



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5A

BERMUDA

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

The mark awarded for this assessment will determine your final mark for Module 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: 202223-336.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 "studentID" 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 8 pages.**



**ANSWER ALL THE QUESTIONS**

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

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

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) A contributory.
- (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?**

- (i) Preferential creditors.**
- (ii) Unsecured creditors.**
- (iii) Costs and expenses of the liquidation procedure.**
- (iv) Floating charge holders.**

**Incorrect - unanswered**

**Choose the correct answer:**

- (a) Order (i), (ii), (iii) and (iv).**
- (b) Order (iii), (iv), (i) and (ii).**
- (c) Order (iii), (i), (iv) and (ii).**
- (d) Order (i), (iii), (iv) and (ii).**

**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 years.**

**(b) One month.**

**(c) Twelve months.**

**(d) Six 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.**

**(b) One 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 the following provision of the Companies Act 1981:*

*(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**

**9 out of 10 marks**

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 4 marks]



**In what circumstances may a provisional liquidator be appointed?**

**Bermuda's only formal insolvency and restructuring procedures are the winding-up process and the scheme of arrangement under the Bermuda Companies Act 1981. Pursuant to section 170 of the Companies Act 1981 (the "Act") the court has the power to appoint a liquidator in certain circumstances. Section 170 provides that: "1)For the purpose of conducting proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators; 2)The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person."**

**There are various circumstances where the appointment of a provisional liquidator is appropriate this includes:**

- 1. When a winding up petition has been presented to the Court and there is a risk of dissipation of assets between presentation of the winding up petition and the final hearing. A provisional liquidator may be appointed to preserve the assets of the company.**
- 2. While negotiations take place with creditors (and/or shareholders and/or third parties as appropriate), and a restructuring is capable of being achieved under the supervision of an independent court officer.**

**In the case of North Mining Shares Limited<sup>1</sup> the Court noted at paragraphs 29 :**

**" The Court's appointment of Joint Provisional Liquidators serves to protect a company against legal action by its creditors while it is undergoing its restructuring efforts. This was spelled out by Kawaley J (as 8 he then was) in Discover Reinsurance Co v PEG Reinsurance Co Ltd [2006] Bda LR 88 [paras 19-20]:**

**"19. The use of provisional liquidation to facilitate a restructuring has not always occurred in clear cases of insolvency. It has often been utilized when companies are in what has been referred to as the "zone of insolvency". Be that as it may, the Bermuda model of restructuring provisional liquidation has often kept the pre-existing management in place, and merely given the provisional liquidators "soft" monitoring powers. In theory, these monitoring powers are designed to reassure both creditors and the Court that assets are not dissipated, on the implicit assumption that the management that has run the company into difficulties can hardly be trusted to have the creditors' best interests at heart.**

**20. In practice, however, in circumstances where no suspicions about the integrity of the directors really exist, the provisional liquidator is**

<sup>1</sup> [2020] SC (Bda) 7 Com (27 January 2020)

**appointed as part of legal quid pro quo for receiving the benefit of the stay on proceedings that the appointment guarantees..."**

**The appointment of a provisional liquidator is a judicial decision taken by the court based on the facts of each case. The primary objective of the court is to safeguard the interests of the company's stakeholders such as creditors and to ensure the orderly supervision of the company's operations.**

**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?**

The Companies Act of 1981 and 37 of the Bankruptcy Act of 1989 both provide for set-off in liquidations. According to the 1989 Act, where there are mutual credits, mutual debts, and other mutual dealings between insolvent companies and creditors, the amount due from one party to the other in respect of mutual dealings will be reconciled by setting off, the final sum due from the party against any sum due from the other party. Section 37 of the 1989 Act prohibits parties from contracting out of it. However, any creditor who extended credit to the company at a time when it had notice that the company was in difficulties cannot set-off.

This does not provide the necessary details of the circumstances in which set-off will be allowed.

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Question 2.3 [maximum 4 marks]

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

**There are several ways of taking security over assets in Bermuda. How security is taken over assets will depend on several factors including:**

- (a) The nature of the property being secured**
- (b) The nature of the debtor's interest in the property being secured.**
- (c) The terms of the parties' agreement, as set out in the security documents/agreements.**

**Three possible ways of taking security over assets under Bermuda law are:**

- 1. Legal Mortgage - In Bermuda, security over real property is typically granted through a legal mortgage (executed as a deed), in which title is transferred to the mortgagee (or lender), or an equitable mortgage (executed under hand), in which a charge is created but title is not transferred to the mortgagee. According to the Land Title Registration Act 2011 the grant of a legal mortgage will necessitate compulsory first registration of title to the real property forming**

**the subject matter of the mortgage or charge, and the relevant mortgage or charge must be lodged at the Land Title Registry Office along with the title documents relating to the property in question. While the debtor retains possession and occupation of the property, legal title is only restored when the loan is paid off and the creditor is satisfied. The creditor will also be required to return legal title of the property when the debt is repaid.**

**2. Fixed Charge- As a form of security a fixed does not transfer legal title, but it does allow the creditor to take control of the property with a right of sale in the case of the debtor's default. Without the agreement of the creditor, the debtor may not deal with any property subject to a fixed charge. When a creditor exercises the power of sale, the proceeds of the sale may be allocated to the payment of the debt in priority to and without regard for other unsecured creditors.**

**3. Floating Charge -Floating charges that are not fixed. A floating charge can be placed on many sorts of assets that alter daily. A floating charge is typically applied to a debtor's whole business and venture. A floating charge, unlike a fixed charge, does not attach to a specific item but instead floats over one or more assets. While the floating charge is in effect, the debtor may dispose of the secured assets without the agreement of the creditor. However, if a specified event of default occurs, the floating charge will crystallize and change into a fixed charge that attaches to the debtor's specific assets at that time. In the event of insolvency, the property secured by a floating charge becomes part of the debtor's assets.**

**Correct - 4 marks**

QUESTION 3 (essay-type question) [15 marks]

Question 3.1 [maximum 8 marks]

**Write a brief essay on the basis upon which foreign liquidators are granted recognition and assistance in Bermuda. Also consider the circumstances in which foreign liquidators might not be granted recognition and assistance.**

Currently there is no statutory provision requiring the Bermuda courts to recognise or grant assistance to foreign liquidators. Bermuda is not a signatory to any international treaties relating to insolvency. There is no statutory equivalent of chapter 15 of the US Bankruptcy code, section 426 of the UK's insolvency Act by which the US and UK have implemented the UNCITRAL model law on Cross-Border Insolvency.

In the Privy Council's judgement of *Singularis Holdings Ltd v Price Waterhouse Coopers*, the court considered an appeal from the Bermuda Supreme Court. The court examined two issues: i) whether the Bermuda court has the common law power to assist a foreign liquidation by ordering the production of information when it lacks statutory authority to wind up an overseas company, and ii) whether such a power can be exercised when the court in which the liquidation is proceeding cannot issue such an order. The first instance judge issued an order recognizing the status of the liquidators appointed by the Cayman Court and utilised what he called a common law power to order PWC to produce documents that could have been obtained under s.195. However, the Bermuda Court of Appeal overturned the order, leading the liquidators to appeal to the Privy Council. The Privy Council unanimously dismissed the appeal, stating that if there were a common law power to assist a foreign liquidation by ordering the production of information, it could not be exercised in circumstances where the foreign court could not issue a similar order.

The Privy Council found that there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. They stated that this power is available only to assist the officers of a foreign court of insolvency jurisdiction to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers and not to enable them to do something which they could not do under the law by which they were appointed. Thus, the power is available only when it is necessary for the performance of the office-holder's functions and is subject to the limitation that such an order must be consistent with the substantive law and public policy of the assisting court.

Consequently, the court will determine how far to assist a foreign liquidator based on the facts of each case and the nature of the power the court is asked to exercise. Thus, the circumstances where foreign liquidators are granted recognition and assistance include:

- i. If there is 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 the appointment of foreign liquidators;
- ii. 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 jurisdictions or Bermuda; and/or the foreign company properly needs to be involved in litigation or arbitration within the jurisdiction of Bermuda; and
- iii. There is no public policy reason under Bermudian Law to the contrary. (e.g. there would be unfairness or prejudice to local Bermudian creditors.)

Also in *Stephen John Hunt v Transworld Payment Solutions U.K. Limited (in liquidation)*, the Supreme Court of Bermuda discharged an ex-parte order recognizing the appointment of Mr. Hunt as liquidator of Transworld Payment Solutions U.K. Limited ("Transworld") by the English High Court and corresponding ex-parte orders granting him assistance in that capacity on the basis that (1) Transworld did not have any assets in the jurisdiction of the Bermuda Court and the Court held that recognition is permissible where there are assets within the jurisdiction in order to clothe the liquidator with the authority to deal with such assets but that conversely a specific restriction applies which prohibits the use of a recognition order to obtain documents and information for use in actual or anticipated foreign litigation.

Thus, foreign liquidators would be granted recognition and assistance in Bermuda in matters such as winding-up orders that has been granted by a court and to assist in circumstances

that would not offend public policy in Bermuda, the salient facts of the case and the nature of the power that the court is asked to exercise.

**Correct – 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.**

In Bermuda, a foreign court's judgment or order does not possess immediate legal impact. Simply put, a foreign judgment lacks enforceability within Bermuda unless specific measures are undertaken to facilitate its enforcement. Certain statutory or common law rules may allow a foreign decision to be recognised or recognisable. These include:

- i. The Judgments (Reciprocal Enforcement) Act 1958 (the 1958 Act) which concern registration and enforcement of final money judgments of superior courts of the UK and other commonwealth countries and territories.
- ii. Maintenance Orders (Reciprocal Enforcement) Act 1974 ("the 1974 act") as amended and regulations made thereunder.
- iii. Common law rules applicable to the enforcement of final money judgments of foreign courts in the rest of the world.
- iv. Other statutory and common law rules that apply to divorce and legal separations.
- v. Statutory and common law rules applicable to the recognition of foreign judgments either as a defence to a claim or as a conclusive proceedings.

Pursuant to the 1958 Act the courts will recognise and enforce a foreign judgment which falls under its scope. Where the 1958 Act does not apply, Bermuda applies standard common law principles to the recognition of foreign judgments. The foreign judgment must be given by a foreign court of competent jurisdiction and may be enforced in Bermuda by an action for the amount due under it if the judgment is final and conclusive on the merits between the same parties, for a definite sum of money (provided that sum does not constitute tax, a fine or a penalty), was not obtained by fraud or contrary to the principles of natural justice, and enforcement would not be contrary to public policy.

"Judgment" is defined for the purposes of the 1958 Act as "a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of money in respect of compensation of damages to an injured party; and it also includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place".

The Bermuda Supreme Court will consider a judgment to be final and conclusive provided that it is not capable of being varied by the court that made it. The foreign court's decision must be final and conclusive on the merits between the same parties.

In order for a foreign judgment to be recognized and enforceable under the 1958 Act, the following conditions must be met:

- i. The judgment must originate from specific Commonwealth Jurisdictions, including but not limited to the UK, Australia, and various Caribbean jurisdictions (excluding the Cayman and Turks and Caicos Islands), Hong Kong, Nigeria, Guyana, and Gibraltar. Notably, the United States, the Channel Islands, Singapore, Canada, India, South Africa, and New Zealand are not included. The judgment must be issued by a "superior court" of the foreign jurisdiction, such as a court higher in authority than a county court or magistrates' court in the UK.
- ii. The judgment must be final and conclusive on the merits, resolving the dispute completely between the parties.
- iii. The judgment must pertain to a specific and definite sum of money, excluding amounts related to taxes, fines, or penalties.
- iv. The judgment or the most recent appeal ruling related to it must be less than six years old.
- v. The judgment must have been rendered by a court that had the jurisdiction, as defined by the statute, to make that particular judgment.
- vi. In the case of: An action involving individuals (in personam), it requires the defendant's submission to the foreign proceedings, residency, principal place of business, or having an office or place of business in the foreign jurisdiction, with the proceedings relating to a transaction conducted through that office or place.
- vii. An action against property, it requires the property to be located within the foreign jurisdiction at the time of the proceedings leading to the judgment.
- viii. The defendant must have received notice of the proceedings with sufficient time to defend themselves.
- ix. The judgment must not have been obtained through fraudulent means.
- x. The judgment must not have been issued contrary to an agreement to resolve the dispute in another jurisdiction, unless the foreign proceedings leading to the judgment were willingly submitted to, waiving the agreement.
- xi. The judgment must not be against a judgment debtor who, under the rules of public international law, had immunity from the jurisdiction of the foreign court.

The Bermuda Court accepts jurisdiction in respect of enforcement of foreign judgments generally, but Bermuda property will be necessary for effective enforcement in principle, recognition is a precursor to enforcement, but not all recognised judgments are strictly speaking enforceable or appropriate to enforce.

In certain situations, according to common law, a foreign judgment may be recognised even if enforcement is not feasible. For instance, if the judgment pertains to something other than a specific amount of money, like the fulfillment of a contract. In such cases, the foreign judgment can be used as a defense in legal proceedings before the Bermuda Court. If there is a prior conflicting judgment issued in Bermuda involving the same matter as determined by the foreign judgment, a defendant has the right to oppose the enforcement of the foreign judgment on the grounds of res judicata. When there are ongoing legal proceedings in Bermuda related to the same issue(s) as a party seeking recognition or enforcement of a foreign judgment, those Bermuda proceedings are likely to be influenced by the foreign judgment and may be put on hold until the recognition/enforceability of the foreign judgment is confirmed. Unless specific challenges are raised (which involve certain Bermuda legal principles such as fraud prevention and protection of public policy considerations), the Bermuda Court will not decline to enforce a foreign judgment based on errors in fact or law, including the foreign court's interpretation of Bermuda law.

According to the 1958 Act, a creditor who has obtained a judgment has a time limit of six years from the date of the foreign judgment to officially record it in Bermuda.

However, if there are any appeals made against the foreign judgment, the six-year period will start from the date of the final judgment in the proceedings. Under common law, a foreign judgment establishes a debt that can be enforced based on legal obligations, and the time limit begins from the date of the foreign judgment. The typical time restriction for taking legal action regarding a simple contract, such as a debt, is also six years.

Once a foreign judgment is acknowledged as enforceable under common law or registered under the 1958 Act, it can be enforced as if it were issued by the Supreme Court. This can be done through various legal processes, including garnishee proceedings, the appointment of a receiver, committal in suitable circumstances, and insolvency proceedings.

In relation to a formal restructuring procedure known as a foreign court-sanctioned scheme of arrangement, the court has acknowledged foreign court orders that approve such arrangements when there is no objection.

[Correct – 7 marks](#)

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

***Bercoffee 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; with indirect trading subsidiaries incorporated in the People's Republic of China (PRC); and with offices and a substantial business presence in Hong Kong. The Company's trading operations in the PRC involves coffee shops and other retail businesses associated with coffee and hot drinks.***

***The Company issued a number of bonds to creditors based in the United States (US) with the face value of USD 500 million, with a view to raising additional capital (by way of debt funding) to fund the expansion of its business activities in the PRC (which had previously been funded with the benefit of shareholders' capital contributions).***

***It was subsequently disclosed that the Company had fraudulently misrepresented its financial performance in the offering documents associated with the bonds, with the consequence that the US bondholders were entitled to demand immediate repayment by the Company of the sum of USD 500 million, even though that money had already been transferred to the Company's indirect subsidiaries in the PRC, and was incapable of being returned due to local currency control restrictions and associated Chinese legal issues.***

***The US bondholders served a statutory demand on the Company in Bermuda, demanding repayment of the sum of USD 500 million within 21 days.***

**The Company's directors decided, however, that it was in the best interests of Bercoffee Limited and its shareholders to not satisfy the statutory demand but to ignore it for the time being, having regard also to the Chinese legal position, and with a view to trading through the Company's financial difficulties.**

**The Company's directors subsequently borrowed an additional USD 50 million from its bank, Lendbank, which loan is secured by way of a floating charge against all of the Company's shares and the assets of its subsidiaries. Out of the USD 50 million received from Lendbank, Bercoffee Limited's directors immediately paid themselves a bonus of USD 20 million and they also paid a dividend to the Company's shareholders in the sum of USD 30 million.**

**The US bondholders only found out about these transactions two weeks later, through a report received from a disgruntled former employee of Bercoffee Limited.**

Using the facts above, answer the questions that follow:

Question 4.1 [maximum 7 marks]

**What actions could the US bondholders take in order to try to recover some or all of the sum of USD 500 million from the Company or other parties? Please consider (a) the jurisdictions in which they could take such action, bearing in mind the potential need for enforcement; (b) the defendants against whom they 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.**

The US bondholders have several potential avenues to try to recover some or all of the sum of USD 500 million from Bercoffee Limited or other parties. However, the success of these actions and the available remedies may vary depending on the jurisdictions involved and the specific circumstances of the case. It is noted that Bercoffee Limited (the Company) was incorporated in 2019 as an exempt Bermuda company. As an exempt company Bercoffee conducts business activities in foreign jurisdictions and has a direct subsidiary incorporated in the British Virgin Islands and indirect trading subsidiaries incorporated in the People's Republic of China (PRC), and offices and a substantial business presence in Hong Kong. The Company's trading operations in the PRC involves coffee shops and other retail businesses associated with coffee and hot drinks. As a result, Bercoffee is liable to face court proceedings in more than one jurisdiction simultaneously. One of the court's will be considered the primary court and the other as an ancillary court.

In terms of the UNCITRAL Model Law on Cross Border Insolvency Bermuda has not enacted legislation incorporating the Centre of Main Interests (COMI) test however the courts have at common law considered the issue of COMI and forum. Therefore the Bermuda Court has affirmed that in the absence of any Bermuda legislation, the court in accordance with the common law, can recognize liquidations taking place in the company's domicile and has the discretion to recognise the primary liquidation taking place in another jurisdiction. In the matter of *Kingate Global Fund Limited et al*<sup>2</sup> Justice Kawaley upheld a previous order of the Bermuda Court ordering two BVI fund companies (which were already in compulsory liquidation in the BVI) to be wound up in an ancillary compulsory liquidation under the

<sup>2</sup> [2010] SC (Bda) 47 Com (20 August 2010),



supervision of the Supreme Court of Bermuda. The Bermuda Court's winding up order was made despite the fact that the BVI fund companies were overseas companies that were exempt from any requirement to be registered as permit companies in Bermuda under the provisions of the Companies Act 1981.<sup>3</sup>

It is noted that Bercoffee had fraudulently misrepresented its financial performance in the offering documents associated with the bonds, with the consequence that the US bondholders were entitled to demand immediate repayment by the Company of the sum of USD 500 million. The US bondholders have served a statutory demand on the Company in Bermuda, demanding repayment of the sum of USD 500 million within 21 days, can therefore issue proceedings pursuant to section 161 of the Companies Act 1981 for the company to be compulsorily wound up by the Court. Section 161 of the Companies act provides the circumstances in which a company may be wound up by the Court which includes ( ones relevant here): i) if— the company has by resolution resolved that the company be wound up by the Court; ii) where the company is unable to pay its debts; or iii) the Court is of the opinion that it is just and equitable that the company should be wound up.

Pursuant to section 162 Bercoffee will be deemed to be unable to pay its debts since the US bondholders served a statutory demand on the Company in Bermuda, demanding repayment of the sum of USD 500 million within 21 days which has not been paid. Consequently, the Court may consider that it is just and equitable in the circumstances to wind up the company. Further the action of the directors shows a lack of probity. Several of the actions taken were highly improper including i) misrepresenting its financial performance in the offering documents associated with the bonds; ii) choosing to not satisfy the debt and ignore it; iii) borrowing an additional USD 50 million from its bank with knowledge of the statutory demand, whilst unable to pay its current debts; iv) proceeding to pay the directors a bonus of USD 20 million out of the USD 50 million received from Lendbank, and v) the payment of a dividend to the Company's shareholders in the sum of USD 30 million.

The court can appoint a provisional liquidator prior to the final winding up hearing once a prima facie case has been made up by the US Bondholder and the court considers that in all the circumstances of the case a provisional liquidator should be appointed. Additionally, the transactions which took place after the statutory demand was made such as securing the loan from Lendbank by way of a floating charge against all of the Company's shares and the assets of its subsidiaries, the bonus payments to the directors and payment of dividends to shareholders are reviewable transactions in any potential winding up proceedings. The US bondholders can therefore under section 36A to 36 G of the Conveyancing act 1983 apply to the court to have these transactions set aside. The US bondholders would have to prove to the court that the main reason for these transactions were to put the property beyond the reach of other creditors. Because the directors were aware of the statutory demand by the US bondholders it is highly probable that a court will find that these transactions were for no proper purpose. Further section 237 of the companies act 1981 provides that any conveyance or mortgage, payment made within 6 months before the commencement of its winding up shall be deemed a fraudulent preference of its creditors and be invalid.

With respect to the floating charges which were granted once they were made within 12 months of the commencement of the winding up it shall be invalid pursuant to section 239 of the companies act 1981. Therefore, it is imperative that if the US bondholders wish to challenge these transactions, they should make the appropriate application to the Court within the timelines indicated.

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<sup>3</sup> International insolvency co-operation in Bermuda: an update, published by LexisNexis UK, (2011) 1 CRI 14, 1 February 2011

It should be noted that a Bermuda company has the legal right to provide protection to its directors and officers against liability to the company or third parties, as long as their conduct does not involve fraud or dishonesty. Section 98 of the Companies Act 1981 explicitly recognizes the validity of such indemnification. Provisions that offer indemnity and waiver to directors and officers are widely used in the by-laws and service contracts of Bermuda companies.

In *Peiris v Daniels*<sup>4</sup> in a case where the unpaid creditor of a company in liquidation filed a misfeasance application against its former directors, alleging breaches of duty due to their failure to obtain compulsory liability insurance. The court determined that the directors had indeed breached their duty, but upheld the by-law indemnity in favor of the directors.

The UK Supreme Court in *BTI 2014 LLC v Sequana SA*<sup>5</sup>, in a case which concerned “*the circumstances and extent to which the company directors must consider the interests of creditors with regard to their common law duties.*” held that directors, as part of their duty to act in good faith in the interests of the company, must also consider the interest of creditors. However, although the duty exists, there is no one single trigger however the following is instructive:

*“Where the company is insolvent or bordering on insolvency but is not faced with an inevitable insolvent liquidation or administration, the directors’ fiduciary duty to act in the company’s interests has to reflect the fact that both the shareholders and the creditors have an interest in the company’s affairs. In those circumstances, the directors should have regard to the interests of the company’s general body of creditors, as well as to the interests of the general body of shareholders, and act accordingly. Where their interests are in conflict, a balancing exercise will be necessary... [T]he more parlous the state of the company, the more the interests of the creditors will predominate, and the greater the weight which should therefore be given to their interests as against those of the shareholders.*”

In this scenario, applying therefore the principles in *BTI v Sequana* the directors were under a duty to consider the interests of the company’s creditors before entering into the transactions that they did because Bercoffee was imminently insolvent and/or insolvency was probable in all the circumstances.

[This is a good effort, but does not engage with all of the jurisdictional issues – 5 marks](#)

Question 4.2 [maximum 8 marks]

**To what extent would it be open to Bercoffee Limited to try to take steps to restructure its debt obligations, and how and where could 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, (that is, if the US bondholders would be issued new shares in the Company in exchange for cancellation of their debt, with existing shareholders’ shares in the Company being cancelled).**

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<sup>4</sup> [2015] SC (Bda) 13 Civ.

<sup>5</sup> [2022] 3 WLR 709

The statutory provisions applicable to Bermuda schemes of arrangement can be found in Part VII of the Companies Act 1981 (the "Act"), and specifically at sections 99 and 100. In Bermuda it would be open to Bercoffee Limited to take certain steps to restructure its debt such as a scheme of arrangement. This is the primary mechanism used to voluntarily reorganise a Bermuda incorporated company. The main aim of the scheme would be to provide Bercoffee with the opportunity to restructure its debt. This is a formal procedure which may be used with a view to continue trading. By undergoing a scheme of arrangement Bercoffee can adjust or compromise all or a class of its debts. Also, it can include the transfer of rights, property and liabilities of the company to another company.

In order for a scheme of arrangement to be binding the company must obtain the necessary majorities (i.e. 75% by value of that class,) from each class of members or creditors as prescribed by the law, the scheme will be binding on dissenting creditors or shareholders. The scheme can be initiated by the company itself, its members, or creditors. In the case of an insolvent company, a liquidator or provisional liquidator may promote the scheme. The process begins by applying to the Supreme Court for directions to convene meetings with the relevant classes of creditors or shareholders who will be impacted by the proposed scheme.

Each class of creditors or members must be fairly represented, all legal requirements must be completed, and the arrangement must be one that a reasonable businessperson would find acceptable to get the court's approval. Bercoffee has the option of to present a winding-up petition to the court and seek the appointment of a provisional liquidator. The provisional liquidator will then have the authority to facilitate and promote the scheme proposed by the company's management, including overseeing the company's board or management activities.

In Bermuda, there is no automatic stay preventing creditor actions while a scheme of arrangement is being implemented. Thus, placing Bercoffee in provisional liquidation during the scheme's implementation might be a good option. This allows for a stay under Bermuda law, and once the scheme has been implemented, the liquidation proceedings are discontinued.

The appointment of the temporary liquidator can ensure creditors that the restructuring process is being carried out carefully with a focus on preserving their interests while yet allowing the board of Bercoffee to maintain control over the company's business. Although the statutory moratorium prohibits creditors from starting winding-up procedures, secured creditors continue to have the right to enforce their security, provided that doing so doesn't entail taking legal action.

It is possible for steps to be taken before the Hong Kong courts as well as the Bermuda with the use of parallel schemes of arrangement. In *Re Titan Petrochemicals Group*<sup>6</sup> the Court noted at paragraph 12 that:

"... this Court frequently approves parallel schemes linking Bermuda, the UK, Hong Kong and/or Singapore. Those jurisdictions have companies legislation regulating schemes of arrangement which are either identical or substantially similar to sections 99–100 of our own Companies Act."

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<sup>6</sup> [2014] Bda LR 90

In Rare Earth Magnesium Technology Group Holdings Limited<sup>7</sup> the Hong Kong Court sanctioned a scheme of arrangement introduced by Rare Earth Magnesium Technology Group Holdings Limited, which was incorporated in Bermuda, to restructure its debt. The Company had shares which were listed in Hong Kong and had subsidiaries principally located in Hong Kong, Mainland China, and the British Virgin Islands. It became (at least cash flow) insolvent and petitioned the Bermuda court for its own winding-up. Soft-touch provisional liquidators were appointed by the Court who also obtained recognition in Hong Kong. The Hong Kong court ordered that a creditors' meeting be convened to consider a proposed scheme of arrangement for restructuring the Company's debt, which was largely governed by Hong Kong law. The scheme was approved by the majority of the creditors although another creditor presented a winding-up petition against the Company in Hong Kong shortly thereafter. The Court in sanctioning the scheme and dismissed the winding-up petition noted that:

"27. In transnational cases, the Court considers whether a scheme is effective in other foreign jurisdictions of practical importance because it would not be a proper exercise of the discretion to sanction a scheme if it serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

(1) Is a material amount of debt to be compromised by a scheme governed by the law of a jurisdiction other than Hong Kong?

(2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?

(3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued.....

29. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme of arrangement will be recognised abroad is justified because the discharge occurs as a matter of substantive Hong Kong law. This is certainly to be expected of a jurisdiction which applies, what is commonly known as, the Rule in *Gibbs*. The Rule in *Gibbs* provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt. As far as I am aware, at the time of this decision *Gibbs* is followed in Bermuda, Cayman Islands and the other offshore jurisdictions. "

It is vital to note that the rule in *Gibbs* in essence prevents debt obligations governed by one law in one country being discharged in a foreign insolvency without consent. Considering the company's facts and circumstances, Bercoffee would therefore need to consider the potential costs and expenses of taking this path before deciding whether to pursue parallel schemes. Bercoffee may therefore try to submit an application for Hong Kong to recognize and enforce the Bermuda scheme. Additionally, the debt restructuring can involve a "debt-for-equity" swap, (that is, if the US bondholders would be issued new shares in the Company in exchange for cancellation of their debt, with existing shareholders' shares in the Company being cancelled within the context of a scheme of arrangement or where all the creditors agree, and the necessary shareholder agreements can be obtained. Consequently, this debt for equity swap has the potential to dilute the ownership stakes of current shareholders.

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<sup>7</sup> [2022] HKFCI 1686

[Good answer - 8 marks](#)

[Total: 45 out of 50 marks](#)

**\* End of Assessment \***

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