



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**.

Commented [DB1]: ???

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

A receiver can be appointed –

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

(d) any of the above.

Commented [RD(DWH2)]: Correct (1 mark) – A ‘receiver’ can be appointed by the court or under a charge document (whether over shares or land, or indeed other assets).

Question 1.2

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

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

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

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

Commented [RD(DWH3)]: 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(DWH4): Correct (1 mark) – s.327 CWUMPO (section 7 of text).

Question 1.4

Select the **correct** answer:

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

- (a) must first be used to satisfy the costs and expenses of the liquidator.
- (b) must first be used to satisfy the whole of all claims by employees but no other claims.
- (c) must first be used to satisfy the claims of preferential creditors as described in the relevant section of CWUMPO.

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

Commented [RD(DWH5): Incorrect (0 marks) – see section 6.4.1 and 5.5 of text: preferential creditors are paid out of assets subject to a floating charge (unless the company is in liquidation and there are sufficient assets to make those payments out of the general estate). Note the question refers to the charge being over all of the company's asset, such that there would be no uncharged assets for the liquidator to meet the preferential claims out of uncharged assets.

Question 1.5

Select the **correct** answer:

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

- (a) the date on which the creditors pass a resolution to wind up the company.
- (b) the date on which the court approves the appointment of liquidators.
- (c) the date on which the members pass a special resolution to wind up the company.
- (d) the date on which notice of the liquidator's appointment is registered at the Companies Registry.

Commented [RD(DWH6): Correct (1 mark) – s.230 CWUMPO (section 6.3.3 of text). Note, however, that a liquidator has limited powers pending the creditors' meeting.

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

- (a) the Companies Ordinance (Cap 622).
- (b) the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).
- (c) the Companies (Winding Up) Rules (Cap 32H).

(d) none of above.

Commented [RD(DWH7): Correct (1 mark) – see section 6.3.1 of text.

Question 1.7

Select the **correct** answer:

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

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

Commented [RD(DWH8)]: Correct (1 mark) – s.186 CWUMPO (section 6.3.7 of text); the mandatory stay also applies if a provisional liquidator is appointed.

Question 1.8

Select the **correct** answer:

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

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

Commented [RD(DWH9)]: Correct (1 mark) – Rule 84 CWUR (section 5.5 of text).

Question 1.9

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

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

Commented [RD(DWH10)]: Correct (1 mark) – The *China Field* decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text).

Question 1.10

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

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

Commented [RD(DWH11)]: 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]

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?

Jurisdictional requirements as is concerns a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over that individual includes:

- must be an individual (under the BO);
- be domiciled in Honk Kong (section 4 of the BO);
- be personally present in Hong Kong on that day the petition is presented (section 4 of the BO); and
- at any time within the 3 years prior to the petition presentation day (section 4 of the BO):
 - The individual is to have been an ordinary resident (or have a place of residence) in Honk Kong; or
 - Have carried on business in Hong Kong.

Commented [RD(DWH12)]: (2 marks) see below

Commented [RD(DWH13)]: No, this should be "or" not "and"

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?

In order for a Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company, there are three "core requirements" that are set out in the CFA's decision re Kam Leung Sui Kwan v Kam Kwan Lai and Others (2015) 18 HKCFAR 501, which are:

1. sufficient connection with Hong Kong must be established and does not necessarily mean the presence of assets within Hong Kong;
2. reasonable possibility that the winding up order would benefit those applying for it; and
3. the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Commented [RD(DWH14)]: (3 marks)

Question 2.3 [maximum 4 marks]

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

Provisional liquidation does not technically exist under Hong Kong law but is used when there are provisional liquidators appointed pursuant to section 193 of the CWUMPO.

To appoint a provisional liquidator ("PL") in Hong Kong, an application may be made at any time after the presentation of a petition. In urgent cases, an application may be made at the same time as the petition filing. Once a PL is appointed by the court, the court has the ability to limit and restrict the PL's powers and terminate the appointment by way of an application made by the PL, an official receiver, a creditor, a contributory, the petitioner or by the company.

For a provisional liquidator ("PL") appointment to be made by the court, there must be sufficient circumstances to justify the appointment, including the risk of asset dissipation or

Commented [RD(DWH15)]: (4 marks)

the risk of the company being in jeopardy prior to a winding up order being issued (per the case of Union Accident Insurance Co Ltd [1972] 1 All ER 1105 at 1109).

Items of consideration taken by the court include the degree of urgency and need for a PL appointment and what the commercial realities are of such appointment.

If appointed by the court, a PL will be tasked with preserving assets (and not realise those assets unless it is necessary to do so in order to preserve value or the court who appointed the PL has permitted to do so via an application being made to the court) in the period between the petition date and the date the official order is made for the company to go into liquidation. A PL may also be appointed by the court to facilitate a restructuring proposal but cannot be appointed for this sole reason alone (per the case of Legend International Resorts Ltd [2006] 3 HKC 565 at 577).

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 one of their roles and powers is to investigate transactions or payments made by the company within a certain period prior to the date of winding up to determine whether the transactions should and can be avoided. An unfair preference occurs when an insolvent company acts to place a creditor (or guarantor) in a better position than it would have been upon the company's insolvency.

If successful, a transaction that is proven to be an unfair preference, pursuant to section 266 of the CWUMPO, can result in various orders made by the court, including:

- vesting in the liquidator the property which is the subject of the unfair preference;
- releasing / discharging security given by the company;
- directing any person subject to an unfair preference to pay to the liquidators any benefits received from the company;
- reviving the obligation of any surety or guarantor which had been previously released or discharged; and
- providing security for the discharge of any obligation imposed by or arising under the order.

In order for a liquidator to succeed with an unfair preference claim, an application to the Court is to be made which sets aside the transaction and the application must show that, at the time the alleged unfair preference was made, the company was unable to pay its debts or became unable to pay its debts as a result of the relevant transaction. The recipient of such a claim is generally a person connected with the company (i.e. an associate of the company and/or director or a shadow director of the company, or an associate/subsidiary of the company), however, it may be challenged by the recipient. Further, the liquidator must also prove that the company was 'influenced by a desire' to improve that recipient's position in the event of a liquidation.

It is generally difficult for a liquidator to succeed with an unfair preference claim in practice due to demonstrating the requirement that a company was influenced by a desire to improve the position of that creditor. An unfair preference transaction will not be considered unless the 'company positively wished to improve the creditor's position in the event of its own insolvent

Commented [RD(DWH16): (3.5 marks) Should also state time limits and distinction between connected and unconnected parties. See also below

Commented [RD(DWH17): Not necessarily

Commented [RD(DWH18): Rebuttable presumption of desire to prefer where beneficiary is a connected person.

liquidation' and that a person does not 'desire' all of the 'necessary consequences of his actions'. Such difficulties to demonstrate desire to prefer is exemplified in the case of *Hau Po Man Stanley (in bankruptcy) v Hau Po Fun Ivy* [2005] *Hau* case (even though it is a personal insolvency case, the principles are the same for liquidations).

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 stand correct for the Mainland. Further to the date that Hong Kong became a Special Administrative Region of the PRC on 30 June 1997 resulting in Mainland China not being classed as a "foreign country" (where 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 Department of Justice (Hong Kong) and the Supreme People's Court (Mainland).

On 1 August 2018, the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) ("**MJREO**") came into effect to give effect to the above arrangement and only applies in certain circumstances: .

1. Commercial contracts: MJREO will only apply to enforcement of money judgments on disputes arising out of commercial contracts; non-commercial contracts (i.e. matrimonial, employment contracts or contracts for personal consumption) are excluded;
2. Valid agreement on choice of Mainland court: a Mainland judgment is only enforceable in Hong Kong if the underlying agreement gives exclusive jurisdiction to the relevant Mainland court;
3. Money judgments from a designated court: Judgments in respect of payment of any tax, fine or penalty are excluded, however, costs orders are registrable. It is noted that in Hong Kong, only Mainland judgments from designated courts stated in the legislation are recognised. In the Mainland, money judgments from any Hong Kong court are recognised;
4. Final and conclusive judgments: The judgment to be enforced has to be final and conclusive and have been given after the commencement of Cap 597. To prove that a Mainland judgment is final and conclusive, the applicant may obtain a certificate from the original Mainland court (or other evidence including an enforcement notice from a Mainland court). In the Mainland, a copy of the judgment in Hong Kong certified by a Hong Kong court and a certificate that the judgment is enforceable by way of execution in Hong Kong is required.

As points 1. and 2. above restrict the utility of the legislation in many commercial cases, a further arrangement (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**") was signed in 2019 between the Supreme Court (of the Mainland) and the Hong Kong Government. This Arrangement will help to remove the requirement for an exclusive jurisdiction clause and will extend enforcement to non-money judgments. This Arrangement is not yet in force as at the submission of this assessment.

Commented [RD(DWH19): (0 marks) The question is about cross border insolvencies, not enforcement of judgments. 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)

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 an effective statutory tool for company restructurings under Hong Kong law. It allows for companies to make binding compromises or arrangements with their members and / or creditors (including any class of them), including modification of debts owed to its creditors or a reduction in share capital.

The statutory regime for SoA in Hong Kong falls under Part 13, Division 2 of the Companies Ordinance (sections 668 to 677). The court procedure relating to the applications necessary to effectuate a SoA is governed by Order 102 rule 2 and rule 5 of the Rules of the High court.

Procedure to commence a SoA:

- An Explanatory Statement is to be prepared, setting out the background to the company, why the SoA is needed and the proposed terms of the SoA;
- Court application for permission to convene meetings of SoA creditors. If permitted, a notice of the meeting must be given to all creditors in the relevant class;
- At the SoA meeting, the proposed SoA must be supported by the majority in number of creditors in their particular classes, representing at least 75% in value of those creditors attending (in person or by proxy) and voting;
- The result of the meeting is then to be reported to court, resulting in a sanction hearing to be held;
- The court will provide sanction only if it is satisfied that the classes are properly constituted and it is considered that the SoA is one which an "intelligent and honest creditor might reasonably approve";
- The SoA will then take effect when it is registered at the Companies Registry. It is noted that the SoA can only bind creditors if the debt is governed by Hong Kong law (or the relevant creditor takes part in the SoA).

Advantages:

- Debt restructuring purposes: a SoA enables companies and their creditors to compromise / adjust debts if stipulated majorities of the relevant creditors approve such compromise or adjustment and the court sanctions such arrangement. Without a SoA, a company would need to obtain the approval of 100% of the relevant creditors to contractually vary the debt.
- Allows companies to adjust debts with many creditors at the same time in circumstances where it would be difficult or impossible to seek the full consent of all creditors.
- An SoA can cancel out existing instruments and be replaced with new instruments.
- Acts as a court sanctioned compromise or arrangement which binds all creditors of the relevant class (even those who vote against it). Therefore, it is useful where there may be hold-out creditors who seek an unfair advantage against a substantial majority of similarly ranked creditors.

Disadvantages:

- Third party obligations (such as guarantors). Theoretically, it is not imminent that releases in favour of such parties is available through the SoA (as it is a statutory

Commented [RD(DWH20)]: (4 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)

arrangement between the parties to it). This can cause grief to implement the SoA. However, it is possible for a company (through the use of a SoA) to release creditors claims under guarantees provided by third parties where the guarantees are in respect of the debt being compromised under the SoA.

- An SoA on its own lacks any form of moratorium. A moratorium can be obtained via a mechanism whereby a petition for the winding up of the company is presented and an application is made for the appointment of provisional liquidators, with the specific powers of investigating the possibility of and, if viable, promoting a restructuring of the company's debts. The moratorium is then obtained by reason of section 182 of CWUMPO. Should the SoA be promulgated in such circumstances, the petition would then be dismissed when the SoA has been successfully implemented.

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.

Mr Chan's friend is not correct, and his advice should not be considered. The advice given to appoint a 'friendly' liquidator to not investigate the company's affairs closely is not appropriate as this breaches the fiduciary duties of Mr Chan that he owes to the company (and to act in the best interests of the creditors) - this is blatantly illegal.

The most appropriate route is for Mr Chan to opt to put the company which he deems is likely insolvent into a Creditors' Voluntary Liquidation ("CVL") and avoid the need for a submission to the court for a compulsory liquidation (which would result in much higher costs and increased timing).

Mr Chan, as director, will need to convene a meeting of shareholders and pass special resolutions (if the company is wound up pursuant to its Articles, then only ordinary resolutions are required) for the winding up of the company to occur. Once the resolutions are passed, the CVL will commence. It is noted that the appointed liquidator will have limited powers until his appointment is confirmed at a meeting of creditors. A meeting of creditors must be convened no later than 14 days from the date the shareholders meeting was held and Mr Chan should submit a statement of affairs which will be laid at the creditors meeting.

A notice of the creditors meeting is to be sent by post to the creditors within 7 days prior to the meeting and be advertised in the Hong Kong gazette and in an English language paper and a Chinese language newspaper circulated in Hong Kong.

Mr Chan is also required to be present at the creditors meeting, however, he may appoint a representative to do so which requires the court's approval to accept this as legitimate. Prior to the meeting of creditors, Mr Chan should ensure that the company's assets are protected. When the company is deemed insolvent, Mr Chan still has a duty to the company which is to act in the best interests of the creditors.

Commented [RD(DWH21)]: (4 marks)

Commented [RD(DWH22)]: Good: this is how advice should be given. Short and direct

Commented [RD(DWH23)]: In any event 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 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.

From the outset, it appears the liquidator cannot obtain realisations from the receivables, as a Receiver appointed via a fixed charge instrument over the receivables has the right to obtain the receivables in order to satisfy the debt of GFL, irrespective of other creditor interests that fall in under the liquidation and the fees and costs of the liquidator to conduct the liquidation (the enforcement of a fixed charge stands wholly outside the conduct of a liquidation). This situation would differ if it was a floating charge over the receivables. Further, the question does not make it clear if the charge would cover all of Kite's receivables – if some receivables from particular customers are not covered by the fixed charge, then this would also be available to the liquidator for payment to be firstly applied to preferential creditors.

The liquidator should look to see if any of the following apply to the fixed charge put in place between Kite and GFL in order to determine if there is any scope for recovery in the liquidation:

- If the fixed charge was not properly registered, which may be the case due to:
 - No separate account was created for the receipts to be paid for receivables that are covered by the charge.
 - The charge registration not being done within one month of the executed document (the question does not provide the dates or any information regarding the registration of the fixed charge).
 - Was entered into 12 months prior to the liquidation and Kite was unable to pay its debts at the time the charge was created or became unable to pay debts as a consequence of the fixed charge.
- If the anti-deprivation principle can be applied:
 - this essentially places GFL in a better position than other creditors if the fixed charge is deemed to be a 'fraud on the insolvency laws'.

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

Commented [RD(DWH24)]: (1.5 marks) Some good points but a bit jumbled. Need to show L how you advise her:

of the advice that should be given to the liquidator:
>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

Commented [RD(DWH25)]: One would check but the question does say "its" receivables; implies all

Commented [RD(DWH26)]: Not a registration point

Commented [RD(DWH27)]: Not a registration point and applies only to floating charges

Commented [RD(DWH28)]: (2 marks) Need to deal with the first question re the effect of the FA clause (anti-deprivation principle); then recognition (and what can be done without it), as well as ancillary liquidation

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

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.

Steps to be undertaken in order to have the BVI liquidation proceedings recognised in Hong Kong include:

- Establishing whether the COMI of the BVI entity, SPL, may be considered for recognition in Hong Kong (first core requirement):
 - The FA is governed by Hong Kong law; and
 - SPL has a bank account in Hong Kong.
 - Mr Qi's connection to Hong Kong is that he is believed to be a Hong Kong resident and is the sole director and shareholder of SPL (as this is a requirement that needs to be met as a result of a shareholder's dispute with the FA).

From the above facts, it would be determined that the first core requirement has been met.

The second core requirement is to show whether the petitioner would benefit from the liquidation. This could be argued as having been met as there is a bank account of SPL in

Hong Kong (however the amount is unknown), even though the main asset was supposedly located in Fiji.

The third (and final) connection is that the petitioner needs to show that there are persons with sufficient connection to Hong Kong that would have a sufficient economic interest in the winding up of SPL's assets to justify making an order. SPL's independent director, Mr Zhang, and SPL's book-keeper, Mr Wong, both live in Hong Kong. Further, Mr Qi's connection to Hong Kong is that he is believed to be a Hong Kong resident. Therefore this condition would be deemed to have been met.

For the new "co-operation mechanism" between Hong Kong and the Mainland to be used, the assets are required to be located within the pilot areas which include Shanghai, Xiamen and Shenzhen, and will allow for recognition and assistance in those areas of the Mainland. It is unclear from the question is the assets are located within the pilot areas.

*** End of Assessment ***

TOTAL MARKS: 33 out of 50

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(2 marks) Need to deal with the first question re the effect of the FA clause (anti-deprivation principle); then recognition (and what can be done without it), as well as ancillary liquidation

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].