



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

A receiver can be appointed –

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

(d) any of the above.

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

Select the **correct** answer:

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

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

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

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

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

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

Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

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

Question 1.7

Select the **correct** answer:

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

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

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

Question 1.8

Select the **correct** answer:

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

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

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

Question 1.9

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

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

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

Question 1.10

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

- (a) He must make an application to the High Court of Hong Kong using the provisions of the UNCITRAL Model Law.
- (b) He must first seek permission from the Ministry of Justice in Beijing.

(c) No recognition is possible.

(d) None of the above.

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?

Section 4 of the Bankruptcy Ordinance (Cap. 6) provides that a bankruptcy petition shall not be presented to the Hong Kong Court unless the debtor:

1. is domiciled in Hong Kong
2. is personally present in Hong Kong on the day on which the petition is presented or
3. at any time in the period of 3 years ending with that day:
 - has been ordinarily resident, or has had a place of residence, in Hong Kong or
 - has carried on business in Hong Kong

Question 2.2 [maximum 3 marks]

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

Following are the 3 core requirements that enable the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company

1. There must be sufficient connection with Hong Kong
2. There must be a reasonable possibility that the winding up order would benefit those applying for it
3. The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Question 2.3 [maximum 4 marks]

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

Provisional Liquidator can be appointed pursuant to section 193 of CWUMPO. Court can appoint provisional liquidator anytime between the winding up petition is presented and winding up order is made. The main purpose of the provisional liquidator is to preserve the assets of debtor. However, provisional liquidator can be appointed to facilitate the restructuring proposal although that cannot be the sole reason for appointment. Provisional liquidator is not allowed to sell any assets of debtor without specific orders from the court. The court may limit and restructure the powers of the provisional liquidator.

In compulsory liquidation following winding up order, Official Receiver shall by virtue of his office become the provisional liquidator and shall continue until he or another person becomes liquidator.

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

Commented [RD(DWH11)]: (3 marks)

Commented [RD(DWH12)]: (3 marks). Would have been preferable to include source (CFA's decision in Yung Kee)

Commented [RD(DWH13)]: (4 marks)

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.

The powers of the liquidators are set out in section 199 and schedule 25 of CWUMPO. One of the powers is to investigate transactions/payments made by company within certain period prior to winding up to determine if these transactions should be avoided.

Unfair Preference is when an insolvent company acts to place a creditor in a better position than it would have been upon the company's insolvency.

The liquidator can make an application to set aside such transactions. Such transaction should have occurred six months (2 years if connected beneficiary) prior to the commencement of winding up.

Liquidator must show that when the unfair preference was given at that time the company was either unable to pay its debts or became unable to pay its debt because of this transaction. Additionally, the liquidator must also prove that the company was driven by desire to improve the beneficiary's position in the event of a liquidation.

In practice this desire of the company is very difficult to prove in court and transactions will not be set aside without such proof.

Commented [RD(DWH14): (4 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves

Commented [RD(DWH15): Rebuttable presumption of desire to prefer where beneficiary is a connected person.

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.

While Hong Kong and Mainland are one country. But due to Hong Kong's history, HK has a different and separate governance and legal system then PRC. This is quite popularly referred to as "one country two system".

HK does not have any statutory framework to deal with cross border insolvency. HK has not adopted the UNCITRAL Model Law on Cross-border framework and not party to any bilateral agreements/treaties with any country (including mainland).

HK courts use common law developments with issues related cross border insolvency issues. HK courts have already, in 2 separate occasion, recognised the appointment of officeholders appointed in the mainland.

The Mainland Judgements (Reciprocal Enforcement) Ordinance (Cap 597) is a mechanism to help with enforcement of PRC judgement in HK under certain specific conditions. These conditions are

1. The Judgement are in relation to commercial courts
2. There is valid agreement on choice of mainland court
3. It is a money judgement
4. Judgement is final and conclusive
5. Judgement is being enforced within 2 years

Commented [RD(DWH16): (2 marks) Correctly mentions the pre-2021 common law developments but there should be more detail on the new mechanism. As an important example it does not apply to the whole of the Mainland, only pilot areas

Commented [RD(DWH17): s.327 CWUMPO?

Commented [RD(DWH18): Not relevant

However, recently in May 2021, a new pilot program has commenced with an arrangement between HK and some provinces (as pilot) of mainland for mutual recognition and assistance in bankruptcy proceedings. This allows for HK appointed Liquidators/provisional liquidators in insolvency proceedings to apply for recognition in the Mainland and vice versa. A letter of request for the respective court is required.

Question 3.3 [maximum 5 marks]

Commented [RD(DWH19)]: (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.

HK does not have a formal corporate rescue regime such as Chapter 11 in US. Instead, the only mechanism for restructuring in HK is the Scheme of Arrangement.

A scheme of arrangement is a statutory mechanism under HK law allowing debtors to arrive at a compromise/restructuring with members/creditors and make this binding in law on all stakeholders. This is laid out in part 12, Division 2 of the companies Ordinance (668-677) while the court procedures are governed by O.102 r 2 and r5 of the Rules of the High Court.

Commented [RD(DWH20)]: 13

Procedure –

1. Debtor submits to the court an explanatory Statement which gives details of the background, why scheme is needed and details of the scheme.
2. Court is request for permission to convene meetings of the scheme creditors
3. With this permission, creditors are given notice of meeting
4. At the meeting the creditors, the scheme needs to be approved by Majority creditors in numbers with at least 75% in value by each class of creditors.
5. The result of the meeting is then reported to the court.
6. Courts will then satisfy itself that the classes of creditors were appropriate, and the scheme is reasonable and fair before granting approval.
7. Once the court approves, the scheme is then registered with the companies registered and becomes effective binding all stake holders.

Moratorium – While HK law did not provide for a formal moratorium on creditor actions when scheme of arrangement is in progress. Now, post amendments to the Rules of the High court, courts have the power to stay proceedings.

Commented [RD(DWH21)]: But not automatic, and not that tested

HK governed debt – The Scheme of Arrangement binds only debt which is governed by HK law or those non-HK governed creditors who choose to take part in the scheme.

Classes of Creditor – The scheme of arrangement allows debtor to classify creditors basis their legal rights and offer differential treatment in the restructuring. The court will decide if the classification is appropriate at a later stage while approving the scheme rather than initially when debtor makes the first application to court in form of explanatory statement. Thus, there is a risk of the restructuring not being allowed by the court due to mis classification of creditors thereby wasting time, money and resources.

Creditor approval – In the scheme of arrangement procedure the debtor needs to obtain approval of majority creditors in numbers with at least 75% in value by each class of creditors. Outside the scheme of arrangement debtor will need to obtain 100% creditor approval for the restructuring to be binding.

Hold out creditors/members – The scheme of arrangement once approved by the requisite number/value of creditors and court is binding on all. Hence makes it easier for debtor to deal with the hold out creditor/members.

Consent fee – Debtor can offer consent fee to creditors for voting in favour of the scheme. However, such fee should be offered to all.

Third Party Obligation – Scheme of arrangement allows for release of third party obligation to creditors in certain conditions.

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.

1. Winding up petition is not the only option for Mr. Chan. While HK does not have a formal corporate rescue mechanism, Mr. Chan can use the scheme of arrangement mechanism to restructure the business liabilities.
2. On appointment of “Friendly” liquidator – Since Mr. Chan is in financial difficulties, the creditors will have the right to appoint a liquidator even if it is a voluntary liquidation. One of the most important powers and duties of the liquidator is to assess if there were any financial irregularities and report it to the court. Hence voluntary winding up will not help.

Mr. Chan could use the Scheme of Arrangement mechanism to restructure the liabilities and post court’s approval it will become binding on all stakeholders.

1. Mr. Chan needs to prepare a plan and make an application to court for convening creditor meeting.
2. Get the plan approved by all class of creditors. Threshold for approval is majority creditors in numbers with at least 75% in value by each class of creditors.
3. Then seek court approval on the plan.
4. Once the court approves, register the plan with the company’s registrar and the plan is binding on all stakeholders.

However, there are many nuances such as debt should be bound by HK laws, creditor classes should be determined by their rights, proper procedure needs to be followed etc which needs to be looked at.

Question 4.2 [maximum 5 marks]

Kite Limited is a Hong Kong incorporated company involved in an import / export business. It buys goods on its own account from suppliers in Mainland China, then sells them on to buyers in Europe at a mark-up. The company has been in difficulty for some time, for example due to reducing margins; unfavourable credit terms leading to a mis-match between the dates on which Kite must pay its suppliers and the dates on which it gets paid by its buyers, thus affecting Kite’s cashflow; European buyers going straight to Mainland suppliers, etc.

Commented [RD(DWH22)]: (1 mark) Advice is correct but not complete: should advise Mr C of options related to voluntary liquidation

Commented [RD(DWH23)]: 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

Commented [RD(DWH24)]: (5 marks) Good answer

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.

Fixed or Floating Charge –

Liquidator first needs to investigate if GFL has a fixed charge or a floating charge on the receivables. While the executed documents might say fixed charge but the fact that Kite continued to operate the receivables from a non-controlled account without explicit permission from GFL for realisation, might make it a floating charge. For a fixed charge, the debtor cannot deal with asset without the consent of the charge creditor.

Registration of Charge –

Any charge on company's assets needs to be perfected by registration with the companies registry (Section 333-356). Such registration must be done within one month of the date of the execution of the documents. If the charge is not registered or not registered within the time is then considered void against the liquidator. Hence liquidator can investigate if the charge is perfected and if not, can take control of the receivables or the recovery from it.

Time validity of Charge –

Section 267 of CWUMPO states that the floating charge will not be valid if it is entered into within 12 months prior to the commencement of liquidation and the company was unable to pay its debt at the time the charge was created or became unable to pay its debts because of the charge. However, floating charge is valid if new money was provided by the creditor. Liquidator can investigate this aspect before challenging the receiver's right on the receivables.

Enforcement of charge –

Any realisation from floating charges must be first used to pay preferential creditors unless there are other assets to make such payment. In this case, we understand that the company is in liquidation and there are no other assets but these receivables. Hence, once liquidation proves this to be floating charge or void charge, preferential and other creditors might be paid out.

Unfair preference –

This is a long shot but if liquidator can prove that GFL was given undue preference by Kite when creating these charges to the detrimental of other stakeholders, the charge can be void and liquidator might be able to take control of the receivables/recoveries from it. However, practically this is very difficult to prove.

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(DWH25)]: (1 mark)

A couple of the right elements but does not demonstrate good understanding.

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

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

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

The BVI liquidator appointed has identified:

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

The liquidator asks for your advice on what steps he can take in Hong Kong, including as regards a concern he has that Mr Xu in fact had no standing to bring the winding up proceedings in the first place given the clause in the FA at (a) above. The liquidator has also read about a new "co-operation mechanism" between Hong Kong and the Mainland that he would like to use in respect of (e) above.

The liquidator can **himself** initiate ancillary liquidation proceedings against SPL in the HK court.

BVI liquidator will be able to **get recognition** for being in control of the company post his appointment in BVI insolvency process.

SPL meets all the following 3 core requirements for initiation winding up of an unregistered company in Hong Kong

1. There is sufficient connect with HK as independent director is in HK, Book keeper is in HK, Mr Q is an HK resident. SPL has bank account in HK.
2. Winding up order will benefit liquidator as he will be able to use this to trace and recovery assets in mainland (under the new "co-operation mechanism" between Hong Kong and the Mainland).
3. The courts will be able to exercise jurisdiction over all persons interest in the distribution as it seems there is only one share holder loan which has already settled

Commented [RD(DWH26)]: In name of company - IS One case

Commented [RD(DWH27)]: Different to recognition per se

by vesting of assets to Mr. Qi who is HK resident . Mr. Xu and liability under FA is governed by HK law.

HK liquidator will have to check if Mr Xu is a creditor of SPL considering the clause in the FA.

HK liquidation can investigate if there were any under value or unfair preference or extortionate transactions undertaken by SPL (Mr. Qi) within the stipulated time period. If yes, these transactions can be void and reversed by making suitable application to the court.

Additionally, once winding up order from HK is obtained, the HK liquidator can use the new pilot program, signed recently in May 2021, between HK and some provinces of mainland for mutual recognition and assistance in bankruptcy proceedings. This will allow for HK appointed Liquidators/provisional liquidators in insolvency proceedings to apply for recognition in the Mainland and vice versa. Thus, HK liquidator can take control of assets at least in few provinces of PRC.

*** End of Assessment ***

TOTAL MARKS: 38 out of 50

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(1 mark)

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

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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].