



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.
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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.

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 Court can exercise its bankruptcy jurisdiction over a debtor if the debtor is an individual and pursuant to Section 4 of the Bankruptcy Ordinance (Cap 6), the individual must:

- a) be domiciled in Hong Kong;
- b) be personally present in Hong Kong on the day the petition is presented; or
- c) 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 “core requirements” for the Hong Kong court to exercise its jurisdiction to wind-up a non Hong Kong company are:

- a. that there must be a sufficient connection with Hong Kong i.e presence of assets in Hong Kong or link of genuine substance between the company and Hong Kong.
- b. That there must be a reasonable possibility that the winding-up order would benefit those applying for it; and
- c. 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?

Pursuant to section 193 of CWUMPO, appointment of a provisional liquidator can be made 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.

Circumstances where there is a risk of dissipation of assets prior to the making of the liquidation order will normally serve to justify the appointment of provisional liquidator.

The provisional liquidator will then tasked with preserving the company's assets during the period after presentation of the petition but before any liquidation order is made. However, the provisional liquidator will not have the powers to realize the assets of the

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). Would have been preferable to include source (CFA's decision in Yung Kee)

Commented [RD(DWH13): (2.5 marks). Should refer to powers being prescribed by the Court and need to show likely to be wound up when petition is heard. Also see note below

company unless directed by the court. The provisional liquidator may also be appointed to facilitate any restructuring proposal.

Commented [RD(DWH14): But this cannot be the only reason (Legend)

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.

Commented [RD(DWH15): (1 mark) Needs to be a much fuller answer including addressing the 'why' that is asked. Need to set out time limits; difference between connected and not connected 'beneficiaries' etc.

A liquidator is able to challenge an unfair preference as Section 266 of CWUMPO allows the Court to make an order that it thinks fit for restoring the position to what it would have been if the company had not given that unfair preference, on the application made by the liquidator.

For the claim to be successful, the liquidator is required to show that at the time of the unfair preference was given, the company was unable to pay its debts or become unable to pay its debt as a result of the unfair preference transaction. The liquidator must also prove that the company was "influenced by a desire" to improve the recipient of the unfair preference's position in the event of a liquidation.

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(DWH16): (5 marks)

Notwithstanding Hong Kong's limited formal arrangements to deal with cross-border insolvency, traditionally Hong Kong court has been keen to rely on common law principles to assist foreign representatives. However, in the case of in the Mainland where its insolvency laws deviates from the assisting or ancillary jurisdiction referred to by the Hong Kong Court does not prevent the Hong Kong Court from rendering their assistance to the insolvency proceedings in the Mainland. The Hong Kong Court has on at least two occasion i.e in the CEFIC Shanghai International Group Ltd's decision and Shenzhen Everich Supply Chain Co's decision recognised the appointment of officeholder appointed in the Mainland as the Hong Kong Court is satisfied that the PRC insolvency law provided for a collective process.

In May 2021, a new co-operation mechanism between Hong Kong and the Mainland was derived from the record of meeting between representatives of the Supreme Court in the Mainland and of Hong Kong Government. The meeting refers to mutual recognition and assistance to "bankruptcy proceedings" which applies to corporate insolvency between Hong Kong and the Mainland. The record of meeting refers to the entitlement provided to both Hong Kong appointed liquidators and Mainland administrator to apply for recognition in the Mainland and in Hong Kong respectively.

In addition, the Supreme Court's opinion has also supplemented the record of meeting which provides:

- i. The pilot areas in the Mainland where liquidator in Hong Kong can seek recognition;
- ii. That "Hong Kong Insolvency Proceedings" means any collective insolvency proceedings commenced under CWUMPO or the CO and includes compulsory

- liquidations, creditors' voluntary liquidation and schemes of arrangement promoted by liquidator or provisional liquidator.
- iii. Debtor's centre of main interest must be in Hong Kong with "Centre of Main Interest" for these purposes means place of incorporation of the debtor. The People's Court shall also take into account other factors such as place of principal office, place of principal asset etc.
 - iv. If the debtor's principal assets in the Mainland are in the pilot area, the Hong Kong administrator may apply for recognition and assistance in accordance with the opinion.
 - v. A letter of request from Hong Kong Court is necessary.

Question 3.3 [maximum 5 marks]

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

A scheme of arrangement is a statutory mechanism which allows companies to make binding compromises or arrangements with their members and/or creditors (or any class of them). Scheme of arrangement may include adjustment of debts owed to its creditors or reduction of share capital. A company, any creditors or class of creditors, members may apply to court for an order of a meeting with creditors or class of creditors, members or class of members respectively to be summoned. An explanatory statement explaining the effect of the arrangement or compromise is to be prepared for the creditors or members. Upon agreement of a majority in number representing 75% in value of the creditors in the case of a meeting of creditors or 75% in value of the class of creditors in the case of a meeting of class of creditors, the Court may sanction the arrangement or compromise.

The pros of scheme of arrangement includes that:

- It allows companies to enter into arrangement or compromise with its creditors if stipulated majorities of relevant creditors approved such compromise or arrangement.
- It allows companies to enter into arrangement or compromise with its creditors in circumstances where it is impossible to obtain unanimous consent of all the creditors.

The cons of scheme of arrangement is that the process, on its own lacks moratorium.

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.

Commented [RD(DWH17)]: (2.5 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)
Should reference more the court involvement, scrutiny of explanatory statement etc, not a 'rubber stamp'

Commented [RD(DWH18)]: (1.5 marks) see notes below; also, bear in mind the answer is supposed to be advice to Mr. Chan.
Should also advise that if company is insolvent owes duties to creditors ahead of the company

With regards to the advice received, it is not entirely correct that the only option available for Mr. Chan is to make application to Court to wind-up the Company. If majority of the Company's creditors are willing to enter into an arrangement or compromise, the Company may want to enter into a Scheme of Arrangement with the creditors and apply to Court for an order for a meeting with creditors for that purpose.

Commented [RD(DWH19): The advice is not correct, but not for this reason. It is not correct because it is not a "must" that Mr Chan applies to court

Otherwise, should the Company is not able to enter into a compromise with its creditors, Mr. Chan may also wind-up his Company by way of a creditors voluntary liquidation. Choice of liquidator will be nominated and voted in by the creditors during the first meeting of creditors. As for winding-up by the Court, the company may apply to court for the winding-up if the is unable to pay its debts. The Court will then have the power to appoint a liquidator or liquidators, provisionally or otherwise. The Court may appoint either the Official Receiver to be the provisional liquidator. As such, the advise is inaccurate that Mr. Chan will be able to appoint a liquidator which is "friendly" to his cause, as the power of appointment of liquidator lies with the Court. Upon winding -up of the Company by the Court, Mr. Chan's power as a Director shall cease.

Commented [RD(DWH20): Importantly, should also advise Mr. Chan that Liquidators should be neutral and carry out their duties (including investigation of how the company has been run/conduct of directors) irrespective of who appoints/nominates them

Question 4.2 [maximum 5 marks]

Commented [RD(DWH21): (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

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

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

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

The characteristic of the security arrangement executed between Kite Limited and GFL where Kite Limited have given a charge over its receivables to GFL meets the definition of a floating charge notwithstanding that the charge was stated as "fixed charge". This is because, Kite Limited is able to continue to deal with its receivables in its normal course of business with the monies collected being paid into and out of Kite Limited normal operating account. In the case of Orion Finance Ltd v Crown Financial Management, the court has shown that it has considered the actual effect of the arrangement instead of the language used by the parties.

In view that the effect of the arrangement is of a floating charge, the liquidator can make a case for the preferential creditors claim to be paid out of the realization from the assets which are subject to the floating charge before the realization can be used to satisfy the claims of the charge holder.

The liquidator will also be able to claw back the realization by the receiver if the liquidator is able to determine whether GFL have previously registered the fixed charge pursuant to Section 335 of the Companies Ordinance. If the charge is not registered, then the charge against the company is void and the liquidator is able to claw back the realization from the receiver.

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 Xu 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.

Commented [RD(DWH22)]: (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].

Notwithstanding Hong Kong lacks statutory framework to deal with cross border insolvency, Hong Kong court normally provides assistance to foreign liquidators based on common law principles. Under Hong Kong jurisdiction, no court order is required for recognition of foreign liquidators. Hong Kong Court may make an order to assist the liquidators on their application upon a letter of request issued by the foreign liquidators. The BVI liquidators should issue a letter to the court to seek for assistance on the following:

- i. Obtain Court order for officers of SPL to surrender books and records of the Company;
- ii. Obtain Court Order to direct the Hong Kong Bank to freeze and return the money to the liquidator;

As for the liquidator's concern on the validity of his standing pursuant to the clause in the FA, it is noted that the clause has the intention to evade insolvency law and created to benefit solely for the benefit of the shareholder instead of creditors in case of insolvency. Under this circumstance, the court generally will not uphold the terms of the contract and may void the terms following the anti-deprivation principle. As such, BVI's liquidator should not be concern of his standing to bring the winding-up proceedings.

In regard to SPL's assets in the Mainland, the "record of meeting" between the representatives of the Supreme Court in the Mainland further developed the co-operation mechanism between Hong Kong and the Mainland. This allows for mutual recognition and assistance to "insolvency proceedings" between Hong Kong and the Mainland. In the context of Hong Kong, "insolvency proceedings" means any collective insolvency proceedings commenced under CWUMPO or the CO and includes compulsory liquidations, creditors' voluntary liquidations and schemes of arrangement which are promoted by a liquidator or provisional liquidator.

Pursuant to the "record of meeting", liquidators from Hong Kong may apply for recognition in the Mainland and obtain assistance from the Mainland to recover debtor company's assets which are located in the designated pilot areas in the Mainland. To qualify for recognition, The debtor's centre of main interest must be in Hong Kong, with the Opinion stating that "Centre of main interests" for these purposes generally means the place of incorporation of the debtor. However, the Mainland's court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor.

As such, the BVI's liquidator will need to first determine the following in order to qualify for the assistance afforded under the "record of meeting":

- i. Whether SPL's "COMI" is in Hong Kong;
- ii. Whether SPL's asset to be recovered in the Mainland is located at the designated pilot areas in the Mainland.

*** End of Assessment ***

TOTAL MARKS: 34 out of 50

Commented [RD(DWH23)]: Depends what want to do. Also, not consistent with the subsequent sentence