INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 5A Guidance Text

Bermuda

2022 / 2023

CONTENTS

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN BERMUDA

Welcome to Module 5A, dealing with the insolvency system of Bermuda. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of Bermuda's insolvency laws;
- a relatively detailed overview of the Bermuda insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Bermuda.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2023 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Bermuda:

- the background and historical development of insolvency law in Bermuda;
- the various pieces of primary and secondary legislation governing Bermuda insolvency law;
- the operation of the Companies Act, Bankruptcy Act and other legislation in regard to bankruptcy, liquidation and corporate rescue;
- the rules of international insolvency law as they apply in Bermuda;
- the rules relating to the recognition of foreign judgments in Bermuda.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Bermuda insolvency law; and
- be able to answer questions based on a set of facts relating to Bermuda insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through the text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO BERMUDA

Bermuda is a self-governing British Overseas Territory[1] and a common law jurisdiction.

Bermuda was first settled in 1612. In common with other British colonies, English law was introduced to Bermuda at the date of settlement in 1612. Although Bermuda law is influenced by, and still shares considerable similarities with, English law, the Bermuda legal system is a separate legal system, and Bermuda law has developed into its own distinct body of jurisprudence.

Bermuda has a written Constitution (made pursuant to the United Kingdom's (UK) Constitution Act 1967 and the Constitution Order 1968 as applied to Bermuda), which has supremacy over other Acts of Bermuda's Parliament.

The Constitution establishes certain human rights and fundamental freedoms of individuals resident in Bermuda and it creates the legal and political structures that establish and maintain the separation of powers between the UK Government (acting through the Governor, the King's representative appointed by the UK's Foreign and Commonwealth Office), the Bermuda Government, Bermuda's local Parliament, and Bermuda's independent judiciary.

Bermuda was one of the first "offshore international financial centres" to facilitate the incorporation in Bermuda of foreign-owned exempt companies (and other exempt business entities), which are principally established to conduct international business from Bermuda or to transact with other international business entities in Bermuda (rather than conducting purely local business in Bermuda).

Bermuda hosts a developed and relatively open economy, with a particular focus on international business, local business, and tourism. Although immigration policy and the grant of work permits are subject to local legislation and Government control, there is very little protectionism associated with international business in Bermuda; whereas local companies are

[1] The other British Overseas Territories include Anguilla, the British Antarctic Territory, the British Indian Ocean Territory, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, St. Helena, the Sovereign Base Areas of Akrotiri and Dhekelia, the Turks and Caicos Islands, and the British Virgin Islands.

currently subject to rules that require at least 60% of their ownership and control to remain in Bermudian hands (subject to Governmental consents allowing for other structures to facilitate the introduction of foreign capital).

International business has thrived in Bermuda for a number of years, in large part due to Bermuda's stable legal, political, and socio-economic environment.

Successive Bermuda governments have sought to attract international business to Bermuda through a combination of business-friendly legislation and regulations, minimal corporate taxation and business-friendly infrastructure.

The Bermuda Government has sought to ensure that Bermuda's legal and regulatory environment is consistent with relevant international standards, particularly on issues such as international tax information provision and co-operation, the provision of assistance to foreign courts and foreign regulators, beneficial ownership, anti-money laundering, anti-terrorism financing, international sanctions and anti-bribery and corruption.

For a number of years, Bermuda's financial and professional services sectors have been focused on the areas of insurance and reinsurance (both captive, commercial, and alternative risk transfer), banking, investment funds, investment management, fund administration, trusts administration and the corporate administration of both private companies and publicly listed companies.

A number of companies incorporated in Bermuda have their shares or securities listed on international stock exchanges, including in New York, London, Oslo, Singapore and Hong Kong.

In recent years, the Bermuda Government has enacted legislation and introduced regulations designed to encourage the formation and appropriate regulation of digital asset, information technology, and fintech businesses in Bermuda.

Bermuda has a local resident population of about 65,000 people, and there are about 20,000 companies registered on Bermuda's Register of Companies.

Gross domestic product (GDP) is just over USD 6 billion, and GDP per capita is in the region of USD 99,000.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

Under section 15 of the Supreme Court Act 1905, the systems of law administered in Bermuda are:

(a) the common law of England;

(b) the doctrines of equity of England; and

(c) the Acts of the Parliament of England of general application which were in force in England at the date of settlement on 11 July 1612, except where those laws have been altered by:

- UK legislation, since 1612, expressly made applicable to Bermuda;
- local Bermuda legislation; and
- expansion or restriction of Bermuda common law since the year 1612.

Law and equity are administered concurrently and in any conflict the rules of equity generally prevail.[2]

Bermuda has its own independent court system established under the Constitution (and under local legislation such as the Supreme Court Act 1905), including a designated Commercial Court which is part of the Supreme Court of Bermuda, with rights of appeal to the Court of Appeal for Bermuda, and then the Privy Council in London.

The Bermuda legal system applies the common law doctrine of precedent. The *ratio decidendi* (that is, the essential legal reasoning) of decisions of the Privy Council, on appeal from Bermuda or from a jurisdiction with the same legal provisions under consideration, are binding on judges of the Court of Appeal for Bermuda and judges of the Bermuda Supreme Court, as well as on the Privy Council, except in exceptional circumstances. The Privy Council can depart from a previous decision where it is right to do so, when, for example, the previous decision is thought to be wrong and impeding the proper development of the law or to have led to results that were unjust or contrary to public policy.[3] Decisions of the Court of Appeal for Bermuda are also binding on judges of the Bermuda Supreme Court. Decisions of the Bermuda Supreme Court are persuasive and should generally be followed by other judges of the Supreme Court.

Decisions of the High Court and the Court of Appeal in England and Wales are also persuasive on matters of English law applicable in Bermuda and such decisions are in practice often followed.[4] Decisions of the House of Lords are almost always followed in Bermuda in common law matters,[5] unless the case concerns a field of common law where circumstances in Bermuda make it inappropriate to develop that field in the same way in Bermuda as it has developed in England and Wales.[6] Both the Privy Council and the Court of Appeal for Bermuda have recognised that there may be circumstances in which the social and economic conditions of Bermuda justify a departure from English precedent.[7]

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2 Supreme Court Act 1905, s 18.

3 *Gibson v The United States of America* [2007] UKPC 52.

4 *Robins v National Trust Co Ltd* [1927] AC 515, PC, per Viscount Dunedin at 519; and *Remington v Remington,* Civil Appeal No 1 of 1977, Court of Appeal for Bermuda.

5 *de Lasala v de Lasala* [1980] AC 546; and *Crockwell v Haley*, Civil Appeal No 23 of 1992, Court of Appeal for Bermuda.

6 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, Privy Council; and *Crockwell v Haley*, Civil Appeal No 23 of 1992, Court of Appeal for Bermuda.

7 See, for example, *La Compagnie Sucrière de Bel Ombre Ltée v Government of Mauritius* [1994] MR 173, 13 December 1995; Privy Council Appeal No 46 of 1995; *Hart v O'Connor* [1985] AC 1000, Privy Council; *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312, per Lord Bridge of Harwich at 320; *Ming-Pao*

In relation to the interpretation of legislation that may be common to Bermuda and to England and Wales, a decision of the UK Supreme Court (or its predecessor the House of Lords) is effectively binding on the Bermuda courts. Furthermore, the Bermuda courts are required, when interpreting or construing any Bermudian statutory provision, to apply as nearly as practicable the rules for the interpretation and construction of provisions of law for the time being binding upon the Supreme Court of Judicature in England.[8]

Decisions of other courts of the Commonwealth may be considered persuasive according to their circumstances. In practice, Privy Council and the UK's Supreme Court decisions, on appeal from other jurisdictions, are treated as binding (or highly persuasive) if the relevant common law or legislation is similar to the law of Bermuda. Decisions of the higher courts from Commonwealth jurisdictions such as Australia, New Zealand, Hong Kong, Singapore, Canada, and other offshore jurisdictions, such as the Cayman Islands, the British Virgin Islands, Jersey and Guernsey, can also be persuasive, and they are often cited in court.

The formal procedures available for companies in financial difficulties are principally contained in the Companies Act 1981 (the winding-up provisions of which are substantially modelled on the UK's Companies Act 1948).

Some provisions of the Bankruptcy Act 1989 are also applied to companies (by virtue of section 235 of the Companies Act 1981) and there is some scope for debate as to the applicability of certain provisions of the Bankruptcy Act 1989 to corporate partnerships.

The procedural rules relating to the compulsory winding-up of companies are contained in the Companies (Winding-up) Rules 1982 (as amended over time) and also, to a lesser extent, in the Rules of the Supreme Court 1985, both of which were largely modelled on similar English provisions subject to certain local differences. The procedural rules relating to personal bankruptcy proceedings are contained in the Bankruptcy Rules 1990, which were also modelled on English rules.

There are specific provisions relating to the insolvency, liquidation and restructuring of insurance companies in the Insurance Act 1978 and relating to segregated accounts companies and their general and segregated accounts in the Segregated Accounts Companies Act 2000.

There are specific provisions relating to banks in the Banking (Special Resolution Regime) Act 2016, although only sections 1 and 10 of that Act are currently in force.

There are specific provisions relating to limited liability companies in the Limited Liability Company Act 2016.

There are specific provisions relating to partnerships in the Partnership Act 1902 and associated partnership legislation.

Newspapers v Attorney-General of Hong Kong [1996] 1 AC 907, at 918; and *Crockwell v Haley*, Civil Appeal No 23 of 1992, Court of Appeal for Bermuda.

8 Interpretation Act 1951, s 10.

4.2 Institutional framework

Bermuda's insolvency legislation, its common law tradition and its independent judiciary can be described as creditor-friendly, while also being commercially flexible and pragmatic in the restructuring context.

The Bermuda Court system is generally regarded as efficient in the context of enforcement of creditor rights, both outside the court process in the case of secured creditors and within the court process in the case of unsecured creditors, subject to the court's powers to supervise and assist with a corporate restructuring.

Secured creditors can generally enforce their security outside of the insolvency process and the insolvency legislation is, both as regards secured and unsecured creditors, highly pro-creditor. It provides, in particular, for the right of an unsecured creditor with an unpaid debt to apply for an order that the corporate debtor be compulsorily wound up and its assets applied in satisfaction of its debts. There is no statutory corporate rescue regime beyond the scheme of arrangement, discussed below.

Nevertheless, the Supreme Court has developed an insolvency practice, through the appointment of "soft-touch" provisional liquidators or provisional liquidators with specific powers to implement a restructuring, which is designed to support formal and informal restructuring plans that have credible prospects of success and the support of the majority of creditors. In the recent decision of *HSBC v NewOcean Energy Holdings Limited* [2022] CA Bda 16 Civ, the Bermuda Court of Appeal stressed the importance of a restructuring plan having credible prospects of success, and the likely support of the majority of creditors, so as to justify the adjournment of a winding-up petition and the continued appointment of "soft-touch" provisional liquidators.

In appropriate circumstances, therefore, the court does have the power to approach corporate insolvencies in a "debtor-friendly" manner, with a view to achieving a corporate restructuring.

The Companies Act 1981 creates the office of the Official Receiver, being also the Registrar of Companies. The Minister responsible for the administration of the Companies Act 1981 is the Minister of Finance.

The Official Receiver and the Minister of Finance have a variety of investigative and enforcement powers available to them under the Companies Act 1981 and the Official Receiver may be appointed as the provisional liquidator or the permanent liquidator of companies in compulsory liquidation (usually on a default basis, in the absence of a commercial insolvency practitioner willing and able to accept office). The Official Receiver may also be appointed as the trustee in bankruptcy of bankrupt individuals.

In practice, however, the Supreme Court of Bermuda regularly appoints commercial insolvency practitioners (usually qualified accountants) as provisional liquidators, permanent liquidators, and trustees in bankruptcy.

In addition to the Minister of Finance, the Registrar of Companies and the Official Receiver, the Bermuda Monetary Authority and the Regulatory Authority of Bermuda (each of which are responsible for regulating certain industry sectors) have certain investigative and enforcement powers, including the power to apply for the compulsory liquidation of companies within their regulatory perimeters.

The Supreme Court of Bermuda (acting both through the judiciary and the Registrar of the Supreme Court) also perform a significant role in the supervision and regulation of court-appointed liquidators and trustees in bankruptcy.

There are no specific statutory provisions for the treatment of insolvent groups of companies in Bermuda. The Supreme Court of Bermuda has, however, occasionally appointed the same office-holders as liquidators to multiple companies in the same group of companies, subject to suitable arrangements being made with respect to any conflicts that might arise (including by way of appointment of a "conflicts" liquidator). In appropriate cases, the Supreme Court has also supported and approved co-operation agreements that have been entered into between separate office-holders of companies within a group of companies.

Self-Assessment Exercise 1

Is Bermuda a creditor-friendly or a debtor-friendly jurisdiction, and why?

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

5.1 Generally

As in other jurisdictions that follow English common law, there are various ways by which a creditor can take security over assets in Bermuda by agreement between the creditor and the debtor, including by way of: legal mortgage, equitable mortgage, fixed charge, floating charge, pledge, contractual lien and assignment.

The nature of the security interest, in any particular case, will be determined by:

(a) the terms of the parties' agreement, ordinarily set out in the relevant security documents;

(b) the nature of the property being secured; and

(c) the nature of the debtor's interest in the property being secured.

There are various statutory provisions relevant to the taking of security in Bermuda, including, for example, section 19(d) of the Supreme Court Act 1905, section 1 of the Bonds and

Promissory Notes Act 1874, and section 2 of the Charge and Security (Special Provisions) Act 1990.

In respect of immovable, movable and certain intangible property, a creditor may take, and a debtor may give, security as follows:

- legal mortgage:
    - this results in legal title of the debtor's property being transferred to the creditor as security for a debt; and
    - the debtor remains in possession of the property but only regains legal title upon payment and satisfaction of the debt and reconveyance of legal title by the creditor.
- equitable mortgage:
    - the debtor retains legal title to, and possession of, the property but transfers the beneficial interest in the property to the creditor; and
    - an equitable mortgage does not take priority over a third party who, without notice of the creditor's beneficial interest, acquires the legal title to the property in good faith and for value.
- fixed charge:
    - a creditor can take a fixed charge over property that does not result in a transfer of legal or beneficial ownership, but gives the creditor a right to take possession of the property with a right of sale, in the event of a default by the debtor;
    - upon exercise of the power of sale, the proceeds of sale may be applied by the creditor towards payment of the debt in priority to and without reference to other unsecured creditors; and
    - the debtor may not deal with any property that is subject to a fixed charge without the consent of the creditor.

In respect of movable and certain intangible property, a creditor can additionally take, and a debtor can give, security as follows:

- floating charge:
    - a floating charge is not fixed to a particular asset (unlike a fixed charge), but "floats" above a variety of assets;

- the debtor can sell or dispose of such assets without the creditor's prior consent, but in the event of default by the debtor, the floating charge will "crystallise" and convert into a fixed charge that attaches to specific assets remaining at that date; and

- property secured only by a floating charge forms part of the debtor's general assets in the event of an insolvency.

- pledge:

  - a pledge involves the creditor taking actual or constructive delivery or possession of the debtor's assets until the debt is repaid or discharged.

- lien:

  - a lien is the right to retain possession of another person's property until that person performs a specific obligation; and

  - a lien is similar to a pledge save that in the case of a lien the property is deposited with the creditor not for the purposes of security but for some other purpose, such as safe custody or repair.

An equitable mortgage, or a fixed or floating charge, may also be taken over intangible property (such as rights under a contract). Thus an equitable mortgage of an intangible may be effected by equitable assignment by way of security. Equitable assignment will not transfer the right to enforce a contractual right at the suit of the assignee.

5.2 Judgments as charges over Bermuda real estate

A judgment of the Supreme Court of Bermuda has historically bound the judgment debtor's real estate in Bermuda as from the date of entry of the judgment and Bermudian goods and chattels are bound as from the date of delivery of a writ of execution with instructions to levy, effectively giving rise to a charge or lien in favour of the judgment creditor.[9]

However, there are now specific provisions of the Land Title Registration Act 2011 (and regulations made thereunder) that have varied the law in this respect, requiring registration of any judgment on the Land Title Register for the purposes of establishing priority.[10]

5.3 Assignment

Section 19(d) of the Supreme Court Act 1905, which is modelled on section 136 of the Law of Property Act 1925 in the UK, provides that an absolute assignment in writing of any debt or other legal chose in action is deemed effective in law, where notice is given to the debtor or other contracting party. Where these requirements are met, the assignee may sue in its own name.

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[9] See *Cates and Panchaud v Dill* [1956] Bda LR 1; *Caesar v Carter* [1997] Bda LR 26; and *Darrell v Bank of Bermuda Limited* [2013] Bda LR 5.

[10] See section 20A and schedule 10 of the Land Title Registration Act 2011, as amended with effect from 2 July 2018.

Section 1 of the Bonds and Promissory Notes Act 1874 authorises the assignment of bonds and other debt instruments, and empowers the assignee to bring an action in the name of the assignee against the debtor under the instrument.

5.4 Security over bank indebtedness

Under section 2 of the Charge and Security (Special Provisions) Act 1990, a bank can take security over its own indebtedness to its customers, reversing the effect of *Re Charge Card Services Ltd*[11] (in which the English Court had doubted a party's ability to establish a proprietary interest in a debt or other liability owed to another, as a matter of common law and in the absence of legislative support).

5.5 Retention of title

The statutory position in Bermuda regarding retention of title is largely similar to that which applies in England and Wales, although in Bermuda there are some minor differences in the statutory wording, the position being governed by sections 17 to 21 and section 70(5), of Bermuda's Sale of Goods Act 1978.

5.6 Unsecured creditors' rights and automatic statutory stay of proceedings

Upon the making of a winding-up order, or upon the appointment of a provisional liquidator, section 167(4) of the Companies Act 1981 provides that no actions may be commenced or continued against the company without leave of the court (although secured creditors are to some extent entitled to realise their security interests outside the liquidation, if possible).

This automatic stay does not extend beyond Bermuda and if there are proceedings against the company in a jurisdiction outside Bermuda, relief in that jurisdiction would need to be sought to obtain a stay (unless it is possible to assert jurisdiction over the creditor and obtain an anti-suit injunction from the Bermudian court).

There have been a number of cases in which the Bermudian courts have considered whether or not the automatic statutory stay of proceedings should be lifted.[12]

5.7 Secured creditors' rights

Secured creditors can take steps to enforce their security rights in each procedure, subject to section 167(4) of the Companies Act 1981 in certain circumstances. Secured creditors have several options in respect of their security rights. They can elect to enforce their security (which essentially takes place outside the liquidation process). If the value of the security exceeds the value of the debt, the secured creditor will make a full recovery and the balance will form part of the company's assets for distribution in the liquidation. If the value of the security is less than the value of the debt, the secured creditor will recover the value of the security and will be able

[11] [1987] Ch 150.

[12] See *Re Kingate Management Limited* [2012] Bda LR 63 and *Ironshore Insurance Ltd et al v MF Global Assigned Assets LLC* [2016] Bda LR 127.

to prove and rank as an unsecured creditor for the balance of the debt owed to him. Otherwise, the secured creditor can value his security and allow the liquidator to realise it for him, or can simply relinquish his security and seek to prove in the liquidation as an unsecured creditor.

5.8 Set-off

Section 37 of the Bankruptcy Act 1989 applies to companies in liquidation and provides for mandatory set-off in the event of a liquidation in Bermuda. In particular, where there have been mutual credits, mutual debts or other mutual dealings, between a debtor company in compulsory liquidation and any other person proving or claiming to prove a debt in the liquidation, an account shall be taken of what is due from the one party to the other in respect of the mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively. However, a person is not entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of insolvency committed by the debtor and available against him.

Set-off can only be exercised after the commencement of a liquidation if:

- the debts giving rise to the set-off were incurred prior to the commencement of liquidation and have crystallised as monetary payment liabilities;

- the transaction giving rise to the debts was not a fraudulent preference or a fraudulent conveyance; or

- the dealings between the parties were mutual (that is, the parties giving rise to the debt are identical to the parties giving rise to the credit and the parties have contracted with each other in the same capacity).

5.9 Registration of security granted by a Bermuda exempt company

Following execution of the relevant security documents, the secured party will want to file details of the security with the Registrar of Companies in Bermuda.

Any Bermuda company providing security and any secured party (and any other person interested in such security) has the option of making an application to register the security in the Register of Charges held by the Registrar.

If the security is duly registered with the Registrar it will, in respect of the secured assets, have priority over any security interests which are not registered or which are subsequently registered in the Register of Charges in respect of those assets.

Registration of security in this manner also provides constructive notice of the existence of the security to third parties.

The security provider should deliver a copy of the certificate of registration of charge and the stamped particulars issued by the Registrar of Companies to the secured party once the filing has been made (unless the secured party is making the application).

The Register of Charges maintained by the Registrar is a publicly searchable register.

There are no statutory time limits for registration of the security with the Registrar, although it is prudent for a secured party to ensure security is registered as soon as possible so that the secured party can take advantage of the priority afforded by registration and protect itself against competing claims or interests.

When a filing is made with the Registrar, in addition to the particulars of charge, there is a requirement to file either an original or certified copy of the security document, which is included on the publicly available Register of Charges.

Since the transfer of shares in a Bermuda exempt company is subject to the approval of the Bermuda Monetary Authority, a secured party seeking to take security over the shares of a Bermuda exempt company will require prior permission of the Bermuda Monetary Authority to transfer any charged or mortgaged shares in a Bermuda exempted company in the event of enforcement of the security.

5.10 Real estate, ships and aircraft

There are separate filings and specialist registers relevant to real estate, ships, and aircraft. A security interest granted by a Bermuda company which is registrable in the specialist registers relating to real estate, ships, and aircraft is not separately registrable under the Companies Act 1981, so as to avoid registration conflicts.

Self-Assessment Exercise 2

What types of security interests may be created under Bermuda law?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

As discussed above, Bermuda's insolvency and bankruptcy laws are relatively fragmented and the applicable law depends to some extent on whether the debtor is a corporate entity (and if so, its precise corporate structure) or an individual.

In general terms, Bermuda's insolvency system is regarded as being creditor-friendly. There is, however, the power to implement a management-led restructuring under the supervision of the Supreme Court of Bermuda through the appointment of a "soft touch" provisional liquidator and the use of schemes of arrangement.

Creditors with security over an insolvent company's core assets have the greatest influence over the company's situation.

Unsecured creditors also exercise considerable influence as a result of the rights they enjoy, pursuant to Bermuda's winding-up jurisdiction. The greater the value of an unsecured creditor's debt (and the greater the support that it can command from other unsecured creditors), the greater the influence. Minority unsecured creditors have relatively limited influence, above and beyond their statutory and contractual rights.

In addition to the Supreme Court (and any foreign courts with jurisdiction over the company), certain regulatory authorities in Bermuda may also influence the company's situation, depending on the circumstances. For example, the Minister of Finance, the Registrar of Companies, the Bermuda Monetary Authority and the Regulatory Authority of Bermuda might, in appropriate circumstances, investigate the affairs of an insolvent company and exercise such regulatory powers as may be appropriate.

Section 165 of the Companies Act 1981 provides that, at any time after the presentation of a winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may apply to the court for a stay of any proceedings pending against the Company.

Section 167(4) of the Companies Act 1981 provides that, when a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.

The Bermuda Court has the separate power to order that Bermuda Court proceedings be stayed in the exercise of its inherent jurisdiction and as a matter of its case management powers under the Rules of the Supreme Court. The Bermuda Court also has the power, in appropriate cases, to issue an anti-suit injunction or an anti-enforcement injunction with respect to claims being pursued in foreign court proceedings.

6.2 Personal / consumer bankruptcy

Bermuda's personal bankruptcy laws are principally contained in the Bankruptcy Act 1989 and the Bankruptcy Rules 1990.

Certain aspects of this legislation are relevant to corporate insolvencies, due to express references in the Companies Act 1981 to the Bankruptcy Act 1989 (including on topics such as fraudulent preferences and set-off).

Certain aspects of the legislation are also relevant to the dissolution and winding-up of partnerships.

In practice, personal bankruptcies relating to Bermuda-resident individuals are rare in Bermuda, since they are generally considered to be an inefficient, expensive, and time-consuming process under the law as it currently stands, the number of eligible debtors is very small and the discharge period can be very lengthy (between six and 15 years in certain cases).

Under the Bankruptcy Act 1989, a "debtor" includes any person who at the time when any act of bankruptcy was done or suffered by him:

(a) was personally present in Bermuda;

(b) ordinarily resided or had a place of residence in Bermuda;

(c) was carrying on business in Bermuda, personally, or by means of an agent or manager; or

(d) was a member of a firm or partnership which carried on business in Bermuda.

The Bermuda Court may make a receiving order under the Bankruptcy Act 1989 if a debtor commits an act of bankruptcy and a petition is presented either by a creditor or by the debtor, for the protection of the estate.

On the making of a receiving order, the Official Receiver is ordinarily constituted receiver of the property of the debtor, and no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose. A receiving order does not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if a receiving order had not been made.

Self-Assessment Exercise 3

Are the rules relating to the bankruptcy of individuals completely separate from the rules relating to the insolvency of corporate entities?

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6.3 Corporate liquidation

The formal procedures available for companies in financial difficulties are principally contained in the Companies Act 1981 (the winding-up provisions of which are substantially modelled on the UK's Companies Act 1948).

Some provisions of the Bankruptcy Act 1989 are also applied to companies – by virtue of section 235 of the Companies Act 1981 – and there is some scope for debate as to the applicability of certain provisions of the Bankruptcy Act 1989 to corporate partnerships. There are also specific provisions relating to insurance companies in the Insurance Act 1978 and relating to segregated accounts companies and their general and segregated accounts in the Segregated Accounts Companies Act 2000. There are also specific provisions relating to banks in the Banking (Special Resolution Regime) Act 2016, although this legislation has not yet been brought into force. The rules relating to compulsory winding-up of companies are contained in the Companies (Winding-up) Rules 1982 and also, to a lesser extent, in the Rules of the Supreme Court 1985.

Insolvent liquidation procedures can generally be divided into compulsory liquidations and insolvent voluntary liquidations (creditors' voluntary liquidations).

The general purpose of the liquidation process is to gather in and realise assets, to pay off creditors in accordance with their rights and priorities, and then to distribute any remaining assets to the company's shareholders. However, liquidators in the winding-up of a company have the power to promote compromises and arrangements, whether by consensual means or using a scheme of arrangement. Furthermore, where the company is not already in liquidation, the winding-up jurisdiction of the court and statutory machinery may be invoked in order to protect the implementation of a restructuring (as discussed above in connection with "soft-touch" provisional liquidation).

Liquidators are generally given a degree of discretion as to the time period within which to effect and complete the liquidation, which may depend to some extent on the nature, location and liquidity of the company's assets. After the liquidation process is complete, the company can then be dissolved and it will cease to exist as a legal entity.

6.3.1 Voluntary liquidation

An insolvent voluntary liquidation is initiated by the company's shareholders through a resolution, based on the recommendation of the board of directors. Although creditors participate in the creditors' voluntary liquidation procedure, they can only secure the active supervision of the court by petitioning for the compulsory liquidation of the company.

6.3.2 Compulsory liquidation

The compulsory liquidation process is initiated by one of the following making a petition to the Supreme Court of Bermuda:

- a creditor, including any contingent or prospective creditor;

- a contributory (that is, any person liable to contribute to the assets of the company in the event of its liquidation, that is, a shareholder or member);

- the company itself (by a shareholders' resolution if it is solvent and / or by a directors' resolution if it is insolvent); and

- in certain circumstances, the Registrar of Companies or the Supervisor of Insurance (being the Bermuda Monetary Authority).

It is also possible, in exceptional circumstances, for receivers of segregated accounts within a segregated accounts company, to petition for the winding-up of the whole company, and also for the court to wind up a company of its own motion.

Section 170(2) of the Companies Act 1981 also allows the court to appoint a provisional liquidator between the presentation of a winding-up petition and its final hearing. There are a variety of circumstances in which the urgent appointment of provisional liquidators can be appropriate and in the best interests of creditors, if, for example, there is a risk that assets will be dissipated in the period between presentation of the petition and the final hearing, or in the event that a restructuring is capable of being achieved under the supervision of an independent Court officer and with the benefit of a stay of other legal proceedings.

A company may be compulsorily wound up by the court in any of the following circumstances, under section 161 of the Companies Act 1981:

(a) if the company has, by resolution, resolved that the company be wound up by the court;

(b) if there is default in holding the company's statutory meeting;

(c) if the company does not commence its business within a year of its incorporation or suspends its business for a whole year;

(d) if the company carries on any restricted business activity;

(e) if the company engages in a prohibited business activity;

(f) if the company is unable to pay its debts;

(g) if the company's ministerial consents were obtained as a result of a material misstatement in the application for consent; or

(h) if the court is of the opinion that it is just and equitable that the company should be wound up.

For the purposes of section 161, a company is deemed to be unable to pay its debts, pursuant to section 162, if a creditor serves a statutory demand on the company's registered office which has been neglected or unsatisfied for a period of three weeks thereafter, or if a judgment in

favour of a creditor remains unsatisfied, or if it is proved to the satisfaction of the Court that the company is unable to pay its debts (taking into account current, contingent and prospective liabilities of the company, that is, cash flow insolvency or balance sheet insolvency).

There are a wide range of circumstances in which a Court may conclude that it is just and equitable to wind up a company, including, for example, exclusion from management of a quasi-partnership, irretrievable breakdown of business relationships, failure of substratum, and lack of probity on the part of the company's directors.

The Supervisor of Insurance (being the Bermuda Monetary Authority) can present a petition for the winding-up of an insurance company if it is in breach of the regulatory provisions of the Insurance Act 1978, or if it is in the public interest that the insurance company should be wound up on just and equitable grounds.

Section 34 of the Insurance Act 1978 also provides that the court may order the winding-up of an insurance company subject to the modification that the insurance company may be ordered to be wound up on the petition of 10 or more policyholders owning policies of an aggregate value of not less than BMD 50,000,[13] provided that such a petition shall not be presented except by leave of the court, and leave shall not be granted until a *prima facie* case has been established to the satisfaction of the court and until security for costs for such amount as the court may think reasonable has been given.

The Registrar of Companies can petition for the winding-up of a company if directed to do so by the Minister of Finance following receipt of a report of an Inspector to investigate the company under section 110 or section 132 of the Companies Act 1981.

A provisional liquidator can be appointed prior to the final hearing of a compulsory winding-up petition if there is a good *prima facie* case that a winding-up order will be made and if the court considers that a provisional liquidator should be appointed in all the circumstances of the case. Classic cases for the appointment of a provisional liquidator include where there is a risk of dissipation of assets, or the need for independent supervision and control.[14]

Subject to any orders dispensing with the need for approval, a number of the powers of a liquidator appointed in an insolvent winding-up of a company may only be exercised with the approval of a "Committee of Inspection", comprising representative creditors of the company. It is also possible for creditors to apply to the court with respect to the exercise or proposed exercise of the liquidator's powers, under sections 175 and 176 of the Companies Act 1981.

The making of a winding-up order brings about a statutory moratorium on proceedings against the company.[15] This will not prevent secured creditors enforcing their security where they can do so without instituting proceedings before the court. Furthermore, even where judicial assistance is needed, leave will usually be given to enforce valid security interests

[13] The Bermuda dollar is pegged to, and equivalent to, the US dollar, subject only to minor currency conversion charges between Bermuda dollars and US dollars.
[14] See, for example, *Re Stewardship Credit Arbitrage Fund Ltd* [2008] Bda LR 67.
[15] Companies Act 1981, ss 165 and 167(4).

notwithstanding the statutory moratorium. A judgment creditor will not be permitted to continue with execution of its judgment against the company where notice of an order winding-up the company is received by the Provost Marshall prior to sale of goods of the company taken in execution, or prior to completion of execution by receipt or recovery of the full amount of the levy.

6.3.3 Reviewable transactions

Payments, transfers of assets, and security transactions can be vulnerable to attack in the event of the company's insolvency or liquidation. Reviewable transactions include (but are not necessarily limited to):

- fraudulent conveyances;
- fraudulent preferences;
- floating charges;
- onerous transactions; and
- post-petition dispositions.

6.3.3.1 Fraudulent conveyances

Sections 36A to 36G of the Conveyancing Act 1983 provide that a creditor of a company may be entitled to apply to the court to have a transaction set aside to the extent required to satisfy its claim, provided that the dominant intention of the transaction was to put the property beyond the reach of other creditors and the transaction was entered into for no value or significantly less than the value of the property transferred. For these purposes, a creditor is one to whom an obligation is owed at the date of the transfer, or to whom it is reasonably foreseeable an obligation will be owed within two years of the date of the transfer, or to whom an obligation is owed pursuant to a cause of action which accrued before, or within, two years after the date of the transfer.

6.3.3.2 Fraudulent preferences

Section 237 of the Companies Act 1981 provides that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding-up, shall be deemed a fraudulent preference of its creditors and be invalid accordingly. Section 238 provides for the liability and rights of fraudulently preferred persons. In order to fall foul of the provision, the transfer or disposition must have been made within the six months prior to the commencement of the winding-up. In the case of a compulsory winding-up, this would be the date of the presentation of the petition to the Supreme Court of Bermuda. The transfer will be invalid if it was carried out with the dominant intention of preferring one creditor over others at a time when the company was unable to pay all of its creditors in full.

6.3.3.3 Floating charges

Section 239 of the Companies Act 1981 provides that a floating charge on the undertaking or property of a company created within 12 months of the commencement of the winding-up shall be invalid, unless it is proved that the company immediately after the creation of the charge was solvent, except to the amount of any cash paid to the company at the time of, or subsequently to, the creation of the charge, together with interest at the statutory rate.

6.3.3.4 Onerous transactions

Section 240 of the Companies Act 1981 provides that the liquidator of a company can, with the court's permission, disclaim any property belonging to the company or any rights under any contracts which he considers to be onerous for the company to hold, or is unprofitable or unsaleable.

6.3.3.5 Post-petition dispositions

Section 166 of the Companies Act 1981 provides that, in a compulsory winding-up, any disposition of the property of a company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding-up (being the time of presentation of the petition) shall be void, unless the court otherwise orders by way of a validation order.

In the case of an insolvent company, the court should only make an order validating a post-petition disposition where it can be shown that the disposition will benefit (in a prospective case), or that it has benefitted (in a retrospective case), the general body of unsecured creditors so as to justify the disapplication of the *pari passu* principle. The focus of the test is mainly directed to an objective assessment of the benefit to be obtained by the general body of unsecured creditors, rather than the necessity or expedience of the disposition from the company's or directors' perspective.[16]

In the case of a solvent company, in contrast, there are four elements which must be established before a validation order may be made:[17]

(1) first, the proposed disposition must appear to be within the powers of the company's directors;

(2) second, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company;

(3) third, it must appear that the directors in reaching that decision have acted in good faith; and

[16] See *Colica Trust Company Ltd. v Bermuda Cablevision Ltd. and Others* 1996 Civil App. No 13, [1997] Bda LR 3 and *Express Electrical Distributors Ltd v Beavis & Ors* [2016] EWCA Civ 765.

[17] See *Re IPOC International Growth Fund Ltd* [2007] Bda LR 74 and *CBM Agente de Valores SA v PPF Life Assets Fund Ltd* [2016] SC (Bda) 76 Com.

(4) fourth, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.

6.3.3.6 Bulk sales in fraud of creditors

Under section 5 of the Bulk Sales Act 1934, certain sales and purchases of stock in bulk are deemed to be fraudulent and absolutely void as against the vendor's creditors, unless the proceeds of sale are sufficient to pay the vendor's creditors in full, and are in fact so applied.

Self-Assessment Exercise 4

Question 1

What sorts of transactions are reviewable in the event of an insolvent liquidation under Bermuda law?

Question 2

What are the grounds upon which a Bermuda company may be put into compulsory liquidation?

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Receivership

It is possible, depending on the circumstances, for receivers to be appointed both outside of court by agreement, and by court order.[18]

If appointed outside of court, the identity of the receiver is determined by the secured creditor making the appointment.

6.4.1 Receivership of company assets outside of court by security agreement

Section 35 of the Conveyancing Act 1983 contains various statutory provisions regarding the appointment, powers and remuneration of a receiver appointed under a mortgage.

For example, a mortgagee entitled to appoint a receiver may not appoint a receiver until he has become entitled to exercise a power of sale but may then, by writing under his hand, appoint such person as he thinks fit to be receiver. The receiver is deemed to be the agent of the mortgagor; and the mortgagor is solely responsible for the receiver's acts or defaults, unless the

[18] Section 19(c) of the Supreme Court Act 1905 enables the Court to appoint a receiver on an interlocutory basis in all cases in which it appears just and convenient to do so, and Order 30 of the Rules of the Supreme Court 1985 contains various provisions relating to applications for the appointment of receivers.

mortgage deed otherwise provides. The receiver has the power to demand and recover all the income of the property of which he is appointed receiver, by action, distress or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of and to give effectual receipts accordingly, for the same.

A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act. The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand. The receiver is entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate of interest, not exceeding the statutory rate on the gross amount of all money received, as is specified in his appointment and, if no rate of interest is so specified, then at the statutory rate on that gross amount, or at such higher rate as the court thinks fit to allow, on application made to it for that purpose.

The receiver must, if so directed in writing by the mortgagee, insure and keep insured against loss or damage, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

The receiver must apply all money received by him as follows:

- in discharge of all rents, taxes and outgoings whatever affecting the mortgaged property;
- in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;
- in payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
- in payment of any sum falling to be paid in accordance with the terms of the mortgage deed, and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

Under section 266 of the Companies Act 1981, a receiver or manager of the property of a company appointed under the powers contained in any instrument may apply to the court for directions in relation to any particular matter arising in connection with the performance of his functions and, on any such application, the court may give such directions, or may make such order declaring the rights of persons before the court or otherwise, as the court thinks just.

A receiver or manager of the property of a company appointed under the powers contained in any instrument shall, to the same extent as if he had been appointed by order of a court, be personally liable on any contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides, and entitled in respect of that liability to indemnity out of the assets; but nothing in the legislation shall be taken as limiting any right to indemnity

which he would have apart from the legislation, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.

Sections 265 to 272 of the Companies Act 1981 also contain a variety of relevant statutory provisions relating to receivers.

6.4.2 Receivership under the Segregated Accounts Companies Act 2000

Under the Segregated Accounts Companies Act 2000, it is possible to establish a company with segregated accounts (equivalent to protected cells), whose assets and liabilities are ring-fenced against the assets and liabilities of other segregated accounts and the company's own general account. This sort of corporate structure has a number of commercial uses in practice, and it is particularly popular for investment fund structures and insurance structures in Bermuda.

Under Part IV of the Segregated Accounts Companies Act 2000, there is a process whereby individual segregated accounts can be put into receivership by Order of the Supreme Court of Bermuda (whether or not the company itself is put into liquidation or is continuing to trade through its general account or through other segregated accounts). Receivership of a segregated account is analogous to liquidation of a company, although there are some features of receivership that are unique to the segregated account structure and that can be used for restructuring purposes rather than liquidation.

Pursuant to sections 19 to 25 of the Segregated Accounts Companies Act 2000, a receivership order must direct that the business and assets linked to a segregated account must be managed by a receiver specified in the order for the purposes of:

(a) the orderly management, sale, rehabilitation, run-off or termination of the business of, or attributable to, the segregated account; or

(b) the distribution of the assets linked to the segregated account to those entitled thereto.

6.5 Corporate rescue

Liquidation procedures can generally be divided into compulsory liquidations and voluntary liquidations. Voluntary liquidations can, in turn, be divided into solvent liquidations (members' voluntary liquidations) or insolvent liquidations (creditors' voluntary liquidations).

The general statutory purpose of liquidation is to gather in and realise assets, to pay off creditors in accordance with their rights and priorities and to distribute any remaining assets to the company's shareholders. The only formal rescue procedure set out in the Companies Act 1981 is the scheme of arrangement. A scheme of arrangement is a formal procedure which may be used to reorganise the business of the debtor with a view to its continued trading.

A scheme of arrangement may result in the adjustment or compromise of all or a class of the debt of the company. It may include the transfer of rights, property and liabilities of the company to another company. Schemes of arrangement may also reorganise the company's capital and

accordingly may be used (and have on several occasions been used) to implement a debt-for-equity swap.

The court has jurisdiction to make specific provision for this in the order sanctioning the scheme of arrangement.

A scheme of arrangement is not an intrinsically insolvency-related procedure. However, it may be employed after the appointment of a liquidator or provisional liquidator, and there can be advantages in employing a scheme of arrangement in this way. Where illiquidity issues confront the company, for example, its freedom to promulgate or pursue a scheme of arrangement may be susceptible to litigation or compulsory winding-up petitions presented by dissentient creditors. Where this is a concern, the powers of the court pertaining to the winding-up of companies and appointment of liquidators may be employed in the protection of a proposed scheme of arrangement. This may include the use of a "soft touch" provisional liquidation.

In the case of an insolvent insurance company, there is another restructuring tool potentially available under section 37(5) and section 39 of the Insurance Act 1978. These provisions enable the court, if it thinks fit, to reduce the amount of the insurance contracts of the insurer, on such terms and subject to such conditions as the court thinks fit. Although the procedure and case law in this area is not fully developed in Bermuda, it is likely that the court would require that a meeting of policyholders be convened in order to canvass their views and one relevant consideration for the court would be the effect of any reduction order on the company's ability to make recoveries against its reinsurers. Depending on the circumstances, a formal scheme of arrangement may be required in any event.

A pre-packaged sale involves the pre-agreement of terms of a sale of the business of the company to another party or a new company, which sale is then effected directly after the appointment of an officeholder. The sale and its terms are frequently negotiated by, or with the approval of, major secured creditors of the company. The prevailing regime in Bermuda does not lend itself to the use of pre-packaged sales. Winding-up proceedings anticipate the death of the company and distribution of its assets. Conversely, the scheme of arrangement process is too dependent upon the views of the general creditor body. Neither allows the discretion necessary to pre-agree and dictate a disposal of the business of the company, in the manner required for a pre-packaged sale. Conceivably, a receiver and manager appointed by a secured creditor pursuant to a charge over substantially all the assets of a company may achieve something akin to a pre-packaged sale. It is also conceivable that a Bermudian exempt company whose centre of main interests is in the UK, or whose assets and liabilities are situated in the UK, might seek the assistance of both the Courts of Bermuda and the Courts of England and Wales for the purposes of having a pre-packaged sale effected under the supervision of a court-appointed administrator. The procedure, however, is not as common in Bermuda as it is in certain other jurisdictions, such as Jersey, and there is some uncertainty in the case law as to the scope of the power of Bermudian Courts and English Courts in this respect.

A binding scheme of arrangement requires the approval of a majority within each class of creditors present and voting (including by proxy) at the meeting of that class, representing 75% by value of that class, votes in favour of the scheme. Accordingly, the scheme of arrangement

must be on such terms as may be approved by the majority of creditors in each class, and a scheme of arrangement is often the result of promotion and direction by majority creditors.

Those voting at scheme of arrangement meetings may in some circumstances include persons beneficially interested in the company's debt. In a recent scheme of arrangement of debts of a company evidenced by a global note held by a trustee, beneficial owners of the note, who were each entitled to require issuance of an individual note enforceable directly against the company, were allowed to vote in the scheme of arrangement as contingent creditors of the company.

As may be seen from the above, a minority of dissenting creditors in each class may be crammed down by a scheme of arrangement. In the event that there is an enforceable debt subordination agreement in place creating different classes of unsecured creditor (or in the event that there are deferred creditors, for example, or shareholders claiming payment of debts arising in their capacity as shareholders), it may be possible to structure and secure the court's approval for a scheme of arrangement in such a way as to cram-down a dissenting (subordinate or deferred) class of stake-holder.

Where the consent of all relevant creditors is forthcoming, informal "work-outs" are possible in practice.

It is not possible to "cram-down" creditors in the absence of a formal restructuring process, however.

Where there is a risk that negotiations towards an informal work-out may be jeopardised by creditors instituting or continuing proceedings against the company seeking enforcement of their debts, the negotiations may be protected by a "soft touch" provisional liquidation, a procedure developed as part of the insolvency practice of the Supreme Court and now commonly used to support work-outs.

Following presentation of a petition for the winding-up of the company (usually presented by the company itself, if the company contemplates a restructuring), a provisional liquidator may be appointed, who may then apply for a statutory stay of all proceedings against the company while the work-out process continues, whether informally or through the medium of a scheme of arrangement. The board of directors retains control over the company and endeavours to effect a work-out under the supervision of the "soft-touch" provisional liquidator and the court. If the work-out negotiations are successful, the winding-up petition can be dismissed; if they are unsuccessful, the winding-up petition can be restored for final hearing and the company can be wound up and placed into full liquidation. While the work-out plan is negotiated, the hearing of the winding-up hearing petition is adjourned (although the company enjoys the protection of the statutory moratorium).

The scheme of arrangement procedure may be initiated by application of a creditor, a member, the company itself, or (where one has been appointed) the liquidator.

The applicant requests the court to convene a meeting of the creditors, or the relevant class of creditors, of the company. If the court so directs (which will almost always be the case, absent

exceptional circumstances), creditors must be summoned by notice. Notification commonly includes advertisement of the meeting.

Where, because of differences in their respective rights, two or more creditors are unable to consult together with a view to their common interest, it will be necessary to separate creditors into classes for the purposes of voting on the scheme proposal.

If a majority within each class of creditors present and voting (including by proxy) at the meeting, representing 75% by value of that class, votes in favour of the scheme and the court approves it, then the scheme of arrangement will be binding on all creditors. Court approval is a discretionary matter. The court must be satisfied that the statutory requirements have been met, including the holding of requisite class meetings and approval of necessary majorities, and that each class was fairly represented at each meeting. In addition, the court must be satisfied that the scheme of arrangement is fair to creditors generally – in other words, that the majority has not taken unfair advantage of its position.

The scheme of arrangement is not effective until a copy of the sanction order is delivered to the Registrar of Companies. The scheme of arrangement order must be annexed to any copies of the company's memorandum of association issued subsequent to the order.

If the scheme of arrangement is conducted outside a liquidation, the company's board of directors and any managers control the process, although a scheme administrator is normally appointed to administer the scheme once it is implemented.

If the scheme of arrangement is conducted within a liquidation, the liquidator controls the process.

However, there is a hybrid option, under which the scheme of arrangement is conducted within a "soft touch" provisional liquidation, used to implement a restructuring within the protective environment of a provisional liquidation but without the necessity of winding-up the company. The board of directors normally manages the scheme of arrangement process under the supervision of the provisional liquidator.

The company generally uses its own assets to finance the procedures of voluntary liquidation, compulsory liquidation, and any scheme of arrangement.

However, if the company does not have sufficient assets or liquidity, it is possible for the company, or its liquidators, to enter into funding arrangements with those interested in the outcome of the procedures, typically creditors, if doing so is necessary for the beneficial winding-up of the company. In such a case, funding liabilities would be expected to be re-paid by the company or by the liquidator prior to the repayment of unsecured creditors, although subject to the specific terms of any funding agreement and the court's approval. In this context, it is possible as a matter of Bermuda law to secure protection (or priority treatment) for rescue financing on an ad hoc basis and by agreement in appropriate circumstances. In certain cases, the liquidator appointed by the court is the Official Receiver, being a government official with a limited government budget.

In a compulsory liquidation or a creditors' voluntary liquidation, creditors' claims are ranked in the following order:

(1) secured creditors enforce their security outside the liquidation, but essentially in priority to all other creditors;

(2) the costs and expenses of the liquidation, including all costs, charges and expenses properly incurred in the company's winding-up, including the liquidator's remuneration if sanctioned by the court;[19]

(3) debts due to employees located in Bermuda;[20]

(4) preferential debts owed to preferential creditors pursuant to section 236(1) of the Companies Act 1981, including unpaid taxes under the Taxes Management Act 1976, unpaid social insurance / Government pension contributions under the Contributory Pensions Act 1970, liability for compensation under the Workmen's Compensation Act 1965, and payments of up to BMD 2,500 due to employees of Bermudian companies but resident outside of Bermuda;

(5) debts secured by a floating charge (although higher priority debts must be paid out of any property secured by a floating charge if the assets of the company are not otherwise sufficient to meet them pursuant to section 236(5) of the Companies Act 1981);

(6) unsecured creditors' debts, including the unsecured balance of secured creditors' claims;[21]

(7) post-liquidation interest on unsecured creditors' debt claims;

(8) debts due to shareholders in their capacity as such;[22] and

(9) shareholders' equity in the event of a surplus balance, according to their rights and interests under the company's by-laws.

Each category of debts must be paid in full before payment of creditors in the subsequent category. Creditors in the same category rank equally (or *pari passu*) among themselves.

However, in the case of the winding-up of segregated accounts companies, section 25 of the Segregated Accounts Companies Act 2000 provides that the liquidator must deal with the assets and liabilities that are linked to each segregated account only in accordance with the segregation principles of the legislation and the relevant governing instruments or contracts for each transaction.

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19 Pursuant to the Companies Act 1981, ss 194, 232, and 236(6) and the Companies (Winding-Up) Rules 1982, r 140.
20 Under the Employment Act 2000, s 33(3).
21 Pursuant to the Companies Act 1981, ss 158(g), 225 and 235.
22 Pursuant to the Companies Act 1981, s 158(g).

Section 36 of the Insurance Act 1978 also provides that, in the case of an insurer carrying on long-term business, the assets in the insurer's long-term business fund will only be available for meeting the liabilities of the insurer attributable to its long-term business and its other assets shall only be available for meeting its other liabilities.

The Insurance Amendment (Number 2) Act 2018 also effected a change to the waterfall of priorities in the case of an insolvent insurance company. The change means that, going forwards, in a winding-up of an insurer commencing on or after the applicable commencement date, the claims of unsecured policyholder creditors of the insurer (including persons reinsured by the insurer in respect of claims under such contracts of reinsurance) will be paid before the claims of all other non-preferential unsecured creditors.

There is some scope for argument as to the order of priority for payment of claims asserted by former shareholders in mutual fund companies, whose shares have been redeemed but who are owed payment of the redemption proceeds at the commencement of liquidation. The general view is that these are debts due to shareholders that rank behind outside trade creditors' debts, but ahead of shareholders' equity, but the legislative provisions, including section 158(g) of the Companies Act 1981, are not entirely clear in this respect, notwithstanding a recent judgment of the Supreme Court of Bermuda that has touched upon the issue.

There is also scope for argument as to the order of priority of outstanding occupational pension payment liabilities under the National Pension Scheme (Occupational Pensions) Act 1998 and Regulation 56 of the National Pension Scheme (General) Regulations 1999, since the legislative provisions are not entirely clear.

6.6 Directors' and officers' duties

6.6.1 Generally

Directors' and officers' duties are principally owed to the company itself. To the extent that the company is solvent, such duties are ordinarily owed to the company for the benefit of its present and future shareholders.

When the company enters the zone of insolvency, directors must act in the best interests of the company's creditors. Directors that allow a company to continue to trade while it is in financial difficulties face a range of potential liabilities, depending on the precise circumstances and the relevant director's conduct and state of mind.

6.6.2 Fraudulent trading

Section 246 of the Companies Act 1981 provides that any director that has knowingly caused or allowed a company to carry on business with intent to defraud creditors of the company or for any fraudulent purpose, may be found personally liable for all, or any, of the debts or other liability as the court may direct. This would include carrying on the business of the company when it is known to be insolvent.

6.6.3 Personal liability for fraudulent conveyances / fraudulent preferences

It is possible that directors might be held to be personally liable, in certain circumstances, for fraudulent conveyances or fraudulent preferences, whether at common law or in equity, or pursuant to the misfeasance provisions of section 247 of the Companies Act 1981. There is limited Bermuda case law addressing the potential scope of a director's personal liability in this context, although in *Peiris v Daniels*,[23] a misfeasance claim under section 247 of the Companies Act 1981 was dismissed by virtue of the directors' entitlement to an indemnity.

6.6.4 Breach of fiduciary duty and failure to exercise reasonable skill and care

Directors owe duties to the company both pursuant to section 97 of the Companies Act 1981 and as a matter of common law, to act honestly and in good faith with a view to the best interests of the company (which can include the interests of the company's creditors when the company is in the zone of insolvency), and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Failure to comply with these obligations may result in personal liability on the part of directors. Although not confirmed in statute, the power of the directors of a Bermuda company to petition for the compulsory winding-up of an insolvent company has been recognised.[24]

6.6.5 Misfeasance and breach of trust

Section 247 of the Companies Act 1981 provides that a director may be personally liable if he has misapplied, or retained, or become liable, or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company. The scope and effect of section 247 was recently considered by the Supreme Court of Bermuda in *Peiris v Daniels*.[25]

6.6.6 Unlawful return of capital

As a matter of common law and pursuant to certain sections of the Companies Act 1981 dealing with dividends, reduction of capital, share repurchases and share redemptions, a Bermuda company that is not in liquidation cannot lawfully return capital to its shareholders except by way of an approved reduction of capital, or by way of authorised dividend, redemption, or repurchase. Section 54 of the Companies Act 1981 provides that a company shall not declare or pay a dividend, or make a distribution out of contributed surplus, if there are reasonable grounds for believing that the company is, or would after the payment be, unable to pay its liabilities as they become due or the realisable value of the company's assets would thereby be less than its liabilities.

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[23] [2015] Bda LR 16.
[24] See *Re First Virginia Reinsurance Ltd* [2003] Bda LR 47.
[25] [2015] SC (Bda) 13 Civ.

6.6.7 Miscellaneous offences and liabilities

Sections 243 to 248 of the Companies Act 1981 set out a range of criminal offences that may be committed by directors of companies, including, for example, by fraudulently altering documents relating to company property or affairs, falsifying books or accounts with the intention of defrauding any person, or fraudulently inducing a person to give credit to the company. There are also various legislative provisions that impose personal liability on directors for any failure to pay certain taxes and remit pension contributions.

6.6.8 Segregated accounts companies representatives

Section 10 of the Segregated Accounts Companies Act 2000 requires a segregated account representative to make a written report to the Registrar of Companies within 30 days of reaching the view that there is a reasonable likelihood of a segregated account or the general account of a segregated accounts company for which he acts, becoming insolvent and section 30 makes it a criminal offence to fail to do so.

Self-Assessment Exercise 5

Question 1

Summarise the key features of a scheme of arrangement.

Question 2

In the event of a compulsory liquidation, are secured creditors or preferential creditors in a more advantageous financial position?

Question 3

What is the main purpose of a compulsory liquidation?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

7.1 Generally

Many of Bermuda's international business companies are exempt companies that conduct business activities in foreign jurisdictions and many are listed on foreign stock exchanges.

As a result, Bermuda exempt companies are often subject to the winding-up jurisdiction of not only the Supreme Court of Bermuda, but also the courts of the foreign jurisdictions in which they operate.

This has resulted, in a number of cases, in Bermuda exempt companies being placed into compulsory liquidation in two jurisdictions simultaneously, with one of the courts being recognised as the "primary" court, and the other court being recognised as the "ancillary" court.

The issue of which court should be granted "primary" status and which court should be granted "ancillary" status with respect to the liquidation of a Bermuda exempt company, is a matter for determination by the respective courts.
Although Bermuda has not enacted local legislation incorporating the Centre of Main Interests test set out in the UNCITRAL Model Law on Cross-Border Insolvency, the court has indicated its willingness, at common law, to take into account all the circumstances of the case, including a company's centre of main interests and the forum with the closest connection to the issues in question.[26]

There have been a number of successful applications by Bermuda liquidators of Bermuda companies for recognition under Chapter 15 of the US Bankruptcy Code (and its statutory predecessors).[27]

The two courts (and two sets of liquidators, if there are different liquidators appointed) are necessarily required to co-operate with each other in the conduct of parallel liquidations.

This has resulted in the Supreme Court of Bermuda issuing various Practice Directions, setting out the guidelines applicable to court-to-court communications and co-operation in cross-border cases. Prior to those guidelines, there had been a number of cases in which protocols had been agreed and approved on an *ad hoc* basis. See, in particular:

- Practice Direction, Circular No 6 of 2017, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters; and

- Practice Direction, Circular No 17 of 2007, Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.

7.2 Parallel schemes of arrangement

There have been a number of restructuring cases in which solvent or insolvent international companies with a Bermuda connection have been restructured or liquidated with the use of parallel schemes of arrangement (or equivalent insurance business transfer schemes) sanctioned by the Bermudian Court and appropriate foreign courts. In *Re Titan Petrochemicals*

[26] See *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69, *Re Refco Capital Markets Ltd* [2006] Bda LR 94, *Re Celestial Nutrifoods Limited* [2017] Bda LR 11 and *Re C&J Energy Services Ltd* [2017] Bda LR 22.

[27] See, eg, *In re Board of Directors of Hopewell Int'l Ins Ltd* 275 BR 699 (SDNY 2002), affirming 238 BR 25 (Bankr SDNY 1999), *In re Millennium Global Emerging Credit Master Fund Ltd* 474 BR 88, 92 (SDNY 2012), affirming 458 BR 63 (Bankr SDNY 2011) and *In re Gerova Financial Group, Ltd* 482 BR 86, 96 (Bankr SDNY 2012).

Group,[28] for example, the Bermudian Court recognised that it frequently approves parallel schemes linking Bermuda, the UK, Hong Kong and / or Singapore.

A number of courts have stressed, however, that it is desirable for the relative advantages and disadvantages, and potential costs and expenses, of parallel schemes of arrangement to be considered in light of the facts and circumstances of any particular restructuring, having regard to the "rule in Gibbs",[29] and alternative restructuring solutions that might be available (such as a potential application for recognition and enforcement of a foreign scheme of arrangement, if possible).[30]

7.3 Recognition of foreign schemes of arrangement

There is some uncertainty whether a foreign scheme of arrangement or related procedure (such as an insurance business transfer scheme under legislation implementing European single market insurance directives) can be recognised and enforced in Bermuda as a matter of common law, in the absence of a local scheme of arrangement implemented in parallel.[31]

Although the Supreme Court of Bermuda has shown some willingness to recognise foreign court orders approving foreign schemes (in the absence of opposition), it is unclear what position it (or an appellate court) might take in a contentious situation.

7.4 Parallel insolvency proceedings relating to foreign companies in both Bermuda and a foreign jurisdiction

There have been a number of cases in which foreign companies with a Bermudian connection have been placed into compulsory liquidation both by foreign courts in their jurisdiction of incorporation and by the Supreme Court of Bermuda, whether on an ancillary basis or a primary basis.

7.5 International insolvencies – recognition of Bermudian insolvency proceedings in foreign jurisdictions

The Supreme Court of Bermuda has on a number of occasions issued letters of request to foreign courts, asking for foreign court recognition of, and assistance to, Bermudian liquidators of Bermudian companies.[32]

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[28] [2014] Bda LR 90.

[29] The "rule in Gibbs" is named after the English Court of Appeal decision in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale de Metaux* (1890) LR 25 QBD 398: in summary, the rule contemplates that a debt can only be validly discharged under the provisions of its governing law, unless the relevant creditor submits to a foreign debt restructuring.

[30] See, in this context, *Re Da Yu Financial Holdings Limited* [2019] HKCFI 2531 and *Re China Oil Gangran Energy Group Goldings Limited* [2021] HKCFI 1592.

[31] See *Re C&J Energy Services Ltd* [2017] Bda LR 22; *Re Energy XXI [*2016] Bda LR 90; and *Re Seadrill Limited* [2018] Bda LR 39.

[32] See, eg, *Re Focus Insurance Co [1997] 1 BCLC 219*.

The jurisdiction to issue such letters of request in the insolvency context has evolved as a matter of common law and the court's inherent jurisdiction, since there is no Bermudian legislation or rules of court specifically governing the process (as opposed to the issuing of letters of request for the purposes of obtaining evidence in foreign jurisdictions).[33]

It is also possible for Provisional Liquidators, whose appointment has principally been made for restructuring purposes, to be granted recognition by foreign courts, including in jurisdictions such as Hong Kong. [34]

Following the decision of the Privy Council in *PricewaterhouseCoopers v Saad Investments Company Limited*,[35] it is clear that the Supreme Court of Bermuda currently has no jurisdiction to wind up "overseas companies" that have not been granted a permit by the Minister of Finance to carry on business in Bermuda. A previously used "loophole" under the External Companies (Jurisdiction in Actions) Act 1885, was closed by the Privy Council's decision.

The Supreme Court currently lacks jurisdiction to order the convening of meetings of creditors in relation to a proposed compromise or arrangement of the debt of an overseas company, unless that company has been registered by the Minister of Finance as a Non-Resident Insurance Undertaking under the Non-Resident Insurance Undertakings Act 1967.

Bermuda has no statutory equivalent of Chapter 15 of the US's Bankruptcy Code, section 426 of the UK's Insolvency Act 1986, or the UK's Cross-Border Insolvency Regulations 2006, by which the US and UK implemented the UNCITRAL Model Law on Cross-Border Insolvency. The Supreme Court of Bermuda has nonetheless confirmed, following the Privy Council decision in *Cambridge Gas Transportation Corp v Navigator Holdings plc*[36] that, as a matter of common law, the Supreme Court of Bermuda may (and usually does) recognise liquidators appointed by the court of the company's domicile and the effects of a winding-up order made by that court, and has a discretion pursuant to such recognition to assist the primary liquidation court by doing whatever it could have done in the case of a domestic insolvency.

However, the precise scope of Bermudian Courts' common law power to assist foreign liquidations and, in particular, to "provide assistance by doing whatever it could have done in the case of a domestic insolvency" has been the subject of considerable debate in a number of recent judgments, including in two recent judgments by the Privy Council, on appeals from the Court of Appeal for Bermuda, in *Singularis Holdings Limited v PricewaterhouseCoopers*[37] and *PricewaterhouseCoopers v Saad Investments Company Limited*.[38]

In summary, subject to the facts of any particular case, the Bermuda Court is likely to recognise the winding-up orders of foreign courts, and to assist foreign liquidators to the fullest extent possible, in circumstances where:

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33 See *Re Sea Containers* [2012] Bda LR 33 and *Hughes v Hannover [1997] 1 BCLC 497*.
34 See, for example, *Re Hsin Chong Group Holdings* [2019] HKCFI 805.
35 [2014] UKPC 35.
36 [2007] 1 AC 508.
37 [2014] UKPC 36.
38 [2014] UKPC 35.

(1) there is a "sufficient connection" between the foreign court's jurisdiction and the foreign company making it the most appropriate, or the "most convenient" jurisdiction to have made an order for the winding-up of the company and appointment of foreign liquidators;

(2) there are documents, assets, or liabilities of the foreign company within the jurisdiction of Bermuda; the foreign company has conducted business or operations within, or from, the jurisdiction of Bermuda, whether directly or by agents or by branches; the foreign company has former directors, officers, managers, agents or service providers within the jurisdiction of Bermuda; and / or the foreign company properly needs to be involved in litigation or arbitration within the jurisdiction of Bermuda; and

(3) there is no public policy reason under Bermudian law to the contrary (if, for example, there would be unfairness or prejudice to local Bermudian creditors).

However, the Privy Council has stressed that the question of how far it is appropriate to develop the common law so as to assist foreign liquidations depends on the facts of each case and the nature of the power that the Bermuda Court is being asked to exercise. In the context of an application for an order for production of documents by an entity within the jurisdiction of the Bermuda Court, the Privy Council has noted that such a power is available only where necessary to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers, but it is not available to assist a voluntary winding-up, which is essentially a private arrangement. The Court does not have a power to assist foreign liquidators to do something which they could not do under the law by which they were appointed, and the Court's exercise of its power must be consistent with the substantive law and public policy of the assisting court in Bermuda.

In the recent case of *Stephen John Hunt v Transworld Payment Solutions UK Limited*,[39] the Supreme Court of Bermuda declined to recognise the appointment of a UK liquidator in circumstances where no active assistance had yet been requested, and any such potential assistance would probably have been refused, given pending litigation in England and Wales and other information-gathering mechanisms available to the parties.

There is some uncertainty as to whether a foreign scheme of arrangement or related procedure (such as an insurance business transfer scheme under legislation implementing European single market insurance directives) can be recognised and enforced in Bermuda as a matter of common law. Although the Supreme Court of Bermuda has shown some willingness to recognise foreign court orders approving foreign schemes (in the absence of opposition), it is unclear what position it might take in a contentious situation.

Exempted companies incorporated in Bermuda carry on business predominantly or exclusively in foreign jurisdictions and frequently have their shares and other securities listed on foreign public exchanges. They are accordingly subject to the insolvency regimes of the jurisdictions in which they do business, where these extend to companies incorporated overseas. Proceedings in other jurisdictions, for example, the United States (US), the UK, the British Virgin Islands, the Cayman Islands, Hong Kong and Singapore, affecting insolvent Bermuda exempted companies,

[39] [2020] SC Bda 14 Com.

are common. Where necessary, these are commonly supported by ancillary liquidation proceedings in Bermuda or by judicial recognition and assistance from the Supreme Court with the foreign proceedings, in the absence of winding-up proceedings in Bermuda.

7.6 Recognition of UK personal bankruptcy proceedings

In the personal bankruptcy context (by contrast), it is worth noting that section 144 of Bermuda's Bankruptcy Act 1989 does provide as follows:

> "**Assistance to courts of United Kingdom**
>
> **144** (1) The Court and the officers of that Court shall assist the courts having bankruptcy jurisdiction in any part of the United Kingdom.
>
> (2) For the purposes of subsection (1), a request for assistance made to the Court by a court having bankruptcy jurisdiction in any part of the United Kingdom is sufficient authority for the Court to which the request is made to exercise in relation to any matters specified in the request such jurisdiction as it or the court making the request could exercise with respect to comparable matters falling within its own jurisdiction; however, in exercising its discretion under this subsection the Court shall have regard in particular to the rules of private international law."

This statutory provision is somewhat similar to the old section 122 of the UK's Bankruptcy Act 1914,[40] as well as section 426 of the UK's Insolvency Act 1986 (save for the use of the word "bankruptcy" rather than "insolvency"). Despite certain cross-references in Bermuda's Companies Act 1981 to "the rules of bankruptcy" and "the law of bankruptcy" (see, for example, sections 234 and 235 of the Companies Act 1981), it does not appear, however, as if the provisions of section 144 of the Bankruptcy Act 1989 have been incorporated by reference into the Companies Act 1981 for the purposes of corporate insolvency.

Self-Assessment Exercise 6

Question 1

On what basis are foreign liquidators granted recognition and assistance in Bermuda?

Question 2

What is the safest method by which to implement a foreign court's restructuring of a Bermuda company in Bermuda?

[40] As discussed by the Privy Council in *Al-Sabah v Grupo Torras SA* [2005] AC 333).

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

8.1 Generally

A judgment or order of a foreign court (a foreign judgment) has no direct legal effect in Bermuda.[41] A foreign judgment is not enforceable in Bermuda in and of itself. Steps have to be taken to have a foreign judgment legally enforced in Bermuda.

Depending on the nature of the foreign judgment, a foreign judgment may be recognised or enforceable in Bermuda pursuant to various statutory rules or common law rules.

In particular:

(a) there are statutory rules that apply to the registration and enforcement of final money judgments of superior courts in the UK and certain Commonwealth countries and territories, under the Judgments (Reciprocal Enforcement) Act 1958 ("the 1958 Act"), as amended,[42] and regulations made thereunder;[43]

(b) there are statutory rules that apply to the registration and enforcement of maintenance orders made by foreign courts of reciprocating countries, under the Maintenance Orders (Reciprocal Enforcement) Act 1974 ("the 1974 Act"), as amended, and regulations made thereunder;[44]

(c) there are common law rules[45] applicable to the enforcement of final money judgments of foreign courts in the rest of the world;

(d) there are statutory[46] and common law rules applicable to the recognition of foreign judgments (rather than their enforcement), either as a defence to a claim or as conclusive of an issue in the Bermuda proceedings; and

(e) there are statutory rules that apply to the recognition of divorces and legal separations.[47]

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41 *Holborn Oil Company Ltd v Tesora Petroleum Corporation,* Civil Jurisdiction 1990: No 273, 20 August 1990; and *Young et al v GNI Fund Management (Bermuda) Limited* [2001] Bda LR 70.

42 For example, by the Protection of Trading Interests Act 1981.

43 The Judgments Extension Order 1956 (SR&O 5/1956); the Judgments (Reciprocal Enforcement) Rules 1976 (SR&O 60/1976); and the Judgments (Reciprocal Enforcement) (Australia) Order 1988 (BR 37/1988).

44 The Maintenance Orders (Reciprocal Enforcement) (Designation) Order 1975 (SR&O 66/1975); and the Maintenance Orders (Reciprocal Enforcement) (Designation) Amendment Order 1998 (BR 6/1998).

45 Subject to the statutory restrictions set out in section 7 of the Protection of Trading Interests Act 1981.

46 1958 Act, s 7.

47 The Recognition of Divorces and Legal Separations Act 1977.

There are additional statutory or common law rules applicable to foreign arbitration awards, foreign judgments relating to the administration of estates, foreign decrees of dissolution or nullity of marriage, foreign maintenance orders, as well as the rules relating to foreign bankruptcy proceedings and foreign insolvency proceedings discussed elsewhere.

The Bermuda Courts will recognise and enforce a foreign money judgment which falls within the ambit of the 1958 Act or the common law rule for recognition and enforcement.

The 1958 Act provides a procedure whereby a judgment rendered in the superior courts of the UK[48] can be registered in Bermuda and given effect upon registration as though it were a judgment rendered in Bermuda.[49]

The Governor has also extended the application of the 1958 Act by Order in Council to the various Commonwealth countries listed in Appendix II thereto.[50]

A foreign judgment registered under the 1958 Act can be set aside on an application of any party against whom a registered judgment may be enforced. The registration of a foreign judgment must be set aside if the Supreme Court is satisfied that:

(a) it is not covered by the 1958 Act or was registered in contravention of the 1958 Act;

(b) the foreign court had no jurisdiction in the circumstances of the case;

(c) the defendant did not receive notice of the proceedings in the foreign jurisdiction in sufficient time to enable him to defend the proceedings and did not appear;

(d) it was obtained by fraud; and

(e) the rights under it are not vested in the person by whom the application for registration was made.

The registration of a foreign judgment may be set aside if the Supreme Court is satisfied that the matter in dispute in the proceedings giving rise to the registered judgment had, previously to

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[48] Judgments of a foreign "inferior court" cannot be registered or enforced under the 1958 Act, even if they have been transferred, registered, or certified in the relevant foreign "superior court" for the purposes of enforcement. In *Crossborder Capital Ltd v Overseas Partners Re Ltd* [2004] Bda LR 17, Kawaley J held that an English County Court judgment (which had been transferred to the High Court for enforcement purposes) was not capable of being registered or enforced in Bermuda under the 1958 Act, since it was not a judgment given in the superior courts of the UK as required.

[49] In the event that a foreign judgment is covered by the 1958 Act, section 6 of the 1958 Act prohibits proceedings for the recovery of a sum payable under a judgment, other than proceedings provided for by the 1958 Act itself. The 1958 Act therefore excludes the bringing of an action at common law upon a judgment capable of registration. In *Young et al v GNI Fund Management (Bermuda) Limited* [2001] Bda LR 70, Meerabux J struck out a claim to enforce a final money judgment of the High Court of England and Wales which had been brought at common law, rather than under the provisions of the 1958 Act.

[50] Pursuant to the Judgments Extension Order 1956 (SR&O 5/1956) and the Judgments (Reciprocal Enforcement) (Australia) Order 1988 (BR 37/1988).

the date of such judgment, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

The Supreme Court of Bermuda in 2009 held that, despite the wording of Rule 12 of the Judgments (Reciprocal Enforcement) Rules 1976, the Supreme Court is not entitled to set aside the registration of a foreign judgment, merely on the grounds that it is not "just or convenient" to enforce the foreign judgment in Bermuda, or on "public policy" grounds.[51]

Those foreign judgments from other jurisdictions which are not registrable under the 1958 Act must be enforced by way of a separate action at common law, on the basis that the foreign judgment is treated as evidence of a debt.

The basic common law rule is generally stated to be that a foreign money judgment will be recognized and enforced as a debt against the judgment debtor where:

(a) such judgment is final and conclusive in the foreign court;[52]

(b) the judgment was obtained in a court of law which had jurisdiction over the judgment debtor;

(c) the judgment was not obtained by fraud;

(d) the judgment was not in respect of taxes, fines or penalties;

(e) the enforcement of the judgment would not contravene the public policy of Bermuda; and

(f) the rules of natural justice were observed in the foreign proceedings.

In general, the Bermuda Courts will follow the principles of the common law of England in recognising and enforcing foreign judgments which fall within the aforementioned rule.[53]

8.2 Recognition

A foreign judgment given by a court of a foreign country with jurisdiction to give that judgment, which is final and conclusive on the merits and not impeachable on any of the grounds referred to above, is also entitled to recognition at common law and may be relied on in proceedings in Bermuda (that is, recognition alone, rather than positive enforcement).

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51 See *Masri v Consolidated Contractors International Company* [2009] Bda LR 12.

52 In *Laep Investments Ltd v Emerging Markets Special Situations 3 Ltd* [2015] CA (BDA) 10 Civ (Laep), the Bermuda Court of Appeal held that a stay order issued by the Brazilian courts meant that a Brazilian arbitration award was not final and conclusive for enforcement purposes under the Bermuda International Conciliation and Arbitration Act 1993.

53 There may be scope for argument in Bermuda as to whether recent judgments from other common law jurisdictions such as Ontario, the Isle of Man, the Cayman Islands and Jersey as to the enforcement of foreign non-money judgments should be followed and applied.

For example, no proceedings may be brought by a person on a cause of action in respect of a judgment which has been given in his favour in proceedings between the same parties or their privies in a foreign court unless that judgment is not enforceable, or not entitled to recognition.

8.3 Estoppel

There is also the issue of estoppel and the case of *House of Spring Garden and ors v Waite and ors*[54] is instructive in this context. In that case, an Irish Judgment was sought to be enforced in England by a common law action for summary judgment and a defendant who had not been party to the Irish action but could have been if he chose, sought to say he was not bound by the decision. The Court of Appeal held that he was bound by estoppel because of the privity of interest between himself and the other defendants.

The requisite privy is said to be a privity of either blood, title or interest.[55] The principle is said to be founded on "justice and common sense." The Court of Appeal also relied on the doctrine of abuse of process, that it would be such an abuse to require the Plaintiffs to re-litigate the matter again. However, *House of Spring Garden* is an exceptional case as it was based on a fraud perpetrated on the Plaintiffs and the Court of Appeal took a robust view.

In *Desert Sun Loan Corp v Hill*,[56] the English Court of Appeal accepted in principle that issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, non-substantive issue where there was express submission of the issue in question to the foreign court and the specific issue of fact was raised before and decided, finally and not just provisionally, by the court. A judgment in default or by consent may be a judgment on the merits, but caution needs to be exercised.[57]

Self-Assessment Exercise 7

What are the recognised grounds for declining to enforce a foreign judgment in Bermuda?

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

9. INSOLVENCY LAW REFORM

One of the more significant recent legislative developments in Bermuda is the Banking (Special Resolution Regime) Act 2016, which has been enacted but not yet brought into force, save with respect to sections 1 and 10 (as at the time of writing). This is a very substantial piece of

[54] [1990] 2 All ER 990. Referred to in passing in *Thyssen-Bornemisza v Thyssen-Bornemisza and others* [1999] Bda LR 14, CA.

[55] See *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853. See also *The Sennar (No 2)* [1985] 1 WLR 490, HL.

[56] [1996] 2 All ER 847, CA.

[57] See *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 at 916-917, 926, and 946.

legislation which provides a new statutory toolset for dealing with the failure or insolvency of a bank in Bermuda.

The Companies and Limited Liability Company Amendment Act 2017 also introduced certain legislative changes regarding retention of the books and papers of a company and its liquidators.

The Bermuda Monetary Authority has been actively engaged in a consultation exercise regarding potential reform of the order in which insurance policyholder creditors rank for payment in an insolvent liquidation of an insurer. The consultation exercise resulted in certain legislative changes to the Insurance Act 1978 by way of the Insurance Amendment (Number 2) Act 2018, effecting a prospective change to the waterfall of priorities in the case of an insolvent insurance company.

The Chief Justice has recently published various consultation papers, proposing certain procedural reforms to the Companies (Winding-Up) Rules 1982 and certain Rules of the Supreme Court of Bermuda 1985, which are of relevance to corporate litigation. Some of these rule changes were implemented in July 2018, and others were implemented in November 2020.

The Government of Bermuda is actively engaged in a consultation exercise with respect to potential relaxation of the 60/40 Bermudian ownership and control requirements for local Bermuda companies.

The Restructuring and Insolvency Specialists Association (Bermuda) is also actively considering a variety of industry proposals for potential law reform in the area of personal bankruptcy, insolvency and corporate rescue and this is also an area of interest to the Government of Bermuda, the Official Receiver, the Registrar of Companies, as well as the Chief Justice.

10. USEFUL INFORMATION

Bermuda legislation

- Consolidated Bermudian legislation is publicly available at Bermuda Laws Online, www.bermudalaws.bm.

UK legislation applicable to Bermuda

- UK legislation applicable to Bermuda is publicly available at http://www.legislation.gov.uk/all?text=bermuda.

International treaties applicable to Bermuda

- A list of international treaties to which the UK is a party and which have been extended to Bermuda is publicly available at https://www.gov.bm/international-conventions-or-treaties. See also https://www.gov.uk/government/publications/guidelines-on-extension-of-treaties-to-overseas-territories.

Bermuda Court judgments

- Reported Bermuda court judgments are available by subscription online to the Bermuda Law Reports through Justis.

- Reported Bermuda court judgments since 2007 are publicly available online at the Judiciary pages of the Bermuda Government website, www.gov.bm.

- Hard copies of Bermudian legislation and court judgments published before 2007 that are not otherwise available through Justis can be made available through the libraries of Bermudian law firms and the library of the Supreme Court of Bermuda.

- Judgments of the Privy Council and the UK Supreme Court are publicly available on their websites and also through Bailii online, www.bailii.org.

Practice directions

Various Practice Directions of the Supreme Court of Bermuda are publicly available on the Bermuda Government website. See, in particular:

- Practice Direction, Circular No 6 of 2017, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters; and

- Practice Direction, Circular No 17 of 2007, Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

Textbooks on Bermuda law

In addition to the many English law textbooks that are available, there are a number of specialist textbooks that provide further discussion of Bermuda legal issues. These include the following:

- *British Overseas Territory Law*, Hart Publishing, ed Hendry and Dickson (2011)

- *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance*, OUP, ed Scorey, Geddes, and Harris (2nd edition due in December 2016)

- *Liability Insurance in International Arbitration: The Bermuda Form*, Hart Publishing, ed Jacobs, Masters, and Stanlie (2nd edition, January 2011)

- *The Law of Reinsurance in England and Bermuda*, Sweet & Maxwell, ed O'Neill and Woloniecki (now in its 4th edition, October 2015)

- *Bermuda, British Virgin Islands and Cayman Islands Company Law*, Sweet & Maxwell Asia, ed Bickley (now in its 4th edition, October 2013)

- *Offshore Commercial Law in Bermuda*, Wildy Simmons & Hill, ed Kawaley (January 2013)

- *Cross-Border Judicial Cooperation in Offshore Litigation* (The British Offshore World), Wildy Simmons & Hill, ed Kawaley, Bolton, Mayor (2nd edition, April 2016)

- *Directors' Liability and Indemnification: A Global Guide*, Globe Law and Business, ed Smerdon (3rd edition, July 2016)

- *Bermuda Commercial Law*, Sweet & Maxwell Hong Kong, ed Mann and Hurrion (March 2016)

- *Cross-Frontier Insolvency of Insurance Companies*, Sweet & Maxwell, ed Moss, Kawaley, Seife, and Montgomery (2001)

- *Global Financial Crisis: Navigating and Understanding the Legal and Regulatory Aspects*, Globe Law and Business, ed Bruno and Cano (September 2009)

- *International Trust Disputes*, OUP, ed Collins, Kempster, McMillan, and Meek (January 2012)

- *Enforcement of Money Judgments*, Juris, ed Newman (published 2000, updated 2016)

- *Attachment of Assets*, Juris, ed Newman (published 1999, updated 2016)

- *International Commercial Dispute Resolution*, Tottel / Bloomsbury Professional, ed Warne (2009)

- *The Law of Wills and Estates in Bermuda*, Appleby self-published, Mello (8th edition, 2015)

- *International Estate Planning*, LexisNexis, ed Christensen (2nd edition, 2012)

- *Held Captive: A History of International Insurance in Bermuda*, Oakwell Boulton, ed Duffy (2004)

There are also very informative chapters on a wide range of topics under Bermuda law (including chapters specifically dealing with insolvency and restructuring), published and updated annually by professional publishing houses, including:

- *International Comparative Legal Guides* (https://www.iclg.co.uk/); and

- *Getting the Deal Through* (https://www.gettingthedealthrough.com/).

The Centre for Justice Bermuda also maintains a hard-copy library and it has published a number of publications/seminar papers on issues of Bermuda constitutional and human rights law: http://www.justice.bm/.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Is Bermuda a creditor-friendly or a debtor-friendly jurisdiction, and why?

Commentary and Feedback on Self-Assessment Exercise 1

I would expect a student to summarise relevant features of the Bermuda legal system, to the effect that:

1. Bermuda is a common law jurisdiction, whose legal system is largely modelled on English law but with its own unique characteristics, its own legislation and case law, and its own judicial system (with rights of appeal to the Privy Council in London);

2. Bermuda's insolvency and restructuring laws are to be found in a diverse range of statutes, statutory instruments, reported judgments, and practice directions, but in many cases, the outcome of a corporate insolvency will depend on the specific facts and circumstances of the specific case before the Court;

3. Although Bermuda's legislation is drafted in such a way as to suggest that Bermuda is a creditor-friendly jurisdiction (prioritising the interests of secured creditors and then the interests of unsecured creditors over the interests of shareholders and management), the Bermuda Court has developed a practice, over the years, to facilitate management-led, debtor-in-possession, restructuring, under the supervision of the Court, through the medium of a 'soft touch' provisional liquidator and the use of a scheme of arrangement. This practice is particularly useful when dealing with cross-border insolvencies involving Bermuda exempt companies conducting international business, since it is quite likely that such Bermuda companies will also be involved in Court bankruptcy proceedings in other jurisdictions through which they do business, very often the USA (which is generally recognised to be one of the more debtor-friendly jurisdictions).

The best answer, therefore, would be one that reached a balanced (and well-reasoned) conclusion to the effect that Bermuda is a creditor-friendly jurisdiction which nonetheless has the tools to effect a debtor-in-possession restructuring under the supervision of an independent judge and Court officers.

Self-Assessment Exercise 2

What types of security interests may be created under Bermuda law?

Commentary and Feedback on Self-Assessment Exercise 2

I would expect a student to explain that the nature of a security interest in any particular case will be determined by the terms of the parties' agreement, the nature of the property, and the nature of the debtor's interest.

I would then expect a student to summarise the key features of:
- a legal mortgage
- an equitable mortgage
- a fixed charge
- a floating charge
- a pledge
- a lien
- a registered judgment
- an assignment
- set-off
- the consequences of registration of security.

Self-Assessment Exercise 3

Are the rules relating to the bankruptcy of individuals completely separate from the rules relating to the insolvency of corporate entities?

Commentary and Feedback Self-Assessment Exercise 3

I would expect a student to explain the fact that individual bankruptcies are generally dealt with by the Bankruptcy Act 1989 and that corporate insolvencies are generally dealt with by various pieces of corporate legislation, including the Companies Act 1981, but that the Companies Act 1981 also imports into corporate insolvency various concepts and provisions of the Bankruptcy Act 1989, whether by way of direct incorporation by reference, or by analogy.

I would also expect a student to demonstrate an awareness, however, that in practice individual bankruptcies are rare in Bermuda, and personal bankruptcies are somewhat inefficient and unattractive solutions to personal indebtedness, whereas corporate insolvencies and restructurings are frequent occurrences, in circumstances where the legislation and judicial creativity have enabled efficient and effective debt restructurings to take place, both locally and in international business cases.

I would also expect a student to touch on the fact that partnerships involving individuals and corporate entities may be subject to the rules of both the Bankruptcy Act 1989 and the Companies Act 1981.

Self-Assessment Exercise 4

Question 1

What sorts of transactions are reviewable in the event of an insolvent liquidation under Bermuda law?

Question 2

What are the grounds upon which a Bermuda company may be put into compulsory liquidation?

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

I would expect a student to summarise and explain the following:

- Fraudulent conveyances
- Fraudulent preferences
- Floating charges
- Onerous transactions
- Post-petition dispositions
- Bulk sales in fraud of creditors

An excellent answer would also go on to address the fact that other reviewable transactions might potentially arise as a matter of common law (whether on theories of contract, restitution, tort, breach of trust, or fraud), for example, payments made by mistake.

Question 2

I would expect a student to summarise and explain all of the grounds for compulsory winding-up in section 161 of the Companies Act 1981, with some explanation or commentary regarding the concepts of "inability to pay debts" and "just and equitable" winding-up.

I would also expect a student to identify the regulatory provisions in the Insurance Act 1978 and the Companies Act 1981 that enable "public interest" petitions to be presented to the Court.

Self-Assessment Exercise 5

Question 1

Summarise the key features of a scheme of arrangement.

Question 2

In the event of a compulsory liquidation, are secured creditors or preferential creditors in a more advantageous financial position?

Question 3

What is the main purpose of a compulsory liquidation?

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

I would expect a student to address the fact that a scheme of arrangement is a formal restructuring procedure, supervised and sanctioned by the Court, that enables a company to restructure its debt or equity with a majority (75%) vote of relevant stakeholders, rather than unanimous consent.

This is not intrinsically linked to a company's insolvency, since a scheme of arrangement can be effected when a company is both solvent and insolvent. However, it can be a beneficial way of promoting and securing a restructuring of an insolvent company in appropriate circumstances, with the sanction of the Court.

Question 2

A student will identify the fact that secured creditors are (for the most part) in a more advantageous position, save for floating charge holders.

Question 3

A student will explain that the main purpose of a compulsory liquidation is to gather in and realise assets, to pay creditors in accordance with their rights and priorities, and to distribute any remaining assets or surplus to shareholders (after payment of the costs and expenses of the liquidation procedure).

Self-Assessment Exercise 6

Question 1

On what basis are foreign liquidators granted recognition and assistance in Bermuda?

Question 2

What is the safest method by which to implement a foreign court's restructuring of a Bermuda company in Bermuda?

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

A student will explain that recognition and assistance of corporate foreign liquidators takes place under common law powers, not as a result of any statutory provisions (of the sort that apply to certain foreign bankruptcies of individuals).

A student will also summarise the extent of the power of assistance, pursuant to the *PwC v Saad / Singularis* judgments of the Privy Council (namely that it is limited to granting assistance to the extent that such assistance is both available from the Bermuda court and the foreign Court and consistent with public policy).

Question 2

A student will explain that the safest way is by way of a parallel procedure in Bermuda itself (whether that is a liquidation and a scheme of arrangement if insolvent, or just a scheme of arrangement if insolvent). A student will also explain that there have been uncontroversial cases before the Bermuda Courts in which the Bermuda Courts have been willing simply to recognise a foreign liquidation or scheme of arrangement order, even with respect to a Bermuda company.

Self-Assessment Exercise 7

What are the recognised grounds for declining to enforce a foreign judgment in Bermuda?

Commentary and Feedback on Self-Assessment Exercise 7

A student will identify that there are two sets of rules (statutory and common law) depending on the nature and place from which the foreign judgment emanates.

A student will then explain that the recognised grounds for declining to enforce a foreign judgment in Bermuda include:

- If it is not covered by the 1958 Act;
- If the foreign Court had no jurisdiction;
- If the Defendant did not receive notice of the foreign proceedings;
- If the foreign judgment was obtained by fraud;
- If the rights under the foreign judgment are not vested in the person making the application for enforcement;
- If the foreign judgment conflicts with another prior, inconsistent judgment from another court with competent jurisdiction;
- If the foreign judgment is not final and conclusive;
- If the foreign judgment is for taxes, fines or penalties;
- If enforcement of the foreign judgment is contrary to Bermuda public policy (save in the case of the 1958 Act, following the *Masri* case).

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