



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.
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3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

A receiver can be appointed –

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

(d) any of the above.

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

Question 1.2

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

- (a) It depends on whether the person with whom the bankrupt transacted is an associate of his or not.
- (b) Two (2) years before the date of the bankruptcy order.
- (c) Five (5) years before the date of the petition on which the bankruptcy order was made.**
- (d) Five (5) years before the date of the bankruptcy order.

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

Question 1.3

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

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

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

(d) The Hong Kong court has a statutory jurisdiction to wind up such a company, and can exercise that jurisdiction if certain requirements are met.

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

Question 1.4

Select the **correct** answer:

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

(a) must first be used to satisfy the costs and expenses of the liquidator.

(b) must first be used to satisfy the whole of all claims by employees but no other claims.

(c) must first be used to satisfy the claims of preferential creditors as described in the relevant section of CWUMPO.

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

Commented [RD(DWH4): Incorrect (0 marks) – see s.265 CWUMPO and section 5.1 of text. Although floating charge realisations must first be used to pay preferential creditors (unless the company is in liquidation and there are sufficient 'free' assets to meet those claims) preferential debts are not restricted to amounts owed to employees and even in respect of employees not ALL of their claims are preferential debts under the legislation.

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): Incorrect (0 marks) - 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?

It is noted that there is no concrete definition of a ‘debtor’ in the Bankruptcy Ordinance (Cap 6) (“BO”), but to qualify as a debtor under the BO, the debtor must:

- Be an individual;
- Be domiciled in Hong Kong;
- Be personally present in Hong Kong on the day the petition is presented; or
- At any time within three years ending with the day the petition is presented –
 - Have been ordinarily resident or had a residence in Hong Kong; or
 - Have conducted 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?

There are three core requirements that a petitioner must satisfy in front of the court in order to wind up a non-Hong Kong company which were set out in the CFA’s decision in the case *Kam Leung Sui Kwan v Kam Kwan Lai and Others (2015) 18 HKCFAR 501*, which include:

- There must be sufficient connection with Hong Kong;
- There must be a reasonable possibility that the winding up order would benefit whoever made the application; and
- The court is able to exercise jurisdiction over at least one person who is interested in distributing the company’s assets.

Question 2.3 [maximum 4 marks]

Commented [RD(DWH13): (2.5 marks). No reference to powers and the part about rule 28 CWUR is a bit confusing. Also see notes below.

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

A provisional liquidator can only possibly be appointed if the company’s assets are in jeopardy. It is noted that the provisional liquidation application will fail in front of the court if the purpose of the application is to bring into effect a restructuring. The term ‘provisional liquidation’ does not technically exist in Hong Kong law, however, provisional liquidators can be appointed pursuant to section 193 of CWUMPO. There is some confusion in the regulations as the Companies Winding Up Rules, rule 28, makes mention to a provisional liquidator as a title used on winding up orders; however, the meaning here is referring to the liquidator being ‘provisional’ pending a creditors’ meeting being held.

Commented [RD(DWH14): Not quite, although it is extremely rare for a PL to be appointed without assets in jeopardy

Commented [RD(DWH15): Only if that is the SOLE purpose for which the appointment is sought.

A provisional liquidator is tasked to preserve a company’s assets after the petition is presented but before a winding up order is made. There must be circumstances present to justify the appointment of a provisional liquidator, such that there is a risk that the company’s assets could be dispossessed or be in jeopardy before a winding up order is levied.

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.

An unfair preference is defined as when an insolvent company acts to place a creditor or guarantor in a better position than it would have been pre-insolvency. A liquidator could take action to challenge an unfair preference, by way of an application to the court, by showing that at the time of the asserted unfair preference, the company was unable to pay its debts as a result of the transaction occurring. Normally, the criterion is that the beneficiary of this transaction is an associate of the company or its director or shadow director.

The liquidator may want to challenge this unfair preference to pre-empt an order granted by the court, pursuant to section 266 of CWUMPO, that results in the:

- Transfer of the property subject to the unfair preference to the liquidator;
- Release or discharge of security given by the company;
- Direction for any person to pay to the liquidators any benefits received from the company;
- Revival of the obligation of any surety or guarantor which had been previously released; and
- Provision of the security for the discharge of an obligation imposed by or arising under the order.

However, a liquidator must be able to prove that the transaction is an unfair preference by showing that the company positively wished to improve the creditor's position in the event of its own insolvent liquidation. According to a ruling on the cases *MC Bacon* and *Osman Mohammed Arab v Cashbox Credit Services Ltd*, the court came to the ruling of a transaction as an unfair preference by noting that the person must not "desire" all the "consequences of their actions"

Although the case *Hau Po Man Stanley (in bankruptcy) v Hau Po Fun Ivy* relates to personal insolvency, it exemplifies the issues surrounding the demonstration of the "desire" to prefer. However, the court has ruled that a company has shown this desire to prefer in examples where a company gave to its bank a mortgage over an asset in preference because personal bankruptcy proceedings were threatened against the same company's directors.

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.

Subject to the Handover of 1997, where Hong Kong became a "Special Administrative Region" of the PRC on 30 June 1997, Mainland China was no longer considered to be a foreign country and therefore, no rules regarding the enforcement of foreign judgments applied to Mainland China. Instead of the arrangements that govern Hong Kong's cross-border insolvency rules, the Hong Kong arrangements that apply to Mainland China are 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"

Commented [RD(DWH16): (3.5 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves. Also, should also state time limits and distinction between connected and unconnected parties; and requirement that party 'preferred' is a creditor (or surety)

Commented [RD(DWH17): Not necessarily

Commented [RD(DWH18): (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)

Concerned" signed into effect in July 2006 and The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) ("MJERO") which effected the above arrangement on 1 August 2008. The MJERO applies in the following circumstances:

- Enforcement of money judgments on disputes arising out of commercial contracts;
- Enforcement of Mainland judgments if the underlying agreement gives exclusive jurisdiction to the relevant Mainland court;
- Enforcement of money judgments from a designated court stated in the relevant legislation (Cap 597) excluding judgments in respect of payment of any tax, fine or penalty. It is noted that money judgments from any Hong Kong court are recognised; and
- Enforcement of judgments that are final, conclusive, and have been given after the commencement of Cap 597.

Another arrangement that was signed as of 2019 is the Arrangement on Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region which will remove the requirement for an exclusive jurisdiction clause and will extend enforcement to non-money judgments.

It is noted that, whilst there are a limited number of arrangements that govern the relationship between Hong Kong and Mainland China, the statement is not technically correct because the legislation that governs the relationship between Hong Kong and Mainland China is not the same as the cross-border insolvency regulations.

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.

The Scheme of Arrangement is a court sanctioned compromise that binds all creditors or members of the relevant class, even those who do not vote for the scheme. The scheme can only bind creditors if the governed by Hong Kong law or the relevant creditor takes part in the scheme. The rules surrounding the application to the court for a scheme of arrangement are governed by O.102 r 2 and r 5 of the Rules of the High Court ("RHC")

Procedure:

- One must prepare an Explanatory Statement which sets out the background to the company, why a scheme is needed, and the proposed scheme;
- One must apply to the court for permission to convene meetings of scheme creditors;
- Notice of the meeting must be given to all creditors in the relevant classes, if leave is given;
- At a meeting of the scheme, the proposed scheme must have support by over 50% of the scheme creditors in number representing at least 75% in value of the creditors attending and voting at the meeting;
- The result of the meeting must be reported to court for a sanction meeting to be held;
- Sanction will be approved by the court only if the classes are properly constituted and it is considered that an intelligent and honest creditor might reasonably approve the scheme; and
- The scheme will take effect after it is registered at the Companies Registry.

Pros:

- Allows for a company and its creditors to adjust debts if the stipulated majorities approve the adjustment and the court sanctions the agreement. Without the scheme

Commented [RD(DWH19)]: (4.5 marks) Also, as classes are important, should outline requirements (similarity of legal rights, not interests)

of arrangement, a company would need to obtain the approval of 100% of its relevant creditors to vary the debt.

- These court sanctioned compromises could include a reduction of a company's share capital or a modification of its debts owed to creditors to effectively replace existing instruments with new arrangements.
- Useful against hold-out creditors who seek some sort of unfair advantage (such as an additional payment) which would be against the interests of a substantial majority of similarly prioritised creditors.
- Scheme will be binding on all the scheme creditors in the relevant class or classes, regardless of whether they attended the creditors' meeting or how they voted.

Cons:

- Lack of any moratorium (although the case *Eastman Chemical Ltd v Heyro Chemical Co Ltd* may further develop a stay in the context of schemes going forward).
- The scheme regulations do not specifically deal with the releases of obligations of third parties, such as guarantors, through a scheme mechanism.

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.

I would advise Mr Chan that his friend is providing him with faulty advice and it should not be followed. Instead, given the company's likely insolvent state, Mr Chan should consider calling a shareholders' meeting to put the company into a Creditors' Voluntary Liquidation ("CVL"). As opposed to Mr Chan's friend's advice to apply to the court to wind up the company which will cost the company much more in liquidation costs and an extended timeline, a CVL is an out-of-court process which can be a much quicker and more cost-efficient process. Mr Chan should also be advised that in a CVL process, there is no *ad valorem* (tax) payable to the government, which is another advantage as opposed to a court-supervised process.

At the shareholders' meeting, Mr Chan can call for a special resolution to wind up the company due to its liabilities exceeding its assets. A liquidator will be appointed, however, the liquidator will have limited powers until the meeting of creditors is held which cannot be set longer than 14 days after the shareholders' meeting. Mr Chan should send notice of the creditors' meeting to all of the company's creditors who could be reasonably known at least seven days before the meeting is held and advertise the notice in the Hong Kong Gazette, an English language newspaper, and a Chinese language newspaper which circulates in Hong Kong. Mr Chan or his representative should be present at the meeting where creditors will nominate and vote for the appointment of a liquidator. Then, Mr Chan should take steps to protect the assets of the company and seek to exercise his duties as a directors whilst also keeping in mind the interests of the company's creditors.

Commented [RD(DWH20): (3 marks) Importantly, should also advise Mr. Chan 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 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 has a fixed charge over the receivables of Kite which is a charge in relation to a specific asset that attaches as soon as the charge is created or the relevant asset is acquired by the debtor, Kite.

I would advise the liquidator that a receiver is entitled to be paid out of the assets over which he is appointed and to exercise a lien over those assets pending payment. In addition, the liquidation of the borrowing company does not affect the receiver's right to hold and/or sell the property or assets secured by the charge under which he is appointed. The liquidator will not be allowed to use the realisations made by the receiver out of the assets charged for payment of any liquidation expenses.

These realisations cannot be used by the liquidator to provide a dividend to unsecured creditors; however, the receivables could be used to meet claims of preferential creditors, only if there are not enough assets to meet those claims from the company's uncharged assets.

I would advise the liquidator to investigate how recently the fixed charge was put over the receivables by the receiver appointed by GFL. Because the fixed charge could be considered voidable if it was created and attached within a certain time before the liquidation was commenced (6 months for a person unconnected to the company, 2 years for a chargee who is connected to the company).

The liquidator should also investigate if the fixed charge was properly registered, as it could be void against a liquidator if it was not properly done. Pursuant to section 335(5)(a) of the Companies Ordinance (Cap 622), a charge requiring registration must be registered within one month of the date of its execution.

Commented [RD(DWH21)]: (1.5 marks) correctly describes the position re fixed charge realisations but then refers to provisions that relate to floating charges.

Thrust of advice is checking validity - including whether a floating charge and not fixed (then realisations available for preferentials).

Outline 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(DWH22)]: Only if floating not fixed charge

Commented [RD(DWH23)]: Only if floating not fixed charge

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.

Hong Kong follows common law principles and a foreign liquidator's right to bring an action in Hong Kong (in the name of the company) should be recognised. With regards to obtaining assistance from a Hong Kong court in relation to the potential assets of SPL held in Hong Kong, the BVI liquidator could apply to the Hong Kong court to commence an ancillary liquidation in Hong Kong where the principal liquidation is situated in the BVI, where the company is incorporated. The Hong Kong court would apply the "modified universalism" approach, where the functions of the Hong Kong liquidators will generally be to collect assets in Hong Kong, to settle a list of Hong Kong creditors and to transfer the assets and

Commented [RD(DWH24)]: (4 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].

list of creditors to the principal liquidators to enable a dividend to be paid to the company's stakeholders. In granting an ancillary winding up order, the court will need to be satisfied that the "three core requirements" are met:

- 1) There must be sufficient connection with Hong Kong – given that SPL's director Mr. Qi is from Hong Kong, SPL's independent director and book-keeper are both from Hong Kong, and SPL has a Hong Kong bank account, the court could view this requirement as met.
- 2) There must be a reasonable possibility that the winding up order would benefit those applying for it – given that SPL holds a bank account in Hong Kong which could be returned to SPL's account in the BVI for distributions to its shareholder, Mr Xu, and that a Hong Kong liquidation proceeding could potentially allow for co-operation with the Mainland regarding SPL's assets believed to be in the Mainland, the court could view this requirement as having been met.
- 3) The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets – given that Mr Xu is from Hong Kong and a creditor of SPL for approximately US\$22 million, he could be seen to have sufficient economic interest in the winding up of the company to justify the court producing an order.

However, it is noted that if the BVI liquidator is recognised as a foreign representative, the Hong Kong bank should readily provide assistance and documents in relation to the company's accounts even without the foreign representative having to first obtain a Hong Kong court order.

Commented [RD(DWH25)]: But could seek bank docs without an order (Bay Capital)

The BVI liquidator could also apply for a recognition order from a Hong Kong court to seek production of documents or examination of individuals in Hong Kong, such as Mr Qi, Mr Zhang or Mr Wong.

With regards to the co-operation mechanism referenced in (e), the assets believed to be held in Mainland would need to be located in the pilot areas of Shanghai Municipality, Xiamen Municipality of Fujian Province, and Shenzhen Municipality of Guangdong Province. Additionally, it would need to be proved that the debtor's COMI is in Hong Kong. Even though, SPL is incorporated in the BVI, there is a chance with the answers provided above to the first requirement (1) that the COMI of SPL could be considered to be Hong Kong.

With regards to the view that Mr Xu had no standing to bring the winding up order because of the clause in the FA noted in (a), there is a chance that the contract itself would be subject to the anti-deprivation principle if the winding up process was brought in front of a Hong Kong court. The court could note that no one can be allowed to benefit from a contract that is in fraud of the insolvency laws, if the court were to view the contract as fraudulent.

*** End of Assessment ***

TOTAL MARKS: 33 out of 50

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