



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

A receiver can be appointed –

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

(d) any of the above.

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

Select the **correct** answer:

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

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

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

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

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

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

Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

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

Question 1.7

Select the **correct** answer:

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

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

Commented [RD(DWH7): Incorrect (0 marks) - s.186 CWUMPO (section 6.3.7 of text) – only when the order is made; 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?

Pursuant to Section 4 of the Bankruptcy Ordinance (Cap 6), the debtor must:

- i. Be domiciled in Hong Kong;
- ii. Be personally present in Hong Kong on the day on which the bankruptcy petition is presented; or
- iii. At any time in the period of three (3) years ending with the day of presentation of the petition:
 - a. Have been ordinarily resident or have a place of residence in Hong Kong; or
 - b. Have carried on business in Hong Kong.

Question 2.2 [maximum 3 marks]

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

It must be satisfied to the court that:

- i. There is sufficient connection with Hong Kong (this does not necessarily mean 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; and
- iii. The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets.

Question 2.3 [maximum 4 marks]

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

Pursuant to Section 193 of CWUMPO, the court may appoint a provisional liquidator at any time between the presentation of a winding up petition and the making of a winding up order in respect of a company. In urgent cases the application to appoint a provisional liquidator can be presented at the same time as the petition. The court also has jurisdiction to appoint a provisional liquidator despite the appointment of a voluntary liquidator.

In order to appoint a provisional liquidator, there must be sufficient circumstances to justify this, for example, if the debtor company’s assets are at risk of dissipating.

A provisional liquidator is tasked with preserving the assets of the debtor company, but not to realise those assets. A provisional liquidator can in some cases be permitted to realise

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

Commented [RD(DWH11): (3 marks)

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

Commented [RD(DWH13): (3 marks). Should refer to powers being prescribed by the Court and need to show likely to be wound up when petition is heard. Should also mention that a PL can be appointed to conduct a restructuring but that cannot be the only purpose (must also show jeopardy)

assets for the debtor company, but ordinarily must make a specific application to the court for a specific order.

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.

To succeed with a claim, a liquidator must prove that a preference has taken place whereby (i) the person is a creditor of the debtor (or surety/guarantor for one of the debtor's debts) and (ii) the debtor does anything which has the effect of putting the person into a position which, in the event of the debtor's bankruptcy, will be a better position than otherwise would have been if the event had not taken place.

The time frame in which a preference can be considered to have taken place depends on whether or not the preferred party is an associate, as defined in Section 51B of the Bankruptcy Ordinance (Cap 6). The time for bringing a claim is:

- For a claim against a non-associate, 6 months before the commencement of the winding up; and
- For a claim against an associate, 2 years before the commencement of the winding up.

A liquidator is able to take such action in order to claw back assets or obtain financial contribution to the liquidation estate for the benefit of the general creditors, which otherwise should have been made available to the general body of creditors had the preference not have taken place.

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.

This statement does not stand true between Hong Kong and the Mainland in comparison to Hong Kong and other foreign jurisdictions.

It is noted that Hong Kong's insolvency legislation does not contain any provision dealing with cross-border insolvency and Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Hong Kong is also not a party to any international treaties dealing with cross-border insolvency.

There was an arrangement in May 2021 between Hong Kong and certain areas of the Mainland for a co-operation mechanism between Hong Kong and the Mainland. The designated pilot areas of the Mainland are:

- Shanghai Municipality;
- Xiamen Municipality of Fujian Province; and
- Shenzhen Municipality of Guangdong Province.

Commented [RD(DWH14): (2.5 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves. Also, the answer misses the very important point that it is necessary to show influenced by desire to prefer

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)

This arrangement stems from a “Record of Meeting” between the PRC Supreme Court 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.

The “Record of Meeting” is supplemented by an opinion from the Supreme Court, which outlines, in summary:

- The abovementioned pilot areas;
- Hong Kong Insolvency Proceedings means any collective insolvency proceedings commenced under CWUMPO or CO;
- The debtor’s centre of main interest must be in Hong Kong;
- If the debtor’s principal assets in the Mainland are in the pilot areas, or if the debtor has a place of business and/or representative office in the pilot areas, the Hong Kong administrator may apply for recognition and assistance to the Hong Kong insolvency proceedings in accordance with the Supreme Court’s opinion; and
- A letter of request from the Hong Kong court is necessary.

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.

Hong Kong does not have a formal corporate rescue regime (such as a US Chapter 11 equivalent), but companies can seek to implement a Scheme of Arrangement as a method of debt restructuring. A Scheme of Arrangement is a statutory mechanism under Hong Kong law. It is a court sanctioned compromise which binds all of a company’s members and/or creditors (or any class of them).

There are some advantages to a Scheme of Arrangement in comparison to the commencement of bankruptcy proceedings.

- A Scheme of Arrangement, if approved, may allow the debtor company to continue trading, which in turn would have social economic benefits whereby the jobs of the debtor company’s employees would be preserved.
- A Scheme of Arrangement would likely achieve a better return for creditors compared to in the event of bankruptcy.
- For the debtor company, an advantage may be that creditors’ debts can be settled, but not necessarily in full, if the Scheme is approved and successfully implemented.
- A Scheme of Arrangement, if approved, is binding on all of the debtor company’s creditors, but does not require approval by all creditors to be implemented.

There are also some disadvantages to Schemes of Arrangement.

- If used on its own, one of the downsides to the Scheme of Arrangement is that it has no moratorium, so the debtor will not benefit from any stay of proceedings and cannot avoid creditor enforcement action.
- Where a Scheme of Arrangement is being sought by a Hong Kong company that is listed on the Hong Kong stock exchange, trading in its shares will usually be suspended.
- A Scheme of Arrangement does not prevent secured creditors from enforcing security in relation to their debts, which could jeopardize the successful implementation of a proposed Scheme.

Commented [RD(DWH16): (3.5 marks) Could include some detail on how it works. Should also mention that due the ‘Gibbs’ principle, a Hong Kong Scheme will only compromise debts arising from obligations governed by Hong Kong law. This is a possible downside in the modern environment where a sophisticated debtor is likely to have debts due under other governing laws. Also, as classes are important, should outline requirements (similarity of legal rights, not interests). Reference should be made to the majorities required

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 should consider whether Mountainview Limited is unable to pay its debts, pursuant to section 178 of the CWUMPO. As Mountainview Limited has financial difficulties, we could assume that it is insolvent and unable to pay its debts.

Mountainview Limited could consider a Scheme of Arrangement as a method of restructuring its debts; however, Mr. Chan has advised that Mountainview Limited is unable to continue in business, so this would likely be futile.

Mountainview Limited should, therefore, seek to commence a creditors’ voluntary liquidation procedure to wind up the company. To do so, Mr. Chan should initially recommend to the shareholders of Mountainview Limited that they should pass a special resolution to wind up the company, then a meeting of the company’s creditors should be called within 14 days of the passing of the shareholders’ resolution.

A liquidator should behave ethically and in the best interests of the creditors of Mountainview Limited; therefore, Mr. Chan cannot appoint a “friendly” liquidator who will not carry out investigations. For this reason, Mr. Chan should consider the nature of any transactions that have taken place that could be considered as antecedent transactions. Any duly appointed liquidator would have a duty to investigate the company’s transactions and to take over and investigate the company’s books and records. If any misconduct is identified to have taken place, the liquidator has power to take appropriate actions against those guilty of any misconduct, which may include Mr. Chan as the sole director of the company.

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).

Commented [RD(DWH17): (3 marks) For completeness, could add that although a company can petition for its own winding up it cannot do so on the basis of a resolution by directors alone (Emmadart) and there is no indication that Mr. Chan is (necessarily) the only shareholder)

Should also advise that if company is insolvent owes duties to creditors ahead of the company

Also, extent of difficulties not known so could consider whether MVL is viable

Commented [RD(DWH18): (1.5 marks) Well written and some of the broad concepts are correct, but the thrust should be to examine what the charge actually is:

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

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.

Assuming that the charge held by GFL is valid, the receiver in this instance may be appointed in accordance with the terms of the charge document and the appointment will take effect from the date that the written deed or document of appointment from GFL is received and accepted in writing by the receiver.

The liquidator should consider whether the appointment of the receiver is valid. The appointment of a receiver requires that, within seven (7) days of the appointment, a statement must be delivered to the Registrar of Companies in relation to the appointment, which provides the identity of the receiver.

The powers of the receiver are limited only to the powers set out in the charge document. In the case of Kite Limited, the appointed receiver's powers will only be in relation to Kite's receivables.

The receiver shall have power to realise Kite's receivables and is entitled to be reimbursed from the realisations of these assets. When realising the Kite's receivables, the receiver's duties are owed to GFL.

Even though Kite is now in a liquidation procedure and a liquidator has been formally appointed, this does not affect the receiver's rights to hold and realise Kite's receivables. The liquidator of Kite is not entitled to receive realisations from Kite's receivables to settle costs and expenses of the liquidation, nor can they be used to pay a dividend to Kite's unsecured creditors, unless sufficient realisations are achieved that would settle GFL's claim in full, as well as all reasonable costs of the receivership. The balance thereafter should then be passed onto the liquidation estate.

However, if there are any preferential creditor claims in the liquidation of Kite, assuming that there are insufficient assets in Kite's liquidation estate to settle such claims, given that the receivables subject to GFL's charge are noted as Kite's only asset, any realisations in this case must be used to meet claims of the preferential creditors.

As a further point, the liquidator should consider whether, if the receivables subject to GFL's charge are Kite's only assets, this may constitute a charge over the whole undertaking of the business. If this proves to be the case, the liquidator should be mindful that the receiver's appointment could be as a "receiver and manager", which would afford wider powers to manage the Company's affairs.

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

Commented [RD(DWH19): Part of advice would be to check

Commented [RD(DWH20): Only if a floating charge - no consideration above to that

Commented [RD(DWH21): (4.5 marks)

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]

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.

When assessing the validity of the winding up order and the standing that Mr. Xu had for bringing the winding up petition, the liquidator should take into consideration the anti-deprivation principle. Although *ipso facto* clauses are usually upheld, the aim of the anti-deprivation principle is to prevent parties from using contractual agreements to give an advantage to one of the contracting parties in the event of the insolvency of another.

Mr. Xu is a creditor of SPL by way of his investment. Given that the insolvency clause in the FA renders the requirement to repay Mr. Xu void, this essentially extinguishes Mr. Xu's debt, for which he has paid a principal sum of USD 20 million. The liquidator should take the view that this clause in the FA goes against the anti-deprivation principle and should not stand. It could be argued that the interest element owed on Mr. Xu's loan (USD 2 million) could be rendered void, however, the principal loan amount of USD 20 million should rank as a liability of SPL, even in the event of insolvency. There should, therefore, be little concern with regards to Mr. Xu's standing to bring the winding up petition against SPL.

Commented [RD(DWH22)]: Why?

In order to take meaningful steps with regards to the liquidation in Hong Kong, the BVI liquidator should consider obtaining formal recognition of the liquidation and of the liquidator's appointment in Hong Kong. The BVI liquidator should note that Hong Kong's insolvency legislation does not contain any provision dealing with cross-border insolvency and it has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

The Hong Kong court has always followed common law principles to deal with cross-border insolvency and in instances where, for example, a foreign liquidator is seeking to bring an action in Hong Kong, a formal order will not always be required for this. However, as a matter of practicality and for assisting in other areas of the liquidation, such as furthering the liquidator's investigations, it would be prudent to seek a formal order of recognition of the liquidator's appointment in the jurisdiction of Hong Kong. By obtaining a formal court order for recognition, this will assist the liquidator in enforcing their powers in Hong Kong, particularly in relation to the following:

- Point b), as neither Mr. Zhang nor Mr. Wong are replying to the liquidators emails, and as both of these individuals are Hong Kong residents, a formal recognition order would assist the liquidator in demanding that these two individuals cooperate with the liquidator and making requests for the production of documents from them, or for attendance at examination, where such an order can be made in line with the *Singularis* principle.
- The above would also apply to Point d), given Mr. Qi's involvement in SPL and the FA, and given that Mr. Qi is believed to be a Hong Kong resident. Therefore, it may become necessary make requests for the production of documents from Mr. Qi, or request his attendance at examination.
- Point c), given that SPL has a bank account at a bank in Hong Kong, the bank may request a Hong Kong order recognising the liquidator's appointment in Hong Kong prior to disclosing information on SPL's account or remitting any credit balance on said account.

Commented [RD(DWH23)]: But could seek bank docs without an order (Bay Capital)

In order for the liquidator to obtain a Hong Kong recognition order, the BVI liquidator (who is the foreign representative in this instance) will require a letter of request issued by the BVI court to the Hong Kong court requesting assistance. The BVI liquidator should be mindful, however, that when seeking the Hong Kong court's assistance, consideration must be given as to what grounds assistance is being sought and for what purpose. Whilst the liquidator should be able to receive assistance from the Hong Kong court for enforcing his/her powers to obtain SPL related documents or obtain assets such as cash at bank, the Hong Kong court may refuse to assist on other requests where such a request is not available in Hong Kong.

Regarding point e), the co-operation mechanism is only available to Hong Kong appointed liquidators or provisional liquidators. In order to benefit from the co-operation mechanism, parallel insolvency proceedings would need to be commenced for SPL in Hong Kong under CWUMPO or the CO, with a Hong Kong based liquidator appointed.

If parallel proceedings can be brought in Hong Kong, it is not automatically certain that the co-operation mechanism can be benefitted from because of the following requirements:

- The co-operation mechanism only applies to these designated pilot areas in the Mainland, which are:
 - o Shanghai Municipality;
 - o Xiamen Municipality of Fujian Province; and
 - o Shenzhen Municipality of Guangdong Province

However, the liquidator is uncertain as to which area of the Mainland SPL's assets are located; and

- The debtor's centre of main interest must be in Hong Kong, which may be difficult to assert given that SPL is registered in the BVI and its operations were centered in a resort in Fiji.

For the reasons set out above, not only will the BVI liquidator potentially be unable to benefit from the co-operation mechanism, but to do so would require parallel Hong Kong insolvency proceedings to be commenced, for which the BVI liquidator should consider the cost effectiveness of doing so.

*** End of Assessment ***

TOTAL MARKS: 37 out of 50

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(4.5 marks)

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].