



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?

A Provisional Liquidator may be appointed where:

- There is a risk of dissipation of assets before the winding up order is made.
- There is a need for independent supervision and control.
- There is a reasonable basis for a restructuring and a restructuring plan in place – there is the benefit of a stay during the restructuring as a result of the winding up petition.
- It is shown that there is a good *prima facie* case for winding up the company.

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?

Rights of set-off can be exercised after the commencement of a liquidation of a Bermuda company if:

- The debts [giving rise to the set-off] were incurred prior to commencement of the liquidation and have crystallised as monetary payment liabilities;
- The transaction giving rise to the debts was a fraudulent preference or a fraudulent conveyance; or
- The dealings between the parties were mutual under Section 47 of the Bankruptcy Act 1989.

CORRECT – 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 various ways of taking security of assets under Bermuda law including, but not limited to:

- i) Legal mortgage – in this case the legal title of the debtor's property is transferred to the creditor as security. The debtor keeps possession of the property, and the title will be transferred back to the debtor upon settlement of the debt.
- ii) Fixed Charge – in this case the fixed charge gives the creditor the right to take possession of the property with a right of sale should the debtor default.
- iii) Lien – a lien gives the right to retain possession of another's property until they perform a specific obligation.

Other ways of taking security are equitable mortgages, floating charges and pledges.

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.

Foreign liquidators are granted recognition and assistance in Bermuda under common law provisions. Bermuda has not implemented the Model Law and there are no statutory mechanisms that apply to foreign liquidators.

Foreign liquidators are likely to be granted recognition and assistance by the court in Bermuda in circumstances where:

1. The company is incorporated in Bermuda, or has conducted business or operations within, or from, the jurisdiction of Bermuda. There must be sufficient connection between the foreign court's jurisdiction and the foreign company making it the most appropriate or convenient jurisdiction to make a winding up order and appoint foreign liquidators.
2. The company has books and records, assets or liabilities in the jurisdiction of Bermuda.
3. The company has (or had) directors, officers, managers, services providers in Bermuda.
4. The company needs to be involved in litigation in Bermuda.
5. Recognition and assistance are not contrary to Bermuda public policy e.g., there is no prejudice to local creditors.
6. The foreign liquidators are seeking assistance that would be available to them under the laws of the foreign jurisdiction as well as Bermuda law. Such assistance has been debated in judgments by the Privy Council such as *Singularis Holdings Limited vs PricewaterhouseCoopers* and *PricewaterhouseCoopers v Saad Investments Company Limited* where the Privy Council noted that that the Court does not have the power to assist foreign liquidators to do something they could not in the foreign jurisdiction.

GOOD 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 judgment has no immediate legal effect in Bermuda, there are a number of steps to be taken before a foreign judgment is legally enforced in Bermuda.

The nature and place of the foreign judgment must be considered in order to determine if it may be recognised or enforceable in Bermuda pursuant to statutory or common law provisions.

A foreign Court judgment will not be registered or enforced in Bermuda in the following circumstances:

1. The foreign judgment is not covered by the Judgments (Reciprocal Enforcement) Act 1958 (the '1958 Act'). The 1958 Act being statutory rules that apply to the registration and enforcement of final money judgments in superior courts in the UK and certain Commonwealth countries. Where a foreign judgment is registered under the 1958 Act it may not be enforced if an application is made by a party against who the registered judgment is enforced.

2. The foreign court making the foreign judgment has no jurisdiction, the foreign court should have jurisdiction over the judgment debtor.
3. The defendant did not receive notice of the proceedings in the foreign jurisdiction in a timely manner to defend the proceedings or did not appear.
4. The foreign judgment was obtained fraudulently.
5. The enforcement of the judgment is contrary to public policy in Bermuda.
6. The judgment was in relation to taxes, fines or penalties.
7. The judgment is not final or conclusive,
8. The foreign judgment is inconsistent with another judgment from a foreign court with foreign jurisdiction.

Foreign Court-sanctioned Schemes of Arrangement may not be registered and enforced in Bermuda, under common law provisions, where there is no parallel scheme in force in Bermuda. The Supreme Court in Bermuda has indicated that they may recognise foreign court orders where such schemes have been approved however, the position of the Supreme Court is not known in contentious proceedings.

GOOD ANSWER – 7 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 consider trying to take action to recover its costs order against Elbow Limited in Hong Kong, BVI or Bermuda.

Hong Kong – Victory Limited could consider taking action in the jurisdiction of the subsidiary who funded the Hong Kong court case, we are aware that Elbow Limited has indirect subsidiaries in Hong Kong, with a substantial business presence in the jurisdiction.

BVI – if the court case was funding by Elbow Limited’s BVI subsidiary or one of its subsidiaries, Victory Limited could consider seeking recognition and enforcement of the costs order in the BVI. Victory Limited would need to explore the extent to which the BVI courts recognise and enforce foreign judgments.

Bermuda – under the 1958 Act, the Bermuda Court will recognise and enforce a foreign money judgment which falls under the act. Under the 1958 Act, a judgment made in a superior court, which includes the Hong Kong Court under the Judgments Extension Order 1956, can be registered in Bermuda and upon registration the effect is as if the judgment had been made in Bermuda.

Victory Limited could therefore seek to have the costs order made by the Hong Kong court registered and enforced under the 1958 Act in Bermuda.

Victory Limited could also consider taking action against the directors of Elbow Limited following the costs order being ignored and in light of the transactions that took place following the costs order, the bonus payment and dividend to shareholders. It should be considered if these transactions can be set aside, i.e., were the transactions fraudulent conveyances or fraudulent preferences, should Victory Limited proceed with insolvency proceedings against Elbow Limited in the BVI rather than pursuing litigation.

Victory Limited should also consider if the transactions made after the costs order are a matter of common law, have the directors breached their fiduciary duty to the company, misfeasance, or breach of trust and if the directors are personally liable should Victory Limited progress with litigation against the Company in order to recover the money due under the costs order.

Victory Limited have already been wrapped up in a court case with Elbow Limited, pursuing further litigation could be costly and result in Elbow Limited not complying with any judgment made by a court, in the same way they have ignored the costs order. In insolvency proceedings in Bermuda, costs and expenses of the liquidation are paid from the assets of the estate rather than by the creditor petitioning for the winding up of the company.

GOOD ANSWER – 7 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 could consider a scheme of arrangement in Bermuda to facilitate a restructuring of its debt obligations. A scheme of arrangement is provided for in Part VII Section 99 of the Companies Act 1981 and it is a formal court-supervised recovery procedure available in Bermuda that can be used to facilitate corporate rescue action or a restructuring – it is a compromise or arrangement between a company and a class[es] of its creditors and/or shareholders. Elbow Limited, its creditors or members could initiate the scheme, or the liquidator, once appointed.

A scheme of arrangement is a straightforward and cost-effective method of corporate restructuring. In order for a scheme to be binding 75% of the class of creditors voting on the scheme will need to vote in favour of the scheme, approving the same.

In a scheme of arrangement, the arrangement can include the transfer of rights, property and liabilities to another company – a company's capital can also be reorganised and used for a debt-equity swap.

A scheme of arrangement can be implemented on a standalone basis or in a provisional liquidation. In Bermuda, the Supreme Court has implemented the practice of appointment of provisional liquidators on a 'soft touch' basis where the liquidators are appointed with specific defined powers – the court can make specific provisions to sanction a scheme. Elbow Limited could file a winding up petition for the appointment of provisional liquidators. In this instance, Elbow Limited would benefit from the scheme of arrangement procedures as well as the benefit of a moratorium on proceedings against the company, this useful as Elbow Limited faces illiquidity issues and as an example Victory Limited would not be able to commence any proceedings against Elbow Limited to recover the money they are due under the costs order whilst the company is in provisional liquidation.

As Elbow Limited is an exempt Bermuda company with substantial business presence in Hong Kong it can also be subject to the insolvency regimes of Hong Kong, as Hong Kong is the jurisdiction in which they do business. Such proceedings can be supported by secondary or ancillary proceedings in Bermuda or recognised by the Bermuda Supreme Court.

Elbow Limited does have the option of parallel proceedings in both Bermuda and Hong Kong simultaneously, however, one of the courts would need to be recognised as the 'primary' court and the other as the 'secondary' court. Which court has primary or ancillary status is determined by the respective courts. The Supreme Court of Bermuda has issued Practice Directions with guidelines for court-court communications and cooperation – the courts are required to cooperate during the proceedings.

Hong Kong also has scheme of arrangement provisions and such schemes in Hong Kong have been approved by the Bermudian Court to run in parallel with a scheme in Bermuda. Elbow Limited should consider that if the scheme is run solely in Hong Kong and no parallel scheme is used in Bermuda, the Supreme Court of Bermuda have shown some willingness to recognise foreign schemes but it is not known of the Court's position in contentious proceedings.

GOOD, COMPREHENSIVE ANSWER – 8 MARKS

TOTAL – 50 MARKS OUT OF 50

*** End of Assessment ***