



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

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?

The jurisdictional requirements for the Hong Kong court to regard a debtor when exercising bankruptcy jurisdiction over that person are:

The debtor must firstly be an individual in accordance with section 4 of the BO and this individual must be domiciled in Hong Kong, be personally present in Hong Kong on the day on which the petition is presented; or at any time in the period of the three years ending with that day; and have been ordinarily resident. Also, the debtor 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?

The core-requirements that enables the Hong Kong court to exercise its jurisdiction to wind-up a non-Hong Kong company are 1) there must be adequate connection with Hong Kong doesn't have to mean the presence of assets; 2) there must be a realistic possibility that the winding up order would be of benefit to those applying for it; 3) the must be able to exercise jurisdiction over one or more persons with interest 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?

Since there is no such thing as a provisional liquidation in Hong Kong. In other jurisdictions provisional liquidation is for the purpose of light touch liquidations but this isn't the case in Hong Kong.

Provisional practitioners appointed in Hong Kong still has the power to conduct restructuring if granted powers by the court. A provisional liquidator can be appointed to assist the facilitating of a restructuring proposal, but it cannot be the main and only reason for the appointment of the provisional liquidator. A provisional liquidator is tasked with preserving assets after the winding petition is made but must be before any winding up order is made.

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

Question 3.1 [maximum 5 marks]

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): (2 marks). See note below; that criterion is not needed as a qualifier and your wording suggests it is.

Commented [RD(DWH12): Not correct; an individual can be made a bankrupt whether or not (s)he carried on a business

Commented [RD(DWH13): (3 marks). Would have been preferable to include source (CFA's decision in Yung Kee)

Commented [RD(DWH14): (2 marks). Not a very full answer. Should refer to need to show jeopardy to assets; powers prescribed by court; balancing act etc.

Commented [RD(DWH15): Liquidators?

Commented [RD(DWH16): (3 marks) See below. Also need to show that company insolvent at time or became insolvent as a result of the relevant transaction

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

A liquidator of a company, either in a voluntary or compulsory winding up proceedings, has the exercisable right to make an application to set aside "unfair preference" transactions.

The liquidator can take action to challenge an unfair preference because this type of transaction would be related to the liquidity of the company and can affect the creditors of the company.

Unfair preference is when an insolvent company acts in a manner which would place a creditor in a better position than it would have been leading up to the company's insolvency.

The liquidator will be tasked with proving that the company was influenced by a desire to improve the creditor's position if the company goes into an insolvent liquidation. Also it needs to be proven that a person does not desire all the compulsory consequences of their actions. For a liquidator to prove these circumstances has been demonstrated to be difficult.

Transactions that are suspected of unfair preference would only be relevant if they were entered into within the last 6 month prior to the commencement of the winding-up of the company, or within two years if the beneficiary of the transaction was a person connected to the company. A person connected to the company could fit either of these criterions 1) an associate of the company, or an associate of a director or shadow director of the company. You would define a company as an associate, as another company that is ran by the same person or one of his associates of the company being wound up.

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.

Although HK has no bilateral agreements with other jurisdictions or countries, there is a new agreement between Hong Kong and certain areas of the Mainland.

The agreement was established in May 2021, which states that Hong Kong and some parts of the Mainland entered into an arrangement which governed cross border insolvency. The arrangement sets up a mechanism for office holders in Hong Kong to gain recognition and assistance in the designated areas of the Mainland and Visa versa for office-holders in the Mainland to gain recognition and assistance in Hong Kong.

The Mainland Judgement (Reciprocal Enforcement) Ordinance (Cap 597) gives effect to the "agreement" between HK and Mainland. The MJERO enforces mainland money judgements in HK. The agreement only applies in circumstances of Commercial contracts, valid agreement on choice of Mainland court, Money judgement from a designated court and final and conclusive judgements

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.

Commented [RD(DWH17)]: ?

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

Commented [RD(DWH19)]: (1.5 marks) Mentions the new system but does not say how it works (e.g. pilot areas, COMI in HK needed, HK appointees only, letter of request). Also Should mention that HK court has assisted in PRC insolvencies (e.g. CEFC Shanghai) by common law

Commented [RD(DWH20)]: Not relevant

Commented [RD(DWH21)]: (1 mark) Not a very full answer. The answer just refers to Schemes and says do not need 100% (plus a reference to position of third party guarantees, but without really explaining).

Should mention how a scheme works and court involvement for example.

Should also mention that due the "Gibbs' principle, a Hong Kong Scheme will only compromise debts arising from obligations governed by Hong Kong law. This is a possible downside in the modern environment where a sophisticated debtor is likely to have debts due under other governing laws

Also, as classes are important, should outline requirements (similarity of legal rights, not interests)

Reference should be made to the majorities required and fact no moratorium

In Hong Kong, a scheme of arrangement procedure is the only statutory mechanism under Hong Kong law which allows companies to enter legally binding arrangements with their members and/or creditors, **no matter the class**. The types of arrangements include the adjustment of debts owed to creditors or even reduction of share capital. A scheme of arrangement is the only mechanism that available to a company seeking to restructure its debt. The procedure is very important as it regards to restructuring regime in Hong Kong.

Commented [RD(DWH22): But getting classes right is important; a scheme can only bind creditors in the same class

An advantage of the scheme arrangement provides is that it allows the company and their creditors to compromise or adjust debts once the stipulated number of relevant creditors approve. A scheme of arrangement saves the company the effort of needing to obtain the approval of 100% of the relevant creditors to contractually vary the debt.

The scheme is needed in situations where a company needs to adjust the debt of many different creditors. The scheme would eliminate the impossibility of seeking unanimous consent from all creditors. A scheme would also be advantageous, in circumstance where may be hold-out creditors who are seeking an unfair advantage over similarly rank creditors.

As there are advantages, issues have also arisen regarding schemes. A common issue as of recent is the issue of dealing with the obligation of third parties. A company by way of a scheme may cause the release of its creditors' claims under the guarantees provided by third parties where the guarantees are related to the debt being compromised under the scheme.

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.

Commented [RD(DWH23): (2 marks) The opening line is incorrect and should also advise as to his duties to creditors.

Commencing voluntary liquidation is down to members

As the sole director of the company, **Mr. Chan can place the company into voluntary liquidation**. Since the company is having financial difficulties, the first step would be to find out if the company is solvent or insolvent. It would have to be determined in the company is unable to pay its debts. The court would consider a cash flow test or balance sheet test appropriate to determine if the company is insolvent or solvent. The director can refer to section 178 of the CWUMPO to help define if the company is "unable to pay its debts".

Commented [RD(DWH24): No, only if 228A is appropriate

A petition if the company is unable to pay its debt. A **petition to the court is not the only way to enter liquidation**. The company can also enter into liquidation voluntarily. Which would be either a members' voluntary liquidation or a creditor's voluntary liquidation.

Commented [RD(DWH25): 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

A member's voluntary liquidation would be an option if the company is solvent. The company will have to pay its debt within 12 months of the commencement of the liquidation. The

directors would also have to sign a certificate of solvency and the shareholders will pass a resolution to wind up the company and to appoint a liquidator.

Mr. Chan can opt for a Creditor's voluntary liquidation if the company is not solvent. He will convene a meeting of shareholder to pass a special resolution for the winding up of the company and a liquidator will be appointed. The appointment of the liquidator must be first confirmed at the creditor's meeting before he has all his powers.

Regarding appointing a "friendly liquidator" none of these instances is the appointment of the liquidator solely up to Mr. Chan. The appointment is decided by different parties, as I mentioned in each circumstance above. Secondly, liquidators are not appointed to be friendly but has a duty to take control of the company, investigate the affairs of the company and the conduct of the directors, realise the assets in order to effect payment to the creditors and then shareholders (if this applies)

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.

Firstly, we will examine the type of charge that is presented in this scenario:

Although the charge was stated as a fixed charge, the charge fits the classic definition of a floating charge which was given by Romer LJ in *Re Yorkshire Wollcomber's Association Limited*. His first characteristic was 1) If the charge is on a class of assets of the company. In this case it is on a class of assets which is the company's receivable. The second characteristics is, if the class of asset is in ordinary course of business of the company, would be changing from time to time. This is definitely the case with receivables as it is an asset that changes often. The third characteristics is if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of the those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets. This was happening in this case as Kite continued to trade with their customer as they

Commented [RD(DWH26): (1 mark) for considering whether in fact a floating charge, but you then continue on the basis it must be a fixed charge. 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

regularly would and the proceeds were being placed into the regular business account, not a separate account.

Although the charge was stated as a fixed charge it holds all the characteristic of a floating charge. Although the company continued operating as usually as it pertained to the receivables, once a crystallisation event is triggered in this case a receiver was appointed, Kite no longer has the right to use the receivables and a fixed security is placed over them.

No the liquidator of Kite Limited cannot insist that the receiver hand over the realisations he makes to pay the cost and expenses of the liquidation. The charge was agreed upon by Kite Limited. The receiver has the right to hold the assets which in this case is the charge that was that was collected over the company's receivables. The realization that is made over the company's receivables are not available to the liquidator for the payment of the liquidation expense. The liquidation does not have any effect on the receivers right to hold the assets by 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:

- 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;
- 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;
- SPL has a bank account at a bank in Hong Kong;
- It is not known where Mr Qi is currently, but it is believed he is a Hong Kong resident;

Commented [RD(DWH27): (2 marks) Not enough on recognition/what L can do in HK

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].

(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.

In advising the liquidator in regard to determining if Mr. Xu has any standing to bring the winding up proceedings against Mr. Qi, I would reference the anti-deprivation principle. Although the liquidator is concerned about the clause mentioned in (a) regarding SPL becoming insolvent and the contract being void, this principle prevents one party from using contractual arrangement to give an advantage to one of the contracting parties in the event of the insolvency of the other (SPL). A 2004 Appeal Court of Appeal case set a precedent that “no one can be allowed to derive a benefit from a contract that is in fraud of the insolvency laws” Another Example would have been one of the collapse of the Lehman Brothers. That clause would not be upheld in Court since it puts one party (Mr. Qi) at an advantage over the next (Mr. Xu) in the event of the insolvency. Mr. Qi entered that contract with the intention to defraud Mr. Xu, since the project was most likely a scam. There the liquidator can open winding up proceeding on behalf of Mr. Xu.

In regard to point (e), it is believed that the company has assets in the Mainland. The mainland has a cooperation mechanism between Hong Kong and Mainland. Once assets are in one of the pilot areas of the Mainland, those assets will be recognised, because of the cooperation mechanism although the assets aren't in Hong Kong the jurisdiction to wind up will still remain even if the matter of the original connection have ceased to exist. This would satisfy the second core requirement for right to wind-up to still remain. There also bank accounts located in Hong Kong.

The liquidator would have to show that there are persons “sufficient connections to Hong Kong” that would have sufficient economic interest in the winding up of the company to justify making an order which will engage the Hong Kong wind up regime. SPL has a book keeper and director which lives in Hong Kong.

The liquidator has the jurisdiction to wind-up the company although the company is registered in the BVI and not in Hong Kong. No formal order is needed to recognise the practitioner.

*** End of Assessment ***

TOTAL MARKS: 27.5 out of 50