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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5A**

**BERMUDA**

This is the **summative (formal) assessment for Module 5A** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 5A**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment5A]**. An example would be something along the following lines: 202223-336.assessment5A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **8 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

When is a Bermuda company deemed to be **unable to pay its debts** under section 161 and section 162 of the Companies Act 1981?

1. Only when it is balance sheet insolvent.
2. Only when it is cash flow insolvent.
3. When it is balance sheet insolvent and cash flow insolvent.
4. 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.

**Question 1.2**

**Who may appoint** a provisional liquidator over a Bermuda company?

1. A secured creditor.
2. A contributory.
3. The company itself (whether acting by its directors or its shareholders).
4. The Supreme Court of Bermuda.

**Question 1.3**

**In what order** are the following paid in a compulsory liquidation under Bermuda law?

1. Preferential creditors.
2. Unsecured creditors.
3. Costs and expenses of the liquidation procedure.
4. Floating charge holders.

Choose the **correct answer**:

1. Order (i), (ii), (iii) and (iv).
2. Order (iii), (iv), (i) and (ii).
3. Order (iii), (i), (iv) and (ii).
4. Order (i), (iii), (iv) and (ii).

**Question 1.4**

**What percentage** of unsecured creditors must vote in favour of a creditors’ scheme of arrangement for it to be approved?

1. Over 50% in value.
2. 50% or more in value.
3. Over 75% in value.
4. A majority of each class of creditors present and voting, representing 75% or more in value.

**Question 1.5**

What is the **clawback period** for fraudulent preferences under section 237 of the Companies Act 1981?

1. Two years.
2. One month.
3. Twelve months.
4. Six months.

**Question 1.6**

What types of transactions are **reviewable** in the event of an insolvent liquidation?

1. Only fraudulent conveyances.
2. Only floating charges.
3. Only post-petition dispositions.
4. All of the above.

**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?

1. At least five.
2. One is sufficient.
3. At least 10 or more owning policies of an aggregate value of not less than BMD 50,000.
4. At least 10.

**Question 1.8**

Where do secured creditors **rank** in a liquidation?

1. Behind unsecured creditors.
2. Behind preferential creditors.
3. Behind the costs and expenses of liquidation.
4. In priority to all other creditors, since they can enforce their security outside of the liquidation.

**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:

1. Section 237 of the Companies Act 1981.
2. Section 238 of the Companies Act 1981.
3. Section 247 of the Companies Act 1981.
4. Section 158 of the Companies Act 1981.

**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?

1. Resign immediately.
2. File a Suspicious Transaction Report forthwith.
3. 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.
4. Notify the directors, creditors and account owners within 28 days.

**QUESTION 2 (direct questions) [10 marks in total]**

**Question 2.1 [maximum 4 marks]**

In what circumstances may be a provisional liquidator be appointed?

[Type your answer here]

Question 2.2 [maximum 2 marks]

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

[Type your answer here]

Question 2.3 [maximum 4 marks]

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

[Type your answer here]

**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.

[Type your answer here]

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.

[Type your answer here]

**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.

[Type your answer here]

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).

[Type your answer here]

**\* End of Assessment \***