



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 be a provisional liquidator be appointed?

Bermuda's insolvency regime can be described as a creditor-friendly regime. For instance, the Bermudan court is generally efficient in the context of enforcing creditor rights both within the court process where an unsecured creditor can apply to the court to wind up a corporate debtor and have the assets applied in satisfaction of the creditor's debt, and outside of the court process where generally a secured creditor can enforce its security.

There is no statutory corporate rescue provision in Bermuda other than the scheme of arrangement which is set out in sections 99 and 100 Companies Act 1981. However, in order to be pragmatic, to maintain commercial flexibility and approach corporate insolvency in a debtor-friendly manner, the Bermudan court exercises its powers by appointing provisional liquidators, in appropriate circumstances, with a view to achieving corporate restructuring.

Referred to as a 'soft touch' provisional liquidation, the purpose of this approach is to support management-led restructuring, in cases where the directors of the company believe that the company is still viable and can be restored to solvency. The soft touch provisional liquidation gives the company the benefit of a statutory moratorium which prohibits the commencement or continuance of proceedings against the company, unless leave of court is granted. Consequently, this gives management breathing room to possibly restore the company to solvency while simultaneously providing creditors with the comfort that management's efforts are being supervised by a provisional liquidator and the court.

Creditors of the company itself can initiate the process by presenting a wind-up petition to the Bermudan court. Once presented the company then applies for the appointment of a provisional liquidator, which then stalls the wind-up petition so as to allow the restructuring to proceed.

It is the appointment of the provisional liquidator which invokes the moratorium against commencement or continuation of proceedings against the company. However, it should be noted that secured creditors can still enforce their security without recourse to court proceedings.

The Registrar of Companies may be appointed as the provisional liquidator as The Companies Act 1981 creates the office of the Official Receiver. However, in practice the court approves professional insolvency practitioners as provisional liquidators who are usually professional accountants. The provisional liquidator will have specific powers conferred upon him by the court and may only exercise such powers as conferred. It is possible for the company

to request that the provisional liquidator be endowed with soft powers which limits them to overseeing management during the restructuring. Effectively, this would allow management to retain control while driving the restructuring under the supervision of the provisional liquidator and the court.

In order for the appointment of the provisional liquidator to be successful, the court will need to be satisfied that, the restructuring plan has reasonable prospects of success and that the proposed restructuring is likely to have the support of the majority of creditors.¹

This answer is too long, and overlooks the Court's power to appoint PLs for non-restructuring purposes.

2 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?

Bermuda's corporate insolvency law is found in various pieces of legislation including the Bankruptcy Act 1989 (which primarily deals with individual bankruptcy). For example, some provisions of the Bankruptcy Act 1989 apply to a Bermudan corporate insolvency by virtue of Section 235 of the Companies Act 1981. Accordingly, in regards to the rights of set-off, Section 37 Bankruptcy Act provides for an automatic set-off where there is mutual credit or mutual debt between an insolvent company and its creditor.

Note that the set-off is automatic. Key aspects to effect the set-off after commencement of liquidation are:

- *the debts giving rise to the set-off must have been incurred prior to the commencement of the liquidation;*
- *the transactions giving rise to the debts must not have been a fraudulent conveyances or fraudulent preferences; and*
- *the dealings between the parties must have been mutual.*

An account is taken of what is due from either party to the other and such sum is then set off against the sum due from the other party. Note however, that a creditor who extended credit during a time when they had notice of the company's financial difficulties will not be able to set off. As Section 37 is stated in mandatory terms it is therefore not possible for the parties to contract out of

¹ *HSBC v NewOcean Energy Holdings Limited* [2022] CA Bda 16 Civ

the provision. Furthermore, there are no statutory provisions which relate to contractual netting.

Correct - 2 marks.

Question 2.3 [maximum 4 marks]

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

Bermuda follows the English common law system and as such, in the context of security, allows creditors to take security over assets in a variety of ways. The type of security sought will depend on the nature of the property, the agreement between the parties and the nature of the debtor's interest.

There are a number of statutory provisions which are relevant to taking security over assets under Bermuda law. Examples include provisions found in the Supreme Court Act 1905, Bonds and Promissory Notes Act 1874, Charge and Security (Special Provisions) Act 1990.

The following are three possible ways creditors can take security over assets under Bermuda law are as follows:

Legal mortgage: *transfers legal interest from the borrower (mortgagor) to the lender (mortgagee). The borrower retains possession of the property while the lender holds the legal title. The borrower has a right to redeem the property and the legal title will be transferred back to the borrower once the loan has been repaid.*

A legal mortgage is created by deed and attracts stamp duty. The deed is submitted to office of registrar general and an entry is made in register of mortgages maintained by the Registrar. The priority of the security is determined by the order in which the mortgage is entered on the Register.

In Bermuda legal mortgages are commonly used for real estate and intellectual property.

Equitable mortgage: *created by contract whereby the borrower transfers the equitable interest in the property to the lender. Note that the borrower retains the legal interest and possession of the property. This type of mortgage is enforceable under the equitable jurisdiction of the court. All other*

formalities relating to legal mortgages are the same for equitable mortgages.

Equitable mortgages are commonly used for real estate and certified shares.

Charge:

there is no transfer of legal or equitable interest to the lender; furthermore, the borrower retains possession of the property. However, a charge creates an encumbrance on the borrower's property in favour of the lender, thereby giving the lender an equitable right to sell the property for repayment of the loan in the event of default.

Charges are created in writing and commonly are created by deed. Deeds can be executed under company seal or by an authorised signatory/signatories.

Charges are commonly used for real estate, tangible and moveable property, and intellectual property.

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.

Bermudan exempt and international business companies conduct business in multiple jurisdictions and many are listed on foreign stock exchanges. As such, these companies are often subject to cross border insolvency and windup proceedings in both Bermuda and in the jurisdictions in which they operate.

Naturally a foreign representative dealing with cross border insolvency involving a Bermudan entity would seek recognition and assistance from the Bermudan court so as to adequately and properly deal with the entity's insolvent estate.

Currently there are no Bermudan statutory provisions to which a foreign representative can rely on to get recognition and assistance. Furthermore, Bermuda has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, which is designed to help equip states with insolvency laws that

would address cross-border insolvency in a more efficient and effective manner.

However, like most states which follow English/common law, the Bermudan court can be approached for a remedy including recognition and assistance, through the common law principle of comity. Historically, the principles of comity (or courtesy), in the context of cross-border insolvency, is based on the notion of 'universalism' which generally holds that a single cross-border proceeding should be facilitated by other jurisdictions. Thus, where a universal distribution of the debtor's assets was in place, a common law court should not interfere with that distribution but in contrary, should facilitate the process.

It was therefore no surprise that the Bermudan Supreme Court stated, following *Cambridge Gas Transportation Corp v Navigator Holdings plc*² that as a matter of common law, it could recognise liquidators appointed by the court of the company's domicile and that it had discretion to assist foreign liquidations 'by doing whatever it could have done in the case of a domestic insolvency';- this was a generous and liberal approach.

Note however that *Singularis Holdings Ltd v Pricewaterhouse Coopers*³ overruled *Cambridge Gas* and that the principle has evolved to embody the current position which is based on the notion of 'modern universalism'. Modern universalism is premised on universalism (i.e. that assets should be collected and distributed on a global basis) however, it allows each jurisdiction to determine how it will protect its local creditors' interests. This allows the power to be exercised in a more defined way and within limited parameters.

The limitations of the current common law power enunciated in *Singularis* are that:

"...[firstly], it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court.

Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed.

² [2007] 1 AC 508

³ [2015] A.C. 1675

Thirdly, it is available only when it is necessary for the performance of the officeholder's functions.

Fourthly, the power is subject to the limitation, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case, that of Bermuda."

*More recently, the scope and limitations of the common law power was affirmed in *Stephen John Hunt v Transworld Payment Solutions U.K. Limited* (in liquidation)⁴. In that case the Bermudan court accepted Mr. Hunt's appointment and authority as liquidator to deal with the estate of the company. However, it was established that Mr. Hunt's application for recognition and assistance was for the purpose of gathering information to use in a UK litigation (i.e. essentially he was seeking the backing of the court to obtain information). The Bermudan court refused the application noting that while they accepted Mr. Hunt's authority, the common law power could not be used to obtain information for use in actual or anticipated litigation; furthermore, where alternative information gathering tools were available to the parties. The purpose of granting recognition is to allow the liquidator to deal with assets in the jurisdiction and to enable the court to assist within the limitations of the common law power as enunciated in the *Singularis* case. In this case, the company had no assets in the jurisdiction and thus there was no support for Mr. Hunt's his application. A recognition order would have therefore served no legitimate purpose.*

In summary, a foreign liquidator can be granted recognition and assistance by the Bermuda court under its common law powers if such relief could be granted under statutory powers of the foreign court controlling or conducting the liquidation and where such relief is available at common law in Bermuda. Recognition and assistance will not be granted if there is an abuse of process and/or if it is being sought for illegitimate purposes such as information gathering.

Note that although the current position is more constrained than its predecessor, the Privy Council did note that the extent to which the common law power would be allowed to extend would depend upon the facts of each case and the nature of the power the court is being asked to exercise.

In exercising their common law power to recognise and provide assistance to foreign liquidator the Bermudan court would have regard to the following:

- *Whether the company was incorporated in Bermuda;*
- *Whether the company has assets in Bermuda;*

⁴ [2020] Bda Lr 17

- *Whether the assistance sought by the foreign liquidator is available to them under both the foreign jurisdiction and Bermuda law; and*
- *Whether or not the recognition and assistance is contrary to Bermudan public policy.*

[A thorough 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.

Foreign judgements do not have direct effect in Bermuda and consequently are not directly enforceable there. When dealing with a foreign court's judgement in Bermuda one must consider whether the judgement can be dealt with under statutory rules or common law rules.

Relevant statutory provisions which deal with the registration and/or enforcement of foreign judgements in Bermuda are:

1. *The Judgments (Reciprocal Enforcement) Act 1958 ("1958 Act"), - which applies to the registration and enforcement of final money judgements of superior UK courts and certain Commonwealth territories and countries - provided certain conditions are met.*
2. *The Maintenance Orders (Reciprocal Enforcement) Act 1974 - which provides for the reciprocal enforcement of certain maintenance orders made by the courts of the UK and other countries and territories. These are orders made in reciprocating countries, provided they are confirmed by the Bermuda Magistrate Court. Maintenance Orders from countries which do not fall under the Act are not enforceable in Bermuda. Those orders however could be recognised under common law principles.*
3. *Protection of Trading Interests Act 1981 - which provisions makes it clear that whether enforcement is sought under common law rules or the 1958 Act, if the judgement is for multiple damages it is not capable of registration. In certain circumstances this Act precludes the registration of foreign judgments designed to restrict competition.*
4. *The Recognition of Divorces and Legal Separations Act 1977 - provides for the recognition of divorces and legal separations.*

Where statute rules do not apply then common law principles will apply to the recognition of foreign judgments in Bermuda.

There are other statutory and common law rules which apply to foreign arbitration awards, foreign judgments in relation to estate administration, foreign decrees and nullity of marriages, maintenance orders, bankruptcy proceedings and foreign insolvency proceedings.

The circumstances in which a foreign court judgment will not be registered or enforced in Bermuda include the following:

- 1. If the judgement is not covered by the 1958 Act;*
- 2. If the foreign court had no jurisdiction;*
- 3. If the defendant did not receive notice of the foreign proceedings;*
- 4. The foreign judgement was obtained by fraud;*
- 5. The rights under the foreign judgement are not vested in the person making the application for enforcement;*
- 6. The foreign judgement conflicts with another prior, inconsistent judgement from another court with competent jurisdiction;*
- 7. If the foreign judgment is not final and conclusive;*
- 8. The foreign judgement is for taxes, fines or penalties;*
- 9. If the enforcement of the foreign judgement is contrary to Bermuda public policy (save in the case of the 1958 Act, following the *Masri* case)⁵*

Additionally, if the appropriate formality is not followed then the judgement cannot be recognised or enforced. In the case of judgements falling under the 1958 Act the required documentation set out in Judgements (Reciprocal Enforcement) Rules 1976 includes an affidavit together with the exhibited judgement; the affidavit is to state that to the best of the deponent's knowledge and belief the judgment creditor is entitled to enforce the judgment; and that the judgement does not fall within the classes of judgements which cannot be ordered in the register under the 1958 Act.

In cases where the judgement is enforced under common law principles, a writ of summons should be issued. The summons is to be endorsed with a statement of claim. The statement of claim should include:

- the date, the subject matter and amount of the foreign judgment;*
- pleading that the foreign court had jurisdiction over the defendant;*
- clear statement of the amount of the judgement which is fixed and arithmetically ascertainable; that it does not offend section of the Protection of Trading Interest Act 1981;*
- that the judgment does not concern foreign fiscal law;*
- that the claim remains unsatisfied in whole or in part; and*
- pleading seeking an order for payment of the sum together with interest.*

⁵ *INSOL International Foundation Certificate International Insolvency - Module 5A - Bermuda - page 50*

In respect of recognition or enforcement of foreign schemes of arrangements, there is some uncertainty as to whether foreign schemes can be recognised and enforced in Bermuda, as a matter of common law, where there is no parallel local scheme of arrangement. Nonetheless, the Bermudan Supreme Court has shown some willingness to recognise foreign schemes which are not opposed, however it remains to be seen what approach it or appellate courts will take in contentious situations.

A thorough answer - 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 should take action against BerCoffee Limited (the "Company") in order to recover some or all of the USD 500 million from the Company. As the Company is a Bermudan exempt company its insolvency and/or restructuring would be regulated by The Companies Act 1981 (the "1981 Act") and the Companies (Winding-Up) Rules 1982 (the "1982 Rules"). Bermuda is therefore the most appropriate jurisdiction in which the US Bondholders should take their action (irrespective of whether the Company has operations, business or assets in Bermuda). Furthermore, it is noted that the US Bondholders have already issued a statutory demand in Bermuda, a pre-requisite for commencing insolvency proceedings under the 1981 Act. It should be noted however that under the Bermudan insolvency regime, if the US Bondholders are secured creditors, they would be entitled to enforce their security outside of the insolvency process.

As unsecured creditors the US Bondholders would need to pursue under sections 161 and 163 a creditor's liquidation i.e. apply for an order that Bercoffee be deemed insolvent and thus wound up compulsorily and that its assets be applied in satisfaction of the debt.

The 1981 Act does not define the terms "insolvency". However, section 162, refers to a company being "unable to pay its debts". A company is deemed unable to pay its debts if:

- 1. the Court is satisfied that it is unable to pay its debts, taking into account the company's current, prospective and contingent liabilities;*
- 2. the company fails to satisfy, within 21 days, an undisputed statutory demand which exceeds BMD 500 dollars; or*
- 3. an execution of judgment or order against the company returns unsatisfied.*

In this case it is noted that Bercoffee failed to satisfy the statutory demand for the USD500 million within the stipulated 21 days and is therefore to be deemed unable to pay its debt, making it liable to be wound up by the US Bondholders.

The US Bondholders would then need to present a petition to the Bermudan Supreme Court seeking relief on ground that the Company is unable to pay its debts (evidenced by the unsatisfied statutory demand) or on grounds that it is just and equity to wind up the Company.

The application must be supported by an affidavit verifying the contents of the petition. The petition must be served on Bercoffee's registered office.

Should the US Bondholders obtain the Bermudan order, any enforceability in a foreign jurisdiction would be dependent upon the national laws of the receiving country.

Alternatively, if the US Bondholders commence foreign proceeding and obtain a foreign judgement they will need to apply for registration and enforcement of the foreign judgement in Bermuda under the Judgments (Reciprocal Enforcement) Act 1958 ("1958 Act"). The 1958 Act provides for the registration and enforcement of final money judgements of superior UK courts and certain Commonwealth territories and countries which includes Hong Kong and PRC - provided certain conditions are met. The appropriate formality will need to be met including filing an affidavit together with the exhibited foreign judgement. The affidavit should state that to the best of the deponent's knowledge and belief the judgment creditor is entitled to enforce the judgment; and that the judgement does not fall within the classes of judgements which cannot be ordered under the 1958 Act.

Any foreign judgment which is not covered under the 1958 Act would need to be enforced under separate action at common law on the basis that such judgement is treated as proof of debt. Generally, the Bermuda court will recognise and enforce foreign judgements as long as such judgment accords with the following rules:

- judgement is final and conclusive in the foreign court;*
- judgement was obtained in a court of law which had jurisdiction over the judgement debtor;*
- judgement was not obtained by fraud;*
- judgement was not in respect of taxes, fines or penalties;*
- enforcement of the judgement would not contravene Bermudan public policy;*
and
- rules of natural justice were observed in the foreign proceedings.*

The US Bondholders may consider litigation in order to recover the debt, with one obvious benefit being the possibility of recovering the debt (ahead of any other creditor) through a regular claims process. However, the chances of recovering the debt will depend on the financial health of the Company which currently is not good. Furthermore, the litigation can further force the Company into insolvency.

Another key disadvantage of the litigation approach is the risk of an automatic stay on all proceedings or moratorium coming into effect should a wind-up application be filed. The US Bondholders would then need leave of court in order to pursue their claim in such circumstances.

On the other hand, US Bondholders could benefit from an insolvency process which primarily benefits creditors in the sense that creditors are the primary beneficiaries of an insolvency. The difficulty is that insolvency is a complex, expensive and lengthy process. In fact, it is not uncommon for creditors to fund the actual insolvency. Furthermore, there may not be enough money to pay all the creditors especially in cases where the debt is significant and there are few assets.

An important benefit of the insolvency process is that an insolvency profession is usually appointed to manage the liquidation, which creditors will find beneficial.

The Company is not under any statutory obligations in Bermuda to bring wind-up proceedings because of its insolvency. However, while insolvent, the directors' fiduciary duty shifts from its shareholders to the company's unsecured creditors. The directors also owe a duty of care to the unsecured creditors. This means that the directors must act in the best interests of the unsecured creditors and must not do anything that could harm or cause them unnecessary loss or damage.

Although there is no clear indicator as to when and/or to what extent the directors' duties shifts to the unsecured creditors, it is noted that the more likelihood of the company becoming insolvent and wound up, the greater the degree to which the directors' duties are owed to the unsecured creditors.

It is therefore submitted that a claim can be brought against the Company's directors for breach of fiduciary duty and breach of duty of care under section 247 of the 1981 Act. During the Company's insolvent state, the directors ignored the statutory demand, borrowed money against the Company's assets, immediately paid themselves a bonus and made dividend payments to the shareholders. Clearly these actions were not in the best interest of the unsecured creditors who will also suffer a loss.

Although the Company carried on business while it was insolvent it would not be liable for wrongful trading, a concept which is not incorporated in Bermuda law. However, once windup proceedings have commenced it is possible to bring claims against the directors personally for the Company's obligations if it can be shown that the directors did not act in the best interest of the creditors or breached their duty of care.

The liquidators should bring the following claims against the Bercoffee directors:

- 1. Fraudulent trading pursuant to section 246 and also for fraudulent conveyance/fraudulent preference pursuant to section 247 - The directors are*

liable because they knowingly traded during a time when they knew the company was insolvent. This includes them taking out a further loan and paying themselves and making distributions shareholders. They should be held personally liable for all or any, of the debts of the company or as the court may direct.

- 2. Breach of fiduciary duty and duty of care - Pursuant to section 97 and as a matter of common law, the directors owe a fiduciary duty to act honestly, in the best interests of the company (including the company's creditors when in the zone of insolvency). They also owe a duty of care to exercise the skill, care and diligence reasonably expected of a prudent person of business in comparable circumstances.*

The Bercoffee directors breached their fiduciary duty when they fraudulently misrepresented its financial performance in the offering documents associated with the bonds. In addition, they did not act in the best interest of the Company and its creditors when they made payments and distributions to themselves. The directors also breached their duty of care when they made commercial decisions which, objectively could not reasonably be expected of a prudent person of business in comparable circumstances; this includes when they ignored the statutory demand and made payments to themselves and shareholders.

- 3. Misfeasance and breach of trust - pursuant to section 247 if a director misapplies, retains or becomes liable or accountable for any money or property of the company, or is guilty of any misfeasance or breach of trust in relation to the company, they can be held personally liable for the company's debts and liabilities.*
- 4. Miscellaneous offences and liabilities - a range of criminal offences are set out in sections 243 to 248 which includes fraudulently altering company documents and falsifying books of accounts with the intention of defrauding a person, or fraudulently inducing a person to advance credit to the company. The directors of Bercoffee fraudulently misrepresented its financial performance in the offering documents associated with the bonds in order to induce the US bondholders to provide credit.*

This is a thorough answer, whose only weakness is that it does not fully consider the range of options available in different jurisdictions.

6 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).

Sections 99 and 100 of the 1981 Act provides for what is referred to as a ‘scheme of arrangement’ procedure which is the only court-supervised restructuring procedure available in Bermuda.

The procedure is available to both solvent and insolvent companies in Bermuda and is therefore open to Bercoffee as a way of restructure its debt. The procedure would need to be initiated by any of Bercoffee’s shareholders, creditors or, if applicable, its liquidator. The scheme must represent an arrangement or compromise between Bercoffee and it’s creditors or shareholders or any classes thereof.

The initiating party will need to apply to the court for directions to convene meetings with various classes of shareholders and/or creditors who will approve the scheme. Approval is by a majority and must represent 75% in value of those present and voting in favour of the scheme at each class meeting.

The court will need to be satisfied that:

- *the statutory requirements have been met;*
- *each creditor/shareholder class was fairly represented; and*
- *the scheme is one which a reasonable businessperson would approve.*

The scheme itself does not trigger a stay or moratorium. Therefore, a wind-up petition needs to be presented to the court in advance of the scheme so that the company is put into provisional liquidation and a provisional liquidator appointed. The appointment of the provisional liquidator will trigger a stay and moratorium. However, for the appointment to be successful, the court will need to be satisfied that, the restructuring plan has reasonable prospects of success and it is likely to have the support of the majority of creditors.⁶ The provisional liquidator will have oversight of the scheme and typically will have ‘light touch’ powers, leaving the directors and officers to continue to manage the company (albeit subject to any limitations required by the court). The scheme is only effective when a copy of the order sanctioning the scheme has been filed with the Registrar of Companies.

The provisional liquidation proceedings will end once the scheme has been implemented. The provisional liquidator would then apply to the foreign courts, including the Hong Kong court, for recognition and assistance. It is noted that the Bermudan court has issued letters of request to foreign courts, requesting that those courts recognise and assist Bermudan liquidators of Bermudan companies. Notably

⁶ *HSBC v NewOcean Energy Holdings Limited* [2022] CA Bda 16 Civ

the Hong Kong court has been generous in its powers to recognise and assist foreign insolvency proceedings, including offshore provisional liquidations which were solely for the purpose of restructuring.⁷

As regards to a Hong Kong approach, there are no formal corporate rescue procedures under Hong Kong law. However, a scheme of arrangement is available under common law principles which would need to be court-sanctioned in order to have legal, binding effect on all relevant creditors including dissenting ones. If Bercoffee wants to take this approach it will need to demonstrate that it has sufficient connection with Hong Kong, which it can demonstrate by virtue of the fact that it has offices and a substantial business presence in Hong Kong. Application will need to be made to the Hong Kong court to approve the scheme of arrangement.

The Hong Kong scheme of arrangement requires an initial court application where the court grants leave for the scheme's proponents to convene creditor meetings. The meetings are convened to vote on the proposed scheme. Approval is by a majority (51% or more) in number and which represents not less than 75% in value of creditors present at the meeting and voting in favour of the proposed scheme. Finally, application is made to the court to approve the scheme. The Hong Kong representative would then have to apply to the Bermuda court to have the scheme recognised and enforced in Bermuda.

It is possible to restructure Bercoffee in both Bermuda and Hong Kong using a parallel schemes of arrangement (wherein the a scheme is approved by both the Bermudan and Hong Kong court). This is an established practice used in many cross-border restructuring proceedings. The aim is to ensure that creditors do not disrupt the scheme by taking hostile action against the company in either jurisdiction during the restructuring process. This approach has however been criticised by the courts as being a costly, unnecessary, and an outmoded way of conducting cross-border restructuring. There has also been calls for greater cross-border coordination by way of recognition.⁸

Additionally, courts have emphasised whether a parallel scheme of arrangement is desirable or appropriate in light of the "rule in Gibbs".⁹ For example the Hong Kong court will consider whether its approval of a parallel scheme will be effective¹⁰ in the other relevant jurisdiction where the Gibbs rule would trump its effectiveness; i.e. the Hong Kong court is unlikely to approve a parallel scheme where the debt cannot be

⁷ *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165.

⁸ *Re Da Yu Financial Holdings Limited* [2019] HKCFI 2531.

⁹ *Antony Gibbs & Sons v La Societe Industrielle et Commerciale de Metaux* (1890) LR 25 QBD 398: the rule, in summary, says 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.

¹⁰ *Da Yu Financial Holdings Limited* [2019] HKCFI 2531.

discharged except for under the debt's governing law and where the relevant foreign creditor has not submitted to the jurisdiction of the Hong Kong court.¹¹

Nevertheless, the Bermuda court is more appropriate than the Hong Kong court to restructure Bercoffee because:

- 1. there is some uncertainty whether a foreign scheme of arrangement can be recognised and enforced in Bermuda in cases where there is no parallel scheme of arrangement in place in Bermuda;¹²*
- 2. while the Bermudan court has shown some willingness to recognise foreign scheme of arrangements in cases where there is no opposition, it is still unclear what the court's approach would be in a contentious case; and*
- 3. the Hong Kong court has no jurisdiction to appoint a provisional liquidator solely for the purpose of restructuring;¹³ note the contrast that a provisional liquidator can be appointment solely for the purpose of the restructuring in Bermuda.*

The Bermudan court has in the past sanctioned scheme of arrangement which included a debt-to-equity swap. The Bermudan court has power to make specific provisions for a debt-to-equity swap in order to sanction the scheme. On the other hand, before approving a debt-to-equity scheme of arrangement the Hong Kong court, will consider whether such arrangement would be effective in the other foreign jurisdiction in light of the Gibbs rule.

[This is a thorough and complete answer: 8 marks.](#)

[Total: 46 out of 50 marks.](#)

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* End of Assessment *

¹¹ *China Lumena New Materials Corp (in provisional liquidation)* [2020] HKCFI 338

¹² *Re C&J energy Services Ltd* [2017] Bda LR22; *Re Energy XXI* [2016] Bda LR 90; *Re Seadrill Limited* [2018] Bda LR 39.

¹³ A provisional liquidator can be appointed for the purposes of a Hong Kong wind-up with whose powers may include exploring a restructure.