



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.

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

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

Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

Commented [RD(DWH6)]: 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.

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?

While there is no definition of the term 'debtor' under the Bankruptcy Ordinance (Cap 6), the debtor must be an individual and the following conditions under Section 4 of the BO must be fulfilled to qualify as a debtor under the BO:

- the debtor must be domiciled in Hong Kong;
- the debtor must be personally present in Hong Kong on the day of presentation of the bankruptcy petition; or
- at any time in the period of three years ending with that day:
 - (i) have been ordinarily resident, or have had a place of residence in Hong Kong; or
 - (ii) have carried on business in Hong Kong.

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?

The core requirements that enable the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company as set out in the Court of Final Appeal's decision in *Re Yung Kee* are:

- there must be a sufficient connection with Hong Kong (not necessarily requiring the presence of assets in the jurisdiction);
- there must be a reasonable probability that the winding up order will benefit those applying for it; and
- the court should 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]

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

Technically, under Hong Kong law, provisional liquidation as a concept does not exist as the company is either under liquidation or not. However, Section 193 of CWUMPO provides for appointment of provisional liquidators. An application to appoint a provisional liquidator can be made any time after a winding-up petition has been presented (or at the same time as the petition in urgent cases) and before a winding-up order has been made.

The circumstance in which a provisional liquidator may be appointed is if there are sufficient circumstances justifying the appointment, for instance if there is a risk that assets will be dissipated or be in jeopardy before a winding-up order is passed. The court takes into

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.

Commented [RD(DWH11): (3 marks)

Commented [RD(DWH12): (3 marks)

Commented [RD(DWH13): (4 marks)

account factors such as degree of urgency, commercial realities and balance of convenience in deciding upon appointment of a provisional liquidator.

The purpose of appointing a provisional liquidator is:

- to preserve assets in period after the petition is presented but before the final order is made but not to realise those assets, unless it is necessary for preservation of value of those assets.
- To facilitate a proposal for restructuring, but that cannot be the sole reason for his or her appointment
- In cases where a provisional liquidator has been appointed by the court, the court may limit and restrict his powers under the order appointing him, or terminate his appointment upon an application by a provisional liquidator, the official receiver, a creditor, a contributory, the petitioner or the company itself.

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

Question 3.1 [maximum 5 marks]

Commented [RD(DWH14): (4 marks). See below

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

A liquidator is able to take action to challenge an unfair preference in accordance with section 266, 266A and 266B of the CWUMPO which allows liquidators to apply for setting aside a transaction where the insolvent company acted in a way to place a creditor or guarantor in a better position than it otherwise would have been in case of the company's insolvency.

A liquidator is able to take this action to challenge an unfair preference as it helps in restoring positions and recovering assets as it would have been, had such a transaction not occurred. The objective is to undo the damage done to the remaining creditors by undertaking of such a preference by the debtor and restore their positions as it would have been in the absence of the unfair preference.

Transactions such as giving of security or payments may fall under the scope of an unfair preference.

The liquidator must show the following to succeed in a claim relating to an unfair preference:

- The transaction was done in a way to place a creditor or guarantor in a better position that it would have otherwise been in case of the company's insolvency;
- At the time that the transaction was done, the company was unable to pay its debts or became unable to pay its debts as a result of the transaction (this is presumed in case the beneficiary of the transaction was a 'person connected with the company' but this is a rebuttable **presumption**);
'a person connected with the company' is one who is an 'associate' of the company or if they are 'associate' of a director or shadow director of the company. An 'associate' includes another company who is controlled by the same entity as the company being wound-up or that entity's associates.
- It must be shown that the company was influenced by a desire to improve the standing of that creditor. Therefore, it will need to be shown that the company positively wished to improve the position of the creditor in case of its insolvent liquidation and a person need desire all the necessary consequences of their action. However, this desire can sometimes be difficult to **prove**.

Commented [RD(DWH15): Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

Commented [RD(DWH16): Rebuttable presumption of desire to prefer where beneficiary is a connected person.

- **Relevant time:** The transaction must have occurred in the period of six months before commencement of winding-up, or two years if the beneficiary of the transaction was connected to the company (i.e., was a related party).

If the liquidator convinces the court that the transaction was an unfair preference, then the court may pass an order to vest the property which was subject to the unfair preference in the liquidator, release or discharge any security given by the company, among others.

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.

This statement does not stand correct with respect to the Mainland. Even though Hong Kong and the Mainland are one country, Hong Kong is a special administrative region of the People's Republic of China with a high degree of autonomy. Hong Kong operates on the principle of one country, two systems. While Hong Kong follows the common law system, Mainland is a civil law jurisdiction.

While Hong Kong has limited formal arrangement to deal with cross-border insolvency, it entered into a cooperation mechanism for cross-border recognition and assistance (pilot agreement) of insolvency proceedings between the courts of Hong Kong and the Mainland on 14 May 2021 which stemmed from a record of meeting between the representatives of the Supreme Court of the Mainland and the Hong Kong Government.

The record of meeting deals with recognition of provisional liquidators and liquidators appointed in Hong Kong in the Mainland and for Mainland administrators to seek recognition in Hong Kong. The record of meeting was also followed by an opinion of the Supreme People's Court which provides:

- The areas to which the pilot agreement applies are: Shanghai Municipality, Xiamen Municipality in Fujian Province and Shenzhen Municipality in Guangdong Province.
- The agreement covers collective insolvency proceeding under CWUMPO or the Companies Ordinance, including compulsory winding up, creditors' voluntary winding up and scheme of arrangement promoted by a liquidator or provisional liquidator and sanctioned by a Hong Kong court;
- The debtor's centre of main interest (COMI) must be in Hong Kong continuously for at least six months. COMI is usually the place of incorporation of the debtor but can also consider factors such as place of principal office or assets;
- The debtor's principal assets, place of business or representative office should be in the identified pilot areas and then the Hong Kong liquidator can seek recognition in the Mainland.
- A letter of request from a Hong Kong court with a request to seek recognition is necessary.

This pilot agreement is an important development and there has already been a first case where Hong Kong Liquidation of Samson Paper Company Limited has been recognized in the Mainland under this agreement.

Question 3.3 [maximum 5 marks]

Commented [RD(DWH17): (4.5 marks) Could also have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai)

Commented [RD(DWH18): (4.5 marks) As classes are important, should outline requirements (similarity of legal rights, not interests)

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

A scheme of arrangement is a statutory mechanism which allows companies to make compromises or arrangements with their creditors and/or shareholders (or any class of them). The statutory provisions for a scheme of arrangement are contained in Part 13, Division 2 of the Cap. 622 Companies Ordinance. The court procedure for a scheme process is provided under O.102 r 2 and r 5 of the Rules of the High Court.

A scheme of arrangement broadly follows the following procedure:

- The company should prepare an explanatory statement setting out background to the company, need for a scheme, and the proposed scheme;
- Application is to be made by the company to the court to convene a meeting of scheme creditors. Debtors may also offer consent fees to creditors in advance of the scheme meeting in exchange for their support of the scheme. As long as all creditors to whom the scheme applies are offered this arrangement, the court will not object to it;
- At the meeting, the scheme should be approved by a majority in number representing at least 75% in value of those creditors present and voting of each class of creditors;
- Result of the meeting is reported to the court and a hearing is held to sanction the scheme;
- The court sanctions the scheme if it is convinced that the classes of creditors was constituted properly and the scheme is one which an intelligent and honest creditor will reasonably approve.
- The scheme takes effect and becomes binding once a certified copy of the court's order sanctioning the scheme is registered by the Registrar of Companies for Hong Kong.

The scheme will only bind creditors whose debt is governed by Hong Kong law or in case the debt is governed by non-Hong Kong law then the creditor has participated in the scheme.

The main pro of relying on a scheme of arrangement is that in the absence of a scheme process, the debtor would require 100% approval from its creditors, for its compromise or arrangement in order to bind them. Through a scheme of arrangement, the debtor can bind its creditor through a lower approval threshold (i.e., majority in number representing 75% in value of each class of creditors present and voting). Therefore, it is a useful tool in case it is difficult or impossible to get unanimous approval for a restructuring. It is also useful in cases involving a hold-out creditor who is seeking an unfair advantage over similarly placed creditors.

The main con of relying on a scheme of arrangement is that there is no automatic statutory moratorium that comes into place while the scheme process is ongoing. However, amendments to the Rule of High Court which now provides that the court's case management powers include a specific power to stay proceedings. The case *Eastman Chemical Ltd v. Heyro Chemical Co Ltd* can possibly be relied on to argue that a Hong Kong court may grant a stay to aid restructuring.

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH19)]: (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.

Since Mr Chan is the sole director of Mountainview Limited and believes that the company will not be able to continue in business then he can try and initiate a creditors’ voluntary liquidation process by convening a meeting of Mountainview’s shareholders to pass a special resolution for the winding-up of the company, which commences on the date of this resolution.

Subsequently, a meeting of creditors will be convened no later than 14 days after the shareholders’ meeting. Notice of the meeting is to be sent by post to creditors at least 7 days before the day on which the meeting is to be held and must be advertised in the Hong Kong Gazette and an English and Chinese language newspaper. The meeting can be presided over by Mr Chan but he may also appoint a representative.

Once the decision to convene a meeting of creditors and shareholders has been taken, Mr Chan should take all steps to protect the assets of the company while these meetings are pending. Once insolvent, Mr Chan’s duties remain to the company but must be exercised with the best interest of the creditors in mind.

The creditors will nominate and appoint the liquidator for the proceedings at its first meeting. The liquidator will then investigate the conduct of affairs of the company by the directors. The liquidator then submits a report to the Official Receiver in this regard.

While the company can also file for a compulsory winding-up before the court, the petition for compulsory liquidation needs to be authorized by a special resolution of the shareholders and directors alone cannot pass such resolution. However, compulsory liquidation proceedings are usually more costly and lengthy as opposed to a creditors’ voluntary liquidation.

Advice re Mr Chan’s position as a director: While there is no statutory obligation on a director to commence liquidation and establishing fraudulent trading is difficult, Mr Chan needs to be cautious to not breach his fiduciary duty by continuing to trade even when the company is insolvent.

Mr Chan should also be aware that a director can be held criminally liable for non-payment of wages or other statutory entitlements under the Employment Ordinance. There are also several grounds such as conviction for an indictable offence, persistent breaches of CWUMPO among others, for which a director may be disqualified.

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.

Commented [RD(DWH20): (3.5 marks) Should also consider: when entered into? Within time period that means may be void against liquidator unless new money (s.267, 267A)
Next to consider: 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.

Goshawk Financial Limited (GFL) is one of Kite's lenders. Having been troubled by the way Kite's business has been heading, some months ago GFL insisted that Kite execute a charge over its receivables, also insisting that the charge was stated to be a "fixed charge". Kite agreed and executed the document. No separate account was opened and Kite continued to trade with its customers as before, with money being paid into and out of its normal operating account (not held with GFL).

Recently, GFL appointed a receiver pursuant to the charge executed in its favour. The company has also been wound up on a petition presented by another creditor and a liquidator appointed. The receivables appear to be Kite's only assets. The liquidator asks for your advice on whether she can insist that the receiver hand over realisations he makes in order that the costs and expenses of the liquidation can be met and the unsecured creditors paid at least a partial dividend.

In order to answer whether the liquidator can insist the receiver hand over realisations made to pay the costs and expenses of the liquidation, it must first be examined whether the charge created in favour of GFL by Kite was registered. If not registered, the charge may be void as against the liquidator. If it is registered, then the liquidator needs to identify if the charge is fixed or floating.

In a fixed charge, the charge attaches from its creation and use of the asset is restricted. On the other hand, in case of a floating charge, the charge can continue to use the asset until a crystallization event occurs. In the given facts, no separate account was opened and Kite continued to trade with its customers as before with money being transferred in and out of its normal operating account which was not held with GFL, therefore, GFL's charge is a 'floating charge' and not a 'fixed charge'.

Importantly, while the enforcement and realization from a fixed charge is entirely out of the liquidation process, realisations from assets under a floating charge can be used to meet claims of preferential creditors if the non-charged assets are not sufficient to make payments to the preferential creditors.

Therefore, given that the charge in favour of GFL is a floating charge, the liquidator may be able to use the portion of realisations necessary to pay preferential creditors, as the receivables are the company's only assets and it likely does not have non-charged assets sufficient to otherwise pay the preferential creditors.

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(DWH21)]: (6 marks) but note comment below

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.

Broadly, the following steps may be taken by the liquidator in Hong Kong:

- 1) Seek recognition of their appointment and the BVI winding-up proceedings: While there is no specific legislation dealing recognition of foreign insolvency proceedings or foreign liquidators, Hong Kong courts have relied on common law principles to recognize foreign insolvency proceedings. The liquidator will need a letter of request seeking recognition from a BVI court. BVI liquidator may then be able to take steps in Hong Kong (i.e., get details of the bank account of SPL in Hong Kong) as if he were appointed in Hong Kong, as long as the powers sought to be exercised are available in both BVI and Hong Kong. The BVI liquidator can seek power to examine Hong-Kong based Mr Zhang or Mr Qi who is believed to be a Hong Kong resident but it will also need to be examined whether BVI law allows for such powers to be granted (according to the Singularis judgment).
- 2) Wind-up SPL in Hong Kong: The BVI liquidator's concern that Mr Xu does not have a standing to bring the winding up proceedings given the clause in the FA at (a) above can be dealt with using the anti-deprivation principle that would apply to the Hong Kong law governed FA. This principle prevents parties from using a contractual term to give one an advantage in case of insolvency of the other. Using this principle, the clause at (a) can be denied effect. In order to wind-up a non-Hong Kong incorporated company in Hong Kong, the following needs to be showed:
 - there must be a sufficient connection with Hong Kong (not necessarily requiring the presence of assets in the jurisdiction) – this can be shown given the fact that SPL has a bank account in Hong Kong and its directors also live in Hong Kong.

Commented [RD(DWH22)]: But could seek bank docs without an order (Bay Capital)

- there must be a reasonable probability that the winding up order will benefit those applying for it – getting a winding-up order against SPL in Hong Kong may help realise monies in SPL's bank account in Hong Kong, which shows that it will benefit those applying for it; and
- the court should be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets – the Hong Kong court has jurisdiction over Mr Zhang who lives in Hong Kong and Mr Qi who is a Hong Kong resident.

Action under co-operation mechanism between Hong Kong and China

In relation to the new cooperation mechanism between Hong Kong and China, a liquidator appointed in a compulsory winding-up in Hong Kong can seek recognition in the Mainland, provided:

- the debtor has assets in Shanghai Municipality, Xiamen Municipality in Fujian Province and Shenzhen Municipality in Guangdong Province.
- The debtors centre of main interest has been in Hong Kong continuously for a period of 6 months;
- The liquidator has a letter of request from a Hong Kong court seeking recognition.

Therefore, the BVI liquidator will need to get appointed as the liquidator in the Hong Kong winding up proceedings and can only seek recognition under the new cooperation mechanism if it can show that SPL has assets in Shanghai Municipality, Xiamen Municipality in Fujian Province and Shenzhen Municipality in Guangdong Province and that it has had its COMI in Hong Kong for a continuous period of 6 months.

*** End of Assessment ***

TOTAL MARKS: 46.5 out of 50

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