



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 - not answered**

**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?**

**Section 170(2) of the Companies Act 1981 allows the court to appoint a provisional liquidator between the presentation of a winding-up petition and its final hearing. A provisional liquidator may be appointed 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: *Re Stewardship Credit Arbitrage Fund Ltd* [2008] Bda LR 67 at [36] ("*Re Stewardship*"). Classic cases warranting the appointment of a provisional liquidator include situations where there is a risk that assets will be dissipated in the period between the presentation of the winding-up petition and the final hearing, or where there is a need for independent supervision and control. For instance, in *Re Stewardship*, the Judge considered the evidence before the court pertaining to the conduct and management of the company's affairs, and concluded that there were "a number of instances where it cannot be said that the Company [had] acted as one might expect a Company in its position to act", such that the company needed "to be under the control of joint provisional liquidators ... rather than under the control of the present board of directors" (at [80] and [86]).**

**Alternatively, the Supreme Court of Bermuda may also appoint a "soft-touch" provisional liquidator or a provisional liquidator with specific powers to support formal and informal restructuring plans where those plans have a credible prospect of success and the support of majority creditors, so as to justify the adjournment of the winding-up petition: see *HSBC v NewOcean Energy Holdings Limited* [2022] CA Bda 16 Civ.**

**The provisional liquidator may be the Official Receiver, though in practice the Supreme Court regularly appoints commercial insolvency practitioners as provisional liquidators.**

**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 in the event of the liquidation of a company. Set-off can be exercised after the commencement of liquidation if:**

- (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 (i.e. the parties giving rise to the debt are the same parties giving rise to the credit and the parties have contracted with each other in the same capacity).**

**A person will not be entitled to claim the benefit of any set-off if he had, at the time of giving credit to the debtor, notice of an act of insolvency committed by the debtor and available against him.**

**Correct - 2 marks**

Question 2.3 [maximum 4 marks]

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

**The following types of security may be taken over immovable, movable and certain intangible property. First, a creditor may take a legal mortgage, which results in the legal title of the debtor's property being transferred to the creditor as security for the debt. The debtor remains in possession of the property but only regains legal title upon payment and satisfaction of the debt, and reconveyance of the legal title by the creditor.**

**Second, a creditor may take out an equitable mortgage. In this case, the debtor retains legal title to and possession of the property, but transfers the beneficial interest to the creditor. An equitable mortgage does not take priority over a third party who, without notice of the creditor's beneficial interest, acquires the legal title to the property in good faith and for value. Where an equitable mortgage is taken over an intangible, it may be effected by equitable assignment by way of security. Equitable assignment will not transfer the right to enforce a contractual right at the suit of the assignee.**

**Third, a creditor may take out a fixed charge over property. This does not result in the 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 creditor may apply the proceeds of sale towards payment of the debt in priority to and without reference to other unsecured creditors. The debtor may also not deal with any property that is subject to a fixed charge without the creditor's consent.**

**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.**

**While Bermuda has not enacted local legislation incorporating the UNCITRAL Model Law on Cross-Border Insolvency, the Supreme Court of Bermuda has confirmed (following the Privy Council decision in *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508 ("*Cambridge Gas*")) 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. The court also 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: see *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69, *Re Refco Capital Markets Ltd* (2006) Bda LR 94, *Re Celestial Nutrifoods Limited* [2017] Bda LR 11 and *Re C&J Energy Services Ltd* [2017] Bda LR 22.**

**It appears that the basis of such powers is the "principle of universality" - as explained by Lord Hoffmann in *Cambridge Gas*, the English case law suggests that there is an aspiration to produce a result equivalent to that which would occur if there were a single universal bankruptcy jurisdiction. Accordingly, while it is doubtful whether a domestic court can apply provisions of the foreign insolvency law which form no part of the domestic system, the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency, so as to prevent the foreign officeholder or creditors from having to commence parallel insolvency proceedings (*Cambridge Gas* at [20]-[22]).**

**A Bermuda Court is therefore likely to recognise the winding-up orders of foreign courts, and to assist foreign liquidators to the fullest extent possible, where:**

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

**That said, the precise scope of the Bermuda Court's common law power to "provide assistance by doing whatever it could have done in the case of a domestic insolvency" remains unclear. In *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, Lord Sumption (sitting in the Privy**

**Council) observed that the court's common law powers must be subject to local law and local public policy, and that the court can only ever act within the limits of its own statutory and common law powers (at [19]). Whether a court should grant the assistance sought will therefore depend on the nature of the power that the court is being asked to exercise, and does not "admit of a single, universal answer". On the facts, the Privy Council found that the Bermuda Court had the power to compel an entity within its jurisdiction to produce documents, so long as the power was being used to assist the officers of a foreign court or equivalent public officers (but not where the power was being used to assist a voluntary winding-up, which was a private arrangement).**

**Another case illustrating the limits of the Bermuda court's powers is *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] UKPC 35. In that case, the Privy Council held that the Bermuda Court had no jurisdiction to wind up an overseas company with assets in Bermuda. The Privy Council observed that the Supreme Court of Bermuda's jurisdiction to wind up companies was wholly statutory, and that the Companies Act 1981 only applied to domestic companies and overseas companies with a permit to carry on business in Bermuda. Given that the debtor company in question was an overseas company without a permit, it followed that the Bermuda court had no jurisdiction to wind it up. Likewise, in *Stephen John Hunt v Transworld Payment Solutions UK Limited* [2020] SC Bda 14 Com, the Supreme Court of Bermuda declined to recognise the appointment of a UK liquidator in circumstances where no active assistance had been requested, and any such potential assistance would likely have been refused, in light of pending litigation in English and Wales and other information-gathering mechanisms being available to the parties.**

**Correct - good and complete 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.**

**The starting point is that the judgment of a foreign court has no direct legal effect in Bermuda and is not enforceable as of right. Depending on the nature of the foreign judgment and the place from which it emanates, whether the judgment can be registered and enforced in Bermuda will be governed by statutory rules, common law rules or both. For instance:**

**(a) Statutory rules apply to the registration and enforcement of final money judgments of superior courts in the UK and certain Commonwealth countries and territories, under the Judgments (Reciprocal Enforcement) Act**

**1958 (the "1958 Act"). Common law rules apply to the enforcement of final money judgments of foreign courts in the rest of the world.**

- (b) Statutory rules apply to the registration and enforcement of maintenance orders made by foreign courts of reciprocating countries, under the Maintenance Orders (Reciprocal Enforcement) Act 1974 and the regulations made thereunder.**
- (c) Statutory rules & common law rules apply to the recognition of foreign judgments either as a defence to a claim or as conclusive of an issue in the Bermuda proceedings.**
- (d) Statutory rules apply to the recognition of divorces and legal separations.**
- (e) Statutory rules or common law rules apply to foreign arbitral awards, foreign judgments on the administration of estates, foreign decrees of dissolution or nullity of marriage, and foreign maintenance orders.**

**Under the 1958 Act, the registration of a foreign judgment must be set aside if:**

- (a) The judgment is not covered by the 1958 Act or was registered in contravention of the Act;**
- (b) The foreign court had no jurisdiction;**
- (c) The defendant did not receive notice of the foreign proceedings in sufficient time to enable him to defend the proceedings and did not appear;**
- (d) The judgment was obtained by fraud; or**
- (e) The rights under the foreign judgment are not vested in the person making the application for enforcement.**

**Further, the Supreme Court of Bermuda may set aside the registration if the dispute giving rise to the registered judgment had previously been the subject of a final and conclusive judgment by a court having jurisdiction on the matter. Following *Masri v Consolidated Contractors International Company* [2009] Bda LR 12, it should be noted that public policy grounds are not a reason to set aside the registration of a judgment that falls under the 1958 Act.**

**For other foreign judgments not registrable under the 1958 Act, such judgments must be enforced by way of a separate action at common law, on the basis that the foreign judgment is evidence of a debt. In general, the Bermuda Courts will follow the principles of English common law in recognising and enforcing foreign judgments. Enforcement of foreign judgments may therefore be declined where:**

- (a) The judgment is not final and conclusive;**
- (b) The judgment was not obtained in a court of law that had jurisdiction over the judgment debtor;**
- (c) The judgment was obtained by fraud;**
- (f) The judgment is for taxes, fines or penalties;**
- (d) Enforcement of the judgment would contravene Bermuda public policy;**
- (g) The foreign judgment conflicts with another prior, inconsistent judgment from another court with competent jurisdiction.**

***As for whether foreign-sanction schemes of arrangement may be registered or enforced in Bermuda, it is uncertain whether the Bermuda courts will permit this as a matter of common law, in the absence of a local scheme of arrangement implemented in parallel: see *Re C&J Energy Services Ltd* [2017] Bda LR 22; *Re Energy XXI* [2016] Bda LR 90; *Re Seadrill Limited* [2018] Bda LR 39. As noted in the answer to the previous question, Bermuda has not implemented the UNCITRAL Model Law on Cross-Border Insolvency and recognition of foreign proceedings therefore occurs as an exercise of the Bermuda court's common law powers. Although the Supreme Court of Bermuda has indicated some willingness to recognise foreign court orders approving foreign schemes in the absence of opposition, it is unclear what position it (or an appellate court) will take in a contentious situation.***

**Correct - good and complete answer**

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.**

***I first discuss (a) the available causes of action, followed by (b) the potential defendants and jurisdictions in which the bondholders can take action; and (c) the pros & cons of litigation versus insolvency proceedings.***

**The available causes of action**

**If the statutory demand that the bondholders served on Bercoffee ("BC") remains unsatisfied for more than 21 days, the bondholders may make a winding up petition to the Supreme Court of Bermuda on the basis that BC is deemed unable to pay its debts (under ss 161 read with 162 Companies Act 1981). Once liquidation proceedings are commenced, the bondholders may be able do the following:**

- 1. File a claim for US\$500m in the liquidation proceedings. *If their claims are accepted by the liquidator, the bondholders may receive a distribution based on the available assets that BC has. However, as the bondholders are unsecured creditors, they will only be paid after secured creditors, the costs & expenses of the liquidation, debts owed to employees in Bermuda, preferential debts, and debts secured by a floating charge are dealt with.***
- 2. Apply to set aside the transfer of moneys to BC's Chinese subsidiaries, directors and shareholders under ss 36A to 36G of the Conveyancing Act 1983. *Section 36C provides that a creditor may apply to set aside a disposition of property made with the requisite intention and at an undervalue, if the creditor is thereby prejudiced. The "requisite intention" means an intention to make a disposition the dominant purpose of which is to put property beyond the reach of creditors, while a transaction occurs at***

*an undervalue if it occurs for no consideration or for consideration that is significantly less than the value of the property. In the present case, the creditors may have a claim if they are able to show that the transfer of US\$500m to BC's Chinese subsidiaries, as well as the payment of US\$20m and US\$30m to BC's directors and shareholders respectively, meet these conditions (eg, the transfer of to BC's Chinese subsidiaries was done for no consideration in return from the Chinese subsidiaries, and was done for the dominant purpose of putting the money out of reach of the bondholders). That said, this may be difficult to prove as on the given facts, each of the transactions *prima facie* seems to have a legitimate purpose - the transfer of US\$500m to BC's Chinese subsidiaries was presumably to fund the expansion of BC's operations in China, while the payments to its directors and shareholders were bonus and dividend payments respectively.*

*For completeness, while s 239 of the Companies Act 1981 provides that a floating charge on the company's property created within 12 months of the commencement of winding up will generally be invalid (unless it is proved that the company was solvent immediately after the creation of the charge), this is unlikely to be of assistance to the bondholders. While a floating charge was granted to Lendbank ("LB") within 12 months of commencement of winding up, LB extended a further US\$50m to BC at the time the charge was created. The floating charge is therefore valid in the sum of US\$50m.*

3. Apply for a declaration that the directors are responsible for fraudulent trading under s 246 Companies Act 1981. **Section 246 provides that if a director has carried on any business of the company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may (on the application of a creditor), if it thinks proper to do so, declare a director who was knowingly party to the carrying on of the business to be personally responsible, without limitation of liability, for all or any of the company's debts. In the present case, given that the directors fraudulently misrepresented BC's financial position to the bondholders, the bondholders may seek a declaration that the directors are personally liable for the US\$500m owed to the bondholders.**
4. Apply for a declaration that the directors are liable for misfeasance under s 247 Companies Act 1981 (resulting in personal liability). **Section 247 provides that the court may compel a director who has misapplied or retained or become liable or accountable for any money or property of the company, or who has been guilty of any misfeasance or breach of trust in relation to the company, to repay or restore the money or property to the company. In the present case, BC's directors have arguably been guilty of misfeasance by fraudulently misrepresenting BC's financial position to creditors and may have breached their duties to the company by paying out US\$20m to themselves and US\$30m to shareholders despite the BC's**



*apparent financial difficulties. In addition, a company is not allowed to declare dividends if there are reasonable grounds to believe that after payment, the company would be unable to pay its debts: s 54 Companies Act 1981. The director's decision to pay a dividend of US\$30m to BC's shareholders arguably breaches s 54 and is further evidence of misfeasance. The bondholders may therefore seek an order that the directors repay the sum of US\$500m, US\$20m and US\$30m on this basis. However, the directors' personal liability may be limited if they are protected by an indemnity: Peiris v Daniels [2015] SC (Bda) 13 Civ.*

5. Commence an action against the directors for breaching their fiduciary duties and their duty to exercise reasonable skill and care. **Directors owe duties to the company pursuant to s 97 of the Companies Act 1981 and as a matter of common law, to act honestly and in good faith with a view to the best interests of the company. Further, as the company approaches insolvency, directors also owe fiduciary duties to creditors to take their interests into account. The directors are arguably liable for breaching their fiduciary duties by misrepresenting BC's financial position, paying out US\$20m to themselves despite the company's financial difficulties, and declaring a dividend of US\$30m in breach of s 54 Companies Act 1981. This is another basis on which the bondholders may seek an order that the directors repay the sum of US\$500m, and US\$50m to the company.**

*Aside from commencing insolvency proceedings and pursuing the abovementioned causes of action, the bondholders may also consider the following claims in private law:*

6. Claim for fraudulent misrepresentation against the directors. **This would be a straightforward contractual claim, namely that the directors fraudulently misrepresented BC's financial position to the bondholders, and in reliance on the misrepresentation the bondholders entered into the various bond contracts. The remedy would be for the court to set aside the relevant bond contracts, or alternatively award the bondholders damages in the sum of US\$500m.**

*This could benefit from some more careful analysis - is the claim against the directors a common law claim in tort, or a contractual claim, or a statutory claim? Surely the claim would also need to be against the Company before the bonds could be set aside or rescinded, as against the Company itself?*

6.

7. Claim for knowing receipt against BC's Chinese subsidiaries, directors and shareholders. **This assumes that Bermuda property law recognises the English doctrine of knowing receipt, and it can be established that BC's Chinese subsidiaries, directors and shareholders received the various payments (of US\$500m, US\$20m and US\$30m) in circumstances that made it unconscionable. This may be the case if, for instance, it can be shown that BC's subsidiaries, directors and shareholders were all party to a fraudulent**

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*scheme perpetrated on the bondholders. The remedy would be for the sums paid out of the company to be returned to it, thus increasing the assets available for distribution in the liquidation.*

- 8.** Claim in tort for wrongful means / lawful means conspiracy. **Again, assuming Bermuda law recognises these causes of action in tort, and it can be shown that BC's Chinese subsidiaries, directors and/or shareholders were party to a conspiracy to defraud the bondholders, the bondholders may have such a cause of action. The remedy would be for the bondholders to be awarded damages of US\$500m, being the loss they suffered.**

**Potential defendants and jurisdictions**

*It follows from the above that the potential defendants are BC's directors, Chinese subsidiaries and shareholders. For the insolvency proceedings listed at paras 1-5 above, these proceedings will take place in Bermuda, since they are dependent on Bermuda statutory provisions pertaining to insolvency. Whether enforcement is feasible depends on whether BC's directors are located - enforcement may not be an issue if BC's directors reside in Bermuda and have their assets located there, but enforcement may pose an issue if BC's directors reside overseas and/or have assets located overseas. In the latter scenario, even if BC's directors are declared personally liable in Bermuda, whether their overseas assets can be seized may depend on the laws of the jurisdiction in which their assets are located.*

*As for the causes of action at paras 6 to 8 above, BC's Chinese subsidiaries are evidently located in China, while it is not stated where its directors and shareholders are located. Assuming BC's directors and shareholders are located outside of Bermuda as well, where proceedings should be commenced will depend on the conflicts of law rules of Bermuda, as well as the conflicts of law rules of the jurisdiction in which BC's subsidiaries /directors/shareholders are located.*

**Pros & cons of insolvency proceedings VS litigation**

*Following from the above, one main advantage of pursuing insolvency proceedings (and the causes of actions listed at paras 1-5 above) is that the proceedings would all be located in Bermuda. This may be more convenient for the bondholders and helps to control costs. However, as noted above, one con may be that the bondholders will have to pursue enforcement proceedings in other jurisdictions - even if BC's directors are found personally liable in Bermuda, this will be of little use if BC's directors do not reside in Bermuda and do not have assets there.*

*Accordingly, litigation (i.e, pursuing the private causes of action stated at paras 6-8 above) may ultimately be more convenient if the defendants are all located outside of Bermuda, and the bondholders can successfully sue the defendants in their respective jurisdictions. The bondholders can then enforce their*

*judgments against the defendants' assets in the respective jurisdictions, as a matter of domestic law.*

*A full and thoughtful answer - subject only to some minor errors in the analysis, but no marks deducted as a result.*

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).*

*Yes, it would be open to BC to enter into a scheme of arrangement ("SOA") in Bermuda under the Companies Act 1981. A SOA 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. It may also be used to reorganise the company's capital, including the implementation of a debt for equity swap.*

*In Bermuda, a SOA may be entered into after the appointment of a liquidator or provisional liquidator. A SOA procedure may be initiated on application of, *inter alios*, the company or the liquidator. The applicant requests the court to convene a meeting of the creditors or the relevant class of creditors. The court will almost always direct as such, unless exceptional circumstances exist, in which case the creditors must be summoned by notice. Creditors will be separated into classes if because of differences in their respective rights, they are unable to consult together with a view to their common interest. A binding SOA requires the approval of a majority within each class of creditors present and voting at the meeting of that class, representing 75% by value of that class. In the absence of a formal restructuring process, it is not possible to cram down on a class of creditors. Further, the court must then approve the SOA. The court must be satisfied that the statutory requirements have been met (including the holding of the requisite class meetings and approval of the necessary majorities), that each class was fairly represented at the meeting, and that the SOA is fair to creditors generally, before the court will exercise its discretion to approve the SOA.*

*The SOA will not be effective until a copy of the sanction order is delivered to the Registrar of Companies. A SOA may be:*

*(a) Conducted within a liquidation, in which case the liquidator controls the process;*

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- (b) Conducted outside a liquidation, in which case the company's directors and managers control the process; or**
- (c) Conducted within a 'soft touch' provisional liquidation, in which case the board of directors normally manages the process under the supervision of a provisional liquidator.**

**A SOA will generally be financed by the company's own assets, although it is possible for the company to enter into funding arrangements with those interested in the outcome of the SOA, if it has insufficient assets.**

**Whether BC will be able to commence an SOA in Hong Kong will depend on the relevant Hong Kong laws, since BC is not a Hong Kong company but nonetheless has its offices and business operations there. Assuming BC commences an SOA in Hong Kong, it may be possible for BC to then seek recognition of the Hong Kong SOA in Bermuda. Given that the Bermuda courts have indicated their willingness, as a matter of common law, to consider all the circumstances of the case (including the company's centre of main interests and the forum with the closest connection to the issues in question), BC could argue that it has its centre of main interests in Hong Kong since its offices and business operations are located there, and that recognition of the Hong Kong SOA should be granted on that basis. However, this may not be the best course of action as the Bermuda position on whether foreign SOAs will be recognised is still uncertain. While the Supreme Court of Bermuda has shown some willingness to recognise foreign court orders approving foreign schemes in the absence of opposition, it is unclear what position it (or an appellate court) will take in a contentious situation.**

**Conversely, another option is for BC to commence an SOA in Bermuda and seek recognition of the Bermuda SOA in Hong Kong. The Supreme Court of Bermuda has on several occasions issued letters of request to foreign courts, asking for recognition of and assistance to Bermudian companies. The jurisdiction to issue such letters exists as a matter of common law. However, whether this course of action is viable would ultimately depend on the Hong Kong laws relating to the recognition of foreign proceedings.**

**In the circumstances, the best option would be for BC to commence parallel SOAs in Bermuda and Hong Kong. The Bermudian Court has recognised that it frequently approves parallel schemes linking Bermuda, the UK, Hong Kong and/or Singapore: *Re Titan Petrochemicals Group* [2014] Bda LR 90.**

**A full and complete answer.**

**TOTAL: 49 out of 50 marks.**

**\* End of Assessment \***