



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?

Pursuant to section 170(2) of the Companies Act 1981, the supreme Court of Bermuda is able to appoint a Provisional Liquidator between the presentation of the winding up petition and the final hearing. The Court may do so in order to protect the assets of the Company prior to the final winding up order or if there is a reasonable chance of recovery which would result in a better return to creditors – ie through a scheme of arrangement.

In cases where the Company presents the winding up petition as it prepares for a restructuring, it may request the Court appoint a provisional liquidator in order to protect the interests of the Company in the interim period. In some cases this may be due to threat of creditor enforcement that may jeopardise the assets, and the return to the body of creditors as a whole (through the scheme).

A DECENT EFFORT, BUT COULD HAVE BEEN MORE DETAILED AND HAVE GREATER ATTENTION TO ACCURACY – 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?

Section 37 Bankruptcy Act 1989 provides for Set off.

Set off can only be applied following liquidation in such cases as:

- The parties had mutual dealings – meaning both parties have contracted with each other in relation to mutual dealings, ie the business for which is to be set off is identical or falling under the same contract signed by both parties
- The transactions is not fraudulent nor a preference
- The debts were incurred prior to commencement of the liquidation and are set off against those due and payable at the relevant date by both parties

CORRECT – 2 MARKS

Question 2.3 [maximum 4 marks]

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

Section 19(d) of the Supreme Court Act 1905

Section 1 of the bonds and promissory Notes Act 1874

Section 2 of the Charge and Security (Special Provisions) Act 1990

Examples of types of security which can be taken in Bermuda (immovable property):

- **Legal Mortgage**
Legal title of the property is transferred to the creditor as security for a debt, the debtor remains in possession of the property but does not hold legal title until such a time as the debt has been paid in full.
- **Fixed Charge**

A creditor will take a fixed charge over the property, but unlike a legal mortgage the creditor does not have legal title of the property. However they do have the right to take possession of the property (include the right to sell) until such a time as the debt is paid in full. In the case of liquidation this right is upheld over and above that of the liquidator.

Examples of types of security which can be taken in Bermuda (movable property):

- **A Floating charge**

Unlike fixed charges a floating charge does not apply to a particular asset, but is held over a variety of assets which are usually 'movable' in that they are constantly changing. An example of this would be stock, the Debtor does not need permission from the Creditor in order to sell/buy stock, but the charge 'floats' over these assets as whatever value they are at any time. In the event the Debtor defaults, or there is an insolvency event the charge will 'crystallise' and the debt 'fixed' to these assets. However unlike with a fixed charge, the assets still remain a general asset of the estate and would be dealt with by the office holder (liquidator).

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 and assistance for foreign liquidators in Bermuda is not a result of statutory provisions but is a matter of common law powers.

This has been debated in *PricewaterhouseCoopers v Saad Investments Company Limited*

Subject to case particulars the Bermuda Court may assist foreign liquidators in circumstances where:

- There is sufficient connection between the jurisdiction and the company where the order was made (that being outside of Bermuda)
- There are assets, liabilities, documents etc of the Company within Bermuda
- The foreign Company by which the order has been made has operated business in Bermuda
- Where the Company (against which the order was made) has agents or branches within Bermuda
- The Companies Directors, shareholders, managers or critical stakeholders are based in Bermuda
- Relevant litigation or arbitration within Bermuda in relation to the Company is taking place
- No reason under Bermudian Law to the contrary

The Court of Bermuda will not assist in voluntary winding-ups which have been deemed private arrangements.

The Court does not have power to assist foreign liquidators to do something that they would not be able to do under the law by which they were appointed. Therefore, the liquidator will not have sanction of powers in Bermuda which would be outside of the scope of the powers provided for within the jurisdiction of their appointment.

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.

Foreign Court Judgment NOT be registered or enforced in Bermuda:

A foreign judgment is not enforceable in Bermuda simply by it being in existence, there are steps which are required for this to become legally enforceable with Bermuda and over assets/estates which are based in Bermuda.

In general, the Bermuda Supreme Court will follow principles of the common law of England in recognising and enforcing foreign judgments.

The 1958 Act provides for procedure for a foreign judgment rendered in the superior courts of the United Kingdom can be registered in Bermuda, this is not extended to various commonwealth countries.

Pursuant to the 1958 Act section (4), the recognition will not be granted (will be set aside) if:

- Not deemed to be a judgment for which the act applies, or was registered in contravention to the act
- Courts of the United Kingdom had to jurisdiction in the circumstances of the case (and further the common wealth xxx)
- The judgment debtor being the defendant) did not received notice of proceedings in sufficient time in order to be able to defend same
- The judgement was obtained by fraud
- The right under the judgement are not vested in the person by whom the application was made.
-

Recognised grounds for declining to enforce a foreign judgment in Bermuda include:

- It is not covered by the 1958 Act
- If the foreign Court had no jurisdiction
- If the defendant did not receive notice of the foreign proceedings
- If the foreign judgment was obtained by fraud
- If the rights under the foreign judgment are not vested in the person making the application for enforcement
- If the foreign judgment conflicts with another prior, inconsistent judgment from another court with competent jurisdiction
- If the foreign judgment if not final and conclusive
- If the foreign judgment is for taxes, fines or penalties
- If enforcement of the foreign judgment is contrary to Bermuda public policy (save in th case of the 1958 Act following the Masri case)

Protection of Trading Interests Act 1981

Pursuant to the above under sub section (7), a foreign court order may not be enforced within Bermuda if:

- A judgment for multiple damages within the meaning of subsection (3)

- A judgment based on a provision or rule of law specified or described in sub section (4) and given after the coming into force of the order; and
- A judgment on a claim for contribution in respect of damages awarded by a judgment within paragraph (a) or (b)

Sub section (3) – a judgment for multiple damages means a judgment for an amount arrived at by doubling, rebelling or other side multiplying a sum asse as compensation for the loss or damage found to have been sustained by the person in whose favour the judgment is given

Sub section (4) – The minister may for the purposes of subsection (2) (b) make an order in respect of any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or be otherwise concerned with the promotion of such competition as aforesaid.

Foreign court sanctions scheme might be registered or enforced:

There are no provisions in Bermuda law for the recognition of foreign schemes of arrangement, therefore it would fall under common law and be at the discretions of the Supreme court.

It may be that more commonly, the scheme is not in itself is sanctioned by the Bermuda court, but the existence of the scheme would support the applicable action to be taken in Bermuda – for example the enforcement of a judgement, recovery of asset etc. Therefore the action falling under a matter for Common Law.

Parallel Schemes

There are cases where parallel schemes have been sanctions by the Bermuda Court. The Court however does make note that it must be considered and demonstrate that this course of action untimely is the best in serving the purpose – which is for the highest return to the creditors. In that the costs of which should be considered, and this should be the best way to achieve the overall purpose in terms of protecting the value of the estate for the creditors.

COMPREHENSIVE 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:

- (i) **Seeking recognition and enforcement of the judgment within Bermuda.**

Under 1958

In order for the judgment to be recognised within Bermuda, and therefore give rise to pursuing the claim against the Company in Bermuda, the judgment would have to satisfy the requirements under the 1958 Act. As the judgment was made in Hong Kong, this would not satisfy the requirement under the 1958 act as the judgment was not made within the United Kingdom or the Commonwealth Countries (as from 1997 Hong Kong was no longer subject to British rule).

Subject to common Law Rules applicable to final money judgements (In Bermuda)

The basic common law rule generally states that a foreign judgment will be recognised and enforced in Bermuda where:

- Such judgment is final and conclusive in the foreign court
- The judgment was obtained in a court of law which had jurisdiction over the judgment debtor
- The judgment was not obtained by fraud
- The judgment was not in respect of taxes, fines and penalties
- The enforcement of the judgment would not contravene the public policy of Bermuda
- The rules of natural justice were observed in the foreign proceedings

In respect of Victory Limited pursuing the claim under these requirements against Elbow Limited in Bermuda, Elbow may have recourse to challenge on the basis:

- The judgment was obtained in a court of law which had jurisdiction over the judgment debtor.

As the judgment was made in Hong Kong, against a Bermudian entity, it may be argued that it would not be enforceable as the Hong Kong Courts do not have jurisdiction over the Bermudian entity. It would therefore also depend upon if Elbow Limited surrendered to the jurisdiction of Hong Kong in the proceedings.

Additional consideration for pursuit in Bermuda:

It must be considered however if taking action with Bermuda would be likely or not to yield a return as it is noted that the majority of the Company's assets are not liquid, and are not subject to the Bermuda jurisdiction directly – ie they are held through subsidiaries outside of Bermuda. And as the Company is an exempted Company (owing to the fact most of business is done outside of Bermuda) it is more common for proceedings to take place where the business is conducted, with ancillary proceedings only in Bermuda.

(ii) Recovery of Funds in Hong Kong

As the Company [Elbow Ltd] has considerable business and offices within Hong Kong it may be beneficial to have the judgment handed down in Hong Kong enforced on the subsidiary business that funded the litigation within Hong Kong. There may be considerable argument to have COMI established within Hong Kong which would further support recover within this jurisdiction. As the main purpose for the Company [Elbow Ltd] was to operate within the Asian market, the offices are located within Hong Kong and the litigation was commenced and funded from same. This will be dependant on the laws of Hong Kong, and the reasons for the initial costs order being made against a Bermuda entity.

Pros and cons of litigation as opposed to insolvency proceedings

When reviewing if litigation or insolvency is best practice for recover, the below should be considered:

- Test of insolvency. In order to seek a winding up order against Elbow Limited, the provisions of Section 161 of the Companies Act 1981 would have to be applied, as the Company does not appear (from information provided) to be insolvent and therefore not satisfy sub section (e) in this regard, there may not be sufficient grounds for a winding up.
In addition, the court would have to be 'of the opinion that it is just and equitable that the Company be wound up', this would likely be challengeable by Elbow Limited owing to the fact the Company is not insolvent and the forced 'fire-sale of the assets would likely put the body of creditors in a worst position, only to (potential) benefit of the petitioning creditor.
- It should also be considered that in an insolvency proceeding there is 'waterfall' of payments which will be made in preference. Without knowing the details of the Company's financial position with regards to preferential creditors, it may not result in a considerable return to Victory Limited. In addition to which, the costs of the liquidation would be taken before any payment to creditors in any event.
- Should an insolvency proceeding occur, then there are potential recoveries in relation to the \$5m loan which was taken out post the judgments from the Hong Kong Courts. This would be pursuant to section 239 Companies Act 1981 with regard to the floating charge, and section 237 of the Companies Act 1981 in relation to fraudulent preferences. Again however, this will not directly result in a return to Victory Ltd as this will form a recovery for the entire estate.

- Victory limited will also need to consider, should an insolvency proceeding take place in Bermuda, whether their debt would be recognised.
- As there is argument for the COMI of Elbow Limited to be in Hong Kong (owing to the offices location, majority of business and main purpose of the Company being within the Asian market) it might be that an insolvency proceeding would be best brought under the Hong Kong jurisdiction.
- Litigation does not provide for any protection in terms of a moratorium which would be in place on insolvency proceedings which protect against the Director dissipating the assets and reducing the value
- It should be considered if litigation action was taken and recoveries made, should the Company then follow with a liquidation proceeding, the transactions may be reversed and be payable into the estate. This will depend on the financial situation of the Company when the transactions were made, and if the making of such payments resulted in the Company then becoming insolvent as a result
- Elbow is an exempted Company and therefore recovery and litigation may be limited with Bermuda, as they are usually subject to the insolvency regimes of the jurisdiction in which they do business – which in this case being Hong Kong.

COMPREHENSIVE 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 to restructure its debt obligations.

Provided for in the Companies Act 1981, the scheme of arrangement is a formal restructuring procedure which is supervised and sanctioned by the Supreme Court of Bermuda. This scheme enables the Company to restructure its debt, which would lead to be higher return to creditors than a liquidation. The scheme is legally binding to all creditors, but must have the consent of 75% of creditors, within each class.

A scheme of arrangement procedure may be initiated by application by a creditor, a member or the Company itself, or in some cases the appointed provisional liquidator.

In most cases, a provisional liquidator would be appointed by the Court in order to manage the proposed schemes preparation and to grant moratorium or stay on action whilst the plan is established. In relation to Elbow this would provide benefit as it would mean Victory would not be able to enforce within Bermuda (further to any relevant recognition).

Elbow would need to ensure the scheme was recognised in the BVI and Hong Kong as it will impact the assets and business which are held within these jurisdictions. It may be that the scheme will need to be registered in Hong Kong and Elbow seek only recognition with

Bermuda as it may be that COMI would be established within Hong Kong being that the offices are based in Hong Kong as well as the majority of the Companies trading business.

Debt-for equity swop

Under the provisions of the Companies Act 1981, the voting would be as:

- Majority within each class of creditors present (either voting or via proxy) representing 75 percent in value for that class vote in favour
- Court sanctions same
- Scheme is binding to all creditors

Should a debt-for-equity swop be considered in terms of shares issued in exchange for the existing debt, this would remove the voting rights of these creditors (on the basis the swop was in full value of the claim) as there would be no debt payable from the scheme ie no distribution ongoing. This would affect those entitle to vote, and may be used in some cases to guarantee the scheme would be approved by removing the voting rights of the problem creditors.

Exempted company

Elbow is an exempted Company and therefore recovery and litigation may be limited with Bermuda, as they are usually subject to the insolvency regimes of the jurisdiction in which they do business – which in this case being Hong Kong. Therefore it may need to seek a scheme of arrangement either in Hong Kong with recognition in Bermuda, or parallel schemes in both jurisdictions.

GOOD ANSWER – 8 MARKS

TOTAL – 49 MARKS OUT OF 50

*** End of Assessment ***