



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

**HONG KONG**

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

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

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

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

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

## ANSWER ALL THE QUESTIONS

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

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

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

#### Question 1.1

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

A receiver can be appointed –

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

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

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

#### Question 1.2

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

- (a) It depends on whether the person with whom the bankrupt transacted is an associate of his or not.
- (b) Two (2) years before the date of the bankruptcy order.

**(c) Five (5) years before the date of the petition on which the bankruptcy order was made.**

(d) Five (5) years before the date of the bankruptcy order.

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

#### Question 1.3

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

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

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

**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 able to exercise bankruptcy jurisdiction over a person, pursuant to section 4 of the Bankruptcy Ordinance. The debtor must be:

- Domiciled in Hong Kong
- Be present in Hong Kong on the day that the petition is presented; or
- At any time in the period of three years ending with that day;
  - o Have been ordinary resident, or have a place of residence in Hong Kong; or
  - o Have carried on business in Hong Kong.

### Question 2.2 [maximum 3 marks]

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

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

In order to wind up an unregistered company in Hong Kong, the petitioner must satisfy the court that the company has sufficient connection to Hong Kong.

The 3 core requirements are:

- There must be sufficient connection with Hong Kong;
- Reasonable possibility that the winding up order would benefit those applying for it;
- 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?

Provisional liquidation is a commonly used term, but under Hong Kong law it technically does not exist. A company is either in liquidation or not. The term is used where provisional liquidators are appointed pursuant to section 193 of CWUMPO.

An application to appoint a provisional liquidator may be made any time after a petition to wind up a company has been presented, however there are urgent cases the application can be made at the same time as the petition.

Provisional liquidators are appointed in circumstances to protect and safeguard the assets of the company until the winding up petition is heard – this will assist if the company's assets are in jeopardy. A provisional liquidator will only be appointed if an accretor can prove to the Court that the Company's assets are in jeopardy.

Additionally, a provisional liquidator may be appointed to facilitate a restructuring proposal, however, this cannot be the sole reason for appointment.

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

#### Question 3.1 [maximum 5 marks]

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

A liquidator is able to take action to challenge an unfair preference as an insolvent company has given a creditor preferential treatment, this would reduce the pool of assets available to the legitimate creditors.

To succeed in an unfair preference claim a liquidator must show that:

- At the time asserted an unfair preference was given, the company was not able to pay its debts or became unable to pay their debts as a result of the transaction.
- If it is presumed that the recipient is a connected party to the company, although, this can be challenged.
- In the case that the recipient is a company, the recipient or an associated company is a company controlled by the same person as the company being wound up.
- The company was influenced by a desire to improve the person's position in the event of a liquidation.

If a transaction is proved to be an "unfair preference" pursuant to section 266 of CWUMOI, the orders which may be made by the court include:

- Vesting in the liquidator the property which is the subject of the unfair preference;
- Releasing or discharging security given by the company;
- Directing any person to pay to the liquidators any benefits received from the company;
- Reviving the obligation of any surety or guarantor which had been released or discharged; and
- Providing security for the discharge or any obligation imposed by or arising under the order.

#### 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.

Yes, this statement stands correct for the Mainland. Following the Handover in 1997, Mainland China is no longer a "foreign country" and therefore any rules as to enforcement of a "foreign" judgment would not apply.

In July 2006, the "Arrangement on Reciprocal Recognition and Enforcement of judgment in Civil and Commercial Matters by the courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties' Concerned" was signed between the Hong Kong Department of Justice and the Supreme People's Court (Mainland).

On 1 August 2008, the Mainland Judgement (Reciprocal Enforcement) Ordinance (Cap597) ("MJREO") came into force. The arrangement applies in the following circumstances:

- a) Commercial contracts: MJREO only applied to enforcement of money judgments on disputes arising out of commercial contracts. Non-commercial contracts are excluded.
- b) Valid agreement on choice of Mainland court: a Mainland judgement is only enforceable in Hong Kong if the underlying agreement gives exclusive jurisdiction to the relevant Mainland court.

Commented [RD(DWH14)]: (3.5 marks) Should also state time limits and distinction between connected and unconnected parties

Commented [RD(DWH15)]: ?

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

Commented [RD(DWH17)]: (0 marks) The answer should deal mainly with the new 2021 mechanism for cross-border recognition but also mention the pre-existing tools, such as s.327 and the common law (e.g. the CEFC Shanghai case)

Commented [RD(DWH18)]: The question relates to cross-border insolvency, not enforcement of judgments

- c) Money judgments from a designated court: judgements in relation to the payment of any tax or fine are excluded. Costs ordered are registerable.
- d) Final and conclusive judgements: the judgement to be enforced has to be final and conclusive and had been given after the commencement of CAP 597.

In 2019, the Supreme Court of Mainland and the Hong Kong Government have signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the "Arrangement"). The Arrangement removes the requirement for an exclusive jurisdiction clause and extends enforcement to non-money judgements.

As application must be made within two years from the date from which the judgement takes effect.

**Question 3.3 [maximum 5 marks]**

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

A scheme of arrangement ("SoA") is a statutory tool that allows companies to make a binding compromise with their members / creditors, including adjustment of debts owed. The statutory regime is in Part 13, Division 2 of the Companies Ordinance. The Hong Kong court will take guidance from English law for schemes of arrangement as the wording is very similar.

A SoA is a court sanctioned compromise between a company and its creditors, or a class of them that gives statutory effect to bind all creditors even if they do not all agree. The following steps are involved in a SoA:

- o The court decided if it wants to grant leave to convene a meeting of creditors.
- o Meetings of the company's creditors convened to vote on the proposed scheme. 50% of the number of creditors that represent 75% in value, present at the meeting must be in favour for the proposed scheme to be approved.
- o The creditors approval of the scheme will need to be submitted to the court for final approval.

Pro of SoA

- A company can continue to trade throughout the process.
- Once the scheme of arrangement is sanctioned the scheme is binding to all creditor members.
- Lower costs associated with SoA as there is less court involvement.

Con of SoA

- The SoA lacks a moratorium that a winding up of the company will have. Often companies are placed in provisional liquidation to overcome this disadvantage to benefit from the automatic moratorium.

**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.

**Commented [RD(DWH19):** (4 marks) Should also mention that due to 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(DWH20):** (3 marks) Could also deal with MVL and fact that if circumstances warrant then company can present own petition, although a company cannot petition on the basis of a resolution by directors alone (Emmadart) and there is no indication that Mr. Chan is (necessarily) the only shareholder)

A 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.

Mr. Chan's friend is incorrect in the advice that he has been given. Mr. Chan's friend advising him to appoint a "friendly liquidator" is inappropriate and would indicate that Ms. Chan potentially had some wrongdoing in the operations of Mountainview Limited.

Mr. Chan has the option to place Mountainview Limited into a creditors' voluntary liquidation ("CVL") as the company is not solvent per the "financial difficulties" noted above.

To commence the CVL, Mr. Chan, on his own or at the request of the shareholders, will convene a meeting of shareholders in order to pass a special resolution for winding up Mountainview Limited. The CVL will commence on the date of passing this special resolution, but the liquidator appointed will have limited powers until their appointment is confirmed at the creditors' meeting.

The meeting of creditors will also be convened for a date not later than 14 days after the meeting of shareholders, and a statement of affairs should be laid before the creditors' meeting.

Notice of the meeting of creditors is posted to the creditors seven days before the meeting and advertised in the Hong Kong Gazette and an English language newspaper, and a Chinese language newspaper in Hong Kong.

The creditors will nominate and vote for the appointment of a liquidator at the meeting, contrary to Mr. Chan's friend's advice. Additionally, Mr. Chan will have a duty to the best interests of the company's creditors now.

Going through a CVL, as opposed to a court liquidation, will reduce the liquidation costs, such as legal fees.

**Commented [RD(DWH21):** Not necessarily, but the point anyway is 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

#### 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

**Commented [RD(DWH22):** (1.5 marks) Correct to identify that assets under fixed charge are not available to the liquidator, and correct to say that need to check registration. However, misses the main elements of advice to the L:

- >First step in any such situation is to check the validity of the charge – execution, registration etc
- >Say 'fixed charge' but court will look at substance : Spectrum. Here, can use the receivables so floating charge more likely
- >When entered into? Within time period that means may be void against liquidator unless new money (s.267, 267A)
- >If any of the above, L can ignore and insist on being handed all of the receivables
- >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.
- >If charge is valid (as floating charge), L cannot lay claim to the receivable (Leyland Daf case) except for preferential creditors (s.265(3B)) – note only asset so there will not be any 'free assets' in estate to meet those

which Kite must pay its suppliers and the dates on which it gets paid by its buyers, thus affecting Kite's cashflow; European buyers going straight to Mainland suppliers, etc.

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

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

GFL have a fixed charge which is in relation to Kite's receivables balance. In accordance with Hong Kong law if a secured creditor holds a fixed charge, such is the case with GFL, GFL is entitled to look to Kite's assets for repayment irrespective of the interests of the other unsecured creditors.

A fixed charge sits outside the liquidation. Once the fixed charge is satisfied the remaining assets will be returned to the liquidator for disbursement to the unsecured creditors. This differs from a floating charge, where realization are made out of assets covered by a floating charge, those realisations must be used to meet claims of preferential claims.

The validity of the documentation surrounding the fixed charge will need to be thoroughly reviewed by the liquidator. Additionally, evidence that the charge was properly registered is vital for the validity of the security.

The anti-deprivation principle will need to be review, to ensure that the security was not credited to give an advantage to a connected party in the event of an insolvency.

Double-dipping will need to be reviewed by the liquidator, as Kite goes into insolvency if GFL holds a guarantee from a third party (the debtor), the creditor is entitles to still prove for the full amount in Kite's insolvency, but cannot recover, in aggregate, more than the full amount of the claim.

**Question 4.3 [maximum 6 marks]**

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

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

The BVI liquidator appointed has identified:

- (a) There is a clause in the FA that states that if SPL becomes insolvent then all other provisions (including the requirement to pay Mr Xu) are void, and all assets automatically and immediately vest in Mr Qi in order to repay shareholder loans Mr Qi has made;
- (b) SPL has a (supposedly independent) director, Mr Zhang, who lives in Hong Kong; and SPL also has a book-keeper, Mr Wong, who lives in Hong Kong. Neither Mr Zhang nor Mr Wong are replying to emails from the liquidator;
- (c) SPL has a bank account at a bank in Hong Kong;
- (d) It is not known where Mr Qi is currently, but it is believed he is a Hong Kong resident;
- (e) SPL is believed to have assets in the Mainland, but the liquidator is not sure where these assets are located.

The liquidator asks for your advice on what steps he can take in Hong Kong, including as regards a concern he has that Mr Xu in fact had no standing to bring the winding up proceedings in the first place given the clause in the FA at (a) above.

The liquidator has also read about a new "co-operation mechanism" between Hong Kong and the Mainland that he would like to use in respect of (e) above.

The clause in the FA that state that is SPL becomes insolvent then all other provisions are void will not be upheld as it results in general creditors being deprived of an asset that would in the absence of the clause, be used to satisfy SPL's debts. This would be considered anti-deprivation as it would put one creditor in a better position than another – the principal is aimed at preventing parties using contractual agreements to give an advantage to one of the contracting parties in the event of an insolvency. Given that this clause would deemed void, Mr. Xu in his capacity as an unsecured creditor would have a standing to bring the winding up proceedings to SPL.

**Commented [RD(DWH23)]: (2.5 marks)**

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

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

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

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

Obtain documents from the company's bank (Bay Capital)

Bring an action against Mr. Qi (perhaps for breach of fiduciary duty) (Irish Shipping – but see recent decision of Nuoxi Capital which creates some uncertainty)

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

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

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

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

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

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

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

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

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

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

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

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

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

Pursuant to Mr Zhang and Mr Wong to investigate SPL's affairs, the liquidator can apply to the court for an order that any person whom the court thinks capable of giving information regarding the affairs of the company should attend court and have them examined under oath. Additionally, the court can order the delivery of the company's documents. This may assist the liquidator with their recoveries and claims.

Commented [RD(DWH24)]: Need recognition or a HK winding up order first

Upon presentation of the winding up petition, SPL's bank accounts in Hong Kong will be frozen once that bank is notified of the winding up.

The liquidator could potentially use co-operation mechanism between Hong Kong and the Mainland. This is an arrangement between Hong Kong and certain areas of the Mainland PRC. If the assets in question are located in one of the pilot areas of the Mainland to which the new cooperation mechanism between Hong Kong and the Mainland applies then the liquidator could use the co-operation mechanism.

**\* End of Assessment \***

**TOTAL MARKS: 34 out of 50**

Formatted: Left