



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5A

BERMUDA

This is the **summative (formal) assessment** for **Module 5A** of this course and is compulsory for all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 5A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5A]**. An example would be something along the following lines: 202122-336.assessment5A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

When is a Bermuda company deemed to be unable to pay its debts under section 161 and section 162 of the Companies Act 1981?

- (a) Only when it is balance sheet insolvent.
- (b) Only when it is cash flow insolvent.
- (c) When it is balance sheet insolvent and cash flow insolvent.
- (d) When it is either balance sheet insolvent, or cash flow insolvent, or a valid statutory demand has not been satisfied within a period of three weeks after service on the company's registered office, or if a judgment in favour of a creditor remains unsatisfied.**

CORRECT

Question 1.2

Who may appoint a Provisional Liquidator over a Bermuda company?

- (a) A secured creditor.
- (b) An unsecured creditor.
- (c) The company itself (whether acting by its directors or its shareholders).
- (d) The Supreme Court of Bermuda.**

CORRECT

Question 1.3

In what order are the following paid in a compulsory liquidation under Bermuda law?

a) Preferential creditors; b) unsecured creditors; c) costs and expenses of the liquidation procedure; d) floating charge holders.

- (a) a, b, c, d
- (b) c, d, a, b
- (c) c, a, d, b**

(d) a, c, d, b

CORRECT

Question 1.4

What percentage of unsecured creditors must vote in favour of a creditors' Scheme of Arrangement for it to be approved?

- (a) Over 50% in value.
- (b) 50% or more in value.
- (c) Over 75% in value.

(d) A majority of each class of creditors present and voting, representing 75% or more in value.

CORRECT

Question 1.5

What is the **clawback period** for fraudulent preferences under section 237 of the Companies Act 1981?

- (a) Two (2) years.
- (b) One (1) month.
- (c) Twelve (12) months.

(d) Six (6) months.

CORRECT

Question 1.6

What types of transactions are reviewable in the event of an insolvent liquidation?

- (a) Only fraudulent conveyances.
- (b) Only floating charges.
- (c) Only post-petition dispositions.

(d) All of the above.

CORRECT

Question 1.7

How many insurance policyholders are required to present a petition for the winding up of an insolvent insurance company under section 34 of the Insurance Act 1978?

- (a) At least five (5).
- (b) One (1) is sufficient.

(c) At least 10 or more owning policies of an aggregate value of not less than BMD 50,000.

- (d) At least 10.

CORRECT

Question 1.8

Where do secured creditors rank in a liquidation?

- (a) Behind unsecured creditors.
- (b) Behind preferential creditors.
- (c) Behind the costs and expenses of liquidation.

(d) In priority to all other creditors, since they can enforce their security outside of the liquidation.

CORRECT

Question 1.9

Summary proceedings against a company's directors for breach of duty (or misfeasance) may be brought by a liquidator under which provision of the Companies Act?

- (a) Section 237 of the Companies Act 1981.
- (b) Section 238 of the Companies Act 1981.
- (c) Section 247 of the Companies Act 1981.
- (d) Section 158 of the Companies Act 1981.

CORRECT

Question 1.10

What is a segregated account representative of an insolvent Segregated Accounts Company required to do under section 10 of the Segregated Accounts Companies Act 2000?

- (a) Resign immediately.
- (b) File a Suspicious Transaction Report forthwith.
- (c) 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 becoming insolvent.
- (d) Notify the directors, creditors and account owners within 28 days.

CORRECT

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

In what circumstances may be a Provisional Liquidator be appointed?

Section 170(2) of the Bermuda Companies Act 1981 (*BCA*) allows the court to appoint a provisional liquidator (PL) between the presentation of a winding-up petition and its final hearing. The court may limit the powers of the PL in the court order as found appropriate.

There are several situations in which a PL may be appointed, i.e. if there a risk of dissipation of assets of the company between the presentation of the WUP petition and the hearing, (the appointment is made to ensure that the target company does not dispose of the company's assets). In these circumstances it is generally always the intent that the target company will ultimately be liquidated.

In recent times however a contemporary concept of the provisional liquidator has arisen, namely that of a "light touch" or "restructuring" PL. When a Restructuring PL is appointed, the intent is not that the provisional liquidator will prevent the dissipation of assets, but that he will oversee the company's restructuring process (via a scheme). The idea is that the provisional liquidation will remain in place while the restructuring is effected and the Restructuring PL will be dismissed, without a winding up order ever being made. This will allow the company to return to solvency and resume trading as normal.

In any event, appointment of PL also had an added benefit of the stay of other proceedings whilst the PL is in office. Section 167(4) of the BCA provides that "*when...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*".

CORRECT – 4 MARKS

Question 2.2 [maximum 2 marks]

When can rights of set-off be exercised after the commencement of a liquidation of a Bermuda company?

Section 37 of the Bankruptcy Act 1989 (which Act largely governs personal insolvencies in Bermuda) applies to companies in liquidation and provides for mandatory set-off of debts in the event of liquidation in Bermuda. If a debtor company under compulsory liquidation has a creditor submitting a proof of debt in the liquidation, with whom it has mutual debt/dealings, the transactions of such dealings will be taken into account.

Se-off can be exercised only if¹:

- The debts giving rise to the set off were incurred prior to the commencement of liquidation and have crystallized as monetary payment liability
- The transactions giving rise to the debts was not a fraudulent preference for a fraudulent conveyance
- The dealing between the parties were mutual (i.e. parties giving rise to the debts are the same as parties giving rise to the credit and the parties have contracted with each other in the same capacity).

¹ Ref Para 5.8, Page 11, Module 5A, INSOL Foundation certificate course

CORRECT – 2 MARKS

Question 2.3 [maximum 4 marks]

Describe **three possible ways** of taking security over assets under Bermuda law?

There are several ways in which a creditor can take security over debtor's assets under Bermuda law (which follows English common law), which would be the following:

1. Fixed Charge:
A fixed charge can be created by a creditor over a property of the debtor. A fixed charge does not result in 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.
Once the power of sale is exercised, the proceeds of sale may be applied by the creditor towards payment of the debt in priority to other unsecured creditors. The debtor is also not allowed to deal with the charged property without the consent of the creditor.
2. Legal Mortgage:
This is a significant form of security as it provides for a transfer of the legal title of the debtors' property to the creditor as security. Although, the debtor remains in possession of the property, legal title is conferred back upon payment and satisfaction of the debt and reconveyance of legal title by the creditor.
3. Equitable Mortgage:
Unlike a legal mortgage, in an equitable mortgage, the debtor retains legal title, (and also the possession) of the property but the beneficial interest in the property is transferred to the creditor. It must be noted that 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 value.

The above forms of security can be exercised in respect of immovable, moveable as well as certain intangible property. In respect of certain other intangible/ movable property such as accounts receivables etc., securities in the form of floating charge, pledge and lien are also available.

CORRECT – 4 MARKS

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

Question 3.1 [maximum 8 marks]

Write a brief essay on the basis upon which foreign liquidators are granted recognition and assistance in Bermuda.

Bermuda has not adopted the UNCITRAL Model Law on Cross-Border Insolvency or any similar cross-border initiatives. It also does not have statutory provisions similar to Chapter 15 US Bankruptcy Code or Section 426 of UK's Insolvency Act 1986 which essentially deal with recognition of foreign insolvency proceedings.

It is, however, often the case that global restructuring proceedings are taking place outside of Bermuda because that is where the group carries on business but the ultimate holding company of the group is incorporated in Bermuda. In such cases, given that, Bermudian insolvency proceedings have been recognised in foreign jurisdictions such as US and UK, the Supreme Court of Bermuda (**SCB**) has also demonstrated through its recent judgements that

it may be willing to provide assistance and recognition where appropriate to foreign insolvency office holders. The Privy Council decision in *Cambridge Gas Transportation Corp v Navigator Holdings plc*² confirmed this position by holding that SCB will usually recognise the liquidators appointed by the court of the company's domicile and also granting assistance to such courts/proceedings to the extent that can be done in the case of a domestic insolvency in Bermuda.

While each case turns on its own facts, and whether recognition and assistance will be granted to a foreign insolvency office holder will depend on the specific circumstances of that particular case, the principles laid down in *Singularis Holdings Ltd v PricewaterhouseCoopers*³ and *PricewaterhouseCoopers v Saad Investments Company Limited*⁴ provide useful guidance on how the Bermuda Courts will treat such applications. In brief, some of the factors that will be considered in order to grant recognition and assistance are as follows:

- (i) The relevant foreign company has 'sufficient connection' with the foreign court's jurisdiction making such jurisdictions as the most appropriate to initiate winding-up and appointment of liquidators. This would include factors such as the company's principal place of business, operations and business functions, and indicates that the Bermudian courts may be willing to look beyond the domicile or place of incorporation and consider the Centre of Debtor's Main Interests (COMI) as a factor for granting assistance and support;
- (ii) If the relevant company is incorporated or if the foreign company has assets, liabilities, conducts some form of business operations, it has former directors, members, some branches of offices or agents, or if the foreign company needs to be involved in some litigation or arbitration in Bermuda;
- (iii) The assistance sought by the liquidators to be recognised would be available to them both under the law of the foreign jurisdiction and under Bermuda law; and
- (iv) Such recognition and co-operation are not contrary to Bermuda public policy, which means for instance that the proceedings would be unfair or prejudice Bermudian creditors.

However, there are instances where the SCB has refused to grant recognition and assistance to foreign liquidators such as in the case of *Stephen John Hunt v Transworld Payment Solutions U.K. Limited (in liquidation)*. Among other things, the rationale provided by the SCB was that, (i) the company did not have any assets in the jurisdiction of the Bermudian Court, (ii) the purpose of the recognition application was essentially to enable the foreign office holders to obtain documents and information for use in litigation that they has decided to bring in England, and (iii) no specific/ active assistance was in fact requested by the foreign office holder which made the recognition impractical.

The courts would also not grant recognition in voluntary winding up cases as that would primarily be a private arrangement and as stated above, the Bermuda courts would not be able to grant recognition/ assistance, which would otherwise not be available in its domestic insolvency regime.

It must also be noted that in the personal bankruptcy proceedings, Section 144 of Bermuda's Bankruptcy Act 1989 provides for assistance to courts of UK, which include assistance in all matters that are comparable with the Bermudian law. However, no such similar provision exists in the BCA dealing with corporate insolvencies.

As would have been understood from above, recognition and assistance are usually interdependent and recognition is granted for assistance to follow. However, recognition of foreign office holders may not always be necessary to seek assistance. For instance when a

² 2007 1 AC 508

³ 2014 UKPC 36

⁴ 2014 UKPC 35

winding-up order or foreign scheme of arrangement may be recognised (refer to answer to Q.3.2 below.

GOOD ANSWER – 8 MARKS

Question 3.2 [maximum 7 marks]

Write a brief essay on the circumstances in which a foreign Court judgment **will not be** registered or enforced in Bermuda. Also consider and address the question as to whether a foreign Court-sanctioned Scheme of Arrangement might be registered or enforced in Bermuda.

A foreign court judgement or an order of a foreign court cannot be directly enforceable in Bermuda. Depending on the nature of the foreign court judgement, specific procedures need to be followed to either get such judgement recognised/ enforced in Bermuda. These procedures may be –

- (1) Codified under statute (such as final money judgements being enforced under the Judgments (Reciprocal Enforcement) Act 1958 (**1958 Act**) and the allied rules); or
- (2) A matter of rules under common law.

There are several circumstances as follows, under which a foreign judgement may either not be enforced/ or if registered under the 1958 Act, may be set aside by the Courts upon application of the party against whom the foreign court judgement has been registered, subject to the court being satisfied that one of the below circumstances exist:

- The enforcement is not covered by the 1958 Act or was registered in contravention of the same;
- The foreign court had no jurisdiction in the specific circumstances of the case;
- The defendant did not receive notice of the foreign proceedings in which jurisdiction the foreign judgement was made and adequate time was not provided for the defendant to prepare for the proceedings, and did not appear for the hearing pursuant to such reasons;
- The foreign court judgment was obtained by fraud,
- The foreign court judgment is/ was not final and conclusive as it was still subject to proceedings in the foreign court;
- The foreign court judgment is for taxes, fines or penalties;
- The applicant had already applied under the 1958 Act, and then re-applied for the same relief under common law i.e. an applicant cannot seek to enforce/ recognise a foreign court judgement under another route if it has already applied for and/or been rejected under the statutory provisions of Bermuda law. The 1958 Act excludes the bringing of an action under common law that can be registered under the 1958 Act itself⁵;
- The rights under the foreign court judgment are not vested in the person making the application for enforcement of the same;
- The foreign judgment conflicts with another prior inconsistent judgment from another court with competing jurisdiction;
- The enforcement of the foreign court judgement is contrary to the Bermuda public policy.

While it is unclear if a foreign scheme of arrangement would be recognised under common law in Bermuda, there have been a few cases where the SCB has provided assistance to foreign insolvency officeholders. In the landmark case of *Z-Obee Holdings Limited*,

⁵ *Young et al v. GNI Fund Management (Bermuda) Limited* [2001] Bda LR 70 – the SCB struck out the claim to enforce a money judgement brought under common law rather than under provisions of the 1958 Act which were available for registering the foreign court judgement in this case.

demonstrating cross border judicial co-operation, Chief Justice Kawaley of the SCB appointed Hong Kong restructuring provisional liquidators for the express purpose of restructuring the company, following the adjournment of a winding up petition in Hong Kong to allow a restructuring to proceed. However, following subsequent recognition proceedings in Hong Kong, parallel schemes of arrangement were entered into in each jurisdiction.

It is also untested whether a foreign scheme of arrangement will be recognised notwithstanding a parallel scheme in Bermuda, however, consistent with its flexible and pragmatic approach, the SCB rather than requiring 2 sets of liquidators and parallel schemes of arrangement to restructure the company, have also instead held that they may recognize and enforce (by way of a stay of any Bermuda proceedings) a foreign restructuring order which extinguishes claims against an insolvent Bermuda company (see *In re C & J Energy Services Limited*⁶).

It must be noted that the issue of recognising foreign schemes of arrangements without parallel scheme in Bermuda is untested in the Bermuda appeal courts, and while there isn't clarity or a proper set of precedents and principles laid down by the SCB on this, the Bermuda courts have shown willingness to assist the foreign insolvency office holders/ liquidators in global restructurings.

VERY GOOD ANSWER – 7 MARKS

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

ELBOW LIMITED (“the Company”) was incorporated in 2019 as an exempt Bermuda company, as the parent company in a group of companies, with a direct subsidiary incorporated in the British Virgin Islands, and with indirect subsidiaries incorporated in Hong Kong and with offices and a substantial business presence in Hong Kong. The Company was formed with the intention of investing, through subsidiaries, in illiquid assets in the form of litigation funding loans and distressed debt in Asian markets.

Having funded, through one of its subsidiaries, a hopeless court case in Hong Kong against VICTORY LIMITED, a costs order was made by the Hong Kong Court against ELBOW LIMITED in favour of VICTORY LIMITED in the sum of USD 2 million, payable in full within 14 days.

At the due date for payment of the costs order to VICTORY LIMITED, ELBOW LIMITED's assets were fully invested and its investments, although illiquid, were valued in the aggregate sum of USD 10 million.

The Company's directors decided that it was in the best interests of ELBOW LIMITED and its shareholders not to satisfy the Hong Kong Court judgment and not to liquidate any of its assets to cash given the risk that an urgent “fire-sale” would completely destroy the value of those assets, and in circumstances where ELBOW LIMITED did not consider that the Hong Kong Court judgment would be enforceable against it in Bermuda.

The Company's directors subsequently borrowed an additional USD 5 million from its bank, LENDBANK, secured by way of a floating charge against all of its shares and the assets of its subsidiaries. Out of the USD 5 million received from LENDBANK, ELBOW LIMITED's directors immediately paid themselves a bonus payment of USD 2 million and they also paid a dividend to the Company's shareholders in the sum of USD 3 million.

⁶ [2017] Bda LR 22.

VICTORY LIMITED only found out about these transactions two weeks later, through a report received from a disgruntled former employee of ELBOW LIMITED.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 7 marks]

What actions could VICTORY LIMITED take to try to recover its cost order against ELBOW LIMITED? Please consider (a) the jurisdictions in which it could take such action, bearing in mind the potential need for enforcement; (b) the defendants against whom it could take such action; (c) the pros and cons of litigation as opposed to insolvency proceedings; and (d) the causes of action that may be available against the various potential defendants.

(a) Victory Limited could:

1. Serve a Statutory Demand for the unpaid Costs Order (Judgment Debt) in Hong Kong under the Hong Kong Companies Winding –Up Ordinance against Elbow Limited (at its principal place of business). If unsatisfied within 21 days of its service on the principal place of business of the company, a winding-up of such company can be initiated. A liquidator can be appointed upon such petition to liquidate the assets of the company and distribute the same amongst the creditors of Elbow Limited (which includes Victory Limited).
 2. As the Hong Kong order was made against Elbow Limited, which is a Bermuda company, before taking any action, Victory Limited would first have to get the judgement recognised and enforced in Bermuda. This is because in Bermuda, a judgement or order of a foreign court is not enforceable *ipso facto*. The Bermuda Judgments (Reciprocal Enforcement) Act 1958 (**1958 Act**) provides for the registration and enforcement of judgements obtained from foreign courts of certain jurisdictions including Hong Kong. However, the foreign court judgement must satisfy the criteria under the 1958 Act (i.e. it must be, among other things, given by a Superior Court of the relevant jurisdiction, it must be final and conclusive, must be in respect of the sum of money (which must not be in respect of taxes)). In any event recognition can also be granted at common law subject to the discretion of the court based on the specific circumstances of the case.
 3. Once recognition and enforcement is granted, Victory Limited as a creditor, can bring winding-up proceedings against the company i.e. Elbow Limited pursuant to Section 161 of the BCA as it is unable to pay its debts. Section 162 of the BCA provides that a company is deemed unable to pay its debts if, among other things, a judgement in favour of the creditor remains unsatisfied (i.e. Elbow Limited failed to satisfy the Hong Kong court judgement), or it is proved to the satisfaction of the court that the company is cash-flow (in this case relevant) or balance sheet insolvent (from the facts – this may not be the case for Elbow Limited). Simultaneously, a liquidator can be appointed to liquidate the assets of the company and distribute the same amongst the creditors of Elbow Limited (which includes Victory Limited).
- (b) Elbow Limited will certainly be the defendant in the proceedings (as explained above in (a)). Moreover, considering that the funding was through Elbow Limited's subsidiaries and key business operations are in Hong Kong, a potential enforcement action may also be brought against the subsidiaries.

In terms of the conduct of the directors, the facts indicate that the directors may have acted in breach of their fiduciary duties (as explained further below) and they can also be made personally liable for some of their actions.

(c) and (d)

The potential causes of action against Elbow Limited would be (i) Failure to satisfy its debts (as explained above in point a)

(ii) Fraudulent Preference/ Floating charge/ Fraudulent Conveyance:

Section 237 of the BCA 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 6 months before the commencement of Winding-up shall be deemed to a fraudulent preference over its creditors and considered invalid. Section 239 of the BCA provides that a floating charge on the undertakings or property of the company, created within 12 months of the commencement of the winding up shall be invalid except when it proved that the company after creating the charge was solvent.

Thus, the floating charge granted to Lend Bank could be invalid as a fraudulent preference / invalid floating charge (knowing that Elbow Limited was unable to pay its debts i.e. insolvent/ verge of insolvency) subject to of course a winding-up petition being initiated within the requisite timeframes.

Victory Limited, as a creditor can also bring a claim to set aside a fraudulent conveyance under Section 36A-36G of the Conveyancing Act 1983 which entitled a creditor of a company to apply to the court to have the transaction set aside to the extent required to satisfy its claim, provided that the dominant intention of the transfer was to put the property beyond the reach of the other creditors (which by putting a charge over all of its shares, Elbow Limited appeared to have done this from the facts) and the transaction was entered into for no value/ significantly lesser value (which also appears to be the case as a USD 5million loan was secured against the shares and assets of Elbow which amounted to USD 10million).

Cause of action against the directors of Elbow Limited

While directors owe its duties to the company, they are required to act in the best interests of the creditors when the company is in the zone of insolvency (which Elbow Limited was in this case). They have a fiduciary duty to act honestly and in good faith and to exercise care, diligent and skill that a reasonably prudent person would exercise. By granting the floating charge to Lend Bank and then using the proceeds of the loan to satisfy their own interests as bonus payments, there appears to be a breach of fiduciary duty and this can result in personal liability against the directors. Further, as mentioned above, the transactions entered into by the directors on behalf of Elbow Limited, may be considered to be a fraudulent conveyance/ preference, and this may also incur personal liability on the directors.

GOOD ANSWER – 7 MARKS

Question 4.2 [maximum 8 marks]

To what extent would it be open to ELBOW LIMITED to try to take steps to restructure its debt obligations? How and where would it do so? Consider whether it would be more appropriate to take steps before the Hong Kong courts, the Bermuda courts, or both and, if so, why? Also consider whether it would make any difference if the debt restructuring involved a “debt-for-equity” swap, i.e. the creditors of ELBOW LIMITED would be issued new shares in the Company in exchange for cancellation of their debt, with existing shareholders’ shares in the Company being cancelled.

A scheme of arrangement is a formal corporate rescue procedure under the BCA which may be used to restructure the business of a company. A scheme may result in compromising all or a class of the debt, including a capital reorganisation of the company resulting in a debt for equity swap. Such rescue procedure is also contemplated under the Hong Kong company law.

For a scheme to be binding upon all creditors of the company, an approval of the majority of creditors (class of creditors as the case maybe) present and voting at the meeting, representing 75% by value of the creditors (or class) should vote for the restructuring of the company. Once the Scheme has been approved at the scheme meeting by the relevant majorities, it is required to be sanctioned by the Court. While this process does not require appointment of liquidators/ provisional liquidators, it is preferred that provisional liquidators be appointed (or winding-up petition be initiated) to benefit from the stay provisions and avoid creditor actions when the restructuring is ongoing.

Considering the place of incorporation of Elbow Limited in Bermuda, but the principal place of business is Hong Kong, a parallel scheme of arrangement in Bermuda and Hong Kong may be the preferred course of action. This is because the uncertainty around the Bermuda/ Hong Kong courts recognising the scheme of arrangement of another foreign jurisdiction and to ensure the scheme compromises all debts with little possibility of any challenge from creditors across the 2 jurisdictions. In support of this, it is important to note the Rule in Gibbs⁷ which 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. Therefore, unless there is strong creditor support (which may be ascertained by creditors entering into a restructuring support agreement), Parallel Schemes may be a safer approach to consider. However, we must indicate to Elbow Limited that Parallel Schemes will be more expensive and cost inefficient.

It must also be noted that where the consent of all relevant creditors/ support is with the restructuring, some informal workouts are also possible and can be considered. However, it may difficult to cram down the creditors in absence of a formal restructuring process.

Capital reorganisation of a company by way of Debt for Equity Swap are very common in Bermuda. However, even if Elbow Limited decides to go ahead with only one scheme of arrangement, in Hong Kong considering the creditors are in HK, as a place of information, several documentation will have to be prepared at the Bermuda level such as the Solvency Statement, amended bye-laws etc. In a recent case, In Samson Paper Holding Limited (A company listed on the Hong Kong Stock exchange and incorporated in Bermuda as an exempt company) was restructured by way of a capital reorganisation in a debt for equity swap with only a Hong Kong Scheme of Arrangement, without a parallel scheme in Bermuda. This was because most debts were Hong Kong Law governed.

GOOD ANSWER – 8 MARKS

TOTAL MARKS = 50 MARKS OUT OF 50

*** End of Assessment ***

⁷*Antony Gibbs and Sons v La Societe Industrielle et Commerciale des Metaux CA 1 Jul 1890*