



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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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): Incorrect (0 marks) - 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 (see 6.2.2 of text) and s.51(1)(a) Bankruptcy Ordinance

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)]: Incorrect (0 marks) - The *China Field* decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text)

Question 1.10

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

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

(c) No recognition is possible.

(d) None of the above.

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

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Commented [RD(DWH11): (3 marks)

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

The court cannot make a bankruptcy order against just any individual. There are certain jurisdictional criteria to be met. The jurisdictional requirements are that the debtor must be an individual and pursuant to section 4 of the Bankruptcy Ordinance (Cap 6), are:

- 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
 - a. have been ordinarily resident or have had place of residence in Hong Kong or
 - b. have carried on business in Hong Kong.

Further, pursuant to section 10 of the Bankruptcy Ordinance a debtor’s self-petition can be presented in the court only if that debtor is unable to pay his debts. This petition must be accompanied by a statement of the debtor’s affairs and contain information on his liabilities and assets. Once the bankruptcy order is made there is automatic stay, and no creditor can commence any action or legal proceedings against that debtor.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12): (2 marks). The core requirements are those stated, but they are NOT mentioned in s.327; they are common law based (see CFA decision in Yung Kee)

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

Section 327 CWUMPO mentions the three core requirements

- there should be sufficient connection with Hong Kong, but this does not necessarily have to consist of the presence of assets within the jurisdiction
- 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.

Question 2.3 [maximum 4 marks]

Commented [RD(DWH13): (2.5 marks). See note below. Also, the element are here but a bit jumbled, showing less understanding of the issues.

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

Under section 193, a person other than the Official Receiver is appointed as provisional liquidator. This provisional liquidator can be appointed in the interim period when the winding up order is made or to help facilitate a restructuring proposal. Sometimes a provisional liquidator is tasked with preserving assets in the period after the petition is presented to the court, but the order is not made, to preserve the value of the asset. However, if the court has appointed the provisional liquidator it might permit him to sell the assets only after a specific application to court is being made.

Commented [RD(DWH14): A bit confusing, and a PL cannot be appointed solely for the purposes of restructuring.

The application to appoint a provisional liquidator can be made any time after the petition has been presented, although in urgent cases the application may be made at the same time as the petition. However, it is been said that it is wrong to apply for the

appointment of a private provisional liquidator under section 193 immediately prior to winding up as to avoid having the Official Receiver as provisional liquidator upon the winding up order being made. Also, the court has jurisdiction to appoint provisional liquidator despite the appointment of voluntary liquidators. When the court appoints the provisional liquidator, it can restrict and limit his powers when he is appointed or even terminate the appointment on application by any of them i.e., a provisional liquidator, the official receiver, a creditor, the petitioner, a contributory or the company.

The circumstances in which the provisional liquidator can be appointed are, if there is a risk that the asset will be dissipated or otherwise be in jeopardy before the winding up order is made. The factors that court considers while appointing the provisional liquidator include commercial realities, the degree of urgency, the need for the order and balance of convenience. The provisional liquidator will need to call the creditors and contributories meeting in case of non-summary liquidation within 3 months after the date of the winding up order, wherein the creditors and contributories will pass the resolution to appoint the liquidator.

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

Question 3.1 [maximum 5 marks]

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

The unfair preference transaction occurs when an insolvent company gives an unfair preference to its creditor or guarantor by placing them in a better position than that creditor or guarantor would have been upon the company's insolvency.

The liquidator of a company can make an application to set aside such transactions in both voluntary winding-up or compulsory winding-up. These transactions include granting the security or making payments. If these types of transactions were entered into during the period of 6 months prior to the commencement of winding-up or 2 years where the beneficiary under the transaction was a person connected to the company. In the application the liquidator needs to show that at the time such unfair preference was given the company was unable to pay its debt or became unable to pay its debt as a result of the transaction concerned. The liquidator also needs to properly establish the connection between the company and a person connected to the company in such transactions, as this person might challenge the application in court. The liquidator will have to establish the connection between the company and the person if he or she is the associate of the company or if that company is controlled by the same person as the company being wound-up. The liquidator must also prove that the company was influenced by a desire to improve that person's position in the event of a liquidation.

If the transaction is proved to be an unfair preference pursuant to section 266 of CWUMPO, the court can make the following orders:

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

Commented [RD(DWH15): (4 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves

Commented [RD(DWH16): 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.

Hong Kong's insolvency legislation does not contain any provision dealing with cross-border insolvency. Hong Kong has also not adopted the UNCITRAL Model law on Cross Border Insolvency and it is also not a party of any international treaties that deal with cross border insolvency. There are also no bilateral agreements with other countries.

However, in May 2021 certain areas of the Mainland PRC and Hong Kong have entered arrangement for a new corporation mechanism wherein Hong Kong officeholders can obtain the recognition and assistance in those area of the Mainland and vice-versa. the arrangement was result of the meeting held between the Supreme court in the Mainland and the Hong Kong Government and this is stated to be based on the Article 95 of the Basic Law which provides that the Hong Kong Special Administrative Region may through consultation and in accordance with law maintain juridical relations with other parts of the country and they may render assistance to each other. These areas of Mainland are designed as (i) Shanghai Municipality (ii) Xiamen Municipality of Fujian Province and (iii) Shenzhen Municipality of Guangdong Province. Further, Supreme court also as outlined that Hong Kong proceedings means any collective insolvency proceedings commenced under CWUMPO or CO and includes compulsory liquidations, creditors voluntary liquidation and scheme of arrangement. If the debtor's assets in the Mainland are in the above-mentioned areas or has a place of business or representative office in that areas then Hong Kong Administrator may apply recognition of and assistance to the Hong Kong insolvency proceedings in accordance with this opinion.

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.

There is no corporate rescue legislation, the scheme of arrangement can be considered as a corporate rescue tool in Hong Kong. A scheme of arrangement is a statutory mechanism under Hong Kong law which allows the companies to make binding compromise or arrangement with their members and/or creditors which can include adjustment to the debt owed to its creditors or reduction of share capital. The statutory regime for the scheme of arrangement is contained in Part 13, Division 2 of the Companies Ordinance (namely section 668 to 677). The Hong Kong court takes guidance from English law cases in respect of the scheme.

The Scheme of Arrangement acts as a court sanctioned compromise or arrangement which binds all creditors of the relevant class. The scheme can cancel the existing debt and replace it with new debt. The creditors must be in the same class otherwise the court will not sanction the scheme, a consent fee can be offered to creditors. If the scheme is put forward to the creditors and the liquidation is most likely alternative, then creditors should be given sufficient details concerning their returns in the liquidation. The rights which are given to creditors should be same or better as compared to those each creditor would get in liquidation. Court generally will look at the rights given on exit of the scheme when approving it.

The pros of the scheme of arrangement would be the court will not approve the scheme if creditors rights are affected. In scheme of arrangement the class of creditors are treated equally and fairly.

The cons in the scheme of arrangement are that there is no moratorium. Secondly the scheme to pass it requires at least 75% by value of the creditors present and voting.

Commented [RD(DWH17)]: (3.5 marks) Should mention that HK court has assisted in PRC insolvencies (e.g. CEFC Shanghai). Also, Should mention some of the main elements that are needed to use the new mechanism as is not a wholesale provision (e.g. COMI for 6 months in Hong Kong, need for letter of request)

Commented [RD(DWH18)]: (3.5 marks) Should also mention that due to the 'Gibbs' principle, a Hong Kong Scheme will only compromise debts arising from obligations governed by Hong Kong law. This is a possible downside in the modern environment where a sophisticated debtor is likely to have debts due under other governing laws. Also, as classes are important, should outline requirements (similarity of legal rights, not interests). Reference should be made to the majorities required.

Commented [RD(DWH19)]: Not sure this is a con; without a mechanism, 100% would be needed

Thirdly there is an issue of dealing with the obligations of third parties such as guarantors.

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 partly correct that he can go to court and file the bankruptcy petition on the ground that his company is unable to pay debts. Section 178 of CWUMPO defines inability to pay debts. However, his petition must be accompanied by a statement of company's affairs, containing information of assets and liabilities. Once the bankruptcy order is pronounced, the Official Receiver becomes the provisional liquidator/ trustee of the company until final liquidator is appointed. The company in this case will not have any influence over which liquidator is appointed. Liquidator will have powers to investigate and claw back any transactions at undervalue or preference or bring action against the directors for breach of fiduciary duty. Thus, Mr. Chan's friend mentioning that that he is appointing a friendly liquidator who will not investigate the company's affairs too closely is incorrect.

However, if the winding up is voluntary via members voluntary liquidation where in company mentions that it will be able to settle all liabilities within 13 months of the commencement of the liquidation, then the appointment of liquidator will be made by the shareholders of the company via a special resolution to commence the winding up and appoint the liquidator. In this case the liquidator can be connected to the company i.e., can be from company's audit firm. However, in the case also the liquidator will have powers to investigate transactions that were undervalue or preference or bring action against the directors for breach of fiduciary duty.

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

Commented [RD(DWH20): (1 mark) Correct that not necessary to go to court but a bit jumbled. Also, inaccuracies as per below. Should also advise that if company is insolvent owes duties to creditors ahead of the company

Commented [RD(DWH21): But the friend's advice is that Mr C "must" go to court

Commented [RD(DWH22): "bankruptcy" is for individuals only

Commented [RD(DWH23): a company cannot petition on the basis of a resolution by directors alone (Emmadart) and there is no indication that Mr. Chan is (necessarily) the only shareholder

Commented [RD(DWH24): 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(DWH25): 12

Commented [RD(DWH26): (1 mark) for identifying that charged assets fall outside liquidation but question is what advice to give to L. An outline is

>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

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.

When a fixed charge is created, it is created on specific asset and it get attached as soon as the charge is created, or the relevant asset is acquired by that debtor. The debtor cannot deal with that asset without the consent of the charge creditor.

In this case, the liquidator will need to check is the mortgage is properly registered at Companies Registry and Land Registry. If not, the security will be void. Section 334 identifies the type of charges that are required to be registered. These include charges over land and books and floating charges. If charge is not registered or is not registered on time (i.e., within one month from the date of execution) than it will be void against the creditor of the company. If yes, then the receiver can enforcement the asset and it will stands wholly outside liquidation, and the creditor will only look at payment of his own debt and not of other creditors. However, the creditor will have to value the asset and if it is greater than its claim the balance of sale proceeds would be available for the general body of creditors, but if the value of the asset is lower than the claim, the creditor will have to will have to submit the proof of debt for the shortfall of the amount. However, it should be noted that the liquidation of the borrowing company will not affect the receivers right to hold and/ or sale the asset secured by the charge under which he is appointed. The realization made from the sale of the charged assets will not be available to the liquidator for the payment of liquidation expenses. However, in this case given receivables are the only asset in the company, the realization from this asset will be used to meet claims of the preferential creditors as there are no other uncharged assets to meet those claims available to the liquidator.

Pursuant to section 267 of CWUMPO, a floating charge will not be valid if it is entered into within 12 months prior to the commencement of the liquidation and the company was unable to pay its debt at the time when charge was created or became unable to pay debt post creation of charge. However, the charge is valid if the new money is provided to the company.

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:

Commented [RD(DWH27): Right lines but in this context, it is not a question of valuing - the secured creditor can sell; and just hands over any surplus

Commented [RD(DWH28): Only if a floating charge

Commented [RD(DWH29): (3.5 mark) A bit disjointed for advice

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]

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

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

The clause which is mentioned 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 can be considered as the anti-deprivation principle, where in Mr Qi has put himself in the better position than other creditors, which can also be classified as a fraud on the insolvency law. It is given Mr. Qi an advantage in the event of insolvency proceedings.

If liquidator wants to examine any Hong Kong based parties i.e., in this case Mr Zhang (an independent director) or Mr. Wong (a bookkeeper) with relevant information there are wide powers in the Hong Kong legislation permitting the liquidator to obtain an order for examination.

An ancillary winding up order in Hong Kong can be applied in the court if the three core requirements are met. This can give foreign liquidator powers in Hong Kong. The three-core requirement being (a) there must be sufficient connection with Hong Kong, which is there in this case; (b) there must be a reasonable possibility that the winding up order would benefit those applying for it, this condition is also met in this case and lastly (c) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets, yes, this condition is also met in this case. In Hong Kong there is no legislation to recognize a foreign liquidation or foreign liquidator. Common law principles have been used to allow a foreign liquidator to be recognized in Hong Kong where this will assist the foreign liquidation.

Banks in Hong Kong should readily assist foreign representative by providing the documents in relation to the SPL's own accounts even without the foreign representative having to first obtain Hong Kong court's order. The court has also granted recognition orders to permit foreign representatives to seek documents or examine the individuals in Hong Kong. However, the liquidator should note that he should have similar powers in his home jurisdiction. However, for the foreign liquidator to exercise power to deal with assets in Hong Kong or funds lying in the bank accounts, the liquidator will have to apply for a specific recognition order from the court.

Commented [RD(DWH30): But need recognition or ancillary liquidation

If the assets are located in the pilot area of Mainland, the new mechanism between Hong Kong and the Mainland may be sufficient to obtain the recognition and assistance in those areas.

*** End of Assessment ***

TOTAL MARKS: 32 out of 50

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(3.5 mark) A bit disjointed for advice

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].