



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C**

**HONG KONG**

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

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

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

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

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

## ANSWER ALL THE QUESTIONS

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

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

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

#### Question 1.1

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

A receiver can be appointed –

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

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

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

#### Question 1.2

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

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

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

#### Question 1.3

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

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

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

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

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

#### Question 1.4

Select the **correct** answer:

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

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

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

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

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

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

#### Question 1.5

Select the **correct** answer:

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

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

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

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

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

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

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

#### Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

(a) the Companies Ordinance (Cap 622).

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

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

(d) none of above.

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

#### Question 1.7

Select the **correct** answer:

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

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

**Commented [RD(DWH7):** 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]**

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?

Hong Kong insolvency law is based on old English legislation. The legislation has undergone a number of amendments with the principal statute that deals with personal bankruptcy in Hong Kong is The Bankruptcy Ordinance (Cap 6), as supplemented by the Bankruptcy Rules (Cap 6A).

Under the Bankruptcy Ordinance (Cap 6) Section 4, the jurisdictional requirements as regards a debtor for the Hong Kong court to be able to exercise its bankruptcy jurisdiction over that person are as follows:

- The individual must be domiciled in Hong Kong.
- The individual must be personally present in Hong Kong on the day in which the petition is presented; or
- At any time in the period of three years the individual has been ordinarily resident in Hong Kong or has had a place of residence in Hong Kong or have carried on business in Hong Kong.

Commented [RD(DWH11)]: (3 marks)

**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 lacks a statutory framework that deals with cross-border insolvency. However, the Hong Kong court has been keen to assist foreign representatives by relying on common law principles. The Hong Kong court can exercise its jurisdiction to wind up a non-Hong company provided that certain requirements are met. These requirements were established in the CFA's decision in *Re Yung Kee*.

These "core requirements" are as follows:

- There must be a sufficient connection with Hong Kong. The court will consider the company assets and COMI here.
- There must be a reasonable possibility that the winding up order would benefit those applying for it. If there are assets in Hong Kong, the petitioner should benefit from the liquidation.
- The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the assets of the company. This requirement will not be automatically met by the presentation of a petition by the creditor.

Commented [RD(DWH12)]: (2.5 marks). See below

Commented [RD(DWH13)]: Remember s.327 CWUMPO

Commented [RD(DWH14)]: Not necessarily COMI

**Question 2.3 [maximum 4 marks]**

Commented [RD(DWH15)]: (2 marks). A bit jumbled; suggests not a full understanding. Should also mention that powers are as prescribed by the court (powers depend on circumstances). See also notes below

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

The key statute for dealing with corporate insolvency is the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO"). Under section 193 of CWUMPO, a provisional liquidator ("PL") is appointed for the period after the petition is presented but before an order is made. The PL is tasked with preserving the assets of the debtor during this period. As well as preserving assets, the PL may summon creditor meetings and apply to the court for a company to be wound up in a summary manner when it is a small liquidation. A PL may also be appointed to help facilitate a restructuring proposal or scheme of arrangement, but this cannot be the sole reason for the appointment.

Commented [RD(DWH16): This mixes different kinds of PL

The application to appoint a PL can be made any time after a petition is presented. The application may also be presented at the same time of the petition in urgent cases. The PL can be appointed on a voluntary basis, or the court may also appoint the PL. The court will appoint the Official Receiver as the PL in the interim when the winding up order relates to a compulsory liquidation. This is unless a PL has already been appointed under section 193 of CWUMPO. When appointing a PL, the court will consider factors such as commercial realities, expediency, the degree of urgency and the need for the order.

Commented [RD(DWH17): I am not sure what this means. It is up to the court whether a PL is appointed; although a PL can also be appointed under s.228A

In a creditor voluntary liquidation, the PL must consent to the appointment in writing and must be either a solicitor or a professional accountant. An appointment made in contravention of these requirements is void.

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

#### Question 3.1 [maximum 5 marks]

Commented [RD(DWH18): (4 marks)

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

The main role of the liquidator is to take over control of the company and realize company assets in order to make distribution to the relevant parties. They are also tasked with investigating transactions made by the company within a certain time period prior to the winding up order. The liquidator must also review the proof of claims by creditors and can reject a proof of debt if required.

An unfair preference occurs in an insolvency when an insolvent company acts to place a creditor in a better position that it would have been upon the insolvency of the company. As discussed above the liquidator has the power to investigate these transactions and set aside such transactions. This is to protect creditor equality (pari passu) and to ensure these transactions were not at the detriment to the company stakeholders.

Commented [RD(DWH19): Or surety

Relevant transactions are those entered during the six months prior to the commencement of the winding up or two years where the beneficiary of the transaction was a 'person connected to the company'.

When submitting this application, the liquidator must show that the company was unable to pay its debts or became unable to pay its debts because of the unfair transaction. The application must also show that the company was influenced by a desire to improve that person's position in the event of a liquidation. If the application is successful, the court can make a number of orders including vesting the property which is subject of the unfair preference to the liquidator and discharging the security given by the company.

**Commented [RD(DWH20):** Rebuttable presumption of desire to prefer where beneficiary is a connected person. Should also demonstrate difficulty of this and court's approach (e.g. Re MC Bacon)

### 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):** (4 marks) Good on the new arrangement but should also have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai)

It is evident that Hong Kong has limited formal arrangements to deal with cross-border insolvency. Hong Kong has not adopted UNCITRAL Model Law on Cross-Border Insolvency, does not have bilateral agreements with other countries and is not part of international treaties on cross-border insolvency.

However, when it comes to the Mainland, the above statement is not correct as there is clear co-operation between Hong Kong and the Mainland on cross-border insolvency issues.

Firstly, there is a new arrangement (May 2021) between Hong Kong and certain areas of the Mainland PRC. This provides a mechanism for Hong Kong officeholders to obtain recognition and assistance in the Mainland areas and vice versa. This is an important step for cross-border insolvency in Hong Kong as there are a number of Hong Kong companies that conduct business in the Mainland.

This mechanism was developed from a record of meeting between representatives of the Supreme Court of the Mainland and of the Hong Kong government. The key takeaways from the meeting were as follows:

- The Mainland pilot areas are to be the Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province.
- Hong Kong insolvency proceedings include compulsory liquidations, voluntary liquidations, and schemes of arrangement.
- The debtor's COMI must be in Hong Kong for at least a continuous six-month period before the application for recognition.
- The Hong Kong Administrator may apply for recognition and assistance if the debtor's principal assets are in one of the Mainland pilot areas or the debtor has a place of business in a pilot area.
- A letter of request from the Hong Kong court is necessary.

This mechanism may be very useful going forward, especially if the liquidator wants to gain access to Mainland subsidiaries. This has been seen in China All Access (Holdings) Limited court case. The Hong Kong court has also used this mechanism to grant liquidators recognition in Shenzhen (Samsen Paper Company Limited).

Before this mechanism, the statement would be true as there were no provisions in place for recognition and assistance between Hong Kong and the Mainland. This has been an important step forward for cross-border insolvency issues in Hong Kong.

**Commented [RD(DWH22):** (2 marks) Gives broad outline of scheme but answer does not indicate a good understanding. Majorities needed not clearly stated.

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)

### 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.

The scheme of arrangement mechanism has been used for a number of years in Hong Kong, despite Hong Kong having no corporate rescue legislation.

There is no formal structure for a corporate rescue in Hong Kong. As well as this, the increase in globalization, alternative finance providers and increased diversified investments has added complexities. In the past, the "Hong Kong Approach to Corporate Difficulties" guidelines which were published by the Hong Kong Monetary Authority were followed when dealing with corporate rescues. These guidelines, however, only applied to banks which were creditors.

The co-operation between the Hong Kong practitioners and the Hong Kong courts in achieving practical solutions has led to the scheme of arrangement being used in Hong Kong for restructuring purposes. This arrangement allows companies to make binding arrangements with their members and creditors. This usually includes adjustments of debts owed to its creditors or reduction of share capital. The statutory provisions relating to scheme of arrangement is contained in the Companies Ordinance (Cap 622).

The Hong Kong court takes guidance from English law cases in respect of schemes but there are some differences. For example, there is no "creditors issue letter" in respect of Hong Kong schemes.

The scheme must be approved by the majority of creditors. An application must be made to the court to convene a creditor meeting and once approved, notice must be given to creditors. The application must identify the classes of creditors whose rights will be adjusted by the scheme. An affirmation must accompany the application as well which explains the background to the scheme. The results of the meeting must be reported to the court. Following this, an application is made by petition for the court to sanction the scheme.

Commented [RD(DWH23)]: And 75% by value

The main benefit of a scheme is that in order for it to be approved, the company needs at least 75% by value of the creditors present and voting. Once completed, the scheme of arrangement will also be binding on all creditors. If there was no scheme, the company would need to obtain the approval of 100% of the relevant creditors. Another benefit is that the Hong Kong company can continue trading during the process while keeping the directors in place and will avoid liquidation if the scheme of arrangement is successful.

Commented [RD(DWH24)]: And majority in number

One of the issues with a scheme of arrangement is that Hong Kong does not provide for a moratorium on creditors' actions while the scheme is being processed and the court can also refuse an application for a stay. To overcome this, a petition for a winding up of the company would be presented to the court with the specific power to consider the possibility for a restructuring of the company debts. Once the scheme is completed, the petition could be then dismissed.

Another issue is that once a company listed on the Hong Kong stock exchange is in difficulty, the trading in its shares will usually be suspended. A scheme will also only be effective if the debt is discharged under the law governing the debt.

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

**Question 4.1 [maximum 4 marks]**

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

Mr Chan should be reminded of his fiduciary duty to Mountainview Limited as a director of the company. As the company is having financial difficulties, Mr Chan should be cautious that he does not breach any fiduciary duty by continuing to trade while the company is insolvent. He can also face criminal liability if he is unable to pay his employees. A liquidator can bring claims against directors of insolvent companies under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) §286B and may claw back any unfair or preference transactions.

As Mr Chan does not want the company's affairs looked at too closely, it is likely that there are reviewable transactions that may need to be looked at. One of the key duties of a liquidator is to investigate transactions made by the company within a certain period to the winding up of a company. If this 'friendly' liquidator does not investigate any transactions, they will not be carrying out their role as a liquidator. A liquidator will also look at the conduct of directors and make a report to the Official Receiver.

Also, it is not up to the director to appoint a liquidator. It is up to the creditors in a creditor voluntary liquidation or the court in a compulsory liquidation. The company has no influence over which liquidator is appointed to avoid instances such as the one facing Mr Chan. A liquidator must also consent to the appointment and the appointment of a 'friendly' liquidator is not ethical.

If there are any transactions that Mr Chan feels he should disclose, he should do so as transactions will be investigated. Mr Chan and the other directors need to consider if a winding up is most appropriate for the company or if they can also petition for a scheme of arrangement to restructure their debts.

**Question 4.2 [maximum 5 marks]**

Kite Limited is a Hong Kong incorporated company involved in an import / export business. It buys goods on its own account from suppliers in Mainland China, then sells them on to buyers in Europe at a mark-up. The company has been in difficulty for some time, for example due to reducing margins; unfavourable credit terms leading to a mis-match between the dates on which Kite must pay its suppliers and the dates on which it gets paid by its buyers, thus affecting Kite's cashflow; European buyers going straight to Mainland suppliers, etc.

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

**Commented [RD(DWH25):** (1 mark) Deals with the liquidator and Mr Chan's duties, but not what should be done with the company (e.g. own petition (with shareholder approval (per Emmadart)), voluntary liquidation, even a Scheme).

**Commented [RD(DWH26):** As insolvent, duties owed to creditors

**Commented [RD(DWH27):** 266

**Commented [RD(DWH28):** (3 marks) Most of the elements there but could also consider unfair preference, and (if it is (as is likely)) a floating charge section 267

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 main issue here is whether the charge held by GFL is in fact a fixed charge or floating charge. According to the document the charge is a fixed charge and Kite has agreed to this document. However, the nature of this charge is not fixed. The charge is over receivables which is a floating charge. Also, Kite has continued to trade with its customers which would indicate that this is in fact a floating charge as Kite maintains a measure of control over this asset in the ordinary course of business. This was seen in *Re Spectrum Plus Limited*.

Generally, in Hong Kong, secured creditors like GFL are not dealt with as part of the insolvency process as the process is intended for unsecured creditors. Assets subject to security are not available for realization by the liquidator.

However, if the liquidator can prove that this claim is in fact a floating charge, an exception may exist to this. Firstly, the liquidator should check if the charge is properly registered at the Companies Registry. If it is not, the charge is void and the Receiver cannot enforce the security against Kite. If the charge has been registered as a fixed charge, the liquidator should reference the above case to the Hong Kong court to indicate that this is in fact a floating charge. **The Hong Kong court follows common law frequently in insolvency decisions.** GFL was aware of Kite's financial difficulties so the timing of this charge should be investigated by the liquidator. A floating charge that is created within twelve months before the commencement of the liquidation may be void.

If the charge is voided, the liquidator can insist that the receiver hand over the realizations. If the charge cannot be voided; the liquidator should also determine what value the realization was. If the value of the receivables was greater than the amount owed to GFL, the remaining balance should be available for the general body of creditors. Also, any realizations by the receiver may be used to meet claims of preferential creditors if there are insufficient assets to meet those claims from the uncharged assets available to the liquidator.

### 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)]: ? Relevance

Commented [RD(DWH30)]: (2 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.

SPL is incorporated in the BVI. Therefore, in order to bring winding up proceedings in Hong Kong against an unregistered Hong Kong company, certain requirements must be satisfied. The liquidator must consider whether the proceeding will meet the three core requirements that were set out in Re Yung Kee:

- SPL must have a sufficient connection with Hong Kong. SPL has a bank account in Hong Kong as well as an independent director and bookkeeper who lives in Hong Kong. This can be argued by the liquidator to show that a sufficient connection exists.
- The liquidator must show that the winding up will benefit the petitioner, Mr Xu. If assets in Hong Kong can be realized for the benefit of Mr Xu, this will satisfy this requirement.
- Finally, the Hong Kong court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets. The FA is governed by Hong Kong law so the Hong Kong court can exercise jurisdiction here.

Commented [RD(DWH31): The petitioner in HK unlikely to Mr Xu but the liquidator

Based on the facts above, a proceeding in Hong Kong will be recognized here.

The liquidator should investigate the validity of the FA. Based on the facts, it does not appear that this transaction is impeachable and should be void. It is not an extortionate credit transaction and was not entered into near to the timing of the winding up petition (two years have passed if it was argued that Mr Xu is a connected party). Mr Xu should therefore be included as a creditor in the priority of payments for the liquidation. Also, the fact that all assets will immediately vest for the benefit of the shareholders when Mr Qi is the sole shareholder is not acting in good faith.

Commented [RD(DWH32): ?

Commented [RD(DWH33): ?? Anti-deprivation principle?

The liquidator should be aware of a new arrangement (May 2021) between Hong Kong and certain areas of the Mainland PRC. This will allow Hong Kong liquidator to

obtain recognition and assistance in the Mainland areas, which will be crucial if there are assets in the Mainland.

The liquidator must find out where the assets are located as the Mainland pilot areas are to be the Shanghai Municipality, Xiamen Municipality of Fujian Province and Shenzhen Municipality of Guangdong Province. The liquidator will need to show that the debtor's COMI is in Hong Kong for at least a continuous six-month period before the application for recognition. As well as this, the debtor's principal assets must be in one of the Mainland pilot areas or the debtor has a place of business in a pilot area. The liquidator will need to gather more facts in relation to the assets based in the Mainland to ensure these requirements are met.

**\* End of Assessment \***

**TOTAL MARKS: 33.5 out of 50**

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(2 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].