



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment8C]**. An example would be something along the following lines: 202122-336.assessment8C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

A receiver can be appointed –

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

(d) any of the above.

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

Question 1.2

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

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

(c) Five (5) years before the date of the petition on which the bankruptcy order was made.

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

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

Question 1.3

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

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

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

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

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

Question 1.4

Select the **correct** answer:

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

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

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

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

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

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

Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

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

Question 1.7

Select the **correct** answer:

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

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

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.

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.

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 [TG7]: Discretionary stay

The instructions are clear that you are not to include any identifying marks in your assessment!? – Course Leader

Commented [RD(DWH8)]: Correct (1 mark) – s.186 CWUMPO (section 6.3.7 of text); the mandatory stay also applies if a provisional liquidator is appointed.

Commented [RD(DWH9)]: Correct (1 mark) – Rule 84 CWUR (section 5.5 of text).

Commented [RD(DWH10)]: Incorrect (0 marks) - 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)

Commented [RD(DWH11)]: 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]

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

Pursuant to the Bankruptcy Ordinance (Cap 6) (BBO), in order for a bankruptcy petition to be made, the debtor must:

- Be domiciled in Hong Kong
- Be personally present in Hong Kong on the day which the petition is presented
- At any time in the period of three years ending within that day
- Have been ordinarily resident, or have a place of residence, in Hong Kong; or
- Have carried on business in Hong Kong

Question 2.2 [maximum 3 marks]

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

Hong Kong Courts are able to wind up companies that are not incorporated or registered in Hong Kong, in some cases, if the following circumstances are met:

- The company is dissolve or has ceased to carry on business, or is carrying on business for the purpose of winding up its affairs
- If the Company is unable to pay its debts; and
- If the court is of the opinion that it is just and equitable that the Company should be wound up.

In order to wind up the Company the petitioner will need to satisfy the Court of sufficient connection to Hong Kong, the three requirements used to test same are (as set out in the CFA's decision in *Re Yung Kee*):

- There must be sufficient connection with Hong Kong, (not necessarily meaning the presence of assets with the jurisdiction);
- There must be a reasonable probability 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 Companies assets

Question 2.3 [maximum 4 marks]

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

- (1) A provisional liquidator may be appointed in line with a Section 228A liquidation (CVL in case of urgency) the primary role of the provisional liquidator in this case is to safeguard assets and is usually used for example in terms of perishable good where the urgency if dealing with the estate will yield a higher/best case return for the creditors.

Commented [RD(DWH12): (2.5 marks). The list stated does not make clear whether all 3 elements are necessary or only 1. It is the latter.

Commented [RD(DWH13): (3 marks)

Commented [RD(DWH14): (1 mark). Not a very full answer. Should explain what needs to be shown to court to appoint (jeopardy etc); powers prescribed; can conduct restructuring but cannot be appointed just for that

(2) Provisional Liquidators may also be appointed pursuant to section 93 of CWUMPO on the winding up order in relation to a compulsory liquidation until such time as a meeting of creditors confirms the appointment.

Commented [RD(DWH15): Should be s.193 not s.93

Commented [RD(DWH16): A PL so appointed will stay in office until then but the purpose is to take action immediately, not just wait for creditors' meeting

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

Question 3.1 [maximum 5 marks]

Describe why you think a liquidator is able to take action to challenge an unfair preference and set out what a liquidator must show to succeed in such a claim.

Commented [RD(DWH17): (1.5 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves. Also, some elements are here but the answer does not show a good understanding of the question or what is required for unfair preference.

Unfair prejudice – Section 266 of CWUMPO

Commented [RD(DWH18): "preference" not "prejudice". Unfair prejudice is a whole different topic, in the context of shareholder disputes

Unfair prejudice is where the Company has taken action to put one creditor in a better position to another, i.e. they have preferred their interest over the body of creditors. This could be by making payment to the creditor ahead of others, or granting a security to a creditor knowing that the insolvency is imminent and therefore putting them in a better position than they would have done in the normal course of business.

The liquidator has the power to have this transaction set aside, on the basis that this transaction occurred within 6 months of the onset of the insolvency.

Commented [RD(DWH19): Or 2 years if connected, and not necessarily the onset of insolvency. The time goes from the commencement of the liquidation (i.e. petition) but that could be some time after insolvency

It must be evidenced to the court, by the liquidator, that the Company (Director or management etc) knew that the company was insolvent, or an insolvency proceeding was to follow, this is typically proven by evidencing the Company was unable to pay its debts as they fell due, and therefore the body of creditors could not be paid as they fell due so they make the decision to pay one creditor ahead of others. This may be challenged by the Company, if the transaction was shown to be essential to the business, or that in the case this was not paid, the creditors as a whole would have been in a worse position.

Commented [RD(DWH20): Do not have to show management knew of insolvency, just that the company was insolvent

In short, what a liquidator would have to evidence to have this transaction set aside:

- The transaction was within 6 months of the insolvency
- The Company was insolvent/unable to pay its debts as they fell due at the time of the transaction
- The Company had a desire to prefer the creditor (whom was paid)

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.

Commented [RD(DWH21): (2 marks) Not a very full answer but does have main point re the Arrangement, which is good, although a couple of more details. Could also have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai)

In May 2021 new legislation was developed to deal with cross-border recognition between the mainland and Hong Kong – i.e. a mechanism for Hong Kong office holders to obtain recognition and assistance in the Mainland, and vice versa.

Commented [RD(DWH22): Not actually legislation

Most cases of recognition are dealt with in Common Law principles

Record of meeting – 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 mutual recognition between Hong Kong and the Mainland.

Commented [RD(DWH23)]: ?

The record of meeting refers to liquidators, and provisional liquidators application for recognition in the mainland – and vice versa.

The 'Mainland' is defined as covering the areas:

Commented [RD(DWH24)]: No, these are the pilot areas

- i. Shanghai Municipality
- ii. Xiamen Municipality of Fujian Province
- iii. Shenzhen Municipality of Guangdong Province

In order to seek recognition/assistance the following conditions (as set out by the meeting and by the Supreme Court) must be met (these conditions are reflected in relation to Hong Kong but the same apply for the mainland):

- Mainland must refer to the areas as stated above
- The insolvency proceedings must have commenced under CWUMPO or the CO – including schemes, CVLS and compulsory and provisional liquidations
- The COMI must be within Hong Kong
- Principle assets and or business must be within Hong Kong
- A letter of request from the applicant Court is needed

Question 3.3 [maximum 5 marks]

Commented [RD(DWH25)]: (2 marks)
Majorities needed incorrectly stated (see below).

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

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)

A scheme of arrangement is a statutory mechanism under Hong Kong law which allows Companies to make binding compromises or arrangements with their creditors (and member).

Pursuant to Part 13, Division 2 of the Companies Ordinance (sections 668 to 677) and O.102 r2 and r5 of the Rules of the High Court (RHC).

Stages of scheme:

- Application to made to court to convene a meeting of creditors to consider and approve the scheme. The court may give direction re advertising etc. it is noted that this application does not generate an automatic stay or moratorium, if necessary this may be sought by appointment a provisional liquidator whilst the scheme is being considered.
- The application must also contain an affirmation which includes the statement (pursuant to section 671 CO) setting out the position, copy of the scheme documents, notice of meetings, proxy forms, adverts etc.
- The meeting takes place and results of which are registered with the Court – the scheme must gain 75% value of creditors voting to be approved
- An application if make to the Court to sanction the scheme

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

Pros:

- Better outcome for creditors than insolvency
- All creditors are bound (should the voting parameters be met)
- Offers a rescue procedure, should the business be successful this will ensure jobs are not lost, income for the economy etc
- Overseen by the Court
- Advertised – therefore all creditors are made aware
- All creditors are entitled to vote and or be made aware of the scheme
- Company remains in control

Cons:

- No statutory moratorium outside of the appointment of a provisional liquidator
- Court has no jurisdiction to approve or force decision if the creditors do not approve
- Creditors make the decision – although there are some provision to mitigate, there is always the possibility that creditors will vote in a way which is not beneficial the larger body of creditors out of principle
- Cost burden

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

Question 4.1 [maximum 4 marks]

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

As Mr Chan has identified that the Company is insolvent, he should:

- Seek the advice in relation to the Options available to the Company – this may be liquidation, but there may also be an option for the Company to go through a scheme of arrangement and come to an agreement with creditors in order to continue to trade

In the interim, before a decision is made Mr Chan should ensure that he does not:

- Pay a creditor in preference to another in cases whereby the expense is not essential for the trading of the business
- He should not grant any new security
- He should not take on any further credit, this included new agreements but also seeking credit on existing accounts whereby he sees no realist potential of this being paid
- Must not take on any further credit from banks, lenders etc
- Ensure he is acting in the best interest of the creditors

Mr Chans friend, whilst trying to offer sound advice, is not correct in that there is not an option for a ‘friendly’ liquidator. Liquidators are officer of the Court and they act in accordance to legislation and follow this statue in the same way across all appointments. The friend may be referring to the challengeable transactions which sometimes occurred an insolvency appointment, should Mr Chan follow the points as listed above, and continue to act in the best interests of the creditors as a whole there will be no issues.

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.

Commented [RD(DWH27)]: (1.5 marks) A good answer insofar as it goes but should advise re voluntary liquidation options

Commented [RD(DWH28)]: (1 mark) Correct to consider registration, unfair preference but you only mention in passing that may be floating charge, and then do not deal with what the effect of that would be.

An outline is

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

Goshawk Financial Limited (GFL) is one of Kite's lenders. Having been troubled by the way Kite's business has been heading, some months ago GFL insisted that Kite execute a charge over its receivables, also insisting that the charge was stated to be a "fixed charge". Kite agreed and executed the document. No separate account was opened and Kite continued to trade with its customers as before, with money being paid into and out of its normal operating account (not held with GFL).

Recently, GFL appointed a receiver pursuant to the charge executed in its favour. The company has also been wound up on a petition presented by another creditor and a liquidator appointed. The receivables appear to be Kite's only assets. The liquidator asks for your advice on whether she can insist that the receiver hand over realisations he makes in order that the costs and expenses of the liquidation can be met and the unsecured creditors paid at least a partial dividend.

The liquidator should challenge the security as this (on initial information) looks to fall as an unfair preference pursuant to Section 266 of CWUMPO against the estate. Kite Limited has preferred GFL above and beyond the other creditors, and the creditor body as a whole once it realised it was unable to pay its debts falling due.

The charge was also designated Fixed, but looks to be over debtors which are not a fixed assets in any case and the relevant charge would have been floating.

In order to challenge this transaction, and therefore recoup the entire receivables for the benefit of the estate the liquidator should seek an order from the court.

In order for this to be granted they would have to evidence the following:

- The transactions were within 6 months of the insolvency
- The Company Director took such action with a desire to prefer
- The Company was insolvent, unable to pay its debt at the time the transaction was made (charge registered)

The Company should also check if the charge was registered correctly at Registered at Companies Registry and Land Registry

As no new money was exchanged in relation to the granting of the charge, this would further support the claim in the court for unfair preference.

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).

Commented [RD(DWH29)]: (2.5 marks)

Outline of elements should be included is as follows (not all would be needed for full marks):

Question asks that advice be given to L; answer should be written accordingly

The FA clause that all provisions (including repayment to Xu) are void if SPL insolvent is almost certainly void due to the anti-deprivation principle

Whether L is properly appointed would be a matter for BVI law L will be able to take certain steps in Hong Kong without a formal recognition order

Obtain documents from the company's bank (Bay Capital)

Bring an action against Mr. Qi (perhaps for breach of fiduciary duty) (Irish Shipping – but see recent decision of Nuoxi Capital which creates some uncertainty)

IF can find him; also query if has assets (litigation worthwhile?). Need to investigate

L should obtain a recognition order to take other steps that 'belong' to an office-holder as opposed to the company itself (e.g. examination of individuals):

The Hong Kong court is receptive to such applications from legal systems similar to Hong Kong (BVI is one)

The Hong Kong court will need the originating court (BVI) to make a letter of request

The powers that the liquidator can then exercise in Hong Kong must be powers that he has as a liquidator in the home (i.e. BVI) jurisdiction and that he would have if appointed as a liquidator here in Hong Kong (the Singularis principle)

Note that although the jurisdiction to examine in Hong Kong's legislation is a broad one (s.286B), some jurisdictions restrict the power to examine to officers or closely related parties, so this should be checked carefully, certainly as regards Mr. Wong (no suggestion he is an officer). Need to check with BVI lawyers. [nb, some development in more recent cases re basis on which examination powers are exercised]

Re **possible assets in the Mainland** and the new "co-operation mechanism":

o The location of the assets should be identified: at present the mechanism only applies if the debtor's (SPL's) principal assets in the Mainland are in a pilot area or it has a place of business in such an area. The pilot areas are Shanghai, Xiamen and Shenzhen

o In any event, the mechanism only applies to proceedings commenced under the specifically identified Hong Kong legislation (CWUMPO, CO etc.). It is therefore unlikely that the liquidator could use the mechanism via a recognition application (i.e. he is 'only' a BVI liquidator which the Hong Kong court has recognised for the purpose of taking certain steps in Hong Kong; he is not appointed under a proceeding commenced under CWUMPO or CO).

o However, the Hong Kong court does have jurisdiction to wind-up non-Hong Kong companies (s.327) if the core requirements are satisfied. These are:

☐ there must be sufficient connection with Hong Kong, (not necessarily meaning the presence of assets within the jurisdiction);

☐ there must be a reasonable possibility that the winding up order would benefit those applying for it; and

☐ the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

o The liquidator could therefore make an application for an ancillary liquidation and it may then be possible that the new mechanism can be utilised (subject to the other criteria being met) – the mechanism making it clear that the COMI of the debtor (COMI in Hong Kong being a requirement) does not necessarily require the company to be incorporated in Hong Kong. [the answer is may be because where, as here, the company is already in liquidation in its jurisdiction of incorporation, the liquidation here would be ancillary – it is yet to be tested whether the Mainland courts will take issue with this. However, for the purpose of this assessment, marks will be awarded for identifying a s.327 winding up as a possible method of accessing the new cooperation mechanism].

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

The BVI liquidator appointed has identified:

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

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

The liquidator could seek recognition in Hong Kong to pursue asset recovery. It may be advisable for the liquidator to seek the winding up of SPL in Hong Kong, there are provisions for winding up a company not registered in Hong Kong but will considerable business within the Jurisdiction. In terms for releasing assets, this might be the most effective way.

The winding up would be pursuant to Section 327 of the CWUMPO, and would need to fit the core requirements:

- Sufficient connection with Hong Kong
- Reasonable possibility that the winding up would be of benefit to those applying for it
- The court must be able to exercise jurisdiction over one of more personas interested in the distribution of the Company's assets

Owing to the following, there is a high chance this will be granted by the Hong Kong Court:

- FA links both parties to Hong Kong
- Mr Qi and Mr Xu – Hong Kong residents
- Assets in the Mainland
- SPL having a bank account in Hong Kong
- Former employees – based in Hong Kong
- Largest creditor (Mr XU) being based in Hong Kong

The clause in the FA would not proceed the insolvency proceedings and therefore the assets would be realized for the estate as a whole, not for the benefit of the shareholder. The liquidation of SPL would not be determinates by the terms of the FA.

Commented [RD(DWH30)]: Issue is whether Xu had locus in first place and if not whether appointment at risk

Once there is a procedure, or recognition in Hong Kong, then the following will apply in relation to the recent changes in legislation when dealing with assets within the mainland:

Record of meeting – 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 record of meeting refers to liquidators, and provisional liquidators application for recognition in the mainland – and vice versa.

The ‘Mainland’ is defined as covering the areas:

- iv. Shanghai Municipality
- v. Xiamen Municipality of Fujian Province
- vi. Shenzhen Municipality of Guangdong Province

In order to seek recognition/assistance the following conditions (as set out by the meeting and by the Supreme Court) must be met (these conditions are reflected in relation to Hong Kong but the same apply for the mainland):

- Mainland must refer to the areas as stated above
- The insolvency proceedings must have commenced under CWUMPO or the CO – including schemes, CVLS and compulsory and provisional liquidations
- The COMI must be within Hong Kong
- Principle assets and or business must be within Hong Kong
- A letter of request from the applicant Court is needed

The above, in the most part, will be met in the current circumstances, the issue may lie in the proceedings having commenced under CWUMPO or CO, which is why it may also support the reasoning to petition for the liquidation in Hong Kong.

*** End of Assessment ***

TOTAL MARKS: 26 out of 50