



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5A

BERMUDA

Commented [INS 11]: MARK REDUCED TO 50% AS A RESULT OF PLAGIARISM. COURSE LEADER.

***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]

Formatted: Font: (Default) Avenir Next, 11 pt, Font color: Red

Formatted: Normal, No bullets or numbering



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

Section 170(2) of the Companies Act 1981 permits 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, per *Re Stewardship Credit Arbitrage Fund Ltd* [2008] Bda LR 67 at [36] ("*Re Stewardship*").

The usual circumstances which warrant the appointment of a provisional liquidator include situations (a) where there is a risk of the dissipation of assets during the window between the presentation of the winding-up petition and the final hearing, or (b) where there is a need for independent supervision and control. In *Re Stewardship*, the court considered the conduct and management of the company's affairs and held that the company did not act as one might expect a company in its position to act and therefore needed to be under the control of joint provisional liquidators instead.

In circumstances where a court is considering the adjournment of a winding-up petition, the Supreme Court of Bermuda may also appoint a provisional liquidator to support formal and informal restructuring plans where those plans have a credible prospect of success and the support of majority creditors, per *HSBC v NewOcean Energy Holdings Limited* [2022] CA Bda 16 Civ.

**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-offs in the event of a liquidation in Bermuda. Set-off can only 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 crystallized 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 such that the parties to the debt are the same parties giving rise to the credit.

If the person claiming set-off had a notice of an act of insolvency committed by the debtor which is available against him at the time of giving credit to the debtor, he will not be entitled to claim the set-off.

- **Correct 2 marks**

Formatted: Font: (Default) Avenir Next, 11 pt, Font color: Red

Formatted: Font: (Default) Avenir Next, 11 pt, Font color: Red

Formatted: List Paragraph, Bulleted + Level: 1 + Aligned at: 0,63 cm + Indent at: 2,19 cm

Question 2.3 [maximum 4 marks]

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

*Taking security over assets (ie, immovable, movable and certain intangible property) under Bermuda law may be by way of: (a) legal mortgage; (b) equitable mortgage; and (c) fixed charges.*

*Legal mortgage*

*A creditor may take security over property by way of legal mortgage. This process involves the legal title of the debtor's property being transferred to the creditor as security for a debt. The debtor retains possession of the property, but the legal title of the property will only be reconveyed to the debtor on payment and satisfaction of the debt to the creditor.*

*Equitable mortgage*

*A creditor may also take out an equitable mortgage. The debtor holds legal title and remains in possession of the property, but transfers the beneficial interest in the property to the creditor. An equitable mortgage does not take priority over third party who acquires, without notice of the creditor's beneficial interest, legal title to the property in a *bona fide* transaction for consideration.*

*Fixed charges*

*A creditor may opt to take out a fixed charge over the property. There is no transfer of legal or beneficial ownership, but the creditor is conferred the right to take possession of the property with a right of sale in the event of a default by the debtor. If the right of sale is exercised, the proceeds of sale may be applied by the creditor towards payment of the debt owed to him in priority to and over any other unsecured creditors. The debtor generally may not deal with any property 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.**

*In Bermuda, the recognition and assistance of foreign liquidators take place under the common law. It has not enacted local legislation incorporating the centre of main interest ("COMI") test set out in the UNCITRAL Model Law on Cross Border Insolvency and it does not have the equivalent of Chapter 15 of the US's Bankruptcy Code, or the UK's Cross-Border Insolvency Regulations 2006. That being said, the Supreme Court of Bermuda has held 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 (*Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508 ("*Cambridge Gas*"). In its common law tradition of such recognition, the courts in Bermuda have the discretion to assist the primary liquidation court by doing whatever it could have done in the case of a domestic insolvency (*Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69).*

*A court in Bermuda is likely to recognise the winding-up orders of foreign courts and to assist foreign liquidators to the fullest extent in circumstances, where:*

- (1) There is a "sufficient connection" between the foreign court's jurisdiction and the foreign company making it the most appropriate, or the "most convenient" jurisdiction to have made an order for the winding-up of the company and 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 by branches; the foreign company has former directors, officers, managers 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 such as unfairness or prejudice to local Bermudian creditors.*

*The basis of such powers is the "principle of universality" - as explained by Lord Hoffmann in *Cambridge Gas*, which suggests that there is an aspiration to produce a result equivalent to that which would occur if there were a single universal bankruptcy jurisdiction.*

*However, the scope of the power the common law confers on the courts has its limitations. In *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, 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. 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. 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 towards a private arrangement). In *PricewaterhouseCoopers v**

*Saad Investments Company Limited* [2014] UKPC 35, the Privy Council held that the Bermuda Court had no jurisdiction to wind up an overseas company with assets in Bermuda as the court's jurisdiction to wind up companies was statutory in nature and that the Companies Act 1981 only applied to domestic companies and overseas companies with a permit to carry on business in Bermuda. The debtor company was an overseas company without a permit, and the court therefore did not have jurisdiction to wind it up in that case.

**Correct - 8 marks**

Question 3.2 [maximum 7 marks]

**Write a brief essay on the circumstances in which a foreign court judgment will not be registered or enforced in Bermuda. Also consider and address the question as to whether a foreign court-sanctioned scheme of arrangement might be registered or enforced in Bermuda.**

The starting point is to consider that the judgment of a foreign court has no direct legal effect in Bermuda (*Holborn Oil Company Ltd v Tesora Petroleum Corporation*, Civil Jurisdiction 1990: No 273, 20 August 1990). Foreign judgments may instead be recognised in Bermuda under statutory or common law rules. The applicable rules depend on the nature of the foreign judgment.

The Judgments (Reciprocal Enforcement) Act 1958 (the "Act") (and the regulations made thereunder) govern the registration and enforcement of final money judgments of superior courts in the UK and certain Commonwealth countries. Under the Act, a judgment rendered in the superior courts of the UK and the Commonwealth countries listed in Appendix II may be registered in Bermuda and given effect upon registration as though it were a judgment entered in Bermuda. However, judgments of inferior courts cannot be registered or enforced under the Act, even if they have been transferred to the relevant superior court (*Crossborder Capital Ltd v Overseas Partners Re Ltd* [2004] Bda LR 17). Furthermore, foreign judgments will not be enforced where an application that could have been made under the Act was brought at common law. A foreign judgment registered under the Act can be set aside on an application of the party against which judgment may be enforced on the following grounds:

- Where the judgment was registered in contravention of the 1958 Act, or if it does not fall within the ambit of the act;
- Where the foreign court had no jurisdiction in the circumstances;
- Where the defendant did not receive notice of the proceedings in the foreign jurisdiction in sufficient time to enable him to defend proceedings and did not appear;
- It was obtained by fraud; and
- The rights under it are not vested in the person by whom the application for registration was made.

*As for foreign judgments which are not registrable under the Act, they are 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 Bermudian courts follow the principles of English common law in recognising and enforcing foreign judgments and are 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;*
- (a) The judgment is for taxes, fines or penalties;*
- (d) Enforcement of the judgment would contravene Bermuda public policy;*
- (b) The foreign judgment conflicts with another prior, inconsistent judgment from another court with competent jurisdiction.*

*It is not clear whether the Bermuda courts will recognise foreign schemes of arrangement for registration or enforcement as a matter of common law, without a parallel local scheme of arrangement (Re C&J Energy Services Ltd [2017] Bda LR 22; Re Energy XXI [2016] Bda LR 90; Re Seadrill Limited [2018] Bda LR 39). 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 there is some willingness to accept such foreign schemes which may be observed from obiter, this is not consistently applied by the courts. It appears that whether the Bermudian courts recognise the foreign-sanctioned scheme of arrangement turns on the similarity of the regime of the foreign country to its own (the Supreme Court of Bermuda recognised a Singapore scheme of arrangement in In the matter of Contel Corporation Limited [2011] SC (Bda) 14 Com (7 March 2011)).*

**Correct - 7 marks**

Formatted: Font: (Default) Avenir Next, 11 pt, Font color: Red

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.***

***Available causes of action against the potential defendants***

***If the statutory demand that the bondholders served on Bercoffee is not met for more than 21 days, the bondholders should consider making a winding up petition to the Supreme Court of Bermuda on the basis that Bercoffee 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 to 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 Bercoffee has. This is subject to the caveat***

that the bondholders are unsecured creditors, and will only be paid after the secured creditors, the costs and 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 Bercoffee's Chinese subsidiaries, directors and shareholders under ss 36A to 36G of the Conveyancing Act 1983. The bondholders (as creditors) may apply to set aside a disposition of property made with the requisite intention and at an undervalue, if the creditor is thereby prejudiced (s 36C). Here, the bondholders must show that the transfer of US\$500m to Bercoffee's Chinese subsidiaries, as well as the payment of US\$20m and US\$30m to its directors and shareholders 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. However, the transactions appear to have a *prima facie* legitimate purpose.

While a floating charge was granted to Lendbank within 12 months of commencement of winding up, which may render it caught under s 239 of the Companies Act 1981, Lendbank extended a further US\$50m to Bercoffee 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 and misfeasance under s 247 Companies Act 1981 (resulting in personal liability). The directors fraudulently misrepresented Bercoffee's financial position to the bondholders, thus the bondholders may seek a declaration that the directors are personally liable for the US\$500m owed to the bondholders under s 246 of the Companies Act 1981. The directors may have also been guilty of misfeasance by fraudulently misrepresenting Bercoffee's financial position to creditors in breach of their duties to the company by paying out US\$20m to themselves and US\$30m to shareholders despite its financial difficulties under s 247 of the Companies Act 1981. Furthermore, 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 debt pursuant to s 54 Companies Act 1981. The payment of US\$30m in dividends by the directors is in contravention of s 54. The bondholders may rely on this basis to seek an order that the directors repay the sum of US\$500m, US\$20m and US\$30m. The caveat being that the directors may be indemnified against personal liability.
4. Take out an action against the directors for breach of fiduciary duties and duty to exercise reasonable skill and care. According to s 97 of the Companies Act 1981 and as a matter of common law, the directors owe a duty to act honestly and in good faith with a view to the best interests of the

*Bercoffee. As the company approaches insolvency, the directors also owe fiduciary duties to creditors to take their interests into account. The directors therefore acted in breach of their duties by misrepresenting Bercoffee's financial position, paying out US\$20m to themselves despite the company's financial difficulties, and declaring dividends of US\$30m in breach of s 54 Companies Act 1981.*

**Would this be a claim by the creditors directly against the directors, or would it have to be a claim by the liquidators on behalf of the company against the directors?**

5. *Private law claims against the Chinese subsidiaries. The bondholders could sue Bercoffee's Chinese subsidiaries for knowing receipt in their receipt of payments in circumstances that made it unconscionable. They need to show that the Chinese subsidiaries were party to a fraudulent scheme perpetrated on the bondholders.*

*Potential defendants and jurisdictions*

*The potential defendants are thus Bercoffee's directors, Chinese subsidiaries and shareholders. The proceedings outlined above will take place in Bermuda, since they are dependent on Bermuda statutory provisions pertaining to insolvency. Enforcement, however, depends on where the directors are located.*

*The Chinese subsidiaries are located in China, while it is not stated where its directors and shareholders are located. Assuming Bercoffee'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 and the other foreign jurisdiction in which Bercoffee's directors and shareholders are based.*

*Advantages and disadvantages of insolvency proceedings as opposed to litigation*

*The main advantage of pursuing insolvency proceedings is that the proceedings would all be located in Bermuda. This is cost-effective and convenient. However, the downside is that the bondholders will have to pursue enforcement proceedings in other jurisdictions. Litigation may be more convenient if the defendants are all located outside of Bermuda, and the bondholders can sue the defendants before seeking enforcement of these judgments in their respective jurisdictions.*

**This is a thorough and considered answer. 7 marks**

Question 4.2 [maximum 8 marks]



**To what extent would it be open to Bercoffee Limited to try to take steps to restructure its debt obligations, and how and where could it do so? Consider whether it would be more appropriate to take steps before the Hong Kong courts, the Bermuda courts, or both and, if so, why? Also consider whether it would make any difference if the debt restructuring involved a “debt-for-equity” swap, (that is, if the US bondholders would be issued new shares in the Company in exchange for cancellation of their debt, with existing shareholders’ shares in the Company being cancelled).**

*The Company may appoint a “soft touch” provisional liquidator in Bermuda to afford itself the “cloak” of a statutory moratorium on creditor enforcement action. This will provide room while the Company explores restructuring options. 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. The Company may therefore present a petition for winding-up, and the provisional liquidator once appointed may then apply for a statutory stay of all proceedings while the work-out process (whether formally or informally) continues with the Board at the helm and under the supervision of the provisional liquidator. If the negotiations for restructuring are successful, the winding-up petition may be dismissed.*

#### *Restructuring in Bermuda*

*Turning to the substance of the restructuring effort, the Company could commence a scheme of arrangement (“SOA”) under the Companies Act 1981. An SOA is a formal procedure which may be used to restructure the Company’s debt obligations with a view to its continued trading. Under an SOA, all of the Company’s debts (or certain classes of debt) may be adjusted or compromised and it may be used to implement a debt-for-equity swap.*

*The approval of a majority within each class of creditors present and voting (including by proxy) at the meeting of that class, representing 75% by value of that class, must vote in favour of the SOA. Upon court approval, the SOA is then binding on all creditors. A successful SOA may thus involve a cram down of a minority of dissenting creditors. Those voting at the SOA meetings may even include persons beneficially interested in the company’s debt, as may be the case for the US Bonds. The court directs that the meeting be called, and the creditors are summoned by notice. For funding, if the Company be cannot use its own assets, it is also possible to enter into funding arrangements with those interested in the outcome of the procedures (such as creditors) if such would be beneficial for the winding-up of the company. Such liabilities take priority over the unsecured creditors.*

*The Bermuda liquidator may also apply for recognition of the SOA under Chapter 15 of the US Bankruptcy Code (*In re Board of Directors of Hopewell Intl Ins Ltd* 275 BR 699 (SDNY 2022)).*

#### *Restructuring in HK*

*The Company should also consider engaging in a parallel SOA in Hong Kong at the same time as in Bermuda. In in *Re Titan Petrochemicals Group* [2014] Bda LR 90, the Bermudian Court recognised that it frequently approves parallel schemes linking Bermuda and Hong Kong (amongst others). This would be the safest way of ensuring the control in the overall scheme and the management of creditor action in both jurisdictions.*

*Another alternative to beginning a parallel SOA in HK is to simply apply for the recognition and enforcement of the Bermudian SOA in HK (*Re China Oil Gangran Energy Group Holdings Limited* [2021] HKCFI 1592).*

#### *Debt-to-equity Swap*

*With a debt-to-equity swap, a Bermuda company that is not in liquidation cannot lawfully return capital to its shareholders except by way of an approved reduction of capital or repurchase. It requires a formal procedure and engage in the formal SOA process in Bermuda in order to enact the debt-to-equity swap.*

**Correct as far as it goes - save that this seems to misunderstand the purpose of a debt for equity swap, and so the discussion of the concept of a debt for equity swap is not as thorough and complete as it could be. 4 marks .**

**TOTAL: 46 out of 50 marks.**

\* End of Assessment \*