



**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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5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

## **ANSWER ALL THE QUESTIONS**

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

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

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

#### **Question 1.1**

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

A receiver can be appointed –

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

**(d) any of the above.**

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

#### **Question 1.2**

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

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

**(d) Five (5) years before the date of the bankruptcy order.**

**Commented [RD(DWH2)]:** Incorrect (0 marks) - Although the commencement of a bankruptcy is the date of the order, most of the provisions dealing with the trustees’ ability to challenge earlier transactions use the date of the petition as the starting point of the ‘relation-back’ period (see 6.2.2 of text) and s.51(1)(a) Bankruptcy Ordinance

#### **Question 1.3**

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

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

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

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

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

#### Question 1.4

Select the **correct** answer:

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

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

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

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

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

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

#### Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

**Commented [RD(DWH5):** Incorrect (0 marks) – s.230 CWUMPO (section 6.3.3 of text): When members pass resolution. Also, the court will not be involved in 'approving' the appointment for a CVL

#### 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); 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?

- Under Section 4 of the Bankruptcy Ordinance, the Hong Kong Court may only exercise bankruptcy jurisdiction over a debtor if:
- They are domiciled in Hong Kong,
- They are present in Hong Kong on the day the petition is presented, or
- At any time in the preceding three of years of the day:
  - Have been ordinarily resident, or have a place of residence in Hong Kong, or
  - Have carried on business in Hong Kong.

### Question 2.2 [maximum 3 marks]

**Commented [RD(DWH12):** (2.5 marks). See note below; better also if cite source (CFA in Yung Kee)

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

- The three core requirements for a Hong Kong Court to wind up a non-Hong Kong Company are that:
- There must be a sufficient connection with Hong Kong which doesn't necessarily mean there needs to be assets present in Hong Kong
- There must be the possibility that those applying for the winding up order would benefit from it and
- The court must be able to exercise jurisdiction over one or more individuals interested in the distribution of the Company's assets
- In determining the above, the court will usually consider the company's center of main interest when dealing with point 1 and 2.

**Commented [RD(DWH13):** Not necessarily

### Question 2.3 [maximum 4 marks]

**Commented [RD(DWH14):** (2 marks). See note below. Also should refer to fact that court will only appoint if likely winding up order would be made. Answer a bit jumbled

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

- A provisional liquidator can be appointed upon a petition being filed for the winding up of a company. They will remain in place until a formal creditors meeting where creditors will vote for a liquidator to be put in place.
- This is used in circumstances where the appointment of a liquidator is immediately required to protect the assets of a company upon the petition being filed, or for any time sensitive matter that may have to be dealt with for the benefit of the estate i.e. for the sale of perishable goods.
- The purpose of a provisional liquidator however, is generally to protect the assets of a company, and not sell them.
- Part of the remit of a provisional liquidator may also be to facilitate a restructuring proposal put forward by the company.
- Provisional liquidators are appointed under Section 193 of the CWUMPO.

**Commented [RD(DWH15):** Restructuring cannot be sole purpose; and where PL can restructure, not necessarily the company's proposal. May be PL's own

- A provisional liquidator is usually only granted by the court under certain circumstances. They will take into account the commercial reality of the situation, the degree of urgency and the need for the order and balance of convenience.

### 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.

- A liquidator is able to challenge an unfair preference as is his right to do so on appointment per Schedule 199 and schedule 25 of CWUMPO.
- If there is seen to be an unfair preference given to a creditor or third party leading up to a winding up petition being made, a liquidator can take the necessary steps to reverse these transactions for the benefit of the estate.
- This is where a debtor company placed a creditor in a better position in terms of a repayment of a debt than it should have been upon the winding up of the company.
- The liquidator can make an application the court to nullify this transaction.
- These relate to transactions in the six months prior to the commencement of the winding up of the company, or two years where the purported beneficiary was a connected person to the company.
- In order for a liquidator to be successful in his aim to challenge any unfair preference, he must prove at the time the unfair preference was given, the company was unable to pay its debts, or was unable to pay its debts subsequent to the transaction.
- In cases dealing with connected persons, the liquidator must be able to prove this connection in support of his application.
- The liquidator must also show that the company was influenced by a desire to improve a persons position prior to the company being placed into liquidation.
- The liquidator must also demonstrate that the recipient does not desire all of the necessary consequences of his actions.
- In practice however, the final two points have proved difficult for liquidators to prove in the past.

**Commented [RD(DWH16):** (2.5 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves. Answer a bit jumbled

**Commented [RD(DWH17):** Section 199 not schedule. These provisions are not really relevant to this question

**Commented [RD(DWH18):** ?

**Commented [RD(DWH19):** Rebuttable presumption of desire to prefer where beneficiary is a connected person.

**Commented [RD(DWH20):** No, this is just a way of explaining why it is difficult to prove an influence of desire

#### Question 3.2 [maximum 5 marks]

Hong Kong has limited formal arrangements to deal with cross-border insolvency. Given that Hong Kong and the Mainland are one country, does this statement stand correct for the Mainland? Discuss.

- Although Hong Kong and the Mainland are one country, Hong Kong is a special administrative region. In the insolvency context, this means the Hong Kong has sovereignty over its own legal system, separate to that of the mainland. As a result, this statement is not correct for the mainland.
- Hong Long legal system is largely based on English common and has no connection to cross-border insolvency law on the Mainland.
- There are no overarching bi-lateral treaties between Hong Kong and Mainland courts for dealing with insolvency law however, more recently a pilot scheme for dealing with matters relating to insolvent companies was introduced between parts of the Mainland and Hong Kong.
- This allows for Hong Kong liquidators to obtain recognition of their appointment in PRC, meaning they will largely have the powers they hold under a Hong Kong order,

**Commented [RD(DWH21):** (3 marks) Should mention some of the main elements that are needed to use the new mechanism as is not a wholesale provision (e.g. COMI for 6 months in Hong Kong, appointments made in Hong Kong only, need for letter of request)

Could also have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai)

**Commented [RD(DWH22):** ?

recognized by the Mainland courts and will be able to exercise those powers in the specified areas of the Mainland and the other way, for Mainland liquidators to obtain recognition in Hong Kong.

- This pilot scheme only applied to certain areas of the Mainland being Shanghai, Xiamen municipality of Fujian and Shenzhen municipality of Guangdong.
- This was brought about by a record of meeting between the Supreme Court of the Mainland and the Hong Kong Government in order to “further the intent of Article 95 of the basis law which provides that The Hong Kong Special Administrative Region may, through consultation and in accordance with law, maintain judicial relations with other parts of the country.
- This is the only cross-border insolvency legislation which is identical in both jurisdictions. The mainland may have limited formal arrangements when dealing with cross-border insolvency in place, but this has no correlation to the two jurisdictions being one country, as their legal systems are separate.

### Question 3.3 [maximum 5 marks]

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

- There is no formal statutory legislation for corporate restructuring in Hong Kong currently in place although the court is seen to be flexible in this regard.
- A workaround to this issue is to put forward a scheme of arrangement that may assist with a corporate rescue. The statutory regime relating to schemes of arrangement is contained in Part 13, Division 2 of the Companies Ordinance.
- The Court application necessary to sanction the scheme is governed by O.102 r.2 and r.5 of the Rules of the High Court.
- Different to other jurisdictions however, one of the negatives in commencing such actions is that there is no moratorium on actions being taken out against the company commencing, or while implementing a scheme, if they have not been placed into liquidation proceedings.
- A workaround to this issue is to appoint a provisional liquidator, an official receiver or a liquidator, to put forward a scheme of arrangement that will assist with a corporate rescue. Commencing a restructuring in this way would mean the debtor company could avail of a moratorium.
- The legislation provides a mechanism for a debtor company to restructure their debts, provided there is a 75% majority in number of present creditors, representing at least 75% of value of creditors, voting in favour of this restructuring, in order to receive sanction by the court. Without this mechanism, the full body of creditors would have to unanimously agree a debt restructuring.
- Each class of creditor will also have to pass this test. Final determinations on classes of creditors are decided by the court when an application for a scheme of arrangement is made.
- In order for scheme to take effect, regardless of the party who is putting the scheme forward:
- Application is made to the Court to consider the appropriateness of calling a meeting of creditors to approve such a scheme where subsequent directions will be given relating to such meeting.
- This application will contain a summons which details all classes of creditors, and the rights they have.
- This is in support of an affirmation which will contain details of the scheme, a copy of the scheme document, a copy of the notice of the meeting and draft advertisements. This is required under 671 of the Companies Ordinance.

**Commented [RD(DWH23)]:** (2.5 marks) A bit unclear in parts, and the majorities needed are wrongly stated. However, a number of the elements are included. 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)

**Commented [RD(DWH24)]:** It is very unlikely the OR would agree to put forward a Scheme

**Commented [RD(DWH25)]:** No, the majority in number is a simple majority

**Commented [RD(DWH26)]:** Not clear that you mean only at the sanction stage

**Commented [RD(DWH27)]:** Other way round: a summons is issued and supported by an affirmation



- Once the court provides direction relating to convening, advertising and notice periods, a meeting is held and this meeting is then reported back to the court by the Chairman. This position is chosen by the Court, upon providing directions for the creditors meeting.
- A petition is then submitted to the court to sanction the scheme of arrangement.
- This is a beneficial tool for companies who may have a viable chance of restructuring, but are suffering short term cash-flow issues. It provides a mechanism for restructuring debt, to enable a company to potentially continue to trade in the future.
- It provides an alternative to formal bankruptcy and subsequent dissolution.
- The scheme does not provide for a moratorium. Formal insolvency proceedings must also take effect in tandem, in order to avail for a moratorium.
- This process can be costly, and it dissipate much of the funds of a company, as no other restructuring alternatives exist in Hong Kong

#### QUESTION 4 (fact-based application-type question) [15 marks in total]

##### Question 4.1 [maximum 4 marks]

Mr Chan is the sole director of Mountainview Limited, which is a Hong Kong incorporated company. Mr Chan comes to you and tells you that the company has financial difficulties and is unlikely to be able to continue in business. A friend has told him that his only option is that he must go to court to wind up the company, and that he should ensure he appoints a "friendly" liquidator who will not investigate the company's affairs too closely. Mr Chan asks whether his friend is correct and to advise him generally on what he should do and his position as a director.

- Mr. Chan's friend is correct in that he must go to court to commence some form of liquidation proceedings, if he is of the understanding that the business is no longer able to continue as a going concern, and will be unlikely to pay its debts.
- Upon liquidation proceedings commencing, Mr. Chan's conduct prior to the company going into liquidation will be investigated. If Mr. Chan was seen to not be acting in the best interest of the Company, he may be financially liable for the Company's debts.
- If his fiduciary duties as sole director of the company were not carried out, he could face both civil and criminal charges. This would include not placing the company into liquidation from the moment he knew the business was no longer viable.
- He is incorrect however in seeking to appoint a friendly liquidator who will not investigate into the affairs of Mr. Chan's Company.
- Mr. Chan should apply for a creditors voluntary liquidation. A shareholder's resolution should first be passed where a liquidator will be appointed by shareholders.
- A creditors meeting will then be held where they will vote to appoint a liquidator. Where there is a difference of opinion between liquidators, the creditors decision will prevail.
- This clearly demonstrates that Mr. Chan does not have ultimate control over who the appointed liquidator will. He is not in a position to appoint a friendly liquidator.
- If Mr. Chan's suggested appointed does end up being appointed as liquidator, they will be compelled to investigate into the affairs of the Company.
- One of the duties of a liquidator is to investigate the cause of the company's failure, and the decisions made by management (in this case Mr. Chan) to ensure no legal action should be taken against the third parties
- Mr. Chan should also make every effort to protect the assets of his company as sole director, upon the application being filed for CVL.
- The conduct of a liquidator is also overseen by the Official Receivers Office. They monitor the duties of a liquidator to ensure they carry out their jobs properly and will follow up on any complaints made by creditors.

**Commented [RD(DWH28):** (1 mark) some of the right elements but, per comments below, the answer does not show a close understanding, and is supposed to be advice to Mr Chan

**Commented [RD(DWH29):** No, he is not: voluntary liquidation

**Commented [RD(DWH30):** No direct obligation to do so, nor direct penalty if he does not. Consider duties as a whole (including to creditors where company is insolvent)

**Commented [RD(DWH31):** Inconsistent with advice that "must" go to court

**Commented [RD(DWH32):** The point here is that there is no such thing as a 'friendly' liquidator; liquidators should be neutral and carry out their duties (including investigation of how the company has been run/conduct of directors) irrespective of who appoints/nominates them

- If a liquidator was seen not to investigate into the affairs a company, he could too find himself personally liable and subject to prosecution. Therefore, Mr. Chans friend is incorrect in that there is no circumstance under which he can appoint a liquidator himself, who will not investigate 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).

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.

- The liquidator does not have any grounds to request that the receiver hand over any realizations they make from the receivables of the company.
- The liquidator may have grounds however, to request all realizations, if this charge came into place less than one year prior to the transfer of the asset.
- The liquidator may remind the receiver however that if the liability is satisfied relating to the charge over the receivables, and the receiver's fees have been paid, the receiver must provide the liquidator with any excess funds which is then permissible to be used to pay preferential creditors of the company.
- The receiver however, acts independently of the liquidator, and has sole control on appointment over the charged asset. The liquidator has no control of the way in which the receiver carries out the realizations process.
- As part of this process, the GFL appointed receiver will have to submit a statement to the registrar of Companies, notifying them of the appointment over the charged asset.
- This will also provide indemnity to the receiver or manager.
- I would advise the liquidator to make sure the charge has been registered with the registrar of Companies. If the charge has not been registered, the liquidator may have grounds to request the full value of the realisation of the receivables.
- Section 334 of the Companies Ordinance, states that any fixed charge over a company's book debts must be registered in Hong Kong.
- A charge must also be registered within one month of its execution or the charge may be void. The liquidator should check into both these points. If not correctly registered, the liquidator has grounds to request the full book of receivables.

#### Question 4.3 [maximum 6 marks]

**Commented [RD(DWH33)]:** (1.5 marks) for mentioning registration and broad concept of secured assets not being available but thrust is to examine nature of charge and its effect:

An outline is

>First step in any such situation is to check the validity of the charge – execution, registration etc  
 >Say 'fixed charge' but court will look at substance : Spectrum. Here, can use the receivables so floating charge more likely  
 >When entered into? Within time period that means may be void against liquidator unless new money (s.267, 267A)  
 >If any of the above, L can ignore and insist on being handed all of the receivables  
 >Next to consider: was it an unfair preference (security can be UP – see Sweetmart)? If so, L may also be able to get receivables. Say 'may' because would need to make application and notoriously difficult to show company was influenced by desire to prefer.  
 >If charge is valid (as floating charge), L cannot lay claim to the receivable (Leyland Daf case) except for preferential creditors (s.265(3B)) – note only asset so there will not be any 'free assets' in estate to meet those

**Commented [RD(DWH34)]:** Only if floating charge, sec 267

**Commented [RD(DWH35)]:** good

**Commented [RD(DWH36)]:** (1.5 marks) see below, and:

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

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

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

The BVI liquidator appointed has identified:

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

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

- The liquidator should take steps to have insolvency proceedings recognized in Hong Kong. Although there is no statutory legislation in place relating to cross-border insolvency law, the Hong Kong courts follow the common law principle and have been flexible in this regard and will grant foreign recognition orders, where there is appropriate grounds to do so.
- The liquidator can apply to the court to commence ancillary liquidation proceedings in Hong Kong. This means an ancillary liquidator will be appointed, who would then have the power to take legal action against Mr. Zhang and Mr. Wong, should they continue to be un-cooperative with the liquidator. The ancillary liquidator could compel both parties to provide any information they might have relating to the affairs of the company, which may lead to recovery actions being made for the US\$20 million.

Commented [RD(DWH37): Why need ancillary to sue? (Irish Shipping)]

- The ancillary liquidator may also compel the bank to provide bank statements to trace cash going from SPL accounts.
- An ancillary liquidator would enjoy the powers of any liquidator that are exercisable under CWUMPO and CWR.
- It is now permissible for the BVI liquidator to seek foreign recognition of their own appointment in Hong Kong, however traditionally there would be a broader range of powers granted to a Hong Kong liquidator.
- Although the court has granted orders that allow for foreign liquidators to seek productions of documents from individuals, and has compelled banks to provide records relating to a company in question, sticking with the appointment of an ancillary liquidator may be the best option.
- Mr. Xu had standing to commence winding up proceedings, as the clause in the contract is in contravention of Hong Kong Company Law. The Court would find the contract void in this instance, as shareholders are not permitted to be paid ahead of other classes of creditor in cases of insolvency.
- Where a foreign recognition is pursued, or an ancillary liquidator put in place, they may pursue Mr. Qi to provide information relating to the company, if currently resides in Hong Kong, once recognized by the Courts.
- The circumstances leading to the winding up of SPL must also be investigated. As a legitimate creditor of the company, Mr. Xu is permitted to commence winding up proceedings, regardless of any terms of the contract.
- If proceedings were to be recognized in Hong Kong, the liquidator could then go about seeking recognition of the order in the Mainland. A pilot scheme has been introduced in 2021, which allows for Hong Kong liquidators to be recognized in certain parts of the Mainland
- Once recognized in the Mainland, the liquidator would have powers to carry out investigations into the assets held in the Mainland, and subsequently bring them under the control of the liquidator for the benefit of the estate.
- This pilot scheme, which applies to Shenzhen, Shanghai and Fujian and Shenzhen municipality of Guangdong.
- This application is the only option the liquidator has in respect of retrieving assets on behalf of the Company in the Mainland.

**\* End of Assessment \***

**TOTAL MARKS: 26.5 out of 50**

**Commented [RD(DWH38):** But could seek bank docs without an order (Bay Capital)

**Commented [RD(DWH39):** Misses the point: looking at anti-deprivation principle

**Commented [RD(DWH40):** Recognised or ancillary liquidation?

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(1.5 marks) see below, and:

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].