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.

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.

(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.

(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]: Incorrect (0 marks) - s.186 CWUMPO (section 6.3.7 of text) – only when the order is made; 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?

The debtor must meet the following jurisdictional requirements:
- Be domiciled in Hong Kong;
- Be personally present in Hong Kong on the day the petition is presented; or
- At any time in the period three years ending with that day;
- Have been ordinarily resident, or have had a place of residence, in Hong Kong; or
- Have carried on business in Hong Kong.

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?

There are three core requirements as set out in the **CFA's** decision in Re Yung Kee, as follows:
1. There must be sufficient connection with Hong Kong, not necessarily meaning the presence of assets within the jurisdiction;
   a. As established in *Re Irish Shipping Ltd* the assets can be of any nature.
2. There must be a reasonable possibility that the winding up order would benefit those applying for it;
   a. There must be clear evidence that the liquidation would benefit the petitioner.
   b. This requirement cannot be dispensed with, nor moderated.
   c. This is most often demonstrated through having assets in Hong Kong.
3. The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.
   a. The petitioner has the obligation to prove that there are persons with sufficient connection with Hong Kong that have an economic interest in the winding up in order to warrant the engagement of the Hong Kong winding up regime.
   b. The Court of Appeal in *Re China Medical* established that this requirement must be met unless there is a sufficiently strong connection with Hong Kong and there are sufficient benefits to creditors.

Question 2.3 [maximum 4 marks]

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

A provisional liquidator's purpose is to preserve the assets in the period after the petition is presented but in advance of any order being made. However, the role is not to realise those assets. In the ordinary course of a provisional liquidator being appointed, the Court will permit the sale of assets upon an application being made to Court.

A provisional liquidator can be appointed to assist with the implementation of a restructuring proposal, however this is not allowed to be the only reason for the appointment.

The application to appoint a provisional liquidator can be made at any stage after the petition has been presented, with the application being made at the same time as the petition

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)

Commented [RD(DWH13]: (4 marks)

is urgent situations. The Court has the power to appoint provisional liquidators whilst there are voluntary liquidators currently appointed.

Where a liquidator is provisionally appointed by the Court, there may be limits and restrictions to the powers afforded by the Order of appointment. The Court may terminate the liquidator upon application by the following:

- A provisional liquidator
- The Official Received
- A creditor
- A contributory
- The petitioner
- The Company.

Further, other factors must be present, such as a high chance of the dissipation of assets before a winding up order being made. The Court will consider commercial factors and the rationale for the urgency of the application.

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.

A liquidator is able to take such action to challenge an unfair preference as it unfairly prejudices the wider creditor body, where the job of the Liquidator is to protect the interests of the creditor body.

An unfair preference occurs when an insolvent company acts to place a creditor or guarantor in a better position that it would have been upon the company's insolvency.

The liquidator must be able to prove that at the time the asserted unfair preference was asserted, the company was unable to pay it's debts or the transaction caused the company to be unable to pay it's debts.

The liquidator must also be able to demonstrate thar the company was influenced by a desire to improve that person's position in the event of a liquidation. This can be complex to prove and the liquidator needs to prove that the company positively wished to improve the creditor's position in the event of its own insolvent liquidation. The aforementioned difficulty was demonstrated in the Stanley Hau case.

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.

In the aftermath of the 1997 handover, mainland China has no longer be seen as a 'foreign country' with respect to the enforcement of foreign judgements.

The Mainland Judgements (Reciprocal Enforcement) Ordinance (Cap 597) was introduced in August 2008 and provided that a registered Mainland judgment carries the same weight as if the judgment was handed down by the Court of First Instance in Hong Kong and entered on the date of registration.

The above-mentioned arrangement only applies in certain circumstances, outlined as follows:

- Commercial contracts
  - Only applicable with respect to the enforcement of money judgments which have arisen from commercial contracts.
- Valid agreement on choice of Mainland court

Commented [RD(DWH14]: (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)

Commented [RD(DWH15]: (1.5 marks) Not 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(DWH16]: Not relevant to the question

- In order to ensure enforceability in Hong Kong, the Mainland judgment must provide exclusive jurisdiction to a Mainland court.
- Money judgements from a designated court
  - Judgments with respect to fines, penalties, or taxes are excluded.
  - Further, per Cap 597, Sch 1, only Mainland judgments that have been handed down by courts stated in the legislation are to be recognized.
- Final and conclusive judgments
  - The judgment that will be executed must be final and issued after the start of Cap 597.

A new arrangement was agreed in May 2021 to assist with co-operation between Hong Kong and Mainland China. The agreement provides Hong Kong officeholders to gain recognition in Mainland and for Mainland officeholders to gain recognition in Hong Kong. This has recently been applied in the cases of Samson Paper Company Limited and China All Access (Holdings) Ltd.

In conclusion, I disagree that the statement stands true for the Mainland due to the above-discussed facts that significantly differentiate the Mainland from other jurisdictions.

Question 3.3 [maximum 5 marks]

Commented [RD(DWH17]: (4 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 scheme of arrangement is, in essence, Hong Kong's only statutory tool for corporate rescue. Describe it, listing the pros and cons.

A scheme of arrangement is a court-approved binding compromise between a company and it's creditors or shareholders. This can include the reduction of debt or share capital. A scheme of arrangement is not a formal insolvency procedure, and can be used by either solvent or insolvent companies.

One of the primary benefits of a scheme of arrangement is that it only requires the approval of 50% of the creditors who vote and 75% of the total value of the creditors who vote. This means that approval is not required from all creditors in order to implement the scheme of arrangement.

Another benefit is that a scheme of arrangement will bind all creditors, regardless of whether they voted, once approved by the court (at the second court hearing).

Also, there is no restrictions on whether the member, creditor or liquidator may initiate a scheme of arrangement.

One of the downside to the use of a scheme of arrangement is the lack of any moratorium on creditors actions, and the Hong Kong Court has previously refused actions for such a stay, as within Credit Lyonnais v SK Global Holding Hong Kong Ltd [2003]. The Court has developed it's Rules and the Court accepts that a possible winding up in a position in which discretion can be applied with the granting of a stay. However, to address this, a practice has developed in HK whereby a petition for the winding up is presented and an application made for appointment of provisional liquidators with the specific powers to assess ability to restructure the debts of the company. Subsequently the moratorium is obtained through s.182 of CWUMPO.

Commented [RD(DWH18]: 186

Further, a scheme or arrangement is process in which the Court is involve, which could add significant cost to the restructuring, and also can protract the timeframe involved.

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH19]: (3 marks) See below

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’s friend is incorrect, there is another alternative to going to Court to wind up Mountainview.
Mr Chan could seek to enter into creditors’ voluntary liquidation (**CVL**). A CVL is where the company puts itself into voluntary liquidation when it is insolvent.
Mr Chan will have to initiate the process by means of convening a shareholders meeting in order to pass a special resolution for the winding up. Upon the resolution being passed, the CVL shall become effective upon that date. The liquidator appointed at the meeting by the resolution, shall not be entitled full liquidators powers until the appointment is confirmed at the creditors meeting, which must occur no later than 14 days after the shareholders’ meeting. At the creditors meeting, a statement of affairs must be prepared by Mr Chan to present to the creditors, as per section 241 (3)(a) of CWUMPO.
Mr Chan’s friend is also wrong with respect to the appointment of a ‘friendly’ liquidator, as it is ultimately he creditors who will vote upon the choice of liquidator at the first meeting of creditors. The duty of Mr Chan is to protect the assets of Mountainview, per s242 of CWUMPO. Ultimately, I would advise Mr Chan, that the CVL will likely be more time efficient and more cost effective than a Court-led compulsory liquidation, with the likelihood of higher creditor distributions on the basis that *ad valorem* duty payable in compulsory liquidations are not payable in CVLs.

Commented [RD(DWH20]: Not so much this. The point is 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

Given the circumstances and limited information provided in relation to Mountainview, it would not appear that section 228A of CWUPO would be appropriate.

Mr Chan should also examine the possibility of a consensual restructuring with creditors, which could involve a scheme of arrangement.

Question 4.2 [maximum 5 marks]

Commented [RD(DWH21]: (2 marks) Correctly identifies that likely a floating charge but not the other elements

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

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.

Section 79 of CWUPMO states that preferential claims are to be satisfied from floating charge realisations, even if there is no liquidation proceeding at the time.
Section 265(3B) explains that within a liquidation, preferential creditor claims are paid out of floating charge realisations to the extent there are insufficient 'uncharged' assets available to the liquidator.

Per the definition of a floating charge as established in *Re Yorkshire Woolcomber's Association Limited,* there are three characteristics to meet;

1. If it is a charge on a class of assets of a company present and future
2. If that class is one which, in the ordinary course of the business of the company, would be changing from time to time
3. If you find that by the charge it is contemplated that, until some future step is taken by its business in the ordinary was as far as concerns the particular class of assets I am dealing with.

With respect to the above, the scenario meets the criteria set out in the points 1, 2 & 3. As such, the charge should be considered as a floating charge.

Upon a 'triggering event', i.e an insolvency procedure occurs, the debtor has to cease to use the assets under the floating charge. The receivable over which there was a floating charge, has now crystallized to a fixed charge. The insolvency practitioner must seek the consent of GFL in advance of dealing with the asset.

Per the above definitions and applications, the liquidator cannot insist that the receiver hand over realisations to pay unsecured creditors. Preferential creditors and liquidation expenses must be satisfied prior to this occurring.

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 Xu 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:

Commented [RD(DWH22]: No, only preferential

Commented [RD(DWH23]: (3 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 ... [1]

(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.

The BVI liquidation should seek recognition of their winding up order in Hong Kong. This would allow the order to be registered with the Court of First Instance.

As per s286b with CWUMPO, the liquidator may apply to the court in order to compel both Mr Zhang and Mr Wong to be examined under oath at court in relation to the affairs and property of SPL. Further, the liquidator should order the delivery of the full books and records of SPL for investigations to be undertaken to the affairs of the Company.

It appears that Mr Xu had authority and standing to initiate the winding up proceedings on a 'just and equitable basis' due to the lack of communication, the breakdown in trust and the potential suspicion of fraud.

Since 1997, Mainland China is no longer considered a 'foreign country', hence the rules to enforce a 'foreign judgment' would not apply.

The liquidator should seek to take control and custody on the bank account in Hong Kong following the recognition of the BVI order.

The 'co-operation mechanism' allows for the Hong Kong liquidator to seek recognition and assistance from the Mainland's Courts. This arrangement is only available if the debtor's COMI was in Hong Kong for at least six months previously. Whilst the COMI is usually the country of incorporation, which would be BVI in this scenario and hence barring and nullifying this possibility, the court will consider other factors. In this scenario, the bank account, independent director and book keeper are all Hong Kong based which provides a strong case to shift the COMI to Hong Kong, from BVI. There must be a sufficiently strong connection between SPL and either Shanghai, Xiamen and Shenzhen for recognition to be granted, as they are the three pilot areas. With the facts of this scenario being that the liquidator is not aware of the nature of the specific assets, not the location, this would significantly lower the chance of recognition through the co-operation mechanism.

Commented [RD(DWH24]: Availability of asset in those places

*** End of Assessment ***

TOTAL MARKS: 35.5 out of 50

Page 10: [1] Commented [RD(DWH23] **Robin Darton** **18/08/2022 11:46:00**

(3 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].