



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

A receiver can be appointed –

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

(d) any of the above.

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

Select the **correct** answer:

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

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

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

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

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

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

Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

Commented [RD(DWH6): Correct (1 mark) – see section 6.3.1 of text.

Question 1.7

Select the **correct** answer:

In a compulsory winding up, there is a mandatory stay of litigation claims against the company:

- (a) from the date on which the petition is presented.
- (b) from the date of commencement of the liquidation.
- (c) from the date of the winding up order.
- (d) There is no statutory provision for a mandatory stay; whether the claimant can continue is a matter for the court's discretion.

Commented [RD(DWH7): Correct (1 mark) – s.186 CWUMPO (section 6.3.7 of text); the mandatory stay also applies if a provisional liquidator is appointed.

Question 1.8

Select the **correct** answer:

In a compulsory winding up, at the first meeting of creditors where a resolution is proposed for the appointment of a liquidator, a creditor holding security from the company:

- (a) is not allowed to vote.
- (b) can vote and the whole amount of its claim is counted.
- (c) can vote if it has valued its security and the amount that is counted is the difference between its claim and that value.
- (d) must get special permission from the chairperson of the meeting to vote.

Commented [RD(DWH8): Correct (1 mark) – Rule 84 CWUR (section 5.5 of text).

Question 1.9

In considering what previous court decisions are binding on the Hong Kong courts, which of the following statements **is correct**?

- (a) A 1995 decision of the English House of Lords is binding.
- (b) A 1993 decision of the UK Privy Council on an appeal from Hong Kong is binding.
- (c) A 1996 decision of the UK Privy Council on an appeal from the Cayman Islands is binding.
- (d) None of the above because they all pre-date the Handover in 1997.

Commented [RD(DWH9): Correct (1 mark) – The *China Field* decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text).

Question 1.10

A liquidator appointed in another jurisdiction wants to seek Hong Kong recognition of his appointment. Which of the following **is correct**?

- (a) He must make an application to the High Court of Hong Kong using the provisions of the UNCITRAL Model Law.
- (b) He must first seek permission from the Ministry of Justice in Beijing.
- (c) No recognition is possible.
- (d) None of the above.

Commented [RD(DWH10): Correct (1 mark) – Hong Kong has not enacted UNCITRAL; the Ministry of Justice in Beijing would not be involved (“1 country, 2 systems”); the courts have developed a practice of giving recognition to foreign office holders in certain circumstances.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Commented [RD(DWH11)]: (3 marks)

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

The jurisdictional requirements to be regarded a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction are:

- The debtor must be an individual; and
- Pursuant to section 4 of the Bankruptcy Ordinance the debtor:
 - is domiciled in Hong Kong;
 - is personally present in Hong Kong on the day on which the petition is presented; or
 - at any time in the period of 3 years ending with that day –
 - i) had been ordinarily resident, or has had a place of residence, in Hong Kong; or
 - ii) has carried on business in Hong Kong.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12)]: (3 marks). Would have been preferable to include source (CFA's decision in Yung Kee)

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

The three core requirements that enable the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company are as follows:

1. Sufficient connection to Hong Kong;
2. Reasonable possibility that the winding up order would benefit those applying for it; and
3. The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Question 2.3 [maximum 4 marks]

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

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

Under section 193 of the CWUMPO a liquidator can be appointed provisionally by the court any time after a winding-up petition has been presented and before a winding up order is made.

Provisional liquidators can be appointed to preserve a company's assets where there is a good *prima facie* case for the winding-up order being made and there is a risk that the company's assets will be dissipated. Provisional liquidators are not appointed to realise assets except for in circumstances where a sale is necessary to preserve the value of the assets – an application to the court will need to be made to the court in order to facilitate a sale.

The provisional liquidators can also be appointed to facilitate a restructuring proposal, however they will not be appointed solely to facilitate the same.

The appointment of provisional liquidators also triggers a moratorium on proceedings/creditor's actions.

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

Question 3.1 [maximum 5 marks]

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

A liquidator can make an application to the court to make an order to set aside unfair preferences pursuant to section 266 of the CWUMPO.

Under Section 266A of the CWUMPO an unfair preference is deemed to have been given to a person if: *that person is i) one of the company's creditors; or ii) a surety or guarantor for any of the company's debts or other liabilities;* and with the action taken by the company, that person is in a better position, upon the company's insolvency, than if that action had not been taken.

Relevant transactions to be considered pursuant to section 266B of the CWUMPO are transactions, not at an undervalue, that:

- were entered into with a person who is connected to a company (if not solely an employee) in the period of 2 years ending with the day of commencement of the winding up
- or any other transaction in the period of 6 months ending with the day of commencement of the winding up.

Pursuant to section 266 of the CWUMPO in order for the court to make the order, the court must be satisfied that *the company was influenced in deciding to give that unfair preference by a desire to produce in relation to that person the effect mentioned in section 266A(1)(b)*. The liquidator must be able to show that the company was 'influenced by desire' – this can be difficult to demonstrate.

The liquidator must also be able to show that at the time the preference was given the company was unable to pay its debts or became unable to pay its debts as a result of the transaction.

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.

Hong Kong lacks formal arrangements to deal with cross-border insolvency, however Hong Kong is a common law jurisdiction which has principles to deal with cross-border insolvencies. The PRC is not a common law jurisdiction.

The PRC has its own bankruptcy regime which came into force on 1 June 2007, the Law of the People's Republic of China on Enterprise Bankruptcy – the law applies to PRC companies and also extends to recognition of certain foreign proceedings with respect to assets located in China.

There is also the new cooperation mechanism between Hong Kong and the PRC which allows for the recognition of liquidators in Hong Kong to be recognized in certain areas of the Mainland and vice versa.

Commented [RD(DWH14): (3.5 marks). Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves. Rebuttable presumption of desire to prefer where beneficiary is a connected person. Also see note below

Commented [RD(DWH15): Rebuttable presumption of desire to prefer where beneficiary is a connected person.

Commented [RD(DWH16): (2 marks) not a full answer, some description of the new mechanism should be given

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.

Scheme of arrangement is a statutory mechanism under Division 2 Arrangement and Compromises (section 668-677) of the Companies Ordinance.

Under section 669 of the Companies Ordinance, Division 2 applies where "*an arrangement or compromise is proposed to be entered into by a company with either or both of the following (a) the creditors, or any class of the creditors, of the company; (b) the members, or any class of the members, of the company.*".

Such arrangements or compromises are binding, once approved, with the members and/or creditors and can include adjustments to the debt owed or reorganization or reduction of the share company's capital. The scheme is considered approved where 75% by value of the creditors present and voting have voted in favor of the scheme. Outside of a scheme of arrangement the company would need to seek approval by 100% of all creditors to make any adjustments to debt owed.

Creditors must be prepared to accept less than they are owed, a company considering a scheme should be somewhat certain of acceptance of the scheme as it can be a costly process to initiate and if not effected can cause further distress to a company.

A scheme of arrangement can be used on a standalone basis or with the mechanism of provisional liquidation. When used on its own, Hong Kong law does not include provisions for a moratorium on creditor action in a scheme of arrangement. A petition can be filed seeking a winding up of a company, a moratorium is obtained at the point of presentation of the petition – however, the petition cannot be filed solely for the purposes of a restructuring. The petition would need to demonstrate that there was risk of dissipation of assets, the liquidators would then be expected to preserve the assets before requesting powers to effect a restructuring, using a scheme of arrangement. The process in this case can be slow.

A scheme of arrangement will need to be sanctioned by the court.

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.

To properly assess Mr. Chan's options, further information would need to be provided on Mountainview Limited's financial situation. While the company has financial difficulties, we would need to consider if the same has affected the solvency status of the Mountainview.

Commented [RD(DWH17): (3.5 marks) See below and as classes are important, should outline requirements (similarity of legal rights, not interests)

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)

Commented [RD(DWH18): Also majority in number

Commented [RD(DWH19): (2 marks) The answer has the main points, but options not fully explained. Recall that you are advising. Should also advise that if company is insolvent owes duties to creditors ahead of the company.

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

If Mountainview remains solvent, then the company can be wound up using the voluntary liquidation mechanism which can be commenced with involvement of the court by way of a member's voluntary liquidation. Mr. Chan would need to be able to sign a certificate of solvency confirming that the company will be able to settle all liabilities within 12 months of the commencement of the liquidation as provided for in section 233 of the CWUMPO. The company's shareholders will then pass a special resolution to wind up the company and appoint the liquidators.

Commented [RD(DWH20)]: Court not involved in MVL

If Mountainview is insolvent, the company can be wound up by way of a creditors' voluntary liquidation or by way of a compulsory liquidation.

In a creditors' voluntary liquidation either:

- the company's shareholders will pass a special resolution to wind up the company and appoint the liquidators at a meeting convened by the directors. The liquidators' powers remain limited until such time that a creditors meeting is held and the liquidators' powers confirmed at the same; or
- where the directors' opinion is that the company should be wound up with immediate effect then the director can deliver a statement certifying the same to Registrar.

In a compulsory liquidation the company is wound up by order of the court. Creditors or the company can present the petition for winding up by order of the court. In a compulsory liquidation it is the responsibility of the liquidator to investigate the affairs of the company.

Commented [RD(DWH21)]: 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

Question 4.2 [maximum 5 marks]

Commented [RD(DWH22)]: This duty exists in voluntary too

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.

Commented [RD(DWH23)]: (4.5 marks) Could also add that should check registration etc. S. 267 is caveated as to new money too

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.

A fixed charge is attached to a specific asset upon creation of the fixed charge – the borrower should be in day-to-day control of the assets secured by the fixed charge. Enforcement of a fixed charge falls outside the scope of the liquidation. In the case of GFL and Kite Limited, should it be determined that the charge is in fact fixed, the liquidator would not be able to insist that the realisations made by the receiver be handed over to settle the expenses of the liquidation.

In the case of GFL, while the charge is stated to be fixed, from the information provided the assets held by the fixed charge remain under the control of Kite Limited instead of GFL. The liquidator should consider if the charge should instead be recharacterized as floating.

With a floating charge the debtor can continue to use the assets under Hong Kong law until such time that the assets are realized. Enforcement of a floating charge is also outside of the liquidation however, where there are realizations made from the secured assets they must first be used to settle the claims of preferential creditors, where there are no other assets to settle the same. The receivables appear to be the only assets of Kite Limited so the receiver may have to hand over the realizations to settle the preferential creditor claims.

The liquidator also needs to consider when the charge was entered into, if it should be recharacterized as floating. Under section 267 of CWUMPO if the floating charge, not to a connected person, is created in,

*“the period 12 months ending with the day on which the winding up of the company commences; and the company—
(i) is unable to pay its debts (within the meaning of section 178) at that time; or
(ii) becomes unable to pay its debts (within the meaning of section 178) in consequence of the transaction under which the charge is created.”*

then the charge may be considered void if the company goes into liquidation. In the case of a person connected to a company, the charge is void in liquidation if created within a period of 2 years of commencement of the liquidation.

From the information provided we only know the charge was created ‘some months’ ago and that the company was facing cashflow issues. If the liquidator determines that the charge was created in the last 12 months and Kite Limited were unable to pay their debts at the time or as a result of the transaction under the charge, then the charge will be invalid, and the receiver will be required to hand over any realizations to the liquidator.

The liquidator should also consider if execution of the charge was an unfair preference transaction – the liquidator would need to determine that the company was influenced by the desire to continue trading. If so, the liquidator could apply to the court to set aside the charge and restore the company’s position to what it would be had the charge not been executed.

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).

Commented [RD(DWH24)]: Spectrum: look at substance not form

Commented [RD(DWH25)]: (3.5 marks) See notes below. Also:

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

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.

With respect to the clause in the FA, regarding the SPL's solvency, the liquidator will need obtain further information about the financial status of SPL

Commented [RD(DWH26): ? From HK perspective: anti-deprivation principle voids it

The liquidator should seek to obtain recognition of the winding up order from the BVI court in Hong Kong so that the liquidator can exercise certain powers, such as the ability to obtain orders for examination, where the power also exists in the BVI for officeholders – the *Singularis* principle. Recognition of foreign liquidators is done through common law principles as there is no legislation in Hong Kong with respect to recognition of foreign proceedings.

The liquidator will need to obtain a letter of request from the court in order to seek recognition in Hong Kong.

If recognition is granted the liquidator would be able to obtain documentation from the bank in Hong Kong in relation to SPL's accounts.

Commented [RD(DWH27): Should not need recognition for this (Bay Capital case)

The liquidator should seek to obtain an order for powers to examine Hong Kong based parties, such as the directors or book-keeper, however the liquidator would need to consider if the power also exist in BVI.

If the power does not exist in the BVI, the liquidator should instead consider opening ancillary proceedings in Hong Kong. The liquidator would need to show the court that the 'three core requirements' have been satisfied before the court grants an ancillary winding up order, the requirements being:

1. There is sufficient connection to Hong Kong;

2. There is a reasonable possibility that the winding up order would benefit those applying for it; and
3. The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Opening such proceedings in Hong Kong would also give the possibility of recognition in the Mainland, with respect to the assets held in the Mainland, via the new cooperation mechanism between Hong Kong and Mainland.

The new cooperation mechanism between Hong Kong and the Mainland (certain areas only) allows Hong Kong insolvency representatives to obtain recognition in the designated pilot areas of the Mainland and vice-versa, Mainland officeholders can obtain recognition and assistance in Hong Kong.

With the new mechanism it will make it easier to wind up a foreign company in Hong Kong with assets located in the Mainland. The liquidator would need to determine where the assets are located in order to seek recognition as the cooperation mechanism only extends to certain areas in the Mainland.

In addition, the debtor's center of main interests ("COMI") should be in Hong Kong continuously for at least 6 months, generally being the company's place of incorporation, however, the Courts will also consider other factors, such as the company's principal place of business, and the location of its principal assets and principal offices. SPL seems to have both directors and a bank account in Hong Kong. It also seems that the records of the company are in Hong Kong. The liquidator will need to consider if this is sufficient to consider Hong Kong as SPL's COMI.

The liquidator would need a letter of request from the Hong Kong court to seek the recognition in the Mainland.

*** End of Assessment ***

TOTAL MARKS: 38.5 out of 50

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(3.5 marks) See notes below. Also:

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].