



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.**

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.

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.

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).

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.

- (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.

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?

Pursuant to section 4 of the Bankruptcy Ordinance (Cap 6)(BO) in order for the Hong Kong to exercise jurisdiction over a debtor, he / she must be an individual who is:

- (a) domiciled in Hong Kong;
- (b) personally present in Hong Kong on the day on which the petition is presented; or
- (c) at any time in the period of three years ending with that day (i) have been ordinarily resident, or have had a place of residence, in Hong Kong; or (ii) have carried on business in Hong Kong.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12): (3 marks)

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

The three “core requirements” that enable the Hong Kong Court to exercise jurisdiction were set out in the CFA’s decision in *Re Yung Kee*¹ as follows:

- a. there must be a sufficient connection with Hong Kong (not necessarily meaning the presence of assets within the jurisdiction);
- b. there must be a reasonable possibility that the winding up order would benefit those applying for it; and
- c. 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): (3.5 marks). Full marks if mention that powers are as prescribed by the court (powers depend on circumstances)

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

The appointment of a provisional liquidator to wind up a company is provided for in sections 192 to 194 of CWUMPO. The Court may appoint a provisional liquidator at any time after the presentation of a winding up petition and before the making of a winding up order². The purpose of appointing a provisional liquidator is to preserve assets and assess the company’s financial situation. A provisional liquidator is often appointed to investigate the possibility of, and if viable, promulgate a restructuring of the company’s debts, often a scheme of arrangement. However, notwithstanding that the circumstances giving rise to an application for the appointment of a provisional liquidator may be a restructuring, the applicant must establish that there was in the first place good reason to appoint provisional liquidators on

¹ *Kam Leung Sui Kwan v Kam Kwan Lai and Others* (2015) 18 HKCFAR 501

² CWUMPO s 193(1)

"traditional" grounds of jeopardy of assets³. Upon the appointment of a provisional liquidator, the moratorium / stay of actions under section 186 of CWUMPO applies.

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

Question 3.1 [maximum 5 marks]

Commented [RD(DWH14): (5 marks) Good answer

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 is able to take action to challenge an unfair preference, which in certain circumstances and pursuant to sections 266, 266A and 266B of CWUMPO, will be voidable. The purpose of these provisions is to impeach transactions with the company entered into in order to place a creditor (or guarantor) in a better position than it otherwise would have been in, in the event of the company's insolvency. The rationale being that in a collective insolvency procedure, the company's creditors should receive distributions according to the statutory waterfall of priority and within each class within the waterfall, share in the amount available on a *pari passu* basis.

Section 266(1) of CWUMPO gives a liquidator the ability to apply to the Court for an order under section 266(3) if the company has at the relevant time (within the meaning of section 266B) given an unfair preference to a person.

As to the definition of an unfair preference, this is provided by section 266A of CWUMPO, which states: "A company will have given an unfair preference to a person if (a) that person is one of company's creditors; or a surety or guarantor for any of the company's debts or other liabilities; and (b) the company does anything or suffers anything to be done what has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position that person would have been in if that thing had not been done".

The relevant time for an unfair preference given to a person who is connected with the company (otherwise than by reason only of being its employee) is at a time in the 2 years ending on the day on which the winding up of the company commences, and in the case of a person who is unconnected with the company, at a time in the period of 6 months ending on the day on which the winding up of the company commences. These provisions are available to a liquidator appointed in either a voluntary up or a compulsory winding up. The commencement of a winding up by the court is the presentation of the petition⁴. The commencement of a voluntary winding up is the time at which a resolution is passed for the voluntary winding up⁵, unless a winding up statement by a company's directors is delivered to the Registrar, in which case, the commencement of the winding up is the time of the delivery of that statement⁶.

In order to succeed in an application for an order under section 266 the liquidator must be able to show that at the time the asserted preference was given, the company was unable to pay its debts or became unable to pay its debts as a result of the transaction concerned. In addition the liquidator must also be able to show that the company was influenced in, in deciding to give that unfair preference, by a desire to produce in relation to that person the effect mentioned in section 266A(1)(b) i.e, to place that person in a better position, in the event of insolvency, than they would otherwise have been. These requirements are presumed against

³ *China Solar Energy Holdings Ltd* [2018] HKCFI 555

⁴ CWUMPO s184(2)

⁵ *Idem*, s230

⁶ *Idem*, s228A(5)(a)

a recipient who is "connected" with the company, although they can be challenged by the recipient.

It is important to note that a liquidator may experience difficulties in demonstrating that the company was influenced by a desire to improve that persons position. As has been considered in relevant jurisprudence, a person does not "desire" all of the "necessary consequences of his actions"⁷. Notwithstanding the difficulties that can ensure in demonstrating the desire to prefer, there are examples where the court has been prepared to find that the desire to prefer existed, for example where a company gave to its bank a mortgage over an asset and the court considered there were no good grounds to grant the mortgage and that the company desired to prefer the bank because personal bankruptcy proceedings were being threatened against the company's directors⁸.

The orders that the court can make if a transaction is proved to be an unfair preference pursuant to section 266 of CWUMPO are intended to restore the position to what it would have been if the company had not given that unfair preference⁹. Such orders include:

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

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.

Since 1 July 1997, Hong Kong has operated under Deng Xiaoping's principle of "One Country, Two Systems". This reflects the fact that Hong Kong is situated within the geographical boundaries of the PRC and the PRC or Mainland deals with foreign policy and nationality issues. Although, Hong Kong has its own Legislative Council with 70 members and its own statutory laws (Ordinances), Hong Kong is part of the PRC and in certain circumstances (as noted above) the position in Hong Kong will be determined by the PRC and not by Hong Kong's own courts or legislature. It is perhaps for this reason that whilst Hong Kong has limited formal arrangements to deal with cross-border insolvency where the proceedings are in other jurisdictions, this is not so with regards to cross-border insolvency where the proceedings are taking place in or concerning the Mainland.

Firstly, there is a new arrangement (May 2021)¹⁰ between Hong Kong and certain areas of the Mainland¹¹, such areas being designated pilot areas for a new cooperation mechanism as between Hong Kong and the Mainland which provides for office-holders in Hong Kong to obtain recognition and assistance in the designated areas of the Mainland piloting the scheme, and vice-versa. The Supreme Court has issued an opinion which supplements the Record of Meeting which notes the designated areas which fall within the scope of this agreement and defines "Hong Kong Insolvency Proceedings" to mean any collective insolvency proceedings commenced under CWUMPO or the CO and includes compulsory liquidations, creditors'

⁷ *Re MC Bacon* [1990] BCLC 324; *Osman Mohammed Arab v Cashbox Credit Services Ltd* [2017] HKEC 2435

⁸ *Re Sweetmart Garment Works Limited (in liq)* [2008] 2 HKC 252.

⁹ CWUMPO s266(3)

¹⁰ Record of Meeting can be found at <https://www.doj.gov.hk/en/mainlandandmacao/pdf/RRECCI/RoMen.pdf>.

¹¹ Shanghai, Xiamen and Shenzhen

Commented [RD(DWH15)]: (4 marks) Could also have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai)

Commented [RD(DWH16)]: In a limited way

voluntary liquidations and schemes of arrangement which are promoted by a liquidator or provisional liquidator. The Supreme Court has also clarified what the center of main interest for these purposes generally means¹² and has confirmed that if the debtor's principal assets in the Mainland are in a pilot area, or it has a place of business or a representative office in a pilot area, the Hong Kong Administrator may apply for recognition of and assistance to the Hong Kong Insolvency Proceedings in accordance with this Opinion". Finally, to invoke the mechanism under this agreement, a letter of request from the Hong Kong court will be necessary. This procedure is considered an important step and will facilitate greater coordination of cross-border insolvency where debtors, creditors and / or assets are located between both Hong Kong and the Mainland designated areas.

It is also worth mentioning that there is also a specific procedure for the recognition and enforcement of judgments from the Mainland pursuant to the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (**MJREO**) which is modelled on the FJREO and enforcement in Hong Kong by registration of money judgments. In this context Mainland means any part of China except Macau and Taiwan. It must be noted that MJREO only applies in certain circumstances, such as to enforce money judgments on disputes arising out of commercial contracts, where the underlying agreement gives exclusive jurisdiction to the relevant Mainland court, the judgment is from a designated court in the Mainland and is not in respect of any tax, fine or penalty. The judgment must also be final and conclusive and the application for its registration under MJREA must be made within two years from the date from which the judgment takes effect.

However, it is not correct to say that the Hong Kong Court will not provide assistance and cooperate in cross-border insolvency cases from other jurisdictions in the absence of formal arrangements. Although Hong Kong lacks a statutory framework for dealing with cross-border insolvency, the Hong Court has long since afforded assistance to foreign representatives relying on common law principles and a foreign liquidator's right to bring an action in Hong Kong (in the name of the company) has long been recognized¹³.

There is also a statutory jurisdiction, provided certain requirements are met, for the Hong Kong court to wind up companies that are not incorporated or registered in Hong Kong¹⁴. The circumstances in which an unregistered company can be wound up are if the company is dissolved or has ceased to carry on business, or is carrying on business for the purpose of winding up its affairs; if the company is unable to pay its debts; and if the court is of the opinion that it is just and equitable that the company should be wound up. The petitioner must also be able to satisfy the "three core requirements" set out in the CFA's decision in *Re Yung Kee*¹⁵.

The Hong Kong court has reinforced its application of common law principles in order to recognize and assist foreign representatives in the CFA's decision of *Chen Li Hung and Another v Ting Lei Miao and Others*¹⁶ which concerned the recognition of bankruptcy trustees appointed in Taiwan. Moreover, the circumstances in which the Hong Kong court will grant assistance has broadened and is not limited to recognizing foreign representatives but also to granting relief in ancillary proceedings if steps were required to be taken in Hong Kong, such

Commented [RD(DWH17)]: Not relevant

¹² "Center of main interests" generally means the place of incorporation of the debtor but adding "at the same time, the people's court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor. When a Hong Kong Administrator applies for recognition and assistance, the center of main interests of the debtor shall have been in the Hong Kong Special Administrative Region, continuously for at least 6 months".

¹³ See *Re Irish Shipping* [1985] HKLR 437

¹⁴ Part X of CWUMPO applies to registered non-Hong Kong companies.

¹⁵ *Kam Leung Sui Kwan v Kam Kwan Lai and Others* (2015) 18 HKCFAR 501; the three requirements are:

a. there must be a sufficient connection with Hong Kong (not necessarily meaning the presence of assets within the jurisdiction);
b. there must be a reasonable possibility that the winding up order would benefit those applying for it; and
c. the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets

¹⁶ (2000) HKCFAR 9

as the production of documents¹⁷. The *Singularis* Principle has been applied on several occasions in Hong Kong since in granting applications for recognition and assistance in relation to cross-border insolvencies. This has also now extended as a basis for assisting in foreign restructurings of overseas incorporated but Hong Kong listed companies, often subject to orders for provisional liquidation which intend to give effect to any restructuring, perhaps parallel schemes of arrangements in Hong Kong and another jurisdiction. For the Hong Court to sanction such a scheme, there must be a "sufficient connection of the foreign company with Hong Kong (but this does not necessarily mean the presence of assets within the jurisdiction¹⁸".

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.

Notwithstanding the general unavailability of corporate rescue mechanisms like the administration procedure in the UK or Chapter 11 procedure in the USA, The scheme of arrangement has been a useful tool in Hong Kong which is provided for in the Companies Ordinance (Cap 662)(CO).

A scheme of arrangement is a statutory mechanism which allows companies to make binding compromises or arrangements with their members and / or creditors (or any class of them), including adjustment of debts owed to creditors or reduction in share capital. The relevant provisions are found in Part 13, Division 2 of the CO (namely sections 668 to 677). The court procedure relating to applications required in give effect of a scheme of arrangement is governed by O.102 r.2 and r.5 of the Rules of the High Court (RHC).

An advantage of a scheme of arrangement is that it enables a company and their creditors to compromise or adjust debts if stipulated majorities of the relevant creditors approve such compromise or adjustment and the court sanctions it. Without a scheme of arrangement, the company would require the approval of 100% of the relevant creditors to contractually vary their debt. Therefore schemes can be usefully deployed to adjust or compromise debt of as many creditors at the same time in circumstances where it would be difficult or impossible to seek unanimous consent of all creditors. This is a useful tool where there may be a small number of creditors who would not agree to the compromise and / or wish to hold out to seek an unfair advantage as against a majority of similarly ranked creditors.

The leading Hong Kong case on schemes is the CFA's judgment of UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin¹⁹ (UDL), however Hong Kong takes guidance from decisions of the English courts in respect of schemes as the language of the legislation is very similar. However, there are differences in relation to procedure, such as the requirement of an applicant in England to circulate a "creditors' issue letter" (or practice statement letter) to inform creditors on a confidential basis that the application is proposing to apply to court to seek an order convening meetings for a scheme of arrangement and giving details of the scheme. This practice is not followed in Hong Kong.

¹⁷ A Co v B (a 2014 decision) and see the Privy Council's decision in *Singularis Holdings v PriceWaterhouseCoopers* [2014] UKPC 36 in which it was clarified that the common law power of assistance exists where the power sought to be exercised: (a) exists in the jurisdiction of the principal liquidation; and (b) the power exists in the assisting jurisdiction (the *Singularis Principle*).

¹⁸ *Re LDK Solar Co Ltd* [2015] 1 HKLRD 458. Considering *Re Yung Kee* and applying *De Drax Holding Ltd* [2004] 1 BCLC 10, that consideration should be limited to the issue of "sufficient connection" (i.e., that it should be enough to satisfy only the first of the 3 core requirements set out in the CFA's *Re Yung Kee* decision.)

¹⁹ (2001) 4 HKCFAR 358.

Commented [RD(DWH18)]: (4.5 marks) A comprehensive answer but see notes below

One of the disadvantages of a scheme of arrangement is that it does not of itself provide for a moratorium. To address this deficiency, a practice has developed in Hong Kong whereby a petition for the winding up of a company is presented and an application made for the appointment of provisional liquidators, with specific powers to investigate the possibility of and, if viable, promulgate a restructuring of the company's debts. The moratorium is then obtained by reason of section 182 of CWUMPO. The Hong Kong court has confirmed that this is a legitimate use of the appointment of provisional liquidators²⁰.

In order for a scheme to be effective, the following procedures or stages are required:

(a) an application is made by originating summons for leave to convene meetings of the relevant creditors to consider, and if thought fit, approve the scheme. At the hearing of this application, directions will be given for giving notice of and advertising the scheme meetings. All scheme creditors have the same rights to participate in and vote at the creditors' meetings, regardless of whether they are in Hong Kong or not.

In terms of the approach to convening meetings for voting purposes, persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting. The test is based on similarity or dissimilarity of rights, as opposed to similarities or dissimilarities of interests not derived from legal rights²¹.

At the convening hearing, the court will decide whether to make an order allowing a meeting of the relevant creditors. However, the constitution of classes will not be considered until the sanction stage. This can pose a risk or a disadvantage as the scheme applicant bears the risk that the application for sanction could be dismissed at the later stage if the classes are not constituted properly²². The application at this stage will need to be accompanied by an affirmation²³ exhibiting a draft explanatory statement, scheme document, notices of the scheme meetings, proxy forms and draft advertisement. The explanatory statement (required by section 671 of the CO) must explain the effect of the scheme and state any material interest of the company's directors under the arrangement or compromise, and their effect on those interests. It will be required to give sufficiently detailed information for the relevant creditors to be properly informed to enable them to reach a sensible decision on the scheme²⁴. Therefore, there is a lot of work which is required in getting a scheme to this stage and so the correct constitution of classes is very important, to avoid it being wasted time and expense.

The explanatory statement must give a sufficient explanation of the scheme and its effects and the court may refuse to grant leave to convene the meeting if the statement is inadequate²⁵. It is also necessary for the statement to give sufficient details concerning what the position would be / estimated return under an independent liquidation analysis and expected duration of that alternative. This is so creditors can be fully informed as to the benefit of the scheme as compared to receiving distributions in a liquidation process.

(b) if satisfied that notice will be given or otherwise brought to the attention of creditors, the court will appoint the chairman of the scheme meetings and sanction the meetings taking place. Scheme meetings take place and the results are reported to the court.

²⁰ *Re Kevew Technology (BVI) Limited* [2002] 2 HKLRD 290; see also *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719.

²¹ See UDL at paragraph 27 for the relevant guidance.

²² For example, see *S Mega Telecommunications Ltd* [2003] 2 HKLRD 583

²³ O.38, r.2, O.41 RHC

²⁴ *Re Heron International NV* [1994] 1 BCLC 667

²⁵ *Kansa General International Insurance Co Ltd* [1999] 2 HKLRD 429 and *Re KB (Asia) Ltd (No 2)* [2014] HKEC 1192

Commented [RD(DWH19): But should add that the Legend Resorts case held that it cannot be the sole reason for appointing PLs

In relation to the vote, the scheme is considered approved if it is supported by a majority in number representing 75% by value of the creditors present and voting (in person or by proxy)²⁶. This test is applicable to each class of scheme creditor and so the same majorities will need to approve the scheme within each class. One possible advantage of this process is that it is often possible to guarantee the support of creditors by way of a "consent fee" agreement. Provided all creditors in that class have the right to participate in this, the court will not find this objectionable²⁷.

(c) If the relevant creditors approve the scheme, an application is made by petition for the court to sanction the scheme. The petition must include details of the company, why the scheme has been proposed, the results of voting at the scheme meeting and it must also be supported by an affirmation proving the posting of the notices convening the meetings, the form of proxy and affirming the contents of the petition²⁸. One disadvantage of schemes of arrangement is that although if the statutory majorities are not obtained, there is no guarantee it will be sanctioned. The court has no jurisdiction to sanction the scheme, even if the majorities are obtained, the court is not bound to sanction the scheme. The issues which the court will consider at this sanction hearing were set out in *Re Wheelock Properties Ltd*²⁹. Of these factors which include whether the meeting were convened in accordance with the court's directions, whether the classes were properly constituted according to creditors' sights and whether the statutory majorities approving the scheme were attained, is the discretionary element of the courts consideration, namely, whether the court can be satisfied that a scheme is one that an intelligent and honest man acting in respect of his interests as a member of the class within which he votes might reasonably approve.

The Court will also need to be satisfied that the relevant class of creditors were fairly represented and the statutory majority were acting bona fide and not coercing members of the minority in order to promote interests adverse to their class³⁰.

The obvious advantage of a scheme is that if sanctioned, it will take effect once registered by the Registrar of Companies, and be binding according to its terms on all the scheme creditors in the relevant class or classes, irrespective of whether or not they attended the meeting or whether they voted in favour. One qualification and perhaps draw back, is that at common law³¹ a scheme seeking to compromise or vary an existing debt will only have real and substantive effect if the debt is discharged under the law governing the debt. Another advantage is that a scheme will also be effective as against any creditor participating in it or whether a creditor seeks to enforce the debt in Hong Kong (e.g. if it obtains judgment in the jurisdiction of the governing law)³². This would include creditors voting on the scheme or, for example, accepting payment from or new instruments created by the scheme³³.

One other advantageous feature of schemes and the way in which the Hong Kong treats them is in respect of the obligations of third parties, including guarantors. Notwithstanding it does not have foundation within the statutory provisions, it has become common practice whereby a scheme may cause the release of its creditors' claims under guarantees provided by third parties where the guarantees are in respect of the debt being compromised under the scheme.

²⁶ CO, s 674(1)(a)-(b); and see *Re PCCW Ltd* [2009] HKEC 738

²⁷ *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; *Re Kaisa Group Holdings Ltd* [2017] 1 HKLRD 18

²⁸ O. 102, r.5

²⁹ [2010] 4 HKLRD 587 at pp 590-591 and *Freeman Fintech Corp Ltd (No 2)* [2021] HKCFI 310

³⁰ *Re PCCW Ltd* [2009] HKEC 738

³¹ *Anthony Gibbs & Sons v Societe Industrielle et Commerciale des Mateux* (1890) 25 QBD 399.

³² *Freeman Fintech Corp Ltd (No 2)* [2021] HKCFI 310

³³ *Rubin v Euro Finance SA* [2013] 1 AC 236

Commented [RD(DWH20)]: Is this a disadvantage; is a safety valve to prevent, say, creditors connected to the company cramming out external creditors

Commented [RD(DWH21)]: "are obtained"?

Hong Kong courts have followed the well-established position under English law³⁴ in this regard and permitted third party releases in appropriate circumstances where they are (a) closely connected with the scheme creditors' rights as creditors against the scheme company; (b) are personal and not proprietary rights; and (c) if exercised and leading to a payment by the third party guarantor, would result in a reduction of the scheme creditors' claims against the company³⁵. The releases must also be "related to and essential" to the scheme. The rationale being if they guarantee claims were permitted to remain then this could undermine the object of the scheme, because if a guarantor is an integral part of a corporate group, the liability would simply be shifted to another part of the group, thereby defeating the object of the scheme. This practice shows the Hong Kong willing to be flexible and facilitate schemes which take into account third party claims so as to give effect to the greater good of enabling the company to restructure in accordance with the terms of 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.

As a director, Mr Chan owes fiduciary duties to the company. Whilst these duties continue in the event of insolvency, they must be exercised with the best interests of the company's creditors in mind³⁶. Therefore, if Mr Chan believes that the financial difficulties of Mountainview are such that the business is unable or soon will be unable to continue in business, it is likely to be incumbent upon him to commence a liquidation procedure so that value can be most effectively preserved and realised for the benefit of the company's stakeholders. In the absence of a creditor initiated compulsory (court) liquidation, Mr Chan can initiate a voluntary liquidation. The first of the voluntary procedures is the 'members' voluntary liquidation' (MVL) procedure. However, this can only be used where Mountainview will be able to settle all liabilities within 12 months of the commencement of the liquidation³⁷. It will also require Mr Chan to sign a "certificate of solvency"³⁸ and the shareholders to pass a special resolution for winding up and appointing liquidators³⁸. The MVL commences on the date the resolution winding up is passed³⁹. The appointed liquidator will take over control of the business from Mr Chan and investigate the affairs of the company and the conduct of Mr Chan.

If Mountainview Limited is insolvent⁴⁰, Mr Chan can (either of his own volition or at the request of shareholders) convene a meeting of shareholders in order to pass a special resolution⁴¹ for the winding up of the company under the 'creditors' voluntary liquidation' (CVL) procedure. The CVL will commence on the date of passing such resolution⁴² and any liquidator appointed at the shareholders' meeting will have limited powers until the appointment is confirmed at the

³⁴ Re Lehman Brothers International (Europe) (in administration) (No 2) [2009] EWCA Civ 1161, [2010] Bur LR 489.

³⁵ Re Winsway Enterprises Holdings Ltd [2017] 1 HKLRD 1; Re Kaisa Group Holdings Ltd [2017] 1 HKLRD 18

³⁶ Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Co, Ltd [2020] HKCFI 398

³⁷ CWUMPO, s 233(1).

³⁸ If the company is being wound up pursuant to its Articles, only ordinary resolutions need be passed.

³⁹ CWUMPO, s 228

⁴⁰ Although there is no statutory definition of "insolvency", a company will be deemed insolvent if there is an "inability to pay debts" within the meaning of section 178 of CWUMPO.

⁴¹ A majority of at least 75% - Companies Ordinance, s 564.

⁴² CWUMPO, s 230

Commented [RD(DWH22)]: (4 marks) Could add that he could petition but 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; so shareholder support is necessary in any event

creditors' meeting⁴³. The first meeting of creditors will be convened for a date not later than 14 days after the meeting of shareholders⁴⁴. A statement of affairs of the company should be laid before the meeting⁴⁵. Notice of the meeting of creditors must be sent by post to creditors at least seven days before the day on which the meeting is to be held and must be advertised in the Hong Kong Gazette, an English language newspaper and a Chinese language newspaper. Mr Chan can preside at the meeting but he may also elect to appoint a representative, which has been accepted by the Court as legitimate⁴⁶. At the first creditors' meeting, creditors will nominate and vote for the appointment of a liquidator⁴⁷. Once the decision has been taken to convene meetings of creditors and shareholders, the directors should take steps to protect the assets of the company pending the meeting of creditors⁴⁸.

A liquidator's role involves the investigation and consideration of the conduct of the directors. Therefore, it is not possible for Mr Chan, nor would it be appropriate for him to attempt, to select a "friendly liquidator" or influence the extent to which a liquidator will execute his responsibilities. The liquidator appointed either in a MVL or CVL will be appointed by the vote of shareholders or creditors. Even if the liquidation of the company is a compulsory (court) liquidation following the presentation of a petition by the company, the liquidator will be appointed by the Court. Therefore, Mr Chan should not, under any procedure commenced, have any sway on who is appointed. The liquidator appointed will be duty bound to investigate the conduct of directors, and if Mr Chan has been in breach of any duties owed, the liquidator can bring claims for breach of such duties. There is also a requirement for the liquidator to report to the Official Receiver in relation to the conduct of a director which justifies the making of a disqualification order under section 168D of CWUMPO. In addition, a court can prosecute and assess damages to the company occasioned by an officer guilty of any misfeasance⁴⁹. The Employment Ordinance (Cap 57) also provides that a director may be held criminally liable for the non-payment of wages and other statutory employee entitlements, and be liable to pay a fine of up to HKD 350,000 and serve up to three years' imprisonment.

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

⁴³ *Idem*, s 243A

⁴⁴ *Idem*, s 241(a)

⁴⁵ *Idem*, s 241(3A)

⁴⁶ *Barlow Investments Limited v Cliftons Limited* [2021] HKCFI 1193 (citing the English decision of *Re Salcombe Hotel Development Company Limited* [1991] BCLC 44).

⁴⁷ CWUMPO, s 242

⁴⁸ *Idem*, s 250A(3)

⁴⁹ *Idem*, ss 276 and 277.

Commented [RD(DWH23)]: (4.5 marks) Good answer; could also have considered whether unfair preference

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.

Generally, GFL's interests and security as a secured creditor, will not be dealt with as part of Kite's insolvency. The appointment of the receiver is said to have been effected pursuant to a charge executed in GSL's favour. This charge is stated to be a fixed charge over Kite's receivables. The starting point is that the receivables over which the fixed charge attaches will not be available for distribution to GFL's other stakeholders. The receiver will not be required to make the receivables over which GFL has security available for payment of the liquidation expenses⁵⁰, and GFL will be entitled to look to the asset for repayment irrespective of the interests of other creditors. The main exception which would apply if the charge were a floating charge is that the receivables must first be used to meet claims of preferential creditors, if there are insufficient assets to meet those claims from the uncharged assets available to the liquidators⁵¹. This eventuality is addressed further below on page 16.

Another potential circumstance which may improve the position of the liquidator and the general body of creditors is if the charge should have been registered, but it was not. In this case the liquidator appointed may be able to argue that the charge is void and the receivables should be made available to the estate for payment of liquidation expenses and unsecured claims. Section 335(5)(a) of the Companies Ordinance (Cap 622) prescribes that a charge requiring registration must be registered within one month of the date of its execution. Section 334 lists the types of "Specified" charges which must be registered and includes a charge on book debts (section 334(d)) and a floating charge on the company's undertaking or property. It is not known whether this charge has been registered from the facts provided. In addition, it is not known whether the arrangement, properly construed, is an absolute sale of the right to the receivables. If so, then registration would not be required as Kite has merely sold a right that it has (the right to be paid by its customers). However, if, properly construed, the charge is a secured financing arrangement, the charge document would need to be registered. Assuming that registration of the charge is required, but it was not registered or not registered in time, then the charge is capable of being void and Kite's liquidator may be able to require the receiver to handover the receivables for the benefit of Kite's estate. The liquidator can search the publically accessible register of charges created by companies at the Companies Registry (which is also online) to see whether the charge in GFL's favour has been registered (if so required). In this scenario, the receivables could be recovered and used to meet the expenses of the liquidation and the claims of unsecured creditors.

It is worth mentioning that a liquidator may be able to recover receivables for payment of statutory preferential claims (including expenses of the liquidation) if the charge were a floating charge or deemed as such. If this were the case, the statutory preferential claims in Kite's liquidation would take priority and the liquidator could require the receiver to handover the receivables in order to meet those claims. However, this would not extend to meeting the claims of unsecured creditors. A fixed charge is a charge in relation to a specific asset (here, Kite's receivables) that attaches as soon as the charge is created. However, it is noted in this scenario that 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). This is inconsistent with the nature of a fixed charge as GFL has no or very little control over the asset and it is questionable whether security attached at the time the charge document was executed. The English case of *Re Spectrum Plus Limited*⁵² confirmed that the key question to ask when considering

⁵⁰ See *Butcher v Talbot* [2004] 2 AC 298 (the "Leyland Daf" case), as applied in Hong Kong in *Re Good Success Catering Group Ltd* [2007] 1 HKLRD 453, CWUMPO s265(3B).

⁵¹ CWUMPO, s 265(3B)

⁵² [2005] 2 AC 681 (and discussed in Hong Kong case, *The Almojil* [2015] HKLRD 598)

Commented [RD(DWH24)]: No indication of this

whether an arrangement takes effect as a floating charge, is what measure of control the secured creditor has over the relevant assets. As the receivables were not paid into a specific account for GFL and Kite continued trading with the use of the receivables, the liquidator might argue that the charge operates as a floating charge and the receivables should be handed over to meet the preferential but not the unsecured claims of Kite's estate.

Thirdly, if the charge is capable of being deemed a floating charge, the liquidator might also be able to challenge the creation and validity of the charge under section 267 of CWUMPO. This provision states that a floating charge will **not be valid if it is entered into within a period of 12 months prior to the commencement of the liquidation and the company was unable to pay its debts at the time the charge was created.** It is noted that the charge was created after GFL became concerned over Kite's business and financial affairs. If the charge is deemed a floating charge but was entered into within the 12 months leading up to the commencement of the liquidation at a time when Kite was unable to pay its debts, the liquidator might seek to have the charge declared invalid under section 267 and recoup the receivables for the benefit of the estate.

The liquidator may also place reliance on the **anti-deprivation principle** which is aimed at preventing parties from using a contractual arrangement to give an advantage to one of the contracting parties in the event of insolvency of the other. In determining any application pursued by the liquidator to recover Kite's receivables on the basis of the anti-deprivation principle, the Court will look to ascertain whether the creation of the charge was part of a genuine commercial transaction and not entered into with the intention of creating an advantage on the insolvency of one of the parties⁵³. It is not clear from the facts whether "new money" was given by GFL in consideration for the charge. This is a factor which will play into any assessment of whether the charge obviates the laws of insolvency by simply giving GFL an advantage over Kite's other creditors, in which case the charge may be struck down.

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:

⁵³ *Belmont Pak Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 (as cited with approval in *Hsin Chong Construction Co Ltd v Build King Construction* [2019] HKCA 1305)

Commented [RD(DWH25): Except to extent of new money

Commented [RD(DWH26): Possible but unlikely - that principle usually deals with a term, in an otherwise legitimate contract, that provides for a change of rights on insolvency

Commented [RD(DWH27): (4.5 marks) Should mention anti-deprivation principle in connection with the FA provision

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 Hong Kong Court has jurisdiction to wind up non-Hong Kong incorporated company in circumstances such as this; where principal liquidation proceedings have been commenced elsewhere, in the jurisdiction in which the company is incorporated⁵⁴. Notwithstanding that SPL is subject to a winding up order in the BVI, the Hong Kong Court can make an order for an ancillary winding up order if it is established that SPL has a sufficient connection. In this regard, the Hong Kong Court is likely to apply the "*modified universalism*" approach⁵⁵, being that the liquidation in Hong Kong will generally be treated as ancillary in the sense that the functions of the liquidator would be to collect assets in Hong Kong, to settle a list of creditors and to transmit assets and the list to the principal⁵⁶. An order for the winding up of SPL in Hong Kong ancillary to the liquidation in BVI may assist the BVI liquidator to collect any assets of SPL in Hong Kong which should be realised for the BVI liquidation estate. It is also to be noted that in appropriate cases, the court will not limit the powers of the Hong Kong liquidator to dealing with Hong Kong assets, and this may assist in the context of any assets in the Mainland⁵⁷ (which is addressed further below).

In order to obtain an ancillary winding up order under section 327 of CWUMPO, the Court will have to be satisfied that SPL is sufficiently connected to Hong Kong by satisfying the "three core requirements" set out in the CFA's decision of *Re Yung Kee*⁵⁸. The Court has held that there is no basis for adopting a less stringent approach in assessing the "three core requirements" for an ancillary liquidation in Hong Kong. In considering these three core requirements, it is noted that SPL has a bank account (which may hold assets) in Hong Kong. It is also noted that SPL is believed to have an independent director, Mr Zhang, and a book keeper, Mr Wong, who are both said to reside in Hong Kong. Moreover, Mr Qi, is also believed to be a Hong Kong resident. Therefore, the BVI liquidator might properly need to request information from these office holders as part of his role in investigating SPL's affairs. Finally, it is noted that the FA is governed by Hong Kong law. Therefore, to the extent that there are issues concerning the FA and how its terms affect or are effected by the winding up of SPL,

⁵⁴ *Re Information Security One Ltd* [2007] 3 HKLRD 780.

⁵⁵ See, eg, *Re Pioneer Iron and Steel Group* (Unreported, HCCW 322/2010, 6 March 2013)

⁵⁶ *Ibid*, at para 30

⁵⁷ *Re Zhu Kuan Group Limited* [2004] HKEC 1857.

⁵⁸ The three core requirements are (i) there must be a sufficient connection with Hong Kong (not necessarily meaning the presence of assets within the jurisdiction); (ii) there must be a reasonable possibility that the winding up order would benefit those applying for it; (iii) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

including persons that are to benefit from distributions, the Hong Kong Court may well consider it has jurisdiction to make an ancillary winding up order and wish to resolve the issue under (a) above. Mr Xu already has the benefit of the winding up order in BVI, but there may be assets located in Hong Kong and officers of SPL reside in Hong Kong. Therefore, it is likely that a sufficient connection will be established in order for an ancillary winding up order to be made by the Hong Kong Court.

Although an ancillary proceeding is likely to be a viable option, particularly best deployed in circumstances where a full range of powers are needed (the BVI liquidator will be able to enjoy powers that are exercisable under CWUMPO and CWUR), another option would be for the BVI liquidator to seek recognition of its foreign appointment and seek assistance from the Hong Kong Court on the basis of common law principles.

Whereas the ancillary proceeding would have traditionally been the route a foreign officeholder would have pursued, more recently, the recognition of any foreign appointment and proceedings has been a popular course of action, particularly following the decisions in *A Co v B* (a 2014 decision), and *Singularis Holdings v PriceWaterhouseCoopers*⁵⁹. In the former a Hong Kong Court granted an order sought by liquidators appointed in the Cayman Islands recognising their appointment and an order for production of documents from certain unnamed respondents. The Court in *A Co v B* held that "*The Companies court may pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law make an order of a type that is available to a provisional liquidator or liquidator under Hong Kong's insolvency regime*". This approach was confirmed in *Singularis*, where the Privy Council clarified that the common law power of assistance exists where the power sought to be exercised: (a) exists in the jurisdiction of principal liquidation; and (b) the power exists in the assisting jurisdiction. This 'Singularis Principle' has been followed in many recent decisions. Thus on the basis of this line of authority and assuming that similar relief is available to the liquidator in the BVI proceedings, the BVI liquidator may be able to obtain recognition and be granted relief / assistance. The practice requires that the BVI liquidator presents a letter of request from the BVI Court to the Hong Kong Court, which will carefully consider the request. Only relief that is available both in the BVI and in Hong Kong will be granted. This is important in the context of any order sought for production of information or assistance from individuals such as Mr Wong and Mr Zhang, for investigation purposes. To the extent that there are limited rights to information or powers for the collection information for investigative purposes in the BVI as compared to the more wide ranging powers and tools available in Hong Kong, the BVI liquidator might benefit more from obtaining an ancillary winding up order. Assuming similar powers in the BVI exist, the liquidator may apply for an order seeking recognition and then an order for production of documents or examination of individuals (such as Mr Qi, Mr Wong and Mr Zhang) in Hong Kong⁶⁰.

The Singularis Principle requirement that equivalent relief must be permitted under the principal insolvency regime that is permitted and sought from the assisting jurisdiction, may have an impact on the Hong Kong Court's decision as to whether to grant relief to the BVI liquidator if the concern that Mr Xu did not have standing to present the winding up petition in the BVI on account of the clause in the FA mentioned at (a) above is found to have merit. If there are grounds to suspect that the BVI liquidator's appointment was based upon a petition which the petitioner, Mr Xu, did not have standing to bring, the appointment may also be considered tainted. If this is the case, the option of an ancillary winding up order over SPL in Hong Kong may be the better course of action. Of course, the objection to a winding up order on the basis of the clause mentioned in (a) above might be raised at the application stage.

⁵⁹ [2014] UKPC 36

⁶⁰ *Re BJB Career Education Co Ltd* [2017] 1 HKLRD; *Re Centaur Litigation SPC* (unreported, HCMP 3389/2015, 10 March 2016)

Addressing the specific steps which the BVI liquidator might take in this scenario regarding SPL's Hong Kong bank account, banks in Hong Kong should readily assist foreign representatives by providing documents in relation to the company's own accounts even without the foreign representative having to obtain a court order⁶¹. Thus the BVI liquidator should be able to make a request for documents absent any court order. However, if the BVI liquidator wishes to deal with any assets the bank account holds (for example, to request a transfer of funds from SPL's bank account) the BVI liquidator should apply for a specific recognition order for this purpose⁶² (if an ancillary winding up order is not applied for).

In relation to the steps which might be taken in relation to assets held in the Mainland, in addition to common law developments which have assisted office holders appointed in Hong Kong, there is now a co-operation mechanism in place between Hong Kong and the Mainland. This emanates from the "record of meeting" between representatives of the Supreme Court in the Mainland and the Hong Kong Government. The record of meeting refers to the mutual recognition of and assistance to "bankruptcy proceedings" between Hong Kong and the Mainland. It provides for appointed liquidators or provisional liquidators in insolvency proceedings in Hong Kong being entitled to apply for recognition in certain pilot areas of the Mainland (and vice versa). If the assets in Mainland are believed to be in one of the designated areas (Shanghai, Xiamen or Shenzhen municipalities) seeking recognition under this cooperation mechanism might be useful. However, for an inbound recognition request to Mainland, the insolvency proceedings must be any collective insolvency proceedings commenced under CWUMPO or the CO. Therefore an ancillary winding up order would be required in order for the BVI liquidator, then appointed in Hong Kong, to seek recognition in the Mainland by way of a letter of request from the Hong Kong Court. Another requirement to bear in mind is that the debtor's centre of main interest will need to be Hong Kong. While this usually means its place of incorporation (which in this case is the BVI), the people's court will also take into account factors such as the place of principal office (which could be Hong Kong, noting the office holders reside in Hong Kong), the place of principal assets, principal place of business etc. The centre of main interests of SPL must have been in Hong Kong continuously for at least 6 months. However, if this cannot be established or SPL's centre of main interests cannot be shown to be in Hong Kong, if it is believed that SPL's principal assets are in Mainland, then the liquidator appointed in the Hong Kong ancillary proceedings may apply for recognition of and assistance to the Hong Kong proceedings in accordance with the Opinion supplementing the record of meeting⁶³.

*** End of Assessment ***

TOTAL MARKS: 46 out of 50

Formatted: Left

⁶¹ *Bay Capital Asia Fund LP (In Official Liquidation) v DBS Bank (Hong Kong)* Unreported, HCMP 3104/2015, 2 November 2016.

⁶² *Re China Lumena New Materials Corp* (in Provisional Liquidation) [2018] HKCFI 276.

⁶³ <https://www.doj.gov.hk/en/mainlandandmacao/pdf/RRECCJopinionenc.pdf>

(4.5 marks) Should mention anti-deprivation principle in connection with the FA provision

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].