



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C**

**HONG KONG**

This is the **summative (formal) assessment** for **Module 8C** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 8C.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment8C]**. An example would be something along the following lines: 202122-336.assessment8C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

## ANSWER ALL THE QUESTIONS

### QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Any reference to “CWUMPO” in the questions below means the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).**

#### Question 1.1

Select the **correct answer** to the question below:

A receiver can be appointed –

- (a) only pursuant to a charge over shares.
- (b) only by the court.
- (c) only pursuant to a legal mortgage over land.

**(d) any of the above.**

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

#### Question 1.2

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

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

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

#### Question 1.3

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

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

(c) As a matter of common law, the Hong Kong court has the right to 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 assets, 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)]:** 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)

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?

In order for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over a person, the person must be an individual and pursuant to section 4(1) of the Bankruptcy Ordinance (Cap 6) (“Bankruptcy Ordinance”), the person must either –

- (a) be domiciled in Hong Kong;
- (b) be personally present in Hong Kong on the day on which the bankruptcy petition is presented; or
- (c) at any time in the period of three (3) years ending with that day –
  - (i) been ordinarily resident, or have had a place of residence, in Hong Kong; or
  - (ii) have carried on business in Hong Kong.

Pursuant to section 4(2) of the Bankruptcy Ordinance, the reference in subsection 4(1)(c) of the Bankruptcy Ordinance to a debtor carrying on business in Hong Kong includes –

- (a) the carrying on of business by a firm or partnership of which the debtor is a member; and
- (b) the carrying on of business by an agent or manager for the debtor or for such firm or partnership.

### 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 that must be satisfied for a Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company are as summarised in the case of *Re Beauty China Holdings Ltd*<sup>1</sup> and reiterated by the Court of Final Appeal in the case of *Kam Leung Sui Kwan v Kam Kwan Lai and Others*<sup>2</sup> as follows –

- (a) 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;
- (b) there must be a reasonable possibility that the winding-up order would benefit those applying for it; and

<sup>1</sup> [2009] HKCFI 829

<sup>2</sup> [2015] HKFCA 79

- (c) the court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

In respect of the first requirement of sufficient connection with Hong Kong, the High Court, in the case of *Penta Investment Advisers Limited v Allied Weli Development Limited (formerly known as Hennabun Capital Group Limited)*<sup>3</sup> held that it is not necessary to have the matters which give rise to the connection to be present at the time of the winding-up petition. The connection, once established, remains even after the matters giving rise to that original connection have ceased to exist. This would prevent the debtor company from, shortly before presentation of the winding-up petition, taking steps to remove the facts giving rise to the substantial connection and pleading lack of connection for the Hong Kong courts to have jurisdiction.

### Question 2.3 [maximum 4 marks]

Commented [RD(DWH13): (4 marks)]

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

Pursuant to section 193(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO"), the court may appoint a provisional liquidator at any time after the presentation of a winding-up petition and before the making of a winding-up order in respect of a company.

Rule 28 of the Companies Winding-up Rules (Cap 32H) ("CWUR") stipulates that the application for the appointment of a provisional liquidator must be supported by an affidavit with sufficient grounds for the appointment of a provisional liquidator. This means that the appointment of a provisional liquidator will not be done in all circumstances but only where the circumstances justify the appointment of a provisional liquidator. Some of the reasons that may justify the appointment of a provisional liquidator include the risk that assets of the company may be dissipated or be in jeopardy before a winding-up order is made – *Re Union Accident Insurance Co Ltd*.<sup>4</sup>

The purpose of appointment of a provisional liquidator is to preserve the assets of a company in the period between the presentation of the petition for winding-up and the making of the winding-up order by the court – *Re Weihong Petroleum Co Ltd*.<sup>5</sup> A provisional liquidator is not entitled to sell the assets of the company unless this is necessary to preserve the value of the asset – *Re MF Global Hong Kong Ltd*.<sup>6</sup> Pursuant to section 193(3) CWUMPO, the court appointing the provisional liquidator may limit and restrict his powers by the order appointing him. The court, in such order, will usually only permit the provisional liquidator to sell the assets of the company upon a specific application to court being made.<sup>7</sup>

A provisional liquidator may also be appointed to facilitate a restructuring proposal of the company – *China Solar Energy Holdings Ltd (No. 2)*.<sup>8</sup> However, the facilitation of a restructuring proposal may not be the sole reason for the appointment of a provisional liquidator – *Re Legend International Resorts Ltd*.<sup>9</sup>

<sup>3</sup> [2017] HKCA 289

<sup>4</sup> [1972] 1 All ER 1105

<sup>5</sup> [2002] HKCU 1425

<sup>6</sup> [2015] 2 HKC 424

<sup>7</sup> Mr Robin Darton, *Foundation Certificate in International Insolvency Law, Module 8C Guidance Text, Hong Kong, 2021/2022 (INSOL International 2021)*, page 39

<sup>8</sup> [2018] HKCU 938

<sup>9</sup> [2006] 3 HKC 565

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

**Question 3.1 [maximum 5 marks]**

Commented [RD(DWH14)]: (4.5 marks). One slip, see below

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.

Section 266A(1) CWUMPO stipulates that a company gives an unfair preference to a person if –

- (a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or liabilities; and
- (b) the company does anything or suffers anything to be done which has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position that person would have been in if that thing had not been done.

When a company goes into liquidation, the creditors of the company stand to lose as it is highly unlikely that they will be repaid their debts in full. In taking over control of the company and realising and distributing its assets, the liquidator has a duty to ensure all creditors receive fair treatment on their unpaid debts in accordance with their respective rights and priority of ranking as provided by law. The liquidator will also seek to maximise the pool of assets that are available for distribution to creditors.

Where a person receives an unfair preference, they are put in a better position than they would have been in had the unfair preference not been given. This would not be fair to, and would prejudice, the other creditors of the company. For example, if the unfair preference is a charge over a property of the company, such property would not be available for realisation for distribution to the general body of creditors of the company. By being able to take action to challenge an unfair preference, the liquidator will be able to obtain from court an order that would put the company in a position it would have been in had the unfair preference not been given (section 266(3) CWUMPO). In the example given above, the charge will be released and the property will be available for distribution to the general body of creditors. This is why a liquidator is able to take action to challenge an unfair preference.

In order to succeed in a claim for unfair preference, the liquidator will need to satisfy all of the following elements –

- (a) the unfair preference must be given to a creditor of the company or to a surety or guarantor of any of the company's debts or liabilities (section 266A(1)(a) CWUMPO).
- (b) the unfair preference has the effect of putting the person receiving the unfair preference into a position which, in the event of the company going into insolvent liquidation, will be better than the position that person would have been in if the unfair preference had not been given (section 266A(1)(b) CWUMPO).
- (c) the unfair preference must be given at a relevant time as provided under section 266B CWUMPO. The relevant time means –
  - (i) if the unfair preference is given to a person who is connected with the company (otherwise than by reason only of being its employee), within a period of two (2) years prior to the filing of the winding-up petition against the company; or



- (ii) if the unfair preference is given to a person who is not connected with the company, within a period of six (6) months prior to the filing of the winding-up petition against the company.

In respect of this requirement, a person is connected with a company if that person is an associate of a director or shadow director of the company or an associate of the company (section 265A(3) CWUMPO).

- (d) at the relevant time, the company was either unable to pay its debts (within the meaning of section 178 CWUMPO) or the company becomes unable to pay its debts (within the meaning of section 178 CWUMPO) in consequence of the unfair preference (section 266B(2) CWUMPO).

In the case of an unfair preference that is given to a person connected with the company (otherwise than by reason only of being its employee), there is a rebuttable presumption that this element is satisfied (section 266B(3) CWUMPO).

- (e) that in deciding to give that unfair preference, the company was influenced by a desire to put the person who received the unfair preference into a better position in the event of the company's liquidation than that person would have been in if the unfair preference had not been given (section 266(4) CWUMPO).

In the case of an unfair preference that is given to a person connected with the company (otherwise than by reason only of being its employee), there is a rebuttable presumption that this element is satisfied (section 266(5) CWUMPO).

### 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.

Though Hong Kong and the Mainland are one country and part of the People's Republic of China ("PRC"), Hong Kong is a Special Administrative Region of the PRC with a high degree of autonomy. The legal system of Hong Kong which remains the responsibility of Hong Kong is different from the legal system in the Mainland and since 1 July 1997, Hong Kong has operated under Deng Xiaoping's principle of "One Country, Two Systems". Hence, an insolvency matter involving Hong Kong and the Mainland would be a cross-border insolvency matter.

Whilst Hong Kong has limited formal arrangements to deal with cross-border insolvency, this is not entirely the case between Hong Kong and the Mainland. Since May 2021, there has been a new arrangement between Hong Kong and certain areas of the Mainland that have been designated as pilot areas for a new cooperation mechanism between Hong Kong and the Mainland in respect of insolvency proceedings. The designated pilot areas of the Mainland are Shanghai, Xiamen and Shenzhen.

*The Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region* signed on 14 May 2021 ("Record of Meeting") sets out the consensus between Hong Kong and the Mainland in relation to mutual recognition of and assistance to bankruptcy (insolvency) proceedings between the courts of the Mainland and Hong Kong.

**Commented [RD(DWH15):** Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3)). For U/P presumption relates to the desire to prefer (where connected party).

**Commented [RD(DWH16):** (4 marks) Should also mention s.327 and common law assistance prior to 2021

The Record of Meeting is said to be made to thoroughly implement Article 95 of the Basic Law of Hong Kong (which provides that Hong Kong may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other), further improve the mechanism for judicial assistance between the Mainland and Hong Kong, facilitate economic integration and development and optimise business environment underpinned by the rule of law.

The Record of Meeting provides that –

- (a) courts in the pilot areas of the Mainland may initiate cooperation with the courts of Hong Kong on mutual recognition of and assistance to bankruptcy proceedings;
- (b) a liquidator or provisional liquidator in insolvency proceedings in Hong Kong may apply to the relevant court at a pilot area of the Mainland for recognition of compulsory winding-up, creditors' voluntary winding-up and corporate debt restructuring proceedings brought by a liquidator or provisional liquidator as sanctioned by the Hong Kong court in accordance with the laws of Hong Kong, recognition of the office of the liquidator or provisional liquidator and grant of assistance for discharge of duties as a liquidator or provisional liquidator;
- (c) an administrator in Mainland bankruptcy proceedings may apply to the High Court of Hong Kong for recognition of bankruptcy liquidation, reorganisation and compromise proceedings under the Enterprise Bankruptcy Law of the PRC, recognition of the office of the administrator and grant of assistance for discharge of duties as an administrator;
- (d) the procedures for and manner in which applications for recognition and assistance are to made, etc. will be in accordance with the provisions of the requested place; and
- (e) the Supreme People's Court and the Government of Hong Kong are respectively issuing a guiding opinion and a practical guide on mutual recognition of and assistance to bankruptcy proceedings. The two sides will continue to communicate on matters regarding the judicial implementation of mutual recognition of and assistance to bankruptcy proceedings, consult each other to resolve relevant issues, persistently improve the mechanism, and progressively expand the scope of the pilot areas.

The PRC Supreme Court has formulated *The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region* ("Opinion") setting out the details of implementation of the arrangement set out in the Record of Meeting. The Opinion, amongst others –

- (a) designates the people's courts in Shanghai municipality, Xiamen Municipality in Fujian Province and Shenzhen Municipality in Guangdong Province to take forward pilot measures on recognition of and assistance to "Hong Kong Insolvency Proceedings";
- (b) defines "Hong Kong Insolvency Proceedings" as the collective insolvency proceedings commenced in accordance with the CWUMPO and the Companies Ordinance of Hong Kong including compulsory winding-up, creditors' voluntary winding up and scheme of arrangement by a liquidator or provisional liquidator and sanctioned by the Hong Kong court;
- (c) provides that "Hong Kong Administrators" include liquidators and provisional liquidators in Hong Kong Insolvency Proceedings;
- (d) provides that the Opinion applies to Hong Kong Insolvency Proceedings where Hong Kong is the debtor's centre of main interests ("COMI"). The COMI generally means the place of incorporation of the debtor. At the same time, the court shall take into account other factors such as place of principal office, principal place of business and

place of principal assets of the debtor. In order for a Hong Kong Administrator to apply for recognition and assistance, the COMI of the debtor must have been in Hong Kong continuously for at least six (6) months;

- (e) stipulates that if the debtor's principal assets in the Mainland are in a pilot area or it has a place of business or a representative office in the pilot area, the Hong Kong Administrator may apply for recognition of and assistance to the Hong Kong Insolvency Proceedings in accordance with the Opinion. If an application is made to two or more people's court having jurisdiction, the people's court that accepts the case first shall exercise jurisdiction;
- (f) stipulates that the Hong Kong Administrator applying for recognition of and assistance to Hong Kong Insolvency Proceedings must submit the following materials to the court of the Mainland –
  - (i) an application;
  - (ii) a letter of request for recognition and assistance issued by the High Court of Hong Kong;
  - (iii) the relevant documents on the commencement of the Hong Kong Insolvency Proceedings and in relation to the appointment of the Hong Kong Administrator;
  - (iv) materials showing that the debtor's COMI is in Hong Kong;
  - (v) a copy of the judgment in respect of which the application for recognition and assistance is made;
  - (vi) a copy of the identity document of the Hong Kong Administrator; and
  - (vii) evidence showing that the debtor's principal assets in the Mainland are in a pilot area or that it has a place of business or representative office in a pilot area;
- (g) states that the application for recognition and assistance must set out the necessary details including details of, the debtor and the Hong Kong Administrator; the progress and plan in relation to the Hong Kong Insolvency Proceedings; the recognition and assistance applied for and its justifications; the debtor's assets, place of business, offices and creditors in the Mainland; any actions in respect of the debtor's property in the Mainland; and any insolvency proceedings against the debtor in other countries or regions;
- (h) provides that upon recognition of the Hong Kong Insolvency Proceedings –
  - (i) payment of debts by the debtor to individual creditors will be invalid;
  - (ii) any civil action or arbitration involving the debtor that has started but not been concluded will be suspended but such action can proceed after the Hong Kong Administrator takes over the debtor's property;
  - (iii) the measures for preserving the property of the debtor will be lifted and the procedure for execution will be suspended;
  - (iv) the court may, upon application, allow the Hong Kong Administrator to take control of and manage the debtor's assets and business and perform such duties as provided for under the insolvency laws of the PRC and Hong Kong;
  - (v) the court may, upon application by the Hong Kong Administrator or a creditor, designate a Mainland administrator and the administrators in both jurisdictions shall strengthen their communication and cooperation;
  - (vi) the court may, upon application, grant assistance concerning matters arising from the insolvency such as realisation and distribution of property;
  - (vii) the property of the debtor in the Mainland must first be used to satisfy the preferential claims under the law of the Mainland and the remainder is to be distributed according to the Hong Kong Insolvency Proceedings provided creditors in the same class are treated equally;
- (i) states that the court will refuse to recognise or assist the Hong Kong Insolvency Proceedings if the debtor's COMI is not in Hong Kong for a continuous period of at least six (6) months, Article 2 of the Enterprise Bankruptcy Law of the People's Republic of China is not satisfied, Mainland creditors are treated unfairly, there is

- fraud, or there are other circumstances where the court considers that recognition or assistance should not be rendered including where it violates the basic principles of law of the Mainland or offends public order or good morals;
- (j) states that where there are concurrent insolvency proceedings in Hong Kong and the Mainland, the administrators in the two (2) jurisdictions shall strengthen their communication and cooperation; and
  - (k) provides that the courts in the pilot areas shall actively communicate and take forward cooperation with courts in Hong Kong.

Further to the above, the Hong Kong government has also issued the *Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance Practical Guide* ("Practical Guide") which sets out the procedures for an application by a Mainland bankruptcy administrator to the Hong Kong court for recognition and assistance of insolvency proceedings commenced in the Mainland.

### 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 court-sanctioned compromise or arrangement between a company and all of its creditors (or a class of them) and/or between a company and its members (or any class of them), that is given statutory effect to bind all such creditors (or all creditors within such class) or all such members (or all members within such class), even if they do not all consent to the arrangement or compromise.<sup>10</sup> The statutory provisions for a scheme of arrangement in Hong Kong are set out in sections 668 to 677 of the Companies Ordinance (Cap 622) ("Companies Ordinance").

On an application for leave to convene a meeting to approve a scheme of arrangement, the court may order a meeting of the creditors (or class of creditors) of the company and/or a meeting of the members (or class of members) of the company depending on whether the arrangement is with the creditors, a class of creditors, members or a class of members of the company (section 670(1) Companies Ordinance). The application may be made by the creditors or members or any class of them if the company is not being wound-up (section 670(3) Companies Ordinance). If the company is being wound-up, the application may only be made by the liquidator or provisional liquidator (section 670(4) Companies Ordinance).

The notice of the creditors' or members' meeting under section 670 Companies Ordinance must be accompanied by an explanatory statement explaining the effect of the scheme of arrangement and must state any material interests of the company's directors under the scheme of arrangement and the effect of the scheme of arrangement on those interests, in so far as the effect is different from the effect on the like interests of other persons (section 671 Companies Ordinance).

At the meeting summoned pursuant to section 670 Companies Ordinance, a majority in number representing at least 75% in value of the creditors or relevant class of creditors present and voting (or in the case of members, representing 75% of the voting rights of the members (or relevant class of members) and a majority in number of the members (or relevant class of members) present and voting) at the meeting must agree to the scheme of arrangement (section 674 Companies Ordinance). Once such an agreement of the creditors

<sup>10</sup> Latham and Watkins, LLP, "Restructuring and Insolvency in Hong Kong", at <https://www.lw.com/thought-leadership/restructuring-and-insolvency-in-hong-kong>, accessed 11 July 2022.

**Commented [RD(DWH17)]:** (4.5 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)

or members, as the case may be, has been obtained, an application may be made to court to sanction the scheme of arrangement (section 673(2) Companies Ordinance).

A scheme of arrangement sanctioned by court will take effect once a certified copy of the court order sanctioning the scheme has been registered by the Registrar of Companies (section 673(6) Companies Ordinance).

A scheme of arrangement sanctioned by the court under section 673(2) Companies Ordinance is binding –

- (a) on the company or, if the company is being wound up, on the liquidator or provisional liquidator and contributories of the company; and
- (b) on the creditors or the class of creditors, or the members or the class of members, or both, with whom the arrangement or compromise is proposed to be entered into

(section 673(5) Companies Ordinance).

The above is one of the main pros of a court-sanctioned scheme of arrangement under the Companies Ordinance. In a normal scenario, 100% of the approval of the creditors (or class of creditors) or members (or class of members) will need to be obtained in order for an arrangement or compromise to be binding on them. However, in the case of a scheme of arrangement under the Companies Ordinance, only majority approval in accordance with section 674 Companies Ordinance needs to be obtained for the scheme to be sanctioned by court and binding on all creditors (or class of creditors) or members (or class of members) that are subject to the scheme, regardless of whether the particular creditor or member actually approved the arrangement or compromise. This would be particularly beneficial where the company wants to adjust the debts of many creditors at the same time and it would be difficult or impossible to obtain the consent of all of the creditors.

A scheme of arrangement is usually proposed when the company is in financial difficulty and faces the potential of winding-up and liquidation. One of the pros of a scheme of arrangement is that it allows the company to restructure its debts and continue to operate its business with a view to generating more revenue. Whilst a compromise by way of the scheme of arrangement would mean that the creditors would receive less than the amount they are owed, the creditors may receive significantly less or no returns at all if the company were to go into liquidation. Hence, the scheme of arrangement would be a better alternative to liquidation. In this regard, it should be noted that where the most likely alternative to the successful implementation of a scheme is the winding-up of the company, the company must give creditors sufficient details on their estimated returns in the event of liquidation.<sup>11</sup> The court may refuse to sanction a scheme if there is failure to disclose relevant information that may affect the decision on voting in respect of a scheme.<sup>12</sup>

One of the cons of a scheme of arrangement is that a scheme of arrangement does not provide for any moratorium. This means that whilst the company is drawing out the restructuring plan and in the process of obtaining the necessary agreement of creditors or members, legal actions may continue to be taken against the company and such actions may hamper the restructuring.

---

<sup>11</sup> Mr Robin Darton, *Foundation Certificate in International Insolvency Law, Module 8C Guidance Text, Hong Kong, 2021/2022* (INSOL International 2021), page 61

<sup>12</sup> *China Light & Power Company Limited and CLP Holdings Limited* [1998] 1 HKLRD 158

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

**Question 4.1 [maximum 4 marks]**

Commented [RD(DWH18)]: (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.

A winding-up by the court or compulsory winding-up is not Mr Chan’s only option to wind-up Mountainview Limited (“Mountainview”). Mountainview can also enter into voluntary winding-up depending on the circumstances of the case. There are two (2) types of voluntary winding-up, namely a members’ voluntary winding-up or a creditors’ voluntary winding-up.

Commented [RD(DWH19)]: 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

(a) Members’ Voluntary Winding-Up

In order for Mr Chan to use a members’ voluntary winding-up to wind-up Mountainview, the following requirements must be satisfied –

- (i) a majority of at least 75% of the members of Mountainview must pass a resolution to voluntarily wind-up Mountainview (section 228(1) CWUMPO); and
- (ii) Mountainview is solvent and must be able to settle all of its debts in full within a period of twelve (12) months from the commencement of the winding-up (section 233(1) CWUMPO).

The following is the process involved in a members’ voluntary winding-up –

- (i) A director’s meeting must be convened and as the sole director of Mountainview, Mr Chan must issue a certificate of solvency to the effect that he has made a full inquiry into the affairs of the company, and that, having so done, he has formed the opinion that the company will be able to pay its debts in full within a period of twelve (12) months from the commencement of the winding-up (section 233(1) CWUMPO). The certificate of solvency must also contain a statement of Mountainview’s assets and liabilities based on the most recent financial statements (section 233(2) CWUMPO).

In signing the certificate of solvency, Mr Chan must have reasonable grounds for having the opinion that Mountainview will be able to pay its debts in full within the period of twelve (12) months from the commencement of the winding-up. Otherwise, Mr Chan will be liable to a fine and imprisonment (section 233(3) CWUMPO).

The certificate of solvency must be filed with the Registrar of Companies within the period set out in section 233(2)(a) CWUMPO.

- (ii) Mr Chan must then convene a general meeting to pass a special resolution to wind-up Mountainview (section 228(1) CWUMPO) and appoint a liquidator and to fix the remuneration to be paid to the liquidator (section 235 CWUMPO). Pursuant to section 262B CWUMPO, in respect of a members’ voluntary winding-up, the liquidator can be a person connected with Mountainview.

Upon the appointment of a liquidator, all the powers of Mr Chan as the director of Mountainview ceases.

Within fifteen (15) days after passing the resolution for voluntary winding-up, the notice of the resolution must be advertised in the Gazette (section 229 CWUMPO). The voluntary winding-up is deemed to have commenced on the date of passing of the special resolution for winding-up (section 230 CWUMPO).

- (iii) The liquidator will then take over control of the business of Mountainview from Mr Chan, investigate the affairs of Mountainview and the conduct of its director and proceed to realise the assets of Mountainview for payment of the liquidator's fees and expenses, settlement of debts to Mountainview's creditors and distribution of any surplus to the members of Mountainview (section 251 CWUMPO).

It must be noted that the liquidator is an agent of Mountainview and is deemed to be a trustee of Mountainview's assets and owes fiduciary duties towards Mountainview and its creditors.<sup>13</sup> Hence, Mr Chan's friend's advice that he should ensure he appoints a "friendly" liquidator who will not investigate the company's affairs too closely is incorrect. The liquidator has a duty to thoroughly investigate the affairs of Mountainview with a view to maximise the pool of assets that are available for distribution.

Commented [RD(DWH20)]: good

(b) Creditors' Voluntary Winding-Up

Where Mountainview is insolvent or unable to pay its debts in full within a period of twelve (12) months from the commencement of winding-up, Mr Chan will not be able to rely on a members' voluntary winding-up to wind-up Mountainview. However, Mr Chan may still seek to wind-up Mountainview by way of a creditors' voluntary winding-up (section 233 (4) CWUMPO).

The following is the process involved in a creditors' voluntary winding-up –

- (i) A general meeting of the shareholders of Mountainview will be convened to pass a special resolution (by a majority of at least 75% of the members of Mountainview) to wind-up Mountainview (section 228(1)(b) CWUMPO). A creditors' voluntary winding-up is deemed to commence at the time of passing of the resolution for the winding-up (section 230 CWUMPO).
- (ii) Within fourteen (14) days after the meeting of the shareholders, Mountainview will need to summon a meeting of the creditors of Mountainview (section 241(1) CWUMPO).

Mr Chan will need to preside over the creditors meeting and cause a full statement of the position of the company's affairs (including details of assets, debts and liabilities, creditors and estimated amount of their claims, securities held by creditors) to be laid before the meeting (section 241(3) CWUMPO).

<sup>13</sup> Dentons Hong Kong, "Hong Kong Regime on Liquidators" at <https://hongkong.dentons.com/en/insights/articles/2021/december/23/-/media/b8efe4ef7c0a4786a8f4d120a75a24cf.ashx> accessed 25 July 2022

- (iii) After the resolution for voluntary winding-up of Mountainview but before the appointment of a liquidator, Mr Chan should do all things that may be necessary to protect Mountainview's assets (section 250A(3) CWUMPO).
- (iv) The creditors and the shareholders will at their respective meetings nominate a person to be the liquidator of the company. If the creditors and the shareholders nominate different persons, the person nominated by the creditors will be the liquidator, unless ordered otherwise by the court (section 242 CWUMPO). On the appointment of a liquidator, all the powers of Mr Chan as the director of Mountainview ceases (section 244(2) CWUMPO).
- (v) The liquidator will then take over control of the business of Mountainview from Mr Chan, investigate the affairs of Mountainview and the conduct of its director and proceed to realise the assets of Mountainview for payment of the liquidator's fees and expenses, settlement of debts to Mountainview's creditors and distribution of any surplus to the members of Mountainview (section 251 CWUMPO).

Once again, it must be noted that the liquidator is an agent of Mountainview and is deemed to be a trustee of Mountainview's assets and owes fiduciary duties towards Mountainview and its creditors.<sup>14</sup> Hence, Mr Chan's friend's advice that he should ensure he appoints a "friendly" liquidator who will not investigate the company's affairs too closely is incorrect. The liquidator has a duty to thoroughly investigate the affairs of Mountainview with a view to maximise the pool of assets that are available for distribution.

(c) Creditors Voluntary Winding-Up in Cases of Urgency

Where Mr Chan is of the opinion that Mountainview cannot by reason of its liabilities continue in business and should be wound-up with immediate effect, Mr Chan may rely on section 228A CWUMPO.

Mr Chan will then need to –

- (i) pass a resolution to the effect that –
  - (A) Mountainview cannot by reason of its liabilities continue its business;
  - (B) Mr Chan considers it necessary that Mountainview be wound up and that the winding-up should be commenced under section 228A CWUMPO because it is not reasonably practicable for it to be commenced under another section of the CWUMPO; and
  - (C) meetings of the company and of its creditors will be summoned for a date not later than twenty-eight (28) days after the delivery of a winding-up statement to the Registrar of Companies.

The resolution must specify the reasons why Mr Chan considers it necessary that Mountainview be wound up and that the winding up should be commenced under section 228A CWUMPO;

- (ii) cause a meeting of the shareholders of Mountainview to be summoned for a date not later than twenty-eight (28) after the delivery of a winding-up statement to the Registrar of Companies;

<sup>14</sup> Dentons Hong Kong, "Hong Kong Regime on Liquidators" at <https://hongkong.dentons.com/en/insights/articles/2021/december/23/-/media/b8efe4ef7c0a4786a8f4d120a75a24cf.ashx> accessed 25 July 2022



- (iii) appoint a person as the provisional liquidator in the winding up of Mountainview with effect from the commencement of the winding up. For the period of his appointment, the provisional liquidator will have like powers and duties of a liquidator in a creditors' voluntary winding-up but save for certain matters, the powers can only be exercised with the sanction of the court (section 228B CWUMPO); and
- (iv) deliver a winding-up statement to the Registrar of Companies. The winding-up of Mountainview will commence at the time of delivery of the winding-up statement to the Registrar of Companies.

Thereafter, the voluntary winding-up under section 228A CWUMPO will proceed as a creditors' voluntary winding-up and the provisions under sections 241 to 248 CWUMPO will apply.

In the event Mountainview is compulsorily wound-up by an order of court, the liquidator will be an officer of the court and once again Mr Chan's friend's advice that he should ensure he appoints a "friendly" liquidator who will not investigate the company's affairs too closely is incorrect. The liquidator has legal duties to the court and a duty to thoroughly investigate the affairs of Mountainview with a view to maximise the pool of assets that are available for distribution to its creditors.

#### 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.

In order to determine whether the liquidator can insist that the receiver hand over the realisations he makes, the following issues will need to be considered –

- (a) firstly, whether GFL has a fixed charge or a floating charge over Kite's receivables.

A fixed charge is a charge over specific assets of the borrower over which the chargee has control and with which the borrower cannot deal without the chargee's

**Commented [RD(DWH21):** (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

consent.<sup>15</sup> On the other hand, a floating charge is a charge over all the assets or a class of assets owned by the security provider, including future assets. Before crystallisation of the floating charge, the security provider can deal with the assets in the ordinary course of business. On crystallisation, the floating charge converts to a fixed charge and attaches to all the assets in the charged class currently owned by the security provider (or acquired afterwards), and its authority to deal with those assets terminates.<sup>16</sup> Insolvency is usually stipulated as a crystallisation event in an instrument creating a floating charge.<sup>17</sup>

Romer LJ in the case of *Re Yorkshire Woolcombers Association Limited*<sup>18</sup> stated that a charge would be a floating charge if it has the following three (3) characteristics –

- (i) if it is a charge on a class of assets of a company present and future;
- (ii) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and
- (iii) by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets being dealt with.

In the case of *National Westminster Bank plc v Spectrum Plus Limited and others*<sup>19</sup> the House of Lords held that the question as to how a particular charge should be categorised depends upon the nature of the rights over the charged asset that have been granted to the chargee and reserved to the chargor. The label that the parties have attributed to the charge may be some indication of the rights the parties were intended to have but is not conclusive. The House of Lords went on to hold that where the asset subject to the charge was 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 was left free to use the charged asset and to remove it from the security, the charge would be a floating charge.

The facts of the case state that GFL has insisted that Kite execute a charge over its receivables and that the charge be stated as a “fixed charge”. Further, the facts state that no separate account was opened in respect of the receivables 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). Applying the definition of a floating charge and the characteristics of a floating charge as stated in the cases above to the present facts, even though GFL has insisted that the charge be called a “fixed charge”, it is safe to conclude that in actual fact, GFL has a floating charge and not a fixed charge over the receivables of Kite.

Commented [RD(DWH22)]: Agree

- (b) secondly, whether GFL's floating charge over Kite's receivables has been registered.

Pursuant to section 335 read together with section 334 of the Companies Ordinance, a floating charge on a company's undertaking or property must be registered with the Registrar of Companies within one (1) month after the date on which the charge is

<sup>15</sup> <https://www.lexisnexis.co.uk/legal/glossary/fixed-charge>

<sup>16</sup> <https://www.lexisnexis.co.uk/legal/glossary/floating-charge>

<sup>17</sup> Mr Robin Darton, *Foundation Certificate in International Insolvency Law, Module 8C Guidance Text, Hong Kong, 2021/2022* (INSOL International 2021), page 13

<sup>18</sup> [1903] 2 Ch 284

<sup>19</sup> [2005] UKHL 41

created. On application by the company or a person interested in the charge, the court may extend the period for registration of the charge.

A charge that is required to be registered but is not registered within the specified time will be void as against any liquidator or creditor of the company (section 337(4) Companies Ordinance). Hence, in order for GFL's floating charge on Kite's receivables to be valid, the floating charge must have been registered with the Registrar of Companies within the specified timeframe. Otherwise, the floating charge would be void against the liquidator of Kite.

- (c) thirdly, we will have to determine whether GFL's floating charge is valid in light of Kite going into liquidation.

Pursuant to section 267 CWUMPO read together with section 267A CWUMPO, a floating charge over Kite's receivables that is entered into within a period of twelve (12) months prior to the date of filing of the winding-up petition against Kite would be invalid if either Kite was unable to pay its debts at the time of creation of the floating charge or Kite becomes unable to pay its debts as a result of the floating charge. However, it must be noted that the floating charge would still be valid to the extent of any new consideration given to Kite for the charge (section 267(2) and 267(3) CWUMPO).

The facts of the case state that the floating charge in favour of GFL was created some months ago at a time when Kite was having financial difficulty. There is also no indication of any new consideration provided by GFL for the creation of the floating charge. Hence, it is likely that the floating charge in favour of GFL would be found to be invalid pursuant to section 267 CWUMPO. In the event of such a finding, Kite's liquidator can insist that the receiver appointed by GFL hand over the realisations made in respect of the receivables.

- (d) fourthly, what happens if the floating charge is found to be valid.

In the event it is found that the floating charge in favour of GFL is not made at the relevant time pursuant to section 267 CWUMPO and the floating charge is in fact valid, we will need to consider the impact on the realisations made in respect of the receivables in such a scenario.

Section 79 CWUMPO provides that where a receiver is appointed pursuant to a floating charge, the assets that are realised by the receiver must be used to pay the preferential debts of the company (under section 265 CWUMPO) in priority to any claim for principal or interest under the floating charge. Section 265(3B) goes on to state that where the company goes into liquidation and the unencumbered assets of the company are insufficient to pay the preferential debts, the assets that are subject to the floating charge will be used to settle the preferential debts in priority to the claims of the floating charge holder.

The facts of the case state that Kite's only assets are the receivables. Hence, in the event the floating charge in favour of GFL is found to be valid, the realisations in respect of Kite's receivables will still need to be used to settle the claims of Kite's preferential creditors before the balance, if any, is used to settle GFL's claims.

Save for payments in respect of preferential debts, assets that are subject to a floating charge are usually dealt with outside of the liquidation. Hence, Kite's receivables can only be used to settle Kite's preferential debts before being used to settle GFL's claim. Only where there is excess after settlement of the preferential

debts and GFL's claim, can the excess be used to meet the costs and expenses of the liquidation and claims of other unsecured creditors.

**Question 4.3 [maximum 6 marks]**

Commented [RD(DWH23)]: (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:

- (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 liquidator may want to bring actions to recover the assets of SPL including the USD 20 million injected by Mr Xu into SPL, the balances in SPL's Hong Kong bank account and the assets in the Mainland. The BVI liquidator may also want to obtain orders for the examination of Mr Zhang and Mr Wong and bring an action against Mr Qi for his actions as the director of SPL.

The BVI liquidator has three (3) options in respect of steps that he can take in Hong Kong in respect of the above actions and the options are discussed in turn below.

(a) Bring the necessary actions in Hong Kong in the name of SPL

The BVI liquidator may bring the necessary actions in Hong Kong in the name of SPL. Hong Kong recognises the right of a foreign liquidator to bring an action in Hong Kong in the name of the company (*Re Irish Shipping*<sup>20</sup>) without the need for any formal order recognising the foreign liquidator. The Hong Kong courts will rely on common law principles to assist the BVI liquidator.

In any action by the BVI liquidator against a party in Hong Kong, the Hong Kong courts may require the BVI liquidator to provide security for costs if there is reason to believe that SPL will be unable to pay a successful defendant's costs (Order 23 of the Rules of the High Court (Cap 4A) and section 905(3) of the Companies Ordinance).

(b) Seek a recognition of the appointment of the BVI liquidator

The BVI liquidator may also apply to the Hong Kong courts for an order to recognise the appointment of the liquidator under the common law as was done in the 2014 decision of *A Co v B*. In the 2014 decision, the Hong Kong court held that Hong Kong Companies courts can and should adopt a similar approach to applications for recognition and assistance to that prescribed in the case of *Re Founding Partners Global Fund Ltd*<sup>21</sup>. The court stated that a Hong Kong Companies court may, pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law, make an order of a type which is available to a provisional liquidator or liquidator under Hong Kong's insolvency regime.

Subsequently, the Privy Council in the case of *Singularis Holdings v PricewaterhouseCoopers*<sup>22</sup> propounded the Singularis Principle whereby the Privy Council clarified that the courts common law power to grant assistance only exists where the power sought to be exercised by the liquidator exists in the jurisdiction of principal liquidation and in the assisting jurisdiction.

Hence, in order for the BVI liquidator to seek a recognition of the BVI winding-up of SPL and the orders for recovery of SPL's assets and examination of Mr Zhang and Mr Wong, the BVI liquidator must –

- (i) present a letter of request issued by the BVI court to the Hong Kong court in which assistance is requested. Although the common law principles do not require a formal request, the practice of Hong Kong courts is that such request must be obtained;<sup>23</sup> and
- (ii) show that the powers sought to be exercised by the BVI liquidator exist in the BVI and also in Hong Kong.

We will first have to determine if there will be any impediment for the BVI liquidator to seek a recognition in Hong Kong of his appointment as the liquidator of SPL in BVI which was pursuant to the winding-up petition filed by Mr Xu. The facts of the case

<sup>20</sup> [1985] HKLR 437

<sup>21</sup> [2011] Bda LR 22

<sup>22</sup> [2014] UKPC 36

<sup>23</sup> Mr Robin Darton, *Foundation Certificate in International Insolvency Law, Module 8C Guidance Text, Hong Kong, 2021/2022* (INSOL International 2021), page 71

indicate that 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.

Since the BVI court has made the winding-up order upon the petition of Mr Xu, the BVI court would have found that Mr Xu had the standing to present the winding-up petition against SPL notwithstanding the aforementioned clause in the FA.

The question is whether the Hong Kong courts would be prepared to recognise the winding-up order given the clause in the FA. In general, it should be noted that in recognising the appointment of a liquidator by a foreign jurisdiction, the courts of the recognising jurisdiction will not go into the merits of the case unless it is contrary to public policy.

In any event, we will consider the impact if any, of the clause in the FA on Mr Xu's standing to bring the winding-up proceedings against SPL. The FA is governed by Hong Kong law. Under Hong Kong law, *ipso facto* clauses, that is, contractual clauses that provide for the determination or modification of a contract upon the insolvency of the counterparty are generally upheld.<sup>24</sup> However, there are exceptions to this. One of the exceptions would be that arising from the anti-deprivation principle. The courts will not generally uphold an *ipso facto* clause which results in general creditors being deprived of an asset that would, absent the *ipso facto* clause, be available to satisfy debts of creditors.<sup>25</sup>

On the present facts, the clause in the FA would, in the insolvency of SPL, result in all assets automatically and immediately vesting in Mr Qi. This in essence deprives the creditors of SPL from the assets of SPL that would be available for distribution to them if not for the clause in the FA. Hence, the Hong Kong courts will also hold that such a clause is invalid. Once the clause is found to be invalid, Mr Xu would be a creditor owed a debt by SPL and would be entitled to bring the winding-up petition against SPL. Hence, the BVI winding-up order against SPL would be valid and there would be no impediment for the BVI liquidator to seek a recognition of the winding-up order in Hong Kong.

The next issue is whether the powers sought to be exercised by the BVI liquidator exist in the BVI and also Hong Kong. In determining this issue, guidance can be found from the case of *Re The Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd*<sup>26</sup> which concerned the recognition of the appointment of liquidators by a BVI court and the exercise of their powers under the laws of Hong Kong as if they were appointed as liquidators of the company under the law of Hong Kong.

Based on the *Pacific Andes* case, the BVI liquidator has the powers –

- (i) to request and receive from Mr Zhang and Mr Kong, documents and information concerning SPL and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency;
- (ii) to locate, protect, secure and take into their possession and control all assets and property within the jurisdiction of the Hong Kong court to which SPL is or

<sup>24</sup> Mr Robin Darton, *Foundation Certificate in International Insolvency Law, Module 8C Guidance Text, Hong Kong, 2021/2022* (INSOL International 2021), page 43

<sup>25</sup> Mr Robin Darton, *Foundation Certificate in International Insolvency Law, Module 8C Guidance Text, Hong Kong, 2021/2022* (INSOL International 2021), page 43

<sup>26</sup> [2017] HKCFI 649

- appears to be entitled including the proceeds in SPL's Hong Kong bank account;
- (iii) to locate, protect, secure and take into the liquidator's possession and control the books, papers, and records of SPL including the accountancy and statutory records within the jurisdiction of Hong Kong and to investigate the assets and affairs of SPL and the circumstances which gave rise to its insolvency;
  - (iv) to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the liquidator considers appropriate for the purpose of advising or assisting in the execution of his powers and duties; and
  - (v) so far as may be necessary to supplement and to effect the powers set out at sub-paragraphs (i) to (iii) above, to bring legal proceedings and make all such applications to the Hong Kong court whether in his own name or in the name of SPL on behalf of and for the benefit of SPL including any applications for:
    - (A) orders for disclosure, the production of documents and/or examination of third parties which it is anticipated may be made by the liquidator to facilitate his investigations into the assets and affairs of SPL and the circumstances which gave rise to its insolvency; and/or
    - (B) ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced.

The Hong Kong court also has the discretion to grant a stay of any actions or proceedings against SPL or its assets or affairs.<sup>27</sup>

(c) Commence ancillary winding-up proceedings against SPL in Hong Kong

Where there is a principal liquidation in a company's place of incorporation, ancillary winding-up proceedings against the company may be commenced in Hong Kong.<sup>28</sup> In order to deal with assets in Hong Kong and bring the relevant actions in Hong Kong, the BVI liquidator may commence ancillary winding-up proceedings against SPL in Hong Kong.

Pursuant to section 327 CWUMPO, the Hong Kong court has the jurisdiction to wind-up an unregistered company under the provisions of the CWUMPO. Section 326 CWUMPO defines an "unregistered company" as a company not registered under Hong Kong's company legislations.

The circumstances under which an unregistered company may be wound-up by the Hong Kong courts under the CWUMPO are—

- (i) if the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;
  - (ii) if the company is unable to pay its debts; or
  - (iii) if the court is of the opinion that it is just and equitable that the company should be wound-up
- (section 327(3) CWUMPO).

Since a winding-up order has been granted against SPL in BVI i.e. its place of incorporation, the winding-up of SPL in Hong Kong would satisfy the requirement of having ceased to carry on business or carrying on business only for the purposes of winding-up its affairs in section 327(3)(a) CWUMPO.

<sup>27</sup> *Re The Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* [2017] HKCFI 649

<sup>28</sup> *Re Information Security One Ltd* [2007] 3 HKLRD 780

In addition to satisfying the requirements in section 327 CWUMPO, the BVI liquidator will also need to satisfy the Hong Kong courts that the three (3) core requirements stated below for the Hong Kong courts to exercise its jurisdiction to wind-up SPL have been satisfied. Pursuant to the decision of the High Court of Hong Kong in *Re Pioneer Iron and Steel Group Company Limited*<sup>29</sup> the three (3) core requirements stated below need to also be satisfied in the case of ancillary winding-up proceedings to be commenced in Hong Kong where the company is in liquidation in the state of its incorporation.

The three (3) core requirements as summarised in the case of *Re Beauty China Holdings Ltd*<sup>30</sup> and reiterated by the Court of Final Appeal in the case of *Kam Leung Sui Kwan v Kam Kwan Lai and Others*<sup>31</sup> that the BVI liquidator will need to satisfy are as follows –

- (i) there has to be a sufficient connection between SPL and Hong Kong, but this does not necessarily have to consist in the presence of assets within Hong Kong.

The facts of the case state that SPL has a bank account in a Hong Kong bank. If there are funds in the bank account, the funds would be assets of SPL. Further, the facts also state that Mr Qi, the sole director and shareholder of SPL is likely a resident of Hong Kong. Based on these facts it is likely that the Hong Kong courts will hold that the first core requirement, that is, a sufficient connection with Hong Kong has been established.

- (ii) there must be a reasonable possibility that the winding-up order would benefit those applying for it.

The facts of the case state that –

- (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; and
- (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.

A winding-up order in Hong Kong will be beneficial to SPL as the liquidator will be able to take the necessary actions to claw-back any assets of SPL including the funds provided by Mr Xu that were misappropriated by Mr Qi. The liquidator will also be able to examine Mr Zhang and Mr Wong to locate, protect, secure and take into the liquidator's possession and control the books, papers, and records of SPL including the accountancy and statutory records within the jurisdiction of Hong Kong and to investigate the assets and affairs of SPL and the circumstances which gave rise to its insolvency.

Based on the above, it is highly likely that the Hong Kong courts will find that the second core requirement has also been satisfied.

- (iii) the court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

---

<sup>29</sup> [2013] HKCFI 324

<sup>30</sup> [2009] HKCFI 829

<sup>31</sup> [2015] HKFCA 79



The BVI liquidator will need to show that there are persons with sufficient connection with Hong Kong (other than by being the petitioner or a creditor who would become subject to the court's jurisdiction if a winding up order were to be made and he submitted a proof of debt) and sufficient economic interest in the winding up of the company to justify making an order which will engage the Hong Kong winding-up regime.<sup>32</sup> This third core requirement must be met unless the connection with Hong Kong is sufficiently strong and the benefits to creditors are sufficiently substantial.<sup>33</sup>

Since there are no known creditors of SPL in Hong Kong, it is unlikely for the third core requirement to be satisfied. However, based on the facts of the case that satisfy the first two (2) core requirements as stated above, it is highly likely that the Hong Kong courts will find that the connection with Hong Kong is sufficiently strong and the benefits to creditors are sufficiently substantial.

Based on the above, it is highly likely that the Hong Kong courts will grant a winding-up order over SPL in Hong Kong. Once appointed in the Hong Kong winding-up proceedings, the BVI liquidator will be able to exercise the powers that are exercisable by a liquidator under the CWUMPO (section 331 CWUMPO).

Commented [RD(DWH24)]: ?

We will now consider what action the BVI liquidator can take in respect of SPL's assets that are in the Mainland. Upon obtaining the winding-up order in Hong Kong, the winding-up proceedings against SPL would be "Hong Kong Insolvency Proceedings" within the meaning of the mutual recognition of and assistance to bankruptcy (insolvency) proceedings between the courts of the Mainland and Hong Kong pursuant to the Record of Meeting.

If the assets of SPL in the Mainland are located in Shanghai, Xiamen or Shenzhen, the BVI liquidator may be able to rely on the Record of Meeting to seek recognition of, and assistance to, the Hong Kong Insolvency Proceedings in the Mainland. However, as stated in the Opinion (discussed above), the Hong Kong Insolvency Proceedings will be recognised in the specified areas of the Mainland only where Hong Kong is the debtor's centre of main interests ("COMI"). Based on the facts of the case, it would be difficult for the BVI liquidator to show that SPL has a COMI in Hong Kong. In such an event, the BVI liquidator will not be able to rely on the co-operation mechanism between Hong Kong and the Mainland to seek a recognition of the Hong Kong Insolvency Proceedings and take action in respect of the assets in the Mainland. The BVI liquidator will instead have to seek other methods to take action in respect of the assets that are in the Mainland.

**\* End of Assessment \***

**TOTAL MARKS: 48 out of 50**

Formatted: Left

<sup>32</sup> *Re China Medical Technologies, Inc.* [2014] HKFCI 656

<sup>33</sup> *Re China Medical* [2018] HKCA 111