



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

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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.
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6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS**QUESTION 1 (multiple-choice questions) [10 marks in total]**

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

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

Question 1.1

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

A receiver can be appointed –

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

(d) any of the above.

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

Question 1.2

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

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

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

Commented [RD(DWH2): 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.

Commented [RD(DWH3): Incorrect (0 marks) - s.327 provides a statutory basis to wind up such a company (section 7 of text)

- (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.

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): Incorrect (0 marks) – see section 6.4.1 and 5.5 of text: preferential creditors are paid out of assets subject to a floating charge (unless the company is in liquidation and there are sufficient assets to make those payments out of the general estate). Note the question refers to the charge being over all of the company's asset, such that there would be no uncharged assets for the liquidator to meet the preferential claims out of uncharged assets.

Question 1.5

Select the **correct** answer:

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

- (a) the date on which the creditors pass a resolution to wind up the company.
- (b) the date on which the court approves the appointment of liquidators.
- (c) the date on which the members pass a special resolution to wind up the company.
- (d) the date on which notice of the liquidator's appointment is registered at the Companies Registry.

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

- (a) the Companies Ordinance (Cap 622).
- (b) the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).
- (c) the Companies (Winding Up) Rules (Cap 32H).
- (d) none of above.

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

Question 1.7

Select the **correct** answer:

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

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

Commented [RD(DWH7): Correct (1 mark) – s.186 CWUMPO (section 6.3.7 of text); the mandatory stay also applies if a provisional liquidator is appointed.

Question 1.8

Select the **correct** answer:

In a compulsory winding up, at the first meeting of creditors where a resolution is proposed for the appointment of a liquidator, a creditor holding security from the company:

- (a) is not allowed to vote.
- (b) can vote and the whole amount of its claim is counted.
- (c) can vote if it has valued its security and the amount that is counted is the difference between its claim and that value.**
- (d) must get special permission from the chairperson of the meeting to vote.

Commented [RD(DWH8): Correct (1 mark) – Rule 84 CWUR (section 5.5 of text).

Question 1.9

In considering what previous court decisions are binding on the Hong Kong courts, which of the following statements **is correct**?

- (a) A 1995 decision of the English House of Lords is binding.
- (b) A 1993 decision of the UK Privy Council on an appeal from Hong Kong is binding.**
- (c) A 1996 decision of the UK Privy Council on an appeal from the Cayman Islands is binding.
- (d) None of the above because they all pre-date the Handover in 1997.

Commented [RD(DWH9): Correct (1 mark) – The *China Field* decision confirmed that pre-1997 decisions of the Privy Council on appeals from Hong Kong were and remain binding (section 4.1 of text).

Question 1.10

A liquidator appointed in another jurisdiction wants to seek Hong Kong recognition of his appointment. Which of the following **is correct**?

- (a) He must make an application to the High Court of Hong Kong using the provisions of the UNCITRAL Model Law.
- (b) He must first seek permission from the Ministry of Justice in Beijing.
- (c) No recognition is possible.

(d) None of the above.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

What are the jurisdictional requirements as regards a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over that person?

In order for the HK Court to be able to exercise jurisdiction, they must meet the following criteria, in accordance with Section 4 of the Bankruptcy Act:

- Hong Kong domiciled
- Present in Hong Kong when the petition is presented
- Within the last 3 years had an ordinary resident or a place of residence in or carried out business

Question 2.2 [maximum 3 marks]

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

The core requirements according to section 327 of CWUMPO are:

- Sufficient connect to HK (doesn't have to be assets present)
- Reasonable to assume that the applicant will benefit from the Winding Up Order
- The HK Court can exercise jurisdiction over people interested in the company's asset distribution

Question 2.3 [maximum 4 marks]

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

PLs are appointed pursuant to s193 of the Insolvency legislation in HK.

A PL's primary task is to preserve company's assets between a Winding Up petition and Winding Up order. However, they are not tasked with realising any assets, without the sanction of the HK Court.

A creditor may apply to Court to appoint a PL after a WU petition is presented, but is usually done simultaneously due to urgency. A PL cannot be used to avoid the Official Receiver being appointed.

The HK Court can restrict and limit a PL's powers and is also able to terminate a PL's appointment. The OR, the PL, a creditor or contributory can apply to the HK Court to terminate the appointment.

A PL can be appointed to assist with implementing a restructuring proposal, however it cannot be the only reason for their appointment.

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

Commented [RD(DWH11): (2 marks). The list stated does not make clear whether all 3 elements are necessary or only 1. It is the latter. See also note below

Commented [RD(DWH12): confusing

Commented [RD(DWH13): (2 marks). The core requirements are those stated, but they are NOT mentioned in s.327; they are common law based (see CFA decision in Yung Kee)

Commented [RD(DWH14): (3 marks). Should refer to need to show likely to be wound up when petition is heard; and see notes below

In HK, the Court will not appoint a PL for a light touch liquidation, in order to pursue a restricting of the company. However, undertaking a restricting process is still a power that the HK Court can grant to a PLC, if there are other grounds for the appointment. This was tested in *re Z Obee*.

Commented [RD(DWH15): Restructuring....

A PL has the ability to negotiate with creditors in HK and put forward a Scheme of Arrangement.

Commented [RD(DWH16): Only if given powers to do so by the court

Finally, the creditor must prove to the HK Court that there is sufficient justification for the appointment of a PL. These circumstances may include:

- Risk of dissipation of assets
- Assets being in jeopardy
- There must be a level of urgency
- There must be a reasonable balance of convenience
- There must be a genuine need for the order
- Any commercial realities

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

Question 3.1 [maximum 5 marks]

Commented [RD(DWH17): (3.5 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves

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.

In HK, a Liquidator has the ability to pursue an impeachable transaction. One of those transactions is an Unfair Preference, pursuant to s266 of CWUMPO.

An Unfair Preference takes places when an insolvency company puts a certain creditor in a superior position than it would have been in the resultant insolvency process.

The Liquidation must make an application to the HK Court to set the transaction aside, in a Compulsory Liquidation of a Voluntary Liquidation.

The transaction can include providing a creditor with security, where the transaction took place 6 months before the winding up commenced for an unconnected party, or 2 years for a connected party.

The Liquidator must prove that the company was insolvent when the transaction took place, or as a result. This will include being unable to pay bests as and when they fall due. Insolvency is presumed to a connected party, but must be proved for an unconnected party. However, the beneficiary has the ability to challenge the presumption.

Commented [RD(DWH18): Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

A person is connected if they are deemed to be an associate of the company, a director or shadow director. This will extend to other companies controlled by associates.

The Liquidator needs to show that the company was influenced by a desire to prefer the creditor's position. In reality, this can be a difficult threshold for a Liquidator to prove. This was reflected in the *re Stanley Hau* case, where the principle can also apply for Liquidations.

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

If it can be proved, the Court could make the following orders:

- Release or discharge of the security
- A monetary award to the Liquidator against the beneficiary
- Vesting the preferred property to the Liquidator

Question 3.2 [maximum 5 marks]

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

Whilst HK has not adopted the UNCITRAL Model Law and has no bilateral agreements with other jurisdictions, in May 2021 an agreement was reached with Mainland. The agreement created a mechanism to co-operate between HK and Mainland.

In terms of formal arrangements for cross-border insolvency, HK has access to Liquidation, include Provisional Liquidations, and how also Schemes of Arrangement. Therefore, there are a number of legislative procedures and arrangements that exist in other jurisdictions, which are not available in HK.

There are stays and moratoriums available to companies, which are akin to arrangements in other jurisdictions. The Court must grant leave for these. In addition, a Liquidation does not prevent a secured creditor from enforcing its security.

A secured creditor can appointment a Receiver through it's security documents, and potentially via the Court, which is not available in Mainland. They also have the option to negotiate a consensual restructuring too. Therefore, whilst certain formal arrangements don't exist, there are some remaining options available.

A main factor was that HK officeholders can get assistance (including recognition) in Mainland, and vice versa for Mainland in HK. These are available in each of the arrangements listed above.

When the HK Court gave it's first recognition decision, the Court noted that recognition was given to a common law jurisdiction with similar insolvency legislation. However, since that matter, the HK Court has subsequently recognised the appointment of Mainland IPs, notwithstanding that Mainland is not a common law jurisdiction.

In the matter re *Obiter* the HK Court recognised the appointment but stated that whilst reciprocity was not a requirement, greater assistance should be given to Mainland.

Question 3.3 [maximum 5 marks]

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

A Scheme of Arrangement is a court sanctioned proposal binding all creditors. They are not available to companies in Liquidation.

When implementing a Scheme of Arrangement, the following considerations need to be made:

- The IP will oversee a HK Court approved arrangement which will bind each class of creditor, including those that have voted against it.

Commented [RD(DWH20)]: (1.5 marks) The answer mentions some of the right elements (the 2021 Arrangement, the common law in HK (should mention use of that to recognise PRC insolvencies, e.g. CEFC Shanghai), but not a good understanding of the issue

Commented [RD(DWH21)]: ?

Commented [RD(DWH22)]: ?

Commented [RD(DWH23)]: (1.5 marks) Some of the main elements are stated but indicates more understanding is needed and there are a few errors (see below). 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)]: Not correct - a PL or liquidator can promulgate a scheme

Commented [RD(DWH25)]: There will not always be an IP. Also, this is inconsistent with the statement in your first paragraph

- The arrangement has the ability to remove and replace any instruments that are already in place.
- A Consent Fee can be paid to all creditors, however this must be paid equally and proportionally to all creditors on a *pari passu* basis.

The procedure to appoint is as follows:

- An explanatory statement sets out the background and needs for the scheme, including the proposal
- An application is then made to the HK Court to convene of meeting of all creditors in the Scheme
- If this leave is granted, notice is given to all creditors in the relevant classes
- 75% of creditors attending must support the Scheme
- The outcome is then updated to the Court so a sanction hearing can be called
- The Court will sanction the Scheme of Arrangements if it is satisfied and the scheme takes effect upon being registered at the HK Registry

Commented [RD(DWH26): Need majority in number representing 75% in value. (So one (or a few) big creditor(s) cannot pass the vote alone)

A weakness of the Schemes of Arrangement does not contain any moratorium to protect the company.

Also, if a bank creditor has a clear majority, then they will have the ability to agree the Scheme of Arrangement without input from other creditors. Creditors do have the option to clearly explain their objectives to the Court to attempt to overturn any decision.

Commented [RD(DWH27): No; hence need for majority in number

However, a positive is that there is a lack of corporate rescue legislation in Hong Kong, therefore a Scheme of Arrangement is at least a viable option.

Also, Schemes of Arrangement allow companies to compromise debts and restructure where there isn't 100% of creditors in agreement, so can assist where a single creditor isn't in favour of an informal debt negotiation.

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

Question 4.1 [maximum 4 marks]

Commented [RD(DWH28): (2 marks) Main elements there but see notes below

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 will be able to petition for Mountainview to be wound up. He will need to pass a special resolution, providing there are no circumstances of fraud or malpractice. Based on the information, Mr Chan doesn't appear to have committed any that could be deemed as fraud yet.

Commented [RD(DWH29): Not himself (unless a creditor). 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(DWH30): ?

However, Mr Chan would most likely undertake a Creditors Voluntary Liquidation, which does not require the Court. The Directors would convene a meeting for Shareholders to pass a resolution to wind the company up. This appointment will then be ratified at a creditors meeting, by the creditors.

There are no legislation obligating Mr Chan to commence liquidation and the fraudulent or wrongful trading provisions are difficult to prove in HK. Notwithstanding this, Mr Chan should be cautious not to breach his fiduciary duty by trading whilst insolvent.

Furthermore, Mr Chan also risks face criminal liability if they are not paid, which he needs to remain mindful of. Employees have the ability to present petitions for benefits under PWIF which are not payable in a voluntary liquidation.

Mr Chan does also have alternatives of proposing a Scheme of Arrangement and consensual restructuring, outside of the Liquidation process.

Mr Chan should approach an independent IP to undertake any process. An IP should also disclose and consider any conflict of interest as part of ethical duties. Therefore, there shouldn't be a 'friendly' Liquidator.

Commented [RD(DWH31): Employees?

Commented [RD(DWH32): Kind of - better put as liquidator has duties irrespective of who nominates them

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 liquidation will not have any impact on the Receiver's rights or abilities. The Receiver will continue to sell the charged asset under their Receivership.

The realisations will be used to pay the Receivers costs and expenses in the first instance. Then GFL's liability will be repaid in full as the secured creditor. Any surplus proceeds will then be paid to the Liquidator for the costs of the Liquidation estate.

This was tests in the matter of *Buchler V Talbot* [2004] 2 AC 298, and was also then applied in Hong Kong in the matter of *Re Good Success Catering Group Limited* [2007] 1HKLRD 15. The section of legislation used in this instance was s265(3B) of the CWUMPO.

The Liquidator could review the charge document to confirm that it is valid. If the Receivership appointment is invalid, then the assets may become part of the liquidation estate, albeit still subject to the security in the order of priority. Furthermore, the Liquidator could also review, likely with legal assistance, the validity of the security. If GFL does not have valid security,

Commented [RD(DWH33): (1 mark) Right idea to consider validity, but note error below. Need to advise L:

- >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): No, this is the exception for preferential claims to be paid out of floating (not fixed) charge assets

they would be an unsecured creditor. However, given the lack of assets, there may not be any funds to pay these costs from.

For the Receiver's appointment to be valid, they must have followed the following process:

- There must be an event of default
- A demand for payment must be made on the company
- The company must be given time to pay or dispute the debt
- An individual must be appointed according to the loan agreement
- Issue notice to the Registrar within 7 days of appointment, with the Receiver's identity

The Receiver will be personally liable for any contracts entered into on behalf of the company.

Question 4.3 [maximum 6 marks]

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

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

The BVI liquidator appointed has identified:

- 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;
- 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;
- SPL has a bank account at a bank in Hong Kong;
- It is not known where Mr Qi is currently, but it is believed he is a Hong Kong resident;
- SPL is believed to have assets in the Mainland, but the liquidator is not sure where these assets are located.

Commented [RD(DWH35)]: (2 marks) Disjointed

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].

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 May 2021, HK made an agreement with certain areas of Mainland, including a co-operation mechanism. The mechanism, amongst other things, allows HK officeholders to seek recognition and assistance in Mainland and vice versa.

Therefore, the Liquidator will need to identify where the assets in Mainland are located. If they are located in the areas of the co-operation mechanism, then the liquidator can seek recognition to realise the assets for the benefit of the liquidation.

Furthermore, despite HK not having statutory framework that covers cross border insolvency matters, the HK courts have complied with common law. As such, the BVI liquidator will have the ability to seek recognition in HK. This was originally heard in the matter of *Re Irish Shipping [1985 HKLR 437]* and was recently tested again in *Re Joint Liquidators of Nuoxi Capital Ltd [2021]*.

This would mean that with recognition, the BVI liquidator would also be likely to be able to realise the funds in the HK bank account. The HK bank account should provide copy statements to investigate and the residual funds. The Liquidator should rely on the matter of *Bay Capital Asia Fund LP V DBS Bank (Hong Kong) Limited [2016] HKEC 2377* in support of this.

However, the Bank may insist on a Recognition Order in the HK Court before transferring the funds, as a result of the court matter of *Joint Provisional Liquidation of China Lumena New Materials Corp [2018] HKCFI 276*.

The clause in the FA also appears to be an *ipso facto* clause. In HK, there is no legislation on how executory contracts (based on common law) are dealt with in insolvency processes. There is also no regulation provided by the general rules.

The HK Court is unlikely to uphold the contract, as it results in the total creditors being deprived of the assets. This is as a result of the anti-deprivation principle in HK. It will ultimately depend on the language and impact of the clause. The factors considered by the court will be:

- The intent to avoid the insolvency law
- Are there non-insolvency situations in the clause
- Is the asset seen to be flawed

These were set out in the matter of *Belmont Park Investments PTY Limited V BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc [2011] UKSC 38*.

Any attempt to put a creditor into a better position is deemed to be a fraud of the insolvency laws, mainly aimed at parties in contractual agreements. In the matter of *Peregrine Investment Holdings Ltd V Asian Infrastructure Fund Management Co Ltd [2004] 1 HKLRD 598*, stated that a contract cannot deprive creditors of the insolvency law, and that the contracts cannot gain an advantage at the expense of creditors.

As a result, it would appear that the clause is likely to be invalid and that Mr Xu would have grounds to wind up the company. The assets would remain vested in the company and would not pass to Mr Qi.

Commented [RD(DWH36): Why start with this given questions of L?

Commented [RD(DWH37): Irish Shipping is about taking action without formal recognition being needed

*** End of Assessment ***

TOTAL MARKS: 25.5 out of 50