



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8C

HONG KONG

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
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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.

Commented [RD(DWH3)]: Incorrect (0 marks) – s.327 provides a statutory basis to wind up such a company (section 7 of text). It will often be the case that no director resides in Hong Kong but a foreign company carries on business here

- (c) As a matter of common law, the Hong Kong court has the right wind up such a company.
- (d) The Hong Kong court has a statutory jurisdiction to wind up such a company, and can exercise that jurisdiction if certain requirements are met.

Question 1.4

Select the **correct** answer:

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

- (a) must first be used to satisfy the costs and expenses of the liquidator.
- (b) must first be used to satisfy the whole of all claims by employees but no other claims.
- (c) must first be used to satisfy the claims of preferential creditors as described in the relevant section of CWUMPO.
- (d) will be kept entirely by the receiver for the benefit of the charge holder irrespective of what claims, preferential or otherwise, exist against the company.

Commented [RD(DWH4): Incorrect (0 marks) – see section 6.4.1 and 5.5 of text: preferential creditors are paid out of assets subject to a floating charge (unless the company is in liquidation and there are sufficient assets to make those payments out of the general estate). Note the question refers to the charge being over all of the company's asset, such that there would be no uncharged assets for the liquidator to meet the preferential claims out of uncharged assets.

Question 1.5

Select the **correct** answer:

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

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

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

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

Question 1.6

Select the **correct** answer:

Hong Kong legislation provides a statutory definition of insolvency in –

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

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

Question 1.7

Select the **correct** answer:

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

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

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

Question 1.8

Select the **correct** answer:

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

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

Commented [RD(DWH8)]: Incorrect (0 marks) – see rule 84 CWUR and section 5.5 of text: can vote but only for unsecured portion of its debt

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]

Commented [RD(DWH11): (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?

For the Hong Kong court to be able to exercise its bankruptcy jurisdiction over a person, the person must meet the following jurisdictional requirements (in accordance with section 4 of the Bankruptcy Act). The person must:

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

Question 2.2 [maximum 3 marks]

Commented [RD(DWH12): (2 marks). The core requirements are those stated, but they are NOT mentioned in s.327; they are common law based (see CFA decision in Yung Kee)

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” that enable the Hong Kong court to exercise its jurisdiction to wind up a non-Hong Kong company are found in section 327 of CWUMPO.

The Hong Kong court needs to demonstrate that the non-Hong Kong company has a sufficient connection with Hong Kong, although that doesn't necessarily mean that the non-Hong Kong company has to hold assets there. It also needs to be satisfied that there is the reasonable possibility that the winding up order would benefit those applying for it. And, finally, the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the non-Hong Kong company assets.

Commented [RD(DWH13): No, the applicant must demonstrate TO the court

Question 2.3 [maximum 4 marks]

Commented [RD(DWH14): (3 marks). Should refer to powers being prescribed by the Court and need to show likely to be wound up when petition is heard

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

A provisional liquidator (“PL”) can be appointed after a petition is presented, but prior to an order being made. A PL has a duty to preserve a company's assets during this period and its appointment can be made to assist with facilitating a restructuring proposal (although NB, this cannot be the only reason for its appointment).

In order for a PL to be appointed, there must be sufficient reasons justifying the same, for example, there is a risk that the company's assets will be dissipated or otherwise in jeopardy, prior to the winding up order being made. The Court takes into account the balance of convenience, commercial realities, the degree of urgency, and the need for the appointment.

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.

Unfair preferences are covered off in section 266 of CWUMPO.

I think a liquidator is able take action to challenge an unfair preference(/impeachable transactions) as, firstly, it occurs when an insolvent company places a creditor or guarantor in a better position than it would have ordinarily been in, upon the company's insolvency.

In order to succeed in such a claim, a liquidator must be able to demonstrate that at the time the unfair preference was given, the company was unable to pay its debts (or became unable to pay its debts) as a result of the transaction(s) in question. NB, this is presumed in instances where the unfair preference related to a person connected with the company.

The liquidator must also prove that the company was "influenced by a desire" to improve the recipient's position in the event of a liquidation. This desire to prefer is difficult to demonstrate – such difficulties are illustrated in the case of Stanley Hau.

If a transaction is proved to be an unfair preference, the court may grant an order:

- Vesting in the liquidator the property which is the subject of the unfair preference;
- Releasing or discharging security given by the company;
- Directing any person to pay to the liquidators any benefits received from the company;
- Reviving the obligation of any surety or guarantor which had been released or discharged; and
- Providing security for the discharge of any obligation imposed by or arising under the order.

In granting an order on the terms of the above, the company's loss may be remedied.

Question 3.2 [maximum 5 marks]

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

Whilst Hong Kong has not adopted the Model Law and is not party to any international treaties dealing with cross-border insolvency, in May 2021, it entered into an arrangement with certain areas of the Mainland for a new co-operation mechanism. This arrangement provides a mechanism for Hong Kong office holders to obtain recognition and assistance in specific areas of the Mainland, and vice versa.

I cannot comment further upon the statement given above as my knowledge of the Mainland is limited.

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.

Commented [RD(DWH15): (2.5 marks) Should also state time limits and distinction between connected and unconnected parties

Commented [RD(DWH16): Should go a bit further to say would offend fairness between creditors/pari passu rule

Commented [RD(DWH17): Presumption of insolvency applies only to transactions at an undervalue, not unfair preferences (s266B(3))

Commented [RD(DWH18): Rebuttable presumption of desire to prefer where beneficiary is a connected person.

Commented [RD(DWH19): (0.5 mark) not a full answer.

Should also have referred to the pre-existing tools (e.g. s.327 and common law developments such as CEFC Shanghai)

The answer should also give some details of the new Arrangement and not just mention it

Commented [RD(DWH20): (1 mark) Not a very full answer. The answer just refers to Schemes and says do not need 100% (plus reference to moratorium).

Should mention how a scheme works and court involvement for example.

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)

Part 13 of Division 2 of the Companies Ordinance (in particular, sections 668 to 677) covers the statutory regime for Schemes of Arrangement ("SOA").

A SOA is a statutory mechanism which allows companies (that aren't in liquidation) to make binding arrangements (or compromises) with any class of its creditors and/or members. Such arrangements or compromises include the adjustment of debts to its creditors and reduction in share capital.

Commented [RD(DWH21): Not correct - a PL or liquidator can promulgate a scheme

Pros

- A SOA acts as a court sanctioned arrangement (or compromise) and binds all creditors of the relevant class – even those who vote against it. To this end, companies can restructure its debts even if all of its creditors or members aren't on board;
- A SOA has the ability to cancel the existing instruments and replace them with new ones; and
- A SOA is one of the limited options available for companies wishing to restructure.

Cons

- A SOA is one of the limited options available for companies wishing to restructure;
- A SOA does not involve a moratorium being granted, meaning that the company in question is not protected and can still be at risk of actions being brought against it; and
- As noted above, a SOA acts as a court sanctioned arrangement (or compromise) and binds all creditors of the relevant class – this is bad for the creditors and members who aren't in agreement with the plan.

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(DWH22): (1.5 marks) Some elements there but not clear (particularly given should be advice). What about voluntary liquidation options?

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

Further information is needed in order to confirm whether Mr. Chan's friend is correct, however, my comments as regards Mountainview Limited's position are set out below.

Commented [RD(DWH23): Not really; he is not correct. It is not a "Must" that Chan go to court; and there is no such thing as a 'friendly' liquidator

In his capacity as director of Mountainview Limited, he can petition for it to be wound up. NB, if he was a creditor of Mountainview Limited, he could also petition in his capacity as creditor.

Commented [RD(DWH24): No he cannot; shareholder resolution needed (Emmadart case)

To advise properly, it would be useful to understand Mr. Chan's relationship(s) with Mountainview Limited's shareholders. If the shareholders were in agreement, then Mr. Chan, in his capacity as director (and on behalf of the board of directors) could call a meeting of members, at which, a resolution could be passed to wind up Mountainview Limited. Should such a resolution be passed, Mountainview Limited would enter into insolvency and its liquidator's appointment would need to be ratified at a meeting of creditors.

Mr. Chan's friend's comments as regards appointing a "friendly" liquidator and one who would not "investigate the company's affairs too closely" suggest that some malpractice may have

occurred. Mr. Chan ought to be advised about impeachable transactions (such as unfair preferences and other matters covered off in section 266 of CWUMPO) and the potential liability (both criminal and financial) associated with the same.

Depending on Mountainview Limited's creditor profile, a scheme of arrangement ("SOA") may be appropriate. A SOA is a statutory mechanism which allows companies (that aren't in liquidation) to make binding arrangements (or compromises) with any class of its creditors and/or members. Such arrangements or compromises include the adjustment of debts to its creditors and reduction in share capital.

Question 4.2 [maximum 5 marks]

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

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

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

In this instance, we note that GFL has appointed a receiver pursuant to the charge executed in its favour and that Kite Limited has been wound up on a petition presented by another creditor, with a liquidator having been appointed.

In instances where 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 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.

In the context of the situation outlined above, this means that (providing GFL's charge and the subsequent receiver's appointment are valid) any realisations made by the receiver will be kept entirely by the receiver for the benefit of GFL, irrespective of what claims, preferential or otherwise, exist against the Kite Limited. To this end, the liquidator of Kite Limited cannot 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 (of Kite Limited) be paid at least a partial dividend.

However, should there be a surplus after the Receiver's costs and expenses have been discharged and GFL is repaid in full, this surplus would be transferred to the liquidation estate

Commented [RD(DWH25)]: (0.5 marks) for mentioning how charged assets not available to L but needs to go further:

An outline is

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

Commented [RD(DWH26)]: Same principles apply to any charged asset, even if not whole of undertaking

of Kite Limited. The result of this may mean that the costs and expenses of the liquidation are met and there could be a potential dividend to Kite Limited's unsecured creditors.

In the event that the charge under which the receiver was appointed proves to be invalid and the receiver's appointment is subsequently considered void, the Receivables (and any other assets subject to the invalid charge) would vest with Kite Limited and be realized for the benefit of the liquidation estate.

Question 4.3 [maximum 6 marks]

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

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

The BVI liquidator appointed has identified:

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

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(DWH27)]: (1 mark) for identifying Mainland mechanism and ancillary requirements, but no advice to L as to what to do....

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

The Hong Kong court is able to exercise its jurisdiction to wind up a non-Hong Kong company, providing it meets the “core requirements” found in section 327 of CWUMPO.

The Hong Kong court needs to demonstrate that:

1. SPL has a sufficient connection with Hong Kong (although that doesn't necessarily mean that SPL has to hold assets there);
2. that there is the reasonable possibility that the winding up order would benefit those applying for it;
3. and that it is able to exercise jurisdiction over one or more persons interested in the distribution of SPL's assets.

As noted at (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. This means that the Hong Kong court could likely demonstrate that SPL has a sufficient connection with Hong Kong, notwithstanding the fact that SPL has a bank account at a bank in Hong Kong (c) and Mr. Qi (SPL's sole director and shareholder) is believed he is a Hong Kong resident (d).

As regards (e), whilst Hong Kong has not adopted the Model Law and is not party to any international treaties dealing with cross-border insolvency, in May 2021, it entered into an arrangement with certain areas of the Mainland for a new co-operation mechanism. This arrangement provides a mechanism for Hong Kong office holders to obtain recognition and assistance in specific areas of the Mainland, and vice versa.

*** End of Assessment ***

TOTAL MARKS: 22 out of 50

After reviewing the script it was found that the candidate's assessment has been marked down without good cause. A cursory review of the assessment and model answer revealed that a total of at least 4 marks could have been awarded under questions 2.2, 2.3, 3.1, 3.2 and 3.3. The mark is therefore adjusted to 26 out of 50, which amounts to a pass.

26 out of 50

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(1 mark) for identifying Mainland mechanism and ancillary requirements, but no advice to L as to what to do....

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].