



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).**
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- 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?

*A provisional liquidator may be appointed to assist with any debtor-in-possession or management-led corporate restructuring under the supervision of the Supreme Court of Bermuda. In such a case, the court may appoint a “soft touch” provision liquidator that is granted specific powers to implement a restructuring designed to support formal and informal restructuring plans that have a credible prospect of success and the support of the majority of creditors: see *HSBC v NewOcean Energy Holdings Limited* [2022] CA Bda 16 Civ. The provisional liquidator may then proceed with restructuring, including the implementation of a scheme of arrangement.*

*Alternatively, a provisional liquidator may also be appointed in cases of urgency, such as where there is a risk that assets will be dissipated in the period between the presentation of the petition and the final hearing. Further, a provisional liquidator may also be appointed where 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: see *Re Stewardship Credit Arbitrage Fund Ltd* [2008] Bda LR 67.*

The relevant statutory provision is s 170(2) of the Companies Act 1981, which allows the court to appoint a provisional liquidator between the presentation of a winding-up petition and its final hearing. The court must be satisfied that 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.

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?

Rights of set-off may be exercised (and is in fact mandatory) 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. In such a case, 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.

Such rights are provided for under s 27 of the Bankruptcy Act 1989. The requirements are that: (a) the debts giving rise to the set-off were incurred prior to the commencement of liquidation and have crystallised as monetary payment liabilities; (b) the transaction giving rise to the debts was not a fraudulent preference or a fraudulent conveyance; or (c) 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).

Correct - 2 marks

Question 2.3 [maximum 4 marks]

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

First, security over assets may be taken by way of a legal mortgage. This applies to immovable, movable and certain intangible property. In this case, the legal title of the debtor's property is transferred to the creditor as security for a debt, and the debtor remains in possession of the property. The debtor, however, regains legal title only upon payment and satisfaction of the debt and reconveyance of legal title by the creditor.

The second is by way of a fixed charge. In this situation, a creditor can take a fixed charge over the property, but this does not result in a transfer of legal or beneficial ownership. Instead, the charge 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. While the charge is in effect, the debtor may not deal with any property that is subject to a fixed charge without the consent of the creditor. Where the creditor exercises 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.

The third is by way of a pledge. This involves the creditor taking actual or constructive delivery or possession of the debtor's assets until the debt is repaid or discharged.

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.

The starting point is that Bermuda has not enacted local legislation incorporating the UNCITRAL Model Law on Cross-Border Insolvency. Accordingly, the Supreme Court of Bermuda's powers to deal with the recognition of foreign liquidators and any

assistance granted is not premised on statute. Instead, such powers are derived from common law. In particular, the Supreme Court of Bermuda cited with approval the Privy Council decision in *Cambridge Gas Transportation Corp v Navigator Holdings p/c* [2007] 1 AC 508 that, as a matter of common law, the Supreme Court of Bermuda may 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 taking any steps that it is so permitted under domestic insolvency law.

The requirements for recognition and assistance granted to foreign liquidators are that:

- (a) There must be a "sufficient connection" between the foreign court's jurisdiction and the foreign company, which makes 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.
- (b) Either: (i) there are documents, assets or liabilities of the foreign company within Bermuda's jurisdiction; (ii) the foreign company has conducted business or operations within, or from, Bermuda's jurisdiction, such operations or business being conducted directly or by agents or branches; (iii) the foreign company has former directors, officers, managers, agents or service providers within Bermuda's jurisdiction; and/or (iv) the foreign company properly needs to be involved in litigation or arbitration in Bermuda's jurisdiction.
- (c) The recognition and grant of assistance is not contrary to Bermuda public policy.

Recognition, however, is not automatic. For instance, the Supreme Court of Bermuda has declined to recognise the appointment of a UK liquidator in circumstances where no active assistance had yet been requested: see *Stephen John Hunt v Transworld Payment Solutions UK Limited* [2020] SC Bda 14 Com.

It must also be noted that the assistance granted to foreign liquidators is not unlimited. The Privy Council observed, for instance, that an order for the production of documents by an entity within the jurisdiction of the Bermuda Court 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 general principle is that the court does not have the 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.

[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.

The circumstances in which a foreign court judgment will be refused registration or enforcement depends on the grounds on which the applicant is seeking registration or enforcement, whether by way of statutory or common law rules.

Where the applicant is seeking registration or enforcement under the Judgments (Reciprocal Enforcement) Act 1958 ("the 1958 Act"), that application is open to challenge by the party (defendant) whom enforcement is proceeded against on the following grounds:

- (a) The foreign judgment 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*
- (d) sufficient time to enable him to defend the proceedings and did not appear.*
- (e) The foreign judgment was obtained by fraud.*
- (f) The rights under the foreign judgment are not vested in the person by whom the application for registration was made.*

Further, the Supreme Court of Bermuda may set aside registration if the matter in dispute in the proceedings giving rise to the registered judgment had, previously to the date of such judgment, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

Where enforcement is sought under common law rules, the requirement is that the judgment be a foreign money judgment. Non-money judgments would not be enforced. Further, the foreign money judgment must satisfy the following requirements, failing which its enforcement would be dismissed:

- (a) The judgment is final and conclusive in the foreign court.*
- (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.*

[A good answer, but it does not address Schemes.](#)

[5 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.

Litigation not preferable

In my view, litigation against the Company for common law tortious or contractual claims such as misrepresentation against the Company and its directors would not serve to advance the shareholders' interest. This is because even assuming that the US Bondholders ("Bondholders) obtain judgment in their favour, they are still unsecured creditors, and Company may ultimately have insufficient funds to pay them. Litigation would thus be a waste of time and resources on the Bondholders' end in pursuing these claims. The preferable approach would be to commence insolvency proceedings against the Company.

Winding up the Company

In my view, the first step that the Bondholders may take is to commence winding up proceedings against the Company in Bermuda. This action is necessary in order to facilitate the Bondholders' recovery of the USD 500 million (or at least part of it). Bearing in mind that the Bondholders are not secured creditors (and there is no evidence showing that they are), whether the Bondholders are able to recover the full sum ultimately depends on: (a) whether there are other creditor claims against the Company; and (b) whether the Company has sufficient assets to pay off the Bondholders claim (and the claims of other creditors) in full. I discuss this in greater detail below.

Returning to the analysis, to commence winding up proceedings, the Bondholders should make an application under s 161(e) of the Bermuda Companies Act 1981 (the "Companies Act"). That provision permits a company to be compulsorily wound up by the court when the company is unable to pay its debts. Section 162 of the Companies Act then states that a company is deemed unable to pay its debts for the purposes of s 161(e) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company, by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

On the facts, since the Bondholders had served a statutory demand on the Company in Bermuda, demanding repayment of the sum of USD 500m within 21 days, and the Company's directors decided not to satisfy the statutory demand, the Bondholders can proceed to file the winding up application after 21 days.

I note, however, that even if the Bondholder's application is successful, this does not mean that they can proceed to recover the full sum. As noted above, the Bondholders are unsecured creditors. I further note the fact that the Company's directors had borrowed USD 50m from Lendbank, which was secured by a floating charge against all of the Company's shares and its subsidiaries' assets. Lendbank would thus rank higher in priority than the bondholders in the event of the Company's winding up and

insolvency. Moreover, given that the USD 500m of debt denominated by the bonds was already transferred to the Company's indirect subsidiaries in the PRC and is incapable of being returned due to local current control restrictions and Chinese legal issues, there is a risk that the assets of the company would not be sufficient to repay the USD 50m loan from Lendbank.

*To increase the chances of obtaining the USD 500m as part of the assets that can be distributed to the Company's creditors, including the Bondholders, the Bondholders may wish to seek recognition and enforcement of the winding-up order obtained in Bermuda in other jurisdictions such as the PRC. A successful recognition and enforcement application would ensure that (a) the Bondholders are able to seek relief to prevent the Company from dissipating the USD 500m to other companies or jurisdictions; and (b) ensure that the USD 500m can be brought within the pool of assets distributable to the Company's creditors, including the Bondholders. In this connection, I should mention that the Supreme Court of Bermuda has issued letters of request to foreign courts asking for foreign court recognition of, and assistance to, Bermudian liquidators of Bermudian companies. The jurisdiction to issue such letters of request has developed 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. However, the Supreme Court of Bermuda 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: see *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] 1 WLR 4482; [2014] UKPC 35.*

An advantage of commencing winding-up proceedings against the Company is that the court may appoint a provisional liquidator between the presentation of the winding-up petition and its final hearing: see s 170(2) of the Companies Act. The appointment of a provisional liquidator would allow the Bondholders to expeditiously prevent the dissipation of the Company's assets in China in the interim period between the presentation of the winding-up petition and the hearing of the petition.

Causes of action against potential defendants

Following the Bondholders' successful application to wind up the Company, they may then consider commencing an action directly against the directors of the Company in the jurisdiction of Bermuda. In particular, the US bondholders may consider pursuing the following causes of action against the directors.

1. Avoiding floating charges

First, it is open to the Bondholders to bring an action against the Company to set aside the floating charge granted to Lendbank under s 239 of the Companies Act. That provision provides that a floating charge on the 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.

On the facts, it is unclear as to when the floating charge was granted to Lendbank. Assuming that the winding-up application was brought by the Bondholders within 12 months from the time the floating charge was granted, however, and provided that they are able to show that the Company was insolvent at the time the charge was granted (which is likely given that the Company would have been unable to pay the Bondholders the USD 500m), the Bondholders would likely be successful in setting aside the floating charge. This also means that Lendbank would have the status of an unsecured creditor and would rank pari passu with the Bondholders in terms of distribution of the Company's assets.

2. Fraudulent Trading

Second, the Bondholders may bring an action for fraudulent trading against the directors under s 246(1) of the Companies Act. That provision allows an application to be made by the Official Receiver, the liquidator or any creditor or contributory of the company to the court to declare that any persons who were knowingly parties to the carrying on of the business with the intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose shall be personally responsible, without any limitation of liability, for all or any of the debts or other liability of the company as the court may direct.

In the present case, the Company had fraudulently misrepresented its financial performance in the offering documents associated with the bonds issued to the Bondholders. Thus, it is likely that the directors may be held personally liable for the return of the USD 500m to the Bondholders, having deliberately defrauded the Bondholders into purchasing the bonds. The advantage of relying on s 246(1) of the Companies Act is that there is no limit on the amounts that the directors may be held liable to repay to the US bondholders. However, the disadvantage in commencing an action directly against the directors is that the directors may not have sufficient assets or funds to meet the liability for the entire sum of USD 500m.

3. Fraudulent conveyances or preferences

Third, the Bondholders may bring an action for fraudulent conveyances or fraudulent preferences against the directors under s 247 of the Companies Act. That provision prescribes that where, in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, 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 court may, on the application of the Official Receiver, or of the liquidator, or of any creditor or contributor, examine the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just.

In the present case, the directors had paid themselves a bonus of USD 20m from the USD 50m borrowed from Lendbank. This would constitute a misapplication of the assets of the Company since the company was, at that point in time, facing a statutory demand of USD 500m from the Bondholders and it is unclear if there is any basis for the payment of the bonus. The Bondholders may therefore seek the return of the USD 20m paid to the directors as bonus.

4. *Action for breach of fiduciary duties*

Fourth, the Bondholders may argue that the directors have breached their fiduciary duties.

Pursuant to s 54(1) of the Companies Act, 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: (a) the company is, or would after the payment, be unable to pay its liabilities as they become due; or (b) the realisable value of the company's assets would thereby be less than its liabilities.

In the present case, the directors had caused the company to declare a dividend of USD 30m to the shareholders of the Company, even though the company was facing a statutory demand of USD 500m from the Bondholders. It is likely that the declaration of the dividend would be contrary to s 54 of the Companies Act. The Bondholders may argue that the directors' declaration of the dividends in breach of s 54 of the Companies Act constitutes a breach of the directors' fiduciary duties, and seek equitable compensation on that basis.

A thorough and well-reasoned answer.

7 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).

Bercoffee Limited ("BL") may seek a scheme of arrangement before the Bermuda court. Pursuant to s 99(1) of the Bermuda Companies Act 1981 (the "Companies Act"), where a compromise or arrangement is proposed between a company and its creditors or any class of them, the court may, on the application of any creditor of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors to be summoned in such manner as the court directs. Pursuant to s 99(2) of the Companies Act, if a majority in number representing three-

fourths in value of the creditors or class of creditors present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall if sanctioned by the court, be binding on all the creditors or the class of creditors and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

*BL may also implement a scheme of arrangement in Hong Kong and apply to have it recognised by the Bermuda court. However, it is uncertain whether a foreign scheme of arrangement can be recognised and enforced in Bermuda as a matter of common law, without a parallel local scheme of arrangement implemented: see *Re C&J Energy Services Ltd* [2017] Bda LR 22. In *Re Titan Petrochemicals Group* [2014] Bda LR 90, the Bermuda court observed that it often approves parallel schemes linking Bermuda and Hong Kong. Therefore, it would be more appropriate to seek parallel schemes of arrangement in both Bermuda and Hong Kong. This is especially so, given that the Hong Court recognises the application of the *Gibbs* rule : see *Re Rare Earth Magnesium Technology Group Holdings Ltd* [2022] HKCFI 1686. The *Gibbs* rule (as formulated in the English Court of Appeal decision in *Antony Gibbs & Sons v La Societe et Commerciale de Metaux* (1890) LR 25 QBD 398) provides that unless a creditor submits to a foreign proceeding or debt restructuring, a foreign proceeding designed to bring about the discharge of a debtor's obligations will discharge only those liabilities governed by the law of the country in which that proceeding took place.*

If, in this case, the debt obligations (or some of the obligations) are governed by Hong Kong law, then the scheme would only be recognised in so far as the Hong Kong courts make a ruling that the scheme was a valid discharge of the Hong Kong law-governed debt obligation(s).

*If the debt restructuring involves a debt-for-equity swap, it might not be open for BL to implement parallel debt restructurings in Bermuda and Hong Kong due to the *Gibbs* rule. In particular, under the *Gibbs* rule, a debt can only be validly discharged under the provisions of its governing law, unless the relevant creditor(s) submits to a foreign debt restructuring.*

In the present case, whether the debt-for-equity swap is effective depends on whether it is recognised as a valid discharge of BL's debt to the Bondholders. This, in turn, raises the following considerations:

- (a) If a debt restructuring involving a debt-for-equity swap is commenced in Bermuda, that debt restructuring would only validly discharge BL's debts if they were governed by Bermuda law. This is unless the Bondholders submit to the Bermuda debt restructuring.*
- (b) If a debt restructuring involving a debt-for-equity swap is commenced in Hong Kong, that debt restructuring would only validly discharge BL's debts if they were governed by Hong Kong law. This is unless the Bondholders submit to the Hong Kong debt restructuring.*

*Thus, for the debt-for-equity swap to be effectively recognised, we should turn to look at the governing law of the bonds which this swap seeks to discharge and to commence the restructuring in that jurisdiction (assuming that the jurisdiction recognises the *Gibbs* rule). In this connection, parallel debt restructurings may be commenced in Bermuda and Hong Kong if the Bondholders submit to the debt restructuring in the other jurisdiction whose laws do not govern the debt of BL, as the case may be.*

A thorough answer. 8 marks

Total: 47 out of 50 marks.

* End of Assessment *