INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

# 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**.

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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]: (2 marks). See note below

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

Section 4 of the Bankruptcy Ordinance outlines he conditions that are to be satisfied to be deemed a debtor in the Hong Kong courts, those jurisdictional requirements are as follows:

- The debtor should be domiciled in Hong Kong
- The day that the petition is presented to the Court, the debtor should be personally present in Hong Kong; and
- In the 3 years prior to the petition being presented, the debtor should have been an ordinary resident or have had a place of residence in Hong Kong or had carried out business in Hong Kong.

Commented [RD(DWH12]: No, this should be "or" not "and"

**Question 2.2 [maximum 3 marks]**

Commented [RD(DWH13]: (2 marks). See notes below

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

There are certain core requirements that enable the Hong Kong courts to be able to wind up a non-Hong-Kong company. The case law which led the way for the introduction of these core requirements is *Kam Leung Sui Kwan v Kam Kwan Law & Others (2015),* where a non-Hong Kong company was seeking to wind up foreign holding companies with underlying businesses and/or assets located Hong Kong. The core requirements as referenced in the Guidance Text are as follows:

- The company must have sufficient connection with Hong Kong which includes assets of any nature or any business activities;
- The persons applying for the winding up order must evidence the benefits of the proceedings and
- The Hong Kong court should have jurisdiction over 1 or more persons benefiting from the distribution of assets.

Commented [RD(DWH14]: Not quite: court clearly has jurisdiction to wind up (s.327); the core requirements go to the exercise of the court's discretion as to whether to do so

Once all three core requirements are satisfied, Hong Kong will proceed to wind up the company.

Commented [RD(DWH15]: Again, the jurisdiction is discretionary

**Question 2.3 [maximum 4 marks]**

Commented [RD(DWH16]: (3 marks). Should mention that powers are as prescribed by the court (powers depend on circumstances); and see note below

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

In Hong Kong, the term provisional liquidation does not exist, however Section 193 of the CWUMPO cover the appointment of liquidators on a provisional basis before the official liquidation has commenced.
According to Subsection (1) of Section 193, a provisional liquidator can be appointed at any time after the presentation of the winding up petition and before the actual order has been made. However, urgent orders for a provisional liquidator can be made at the time of the presentation of the petition. This is usually done to protect and preserve the assets of the Company, in the instance that there is a fear that the director will try to dissipate the assets of

the company out of the reach of the liquidators and creditors of the company. The provisional liquidators will initially not be granted the power to realize the assets of the Company unless expressed orders by the Court. The provisional liquidators can also assist with restructuring scheme for the Company. The Official Receiver can possibly by appointed as a provisional liquidator or the creditors may prefer to appoint a private provisional liquidator.
A provisional liquidator can also be appointed with specific powers to investigate and ascertain whether a scheme of arrangement is viable for the Company. The order will most likely not be made at the same time of the winding up order to appoint the provisional liquidators due to recent case rulings, but they may later on be awarded those powers by the Court.

Commented [RD(DWH17]: Not quite: court will not appoint a PL solely to restructure

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

**Question 3.1 [maximum 5 marks]**

Commented [RD(DWH18]: (4.5 marks). See below re why not full marks

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

Unfair Preference is known as placing a creditor in a better position than they would have been if the insolvent company had been wound up. The Liquidators would have to make an application setting aside the transactions made to those creditors. The transactions however must have occurred during the six months prior to the company being wound up or two years where the beneficiary under the transaction was " a person connected to the company", which is described as an associate of the Company or the director of the Company. It is deemed quite hard to demonstrate that the company acted unfairly. The Liquidator must be able to evidence that at the time, the company was not in a position to pay its debts or due to the payments made became unable to pay it debts. However, the Liquidator is entitled to take action to challenge unfair preferences as the liquidators are appointed to ensure that all creditors' interests are considered. If a few creditors benefitted because the company at that time wanted their position to improve for whatever reason, the liquidators have to use their impartiality to ensure that those transactions are clawed back, and potentially repaid to the Liquidators and increase the realization pool.
Once the liquidators can justify the transactions were done with unfair preference, according to Section 266 of CWUMPO, and as quoted from the Guidance Text, the court can therefore allow the liquidator to obtain the property subject to unfair preference, release or discharge security given by the Company, direct any person to repay the sums back to the liquidator, provide security for the discharge of any obligation imposed and revive the obligation of any surety or guarantor which had been released.

Commented [RD(DWH19]: Or surety

Commented [RD(DWH20]: Rebuttable presumption of desire to prefer where beneficiary is a connected person.

**Question 3.2 [maximum 5 marks]**

Commented [RD(DWH21]: (1.5 marks) not a full answer, should reference the common law tools (CEFC Shanghai case for example), and some description of the new mechanism should be given

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 and Mainland are one country; however they are governed separately. Mainland consists of any part of China other than Hong Kong, Macau and Taiwan, although it is not classified as a foreign country following the Handover in 1997. China is responsible for Hong Kong's foreign and defense affairs, however other areas such as policing, immigration, taxation, and the legal system (which retains the British Law approach) is the responsibility of Hong Kong. Therefore, Mainland will have other arrangements and means of handling cross border insolvency, as discussed below.
Hong Kong has limited formal arrangements to handle cross border insolvency, it has not adopted the UNCITRAL Model Law on Cross-Border insolvency, and they are no bilateral agreements with other countries other than Mainland. There is however a new arrangement which covers Hong Kong and most parts of Mainland. It allows Hong Kong office holders to

obtain recognition and assistance in Mainland, and for Mainland office holders to obtain recognition and assistance in Hong Kong.
Due to China not being classified as a "foreign country" following the handover, the Mainland introduced the Mainland Judgements (Reciprocal Enforcement) Ordinance (Cap 597) on 1 August 2008. The arrangements only applies in circumstances such as Commercial contracts, Valid agreement on choice of Mainland court, Money judgments from a designated court and final and conclusive judgements.

**Commented [RD(DWH22]:** Not relevant to the question

**Question 3.3 [maximum 5 marks]**

**Commented [RD(DWH23]:** (3.5 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)
Reference should be made to the majorities required

The scheme of arrangement is, in essence, Hong Kong's only statutory tool for corporate rescue. Describe it, listing the pros and cons.

There is no legislation in Hong Kong specifically dealing with corporate rescue, however a Scheme of Arrangement is said to be Hong Kong's only statutory tool for corporate rescue and is considered very important. According to the Guidance Text, Scheme of Arrangements is a statutory mechanism under Hong Kong law which allows companies to make a binding compromise or arrangements with their members and/or creditors. This scheme also includes adjusting debts owed to creditors or reducing share capital. Scheme of Arrangements in Hong Kong are governed by Part 13, Division 2 of the Companies Ordinance. The Hong Kong scheme of arrangements are similar to the British law cases, however there are some key differences.
A process to make an application to the court to approve a scheme of arrangements is covered in the following steps:

- An application must be made to convene a meeting of creditors. This application is heard by the court who will give directions in terms of advertising the notice
- The meeting of creditors should then take place and the outcome reported to the court
- The court will then make a decision to sanction the scheme once the application is made. As per the Guidance Text, the application should include an affirmation explaining the background of the scheme, a copy of the draft explanatory statements, a copy of the draft scheme document, a copy of the notices of the scheme meetings, a copy of the proxy forms and a draft advertisement to be published.

In the Court making a decision to sanction the scheme, the following are considered:

- The Jurisdiction of the debtor and
- The suitability of all the documents presented in the application.

One of the advantages of the scheme of arrangement is that without the scheme, the company would have to obtain 100% approval from the relevant creditors to be able to adjust any debts. The scheme of arrangements makes this process easier in that only a major vote is required of the relevant creditors to approve any adjustments.
Another advantage of the scheme of arrangements is that they are a useful tool to use for creditors who may be seeking unfair advantage. Unfair advantage is normally sought against those "substantial majority of similarly ranked creditors" as per the Guidance Text.
One of the disadvantages of the scheme of arrangements is the issues arising from handling third party obligations, especially guarantors. This is due to the fact that it is not always obvious that any releases that would be in the guarantors' favor would be available through a scheme.
Another disadvantage of a scheme of arrangement is the risk of application failing is high and considering the level of costs involved. If for any reason the Court decides that the creditors have not given sufficient explanation of the scheme the court may refuse to allow the creditors to convene a meeting. If the court does grant sanction for the meeting to be held and in the petition to the court following the meeting, the court id not satisfied after considering the issues as summarized in Re Wheelock Properties Ltd, the court has the right to reject the scheme.

**Commented [RD(DWH24]:** Why?

**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.

As the director of the Mountainview Limited, Mr. Chan should have the inside scoop on how well or not the Company is performing and therefore has raised concerns about the Company's' financial difficulties. One question that should be raised however is whether the company is already insolvent or if on its way to becoming insolvent. If the company is not yet at that point of being insolvent, there are other means to assist so that the state of insolvency can be delayed or avoided the directors of the Company will have to discuss those matters and determine a way forward for the Company, whether it be to cut back on expenses or downscale.

However, if the Company is already at the stage of insolvency, a petition can be made on behalf of a Company who is unable to pay its debts when they fall due. Section 178 of CWUMPO covers the conditions that constitute as a Company being unable to pay their debts. Mr. Chan's friend has advised him that he must go to court to wind up the Company, however that is not entirely correct. Only in compulsory liquidations would one be obligated to go before the Court, and this is usually presented by a creditor on the grounds that the company is unable to its debts. The petition can be presented by the Company as well, however the Court would then be obligated to appoint a liquidator. Another option that Mr. Chan has is voluntary liquidation of which there are two types, members voluntary liquidation (**MVL**) and creditors voluntary liquidation. (**CVL**).

In a MVL, the Company must be able to settle its debt within 12 months of being placed into liquidation and it requires a signed certificate of solvency and the shareholders must pass a special resolution for winding up the company.

In a CVL, the Company places itself into liquidation and the directors will convene a meeting of shareholders to pass a special resolution after which a meeting of creditors will be held at which a nomination and vote for a liquidator will take place.

It should be noted however that any liquidator appointed over the Company will investigate the company thoroughly as they are obligated to do. In Mr. Chan's friend suggesting that a "friendly" liquidator be appointed, does raise a few flags as to whether Mr. Chan had any part to play in the Company's downfall.

**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

**Commented [RD(DWH25]:** (3 marks) See below. Should also advise that if company is insolvent owes duties to creditors ahead of the company

**Commented [RD(DWH26]:** 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)

**Commented [RD(DWH27]:** A liquidator will be appointed whichever method of liquidation is pursued

**Commented [RD(DWH28]:** (3 marks) A reasonable answer but need to consider Spectrum (i.e. substance not form) therefore likely a floating charge. See also below

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.

GFL insisted that Kite executed a fixed charge over the receivables of the Company and Kite agreed and executed this document. A charge over an asset can be either fixed or floating. A fixed charge is a charge in relation to a specific asset, and a floating charge does not attach to a specific asset but is usually over a class of assets (such as receivables of stock). The floating charge awaits that "crystallization event" which is also referred to as a "trigger event" after which the debtor can no longer utilise the asset and therefore the charge becomes fixed.

A fixed charge is not usually placed over receivables as stated above, and therefore queries whether the charge was incorrectly charged in the scenario above or is now void. Any security that was not accurately registered, is void. Also, any floating charge that was entered into 2 years prior to the Company being placed into liquidation (in the absence of new money) and in favour of a person connected to the Company will also be deemed void. Therefore, if the charge was incorrectly registered and should have been registered as a floating charge, it would have still been deemed as void. GFL also insisted that the charge be placed over the receivables as they were aware of the financial difficulties Kite was having, which is also classified as unfair preference, which is also voidable.

The Liquidator can look to raise all these issues upon their appointment, however in the instance that the charge was deemed appropriately registered, all realisations over charges made by the Receiver are not available for the liquidator and any expenses arising from the liquidation. GFL was appointed by GFL over the specific charge and due to the fact that the Company was no longer able to pay their debt. The receivers therefore owe a duty to GFL, not the Company nor its creditors.

There is a charge over the asset and no other assets available, therefore there is nothing further the liquidator will be able to do besides closing down the liquidation on the premise that there are no other assets available to realise and distribution.

**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(DWH29]:** Not void; just takes effect as a floating charge

**Commented [RD(DWH30]:** Unfair preference not automatic. Need to apply

**Commented [RD(DWH31]:** Should consider what happens if takes effect as a floating charge: R has to give up $ for preferential claims

**Commented [RD(DWH32]:** (3 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":
- 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
- 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).
- 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.
- 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 ... [1]

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.

It is evident from the scenario that the project was a scam, which ultimately led to Mr. Xu obtaining a winding up order over the BVI incorporated Company, SPL. Mr. Xu incorporated this company and injected 20 million dollars into the project, and it was agreed that when the project as sold, he would receive his investment with interest of 2 million. Unfortunately, Mr. Qi's intention was to defraud Mr. Xu.
The BVI appointed liquidators has discovered a few issues in the FA, the first being the FA is governed by Hong Kong laws and there was a clause that states that if SPL becomes insolvent then all other provisions were void and all assets would vest in Mr. Qi. Those provision included the requirements to repay Mr. Xu as well. However, the Hong Kong Court may not uphold a contract that deprives Mr. Xu and other creditors of the Company. The Anti Deprevation Principle covers this in that it applies where security was given with the intention of preventing parties from using contractual arrangements to give an advantage to one of the contracting parties in the event of insolvency. A contractual clause in the contract would normally be upheld however one of the limits are where it is clear that the creditors would be deprived. However, in order for the anti-deprivation rules to take effect, a few factors must be considered. Those factors include:

- Whether it was the intention to evade insolvency laws?
- Whether the clause operated in situations other than upon insolvency?
- Whether the asset concerned is flawed

Once it can be proven that the Anti Deprivation Principle applies, the clause in the FA will be void and SPL can be placed into liquidation.
SPL is believed to have assets in Mainland, and a bank account in Hong Kong. In terms gaining foreign recognition in Hong Kong, Hong Kong does not have the statutory framework to deal with cross border insolvency, it has not adopted the UNCITRAL Model on Cross-Border

Insolvency but has followed common law principles in terms of cross border insolvency and assisting foreign representatives. In this case, Ancillary liquidation proceedings can be taken to obtain information relating to the bank account in Hong Kong. The Guidance Text notes that the Banks are willing to assist foreign representatives by providing them with documents in relation to the accounts held by the Company even without obtaining a foreign representative court order. However, in simply being granted recognition in Hong Kong, the foreign officeholders will have limited powers and those powers would compare to those that the foreign liquidator would have in their home country. In obtaining an ancillary liquidation order, the foreign liquidator will have all the powers granted to a Hong Kong liquidator. The BVI Liquidator can then have the jurisdiction to compel Mr. Zhang, Mr. Wong and Mr. Qi to provide books and records they hold on behalf of the SPL. Opening Ancillary proceedings in Hong Kong also assists in obtaining information on the assets that are in the Mainland. With the new "co-operation mechanism" arrangement in place between Hong Kong and Mainland, the foreign representative would be able to gain recognition an assistance in Mainland and can conduct investigations to locate the assets of the Company with the aim of maximizing assets for the benefit of all creditors of SPL.

**Commented [RD(DWH33]:** But could seek bank docs without an order (Bay Capital)

**Commented [RD(DWH34]:** May be able to do this through recognition too

*** End of Assessment ***

**TOTAL MARKS: 35.5 out of 50**

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(3 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].