INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment8C]**. An example would be something along the following lines: 202122-336.assessment8C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

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.

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

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

Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

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

Question 1.7

Select the **correct** answer:

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

(a) from the date on which the petition is presented.

(b) from the date of commencement of the liquidation.

(c) from the date of the winding up order.

(d) There is no statutory provision for a mandatory stay; whether the claimant can continue is a matter for the court's discretion.

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

Question 1.8

Select the **correct** answer:

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

(a) is not allowed to vote.

(b) can vote and the whole amount of its claim is counted.

(c) can vote if it has valued its security and the amount that is counted is the difference between its claim and that value.

(d) must get special permission from the chairperson of the meeting to vote.

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

Question 1.9

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

(a) A 1995 decision of the English House of Lords is binding.

(b) A 1993 decision of the UK Privy Council on an appeal from Hong Kong is binding.

(c) A 1996 decision of the UK Privy Council on an appeal from the Cayman Islands is binding.

(d) None of the above because they all pre-date the Handover in 1997.

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

Question 1.10

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

(a) He must make an application to the High Court of Hong Kong using the provisions of the UNCITRAL Model Law.

(b) He must first seek permission from the Ministry of Justice in Beijing.

(c) No recognition is possible.

(d) None of the above.

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

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Commented [RD(DWH11]: (3 marks)

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

For a Hong Kong court to exercise its bankruptcy jurisdiction, the debtor must be an individual and section 4(1) of the Bankruptcy Ordinance provides that the debtor must –

(a) be domiciled in Hong Kong;
(b) be personally present in Hong Kong on the day on which the petition is presented; or
(c) at any time in the period of 3 years ending with that day –

(i) have been ordinarily resident, or has had a place of residence, in Hong Kong; or
(ii) have carried on business in Hong Kong.

Section 4(2) of the Bankruptcy Ordinance further elaborates that a debtor carrying on business in this regard includes the carrying on of business –

(a) by a firm or partnership of which the debtor is a member; and
(b) by an agent or manager for the debtor or for such firm or partnership.

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?

For the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company, the petitioner has to satisfy three "core requirements", as set out by the Court of Final Appeals in the Yung Kee case,[1] as follows:

(a) there had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;
(b) there must be a reasonable possibility that the winding-up order would benefit those applying for it; and
(c) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

The Court of Final Appeals also held that once a sufficient connection to Hong Kong is established, the jurisdiction is established even after the "original" connecting factors cease to exist.

[1] Kam Leung Siu Kwan v Kam Kwan Lai (2015) 18 HKCFAR 501

Question 2.3 [maximum 4 marks]

Commented [RD(DWH13]: (4 marks)

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

A provisional liquidator may be appointed after a winding-up petition has been presented and before a winding-up order is made (s.193 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance ("CWUMPO")). Where urgent, the application for appointment of provisional liquidator can be made concurrently with presentation of the petition.

A provisional liquidator may be appointed in the circumstances where there is jeopardy to the company's assets. The provisional liquidator will therefore be appointed for the purposes of preserving the company's assets. In addition, provided the ground that there is jeopardy to the assets has been satisfied, the provisional liquidator could also be empowered to consider and promulgate a restructuring of the company's debts.

Aside from the above, a provisional liquidator can also be appointed as follows –

(a) the Official Receiver will be appointed as the provisional liquidator following the winding-up order in a compulsory liquidation, pending the meetings of creditors and contributories to pass a resolution for appointment of a liquidator (s.194 of CWUMPO); and
(b) a provisional liquidator will be appointed in an urgent creditors' voluntary winding-up under s.228A of CWUMPO. This is usually where there is an immediate need for a provisional liquidator, such as when there are perishable goods and other goods that are likely to diminish in value if not immediately disposed off.

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

Question 3.1 [maximum 5 marks]

Commented [RD(DWH14]: (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 to ensure that transactions which puts a creditor or a surety/guarantor in a better position in insolvency than it would otherwise have been, may be voided. If voided, this will increase the pool of assets available for distribution to creditors of the company.

To succeed in an application to set aside a transaction for unfair preference, the liquidator has to show that the transaction (which is not at an undervalue) was entered into within the 6 months period prior to commencement of winding-up or, if the undue preference is given to a person connected with the company, within the 2 years' period prior to commencement of winding-up (s.266B of CWUMPO). S.265A(3) CWUMPO provides that a person is connected with a company if that person is –

(a) an associate of a director or shadow director of the company; or
(b) an associate of the company.

"Associate" is further elaborated to include a spouse or cohabitant, a relative of the person or the person's spouse/cohabitant or a spouse of such relative.

Further, the liquidator will also have to show that, at the time the undue preference was given, the company was unable to pay its debts or became unable to pay its debts as a result of the

relevant transaction. The criteria is presumed to be fulfilled if the undue preference is given to a person connected with the company. Such presumption may be rebutted by the recipient by producing evidence otherwise.

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

Finally, the liquidator also has to show that the undue preference was given because the company was influenced by a desire to improve the recipient's position in the event of insolvency. Again, there is a rebuttable presumption that the company was "influenced by desire to prefer" if the undue preference is given to a person connected with the company (s.266(5) CWUMPO).

The criteria of "influenced by a desire to prefer" is difficult to demonstrate as it is not sufficient if the company had given the undue preference due to genuine pressure exerted over the debts of the company. However, this criteria can be satisfied if the undue preference was given by the company because personal bankruptcy proceedings were threatened against the company's directors (rather than pressure against the company itself).

Question 3.2 [maximum 5 marks]

Commented [RD(DWH16]: (5 marks) Good

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.

Although Hong Kong is a Special Administrative Region of the People's Republic of China (PRC), it operates under the principle of "One Country, Two Systems" where certain areas, including the legal system, remains under the responsibility of Hong Kong and differs from the position of the Mainland. Accordingly, insolvency proceedings in PRC are treated as foreign proceedings by the Hong Kong courts, and vice versa.

Generally, despite the limited formal arrangements, Hong Kong courts are inclined to rely on common law principles to assist foreign representatives, including Mainland proceedings. One example is the case of CCIC Finance v GITIC, where the Hong Kong court stayed garnishee proceedings in Hong Kong against a company which was subject to bankruptcy proceedings in the Mainland.[2]

However, in addition to common law, there is now a new co-operation mechanism between Hong Kong and the Mainland for mutual recognition and assistance in relation to bankruptcy proceedings. This development arises from the record of meeting between representatives of the Supreme Court in the Mainland and the Hong Kong Government, in order to further the intent of Article 95 of the Basic Law that Hong Kong may maintain juridical relations with the judiciary of other parts of the PRC and may render assistance to each other.[3] The mechanism allows the parties to apply for recognition and assistance for:

(a) the Hong Kong insolvency proceedings, including compulsory or voluntary liquidations under CWUMPO as well as schemes of arrangement which are promulgated by a liquidator/provisional liquidator;

(b) certain pilot areas in the Mainland i.e. Shanghai Municipality, Xiamen Municipality and Shenzhen Municipality.

For a Hong Kong insolvency representative to seek recognition or assistance in the Mainland pilot areas under this mechanism, there must be a letter of request from the Hong Kong court.

[2] [2005] 2 HKC 589
[3] Guidance Text Module 8C – Hong Kong, page 75

The centre of main interests of the debtor company must have been in Hong Kong continuously for at least 6 months when the Hong Kong administrator applies for recognition and assistance.

The mechanism between Hong Kong and the Mainland is still fairly new, but it would appear to ease the mutual recognition and assistance of insolvency proceedings between Hong Kong and the Mainland.

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 is a court-sanctioned compromise or arrangement between the company and its creditors or members or a class of them, that has statutory effect of binding all such creditors or members, even if not all consents to the scheme. In general, there are three stages for the scheme to be put in place:[4]

(a) The process starts with an ex-parte originating summons applying for leave of the court to convene meetings of the relevant creditors or members, for purpose of considering and voting on the scheme;

(b) The scheme meetings are held with each class of relevant creditors/members to vote on the scheme. For the scheme to be approved, a majority representing at least 75% in value of creditors present and voting at the meeting must vote in favour of the scheme. This applies to each class of creditors/members if there are multiple classes;

(c) If the creditors' approval is obtained, a petition is made for the court to sanction the scheme.

The pro of the scheme of arrangement is that it will allow the company to compromise or adjust its debts with its creditors or members (or certain classes of them) and bind all such creditors/members even those who did not vote in favour of the scheme. This will allow the scheme to be implemented where otherwise it would fail if the company has difficulty obtaining unanimous approval or where a creditor is holding out in order to obtain an advantage over other creditors in its class.

However, one con of the scheme of arrangement is that there is no moratorium that stays proceedings against the company and its assets pending the process. One way to overcome this is for a winding-up petition to be presented first where there is an automatic stay, and a provisional liquidator is then appointed to promulgate a scheme. However, a provisional liquidator cannot be appointed on the sole ground of promulgating a scheme, and it must still be shown that there is jeopardy to the company's assets or any other traditional basis for appointment of a provisional liquidator.

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH17]: (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)

Commented [RD(DWH18]: (4 marks) Good, clear and concise answer

[4] The three-stage process was confirmed by the Court of Final Appeals in the case of UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin [2001]4 HKCFAR 358.

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 incorrect as, aside from court winding-up, there is the option of voluntary liquidation.

If Mountainview Limited is able to settle all its liabilities within 12 months from commencement of the liquidation, a members voluntary liquidation can be carried out by the directors signing a certificate of solvency and the shareholders passing a special resolution to wind up the company and to appoint a liquidator.

If Mountainview Limited is not solvent, it can opt for a creditors' voluntary liquidation. A shareholders' meeting will be convened to pass a special resolution to wind-up the company and appoint a liquidator. The liquidator has limited powers until his appointment is confirmed at the creditors' meeting convened thereafter (not later than 14 days from the shareholders' meeting passing the winding-up).

By opting for a creditors' voluntary liquidation, Mountainview Limited will be able to save costs and time. In this regard, ad valorem duty is not payable in a voluntary liquidation.

However, a liquidator appointed in a voluntary winding-up will still investigate the affairs of the company and the conduct of the directors. In this regard, Mr Chan should take note that:

(a) he may breach his fiduciary duty by allowing Mountainview Limited to continue trading when insolvent;
(b) he may incur criminal liability if employees of Mountainview Limited are not paid.

Question 4.2 [maximum 5 marks]

Commented [RD(DWH19]: (5 marks) Good answer

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.

At the outset, it is not quite clear what type of security has been created in favour of Goshawk Financial Limited (GFL). While the charge is called a "fixed charge", it seems to have the features of a floating charge as Kite Limited was still able continue trading with its customers as usual and the monies from the receivables were not paid into a separate account. It is a floating charge if –

(a) it is a charge on a class of assets present and future. In this case, it would seem the charge is on both present and future receivables;
(b) the class is one in which would be changing from time to time in the ordinary course of business. In this case, the charge is on receivables which would certainly continue to change as Kite continues trading;
(c) until some future step is taken by the charge, the company may carry on its business in the ordinary way in respect of the charged asset. In this case, Kite could continue to trade as per normal until GFL had appointed a receiver.

On the facts, it is likely that the charge will be determined to be a floating charge.

Commented [RD(DWH20]: Court will look at substance, not form: Spectrum etc.

If it is determined to be a floating charge, the proceeds from the realisation will first be paid to preferential creditors as set out in s.79 and 265(3) of CWUMPO. However, this will not include liquidation expenses and the unsecured creditors unless there is surplus after GFL's debts are paid.

In this case, the liquidator should look into whether the charge can be set aside. Firstly, a charge over the receivables (including book debts) will need to be registered within one month of the date of execution. From the facts, it is not clear whether the charge was registered. If it was not registered or registered out of time, then the charge is void against the liquidator.

Even if registered properly, a floating charge is not valid and can be set aside if it is entered into within a period of 12 months prior to commencement of the liquidation and Kite was unable to pay its debts at the time the charge was created or became unable to pay its debts as a consequence of the charge (s. 267 of CWUMPO). The floating charge will only be valid to the extent of the value of any new consideration provided by GFL to Kite at the time of, or after the creation of, the charge. It will not be valid for the debts owing by Kite to GFL prior to creation of the charge. On the facts, assuming the charge was properly registered, this would be the best option for the liquidator to void the charge (or part of it).

Alternatively, the liquidator can consider if the charge could be entirely set aside for unfair preference given to GFL. To succeed in such a claim –

(a) the charge must be given within 6 months prior to the commencement of the winding-up of Kite;
(b) Kite was unable to pay its debts or became unable to pay its debts as a result of giving the charge;
(c) Kite was "influenced by a desire to prefer" GFL. This final criteria is likely to fail as genuine pressure exerted by GFL on Kite is insufficient to satisfy this requirement.

Question 4.3 [maximum 6 marks]

Commented [RD(DWH21]: (5 marks) A very good answer but does not deal with L's concern about the FA provision: should discuss anti-deprivation principle (and need to get BVI advice re validity of appointment)

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.

On the facts, the liquidator should consider applying to the Hong Kong court for recognition of his appointment and for an order for the production of documents or examination of Mr Zhang and Mr Wong (who both live in Hong Kong). There is precedence in the court granting recognition orders to permit foreign officeholders to seek production of documents or examination of individuals in Hong Kong - see, for example, Re BJB Career Education Co Ltd [2017] 1 HKLRD.

In this regard, the court can rely on common law power to provide recognition and assistance if the power sought to be exercised (i.e. the production of documents and examination) exists in both the jurisdiction of principal liquidation (i.e. BVI) and the assisting jurisdiction (i.e. Hong Kong).[5] In order to apply for such recognition and assistance, the liquidator must have a "letter of request" issued from the BVI court to the Hong Kong court to request for assistance. If the liquidator can satisfy the aforesaid requirements, the Hong Court will grant such recognition and assistance.

[5] Privy Council in Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36.

For the SPL bank account, the bank that the account is opened with may assist the BVI liquidator to provide documents in relation to the SPL account even if there is no Hong Kong court order. However, if the liquidator intends to deal with the SPL account, then he has to apply for a specific recognition order from the Hong Kong court for the purpose of dealing with such SPL bank account.

As for the purported assets of SPL in the Mainland, the new "co-operation mechanism" between Hong Kong and the Mainland will only be relevant if the assets are located in the designated pilot areas of Shanghai, Xiamen and Shenzhen. Otherwise, the new cooperation mechanism will not apply.

Further, in order for the liquidator to avail itself of the co-operation mechanism, the liquidator will need to commence winding-up proceedings (under CWUMPO) against SPL in Hong Kong. The application for recognition or assistance under the mechanism must be made by the Hong Kong administrator in respect of Hong Kong insolvency proceedings and there must be a letter of request from the Hong Kong court. The Hong Kong administrator must also show that the centre of main interest is in Hong Kong continuously for at least 6 months when applying for recognition and assistance under the cooperation mechanism.

In view of the above, the new cooperation mechanism between Hong Kong and Mainland does not seem relevant, or at least it is premature to consider it at this point until the liquidator can ascertain that the assets are located in the designated pilot areas.

*** End of Assessment ***

TOTAL MARKS: 48 out of 50

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