



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).
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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.**

Question 1.2

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

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

Question 1.3

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

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

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

Commented [RD(DWH2)]: Correct (1 mark) – s.49 and s.51(1)(a) Bankruptcy Ordinance (section 6.2.10.1 of text). Although the commencement of a bankruptcy is the date of the order, most of the provisions dealing with the trustees’ ability to challenge earlier transactions use the date of the petition as the starting point of the ‘relation-back’ period. For some provisions, the time period changes depending on whether the other party to the transaction is connected to the bankrupt, but not for transactions at an undervalue.

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

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

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

Question 1.4

Select the **correct** answer:

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

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

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

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

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

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

Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

Commented [RD(DWH6): Incorrect (0 marks) – there is no definition of insolvency in Cap 32. 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)

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?

Section 4 of the Bankruptcy Ordinance sets out the jurisdictional requirements, which are:

- The debtor must be domiciled in Hong Kong;
- The debtor must be personally present in Hong Kong on the day on which the petition is presented; or
- The debtor has at any time in the period of three years ending on that day:
 - o Been ordinarily resident, or have had a place of residence in Hong Kong; or
 - o Carried on business in Hong Kong.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12): (3 marks)

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

The core requirements are:

1. There had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;
2. There must be a 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 in the distribution of the company’s assets.

(*Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501)

Question 2.3 [maximum 4 marks]

Commented [RD(DWH13): (3 marks). Answer should say that powers are prescribed by court; and that cannot appoint SOLELY for the purpose of restructuring

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

Provisional liquidators can be appointed at any time after the presentation of a winding up petition and before a winding up order is made (s 193(1) of the CWUMPO).

Court may appoint provisional liquidators if (1) there is a prima facie case that a winding up order will be made and (2) in the circumstances of the case it would be right that a provisional liquidator be appointed (for example, there is a risk of jeopardy to the company’s assets) (re *Union Accident Insurance Co Ltd* [1972] 1 All ER 1105).

Provisional liquidators are usually appointed to preserve the assets of the company before the winding up order is made; to investigate the affairs of the company if there is any question as to the integrity of the company’s management and the quality of its

accounting and record keeping; and to explore and facilitate a restructuring of the company.

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.

Unfair preference occurs when an insolvent company acts to place a creditor in a better position than it would have been in upon the company's insolvent liquidation. It is in breach of the pari passu principle. So the liquidator, who is responsible for distributing the company's assets in accordance with the pari passu principle, is empowered to take action to challenge an unfair preference.

In order to succeed in the claim the liquidator must show that:

1. The person being benefited by the impugned transaction is an existing creditor;
2. The effect of the transaction is to put that creditor in a better position than he would have been in in the event of the company's insolvent liquidation if that transaction had not taken place;
3. The transaction was made at a time that the company was unable to pay its debts or became unable to pay its debts as a result;
4. In making the transaction, the company was influenced by a desire to improve the position of that creditor.

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.

Under one country, two systems policy, Hong Kong's judicial system is separate from and different to the Mainland judicial system. Hong Kong proceedings are not automatically recognised in the Mainland, and neither do Mainland proceedings can be automatically recognised in Hong Kong. Until recently, there is very limited formal arrangement between the Mainland and Hong Kong, recognition is made on a base by case basis.

In May 2021, Hong Kong and the Mainland entered into a formal arrangement concerning cross-border mutual recognition, assistance and cooperation arrangement between Hong Kong and Mainland in relation to corporate insolvency and restructuring matters. Initially, the new arrangement applies only to the pilot areas in the Mainland, which are, Shanghai, Xiamen and Shenzhen. Under the new arrangement, a Hong Kong liquidator may apply to the relevant court in a pilot area for recognition and assistance, if (1) the Hong Kong proceeding is a collective insolvency proceeding, (2) the debtor's COMI is in Hong Kong, and (3) the debtor's principal assets in the Mainland are in a pilot area, or it has a place of business of a representative office in a pilot area. Interim relief will also be available upon application from the time of the application for recognition and assistance until such application is determined. Upon recognition, certain relief such as suspension of civil action and arbitration proceedings against the debtor will automatically come into effect.

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): Or guarantor

Commented [RD(DWH16): (3.5 marks) Should mention that there is the statutory provision permitting the HK court to wind up foreign companies (s.327 CWUMPO)

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

Under the new arrangement, recognition of Mainland insolvency proceedings in Hong Kong continues to be dealt under the existing common law framework. On application, the Hong Kong High Court may grant (i) recognition of liquidation, reorganization and compromise proceedings under the Mainland's Enterprise Bankruptcy Law, (ii) recognition of a Mainland bankruptcy administrator's office as an administrator, and (iii) assistance for discharge of the bankruptcy administrator's duties as an administrator.

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.

A scheme of arrangement is a statutory mechanism which allows companies to make binding compromises or arrangements with their members and/or creditors (or any class of them), including adjustment of debts and reduction of share capital.

Advantages of a scheme of arrangement include:

- The company may avoid insolvency. Scheme of arrangement is not an insolvency procedure. There is less stigma attached to scheme of arrangement.
- A scheme provides great flexibility. The company and the affected creditors/members are free to agree on the terms of the compromises or arrangements.
- Without a scheme, a company would need to obtain 100% of the relevant creditors approval to contractually vary a debt. In a scheme, if approved by majority in number representing at least 75% in value of creditors present at the scheme meeting, the scheme will bind dissenting creditors.

Disadvantages of a scheme of arrangement include:

- There is no moratorium. In order to get a breathing space, the company will need to petition for winding up and appointment of provisional liquidator.
- A scheme of arrangement may not be able to discharge debts governed by foreign laws (rule in *Gibbs*). To effectively discharge foreign law debts, a parallel scheme in the relevant jurisdiction may be necessary.
- A scheme must to be approved by majority in number representing at least 75% in value of each affected class. The head count requirement (majority in number) can be difficult to satisfy for public listed companies.
- Schemes are court supervised process. At least two court hearings are required. So, it takes time and involves costs.
- Even if a scheme is approved by requisite majority, the Court has a discretion whether to sanction the scheme. The Court will only sanction a scheme if it is satisfied that a scheme is one that an intelligent and honest man acting in respect of his interests as a member of the class within which he votes might reasonably approve.

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH17)]: (4.5 marks) As classes are important, should outline requirements (similarity of legal rights, not interests)

Commented [RD(DWH18)]: (3 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

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.

The friend’s advice is not correct. Winding up by court may not necessary. If Mr Chan is in the opinion that the company cannot continue its business by reason of its liability, he may initiate a creditors’ voluntary liquidation. To do so, he needs to convene a shareholders’ meeting and a creditors’ meeting to approve putting the company into liquidation and to appoint liquidators.

If in the shareholders’ meeting, a special resolution is passed to approve the liquidation, liquidation commences upon passing of the special resolution and the company will cease to carry on business and the power of directors cease immediately upon appointment of liquidator. Whereupon, Mr Chan must cease to act on behalf of the company.

In the shareholders’ and creditors’ meeting, shareholders and creditors may each nominate a liquidator, if the nominated persons are different, creditors’ nomination shall prevail. Mr Chan as a director, does not have the right to choose liquidators. Liquidators’ main duties are to collect the company’s assets, settle its liabilities, distribute the funds amongst creditors and investigate the conduct of those involved in its dealings and affairs. So, liquidators, by whoever appointed, must closely investigate the company’s affairs. Further, at the creditors’ meeting, creditors may appoint a committee of inspection to supervise the liquidation. Therefore, even if a “friendly” liquidator is appointed, the committee of inspection will oversee the process to ensure the company’s affairs have been properly investigated.

As the company is insolvent or near insolvent, Mr Chan should be mindful of his duties as a director. Once the company is in the zone of insolvency, the duties are owed to creditors as a whole. This requires Mr Chan to act bona fide for the interests of creditors. Failing to do so, he could be in breach of duty, the consequence of which include personal liabilities as to damages and disqualification.

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

Commented [RD(DWH19)]: (5 marks) Could have added that could examine whether granting the security was an unfair preference (per Sweetmart) but rest of answer very good hence full marks

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.

[Though the charge over the receivables is stated to be a fixed charge, the proper characterization of the security depends on the substance and effect of the transaction and not the declared intention (*Re Brumark Investments Ltd* [2001] UKPC 28; *Re Spectrum Plus Ltd* [2005] UKHL 41). The essential characteristic of a floating charge is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event, and in the meantime the chargor is left free to use the charged asset and to remove it from the security (*Re Brumark Investments Ltd* [2001] UKPC 28; *Re Spectrum Plus Ltd* [2005] UKHL 41). Here, no separate account was opened for the charged receivables and Kite is left free to deal the charged receivables and its proceeds. Based on the arrangement and rights and obligations of the parties, the charge should be characterized as a floating charge.

Section 267 of the CWUMPO provides that a floating charge that is created within a period of 12 months before the commencement of liquidation, and when the company is unable to pay its debts or becomes unable to pay its debt as a result of the transaction is invalid except to the extent of the amount of the new consideration provided. Here the charge was created a few months before the commencement of liquidation, and it seems that GFL has not provided any new consideration for the charge. Therefore, the charge may be invalid if at the time that charge was granted Kite was unable to pay its debts.

Commented [RD(DWH20)]: This is uncertain but correct that this is the point to consider

Further the charge needs to be registered with the Hong Kong Companies Registry in accordance with section 335 of the Companies Ordinance. Failing to do so, the charge would be void against the liquidator (section 337(4) of the Companies Ordinance). The liquidator needs to check whether the charge was properly registered.

If the charge is invalid or void for the reasons above, the liquidator can request the receiver to hand over realisations to pay costs and expenses of the liquidation and unsecured creditors in accordance with the prescribed statutory priority.

If the charge is not invalid or void, the receiver is entitled to retain the proceeds for the benefit of GFL subject to payment of preferential debts (section 79 of CWUMPO). Under such circumstances, the liquidator cannot use these proceeds to pay liquidation costs and general unsecured creditors.

Question 4.3 [maximum 6 marks]

Commented [RD(DWH21)]: (6 marks) Good answer

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.

Mr Xu's standing

The clause in the FA referred to above may be ineffective because it infringes the anti-deprivation rule and *pari passu* rule.

Anti-deprivation rule prohibits parties from contractually agreeing to remove assets from a company which would otherwise form part of the insolvent estate for the distribution to the company's creditors upon its liquidation. In considering whether the clause infringed the anti-deprivation rule, the court will look at the substance of the agreement and consider whether there is any intention to evade insolvency law or whether it has some legitimate commercial basis (*Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd & Anor* [2012] 1 AC 383; *Re Hsin Chong Construction Co Ltd* [2020] 1 HKLRD 316).

Pari passu rule provides that it is contrary to public policy to contract out of pari passu distribution as provided for in the relevant insolvency legislation. If the effect of the arrangement is to cause the asset to be distributed otherwise than in accordance with the statutory rules, then the pari passu rule is engaged and the arrangements are void to the extent that they have that effect, regardless of any commercial basis for the arrangement (*British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390; *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd & Anor* [2012] 1 AC 383)

The effect of the FA clause referred to above, was to disentitle other creditors under the FA, remove the assets from the company for the benefit of Mr Qi alone, thereby depriving other creditors of SPL of assets for distribution under the insolvency laws. It does not seem to have any commercial basis for inserting this provision. If Mr Qi wish to protect his legitimate interest as a creditor, he could have and should have sought security over the company's assets to secure payment of his shareholder's loan. The provision to vest the company's assets in Mr Qi is intended to illegitimately deprive creditors of the company of distribution of the company's assets and thus is void for breach of anti-deprivation rule. It also has the effect of giving Mr Qi priority in the distribution of the company's asset in liquidation contrary to the statutory distribution order. Therefore, it is also void for breach of pari passu rule.

Commented [RD(DWH22)]: Xu?

To summarize, the clause referred to above is void. Mr Xu remains an unsecured creditor, and has standing to petition for winding up SPL.

Recognition and assistance in Hong Kong

In order to take steps to gather information and dealing with the company's assets in Hong Kong, the liquidator should seek recognition and assistance in Hong Kong. Hong Kong does not have statutory provisions in relation to recognition of foreign insolvency proceedings. The recognition and assistance should be sought under common law.

A Hong Kong court will recognize foreign proceedings if it can be satisfied that (1) the proceeding is a collective insolvency proceeding, and (2) it is opened in the company's country of incorporation (*Re Kaoru Takamatsu* [2019] HKCFI 802). The BVI insolvency proceeding seems to meet these requirements, the proceedings should be able to be recognised in Hong Kong.

Upon recognition, the liquidator may seek assistance from Hong Kong courts, such as to require Mr Zhang, Mr Wong and Mr Qi to provide information and documents concerning the affairs of SPL and to take control of SPL's bank account in Hong Kong. However, Hong Kong courts will only grant such assistance if (1) they are available in Hong Kong insolvency regime (2) they are available to the liquidator under the BVI law (*Singularis Holdings v PriceWaterhouseCoopers* [2014] UKPC 36).

Hong Kong court has permitted foreign officeholders to seek production of documents and examination of individuals in Hong Kong (*BJB Career Education Co Ltd* [2017] 1 HKLRD; *Re Centaur Litigation SPC* (unreported HCMP 3389/2015, 10 March 2016). To the extent it is permitted under the BVI law, the liquidator should be able to get an order requiring Mr Zhang, Mr Wong and Mr Qi, all of whom reside in Hong Kong, to provide information concerning SPL.

Banks in Hong Kong should readily assist foreign representatives by providing documents in relation to the company's accounts without a Hong Kong court order. But if the liquidator needs to deal with the accounts, such as by transferring the balance, a court order is required (*Re China Lumena New Materials Corp (in Provisional Liquidation)* [2018] HKCFI 276).

Other than seeking recognition and assistance, the liquidators may consider opening a free standing winding up proceeding in Hong Kong or open an ancillary proceeding, if the three core requirements can be met, namely (1) SPL had a sufficient connection with Hong Kong (seems that directors reside in Hong Kong and books and accounts are kept in Hong Kong); (2) there must be a reasonable possibility that the winding-up order would benefit the petitioner (assistance from the Mainland and to pursue Mr Qi's liability); and (3) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets) (for example, Mr Qi).

Recognition and assistance in the Mainland

The liquidator is unlikely to be able to use the new cross border arrangement between Hong Kong and the Mainland. Firstly, only Hong Kong proceeding and Hong Kong liquidator can seek recognition and assistance under this new arrangement. The liquidator is appointed by the BVI Court and cannot benefit from it.

Even if a freestanding or an ancillary proceeding is opened in Hong Kong. The Hong Kong court appointed liquidator may not be able to use the new arrangement. In order to seek assistance under the new arrangement, it must be established that (1) the Hong Kong proceeding is a collective insolvency proceeding, (2) the debtor's COMI is in Hong Kong, and (3) the debtor's principal assets in the Mainland are in a pilot area, or it has a place of business of a representative office in a pilot area.

Hong Kong may not be SPL's COMI. In assessing the debtor's COMI, the Mainland court will take into account of factors including the place of incorporation, the place of principal office, the principal place of business, the place of principal assets. SPL is incorporated in the BVI, it does not seem to have any business operation or office or principal assets in Hong Kong. There is no evidence that SPL has a place of business or assets in a pilot area in China.

In light of above, it is unlikely that the liquidator could use the new cooperation mechanism.

*** End of Assessment ***

TOTAL MARKS: 43.5 out of 50

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