



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.

INCORRECT

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?

Section 170(2) of the Companies Act 1981 allows the Supreme Court of Bermuda to appoint a provisional liquidator between the presentation of a compulsory winding up petition and its final hearing if it is appropriate and in the best interests of creditors. The appropriateness includes if there is a good prima facie case that a winding up order will be made and if the Supreme Court of Bermuda considers that a provisional liquidator should be appointed.

Examples where a provisional liquidator might be appointed include where there is a risk that assets will be dissipated in the period between presentation of the petition and the final hearing, or where a restructuring is capable of being achieved under supervision of an independent court officer.

Provisional liquidators have specific powers to implement a restructuring designed to support formal and informal restructuring plans that have credible prospects of success and support the majority of creditors. The process is debtor-friendly as it allows the power to implement a management-led restructuring under the supervision of the Supreme Court of Bermuda as the board of directors retain control over the company.

Informal work-out negotiations may be protected by provisional liquidation where there is risk that they may be jeopardised by creditors instituting or continuing proceedings against the company seeking enforcement of their debts. While the work-out plan is negotiated, the hearing of the winding up petition is adjourned. During this time the company is under the protection of a statutory moratorium. If the work-out negotiations are successful, the petition is dismissed, if they're unsuccessful the petition can be restored for a final hearing.

GOOD 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?

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

GOOD ANSWER, BUT COULD HAVE CITED THE LEGISLATIVE PROVISIONS – 1 MARK

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 and assignment. Legal mortgage, equitable mortgage and fixed charge can all be used in respect of immovable, movable and certain intangible property.

Under a legal mortgage, legal title of the property of the debtor is transferred to the creditor as security for a debit. 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 an equitable mortgage, the debtor retains legal title and remains in possession of the property but transfers the beneficial interest in the property to the creditor. The equitable mortgage does not take priority over a third party who acquires the legal title to the property in good faith and for value without notice of the creditor's beneficial interest.

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.

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. Recognition and assistance of corporate foreign liquidators takes place under common law powers in Bermuda and not as a result of any statutory provisions that apply to certain foreign bankruptcies of individuals.

The Supreme Court of Bermuda have confirmed that as a matter of common law, following the Privy Council decision in Cambridge Gas Transportation Corp v Navigator Holdings plc, that they may recognise liquidators appointed by the court of the company's domicile and the effects of a winding up order made by that court and therefore have the discretion to assist the primary liquidation court by doing what they do in a domestic insolvency case.

However, the scope by which the Supreme Court of Bermuda can assist is case-specific as demonstrated in Singularis Holdings Limited v PricewaterhouseCoopers and PricewaterhouseCoopers v Saad Investments Company Limited. The facts of each case and the nature of the power the Supreme Court of Bermuda is being asked to exercise will determine what assistance under common law the Supreme Court of Bermuda is able to provide. The extent that assistance is granted is limited to the extent that assistance is available by both the Bermuda court and the foreign Court and consistent with public policy.

The Supreme Court of Bermuda is likely to recognise the winding-up orders of foreign courts and 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 convenient jurisdiction to make a winding-up order and appoint a foreign liquidator(s); (2) there are documents, assets or liabilities of the foreign company within the jurisdiction of Bermuda; (3) the foreign company has conducted business within Bermuda; (4) the foreign company has directors, officers, managers, officers or service providers within

Bermuda; and/or the foreign company needs to be involved in litigation within Bermuda; and (5) there is not public policy reason under Bermudian law to the contrary.

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.

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.

There are a number of recognised grounds for declining to enforce a foreign judgement in Bermuda. The Supreme Court of Bermuda can set aside the registration of a foreign judgement if it is satisfied that (a) it is not covered by the 1958 Act; (b) the foreign Court had no jurisdiction in the case circumstances; (c) the defendant did not receive notice of the foreign proceedings within sufficient time; (d) the foreign judgement was obtained by fraud; (e) the rights under the foreign judgement are not vested in the person making the application for enforcement (f) the foreign judgement conflicts with another prior, inconsistent judgement from another court with competent jurisdiction; (g) the foreign judgement is not final and conclusive; (h) the foreign judgement is for taxes, fines or penalties; (i) the rules of natural justice were not observed in the foreign proceeding or (j) enforcement of the foreign judgement is contrary to Bermuda public policy unless in the case of the 1958 Act following the Masri case.

A scheme of arrangement is the only formal procedure set out in the Companies Act 1981 and may be used to reorganise the business of the debtor with a view to continue trading. There has been some uncertainty through common law cases (Re C&J Energy Services Ltd [2021] Bda LR 22, Re Energy XXI [2016] Bda 90 and Re Seadrill Limited [2018] Bda LR 39) whether a foreign scheme of arrangement can be recognised and enforced in Bermuda as a matter of common law in the absence of a local scheme of arrangement implemented in parallel. The Supreme Court of Bermuda has shown willingness to recognise foreign court orders approving foreign schemes in the absence of opposition, however, it is unclear what position it might take in a contentious situation.

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.

- (a) VICTORY LIMITED's Hong Kong judgment, being foreign, is not, in and of itself, enforceable in Bermuda and steps will have to be taken to have it legally enforced in Bermuda. If the foreign money judgment falls under the 1958 Act or common law rule for recognition and enforcement then the Bermuda Courts will recognise and enforce the judgment.
- (b) Defendants would include the directors due to their actions of taking out a loan to pay themselves bonuses and the Company directly.
- (c) Upon the making of a winding-up order, no action may be commenced or continued against the court without leave of the court, however, this automatic stay does not extend beyond Bermuda. Litigation would not bring in an automatic stay. Direct litigation between VICTORY LIMITED AND ELBOW LIMITED may be more costly to VICTORY LIMITED than submitting a winding-up order.
- (d) By the directors paying themselves a bonus and the shareholders a dividend the causes of action available would include (a) under 54 of the Companies Act 1981 a company shall not pay a dividend if there are reasonable grounds for believing the company is, or would after the payment be, unable to pay its liabilities as they become due; and (b) Pursuant to section 97 of the Companies Act 1981 and as a matter of common law, director owe duties to the company to act honestly and in good faith with a view to the best interests 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.

It is possible for ELBOW LIMITED to submit an application to the court to restructure their debt through a provisional liquidation in Bermuda as it was incorporated in Bermuda. Once in provisional liquidation, ELBOW LIMITED could use a Scheme of Arrangement to reorganise the business with a view to continued trading. The scheme of arrangement can reorganise ELBOW LIMITED’s capital and may be used to implement a debt-for-equity swap. It is possible for Bermuda Provisional Liquidators to be granted recognition in Hong Kong.

As the offices and a substantial business presence is in Hong Kong and assets are in Asian markets, ELBOW LIMITED should either apply directly to the Hong Kong court for provisional liquidation or apply for foreign recognition. The automatic stay that comes into place for a winding-up order in Bermuda does not extend beyond Bermuda so in order for the stay to apply in Hong Kong, a secondary appointment or recognition in Hong Kong is required.

It would be possible for a parallel scheme of arrangement to occur as the Bermudian Court frequently approves parallel schemes linking Bermuda and Hong Kong, however, the potential costs and expenses of running two schemes should be considered. Another option would be obtaining recognition of the foreign scheme of arrangement in either Hong Kong or Bermuda, depending on which jurisdiction the scheme was established. The Supreme Court of Bermuda has shown willingness to recognise foreign court orders approving foreign schemes, however, it may take a different position in a contentious situation.

GOOD ANSWER – 8 MARKS

TOTAL = 48 MARKS OUT OF 50

*** End of Assessment ***