



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5A

BERMUDA

***This is the*** summative (formal) assessment for Module 5A ***of this course and must be submitted by 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: 202223-336.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 "studentID" 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 8 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) A contributory.
- (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?**

- (i) Preferential creditors.**
- (ii) Unsecured creditors.**
- (iii) Costs and expenses of the liquidation procedure.**
- (iv) Floating charge holders.**

**Incorrect - unanswered**

**Choose the correct answer:**

- (a) Order (i), (ii), (iii) and (iv).**
- (b) Order (iii), (iv), (i) and (ii).**
- (c) Order (iii), (i), (iv) and (ii).**
- (d) Order (i), (iii), (iv) and (ii).**

**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 years.**

(b) One month.

(c) Twelve months.

(d) Six 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.

(b) One 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 the following provision of the Companies Act 1981:**

**(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**

**9 out of 10 marks**

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 4 marks]



**In what circumstances may a provisional liquidator be appointed?**

*Provisional liquidators may be appointed under section 170(2) of the Companies Act 1981 between the presentation of a winding up petition and its final hearing.*

*The circumstances which usually give rise to such an appointment is where there is a risk of dissipation of assets, or the need for independent supervision and control of assets. A provisional liquidator will therefore be appointed to sit in the period between the presentation of the petition and the final hearing of the petition. In the context of a soft touch liquidation, and an informal work-out that is being at risk due to proceedings being pursued against the company, a provisional liquidator can be appointed for the purpose of obtaining a statutory stay. A provisional liquidator may also be appointed where a scheme of arrangement is being conducted within a soft touch provisional liquidation. That process is used to restructure the company without necessarily winding it up. A provisional liquidator would therefore be appointed to supervise the board in managing the scheme of arrangement.*

**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?**

*After the commencement of a liquidation, the rights of set-off can only be exercised in the following circumstances:*

- 1. Those debts were incurred prior to liquidation commencing and have crystallised as monetary payment liabilities;*
- 2. The transaction does not amount to a fraudulent preference or fraudulent conveyance; or*
- 3. The parties' dealings between themselves were mutual.*

**Correct - 2 marks**

Question 2.3 [maximum 4 marks]

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

*The nature of the security interest depends on the terms of the parties' agreement, the nature of the property being secured and the nature of the debtor's interest in the property being secured.*

*Legal Mortgage - This is where the creditor takes legal title of a debtor's property to secure a debt but the debtor continues to remain in possession. Title would then be transferred back to the debtor only after the debtor has satisfactorily discharged the debt.*

*Equitable Mortgage - This type of mortgage involves the transfer of a beneficial interest with a retention of legal title by the debtor. An equitable mortgage can apply in respect of intangible property.*

*Pledge - This type of security would involve the creditor taking possession of the debtor's assets until the debt is discharged.*

**Correct - 4 marks**

QUESTION 3 (essay-type question) [15 marks]

Question 3.1 [maximum 8 marks]

**Write a brief essay on the basis upon which foreign liquidators are granted recognition and assistance in Bermuda. Also consider the circumstances in which foreign liquidators might not be granted recognition and assistance.**

*Bermuda does not have statutory guidelines which set out the criteria and circumstances in which the Supreme Court of Bermuda must grant recognition and assistance to a foreign liquidator. Therefore, the court must follow common law principles in seeking to determine the cases in which it will grant such recognition and assistance.*

*The ability of the Bermuda Supreme court to recognise foreign liquidators as a matter of common law was confirmed in the Privy Council decision in *Singularis Holdings Limited v PricewaterhouseCoopers* and *PricewaterhouseCoopers v Saad Investments Company Limited* 2014 UKPC 36, followed by the Supreme Court in *Cambridge Gas Transportation Corp v Navigator Holdings PLC* 2014 UKPC 35. Whilst the precise scope of the Supreme Court's powers is the subject of ongoing debate, the court will usually grant recognition and assistance to a foreign liquidator where:*

- 1. Either the foreign court's jurisdiction has a sufficient connection to Bermuda (and therefore the most appropriate forum)*
- 2. There are connecting factors such as documents, assets, business operations, agents, former officers (including directors) are in Bermuda and/or the foreign company is a proper party to the litigation;*
- 3. There are no public policy reasons preventing such recognition.*

*The court will not assist a foreign liquidator to grant them more powers than what they would usually get in their home jurisdiction: *Stephen John Hunt v Transworld Payment Solutions UK Limited* 2020 SC Bda 14 Com.*

*This is fairly complete, but could have offered slightly more detail.*

7 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.**

Registration and enforcement of foreign judgments in Bermuda is governed by local statute specifically, the Judgments (Reciprocal Enforcement) Act 1958 (the "1958 Act") and common law principles derived from English law. The 1958 Act prescribes the types of judgments to which it applies.

In cases where the 1958 Act does not apply, the standard common law principles on the recognition of foreign judgments come into effect.

The 1958 Act defines judgments as follows. (This is the same general approach followed at common law.)

*"a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of money in respect of compensation of damages to an injured party; and it also includes an award in proceeding on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place".*

Section 2 of the 1958 Act sets out the judgments to which the Act applies i.e.

*"2 (1) Any judgment given in the superior courts of the United Kingdom, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Act applies, if—  
(a) it is final and conclusive as between the parties thereto; and  
(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty."*

(Judgments are deemed to be final and conclusive notwithstanding that an appeal may be pending against it.)

Therefore, the Bermudan Court will not register a judgment which fails to meet the criteria above. Section 4 of the 1958 Act goes on to prescribe the circumstances in which the registration may be set aside following registration. In addition to failing to meet the criteria in section 2 above, Section 4 requires that the Bermudan court set aside the registration of a foreign judgment if,

1. That registration contravened the 1958 Act;
2. The courts of the United Kingdom had no jurisdiction;
3. The judgment debtor was not duly served;
4. The judgment was obtained by fraud; or
5. the rights under the judgment are not vested in the person by whom the application for registration was made.

*The Bermudan Court however has discretion when it comes to the setting aside of a registration if the Supreme Court is satisfied that the matter in dispute in the proceedings giving rise to the registered judgment had, previously to the date of such judgment, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.*

*While the Supreme Court has shown willingness recognise a foreign scheme of arrangement, it is unclear what the position is. Bermudan decisions do however provide some guidance as to the circumstances in which schemes of arrangement are unlikely to be recognised in Bermuda.*

[Correct - 7 marks](#)

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

***Bercoffee 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; with indirect trading subsidiaries incorporated in the People's Republic of China (PRC); and with offices and a substantial business presence in Hong Kong. The Company's trading operations in the PRC involves coffee shops and other retail businesses associated with coffee and hot drinks.***

***The Company issued a number of bonds to creditors based in the United States (US) with the face value of USD 500 million, with a view to raising additional capital (by way of debt funding) to fund the expansion of its business activities in the PRC (which had previously been funded with the benefit of shareholders' capital contributions).***

***It was subsequently disclosed that the Company had fraudulently misrepresented its financial performance in the offering documents associated with the bonds, with the consequence that the US bondholders were entitled to demand immediate repayment by the Company of the sum of USD 500 million, even though that money had already been transferred to the Company's indirect subsidiaries in the PRC, and was incapable of being returned due to local currency control restrictions and associated Chinese legal issues.***

***The US bondholders served a statutory demand on the Company in Bermuda, demanding repayment of the sum of USD 500 million within 21 days.***

**The Company's directors decided, however, that it was in the best interests of Bercoffee Limited and its shareholders to not satisfy the statutory demand but to ignore it for the time being, having regard also to the Chinese legal position, and with a view to trading through the Company's financial difficulties.**

**The Company's directors subsequently borrowed an additional USD 50 million from its bank, Lendbank, which loan is secured by way of a floating charge against all of the Company's shares and the assets of its subsidiaries. Out of the USD 50 million received from Lendbank, Bercoffee Limited's directors immediately paid themselves a bonus of USD 20 million and they also paid a dividend to the Company's shareholders in the sum of USD 30 million.**

**The US bondholders only found out about these transactions two weeks later, through a report received from a disgruntled former employee of Bercoffee Limited.**

Using the facts above, answer the questions that follow:

Question 4.1 [maximum 7 marks]

**What actions could the US bondholders take in order to try to recover some or all of the sum of USD 500 million from the Company or other parties? Please consider (a) the jurisdictions in which they could take such action, bearing in mind the potential need for enforcement; (b) the defendants against whom they 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.**

- *By failing to satisfy payment of the statutory demand (assuming) within the 21-day time-period, Bercoffee is "unable to pay its debts" within the meaning of section 161 of the Companies Act 1981 and therefore insolvent.*
- *Bercoffee can be made the subject of a compulsory liquidation by both the foreign jurisdiction in which Bercoffee operates and the Supreme Court of Bermuda.*
- *If proceedings were to be brought in Hong Kong, such proceedings would be supported either by ancillary liquidation proceedings in Bermuda or by way of judicial recognition and assistance from the Bermuda Supreme Court.*

Jurisdiction

- *As an exempt company carrying on substantial business in Hong Kong, the starting point is that Bercoffee would likely be subject to the jurisdiction of Hong Kong.*
- *In the event that compulsory winding up is pursued simultaneously in multiple jurisdictions, the distinction between the court having "primary" status and the court(s) having "ancillary" status, respectively, would be determined by*

*reference to all relevant circumstances (given the absence of local Bermudan legislation adopting the UNCITRAL Model Law on Cross-Border Insolvency which incorporates the COMI test).*

- **Accordingly, the court will apply the common law test to determine the forum with the closest connection to the issues in question.**
  - **Whilst based in Bermuda, the nature of an Exempt company means that it is restricted from carrying on business in Bermuda (See S. 129A of the Companies Act 1981). Rather, the conduct of any business is strictly for the furtherance of work overseas. (There is no indication that the Minister of Finance has permitted Bercoffee to conduct business in Bermuda or any indication that it does conduct business in Bermuda.)**
  - **If insolvency proceedings were to commence in Bermuda, the court could issue a letter of request in Hong Kong in order for a Bermudan insolvency to be recognised in that jurisdiction.**
  - **If the insolvency proceedings are commenced in Hong Kong, then the court can and has in the past granted recognition in respect of orders of the Hong Kong Court.**

#### Relevant Parties

**The defendants could take action to commence litigation proceedings as against the Bermuda company and possibly the Hong Kong-based subsidiaries given the company's substantial business presence and the likelihood**

**If the bondholders were to proceed with litigation, they would benefit from being able to eventually enforce that claim. However, those claims would potentially be stymied in the event that the company eventually went into liquidation since the making of a winding up order would bring about statutory moratorium on proceedings against the company. The insolvency proceedings would allow the bondholders to recover some of their investment but that would have to go through a liquidation process thereby making any payments subject to the order of priority which would be applied.**

#### Floating charge

**The borrowing of the additional USD 50 million from its bank, Lendbank, which loan is secured by way of a floating charge against all of the company's shares falls afoul of Section 239 of the Companies Act 1981 given that it was created within 12 months. Unless the company can prove that it was solvent immediately following the creation of the charge.**

#### Fraudulent Preference/Fraudulent Conveyance

**The immediate payout of a bonus of USD 20 million and the payment of dividend to the Company's shareholders in the sum of USD 30 million could constitute a fraudulent preference under section 237 of the Companies Act or Fraudulent Conveyance under Sections 36A to 36G of the Conveyancing Act 1983.**

*In relation to the fraudulent conveyances and fraudulent preferences, the director s could be held personally liability either at common law or in equity and pursuant to the provisions in section 247 for misfeasance.*

*The bondholders could bring a breach of fiduciary duty claim (Under s97 of the Companies Act) and a Misfeasance and Breach of Trust Claim under section 247 against the directors in respect of the payments made to themselves.*

*The bondholders could also bring an action under section 54 of the Companies Act in respect of the dividend that the company declared.*

*This is a fairly thorough answer, but it does not fully consider all of the available jurisdictions in an organised manner. There are also a few minor errors.*

#### 5 marks

Question 4.2 [maximum 8 marks]

***To what extent would it be open to Bercoffee Limited to try to take steps to restructure its debt obligations, and how and where could 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, (that is, if the US bondholders would be issued new shares in the Company in exchange for cancellation of their debt, with existing shareholders’ shares in the Company being cancelled).***

*Bercoffee could try to take steps to restructure its debt by way of a scheme of arrangement which could be conducted in parallel to a restructuring scheme in Hong Kong. If Bercoffee were to seek to obtain recognition in Bermuda of a foreign scheme of arrangement, it would have to be aware of the limitations which exist under Bermuda law i.e. the uncertainty with respect to the position that the Bermuda court would take in the face of any contentious matters that might arise. It is possible that a provisional liquidator to be appointed in Bermuda for the purpose of restructuring and for that appointment to be recognised in Hong Kong. The benefit of employing the use of a scheme would be that the company could take advantage of the usual protections available under a winding up.*

*Given the limitations of the scheme of arrangement framework in Bermuda, it may be preferable for the company to instead commence a scheme in Hong Kong and for that scheme to be recognised in Bermuda. If the company wished to achieve a reorganisation of its capital, it could consider providing a debt-for-equity swap which can be achieved by way of a scheme of arrangement. In the event that*

*This answer provides the foundation for a good answer, but it appears to be incomplete in its final paragraph, and it does not engage with some of the more detailed issues associated with Bermuda and foreign Schemes of Arrangement.*

4 marks.

Total: 42 out of 50 marks

**\* End of Assessment \***

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