



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.**

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- (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]

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In what circumstances may a provisional liquidator be appointed?

Section 170(2) of the Companies Act 1981 provides the Court with broad scope to appoint a provisional liquidator "on the presentation of a winding up petition or at any time thereafter and before the first appointment of a liquidator" - in effect, this means that the Court may appoint a provisional liquidator at any time while a winding up petition is before it and in respect of which a liquidator has not been appointed. In practice, the Court's discretion to grant interim relief to a petitioner in the form of appointing a provisional liquidator is generally applied in circumstances where it is in the best interest of creditors to do so having regard to either of the following circumstances:

- a) There is a real and imminent risk of dissipation of the Company's assets in the period between the time when the Court may choose to exercise its discretion and the final hearing of the petition. In this circumstance, the main role of the provisional liquidator is to prevent or reduce the risk of such dissipation of assets.*
- b) A restructuring of the company's assets, liabilities and affairs is capable of being achieved, under the supervision of an independent officer of the Court, and that restructuring is likely to maximise the return to creditors over a full liquidation of the Company. These are commonly referred to as 'light touch' provisional liquidators.*

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?

Set-off can be exercised where there are mutual credits, mutual debts or other mutual dealings between the company in liquidation and a creditor (or a purported creditor) of the Company, only in circumstances where:

- The debts crystallised prior to the commencement of the liquidation as liabilities for monetary payment .*
- The party claiming a right of set-off, at the time of giving credit to the company, had no notice of an act of bankruptcy of the debtor.*
- The debt owed by the person which gave credit to the company did not arise from a fraudulent conveyance or preference.*

Rights of set-off is dealt with in Section 37 of the Bankruptcy Act 1989, rather than the Company's Act 1981.

Correct - 2 marks

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Question 2.3 [maximum 4 marks]

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

- *A fixed charge - which involves a creditor charging a fixed asset (i.e. non-circulating, or immovable - so a property or a motor vehicle as opposed to the cash held by a company) by virtue of a security agreement entered into between the legal owner of the asset and a creditor who provides finance to the legal owner. A fixed charge does not necessarily have to follow a specific finance agreement in respect of the charged asset, nor does it involve title to the asset passing to the creditor. It does, however, provide the secured creditor with a right to take possession of the asset and to sell it, if the debtor defaults on its debt owed to the creditor, in order that the creditor can recover some or all of its debt owed. Debtors are not permitted to deal with (i.e. sell) an asset subject to a fixed charge without the secured party's consent.*
- *Lien - which involves the secured party retaining possession of property owned by another party subject to specific performance of an obligation by that other party. A common form of lien arises where a party has formed some agreed work in respect of an asset in order to its value or condition and the asset-owner fails to pay for that agreed work*
- *Legal mortgage - an agreement whereby legal title to a secured asset transfers to a creditor upon it taking security over that asset, notwithstanding the possession being retained by the debtor.*

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 has not adopted the UNCITRAL model law on cross-border insolvency and the jurisdiction's recognition of and assistance to foreign liquidators are not governed by specific legislation or court rules. As a result, the powers of the Supreme Court of Bermuda to determine whether or not to grant recognition are both discretionary and broad. As an English common-law jurisdiction with accordingly derivative insolvency laws, the Supreme Court of Bermuda's discretionary powers follow common-law precedent and the Court has, historically, relied on a number of factors in order to show a willingness to grant recognition and other relief to foreign liquidators in a number of circumstances within its discretionary powers.

The common-law principle of modified universalism mandates that Bermuda should, within the bounds of its public policy, co-operate with other jurisdictions. The broadness of this principle - combined with the lack of specific legislation such as the UNCITRAL model law - has resulted in the Supreme Court of Bermuda showing that it will generally cooperate with other jurisdictions by granting recognition of a foreign liquidation where, at a minimum, the following factors are present:

- 1. The company has assets, records or debts within Bermuda; and*
- 2. Where there is a "sufficient connection" between the company in liquidation and the jurisdiction which granted the liquidation order.*

To illustrate, the Supreme Court of Bermuda would almost certainly decline to recognise the English liquidation of an English-registered company which had no assets, liabilities or records within Bermuda, but is likely to recognise that same liquidation upon presentation of sufficiently robust evidence that the company had records stored in an office in Bermuda which were not capable of being recovered in absence of recognition. On the other hand, it would be unlikely to recognise an Australian liquidation of an English-registered company with no clear connection to Australia (irrespective of whether the company had assets, liabilities or records in Bermuda).

Moreover, the extent to which the Court will grant recognition of a liquidation remains limited by a number of factors. In particular, and perhaps most importantly, the Supreme Court of Bermuda will decline to grant recognition of a foreign liquidation where there are Bermudian creditors who would be prejudiced or unfairly affected by the granting of the recognition or other assistance to the foreign liquidator.

The breadth of the Court's scope to exercise its discretionary powers in respect of recognition or assistance to foreign liquidators, and the fact that there is no specific legislation in Bermuda governing recognition of foreign liquidators should one hand be welcomed by practitioners; however, those liquidators should nonetheless be wary of the possibility of being declined recognition on the grounds of public policy or an insufficient connection between their appointment and the affairs of the company over which they're appointed, or between the company and Bermuda itself.

[Correct - a well-drafted and thoughtful summary - 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 judgments, originating from courts outside Bermuda, have no automatic legal effect in Bermuda and are therefore unenforceable unless steps have been taken to make it legally enforceable within Bermuda. The steps which must be taken in this respect are provided for by rules contained within provisions of statute (such as the *Judgments (Reciprocal Enforcement) Act 1958* ("1958 Act") and the *Maintenance Orders (Reciprocal Enforcement) Act 1976* ("1976 Act")), as well as the common law. In considering whether a foreign court-sanctioned scheme of arrangement might be registered or enforced in Bermuda, one must have regard to the rules within each of these categories. It should be noted at the outset that there exists a level of uncertainty as to whether a foreign scheme of arrangement may be recognised at all in Bermuda if there is no parallel scheme extant in Bermuda. Courts have shown some willingness to assist foreign courts in this respect under common law, but the question has not been fully tested in contentious situations or by appellate courts.*

The 1958 and 1976 Act provide the mechanism for recognition and enforcement of foreign money judgment and maintenance orders, respectively. If a foreign judgment falls outside the scope of these acts, it will not be eligible for registration and enforcement in Bermuda under these provisions. Foreign court-sanction schemes of arrangement would not generally fall under the scope of either of these Acts as such an arrangement would not involve a final and conclusive money-judgment of a particular sum other than taxes or charges (see s2(1)(a) and (b) of the 1958 Act), and do not relate to the payment of maintenance sums (see s1 - Interpretation - of the 1976 Act, although a scheme of arrangement may ultimately result in an agreement for a similar arrangement - e.g. periodical payments to a class of creditors - the nature of the scheme itself, and certainly not at its commencement, is not a maintenance order).

Bermuda courts will have regard to the jurisdictional competence of any foreign judgement. In particular, if the foreign court from which the order originated lacked proper personal or subject-matter jurisdiction necessary to make the order, it will not be enforceable under common law in Bermuda. In terms of a foreign scheme of arrangement, therefore, a Bermuda court will fail to recognise such a scheme if it determines that the court which made the order did not have personal or subject matter jurisdiction to do so - even if it meets all the other criteria for recognition.

Similarly, if a foreign court made an order sanctioning or placing a debtor into a scheme of arrangement which the Bermuda Court then determines was obtained by fraud (e.g. through a party's fraudulent misrepresentations), then recognition will be declined by the Bermuda Court.

Bermuda's legal system holds paramount the principles of public policy. Any foreign judgment that contradicts Bermuda's public policy will not be recognized or enforced, with the exception of the 1958 Act, following the Masri case precedent. Similarly, foreign court-sanctioned schemes of arrangement that go against Bermuda's public policy may not be enforceable within the jurisdiction.

Foreign judgments relating to taxes, fines, or penalties generally fall outside the scope of enforceable judgments in Bermuda. These are typically not recognized for enforcement purposes.

Bermuda recognition of foreign judgments, including in respect of foreign schemes of arrangements, is a complex question which involves consideration of both the statute and common law. The genuine connection to the foreign jurisdiction, compliance with due process, absence of fraud, and adherence to Bermuda's public policy are all crucial factors that Bermuda courts assess when deciding whether to recognize and enforce foreign court-sanctioned schemes of arrangement within the jurisdiction.

[A thorough and well-drafted answer - 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.

Possible jurisdictions

The likely jurisdictions for the bondholders to seek remedy in this case would be Bermuda, BVI or potentially Hong Kong. Litigating directly in PRC is difficult/complex and potentially opaque, especially given that the bondholders are US-based, which leads one to think that they are likely to be relatively unfamiliar with litigation in PRC. There is to some extent a balancing act in terms of how far 'up-stream' to litigate or seek recovery - higher up (i.e. at the Bermuda level) makes more sense if an insolvency process is used as it maximises recovery options available (as there may be claims available at each level and this would allow for a more holistic recovery strategy to be developed - e.g. by applying pressure on the ultimate controlling parties using claims in multiple jurisdictions and of different nature), whereas lower-down (i.e. against the business in HK, or potentially against the directors who are presumed to be based in PRC) may make more sense if direct litigation is undertaken as this would maximise proximity to the fraudulently obtained funds.

Depending on the terms of the bonds, the US bondholders may also be able to litigate in the United States. The US' position of near-hegemony of global finance means that judgements obtained there have wide-reaching powers which would be useful to recovering funds for the bondholders.

Possible defendants

The bondholders actions would initially likely be against the company in Bermuda, to whom the statutory demand has been issued. This is the most obvious route as there is a simple money-debt owed to the bondholders by this company. Based on the facts - i.e. apparent fraud by the company, having acted through its directors, using the downstream subsidiaries in BVI, HK and PRC - it is likely that the bondholders could

also litigate against the directors and/or the downstream subsidiaries, however the evidential burden would be greater as they would have to show how these parties caused damage to the bondholders (rather than simply relying on the money owed by the company).

Pros and cons of litigation vs insolvency

Both the defendants to proceedings and the jurisdiction in which those proceedings take place will depend on whether direct litigation or an insolvency process is used. E.g. if direct litigation is used, it would be preferable to litigate against the persons which are most likely to hold or have access to the fraudulently obtained monies - i.e. the company's directors, or the business trading in Hong Kong (as below, litigating directly in PRC would be difficult and expensive process for the US bondholders). Some specific advantages of litigation over insolvency and vice versa are set out below.

Litigation over insolvency

- *More control over whole process vs insolvency proceedings where control over recovery is given to insolvency practitioner.*
- *Able to conduct proceedings in sole interest of litigants, as opposed to insolvency proceeding which, depending on exact nature of proceedings, would generally be in interest of creditors collectively or those holding economic interest in debtor.*
- *Less regulatory or court-oversight - still need to comply with court rules and principals of e.g. full and frank disclosure, but no need to conduct litigation process as an officer of court, as would be the case for insolvency proceedings in Bermuda, BVI or HK.*
- *No need (necessarily) to share any recovery with other creditors (although always a risk that company is wound up by other creditors or by its members anyway)*

Insolvency over litigation

- *Potentially less expensive - liquidator likely to take matter on-risk or seek external funding if there are likely to be assets available*
- *Potentially additional remedies available - e.g. claim for undervalue transactions, fraudulent disposition etc. which would not be available*
- *Gain control of structure at top - therefore can recovery money as the entity itself by appointing directors/gaining control of subsidiaries. More control of funds flow from PRC upstream.*

Causes of action

A number of options are immediately clear:

- Apply to wind-up Bercoffee (in Bermuda) b, including potentially seeking interim relief for appointment of Provisional Liquidators to hold-the-ring and investigate fraudulent activity. Liquidators would be empowered to take control of the entire structure, investigate fraud, .
- Subject to the terms of the bonds, possible actions in U.S. (such as fraudulent misrepresentation or breach of contract), which may include direct litigation against the company and/or the directors, or a potential Chapter 11 petition of the Bermuda company and its subsidiaries (assuming there is sufficient connection to the US to give its courts jurisdiction over the subject matter and persons).
- Multi-jurisdictional enforcement - e.g. liquidation in Bermuda followed by Chapter 15 recognition in the US if there is sufficient connection and an HK order granting recognition of Bermuda liquidators as 'authorised agents' (e.g. see *Re RZ3262019 Limited*).
- Litigation against directors for fraud in PRC. As above, this is likely to be difficult and unattractive for the US bondholders.

A thoughtful and well-drafted answer - 7 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 seek debt restructuring in Bermuda, Hong Kong or in multiple jurisdictions simultaneously. In Bermuda, the extent to which it could do this depends on the composition of its creditors and its ability to convince the Court that it would be equitable for a debt restructuring to take place. In these circumstances - where fraud has apparently taken place - it would appear that Bercoffee would be unlikely to secure the requisite court sanction in Bermuda for a debt restructuring, and unless there are significant other creditors.

It is unlikely that a debt-equity swap would have any impact here. The bondholders would still need to agree to a debt-equity swap for the company to be able to implement it through a restructuring scheme (unless they were outnumbered by other creditors who voted in favour of the scheme, which is not evident from the facts). Whilst it may have made sense in some circumstances for the bondholders to take a debt-equity swap (e.g. if the business was trading in a jurisdiction familiar to them and where there were not allegations of fraud), this option would appear highly unattractive in this situation where there is evidence of fraud. First, any entitlement to payment of monies as equity holders would generally be subordinate to payment

rights available to them as bondholders and, accordingly, this proposal may only make sense to the bondholders if they were able to secure a controlling equity interest in the entire structure (i.e. allowing them to change the boards of Bercofee and its subsidiaries and take control of and potentially sell its assets directly through this new board). However, even if the bondholders did obtain a controlling equity interest, there would appear to be a significant risk of further fraud on part of the directors of Bercofee - e.g. by transferring PRC assets out of the structure in which the bondholders have become equity holders. Litigating and/or implementing protective measures in this respect would likely be difficult for the US bondholders without a substantial and influential presence in PRC.

Ignoring these impediments, however, it appears that a debt restructuring, if it did take place, would most effectively be undertaken through a joint restructuring in Hong Kong and Bermuda.

[This is a good answer, but could potentially have been improved by a more detailed discussion of the percentage threshold of support required for a Scheme of Arrangement under a Bermuda law, as well as some discussion of the challenges associated with a PL appointment on a soft-touch basis.](#)

[6 marks](#)

[Total: 47 out of 50 marks.](#)

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*** End of Assessment ***