



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.

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

(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): Incorrect (0 marks) – there is no definition of insolvency in Cap 32. 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?

The Hong Kong court can make a bankruptcy order against a debtor if the debtor is an individual pursuant to section 4 of the Bankruptcy Ordinance (Cap 6) ("BO"):

- Be domiciled in Hong Kong;
- Be personally present in Hong Kong on the day on which the petition is presented; or
- At any time in the period of three years ending with that day (i) have been ordinarily resident, or have had a place of residence, in Hong Kong; or (ii) 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?

The Hong Kong court can exercise its jurisdiction to wind up a non-Hong Kong company if the petitioner can satisfy the court with the following "three core requirements" from the decision from *Re Yung Kee*:

- 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.

Question 2.3 [maximum 4 marks]

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

Under section 193 of Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("CWUMPO"), the court may appoint a provisional liquidator at any time after the presentation of a winding-up petition and before the making of a winding-up order in respect of a company. The court may appoint either the Official Receiver or any other fit person to be the provisional liquidator. The reasons for appointment of provisional liquidation *inter alia*:

- To preserve assets during the period between presentation of petition and the order being made; and
- To facilitate a restructuring proposal (although it cannot be the sole purpose of such 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): (3 marks)

Commented [RD(DWH12): (3 marks)

Commented [RD(DWH13): (3 marks). Should refer to powers being prescribed by the Court and need to show likely to be wound up when petition is heard

A provisional liquidator can be appointed under section 228A of CWUMPO but must consent to his appointment in writing, and must be either a solicitor or a professional accountant. Appointment made in contravention of these requirements is void and appointee is liable to a fine. The appointment can be made in circumstances where the directors' of the Company is of the opinion that Company should be wound up with immediate effect, pass a resolution at the directors' meeting, and deliver to the Registrar a statement certifying that a resolution has been passed to the effect that:

- The company cannot by reason its liabilities continue its business;
- The company can only be reasonably and practicably wound up under this section and not any another section; and
- Meetings of the companies creditors and contributories will be summoned no later than 28 days from filing the winding up statement.

The reason for this appointment is to speed up the appointment of a liquidator in an emergency case, where perishable goods are involved.

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

Question 3.1 [maximum 5 marks]

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

Section 50 of the Bankruptcy Order Cap 6 ("BO") sets out the definitions and what is considered as an unfair preference. In particular, subsection 4, states that the court can only make an order regarding unfair preference if it can be proven the debtor had the "desire" to place a person (within the scope of the section) in a better position than the position they would have been had the act had not been done.

In order to make a successful claim, the liquidator must prove the following:

- i. The person who received an unfair preference was a person who is on the debtor's creditors or a surety / guarantor for any of the debtors debt or other liabilities (section subsection 3 (a) of the BO);
- ii. The debtor was either insolvent at the time of payment of unfair preference or the same had made the debtor insolvent (section 51 (2) of the BO);
- iii. The transfers of assets or the act of payment (whether in part or in full) to a creditor's debt was made within 6 months prior to the commencement of the insolvency proceeding or 2 years prior to the commencement of insolvency proceedings for creditors who are considered associate of the debtor (section 51 (1) of the BO); and
- iv. the debtor had the "desire" to place a person (within the scope of the section) in a better position than the position they would have been had the act had not been done.

It is difficult to prove "unfair preference" in Hong Kong because a defendant in a preference action is entitled to rely on the defence that genuine pressure was exerted on the debtor resulting in the debtor to pay / distribute the asset to the creditor rather than from a standpoint of a "desire to prefer". This was explored in the case of *The Joint and Several Trustees of the Property of Hau Po Man, Stanley (in bankruptcy) v Hau Po Fun Ivy and Derek Yuen* ("Hau Po Man case"). They Hau Po Man case questioned the debtor's desire to unfairly prefer payment to an associate and her husband. It was discussed that in order to

Commented [RD(DWH14): (3.5 marks) Need to say "why". Reason is the pari passu principle and that all creditors should be treated fairly amongst themselves. Also, although the principles (and application) are almost the same as between bankruptcies and liquidations, as the question refers to a liquidator, it would be better to refer to the CWUMPO provisions (s.266 et seq)

Commented [RD(DWH15): Rebuttable presumption of desire to prefer where beneficiary is a connected person.

prove that relevant desire does not exist, the pressure receive from a creditor has to be proper commercial pressure or physical pressure such as intimidation. This is one aspect that a liquidator can challenge as the burden of proof is on the debtor to demonstrate complete absence of relevant desire on the debtor's part.

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.

Yes, the statement holds true for the Mainland as well.

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 only mechanism available to corporations seeking to restructure its debts in Hong Kong is the scheme of arrangement procedure.

A scheme of arrangement (the "scheme") allows companies to make binding compromises or arrangements with their members and / or creditor, including reduction of share capital of their members or adjustment of debts owed to their creditors. Rules are contained in Part 13, Division 2 of the Companies Ordinance (668 to 677).

In order to make a scheme effective, the following steps are taken:

1. Make an application to make an order for leave to convene meetings with relevant creditors (and / or contributories) to consider and approve the scheme. This is usually made on an *ex parte* basis. This must be accompanied by an affirmation explaining the background to the scheme and *inter alia*, exhibit a copy of the draft explanatory statement, a copy of the draft scheme document, a copy of the notices of the scheme meetings, a copy of the proxy forms, and draft advertisement to be published. The application is heard by the court whereat the court will give directions for giving notice of and advertising such meetings (sections 669 to 670);
2. The scheme meetings take place, and the results of such meeting(s) are reported to the court. Every notice summoning the meeting that is sent to creditors (and contributories), or given by advertisement must be accompanied by an explanatory statement explaining the effect of the arrangement (section 671); and
3. An application is made by petition for the court to sanction the scheme (section 673).

A scheme enables companies and their creditors to compromise or adjust debts if stipulated majorities of the relevant creditors (at least 75%) approve such compromise or adjustment and the court sanctions such arrangement. Without such arrangement, a company would be required to obtain the approval of 100% of the relevant creditors to contractually vary the debt. This is beneficial to companies in cases where a company seeks approval from many creditors and it is difficult to obtain unanimous consent from all creditors. It is also beneficial to creditors where there may be hold-out creditors who seek an unfair advantage against

Commented [RD(DWH16): (0 marks) No attempt to answer the question properly. Should have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai) and then the 2021 Arrangement with the outline details

Commented [RD(DWH17): (2 marks) 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 main disadvantage is no 'built-in' moratorium whilst the restructuring progresses

Commented [RD(DWH18): Need majority in number representing 75% in value. (So one (or a few) big creditor(s) cannot pass the vote alone)

other creditors in similar classes. On the other hand, the scheme is disadvantageous to non-consenting creditors (in the same class) as they may be bound to terms of the scheme.

As explained above, there is a process to the scheme. The court must be satisfied that creditors have been given sufficient explanation of the scheme and its affect. The court must also be satisfied that the relevant class of creditors was fairly represented and acting in *bona fide* and not coercing the minority which would result in adverse returns to creditors in that class. The process is court supervised therefore the scheme considers what is fair for both debtors and creditors (and contributories) under the scheme.

On the other hand, the process is timely and may incur high cost (hiring professionals to make analysis of the scheme and legal matters to assist with applications). There is a risk that either the creditors (and contributories) or the court rejects the scheme. The company is already limited in financial resources and making subsequent adjustments / updates to the application will incur more cost. Time and cost spent will be wasted if approval is not obtained.

Another issue with the scheme is in instance where the debt being adjusted has guarantors. Process of the scheme may cause the release of creditors' claims under guarantees. The debtor must satisfy the court that scheme which releases obligation of guarantors does not reduce creditors' claims when a scheme is put in place.

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.

If Mr Chan fully believes that Mountainview Limited ("Mountainview") is unlikely to continue as a going concern, Mr. Chan can choose to put the company into liquidation. In an insolvent company, which is the case for Mountainview considering Mr Chan believes the company is unlikely to continue in business, then Mountainview can place present a petition to the High Court to wind up itself.

The term "friendly" liquidator does not exist in terms of "light" investigation being performed on the company's affairs. When the High Court places the company into liquidation and a liquidator is appointed (initially a provisional liquidator is appointed until a final liquidator is appointed upon the approval from creditors and contributories at the meetings and a resolution is passed), the liquidator has the following powers, *inter alia*, take control the assets and accounting records of the company and investigate the causes of the company's failure by reviewing the statement affairs of the company. Once the liquidator concludes its review, the liquidator must take appropriate action against those officers, directors and those wrongdoers including reporting the same to the authorities.

Mr Chan can also opt for a rescue process if he still thinks there is some way that Mountainview can be salvaged. This is done through a restructuring process called the scheme of arrangement. This would allow Mountainview to arrange or compromise with their members by way of reduction of share capital or with their creditors by adjusting debts owed

Commented [RD(DWH19): (1.5 marks) First piece of advice is that it is not correct that Mr. Chan "must" go to court. The voluntary liquidation options should be discussed.

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

Commented [RD(DWH20): But a company cannot petition on the basis of a resolution by directors alone (Emmadart) and there is no indication that Mr. Chan is (necessarily) the only shareholder) so needs shareholder support

to them. One of the disadvantages with this procedure is that it does not grant a stay in proceeding (unlike a liquidation process) but regardless, this is also an option.

Restructuring options are also reviewed by a provisional liquidator even if Mr Chan choose to take the liquidation route straightaway.

Question 4.2 [maximum 5 marks]

Commented [RD(DWH21)]: (4 marks) Good answer but not error below

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.

Goshawk Financial Limited ("GFL") insisted that Kite Limited ("Kite") place "fixed charge" over their receivables to them. The questions to assess is what type of charge did GFL create, is the charge, in fact, a "fixed charge" and whether GFL has valid charge over those assets.

A fixed charge is a charge in relation to a specific asset and attaches as soon as the charge is created, or the relevant asset is acquired by the debtor. Fixed charge is so called because:

1. the value is somewhat fixed i.e. it does not fluctuate in value; and
2. the lender must have control over the assets, otherwise the charge is a floating charge.

Does GFL's creation of the charge meet the definition of a fixed charge?

1. Kite continued to use money being paid from its customers to pay out its normal operations cost, therefore the money fluctuates over time; and
2. No separate account was set up in GFL to secure the money realized from Kite's customers, therefore GFL does not have control over the asset.

It does not appear that GFL charge cannot meet the definition of a fixed charge. The next question is whether the charge created constitutes a floating charge.

A floating charge was defined in a case called *Re Yorkshire Woolcombers Association Limited* [1903] 2 CH 284. A charge meets the definition of a floating if it meets the following criteria:

1. It is a charge on a class of assets of a company present and future;
2. If that class is one in which, in the ordinary course of the business of the company, would be changing from time to time; and
3. If found that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets dealt with.

Does GFL's charge meet the definition of a floating charge instead?

1. GFL's charge is over the receivables of Kite (assumed it is both present and future as it does not state in the case study otherwise);
2. The amount fluctuates over time as more receivables are realized and at the same time more operation cost is incurred and paid (also assuming some customers may have fully paid up from time to time therefore also changing the composition of the charge); and
3. Kite continued to use the amount realized from receivables therefore was allowed to continue to run in the ordinary course of business until the GFL appointed a receiver over the charge and Kite was placed into liquidation.

It appears that GFL's charge meets the definition of a floating charge, therefore the charge should at least be considered as a floating charge instead of a fixed charge.

Does GFL have a valid charge of the receivables?

In order for GFL to have security over the assets, as long as the charge was registered in accordance with section 334 of the Company Ordinance (Cap 622) ("CO") and it was registered within one month of the date of its execution as prescribed in section 335(5)(a) of the CO. Furthermore, under section 267 of the CWUMPO, a floating charge will not be valid if it is entered into within a period of 12 months prior to the commencement of the liquidation and that the creation of the company was done at the time the company is insolvent or it made the company insolvent. There is insufficient information present in the case study, therefore in answering the remaining issue, I assumed that these have been completed and the charge does not interfere with the requirements under 267 for valid floating charge.

Since the charge is considered a floating charge as above, the assets under the floating charge is considered to be part of the assets to be distributed by the liquidator in the liquidation and ranks below the following:

- Expenses of the winding up including the liquidator's remuneration; and
- Preferential creditors (section 79 and section 265 of the CWUMPO).

The liquidator is able to realize assets in order to pay its fees and expenses however, they cannot make payment to the unsecured creditors as it ranks below the floating charge holders. It is unlikely that the unsecured creditors will be able to receive distribution as the receivables are the only assets of the company. I assumed that the amount realized from the receivables is below the amount required to satisfy GFL's claim.

Question 4.3 [maximum 6 marks]

Commented [RD(DWH22)]: No, only the preferentials

Commented [RD(DWH23)]: (0.5 marks) for mentioning the new Mainland mechanism and s.327 but the answer suggests limited understanding of the position and what advice is being given

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]

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

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

The BVI liquidator appointed has identified:

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

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

A company can be placed into a compulsory liquidation when a petition is filed to the High Court creditor.

Commented [RD(DWH24)]: ? Relevance ?

The first question is whether the fact that the project was not developed within two years and Mr. Xu is owed by Sunrise Pacific Limited ("SPL") in the sum of \$22 million as contained in the Framework Agreement ("FA") or the clause under the FA that in the event the SPL becomes insolvent then all other provisions is void.

The facts of the case suggest that Mr Xu discovered that even start the project (at least 2 years after the FA was signed), prior to the filing of petition. At that stage, Mr Xu's obligation

would have crystallized, and the clause included in the FA is void. SPL owes Mr Xu \$22m prior to the petition of the winding up, therefore Mr Xu standing in bringing the winding up in the first place. Consequently, Mr Qi should not repay shareholders loans that he made.

The liquidators believe that SPL has assets in Mainland although the liquidators are unsure of where the assets are located. There are areas of Mainland PRC [i.e. Macau and Taiwan that is subject to common law rules therefore the liquidator can pursue those assets if found under common law rules.]

Commented [RD(DWH25)]: ??

Some assets may be in Hong Kong. Hong Kong has not adopted the UNCITRAL Model Law and is not a party to any international treaties that deal with cross-border insolvency. However, an arrangement was made in May 2021 between Hong Kong and the Mainland. Hong Kong officeholders can obtain recognition and assistance in certain areas of Mainland PRC and Mainland officeholders can obtain recognition and assistance in Hong Kong. As such, the liquidator must first seek for the proceeding to be recognized in Mainland which would result in an appointment of a joint liquidator in Mainland. Mainland liquidator can seek recognition and assistance from a Hong Kong liquidator.

In *China Huiyan Juice [2020] HKCFI 2940*, it was held that in an application to grant assistance in Hong Kong, the petitioner must emphasize the benefit from a winding up order made in Hong Kong. An example of this benefit is that Mr Qi is a Hong Kong resident, any insolvency / legal pursuance against him can be done so once Hong Kong liquidator has been appointed.

Section 327 of CWUMP requires three things to enable them to wind up the company in Hong Kong:

- Sufficient connection with Hong Kong (not necessarily presence of assets) – Mr Qi as a resident in Hong Kong
- Reasonable possibility that winding up order would benefit those applying for it – as discussed above, it does; and
- The court must be able to exercise jurisdiction over on or more persons interested in the distribution of the company's assets – Mr Wong (a Hong Kong resident) is a book-keeper and may be owed some distribution from the estate.

The above meets the criteria for the BVI liquidator to receive assistance from Hong Kong.

*** End of Assessment ***

TOTAL MARKS: 27.5 out of 50

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(0.5 marks) for mentioning the new Mainland mechanism and s.327 but the answer suggests limited understanding of the position and what advice is being given

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].