in question is sufficiently connected to Hong Kong by satisfying the "three core requirements" set out in the CFA's decision in Re Yung Kee. These are:

(1) There must be sufficient assets in connection with Hong Kong (not necessarily meaning the presence of assets within the jurisdiction);
(2) There must be reasonable possibility that the winding up order would benefit those applying for it; and
(3) The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Question 2.3 [maximum 4 marks]

Commented [RD(DWH13]: (3.5 marks). Full marks if mention that powers are as prescribed by the court (powers depend on circumstances)

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

An application to appoint a provisional liquidator may be made any time after a petition has been presented, although in urgent cases the application may be made at the same time as the petition.

A creditor might consider applying for appointment of a provisional liquidator under CWUMPO section 193 in order to obtain a moratorium, thereby some breathing space for negotiations with creditors, and for the provisional liquidator to promulgate a Scheme of Arrangement. However, the provisional liquidator appointment is only likely to be possible if assets are in jeopardy. If the purpose is only to effect a restructuring , the application will fail.

A provisional liquidator is tasked with preserving assets in the period after the petition is

presented but before any order is made, but not actually realise those assets (save where this might be necessary to preserve their value).

A provisional liquidator can be appointed to help facilitate a restructuring proposal, although that cannot be the sole reason for the appointment.

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.

An unfair preference occurs when an insolvent company acts to place a creditor (or guarantor) in a better position than it would have been upon the company's insolvency. The liquidators of a company may make an application to set aside such transactions. If transaction is proved to be an "unfair preference pursuant to section 266 of CWUMPO, the orders which may be made by the court include vesting in the liquidator the property which is the subject of the unfair preference, or directing any person to pay to the liquidators any benefits received from the company.

The liquidator must show that, at the time the asserted unfair preference was given, the company was unable to pay its debts or became unable to pay its debts as a result of the transaction concerned. This criterion is presumed against a recipient who is "a person connect with the company", although this presumption can be challenged by the recipient.

A person is a connected person of the company if he or she is an "associate" of the company or if he or she is an "associate" of a director or shadow director of the company. For a company, associates include another company which is controlled by the same person as the company being wound up.

The liquidator must also prove that the company was "influenced by a desire" to improve that person's position in the event of a liquidation. It is difficulty for a liquidator to demonstrate this. A transaction will not be set aside as an unfair preference "unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation" and a person does not "desire" all of the "necessary consequences of his actions". The court has been prepared to find that the desire to prefer existed.

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.

There is a new (May 2021) arrangement between Hong Kong and certain areas of the mainland PRC. Thise areas were designated as pilot areas for a new co-operation mechanism as between Hong Kong and the Mainland. This is an important development for Hong Kong. The arrangement provides a mechanism for Hong Kong office holders to obtain Recognition and assistance in those areas of the Mainland, and for Mainland office holders to obtain recognition and assistance in Hong Kong.

This cooperation mechanism stemmed from the record of meeting between representatives of the Supreme Court in the Mainland and of the Hong Kong Government. The record of meeting is stated to be based on furthering the intent of Article 95 of the Basic Law which

Commented [RD(DWH14]: (2.5 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves. Also, should also state time limits and distinction between connected and unconnected parties

Commented [RD(DWH15]: Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

Commented [RD(DWH16]: ??

Commented [RD(DWH17]: (3.5 marks) Good answer but Should mention that there is the statutory provision permitting the HK court to wind up foreign companies (s.327 CWUMPO) and common law (CEFC Shanghai for example)

provides that "the Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the juridical organs of other parts of the country, and they may render assistance to each other. The meeting refers to the mutual recognition of and assistance to "bankruptcy proceedings" between Hong Kong and the Mainland.

The record of meeting refers to Hong Kong appointed liquidators or provisional liquidators in insolvency proceedings being entitled to apply for recognition in the Mainland, and for Mainland administrators to apply for recognition in Hong Kong.

In the context of cross border insolvencies in Hong Kong, this arrangement is a very significant step. The Hong Kong court has already made reference to the mechanism in a case where the presence of the second core requirement was in issue, with the court indicating that the petitioner may as well benefit from a winding up order being made in Hong Kong because the liquidator then appointed may well be able to take advantage of the new mechanism to gain access to the Mainland subsidiaries.

The court has also made it known in a couple of decisions that the mechanism is an important step forward and should be used, and has already granted a letter of request to a liquidator to enable that liquidator to seek recognition in Shenzhen (being one of the pilot areas).

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.

The scheme of arrangement ("SOA") has been used for a number of years to effect restructurings.

A SOA allows companies to make binding compromises or arrangements with their members and/or creditors (or any class of them), including adjustment of debts owed to its creditors or reduction of share capital. A SOA acts as a court sanctioned compromise or arrangement which binds all creditors of the relevant class, even those who vote against it.

For debt restructuring purposes, a SOA enables companies and their creditors to compromise or adjust debts if stipulated majorities of the relevant creditors approve such compromise or adjustment and the court sanctions such arrangement. Without a SOA, a company would need to obtain the approval of 100% of the relevant creditors to contractually vary the debt. Schemes are therefore useful - and necessary – where a company seeks to adjust debts with many creditors at the same time in circumstances where it would be difficult or impossible to seek unanimous consent of all creditors.

Schemes are also useful where there may be hold-out creditors seeking an unfair advantage (such as an additional payment) as against a majority of similarly ranked creditors.

A weakness for using a SOA on its own is that Hong Kong law does not provide for a moratorium on creditors' actions while a SOA plan is being processed and in the past the courts have refused applications for such a stay.

However, there have since been certain amendments to the Rules of the High Court which now provide that the court's case management powers include a specific power to stay proceedings and it would appear that the court accepts that a possible winding up is a situation where its discretion should be exercised in that regard. It is therefore more likely

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 mention the statutory majorities needed and (3mthe court involvement, scrutiny of explanatory statement etc.

that, in that situation, the Hong Kong court would permit a stay to aid a restructuring such as a SOA.

Also, a practice has developed in Hong Kong whereby a petitioner for the winding up of the company would be presented and an application made for the appointment of provisional liquidators, with specific powers to investigate the possibility of and, if viable, promulgate the restructuring of the company's debts. The moratorium is then obtained by reason of section 182 of CWUMPO. A SOA promulgates in such circumstances would usually provide for the petition to be dismissed on the scheme's successful implementation.

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 needs to be aware of his own liability as the sole director of Mountainview, rather than concerning himself with appointing a "friendly" liquidator. There are no express statutory provisions creating an obligation to commence liquidation. Further, there are (at present) no insolvent trading provisions and the fraudulent trading provisions are difficult to establish. However, directors do need to be cautious that they do not breach their fiduciary duties by continuing to trade when the company is insolvent. A director can face criminal liability if employees are not paid.

Once a company becomes insolvent, although the duties owed by directors remain duties to the company, the directors must exercise those duties with the best interests of the creditors in mind.

The best option available to Mr Chan is to commence a creditors' voluntary liquidation ("CVL"). This can occur where the company decides to put itself into voluntary liquidation but is not solvent.

The director (whether by their own volition or at the request of the shareholders) can convene a meeting of shareholders in order to pass a special resolution for the winding up of the company. The CVL will commence on the date of the passing of this resolution. A liquidation appointed at the shareholders' meeting has limited powers until his appointment is confirmed at the creditors meeting.

A meeting of creditors will also be convened within 14 days of the meeting of the shareholders, and a statement of affairs of the company should be laid before that meeting. The directors meeting must also be advertised. Mr Chan will have to preside over the meeting, unless he appoints a representative to do so.

Creditors will nominate and vote for the appointment of a liquidator at the first meeting of creditors.

Once the decision has been taken to convene meeting of the creditors and shareholders, Mr Chan must take steps to protect the assets of the company pending the meeting of the creditors.

Commented [RD(DWH19]: (3.5 marks) 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

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)

May also be the case that a MVL is possible depending on debt profile

The benefits of a CVL, rather than a compulsory (court) liquidation by a creditor, is costs and timing. In the compulsory procedure, there is a much greater level of court involvement than in the CVL procedure, which can lead to delays and additional costs. A CVL can be commenced quite quickly compared with a compulsory liquidation. This may be more appealing to Mr Chan.

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

GFL explicitly stated that the charge over Kite's receivables was to be a fixed charge, which Kite agreed to. A fixed charge is a charge in relation to a specific asset (in this case, Kite's receivables) and attaches as soon as the charge is created, or the relevant asset it acquired by the debtor. The debtor cannot deal with the asset without the consent of the chargee. From the information provided above it appears that, given that no separate account was opened and Kite continued to trade with its customers as before, Kite was dealing with the assets that were subject to the fixed charge. It is not clear whether Kite obtained GFL's consent to do so.

Where a secured creditor holds a mortgage or a fixed charge, the creditor is entitled to look to the asset for repayment irrespective of the interests of other creditors.

The realisations made by the receiver out of the assets charged are not available to the liquidator for payment of the liquidation expenses, so the liquidator of Kite cannot insist that the receiver hand over realisations he makes in order to pay the costs and expenses of the liquidation.

Pursuant to statute, where realisations are made out of assets covered by a *floating charge*, those realisations must first be used to meet claims of preferential creditors. This is of no assistance to the liquidator in this situation here however, as GFL is the holder of a fixed charge and not a floating charge. The realisations made by the receiver in this scenario cannot be used to pay any of Kite's other creditors, whether preferential, unsecured or otherwise.

Enforcement of a fixed charge stands wholly outside the liquidation process. The liquidator

Commented [RD(DWH20]: (1 mark) for identifying when charged assets can be available to a L.

However, 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

of Kite does not affect the receiver's right to hold and/or sell the property or assets secured by the charge under which he is appointed.

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;

(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.

A contractual clause that provides for the determination or modification of a contract upon the insolvency of the counterparty will typically be upheld, although there are limits to this. A court will not uphold a contract term which results in general creditors being deprived of an asset that would, in the absence of the clause, be used to satisfy their debts. This is known as the anti-deprivation principle. The language and effect of such a clause will be considered

Commented [RD(DWH21]: (3.5 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":
- 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
- 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).
- 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.
- 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].

on a case by case basis, and the courts have developed a number of factors that will assist in determining if the ant-deprivation principle has been violated. Such factors include whether the intention was to evade insolvency laws. From the information provide above, it does appear that the clause in the FA was intended to deprive Mr Xu of his rights.

The anti-deprivation principle is aimed at precenting parties from using a contractual arrangement to give an advantage to one of the contracting parties in the event of the insolvency of the other. The clause in the FA is clearly intended to prefer Mr Qi. The clause is likely to be struck down by the court, therefore the liquidator need not worry about Mr Xu's standing.

Although Hong Kong lacks a statutory framework to deal with cross-border insolvency, the Hong Kong court has always followed common law principles in this regard. A foreign liquidator's right to bring an action in Hong Kong in the name of the company has long been recognized.

The jurisdiction to wind up a company that is not incorporated in Hong Kong (such as SPL) can apply to a "free standing" Hong Kong liquidation or can be used to commence an ancillary liquidation in Hong Kong where there is a principle liquidation elsewhere – most likely in the company's place of incorporation (in tis case, the BVI).

This would be a useful tool for the BVI liquidation. As the Hong Kong court has applied the "modified universalism" approach, the liquidation in Hong Kong will be generally treated as ancillary in the sense that the functions of the liquidator would be to collect assets in Hong Kong, to settle a list of Hong Kong creditors and to transmit the assets and the list to the principal liquidators to enable a dividend to be declared and paid. In granting an ancillary winding up order in Hong Kong, the court will still have to be satisfied that the three core requirements are met. The petitioner must satisfy the court that SPL is sufficient connection to Hong Kong (which does not necessarily mean assets in Hong Kong), 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.

This test is easily met here. SPL has a sufficient connection to Hong Kong as its director and bookkeeper live in Hong Kon and it has a bank account in Hong Kong, and the winding up order would benefit those applying for it. Further the Hong Kong Court can exercise jurisdiction over Mr Xu, who has an interest in the distribution of the company's assets.

A new cooperation mechanism has been brought into effect between the Mainland and Hong Kong. This only applies to certain areas of the Mainland however which have been specifically designated as pilot areas, so whether this new mechanism is useful to the liquidator will depend on where SPL's assets are located in the Mainland.

*** End of Assessment ***

TOTAL MARKS: 36.5 out of 50

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