



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.

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]

Reference: INSOL International, 2021, p.22

Bankruptcy ordinance Cap 6

Hong Kong legislation:

https://www.elegislation.gov.hk/hk/cap6?xid=ID_1438403511024_004

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?

The term “debtor” is not defined as such in the Bankruptcy Ordinance (Cap6)(BO), but the requirement to qualify as a debtor, the person must be an individual and, as per section 4 of the BO, a bankruptcy petition shall not be presented to the court unless the debtor:

- (a) is domiciled in Hong Kong;
- (b) is 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) has been ordinarily resident, or have had a place of residence, in Hong Kong; or
 - (ii) has carried on business in Hong Kong.

The reference in (c) (ii) to a debtor carrying on business includes—

- (a) the carrying on of business by a firm or partnership of which the debtor is a member; and
- (b) the carrying on of business by an agent or manager for the debtor or for such a firm or partnership.

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12): (3 marks)

References:

- Section 326, 327, 327 A of the CWUMPO
- INSOL International, 2021, p.67
- Hong Kong legislation available at: https://www.elegislation.gov.hk/hk/cap32?xid=ID_1438402996679_001&SEARCH_WITHIN_CAP_TXT=unfair%20preference
- *Kam Leung Sui Kwan vs Kam Kwan Lai and Others* (2015) 18HKCFAR501.
- Asia disputes notes. 2015. *Hong Kong Court of Final Appeal clarifies the law in respect of shareholders' petitions to wind up foreign companies on just and equitable grounds.* [online] Available at: <<https://hsfnotes.com/asiadisputes/2015/11/12/hong-kong-court-of-final-appeal-clarifies-the-law-in-respect-of-shareholders-petitions-to-wind-up-foreign-companies-on-just-and-equitable-grounds/>>.

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

The part X of the CWUMPO defines an “unregistered company” as a company not registered under the company’s legislation. Section 326(2) of the act clarifies that part X includes a registered “non-Hong Kong company”.

The circumstances to wind up an unregistered company are:

- a) if the company is dissolved or has ceased to carry on business, or is carrying on business for the purposes of winding up its affairs
- b) if the company is unable to pay its debts
- c) if the court is of the opinion that it is just and equitable that the company should be wound up

The petitioner must satisfy the court that the company in question is sufficiently connected to Hong Kong by satisfying three core requirements as set out in the CFA's decision Re: Yung Kee for the court to exercise its jurisdiction:

1. There must be sufficient connection with Hong Kong (not necessarily that there should be presence of assets in Hong Kong)
2. There must be reasonable probability that the winding up order will benefit those applying for it
3. The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets

If sufficient connection is established via the three requirements, the jurisdiction to wind-up the company will remain, even after the scenario that the matters giving rise to the original connection have ceased to exist. This is to avoid removal of assets by unregistered companies with the argument that the core requirements are not met.

Question 2.3 [maximum 4 marks]

Section 193, section 28, section 228A

Reference: INSOL International, 2021, pp.39-40 section 193, 228 of CWUMPO, Sec 28 CWUR

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

The term provisional liquidator is used where provisional liquidators have been appointed under section 193 of the CWUMPO.

- A. Subject to the provisions of the law, the court may appoint a liquidator provisionally, at any time after the presentation of a winding up petition and before making a winding up order in respect of a company.
- B. In urgent cases the application may be made at the same time as the petition. It has been held that, it is wrong to apply for appointment of a private liquidator under section 193 just before the winding up to avoid having the Official Receiver as the Provisional Liquidator upon the winding of order being made.
- C. A provisional liquidator is primarily tasked with the role of preserving the assets in the period after the petition is presented but before the winding up order is made. The role is not to actually realise those assets (save where it is necessary to preserve their value). This can be done by presenting an application to court, for the sale of assets.
- D. A provisional liquidator can be appointed for the purposes of helping in facilitation of a restructuring proposal, although this cannot be the sole reason for the appointment.
- E. The court also has a jurisdiction to appoint a provisional liquidator, despite the appointment of voluntary liquidators.
- F. Where the court appoints a provisional liquidator, the court can limit and restrict the powers by the order appointing him or terminate the appointment on application by a provisional liquidator, Official Receiver, a creditor or contributory, the petitioner or the company.
- G. To justify the appointment there must be sufficient reasons;

Commented [RD(DWH13): (3.5 marks). Should refer to need to show likely to be wound up when petition is heard

Commented [RD(DWH14): Provisions of CWUR are 'rules' not 'sections'

- like the risk of assets being dissipated or in jeopardy before the winding up order is made.
- The court will consider commercial realities, the degree of urgency, the need for the order and the balance of convenience before granting the order and upon such terms as in the opinion of the court shall be just and necessary.

Under section 228A the directors of a company may appoint a person as a provisional liquidator in the winding up of the company. The appointment is effective from the commencement of the winding up.

- a. This is a special procedure for voluntary winding up of the company.
- b. Where the company is unable to continue its business due to its liabilities.
- c. The directors consider it necessary that the winding up be done immediately and it is not practicable to initiate the winding up under another section and the meeting of the contributories and creditors will be held within 28 days from the filing up of the winding up statement.

Under section 28 of the CWUR, a provisional liquidator can be appointed on the winding up order being made. However, here the role is provisional in the sense that the appointment is provisional pending the holding of the creditors' meeting.

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

Question 3.1 [maximum 5 marks]

Commented [RD(DWH15)]: (5 marks)

References:

- INSOL International, 2021, pp.45-46
- Section 266 CWUMPO
- Tanner De Witt Solicitors, Law Firm Hong Kong. 2010. *Legal update: Recent developments in respect of unfair preference claims re: HCCW 755/2005 – Sweetmart Garment Works Limited (in Liquidation)* - Tanner De Witt Solicitors, Law Firm Hong Kong. [online] Available at: <<https://www.tannerdewitt.com/recent-developments-respect-unfair-preference-claims-re-hccw-7552005-sweetmart-garment-works-limited-liquidation/>>

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.

For the fair treatment of all creditors, when a business is insolvent, liquidators are empowered to "look back" at the transactions with the company prior to the commencement of the winding up.

Unfair preference occurs when an insolvent company acts to place a creditor or a guarantor, in a better position than it would have been, upon the company's insolvency.

In the case of the company's insolvency, the law does not require commercial dishonesty in the form of intention to prefer. The test is whether the decision is influenced by a desire to improve the creditor's position, in the event of an insolvent liquidation.

Such transactions can be set aside by the liquidators, by making an application to court. This power is exercisable in both voluntary and compulsory winding up proceedings.

The timeframe for the transactions which can be set aside:

- Non associates: 6 months from the date of commencement of the winding up, and

- Associates: 2 years where the beneficiary is a person connected to the company.

The types of transactions that can be set aside, include granting of security payments etc.

The liquidator has to show, that at the time the particular preference was given, the company was unable to pay its debts or became unable to do so, because of said transaction.

In the case of a "connected person" or associate, this criterion is presumed as automatically met.

The connected person is defined as an associate of the company or if the person is an associate of a director or shadow director of the company.

The associate will include another company which is controlled by the same person, as the company being wound up or that person's associates.

In the case of a non-associate, the onus is on the liquidator to show that, the company was influenced by a desire to improve the Creditor's position over other creditors.

A transaction will not be set aside as unfair preference, unless the company positively wished to improve the creditor's position, in the event of its own insolvent liquidation and that a person does not desire all of the necessary consequences of his actions.

While it is difficult to prove the desire to prefer, there have been cases where the courts have ruled that the company had no reason to give a bank, a mortgage and that this was done to prefer the bank because of personal bankruptcy proceedings that were being threatened against a director.

It has been held that moral pressure can be as real as commercial pressure and was sufficient to negate the suggestion that the debtor motivated by a desire to prefer.

Under section 266 of CWUMPO, If a transaction is proved to be an "unfair preference, the orders which may be made by the court include:

- (a) vesting of the property, which is the subject of the unfair preference, in the liquidator;
- (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]

References:

- INSOL International, 2021, p.65, 75 and 84-85
- Hong Kong legislation: Available at (<https://www.elegislation.gov.hk/hk/cap88/en>)
- HKU Libraries: Historical Laws of Hong Kong - Available at: (<https://oelawhk.lib.hku.hk/items/show/2406>)
- Basic Law: Available at (<https://www.basiclaw.gov.hk/en/basiclaw/chapter4.html>)
- Department of Justice of Hong Kong SAR: Available at: https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_opinion_en_tc.pdf

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.

Hong Kong and mainland China though are one country but the insolvency and judicial system remains largely separate. Hong Kong continues to follow Common Law. From the handover

Commented [RD(DWH16): Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

Commented [RD(DWH17): (3 marks) The elements of the answer are here, but there is a long part of the answer that is not relevant which suggests less than perfect understanding of what is required

of 1997 mainland China is no longer a foreign country and therefore the rules, as to enforcement of a foreign judgment would not apply.

Prior to the Handover, on 23 February 1997, the Standing Committee adopted a decision regarding the treatment of laws, previously in force in Hong Kong. Under paragraph 1 of that decision, the Standing Committee decided that "the laws previously in force in Hong Kong, which include the common law, rules of equity, ordinances, subsidiary legislation and customary law, except for those which contravene the Basic Law, are to be adopted as the laws of Hong Kong"

The Application of English Law Ordinance (Cap. 88) provided that the common law and rules of equity would apply in Hong Kong (subject to such modifications as necessary) was passed before the resumption of Chinese Sovereignty.

However, the standing committee also decided that "the laws previously in force in Hong Kong, which include the common law, rules of equity, ordinances, subsidiary legislation and customary law, except for those which contravene the Basic Law, are to be adopted as the laws of Hong Kong ". Thus, any new laws developed under Common Law after 30 June 1997 would not automatically apply in Hong Kong.

In 2006 July, the Arrangement on Reciprocal Recognition and Enforcement of Judgment in Civil and Commercial Matters by the courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties' Concerned was signed between the department of Justice (Hong Kong) and the Supreme People's Court (Mainland)

To give effect to the above, the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO) came into force on 1 August 2008. MJREO is modelled on FJREO and enforcement in Hong Kong is by way of registration of Mainland money judgments. The arrangement came into effect on 1 August 2008 by way of a judicial interpretation dated 3 July 2008 promulgated by the Supreme People's court in the mainland

In this context "Mainland" means any part of China other than Hong Kong, Macau and Taiwan. Macanese and Taiwanese judgments are only enforced by way of common law recognition.

The arrangement applies only in specific situations:

- (a) **Commercial contracts:** The enforcement of money judgements on disputes under the commercial contracts are covered under MJREO. Non-Commercial contracts such as employment, matrimony or contracts for personal consumption are excluded.
- (b) **Valid agreement on choice of Mainland court:** If the underlying agreement gives exclusive jurisdiction to the relevant Mainland court, only then it is enforceable in Hong Kong.
- (c) **Money judgments from a designated court:** Also excluded are the judgements with regards to payment of any tax, fine or penalty. Costs orders are registrable. In Hong Kong, recognition is granted to judgments from designated courts of the mainland, as stated in the legislation, are recognised. Hong money judgments from any Hong Kong court are recognised in the mainland.
- (d) **Final and conclusive judgments:** A final and conclusive judgement can be enforced if it has been given after the commencement of Cap 597. The applicant must produce a

certificate from the original Mainland court or such other evidence, that the judgement is final and conclusive. A copy of the judgement duly certified by a Hong Kong court and a certificate that the judgement is enforceable by way of execution is required for the Mainland. For the Mainland any document submitted in languages other than Chinese language will need certified translations to Chinese language, to be submitted as well.

Due to the restriction of utility of the legislation in commercial cases (as in (a) and (b) the Supreme court of the Mainland and the Hong Kong government have signed a further arrangement in 2019. (The "Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region").

This arrangement will remove the requirement for exclusive jurisdiction clause and will be extended to non – money judgements.

In the past, with regards to Hong Kong, the ability of an officeholder to take steps in the PRC has always been in question. Despite of some instances of success and certain assistance from the PRC courts, recognition in the PRC has been difficult for Hong Kong officeholders. The Hong Kong court addressed some of these issues by way of common law development and the recent co-operation mechanism.

As regards the common law developments, when the Hong Kong court gave its first written decision in respect of recognition (the A v B case), the court referred (as stated above) to a request from a "common law jurisdiction with a similar substantive insolvency law".

Para11 of *The Joint Official Liquidators of A Company v B and Another* [2014] 4HKLRD374 (A Cov B).- (INSOL International, 2021, p.65)

The Hong Kong court has at least on two occasions recognised the appointment of officeholders appointed in the Mainland (PRC), notwithstanding that the PRC is not a common law jurisdiction. The court was satisfied that prevailing PRC insolvency law provided for a collective process. However, in the CEFC decision, the court commented on the fact that under PRC law, for other proceedings (including from Hong Kong) to be recognised in the PRC there is the need for reciprocity.

Commented [RD(DWH18)]: Good; up to here, mostly not relevant

In that context, while recognising the appointment, the court commented that "while the principles that govern common law recognition and assistance did not require reciprocity to be demonstrated, the extent to which greater assistance should be provided to Mainland Chinese administrators in future would be decided on a case- by-case basis and the development of recognition was likely to be influenced by the extent to which the court was satisfied that the Mainland promoted a unitary approach to transnational insolvencies".

Re CEFC Shanghai International Group Ltd (Mainland Liquidation) [2020] HKCFI 167; and *Re Liquidator of Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965. (INSOL International, 2021, p.75)

The co-operation mechanism emanating between Hong Kong and the Mainland, from the "record of meeting" between representatives of the Supreme Court in the Mainland and of the Hong Kong Government, is a recent development. The "record of meeting" is primarily based on the intent of Article 95 of the Basic Law which provides that "The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other." The meeting refers to the mutual recognition of and assistance to "bankruptcy proceedings" between Hong Kong and the Mainland.

It entitles Hong Kong appointed liquidators or provisional liquidators in insolvency proceedings, to apply for recognition in the Mainland and for Mainland administrators to apply for recognition in Hong Kong.

The record of meeting is supplemented by an opinion of the Supreme Court which entails:

- a. that the designated pilot areas in the Mainland are:
 - i. Shanghai Municipality
 - ii. Xiamen Municipality of Fujian Province, and
 - iii. Shenzhen Municipality of Guangdong Province for measures of recognition and assistance to "Hong Kong Insolvency proceedings"
- b. That "Hong Kong Insolvency Proceedings" means the collective insolvency proceedings commenced under CWUMPO or the CO and includes which includes compulsory winding up, creditors' voluntary winding up and scheme of arrangement promoted by a liquidator or provisional liquidator and sanctioned by a court of the Hong Kong Special Administrative Region in accordance with section 673 of the Companies Ordinance of the Hong Kong Special Administrative Region.
- c. The debtor's centre of main interest must be in Hong Kong, with the Opinion stating that "Centre of main interests" for these purposes generally means the place of incorporation of the debtor. However, adding that "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 centre of main interests of the debtor shall have been in the Hong Kong Special Administrative Region continuously for at least 6 months".
- d. "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."
- e. 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.

References:

- INSOL International, 2021, p.58-67
- Companies Ordinance (cap 622) section (668-677), Rules of HC O.102 r2 and r5 section 182 CWUMPO
- Hong Kong legislation: Available at: <https://www.elegislation.gov.hk/hk/cap622>
- Practical Law - Thomson Reuters. 2021. *Restructuring and insolvency in Hong Kong: overview | Practical Law*. [online] Available at: <[https://uk.practicallaw.thomsonreuters.com/1-502-0035?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-502-0035?transitionType=Default&contextData=(sc.Default)&firstPage=true)>
- Allen and Ovary, 2020, *Restructuring Across Borders - Corporate restructuring and insolvency procedures*. Available at: <https://www.allenoverly.com/global/-/media/allenoverly/2_documents/practices/restructuring/restructuring_across_borders_final/hong_kong_sar_-_corporate_restructuring_and_insolvency_procedures.pdf>
- <https://www.lw.com/thoughtLeadership/restructuring-and-insolvency-in-hong-kong>

Commented [RD(DWH19): (5 marks) A good answer that could also have included explanation of classes as are important (similarity of legal rights, not interests)

The Companies Ordinance (Cap 622) – which deals with issue of companies other than winding up, is still relevant, as it contains the statutory provisions relating to schemes of arrangement.

There is no legislation in Hong Kong specifically dealing with corporate rescue in Hong Kong. However, the Scheme of Arrangement can be considered as a corporate rescue tool under Hong Kong law. Companies can propose a scheme of arrangement. The proposed scheme will allow companies to make binding compromises or arrangement with the members and or creditors including adjustment of debts owed or reduction in Share capital.

The statutory regime for schemes of arrangement in Hong Kong is contained in Part 13, Division 2 of the Companies Ordinance (namely sections 668 to 677). For effecting a scheme of arrangement in court, it is governed under the rules of High Court. The court procedure relating to the applications necessary to implement a scheme of arrangement is governed by O.102 r 2 and r 5 of the Rules of the High court (RHC).

Advantages:

- Without a scheme, the company would need to seek approval of 100% of the creditors of each class, to contractually vary the debt. Hence schemes are the solution in cases where there are many creditors and there is a possibility that unanimous consent may not be possible.
- Schemes are helpful where a creditor may be holding out, to seek unfair advantage like additional payments as against other majority of creditors of similar ranking.
- There is an issue of dealing with obligations of third-party such as guarantors under the scheme. This provision is not conceptually available, as it is a statutory arrangement between the concerned parties. However, in practice may cause the release of the creditor's claims under guarantees provided by third parties, in respect of the debt being compromised under the scheme. This is now well established under English law.
- Insolvency is not required for a scheme of arrangement and can be used when a scheme is sanctioned by the court under a liquidator or a private Liquidator is appointed. The company's management a can remain in place too, for the implementation of the scheme.
- If company is not a Hong Kong company scheme miss still be sanctioned by the court as long as there is sufficient connection with Hong Kong and the foreign company

Weaknesses:

- No moratorium is available during the consideration of the scheme.
- In a bid to address this issue in Hong Kong provisional liquidators are appointed after presenting a winding up petition with specific powers to investigate any possible and if viable, to promulgate a restructuring of the company's debts.
- The moratorium is then obtained under section 182 of the CWUMPO. Schemes in such cases will provide for the winding up petition to be dismissed on the Scheme's successful implementation.

Procedure

An Explanatory Statement must be made by the company giving out the background to the company, as to why a scheme is required, and the proposed scheme :

Initial court Hearing:

- Application is to be made to the court to grant leave for the scheme proponent to convene meetings of scheme creditors.
- If leave is granted, a notice of the meeting must be given to all creditors in the relevant class(es)

Meetings of the Company's creditors:

- The meeting is convened for voting on the proposed scheme.

- At the meeting, the proposed scheme, must be voted in favour, by the majority in number (more than 50%) and representing at least 75% in value of those creditors attending (in person or by proxy) and voting.
- If multiple classes, all classes must approve the scheme.

Final approval:

- The result of the meeting is then reported to court and a sanction hearing is held.
 - The court will sanction the scheme if it is satisfied that the classes are properly constituted and it is considered that the scheme is one which an "intelligent and honest creditor might reasonably approve"
 - The court maintains a discretion in whether to sanction a scheme, and will consider compliance of due process and if the majority approving the scheme is fairly representative of its class of creditors and also if the scheme is fair to all creditors.
 - The scheme takes effect, when it is registered at the Companies Registry;
- Note that the scheme can only bind creditors if the debt is governed by Hong Kong law or the relevant creditor takes part in the scheme.

Non-Hong Kong companies

With regards to cross-border insolvency, an important consideration, is the use of the scheme of arrangement procedure for Non-Hong Kong companies.

In order to obtain sanction of a scheme of arrangement for such companies in Hong Kong, the applicant must show:-

- that the court has jurisdiction to do so in respect of that company. (Hong Kong connection)
- that the scheme would be effective in the sense that the scheme would be recognised by other relevant jurisdictions.

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

Question 4.1 [maximum 4 marks]

References:

- INSOL International, 2021, p.31-35
- Section 228 to 239. 240 to 248 CWUMPO,
- Companies Ordinance Sec 668 to 677

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.

Given the situation that Mountainview Limited is unlikely to continue business due to its financial problems, the director has the following options:

- Voluntary Liquidation
- Scheme of arrangement
- Court Liquidation

The director is exploring options other than a court liquidation, these are discussed below:

- Voluntary liquidation:

Commented [RD(DWH20)]: (3 marks) Most of the elements are there but the answer is supposed to be an advice to Mr. Chan. Client will not want an essay on options.

should also advise Mr. Chan that 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

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

This is subject to the Solvency test. This test will determine whether the mode is a Members Voluntary Liquidation or Creditors Voluntary Liquidation.

B. Members Voluntary Liquidation (MVL):

This procedure can be used where the company has the ability to settle all its liabilities (creditors) within 12 months of the commencement of the liquidation.

The director of the company needs to sign a "Certificate of Solvency" and the shareholders have to pass a special resolution for winding up and appointing liquidators. The liquidation commences on the date the resolution is passed.

The Liquidator takes control of the company's affairs from the directors and realises the assets in order to pay the creditors and subsequently the shareholders.

The liquidator's fees are also paid from the assets of the company. Surplus monies after paying the fees and expenses and the company's liabilities will be distributed to the members of the company.

There is no specific qualification for the liquidator who has to be appointed. The liquidator can be "connected" to the company.

C. Creditors' Voluntary Liquidation (CVL):

The directors of the company on their own or on the request of Shareholders will convene a meeting of the shareholders of the company to pass a special resolution to wind up the company. The Liquidation will commence immediately on this date.

The shareholders can appoint a liquidator but the liquidator has limited powers until the appointment is confirmed at the meeting of the creditors.

The creditors can also nominate a liquidator and vote for the appointment of the liquidator at the first meeting of the creditors.

Once the decision to call for the meeting of creditors and shareholders is taken or company is insolvent, it is the duty of the directors to preserve the assets for the benefit of the creditors.

The CVL process is a less time consuming and cost-efficient process to put the company in liquidation. The Ad-Valorem duty payable on realizations is not payable in voluntary liquidations.

D. Liquidation under Section 228A:

Under this section of the CWUMPO, the directors can also liquidate the company, wherein the company can be wound up with immediate effect.

The directors may resolve to wind up the company at a meeting of the directors and deliver to the Registrar a certified statement that the resolution has been passed to the effect that:

- The company cannot continue its business due to its liabilities
- Directors consider that the company must be wound up and that it is not reasonably practicable to use another section of the act for this purpose.
- Meeting of the creditors and shareholders will be summoned not later than 28 days from filing of the statement of winding up.

For use of this section there must be special reasons to show the use of this section for winding up rather than any other section of the act. A provisional liquidator, on his consent, is appointed and must be a solicitor or a professional accountant.

E. Scheme of arrangement:

The company has this option to restructure its debts. This allows companies to make binding compromises or arrangement with the members and or creditors including adjustment of debts owed or reduction in Share capital.

However, there is no moratorium given here on creditors' actions whereas under voluntary and court liquidations the company gets moratorium.

F. Court or compulsory Liquidation:

A company can be wound up by the court, when a creditor presents a petition to the court, on the grounds that the company is unable to pay its debts. However, a company can present a petition to wind up itself, and the court also has jurisdiction to wind up on the petition of a shareholder and on the ground, it is just and equitable to do so. The mechanism permits the court to appoint a liquidator who would then take control over the conduct of the company, collect assets and distribute any proceeds. The company has no influence over which liquidator is appointed.

Friendly liquidator:

The role of a liquidator is an independent one and the liquidator is required to look into past transactions to consider any undue preferences or under value dispositions which may have been detrimental to the interests of the creditors.

Question 4.2 [maximum 5 marks]

References:

- INSOL International, 2021, pp.12-15 and 46
- Section 79, 265, 266,267 CWUMPO
- Companies Ordinance CO (cap 622) Part 8 Sec 332 to 336

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).

GFL recently 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 has had a liquidator appointed. The receivables appear to be Kite's only assets. The liquidator asks 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 needs to consider the following issues:

- A. Registration of the charge
- B. Is the charge fixed or floating in nature?
- C. Preferential claims paid through floating charge realisations
- D. Validity of the floating charge in case of liquidation
- E. Unfair preferences

Commented [RD(DWH21)]: 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

Commented [RD(DWH22)]: (4.5 marks) Good points, but not really advice to the L

These points are discussed as below:

A. Registration of charge;

If the charge is not duly registered properly, the Hong Kong makes it void against the liquidator or creditor of the company. The liquidator in this case has a right to claim back the assets charged.

Section 334 identifies the types of charges that require registration. Charges over land and book debts are mentioned as charges that need to be registered including floating charges over the company's undertaking or property.

Section 335(a) mandates that a charge which requires registration must be registered within one month from the date of execution.

B. Is the charge fixed?

In this case a fixed charge has been granted over the receivables of the company. By nature of the assets, it is floating. For a fixed charge the charge needs to be fixed to the asset. The lender must also ensure actual control over the charged asset so that the charger cannot deal with the assets freely as if they were not subject to a fixed charge. In this case the lender has allowed the charger to continue to trade in business with the customers as before the execution of the charge and no separate account was opened for control purposes. The security may hence be classified as a floating charge.

Definition of floating charge: INSOL International, 2021, p.13

The "classic" definition of a floating charge is often given as that of Romer LJ in *Re Yorkshire Woolcombers Association Limited*:

"...I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

C. Preferential claims paid through floating charge realisations

The lender has tried to create a fixed charge rather than a floating charge as in the case of a floating charge the ranking of the creditors with this charge is below the preferential creditors.

Section 79 of CWUMPO provides that the preferential claims must be met out of floating charge realisations even if there is no liquidation at the time. Section 265(3B) clarifies that where there is a liquidation, the preferential claims are paid out of floating charge realisations to the extent that there are insufficient "uncharged" assets available to the liquidator.

D. Validity of the floating charge in case of liquidation

Under Section 267 a floating charge will not be valid if it is entered within 12 months prior to the liquidation and the company was not able to pay its debts at the time the charge was created (this is 2 years for person connected to the company). In this case, the charge was created after the lender realised the business was running in a troubled way and subsequently the company was wound up after the charge was created.

E. Unfair preferences:

This occurs when an insolvent company acts to place a creditor or guarantor in a better position than it would have been upon the company's insolvency.

The liquidator can set aside such transactions which include granting of security etc. where such transactions were entered within 6 months prior to the commencement of winding up or 2 years prior to commencement of the winding up if the beneficiary was a person connected to the company.

The liquidator will have to prove that the company positively wished to improve the creditor's position in the event of its liquidation and that a person does not desire all of the necessary consequences of his actions.

If a transaction is proved to be an unfair preference, the orders made by the court include: (a) the property which is the subject of the unfair preference, to be vested in the liquidator; (b) releasing or discharging the security given by the company (c) the liquidators to be paid any benefits received from the company by the beneficiaries (d) reviving the obligation of any surety or guarantor which had been released or discharged (e) providing security for the discharge of any obligation imposed by or arising under the order.

Based on the above the liquidator can realise the assets for the unsecured creditors after having the charge dismissed.

Question 4.3 [maximum 6 marks]

References:

- INSOL International, 2021, p.17, 43 and 75
- Vaccari, E., 2022. The normative and Jural meanings of the anti-deprivation principle <i>vis-à-vis</i> freedom of contract. International Insolvency Review, Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region- Available at: https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf
- Herbert Smith Freehills | Global law firm. 2021. Mutual recognition of insolvency in Hong Kong and Mainland China – first steps. [online] Available at: <<https://www.herbertsmithfreehills.com/latest-thinking/mutual-recognition-of-insolvency-in-hong-kong-and-mainland-china-%E2%80%93-first-steps>>.

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).

Commented [RD(DWH23)]: Only if successful

Commented [RD(DWH24)]: (3.5 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

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.

In Hong Kong law, no formal order is required for recognition of foreign Liquidator. The Hong Kong courts, traditionally assist foreign liquidators based on common law principles.

The liquidator may give a letter of request to the Hong Kong court, issued by the foreign court and request for recognition and assistance as in the case of *A Co v B* (2014 decision) wherein the court stated that:

“18. In my view the Hong Kong Companies court can and should adopt a similar approach to applications for recognition and assistance to that described in paragraph 60 of Kawaley J's judgment. 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 which is available to a provisional liquidator or liquidator under Hong Kong's insolvency regime. For this reason I granted the orders referred to at the beginning of this decision.” (*Insol* page 71)

The liquidator can hence also claim any monies in the account or any assets belonging to SPL in Hong Kong after recognition including information such as the books and records from the officers of the company.

In this case the FA is governed by Hong Kong law and this establishes a connection to Hong Kong and hence laws of Hong Kong will apply.

One of the roles of the liquidator will be to consider contracts which may form a part of the company's assets if the contract can be assigned for value. There are no particular rules for the treatment of execution-based contracts under Common Law.

Commented [RD(DWH25)]: Depends what L wants to do
Some steps could be taken without recognition (e.g. documents from bank (Bay Capital)), sue Mr Qi

Generally, a contractual clause that provides determination or modification of a contract upon insolvency of the counter party will be upheld (ipso facto). However, a term in the contract that results in general creditors being deprived of an asset, that would be available to satisfy the debts of creditors, will not be upheld by court. This is the anti-deprivation principle. In general, the anti-deprivation principle is a common law rule, that voids any arrangement designed to remove assets from the insolvent debtor because of the debtor's insolvency and to the detriment of the cohort of creditors.

Not every asset falling in this category, which goes beyond the reach of the general body of creditors, will be struck down. This is viewed on a case-to-case basis. The courts have come out with a set of factors which assist in the decision; if the anti-deprivation principle has been violated.

1. Was the intention there to evade insolvency laws
2. Does the clause operate in situations other than upon insolvency?
3. Is the concerned asset flawed? (I.e. the interest is subject to the condition that counterparty remains solvent as opposed to an outright interest which is forfeited on insolvency).

In this case, it is evident that the clause is solely to benefit the shareholder and not the creditors.

Onerous property:

The liquidator can disclaim onerous property with leave of the court within 12 months of the commencement of the winding up. This includes unprofitable contracts.

Hence, the liquidator should not be worried on the grounds of appointment as the FA clause is contravening the anti-deprivation principle and he has the power to disclaim the contract.

The liquidator can apply to court to set aside the FA and pass judgement for recovery of the monies from Mr Qi for the benefit of the creditors.

The Liquidator can then even claim assets from the Mainland under the cooperation mechanism after recognition in Hong Kong.

With regards to co-operation mechanism between Hong Kong and China, this has been promoted from the "record of meeting between representatives of the Supreme Court in the Mainland and those of the Hong Kong Government.

The "record of meeting" objective is to further the intent of Article 95 of the Basic Law which provides that "The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other." The meeting refers to the mutual recognition of and assistance to "bankruptcy proceedings" (Insolvency) between Hong Kong and the Mainland.

This meeting refers to liquidators or provisional liquidators in insolvency proceedings appointed in Hong Kong, being entitled to apply for recognition in the Mainland and for Mainland administrators to apply for recognition in Hong Kong. This provision is on a pilot basis currently. The record of meeting is supplemented by an opinion of the Supreme Court³⁶⁰ which, outlines:

- (a) the pilot areas in the Mainland are designated as: (i) Shanghai Municipality
- (ii) Xiamen Municipality of Fujian Province, and (iii) Shenzhen Municipality of Guangdong Province

(b) That “Hong Kong Insolvency Proceedings” means any collective insolvency proceedings commenced under CWUMPO or the CO and includes compulsory liquidations, creditors’ voluntary liquidations and schemes of arrangement which are promoted by a liquidator or provisional liquidator;

(c) The debtor’s centre of main interest must be in Hong Kong, with the Opinion stating that “Centre of main interests” for these purposes 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 centre of main interests of the debtor shall have been in the Hong Kong Special Administrative Region continuously for at least 6 months”.

This test also opens the door for companies incorporated off shore but may have COMI in Hong Kong.

(d) “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.”

(e) A letter of request from the Hong Kong court is necessary.

Using these provisions, the liquidator will firstly have to gain recognition in Hong Kong using the common law principles and also the “connection to Hong Kong” as the FA is governed under Hong Kong law as well as the director and the book keeper reside in Hong Kong and also the company has a bank account in Hong Kong.

The Liquidator has to set aside the FA through the court and enforce the same on Mr Qi to pay back the monies for the benefit of the creditors. Based on the evidence, or the books and records of the company, if assets are located in the Mainland, he can then subsequently apply for recognition in the mainland. The liquidator can discover and realise the assets of the company for the benefit of the creditors.

*** End of Assessment ***

TOTAL MARKS: 43.5 out of 50

Please note that the marker for this assessment has flagged possible copying with student 606. I have checked and you both work for the same company. I realise of course that you may have worked together, but this is the risk you take if answers are similar or the same. At this point no action is being taken; however, if other markers flag a similar issue I will have no choice but to investigate further by appointing a sub-committee of the Course Committee to look into this. David Burdette (Course Leader)

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(3.5 marks)

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