



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5A

BERMUDA

This is the **summative (formal) assessment** for **Module 5A** of this course and is compulsory for 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: 202122-336.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 “studentnumber” 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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **7 pages**.

Commented [DB1]: I don't think you bothered to comply with this instruction with any of the assessments you submitted, which is disappointing.

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) An unsecured creditor.
- (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?

a) Preferential creditors; b) unsecured creditors; c) costs and expenses of the liquidation procedure; d) floating charge holders.

- (a) a, b, c, d
- (b) c, d, a, b
- (c) c, a, d, b**

(d) a, c, d, b

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 (2) years.
- (b) One (1) month.
- (c) Twelve (12) months.

(d) Six (6) 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 (5).
- (b) One (1) 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 which provision of the Companies Act?

- (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.

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CORRECT

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

In what circumstances may be a Provisional Liquidator be appointed?

Following the presentation of a winding up petition (and prior to the final hearing) a provisional liquidator can be appointed if there is a good *prima facie* case that i) a winding up order will be made; and ii) the court considers that a provisional liquidator should be appointed in all the circumstances.

A common example of a circumstance for the appointment of provisional liquidators is where there is a risk of the dissipation of assets or the need for an independent person to be appointed to the Company for supervision and control.

CORRECT – ALTHOUGH ANSWER COULD HAVE BEEN FULLER TO ADDRESS SOFT-TOUCH RESTRUCTURING APPOINTMENTS – 3 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?

1. the transaction which gave rise to the debt was not a fraudulent preference or fraudulent conveyance;
2. the debts were incurred prior to the commencement of the liquidation and have crystallized as monetary liabilities; or
3. the dealings between the parties were mutual.

CORRECT – ALTHOUGH ANSWER COULD HAVE BEEN FULLER BY REFERENCE TO RELEVANT STATUTORY PROVISION – 1 MARK

Question 2.3 [maximum 4 marks]

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

A legal mortgage is a form of security where the legal title in the debtor's property is transferred to the creditor as security for the debt. However, the debtor remains in possession of the property yet only regains the title once the payment and satisfaction of the debt (upon which title is returned).

An equitable mortgage is a form of security where the beneficial interest in the property is transferred to the creditor. However, unlike a legal mortgage the title stays with the debtor. Accordingly, an equitable mortgage does not have priority of an innocent third party who acquires the legal title of the property in good faith and for value without notice of the creditor's beneficial interest.

A fixed charge is where the debtor retains the legal and beneficial ownership. However, the creditor has the right to take possession of the property with a right of sale should an event of default occur. Should the creditor exercise the right of sale, the proceeds may be applied towards the debt in priority of any other unsecured creditor. The Debtor is unable to deal with the property subject to the fixed charge without the consent of the creditor.

CORRECT – 4 MARKS

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 8 marks]

Write a brief essay on the basis upon which foreign liquidators are granted recognition and assistance in Bermuda.

Recognition of foreign corporate liquidators takes place under common law powers and not as a result of any statutory provisions.

The Supreme Court of Bermuda following the Privy Council case of *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508 that the Supreme Court of Bermuda, under its common law powers, recognise liquidators appointed by the Court of the country of the Company's domicile and the winding up order made by that Court. Further, the Supreme Court of Bermuda has the discretion to assist the liquidation by doing whatever it could have done had the company been a Bermuda incorporated Company wound up under the jurisdiction of the Supreme Court of Bermuda.

However, in the recent judgments of the Privy Council on appeal from the Court of Appeal of Bermuda the scope of the Supreme Court of Bermuda's common law power to assist foreign liquidations has been subject to debate. In particular, what is the scope of the power to "provide assistance by doing whatever it could have done in the case of a domestic insolvency". These two cases were *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 and *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] UKPC 35.

The these cases the Privy Council made it clear that the ability to assist foreign liquidators depends on the facts of each case and the nature of the power the court was being asked to exercise. However, it made it clear that the Court of Bermuda was likely to assist and recognise foreign liquidators In the circumstances where:

1. there was a sufficient connection between the foreign company and the foreign court's jurisdiction making it the most convenient jurisdiction to have the order winding up the company and the liquidators appointed;
2. there is a relevant connection to the jurisdiction of Bermuda (ie. Documents, assets, or liability of the foreign company within the jurisdiction, it has conducted business in Bermuda); and
3. there is no public policy reason under the laws of Bermuda to the contrary.

A GOOD EFFORT – BUT COULD HAVE BEEN MORE COMPREHENSIVE AND THERE WERE ALSO A FEW SPELLING & GRAMMATICAL ERRORS – 6 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.

In Bermuda there are two sets of rules, being statutory and common law) depending on the nature and place from which the foreign judgment emanates.

There are statutory rules that apply in the following circumstances:

1. pursuant to the *Judgments (Reciprocal Enforcement) Act 1958* (the "**1958 Act**") the registration and enforcement of final money judgments of the superior courts in the UK and certain Commonwealth countries;
2. pursuant to the *Maintenance Orders (Reciprocal Enforcement) Act 1974* (the "**1974 Act**") to the registration and enforcement of maintenance orders made by foreign courts of reciprocating countries;
3. pursuant to the *Recognition of Divorces and Legal Separations Act 1997* the recognition of divorces and legal separations; and
4. pursuant to the 1958 Act as a recognition of foreign judgments either as a defence to a claim or as conclusive of an issue in the Bermuda proceedings.

Further there are re common law rules, subject to the statutory restrictions set out in section 7 of the *Protection of Trading Interests Act 1981*, to the enforcement of final money judgments of foreign courts and to the recognition of foreign judgments either as a defence to a claim or as conclusive of an issue in the Bermuda proceedings.

There are many grounds by which the Court in Bermuda may decline to recognise a foreign judgment. This include:

1. If it is not covered by the 1958 Act;
2. If the foreign Court had no jurisdiction;
3. If the Defendant did not receive notice of the foreign proceedings;
4. If the foreign judgment was obtained by fraud;
5. If the rights under the foreign judgment are not vest in the person making the application for enforcement;
6. If the foreign judgment conflicts with a prior, inconsistent judgment from another court with competent jurisdiction;
7. If the foreign judgment is not final and conclusive;
8. If the foreign judgement is for taxes, fines or penalties;
9. In certain cases, being outside of cases of the 1958 Act, if enforcement of the foreign judgment is contrary to the Bermuda public policy.

A GOOD EFFORT – BUT NO DISCUSSION OF THE RECOGNITION OF FOREIGN SCHEMES – 5 MARKS

QUESTION 4 (fact-based application-type question) [15 marks in total]

ELBOW 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, and with indirect subsidiaries incorporated in Hong Kong and with offices and a substantial business presence in Hong Kong. The Company was formed with the intention of investing, through subsidiaries, in illiquid assets in the form of litigation funding loans and distressed debt in Asian markets.

Having funded, through one of its subsidiaries, a hopeless court case in Hong Kong against VICTORY LIMITED, a costs order was made by the Hong Kong Court against ELBOW LIMITED in favour of VICTORY LIMITED in the sum of USD 2 million, payable in full within 14 days.

At the due date for payment of the costs order to VICTORY LIMITED, ELBOW LIMITED's assets were fully invested and its investments, although illiquid, were valued in the aggregate sum of USD 10 million.

The Company's directors decided that it was in the best interests of ELBOW LIMITED and its shareholders not to satisfy the Hong Kong Court judgment and not to liquidate any of its assets to cash given the risk that an urgent "fire-sale" would completely destroy the value of those assets, and in circumstances where ELBOW LIMITED did not consider that the Hong Kong Court judgment would be enforceable against it in Bermuda.

The Company's directors subsequently borrowed an additional USD 5 million from its bank, LENDBANK, secured by way of a floating charge against all of its shares and the assets of its subsidiaries. Out of the USD 5 million received from LENDBANK, ELBOW LIMITED's directors immediately paid themselves a bonus payment of USD 2 million and they also paid a dividend to the Company's shareholders in the sum of USD 3 million.

VICTORY LIMITED only found out about these transactions two weeks later, through a report received from a disgruntled former employee of ELBOW LIMITED.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 7 marks]

What actions could VICTORY LIMITED take to try to recover its cost order against ELBOW LIMITED? Please consider (a) the jurisdictions in which it could take such action, bearing in mind the potential need for enforcement; (b) the defendants against whom it 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.

Victory Limited could seek the enforcement of its Hong Kong Court Order in Bermuda. In the circumstances that the Court Order is directed against Elbow Limited, Victory Limited would only be able to seek recognition of its order and enforce against Victory Limited.

Were Victory Limited to seek to commence insolvency proceedings against Elbow Limited there are various pros and cons.

Pros – The Liquidators would potentially be able to get control of all the assets of Elbow Limited (and its various subsidiaries) in all the jurisdiction as it would be able to seek recognition of the liquidators appointment. Accordingly, they would be able to access all the assets. The Liquidators would also have access to the clawback provisions and accordingly, may be able to reverse the pay to the directors and potentially the dividends

Cons - If they proceeded to liquidation, Victory limited would be an unsecured creditor and accordingly would be paid after the liquidators and the security creditors (in this case the Bank who have a floating charge over the shares in the subsidiaries). Accordingly, there is a risk that there would be nothing left for Victory limited once the Bank takes the shares (and accompanying assets) for in repayment of its loan.

If Victory limited proceeded with the recognition of their order and enforcement in the BVI they may be able to be paid without falling into the general pool of unsecured creditors. However, they will not have access to the various clawback provisions. Also, they would not be able to pursue the assets of the subsidiaries directly.

NOT A BAD EFFORT – BUT THE ANSWER COULD HAVE BEEN MORE COMPREHENSIVE – 5 MARKS

Question 4.2 [maximum 8 marks]

To what extent would it be open to ELBOW LIMITED to try to take steps to restructure its debt obligations? How and where would 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, i.e. the creditors of ELBOW LIMITED would be issued new shares in the Company in exchange for cancellation of their debt, with existing shareholders’ shares in the Company being cancelled.

In the circumstances that Elbow Limited is the parent company, it makes sense to pursue any restructuring in Bermuda. Elbow Limited could pursue creditors voluntary liquidation. Specifically, a Scheme of Arrangement could be used to adjust or compromise a class of debt (in this case Victory Limited’s debt) and even could result in the a debt-for-equity swap to enable Elbow Limited to utilize its assets (without risking the fire sale).

Were Elbow Limited to pursue a voluntary liquidation and appoint provisional liquidators, it would protect the Scheme from being derailed by other creditors seeking to pursue litigation or compulsory winding up of the company.

If Elbow limited was to pursue a Scheme, it may attend a pre-packaged sale of its equity to Victory Limited. Where that is the case, given it has a COMI in Hong Kong, it may seek the assistance of both the Courts of Bermuda and Hong Kong for the purposes of having the pre-packed sale effected under the supervision of a court-appointed administrator.

THIS ANSWER IS LESS COMPLETE THAN I WOULD HAVE HOPED. IT ALSO APPEARS TO CONFUSE THE CONCEPTS OF VOLUNTARY LIQUIDATION AND COMPULSORY LIQUIDATION OR PROVISIONAL LIQUIDATION. - 4 MARKS

TOTAL MARKS = 38 MARKS OUT OF 50

*** End of Assessment ***