



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?

- (a) *Preferential creditors.*
- (b) *Unsecured creditors.*
- (c) *Costs and expenses of the liquidation procedure.*
- (d) *Floating charge holders.*

Incorrect - unanswered question

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?

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- (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?

A provisional liquidator can be appointed prior to the final hearing of a compulsory winding-up petition if there is a good prima facie case that a winding-up order will be made and if the court considers that a provisional liquidator should be appointed in all the circumstances of the case. Classic cases for the appointment of a provisional liquidator include where there is a risk of dissipation of assets, or the need for independent supervision and control.

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 only be exercised after the commencement of a liquidation if:

- the debts giving rise to the set-off were incurred prior to the commencement of liquidation and have crystallised as monetary payment liabilities;*
- the transaction giving rise to the debts was not a fraudulent preference or a fraudulent conveyance; or*
- the dealings between the parties were mutual (that is, the parties giving rise to the debt are identical to the parties giving rise to the credit and the parties have contracted with each other in the same capacity).*

Correct - 2 marks

Question 2.3 [maximum 4 marks]

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

1. legal mortgage:

- this results in legal title of the debtor's property being transferred to the creditor as security for a debt; and*
- 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.*

2. fixed charge:

- a creditor can take a fixed charge over property that does not result in a transfer of legal or beneficial ownership, but gives the creditor a right to take possession of the property with a right of sale, in the event of a default by the debtor;*

- upon exercise of the power of sale, the proceeds of sale may be applied by the creditor towards payment of the debt in priority to and without reference to other unsecured creditors; and
- the debtor may not deal with any property that is subject to a fixed charge without the consent of the creditor.

3. floating charge (in respect of movable and certain intangible property):

- a floating charge is not fixed to a particular asset (unlike a fixed charge), but "floats"
- above a variety of assets;
- the debtor can sell or dispose of such assets without the creditor's prior consent, but in the event of default by the debtor, the floating charge will "crystallise" and convert into a fixed charge that attaches to specific assets remaining at that date; and
- property secured only by a floating charge forms part of the debtor's general assets in the event of an insolvency.

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.

In summary, subject to the facts of any particular case, the Bermuda Court is likely to recognise the winding-up orders of foreign courts, and to assist foreign liquidators to the fullest extent possible, in circumstances where:

- there is a "sufficient connection" between the foreign court's jurisdiction and the foreign company making it the most appropriate, or the "most convenient" jurisdiction to have made an order for the winding-up of the company and appointment of foreign liquidators;
- there are documents, assets, or liabilities of the foreign company within the jurisdiction of Bermuda; the foreign company has conducted business or operations within, or from, the jurisdiction of Bermuda, whether directly or by agents or by branches; the foreign company has former directors, officers, managers, agents or service providers within the jurisdiction of Bermuda; and / or the foreign company properly needs to be involved in litigation or arbitration within the jurisdiction of Bermuda; and
- there is no public policy reason under Bermudian law to the contrary (it, for example, there would be unfairness or prejudice to local Bermudian creditors).

However, the Privy Council has stressed that the question of how far it is appropriate to develop the common law so as to assist foreign liquidations depends on the facts of each case and the nature of the power that the Bermuda Court is being asked to exercise. In the context of an application for an order for the production of documents by an entity within the jurisdiction of the Bermuda Court, the Privy Council has noted that such a power is available only where necessary to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers, but it is not available to assist a voluntary winding-up, which is essentially a private arrangement. The Court does not have the power to assist foreign liquidators in doing something which they could not do under the law by which they were appointed, and the Court's exercise of its power must be consistent with the substantive law and public policy of the assisting court in Bermuda.

*In the recent case of **Stephen John Hunt v Transworld Payment Solutions UK Limited**, the Supreme Court of Bermuda declined to recognise the appointment of a UK liquidator in circumstances where no active assistance had yet been requested, and any such potential assistance would probably have been refused, given pending litigation in England and Wales and other information-gathering mechanisms available to the parties.*

[A good answer - but it omits to address the statutory position \(i.e. the lack of a legislative framework\).](#)

[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.

Foreign court judgment

A foreign judgment registered under the 1958 Act can be set aside on an application of any party against whom a registered judgment may be enforced. The registration of a foreign judgment must be set aside if the Supreme Court is satisfied that:

- (a) it is not covered by the Judgments (Reciprocal Enforcement) Act 1958 or was registered in contravention of the 1958 Act;**
- (b) the foreign court had no jurisdiction in the circumstances of the case;**
- (c) the defendant did not receive notice of the proceedings in the foreign jurisdiction in sufficient time to enable him to defend the proceedings and did not appear;**
- (d) it was obtained by fraud; and**

(e) the rights under it are not vested in the person by whom the application for registration was made.

The registration of a foreign judgment may be set aside 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.

Those foreign judgments from other jurisdictions which are not registrable under the 1958 Act must be enforced by way of a separate action at common law, on the basis that the foreign judgment is treated as evidence of a debt.

The basic common law rule is generally stated to be that a foreign money judgment will be recognized and enforced as a debt against the judgment debtor where:

- (a) such judgment is final and conclusive in the foreign court;*
- (b) the judgment was obtained in a court of law which had jurisdiction over the judgment debtor;*
- (c) the judgment was not obtained by fraud;*
- (d) the judgment was not in respect of taxes, fines or penalties;*
- (e) the enforcement of the judgment would not contravene the public policy of Bermuda; and*
- (f) the rules of natural justice were observed in the foreign proceedings.*

In general, the Bermuda Courts will follow the principles of the common law of England in recognising and enforcing foreign judgments which fall within the aforementioned rule.

Foreign court-sanctioned scheme of arrangement

There is some uncertainty about whether a foreign scheme of arrangement or related procedure (such as an insurance business transfer scheme under legislation implementing European single market insurance directives) 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.

Although the Supreme Court of Bermuda has shown some willingness to recognise foreign court orders approving foreign schemes (in the absence of opposition), it is unclear what position it (or an appellate court) might take in a contentious situation.

[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.

(a) the jurisdictions in which they could take such action, bearing in mind the potential need for enforcement;

The US Bondholders can take action in (1) the United States, as the bonds are US dollar bonds; (2) in Bermuda, as the company issuing the Notes is incorporated in Bermuda; (3) the PRC, as the operation and assets of the companies are located in the PRC. Taking into consideration the enforcement, it is better to start proceedings in multiple jurisdictions including in the PRC, where the majority of the assets are located.

(b) the defendants against whom they could take such action;

The potential defendants include: (1) the Bermuda company, Bercoffee Limited; (2) the directors of Bercoffee Limited.

(c) the pros and cons of litigation as opposed to insolvency proceedings;

The Bondholders can petition to wind up the Bermuda company and its subsidiaries or pursue litigations against the directors. The pros of litigation is it can hold the directors personally responsible for the frauds committed, the con is there may be insufficient funds to provide damage; The pros of insolvency proceedings is that it can drill down the corporate layers and get to the assets of the company, cons is that it requires multi-jurisdiction parallel proceedings and cross-boarder cooperations to achieve this, which is very costly and complex. Also for bondholders who do not wish to see the company be wound up, it is not the best option (as the bondholders may recover more if the company is allowed to restructure itself and continue to make profits to make the repayment).

(d) the causes of action that may be available against the various potential defendants.

Against Bercoffee Limited and its subsidiaries: charging orders against the company, winding up petitions.

Against the directors: breach of fiduciary duties, fraud claims, tort, disqualification, claw-back and void transaction claims.

This answer seeks to cover a lot of ground, but the result is some passages are somewhat superficial and insufficiently reasoned.

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 Limited can try to take steps to restructure its debts in Bermuda.

*The Supreme Court has developed an insolvency practice, through the appointment of "soft-touch" provisional liquidators or provisional liquidators with specific powers to implement a restructuring, which is designed to support formal and informal restructuring plans that have credible prospects of success and the support of the majority of creditors. In the recent decision of *HSBC v NewOcean Energy Holdings Limited* [2022] CA Bda*

16 Civ, the Bermuda Court of Appeal stressed the importance of a restructuring plan having credible prospects of success, and the likely support of the majority of creditors, so as to justify the adjournment of a winding-up petition and the continued appointment of "soft-touch" provisional liquidators. In appropriate circumstances, therefore, the court does have the power to approach corporate insolvencies in a "debtor-friendly" manner, with a view to achieving a corporate restructuring.

Following presentation of a petition for the winding-up of the company (usually presented by the company itself, if the company contemplates a restructuring), a provisional liquidator may be appointed, who may then apply for a statutory stay of all proceedings against the company while the work-out process continues, whether informally or through the medium of a scheme of arrangement. The board of directors retains control over the company and endeavours to effect a work-out under the supervision of the "soft-touch" provisional liquidator and the court.

If the work-out negotiations are successful, the winding-up petition can be dismissed; if they are unsuccessful, the winding-up petition can be restored for final hearing and the company can be wound up and placed into full liquidation. While the work-out plan is negotiated, the hearing of the winding-up hearing petition is adjourned (although the company enjoys the protection of the statutory moratorium).

A “debt-for-equity” swap can be included in a scheme, and it helps to reorganise the company’s capital. This is beneficial for the company and can be used to reduce the company’s debt liabilities.

This is a thorough answer, save only for the superficial treatment of the potential debt for equity issues.

6 marks.

TOTAL: 44 out of 50.

*** End of Assessment ***