



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?

*Under s 170(2) of the Companies Act 1981, the court may appoint a provisional liquidator between the presentation of a winding-up petition and its final hearing, if there is a good *prima facie* case that a winding up order will be made and if the court considers that a provisional liquidator should be appointed in all the circumstances of the case. The key question is whether the appointment of a provisional liquidator is appropriate and in the best interests of creditors. Examples of such circumstances are where there is a risk that assets will be dissipated in the period between presentation of the petition and the final hearing, or in the event that a restructuring is capable of being achieved under the supervision of an independent Court officer and with the benefit of a stay of other legal proceedings. Provisional liquidators with specific powers to implement a restructuring ("soft-touch" provisional liquidation) may also be appointed where there is a need to protect a proposed scheme of arrangement, for example where the company's freedom to promulgate or pursue an informal work-out is susceptible to litigation or compulsory winding-up petitions presented by dissentient creditors.*

Correct - 4 marks

Question 2.2 [maximum 2 marks]

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

Section 37 of the Bankruptcy Act 1989 provides for mandatory set-off after the commencement of a liquidation of a Bermuda company. Section 37 provides that 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, 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 one party shall be set-off against any sum due from the other party. The balance of the account, and no more, shall be claimed or paid on either side respectively. However, a person is not entitled under section 37 to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving creditor to the debtor, notice of an act of insolvency committed by the debtor and available against him.

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

- *The debts giving rise to the set-off were incurred prior to the commencement of liquidation and have crystallised as monetary payment liabilities;*
- *The transaction giving rise to the debts was not a fraudulent preference or a fraudulent conveyance; or*
- *The dealings between the parties were mutual. In other words, 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.

There are various ways by which a creditor can take security over assets in Bermuda by agreement between the creditor and the debtor. One example of a security a creditor may take / a debtor may give in respect of immovable, movable and certain intangible property is a legal mortgage. A legal mortgage results in legal title of the debtor's property being transferred to the creditor as security for a debt. The debtor remains in possession of the property but only regains legal title upon payment and satisfaction of the debt and reconveyance of legal title by the creditor.

Other examples of security that can be taken in respect of immovable, movable and certain intangible property are an equitable mortgage and a fixed charge. A fixed charge does not result in a transfer of legal or beneficial ownership, but gives the creditor a right to take possession of the property with a right of sale, in the event of a default by the debtor. Upon exercise of the power of sale, the proceeds of sale may be applied by the creditor towards payment of the debt in priority to and without reference to other unsecured creditors. The debtor may not deal with any property that is subject to a fixed charge without the consent of the creditor.

In respect of movable and certain intangible property, a creditor can additionally take, and a debtor can give, a floating charge. Unlike a fixed charge, a floating charge is not fixed to a particular asset, but "floats" above a variety of assets. The debtor can sell or dispose of such assets without the creditor's prior consent, but in the event of default by the debtor, the floating charge will "crystallise" and convert into a fixed charge that attaches to specific assets remaining at that date. Moreover, the property secured only by a floating charge forms part of the debtor's general assets in the event of an insolvency. Other examples of security that can be taken in respect of movable and certain intangible property are a pledge and a lien.

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 basis upon which foreign liquidators are granted recognition and assistance in Bermuda is the common law. This arises from how Bermuda has not formally

implemented the UNCITRAL Model Law on Cross-Border Insolvency, and has no statutory equivalent of Chapter 15 of the US's Bankruptcy Code, section 426 of the UK's Insolvency Act 1986, or the UK's Cross-Border Insolvency Regulations 2006. Nonetheless, following the Privy Council decision in *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508, the Supreme Court of Bermuda has confirmed that, as a matter of common law, the Supreme Court of Bermuda may, and usually does, recognise liquidators appointed by the court of the company's domicile and the effects of a winding-up order made by that court. The Supreme Court of Bermuda also affirmed that it has a discretion pursuant to such recognition to assist the primary liquidation court by doing whatever it could have done in the case of a domestic insolvency.

However, the precise scope of the Bermudian Courts' common law power to assist foreign liquidations and "provide assistance by doing whatever it could have done in the case of a domestic insolvency" is hotly debated, most notably in two judgments by the Privy Council on appeals from the Court of Appeal for Bermuda (*Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 and *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] UKPC 35).

Generally, the Bermuda Court is likely to recognise the winding-up orders of foreign courts, and to assist foreign liquidators to the fullest extent possible, in circumstances where all the following are present:

1. There is a "sufficient connection" between the foreign court's jurisdiction and the foreign company, making Bermuda the most appropriate or most "convenient" jurisdiction to make an order for the winding-up of the company and appointment of foreign liquidators.
2. There are documents, assets or liabilities of the foreign company within the jurisdiction of Bermuda; the foreign company has conducted business or operations within or from the jurisdiction of Bermuda, whether directly or by agents or branches; the foreign company has former directors, officers, managers, agents or service providers within the jurisdiction of Bermuda; and/or the foreign company properly needs to be involved in litigation or arbitration within the jurisdiction of Bermuda.
3. There is no public policy reason under Bermudian law to the contrary - for example, there is no unfairness or prejudice to local Bermudian creditors.

However, the above are broad principles. The Privy Council has stressed that the question of how far it is appropriate to develop the common law so as to assist foreign liquidations depends on the facts of each case and the nature of the power that the Bermuda Court is being asked to exercise. Foreign liquidators may not be granted recognition or assistance where the above principles are not met or where there are any other reasons militating against the Bermuda Court's granting of assistance. For example, regarding an application for an order for production of documents by an

entity within the jurisdiction of the Bermuda Court, the Privy Council has noted that this power is only available to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers, and is not available to assist a voluntary winding-up on the basis that the latter is a private arrangement. The Court has no power to assist foreign liquidators to do something which they could not do under the law by which they were appointed. The Court's exercise of its power must also be consistent with the substantive law and public policy of the assisting court in Bermuda.

*Recognition and assistance may also be denied where there is not yet a need for assistance from the Bermuda court or where there are other more suitable jurisdictions for requesting such assistance. This was the case in *Stephen John Hunt v Transworld Payment Solutions UK Limited* [2020] SC Bda 14 Com, where the Supreme Court of Bermuda declined to recognise the appointment of a UK liquidator in circumstances where no active assistance had yet been requested, and any such potential assistance would probably have been refused, given pending litigation in England and Wales and the other information-gathering mechanisms available to the parties.*

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.

A foreign court judgment has no direct legal effect in Bermuda. Steps have to be taken to have a foreign judgment registered and legally enforced in Bermuda. Depending on the nature of the foreign judgment, it may be recognised or enforceable in Bermuda pursuant to various statutory or common law rules, such as the Judgments (Reciprocal Enforcement) Act 1958 ("the 1958 Act") (which applies to the registration and enforcement of final money judgments of superior courts in the UK and certain Commonwealth countries and territories) and the Maintenance Orders (Reciprocal Enforcement Act) 1974 as amended (and regulations made thereunder) (which applies to the registration and enforcement of maintenance orders made by foreign courts of reciprocating countries). The 1958 Act provides a procedure whereby a judgment rendered in the superior courts of the UK can be registered in Bermuda and given effect upon registration as though it were a judgment rendered in Bermuda. There are additional statutory and common law rules applicable to foreign arbitration awards, foreign judgments relating to the administration of estates, etc.

Under the 1958 Act, the registration of a foreign judgment must be set aside if the Supreme Court is satisfied that:

- 1. It is not covered by the 1958 Act or was registered in contravention of the 1958 Act;*

2. *The foreign court had no jurisdiction in the circumstances of the case;*
3. *The defendant did not receive notice of the proceedings in the foreign jurisdiction in sufficient time to enable him to defend the proceedings and did not appear;*
4. *It was obtained by fraud; and*
5. *The rights under it are not vested in the person by whom the application for registration was made.*

The registration of a foreign judgment may also be set aside if the Supreme Court is satisfied that the matter in dispute in the proceedings giving rise to the registered judgment had, prior to the date of the judgment, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

*Notably, the Supreme Court is not entitled to set aside the registration of a foreign judgment merely on the grounds that it not "just or convenient" to enforce the foreign judgment in Bermuda, or on "public policy" grounds, despite the wording of Rule 12 of the Judgments (Reciprocal Enforcement) Rules 1976 (*Masri v Consolidated Contractors International Company* [2009] Bda LR 12).*

For foreign judgments from other jurisdictions not registrable under the 1958 Act, those must be enforced by way of a separate action at common law, on the basis that the foreign judgment is treated as evidence of a debt. Under the common law, a foreign money judgment will be recognised and enforced as a debt against the judgment debtor where:

1. *The judgment is final and conclusive in the foreign court;*
2. *The judgment was obtained in a court of law which had jurisdiction over the judgment debtor;*
3. *The judgment was not obtained by fraud;*
4. *The judgment was not in respect of taxes, fines or penalties;*
5. *The enforcement of the judgment would not contravene the public policy of Bermuda; and*
6. *The rules of natural justice were observed in the foreign proceedings.*

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

It is uncertain whether a foreign court-sanctioned scheme of arrangement might be registered or enforced in Bermuda under the common law. This also includes related procedures, such as an insurance business transfer scheme under legislation implementing European single market insurance directives. While the Supreme Court of Bermuda has shown some willingness to recognise foreign court orders approving such schemes in the absence of opposition, it is unclear what position it might take in a contentious situation.

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

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.

Any potential actions that can be taken by the US bondholders should be done in Bermuda.

This is not necessarily correct. There may be actions that are viable in Hong Kong, for example.

The US bondholders are advised against commencing proceedings in the US because the US courts do not have jurisdiction over the Company. This means that a judgment obtained from the US courts would not be able to be recognised and enforced as a debt against the Company in Bermuda under the common law rule which requires that the judgment be obtained in a court of law which had jurisdiction over the judgment debtor. It is also not recommended for the US bondholders to pursue a claim against the Company's PRC subsidiaries, given the local currency control restrictions and other undisclosed issues.

The US bondholders may take action against the Company and its Directors in Bermuda.

First, as against the Company, upon the filing of the statutory demand on the Company in Bermuda, the Company is deemed unable to pay its debts pursuant to ss 161 and 162 of the Companies Act 1981. The Company's borrowing of an additional US\$50 million from Lendbank with a floating charge against all of the Company's shares and assets of its subsidiaries can be reviewed. Section 239 of the Companies Act 1981 provides that a floating charge on the undertaking or property of a company created within 12 months of the commencement of the winding-up shall be invalid, unless it is proved that the company immediately after the creation of the charge was solvent, except to the amount of any cash paid to the company at the time of, or subsequently to, the creation of the charge, together with interest at the statutory rate. On the facts, the Company was deemed insolvent when the floating charge was created, given the statutory demand, and it is highly unlikely that the contrary would be proven. Therefore, the floating charge declared over the Company's shares and assets of its subsidiaries will be declared invalid.

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*The US bondholders can also seek to declare the bonus payment of US\$20 million to the Directors and the US\$30 million dividend declaration invalid on the basis that both are post-petition dispositions. Section 166 of the Companies Act 1981 provides that, in a compulsory winding-up, any disposition of the property of a company, including things in action, and any transfer of shares, made after the commencement of the winding-up (being the time of presentation of the petition), shall be void, unless the court otherwise orders by way of a validation order. The court should only make an order validating a post-petition disposition where it is shown that the disposition will benefit or has benefitted the general body of unsecured creditors so as to justify the disapplication of the *pari passu* principle. This is unlikely to be the case here: there is little evidence showing that the Directors believed the dispositions were necessary or expedient in the interests of the company, or that they acted in good faith, or that an intelligent or honest director could reasonably hold the same reasons for the dispositions. The fact that the Directors paid themselves a hefty bonus even after a statutory demand was issued to the Company strongly suggests the dispositions are self-serving.*

Second, the US bondholders may commence litigation against the Directors for breach of their duties. While directors' duties are principally owed to the company itself when the company is solvent, once the Company entered into the zone of insolvency, the Directors are obliged to act in the best interests of the creditors, which include the US bondholders. It is likely that the US bondholders would be able to pursue a claim against the Directors for breach of their fiduciary duty and failure to exercise reasonable skill and care. Under s 97 of the Companies Act 1981 and as a matter of common law, the Directors owe duties to act honestly and in good faith with a view to the best interests of the Company, (which include the interests of the US bondholders when the Company is in the zone of insolvency), and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The Directors may assume personal liability if the Court finds that they have failed to comply with these obligations.

*Both insolvency proceedings and litigation against the Directors have their pros and cons, which should be considered when determining which path to take, or whether to pursue both. Litigation against the Directors will be a costly and possibly drawn-out affair. On the other hand, setting aside the post-petition transactions is slightly more straightforward. However, all that does is to restore the estate to the state it was before the floating charge was granted and the dispositions were made. The US bondholders will still have to file their proof of claims with the insolvency administrator. Distribution of the Company assets would also have to follow the statutorily prescribed order. Following the *pari passu* principle and depending on whether the Company has many high-value secured and preferential creditors, the US bondholders may not be able to recover as much from the Company.*

Largely correct, but a few small errors and omissions (eg reference to the 'insolvency administrator') - 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).

Debt restructuring options

Bercoffee Limited may restructure its debt obligations in Bermuda under a scheme of arrangement, which is the only formal rescue procedure set out in the Companies Act 1981. A scheme of arrangement may result in the adjustment or compromise of all or a class of the debt of the Company, and may include the transfer of rights, property and liabilities of the Company to another company. Schemes of arrangement may also reorganise the company’s capital and may be used to implement a debt-for-equity swap.

A binding scheme of arrangement requires the approval of a majority within each class of creditors presenting and voting (including by proxy) at the meeting of that class, representing 75% by value of that class. Accordingly, the scheme of arrangement must be on such terms as may be approved by the majority of creditors in each class. A minority of dissenting creditors in each class may be crammed down by a scheme of arrangement.

Because a majority of creditors in each class is required to approve the scheme, it is possible that a debt-for-equity swap would be more difficult to achieve. It is unlikely that a majority of the shareholder class would vote in favour of the scheme.

It is doubtful that shareholders would be entitled to vote in a creditors’ scheme.

To that end, the Company should consider a “soft touch” provisional liquidation - in other words, to only employ a scheme of arrangement after the appointment of a liquidator or provisional liquidator. It is possible for the court to employ a “soft touch” provisional liquidation to protect a proposed scheme of arrangement, given the illiquidity issues that confront the Company - in particular, the Company’s susceptibility to being embroiled in litigation regarding the floating charge that was granted to Lendback and the post-petition dispositions made to the Directors and the Company’s shareholders. The provisional liquidation could also facilitate negotiations between the shareholder class and the other classes of creditors, where a plan could be proposed for the shareholders to, for instance, receive some compensation for the cancellation of their shares in the debt-equity swap.

A pre-packaged sale is another option the Company can consider to restructure its debt. A pre-packaged sale involves the pre-agreement of terms of a sale of the business of the company to another party or a new company, which sale is then effected directly after the appointment of an officeholder. A pre-packaged sale is, however, not supported by the prevailing regime in Bermuda, which only anticipates winding-up proceedings and schemes of arrangement. One option to achieve something akin to a pre-packaged sale is through the appointment of a receiver and manager appointed by a secured creditor pursuant to a charge over substantially all the assets of the Company. Based on the available facts, however, this may not be a viable solution here, considering that there is no information on whether there is such a creditor. Lendbank's floating charge over the Company's shares and the assets of its subsidiaries is likely to be declared invalid under s 239 of the Companies Act 1981.

The Company may also consider an informal "work-out". However, this is only possible where the consent of all relevant creditors is forthcoming, as it is not possible to "cram-down" creditors in the absence of a formal restructuring process. Nevertheless, if the Company wishes to pursue an informal work-out, it is possible for the negotiations to be protected from the institution or continuation of enforcement proceedings by a "soft touch" provisional liquidation, which is a procedure developed as part of the insolvency practice of the Supreme Court and most commonly used to support work-outs. This involves a provisional liquidator being appointed and applying for a statutory stay of all proceedings against the Company while the work-out process continues, whether informally or through the medium of a scheme of arrangement. During this time, the board of directors retains control over the Company and endeavours to effect a work-out under the supervision of the "soft-touch" provisional liquidator. As mentioned above, this can be employed to facilitate negotiations in order to arrive at a conclusion as to how a debt-equity swap, or other similar restructuring plan, can be achieved.

Available jurisdictions

*The Company may take steps to restructure its debt before *both* the Bermuda and the Hong Kong courts. There have, in fact, been a number of restructuring cases of companies with a Bermuda connection with the use of parallel schemes of arrangement sanctioned by the Bermudian Court and the appropriate foreign court. For example, in *Re Titan Petrochemicals Group* [2014] Bda LR 90, the Bermudian Court recognised that it frequently approves parallel schemes linking Bermuda, Hong Kong, the UK and/or Singapore. A number of courts have stressed, however, that it is desirable for the relative advantages and disadvantages, and potential costs and expenses, of parallel schemes of arrangement to be considered in light of the facts and circumstances of the restructuring, having regard to the rule in *Gibbs* and alternative restructuring solutions that may be available. The rule in *Gibbs* originates from the English Court of Appeal decision in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale de Metaux* (1890) LR 25 QBD 398. The rule contemplates that a debt can only be validly discharged under the provisions of its governing law, unless the relevant creditor submits to a foreign debt restructuring.*

One of the considerations to bear in mind in pursuing a restructuring in Hong Kong only is the uncertainty over whether a foreign scheme of arrangement or related procedure can be recognised and enforced in Bermuda as a matter of common law, in the absence of a local scheme of arrangement implemented in parallel. Therefore, if the Company wishes to pursue a restructuring in Hong Kong, it is strongly advised to pursue a parallel restructuring in Bermuda.

A good answer, and largely complete - but a few errors regarding shareholder rights in a creditor scheme context.

6 marks.

TOTAL: 45 out of 50 marks

*** End of Assessment ***