



**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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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**.

Commented [DB1]: ???

**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(DWH2)]:** 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(DWH3)]:** Incorrect (0 marks) - For some provisions, the time period changes depending on whether the other party to the transaction is connected to the bankrupt, but not for transactions at an undervalue.

**Question 1.3**

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

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

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

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

**Commented [RD(DWH4):** 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(DWH5):** 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(DWH6):** 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(DWH7):** 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(DWH8):** 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(DWH9):** 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(DWH10):** 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.**

**Commented [RD(DWH11):** Incorrect (0 marks) - Although Hong Kong has not enacted UNCITRAL or similar provisions, the courts have developed a practice of giving recognition to foreign office holders in certain circumstances (see section 7 of text)

(d) None of the above.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 3 marks]**

What are the jurisdictional requirements as regards a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over that person?

[Type your answer here]

For the Hong Kong Court to exercise its bankruptcy jurisdiction over a debtor, the debtor must be an individual, and pursuant to section 4 of the Bankruptcy Ordinance (Cap 6) ("BO") must:

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

Commented [RD(DWH12)]: (3 marks)

**Question 2.2 [maximum 3 marks]**

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

[Type your answer here]

In order to wind up an unregistered company in Hong Kong, the petitioner must satisfy that the company is sufficiently connected to Hong Kong by satisfying the three core requirements set out in the Hong Kong Court of Final Appeal's ("CFA") decision in *Re Yung Knee*. The three core requirements are:

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

Commented [RD(DWH13)]: (3 marks)

**Question 2.3 [maximum 4 marks]**

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

[Type your answer here]

The appointment of a provisional liquidator is outlined at section 193 of the CWUMPO.

An application to appoint a provisional liquidator may be made at any time after a petition has been presented. In urgent cases, the application may be made at the same time as the petition. The Hong Kong Courts have found in *Re Kong Wah Holdings Ltd & Anor [2001]* that it is not appropriate to appoint a provisional liquidator immediately prior to winding up to avoid

Commented [RD(DWH14)]: (3.5 marks). Full marks if mention that powers are as prescribed by the court (powers depend on circumstances)

having the Official Receiver as provisional liquidator upon the winding up order being made. As per *Re Texxan Industries Ltd (in Liq) [1990]*, the court also has jurisdiction to appoint a provisional liquidator despite the appointment of voluntary liquidators.

For a provisional liquidator to be appointed, there must be sufficient circumstances justifying the appointment. For example, if there is a risk that assets will be dissipated, or otherwise be in jeopardy, before a winding up order is made. The court may consider factors such as commercial realities, the degree of urgency, the need for the order and the balance of convenience.

The purpose of appointing a provisional liquidator is to preserve the assets in the period after the petition is presented but before the order is made. The provisional liquidator does not actually realise those assets, unless doing so would be necessary to preserve those assets value. A provisional liquidator may also be appointed to facilitate a restructuring proposal, although that cannot be the sole reason for their appointment.

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

#### Question 3.1 [maximum 5 marks]

Describe why you think a liquidator is able take action to challenge an unfair preference and set out what a liquidator must show to succeed in such a claim.

[Type your answer here]

A liquidator is able to take action in relation to an unfair preference pursuant to section 266, 266A and 266B of the CWUMPO in order to ensure that the assets of the company are fairly distributed between the creditors. The unfair preference provisions prevent creditors from being placed in a better position than they ordinarily would have been upon a company's insolvency.

In order for a liquidator to successfully make a claim for an unfair preference, the liquidator must prove:

- (i) the transaction was entered into:
  - a. during a period of six (6) months prior to the commencement of winding up; or
  - b. during a period of two (2) years prior to the commencement of winding up where the beneficiary under the transaction was a person connected to the company;
- (ii) at the time of the transaction, the company was unable to pay its debts or became unable to pay its debts as a result of the transaction concerned;
  - a. This criterion is presumed against a recipient who is a person connected with the company if her or she is an 'associate' of the company or if he or she is an 'associate' of a director or shadow director of the company; and
- (iii) that the company was 'influenced by a desire' to improve the creditors position in the relevant liquidation.

#### Question 3.2 [maximum 5 marks]

Hong Kong has limited formal arrangements to deal with cross-border insolvency. Given that Hong Kong and the Mainland are one country, does this statement stand correct for the Mainland? Discuss.

[Type your answer here]

**Commented [RD(DWH15):** (3.5 marks) Should also state requirement that party 'preferred' is a creditor (or surety); and see below

**Commented [RD(DWH16):** Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

**Commented [RD(DWH17):** This element is a rebuttable presumption if beneficiary is connected

**Commented [RD(DWH18):** (0 marks) The answer should deal mainly with the new 2021 mechanism for cross-border recognition but also mention the pre-existing tools, such as s.327 and the common law (e.g. the CEFC Shanghai case)

The People's Republic of China resumed sovereignty over Hong Kong from 1 July 1997, pursuant to a Sin-British Joint declaration signed in 1984 and ratified in 1985 ("the Joint Declaration"). Pursuant to the Joint declaration, upon the PRC resuming sovereignty over Hong Kong, Hong Kong would become a Special Administrative Region of the PRC with a high degree of autonomy. This resulted in Hong Kong remaining responsible for certain aspects of their territory including the legal system, which retains the British Common Law Approach. In short, since 1 July 1997 Hong Kong has operated under Deng Xiaoping's principle of "One Country, Two Systems".

After the handover to the PRC, the laws in Hong Kong in force as at 30 June 1997 continued to apply in Hong Kong only insofar that they are not declared by the Standing Committee of the National People's Congress ("the Standing Committee") to contravene the Basic Law. The Basic Law operates as Hong Kong's constitution and was promulgated by the PRC. In preparation for the handover, the Standing Committee declared that "*the laws previously in force in Hong Kong, which include the common law, rules of equity, ordinances, subsidiary legislation and customary law, except those which contravene the Basic Law, are to be adopted as the laws of Hong Kong*".

Accordingly, Hong Kong's individual insolvency laws are contained in the Bankruptcy Ordinance (Cap 6), as supplemented by the Bankruptcy Rules (Cap 6A) and Hong Kong's corporate insolvency laws are contained in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 232), as supplemented by the Companies (Winding Up) Rules (Cap 32H).

Therefore, Hong Kong and the Mainland PRC remain as two separate judicial systems and the arrangements available to deal with cross-border insolvency will differ between the two (2) jurisdictions.

**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.

[Type your answer here]

A scheme of arrangement is a statutory mechanism under Hong Kong law which allows companies to make binding compromises or arrangements with their members and / or creditors (or any class of them), including adjustment of debts owed to its creditors or reduction of share capital. For debt restructuring purposes a scheme of arrangement enable companies and their creditors to compromise or adjust debts if stipulated majorities of the relevant creditors approve the same and the court sanction such an arrangement. The statute for schemes of arrangement are contained in Part 13, division 2 of the Companies Ordinance (primarily section 668 to 677) and the procedure relating to the applications necessary to effect a scheme of arrangement is governed by O.102 r2 and r5 of the Rules of the High Court.

Some pros of a scheme of arrangement are:

- (i) a company does not require 100% of the relevant creditors approval to contractually vary their debt. In a scheme of arrangement, the scheme is considered approved by the scheme creditors' meeting if it is supported by a majority in number representing 75% by value of the creditors present and voting. A scheme of arrangement is therefore helpful where it would be difficult or impossible to seek unanimous consent of all creditors, or, where there may be hold out creditors who seek an unfair advantage as against a substantial majority of similarly ranked creditors.

**Commented [RD(DWH19):** (4 marks) as classes are important, should outline requirements (similarity of legal rights, not interests); also reference the court involvement, scrutiny of explanatory statement etc.



- (ii) Companies can continue trading following implementation of a scheme of arrangement.

Come cons of a scheme of arrangement are:

- (i) in a scheme of arrangement it is not immediately obvious that releases in favour of third parties, such as guarantors, should be available through the scheme mechanism. The practice has developed that a company, through a scheme, may cause the release of its creditors' claims under guarantees provided by third parties where the guarantees are in respect of the debt being compromised under the scheme. The Hong Kong court has permitted third party releases in appropriate circumstances (*Kaisa and Winsway* decisions).
- (ii) With reference to *Anthony Gibbs & sons v Societe Industrielle et Commerciale des Metaux*, a scheme of arrangement seeking to compromise or vary an existing debt will only have real and substantive effect if the debt is discharged under the governing law of the debt. Therefore, foreign debts will not be discharged in the respective foreign jurisdiction.

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

##### Question 4.1 [maximum 4 marks]

Mr Chan is the sole director of Mountainview Limited, which is a Hong Kong incorporated company. Mr Chan comes to you and tells you that the company has financial difficulties and is unlikely to be able to continue in business. A friend has told him that his only option is that he must go to court to wind up the company, and that he should ensure he appoints a "friendly" liquidator who will not investigate the company's affairs too closely. Mr Chan asks whether his friend is correct and to advise him generally on what he should do and his position as a director.

[Type your answer here]

Given Mr Chan's comment that Mountainview Limited ("Mountainview") is "unlikely to be able to continue business", the best option for Mr Chan is to consider voluntary liquidation, so final settlement can be reached with his creditors and any other stakeholders, and the company can be deregistered. Mr Chan is aware of Mountainview's financial distress and should take action to wind up the company prior to a creditor applying for the winding up of Mountainview to the Court. There are two (2) types of voluntary liquidation, members' voluntary liquidation ("MVL") and creditors' voluntary liquidation ("CVL").

Pursuant to section 233(1) of the CWUMPO, an MVL is a procedure which is used where the company is able to settle its liabilities within twelve (12) months of the commencement of the liquidation. In an MVL, the director(s) will be required to sign a declaration of solvency. The appointed liquidators take over control of the business from the director(s) and investigate the company's affairs (including the conduct of the director(s)) and realise the assets in order to pay the company's creditors (in full), distributing any surplus to the shareholders (section 256 of the CWUMPO).

Pursuant to section 233(4) of the CWUMPO, a CVL is where a company places itself into liquidation but it is not solvent. The directors will convene a meeting of shareholders in order to pass a special resolution for the winding up of the company. The CVL commences on the date of the shareholder resolution. After the appointment a creditors meeting is held within 14 days (section 241(a) of the CWUMPO) where a statement of affairs for the company is presented (section 241 (3A) of the CWUMPO). Pursuant to section 242 of the CWUMPO, at the creditors meeting, the creditors will nominate and vote for the appointment of a liquidator,

**Commented [RD(DWH20)]:** (2.5 marks) Remember that the question asks you to advise Mr. Chan

A company can present its own petition, so that should be discussed; but 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)

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

and the liquidator will receive his full powers to conduct the liquidation. The director(s) are not required to sign a declaration of solvency in a CVL.

If Mountainview is solvent, Mr Chan should commence an MVL. If Mountainview is insolvent, Mr Chan should commence a CVL. The primary advantage to both an MVL and a CVL compared to a compulsory (court) liquidation, is there will be less involvement from the court, which will save costs for Mountainview, Mr Chan and the creditors of Mountainview.

#### 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.

[Type your answer here]

GLF has executed an agreement with Kite in which Kite has provided a fixed charge over their receivables to GLF. However, in order for a charge to be recognised as a fixed charge, rather than a floating charge, GLF must demonstrate control over the charged assets (the receivables) and that Kite is not permitted to freely deal with the receivables as though they were subject to the fixed charge. This is prevalent in the cases of *National Westminster Bank plc v Spectrum Plus Limited and others*, and, *Re Harmony Care Homes Limited (in administrative receivership)* which held that a fixed charge may be obtained over receivables, and the proceeds of those receivables paid into a bank account) only if the secured party has sufficient control over those proceeds.

Sufficient control is generally demonstrated by the entity holding the fixed charge blocking the account into which the proceeds of the receivables are paid so that the charger (in this case Kite) will not have the authority to withdraw funds from the account without first obtaining the chargee's (GLF's) consent for withdrawal. The secured party will be the sole authorised signatory with rights to direct activities in relation to the account and the account bank should agree to only take instructions from the secured party with respect to the account. Alternatively, the chargee can open a new account with similar restrictions.

No separate account has been opened for payment of Kite's receivables subject to GLF's fixed charge. Additionally, Kite has continued to be paid receivables into its normal operating account. Therefore, GLF has not exercised sufficient control and the fixed charge may need to be reclassified as a floating charge.

**Commented [RD(DWH21):** (3 marks) A good answer but should add:

check the validity of the charge – execution, registration etc

When was it entered into? Within time period that means may be void against liquidator unless new money (s.267, 267A) was it an unfair preference (security can be UP – see Sweetmart)? If so, L may also be able to get receivables. Say 'may' because would need to make application and notoriously difficult to show company was influenced by desire to prefer.

**Commented [RD(DWH22):** agree

However, even if GLFs fixed charge is recategorized as a floating charge their appointment as receiver over the receivables will still stand, but the priority of payments will change. The liquidation of Kite, will not affect the receiver's right to hold, sell and realise the accounts receivable. The realisations made by the receiver out of the receivables are not available to the liquidator of Kite for payment of the liquidation expenses (section 265(3B) of the CWUMPO). However, pursuant to section 79 of the CWUMPO, realisations are made out of the assets covered by a floating charge, those realisation must first be used to meet claims of preferential creditors.

Accordingly, the liquidator of Kite cannot insist that the receiver hand over realisations from the receivables in order to meet the costs and expenses of the liquidation and to pay a partial distribution to creditors of the liquidation.

#### Question 4.3 [maximum 6 marks]

Mr Xu entered into a Framework Agreement (FA) with his business associate, Mr Qi. The FA is governed by Hong Kong law. The idea was to develop a resort project in Fiji. The FA provided that Mr Qi would incorporate a BVI company to purchase a 100% interest in the project from its original owners. To this end, Mr Qi incorporated Sunrise Pacific Limited (SPL) in the BVI. He was (and remains) the sole director and shareholder of SPL, telling Mr Xi that this was necessary because the original developers of the resort trusted him and him alone. The FA provided that Mr Xu would inject USD 20 million into the project by advancing that sum to SPL. The FA also provided that if the project could not be developed and sold on to a buyer within a period of two (2) years from the date of the FA, then SPL will pay a sum of USD 22 million to Mr Xu (representing a return of his investment plus USD 2 million to represent interest).

Mr Xu remitted the USD 20 million to SPL but over the months that followed became concerned that the project was not progressing, with many excuses coming from Mr Qi. He subsequently discovered that the project had not even started (and may be a scam entirely). More than two (2) years has passed since the date of the FA and SPL did not pay any money to Mr Xu. Mr Xu therefore obtained a winding up order over SPL in the BVI.

The BVI liquidator appointed has identified:

- (a) There is a clause in the FA that states that if SPL becomes insolvent then all other provisions (including the requirement to pay Mr Xu) are void, and all assets automatically and immediately vest in Mr Qi in order to repay shareholder loans Mr Qi has made;
- (b) SPL has a (supposedly independent) director, Mr Zhang, who lives in Hong Kong; and SPL also has a book-keeper, Mr Wong, who lives in Hong Kong. Neither Mr Zhang nor Mr Wong are replying to emails from the liquidator;
- (c) SPL has a bank account at a bank in Hong Kong;
- (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.

#### Commented [RD(DWH23)]: (3.5 marks)

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

Question asks that advice be given to L; answer should be written accordingly

The FA clause that all provisions (including repayment to Xu) are void if SPL insolvent is almost certainly void due to the anti-deprivation principle

Whether L is properly appointed would be a matter for BVI law L will be able to take certain steps in Hong Kong without a formal recognition order

Obtain documents from the company's bank (Bay Capital) Bring an action against Mr. Qi (perhaps for breach of fiduciary duty) (Irish Shipping – but see recent decision of Nuoxi Capital which creates some uncertainty)

IF can find him; also query if has assets (litigation worthwhile?). Need to investigate

L should obtain a recognition order to take other steps that 'belong' to an office-holder as opposed to the company itself (e.g. examination of individuals):

The Hong Kong court is receptive to such applications from legal systems similar to Hong Kong (BVI is one)

The Hong Kong court will need the originating court (BVI) to make a letter of request

The powers that the liquidator can then exercise in Hong Kong must be powers that he has as a liquidator in the home (i.e. BVI) jurisdiction and that he would have if appointed as a liquidator here in Hong Kong (the Singularis principle)

Note that although the jurisdiction to examine in Hong Kong's legislation is a broad one (s.286B), some jurisdictions restrict the power to examine to officers or closely related parties, so this should be checked carefully, certainly as regards Mr. Wong (no suggestion he is an officer). Need to check with BVI lawyers. [nb, some development in more recent cases re basis on which examination powers are exercised]

Re **possible assets in the Mainland** and the new "co-operation mechanism":

- o The location of the assets should be identified: at present the mechanism only applies if the debtor's (SPL's) principal assets in the Mainland are in a pilot area or it has a place of business in such an area. The pilot areas are Shanghai, Xiamen and Shenzhen

- o In any event, the mechanism only applies to proceedings commenced under the specifically identified Hong Kong legislation (CWUMPO, CO etc.). It is therefore unlikely that the liquidator could use the mechanism via a recognition application (i.e. he is 'only' a BVI liquidator which the Hong Kong court has recognised for the purpose of taking certain steps in Hong Kong; he is not appointed under a proceeding commenced under CWUMPO or CO).

- o However, the Hong Kong court does have jurisdiction to wind-up non-Hong Kong companies (s.327) if the core requirements are satisfied. These are:

- ▣ there must be sufficient connection with Hong Kong, (not necessarily meaning the presence of assets within the jurisdiction);
- ▣ there must be a reasonable possibility that the winding up order would benefit those applying for it; and

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

- o The liquidator could therefore make an application for an ancillary liquidation and it may then be possible that the new mechanism can be utilised (subject to the other criteria being met) – the mechanism making it clear that the COMI of the debtor (COMI in Hong Kong being a requirement) does not necessarily require the company to be incorporated in Hong Kong. [the answer is may be because where, as here, the company is already in liquidation in its jurisdiction of incorporation, the liquidation here would be ancillary – it is yet to be tested whether the Mainland courts will take issue with this. However, for the purpose of this assessment, marks will be awarded for identifying a s.327 winding up as a possible method of accessing the new cooperation mechanism].

**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.

[Type your answer here]

The liquidator's concern that all assets vest in Mr Qi when SPL becomes insolvent is a legal argument that should be settled in the BVI Court, prior to proceeding with the liquidation generally. Given the winding up order was granted, the BVI Court was satisfied that it was appropriate to wind up SPL as at the date of the order and based on the evidence. However, if the circumstances have changed, the liquidator needs to consider this with the BVI Court prior to taking steps in Hong Kong as any potential application to the Hong Kong Court may be rejected on this basis.

Regarding the steps that can be take generally, there is no legislation in Hong Kong to recognise a foreign liquidation or foreign liquidators. Common law principles have been used and developed to allow a foreign liquidator to be recognised in in Hong Kong, where it will assist the foreign liquidation.

This process will require the court of the foreign liquidation (BVI) to send a letter of request for the recognition to the Hong Kong Court.

The principle surrounding the common law recognition is that, if successful, the Hong Kong court will make an order permitting the liquidator of SPL to take steps in Hong Kong as if appointed there, provided that the power sought to be exercised is available in both the BVI and in Hong Kong.

The Hong Kong Court may also grant a recognition order that permits the liquidator of SPL to seek the production of documents from Mr Zhang (director) and Mr Wong (bookkeeper).

As outlined in *Bay Capital*, the Hong Kong Bank of the Company should readily assist the SPL liquidator in providing records for the bank account held. If the SPL liquidator wishes to deal with any assets held with the Hong Kong bank, the SPL liquidator will have to apply for a specific recognition order in that regard (*Re China Liumena New Materials Corp (in Provisional Liquidation)*).

Another option available to the SPL liquidator is an ancillary liquidation. An ancillary liquidation (if successful) would provide the SPL liquidator with the same powers a 'Hong Kong Liquidator' would receive. The Hong Kong Court must consider the three core principles as set out in the decision ins *Re Yung Kee* in order to grant an ancillary winding up order:

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

In the case of SPL:

- (i) The FA is governed by Hong Kong Law. Additionally, Mr Zhang (the independent director) and Mr Wong (the bookkeeper) reside in Hong Kong and Mr Qi is believed to reside in Hong Kong;

**Commented [RD(DWH24)]:** Correct that any issues as to validity of appointment would be for BVI lawyers, but the FA is subject to HK law - anti-deprivation principle applies

- (ii) The winding up order would benefit the SPL liquidator as the SPL liquidator will be able to:
  - a. Deal with any potential assets with the Hong Kong Bank;
  - b. Pursue the records held by Mr Zhang and Mr Wong; and
  - c. Have further jurisdiction to deal with the potential assets in Mainland China.

In May 2021 a cooperation mechanism was introduced between Hong Kong and certain Mainland China areas. Those areas are:

- (i) Shanghai Municipality;
- (ii) Xiamen Municipality of Fujian Province; and
- (iii) Shenzhen Municipality of Guangdong Province.

The new cooperation mechanism relates to 'Hong Kong Insolvency Proceedings' which means any collective insolvency proceedings commenced under CWUMPO or the CO. Additionally, the debtor's centre of main interest must be in Hong Kong.

SPL's recognition in Hong Kong (either through a recognition order or ancillary liquidation), would not meet the requirements of a 'Hong Kong Insolvency Proceeding'. SPL is a company registered in the BVI and therefore it is likely that its centre of main interest is not in Hong Kong.

Therefore, the SPL liquidator would have to apply directly to the relevant Court in Mainland China in respect of the potential assets.

**\* End of Assessment \***

**TOTAL MARKS: 34 out of 50**

Commented [RD(DWH25)]: Place of incorporation not the same as COMI

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