



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**.

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.

CORRECT

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

In what circumstances may a Provisional Liquidator be appointed?

Based on the Section 170(2) of the Companies Act 1981, a provisional liquidator can be appointed by the Supreme Court of Bermuda between the presentation of a compulsory winding up petition and its final hearing. There are multiple circumstances in which a provisional liquidators must be appointed. For example, in the best interest of the creditors, if there is a risk that assets will be dissipated between the period of the presentation of the petition and the final hearing, or where a restructuring is capable of being achieved under supervision of an independent court officer.

The provisional liquidator will be appointed if there is a good *prima facie* that a winding up order will be made

DECENT ANSWER – 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 applies to companies in liquidation and provides for mandatory set-off.

Set-off can only be exercised after the commencement of a liquidation in the circumstances where either debts giving rise to the set-off were incurred prior to the commencement of liquidation and have already crystallized as monetary payment liabilities; the transaction giving rise to the debt was not a fraudulent preference or a fraudulent conveyance; or the dealings between the parties were mutual.

DECENT ANSWER – 2 MARKS

Question 2.3 [maximum 4 marks]

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

There are a number of ways to take security over assets under Bermuda law including by way of legal mortgage, equitable mortgage, fixed charge, floating charge, pledge, contractual lien, a registered judgement and assignment.

Under a legal mortgage, legal title of the property of the debtor is transferred to the creditor as security for a debt. The debtor remains in possession of the property but only regains legal title upon payment and satisfaction of the debt and reconveyance of legal title by the creditor.

Under a lien, which is the right to retain possession of another person's property until that person performs a specific obligation. A lien is similar to a pledge save that in case of a lien the property is deposited with the creditor not for the purposes of security but for some other purpose, such as safe custody or repair.

Under a fixed charge over property, a transfer of legal or beneficial ownership does not occur, but the creditor has a right to take possession of the property with a right of sale in the event of a default by the debtor. The proceeds of sale may be applied by the creditor towards payment of the debt in priority to unsecured creditors. The debtor may not deal with any property that is subject to a fixed charge without the consent of the creditor.

GOOD ANSWER – 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 and assistance of corporate foreign liquidators takes place under common law powers in Bermuda and not because of any statutory provisions that apply to certain foreign bankruptcies of individuals. In fact, in Bermuda, a judgement or order of a foreign court has no direct legal effect and is not enforceable in and of itself. A foreign judgement may be recognised or enforceable pursuant to statutory rules or common law rules.

In the *PwC v Saad/Singularis* judgements of the Privy Council the extent of the power of assistance is outlined, being limited to granting assistance to the extent that such assistance is both available from the Bermuda court and the foreign court and consistent with public policy.

To sum up, the Bermuda Court is likely to recognise the winding up of foreign courts, and to assist foreign liquidators in circumstances where:

- 1) There is a “sufficient connection” between the foreign court’s jurisdiction and the foreign company making it the most appropriate to appoint a 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; the foreign company has former directors, officers, managers, agents 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.

DECENT 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.

A foreign judgement is not enforceable in Bermuda in and of itself. In Bermuda there are two sets of rules depending on the nature and place from which the foreign judgement emanates, being, statutory and common law.

There are a number of recognised grounds for declining to enforce a foreign judgement in Bermuda. These include:

- 1) if the judgement is not covered by the 1958 Act;
- 2) if the foreign Court has no jurisdiction;

- 3) if the Defendant did not receive notice of the foreign proceedings in the foreign jurisdiction in sufficient time to enable him to defend the proceedings and did not appear;
- 4) if the foreign judgement was obtained by fraud;
- 5) if the rights under the foreign judgement are not vested in the person making the application for enforcement;
- 6) if the foreign judgement conflicts with another prior, inconsistent judgement from another court with competent jurisdiction;
- 7) if the foreign judgement is not final and conclusive;
- 8) if the foreign judgement is for taxes, fines or penalties; or if enforcement of the foreign judgement is contrary to Bermuda public policy unless in the case of the 1958 Act following the Masri case.

DECENT ANSWER, BUT DOES NOT ADDRESS THE ISSUE OF FOREIGN SCHEMES – 4 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.

A judgement or order of a foreign court (Hong Kong) has no direct legal effect in Bermuda. Depending on the nature of the foreign judgement, it may be recognised or enforceable in Bermuda pursuant to various statutory rules or common law rules.

Particularly, there are common law rules applicable to the enforcement of final money judgements of foreign courts (subject to statutory restrictions set out in section 7 of the protection of trading interests Act 1981). Hong Kong as a former colony of Commonwealth falls into the potential application to the registration and enforcement of final money judgements by the Bermuda Courts.

THIS IS A SUPERFICIAL ANSWER THAT DOES NOT REALLY GRAPPLE WITH THE QUESTIONS BEING ASKED – 2 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.

Elbow limited is registered in Bermuda. As such, it could benefit from a Scheme of Arrangement as a formal restructuring procedure. As such the company would have been able to restructure its debt. It could be a beneficial way of promoting and securing a restructuring of the company.

THIS IS A SUPERFICIAL ANSWER THAT DOES NOT REALLY GRAPPLE WITH THE QUESTIONS BEING ASKED – 2 MARKS

TOTAL MARKS = 36 MARKS OUT OF 50

*** End of Assessment ***