



**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?

In order to exercise jurisdiction, the Hong Kong courts must satisfy itself that firstly the debtor is an individual and meets the following criteria:

- The debtor must be domiciled in Hong Kong;
- The debtor must be present in Hong Kong on the day the petition is presented; or
- The debtor in the three years prior to the petition being presented was ordinarily resident in Hong Kong or had their residence in Hong Kong; or
- The debtor conducted 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?

Section 327 of the CWUMPO legislation provides the following core requirements in order for a non-Hong Kong company to be wound up under the Hong Kong jurisdictions courts:

- The Hong Kong courts must be able to exercise their jurisdiction over at least one person who has an interest in the distribution of the company's assets.
- The non-Hong Kong entity has sufficient connection to Hong Kong.
- There is a reasonable possibility that the winding up order would benefit the person who are making the application.

### Question 2.3 [maximum 4 marks]

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

Under section 193 of CWUMPO a provisional liquidator can be appointed. In order to make an order to appoint provisional liquidators there needs to be justifying reasons for making such an order. These reasons could include to protect against the risk of assets being dissipated prior to a winding up order being made.

A provisional liquidator is usually installed in order to protect assets rather than realize them unless the realization of the asset if necessary to preserve its value. In this vein a provisional liquidator can be appointed in order to facilitate a restructuring being implemented however this cannot be the only reason for the appointment.

**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):** (2.5 marks). Should include the source (s.4 of Bankruptcy Ordinance) given a specific reference to jurisdictional requirement

**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)

**Commented [RD(DWH13):** (3 marks). Should refer to powers being prescribed by the Court and need to show likely to be wound up when petition is heard

A provisional liquidator cannot be appointed immediately prior to a winding up order simply to avoid the official receiver being appointed provisional liquidator upon the order being made.

### 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.

Per sections 266, 266A and 266B of the CWUMPO, Liquidators are able to action to set aside transactions that considered to be an unfair preference.

The purpose of a liquidator being able to set outside unfair preference transactions is in order to ensure that the entirety of the estate is treated fairly and in accordance with the legislation. It is to ensure that one creditor does not benefit above all others in their class or to ensure that a creditors position is not prejudiced by such transactions.

In order to succeed the liquidator must show that the company was insolvent or became insolvent at the time of the preference or due to the preference being made. Where the preference is for the benefit of an associate of the entity, then above criteria is presumed.

Additionally, the liquidator must also prove that the company wanted/desired to improve the position of the beneficiary of the preference.

Evidencing the company's desire to improve a creditors position is a difficult evidentiary burden to overcome, however, it has been achieved in the past.

#### 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.

Whilst Hong Kong and the mainland are now considered one country and two systems, there are still deficiencies in the recognition of insolvency proceedings between the two jurisdictions.

Developments have been made in this regard following the introduction of a pilot program which provides a co-operation mechanism between Hong Kong and certain areas of the mainland as of May 2021, these areas are Shanghai municipality, Xiamen municipality and Shenzhen municipality. Liquidators from Hong Kong will now be able to apply for recognition of orders in mainland China.

Prior to this recognition of appointment in Hong Kong was not sufficient to have recognition in the mainland and any action required in the mainland would not be recognized as per

**Commented [RD(DWH14):** (3 marks) Should also state time limits and distinction between connected and unconnected parties; and requirement that party 'preferred' is a creditor (or surety)

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

**Commented [RD(DWH16):** Rebuttable presumption of desire to prefer where beneficiary is a connected person.

**Commented [RD(DWH17):** (1.5 marks) Not a very full answer. 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). Also, Could also have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai)

Solar Touch where a petitioners application was denied as the court could not provide an order in the Hong Kong courts for investigative action on the mainland.

**Question 3.3 [maximum 5 marks]**

The scheme of arrangement is, in essence, Hong Kong's only statutory tool for corporate rescue. Describe it, listing the pros and cons.

A scheme of arrangement is a statutory mechanism under sections 668 and 677 of Part 13, Division 2 of the Companies Ordinance.

In order to be affected, a scheme must have a majority in number representing 75% in value of claims that are voting at the scheme's meeting of creditors.

A scheme of arrangement is able to compromise or adjust debts by agreement with their creditors with sanction of the court once the scheme is approved by the voting noted above.

The advantages of a scheme given the nature of the voting is that it allows you deal with debts with multiple creditors at the same time in situations where achieving unanimous consent would be difficult. Additionally, the scheme can be enforced over creditors who attempt to dissent or hold out from agreeing to compromise.

There are some weaknesses, for example a scheme does not provide a moratorium or stay over the company to stop any enforcement action. Therefore a company would need to also appoint a provisional liquidator to provide such protection. This adds a layer of cost to the proceeding.

Also, Hong Kong schemes do not allow for cross class cramdown, in order for the scheme to succeed all classes must vote in favor per the voting thresholds.

**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 correct in that he should speak to a professional advisor to help assess the current financial situation of the Company.

Mr. Chan's friend is incorrect however that he should look to appoint a "friendly" practitioner in order to avoid an investigation.

The fact pattern above is limited in its detail and a professional advisor may be able to provide alternate routes to solving the current financial difficulties such as a scheme of arrangement together a provisional liquidation to benefit from the moratorium.

**Commented [RD(DWH18):** (3 marks) A clear answer but 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, reference the court involvement, scrutiny of explanatory statement etc.

**Commented [RD(DWH19):** (1 mark) Identifies that a 'friendly liquidator' is not a thing - liquidators are neutral, but does not identify Mr C's options (e.g. voluntary liquidation). Also should also advise that if company is insolvent owes duties to creditors ahead of the company

**Commented [RD(DWH20):** Where does the question state that the friend said this?



Alternatively, even if the director appointed their choice of liquidator through a company petition court process, the appointee would only be a provisional liquidator until such time as the first meeting of creditors is held at which time they could vote to appoint their own choice of liquidator who would investigate the affairs of the Company in greater detail.

It is therefore best to approach an independent impartial practitioner in the first instance in order to get impartial and factual advice to allow for a well informed decision to be made.

**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.

In realizing the assets in the bank account to which the Receiver has been appointed, the Receiver must act in good faith and in accordance with the powers granted under the instrument, additionally, the Receivers are able to put the charge holders interests ahead of all others when determining the course of the Receivership. Therefore the Receivers duty will be to GFL first and the Liquidator second.

Secondly, the Receivers asset realizations may only be made available to the Liquidator in two scenarios. The first scenario being if the realizations made repay the charge holder in full and a surplus is available after all costs of the Receivership are defrayed. This surplus would fall into the general pot of assets available to the Liquidator. The second scenario is where preferential claims are present, the Liquidator can insist that assets realized by the Receiver are used to settle the balance of preferential claims where the assets of the Liquidation estate are insufficient. In order for this fact pattern to be established the charge would need to be deemed valid and it would have to be registered, it is therefore unusual that payments were not made to a separate account, though not required.

As this security relates to a financing arrangement, the lender has been clear that the instrument contain a clause noting this a fixed charge rather than the ambiguity of whether it is a sale of the receivable. Given that that charge was granted "months" ago it may be within the voidable transaction window if the Liquidator can evidence that GFL received preferential

**Commented [RD(DWH21):** (0.5 marks) Correct to identify how secured creditor treated and to consider and unfair preference, but needs to go further (thrust is whether in fact a floating charge):

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

**Commented [RD(DWH22):** Only for floating charge

treatment when compared to other creditors. This could be another avenue that the liquidator could consider in order to benefit from the realizations. It would be for the Liquidator to approach the Courts to have the security set aside as a voidable preference. The court could however find that this was in effect a sale of the asset in which case the Liquidator would not be entitled to the monies unless they could evidence the transaction as a sale at undervalue.

#### Question 4.3 [maximum 6 marks]

Mr Xu entered into a Framework Agreement (FA) with his business associate, Mr Qi. The FA is governed by Hong Kong law. The idea was to develop a resort project in Fiji. The FA provided that Mr Qi would incorporate a BVI company to purchase a 100% interest in the project from its original owners. To this end, Mr Qi incorporated Sunrise Pacific Limited (SPL) in the BVI. He was (and remains) the sole director and shareholder of SPL, telling Mr Xi that this was necessary because the original developers of the resort trusted him and him alone. The FA provided that Mr Xu would inject USD 20 million into the project by advancing that sum to SPL. The FA also provided that if the project could not be developed and sold on to a buyer within a period of two (2) years from the date of the FA, then SPL will pay a sum of USD 22 million to Mr Xu (representing a return of his investment plus USD 2 million to represent interest).

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

The BVI liquidator appointed has identified:

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

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

**Commented [RD(DWH23)]:** (4 marks) More needed on recognition and steps could take 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].

Hong Kong does not require a formal order of recognition for the Liquidator to bring action in Hong Kong. However, in this scenario it may be beneficial to have an ancillary proceeding opened in Hong Kong in order to gain mainland recognition, which will be discussed further below.

In order to open the ancillary proceeding, the Liquidator will need to satisfy the Hong Kong courts of the three core requirements.

- a) There is sufficient connection to Hong Kong which in this case there is given the Hong Kong bank account, the directors possible residence in Hong Kong and the residence of Mr Wong and Mr Zhang.
- b) There must be a reasonable possibility that the ancillary order would benefit the applicant, in this case it would as the applicant is looking to locate assets in the mainland. If these assets are located in the pilot zones of Shanghai, Xiamen or Shenzhen then the ancillary order would allow for further recognition in these locations.
- c) Finally, the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the assets. The book keeper Mr Wong is a potential creditor and has an interest in the distributions together Mr Qi who would be interested if there are sufficient assets to enable a distribution to shareholders.

The next issue is to consider whether the original petition and appointment is valid given the FA clause. The contractual clause in the FA is what is known as an ipso facto clause. Essentially the contract is modified once an insolvency proceeding is started. In the scenario above, this clause would not be enforceable, the Hong Kong courts would grant relief here under the anti-deprivation principals, as this clause is specifically set out to deprive creditors of the estate by vesting all assets in the shareholders. Therefore, the appointment is valid.

The final issue is the location of assets in mainland China. If the assets are outside of the pilot locations set out above then any effort to gain a recognition order would fail and the assets would likely be unreachable by the BVI liquidator. However, should the assets reside in one of the three pilot locations, then by utilising the ancillary order in Hong Kong, the liquidators could gain recognition in these locations in order to enforce on assets therein and take action to realize those assets for the benefit of the estate.

**\* End of Assessment \***

**TOTAL MARKS: 30.5 out of 50**

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