



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 - not answered.

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?

Section 170 of the Companies Act allows the court to appoint a provisional liquidator after the presentation of a winding-up petition but before the final hearing. The court will appoint a provisional liquidator if there is a good *prima facie* case that a winding-up order will be made and the appointment of a provisional liquidator is appropriate in all the circumstances of the case (*Re Stewardship Credit Fund Ltd* [2008] Bda LR 67 at [35]). For example, the court may appoint a provisional liquidator where there is a risk that the debtor's assets will be dissipated prior to the final winding-up hearing. Another example is where there is a need for immediate independent supervision and control of the company, which could be the case where restructuring is possible and the stay of legal proceedings that comes with the appointment of a provisional liquidator (s 167(4)) is beneficial.

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?

Generally, rights of set-off *cannot* be exercised after the commencement of liquidation. They can be exercised only when: (a) the debts which gave rise to those rights of set-off were incurred prior to the commencement of liquidation and have crystallised as monetary payment liabilities; (b) the transaction giving rise to the rights was not a fraudulent preference or fraudulent conveyance; or (c) the dealings between the parties were mutual. "Mutual dealings" refers to a situation where the parties giving rise to the debt and credit respectively are identical, 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:** Security involves a specific asset. Legal mortgages involve the legal title to the property being transferred to the creditor. The debtor retains possession of the secured property. The debtor only recovers legal title to the property upon satisfaction of the debt and a reconveyance by the creditor.
- (2) **Fixed charge:** In practice, similar to a mortgage (security involves a specific asset) but the difference is that no title to the property is conveyed to the creditor. The creditor has a right to take possession of the property and sell it when the debtor defaults on the debt.

(3) Floating charge: The security floats above a variety of assets. The debtor can deal with the assets freely, but once there is a default the floating charge crystallises and becomes a fixed charge attaching to specific assets remaining at the date of default. Property secured in this manner forms part of the general insolvency estate - unlike with a legal mortgage/fixed charge, the secured property is not separated from the insolvency estate.

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.

*There is no statutory framework in Bermuda that governs the recognition of foreign liquidators and the provision of assistance to them. However, the Supreme Court of Bermuda can, and generally does, recognise liquidators appointed by the court of the company's domicile: *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508. The court will recognise the effects of the winding-up order by the foreign court, and exercise its discretion to assist the foreign court by doing whatever it could have done had the insolvency proceedings begun in Bermuda. The power to recognise and assist foreign liquidations comes from the common law.*

Recent cases have shown that the courts will only recognise foreign liquidations where:

- (a) There is a sufficient connection between the foreign court's jurisdiction and the foreign company, which makes it the most convenient jurisdiction to have made an order for winding up and for the appointment of foreign liquidators.*
- (b) There are documents, assets or liabilities of the foreign company within the jurisdiction of Bermuda; the foreign company has conducted business operations in or from Bermuda; the foreign company has former officers, directors, managers, agents or service providers in Bermuda; or the foreign company needs to be involved in litigation or arbitration in Bermuda.*
- (c) There is no public policy concern under Bermudian law which militates against recognising the foreign liquidation.*

One example of where the Bermuda courts will not render assistance that is available under Bermuda law to a foreign insolvency is where that assistance is not available under the foreign law. For example, in *Singularis Holdings Limited v PricewaterhouseCoopers* [2015] 2 WLR 971; [2014] UKPC 36, the Privy Council found that the Bermuda courts could not order the disclosure of certain material because such material would not have been attainable under Cayman Islands law (the winding up was being carried out in the Cayman Islands): at [29]. As Lord Sumption explained, the juridical basis for the Bermuda

courts' common law power to assist foreign liquidations is the *duty* to assist the foreign court so far as it properly can. It exists to allow the foreign courts to surmount the problems that are present where a worldwide winding up is involved. This extends only to allowing the foreign court to do in Bermuda what it could do in its own jurisdiction. It does not extend to assisting the foreign liquidation by allowing it to make use of all the statutory mechanisms available under Bermudian law, which explicitly only apply to liquidations in Bermuda.

In the same case, Lord Sumption explained that assistance would not be available in respect of a foreign voluntary winding up, because that would essentially be a private arrangement that, while subject to supervision of the court, was not *conducted* by an officer of the court (at [25]). As such, there is no duty to assist in such proceedings and accordingly no common law power to do so.

Another example is where the assistance is sought for use in actual or anticipated litigation: *Stephen John Hunt v Transworld Payment Solutions UK Limited* [2020] SC Bda 14 Com at [36]. Seeking such assistance is an impermissible use of the Bermudian courts common law powers.

[Correct - 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.

A foreign judgment will not be registered and enforced in Bermuda for any of the following reasons:

- (1) The foreign court that gave the judgment did not have jurisdiction to do so.*
- (2) The foreign judgment is not final and conclusive on the merits.*
- (3) The foreign judgment was obtained by fraud.*
- (4) The foreign judgment was in respect of taxes, fines or penalties.*
- (5) The enforcement of the foreign judgment would contravene the public policy of Bermuda.*
- (6) The rules of natural justice were not observed in the foreign proceedings that gave rise to the foreign judgment.*
- (7) The rights under the foreign judgment are not vested in the person seeking to register and enforce it.*
- (8) The foreign judgment conflicts with another prior judgment from a court of a competent jurisdiction.*

*It should be noted that reason (5) above is not applicable to judgments covered by the Judgments (Reciprocal Enforcement) Act 1958. The Supreme Court of Bermuda clarified in *Masri v Consolidated Contractors International Company* [2009] Bda LR 12 that it was not entitled to set aside recognition of such a judgment merely on the grounds that it was not "just and convenient" to enforce it, or on "public policy" grounds.*

Also, for judgments initially registered under the REA, their registration may be set aside if the judgment is not properly covered by the REA.

*It is possible for a foreign court sanctioned scheme of arrangement to be registered and enforced in Bermuda. However, the scope of such recognition and enforcement is not yet clear. In *Re C&J Energy Services Ltd* [2017] Bda LR 22 at [16], the court explained that the Bermuda courts will recognise and enforce a foreign restructuring order extinguishing claims against an insolvent Bermudian company. Such orders will typically accompany a foreign court-sanctioned scheme of arrangement. For such orders, the Bermuda courts will only recognise and enforce them if the parties subject to them (the creditors) properly submitted to the personal jurisdiction of the foreign court and the orders cover property that is subject to the *in rem* jurisdiction of the foreign court. This recognition is derived from the Bermuda courts' common law power to assist a foreign insolvency court as much as it can. It is not clear, however, whether the Bermuda courts will recognise such orders where the creditors challenge such recognition. In *Re Energy XXI* [2016] Bda LR 90, the Bermuda courts recognised a restructuring plan sanctioned in Texas, but noted that it remained possible for a creditor not party to the foreign restructuring proceedings, to contend in the Bermuda courts that the restructuring plan should not be recognised.*

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.

In summary, the US Bondholders have three options:

- (1) Commence winding up proceedings in Bermuda against the Company*
- (2) Commence a suit in Bermuda against the Company's directors*
- (3) Commence a suit in Bermuda against the Company*

Winding up

Under s 161(e) of the Companies Act, a company may be wound up where it is unable to pay its debts. Under s 162, a company is considered unable to pay its debts where it has, after three weeks, failed to satisfy a statutory demand by a creditor in respect of a debt of more than \$500. This has been satisfied in the present case given that the Company ignored the bondholders demand for repayment of US\$500m in 21 days. There is therefore no doubt that the bondholders have grounds to wind up the Company in Bermuda.

However, the US bondholders that winding up the Company is not likely to allow them to recover the full amount of their loan. First, it does not appear that the US bondholders obtained any security in respect of their loan. They would thus be

unsecured creditors in any liquidation of the Company. This means that their claims will be satisfied last, after the claims of secured creditors, for expenses of the liquidation, of preferential creditors, and of holders of floating charges. Depending on the size of the claims from all those groups, and the total value of the Company's assets, there is a good chance that the bondholders will not be able to recover the full sum of US\$500m in winding up proceedings. It is already known that Lendbank has a US\$50m claim against the Company which will be satisfied in priority to the bondholders' because it is secured by a floating charge over the Company's shares.

That being said, there are a number of courses of action which will be available to the liquidators of the company to recover certain sums from the directors and shareholders. This will increase the value of the insolvent Company's assets and increase the likelihood that the US bondholders will be able to recover a greater proportion of their claim. Under s 246 of the Companies Act, if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company for any fraudulent purpose, the Court, on the application of any creditor, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liability of the company as the Court may direct. The bondholders may be able to argue that the directors carried on the business fraudulently when they misrepresented its financial performance, and rely on this section to render the directors liable for the full sum of US\$500m.

Even if this cannot be proven, it can at least be proven that the directors acted improperly when they paid out the US\$50m loan to themselves and the shareholders. By this time, it was known to the directors that the Company was unable to pay its debts and was insolvent. Further, the payment of US\$30m to the shareholders was an unlawful return of capital pursuant to s 54 of the Companies Act and was authorised by the directors. The sum of \$50m should at least be able to be recovered by the liquidators of the Company.

Winding up will also potentially allow the US bondholders to recover their claim from the Company's overseas subsidiaries that actually operate the business and own the assets. The US Bondholders have no direct cause of action against those companies - they did not lend the US\$500m to them. However, once the Company is wound up, this could lead to the liquidators of the Company winding up the subsidiaries as well in order to satisfy the claims of its creditors. The liquidation of these companies can be commenced by the liquidators in their respective jurisdictions.

Suing the directors

The US Bondholders may wish to sue the directors, as they are the real wrongdoers that have caused the loss of US\$500m to the US Bondholders. That said, it is not clear what legal basis a creditor would have to sue the directors of a Company. Furthermore, it is highly unlikely that the directors have US\$500m worth of assets - this means that

the Company would face the same issue of not being able to recover its full sum. This is not an advisable course of action.

Suing the company

*Suing the Company for breach of the terms of the bonds is a possibility. If the bondholders are able to obtain judgment against the Company for US\$500m and then enforce this judgment against the assets of the Company *before* the company is wound up, they will move themselves up the priority list. That said, this is unlikely to work in practice because the Company is likely to commence voluntary winding up the moment the US bondholders commence the suit against it. This is also not an advisable course of action.*

Conclusion

Thus, the most advisable course of action is to commence winding up proceedings in Bermuda against the Company.

This is quite a thorough answer, but it does not really engage in a comparative analysis of the pros and cons of bringing proceedings in foreign jurisdictions.

I am not entirely sure that I follow why the Company will initiate a voluntary liquidation (and, if it did, this would almost certain convert into either a creditors' voluntary liquidation or a compulsory liquidation).

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).

Under s 99(1) of the Companies Act, the court may order a meeting of creditors where a compromise is proposed between a company and its creditors. Thus, in Bermuda, the Company could make arrangements with the bondholders for a compromise and the bondholders could then apply to the court to summon a meeting of the creditors. If, at the meeting of the creditors, a majority in number representing 75% in value of the creditors or class of creditors present and voting agree to the compromise, it can then be sanctioned by the courts.

Alternatively, the Company could seek a scheme of arrangement in Hong Kong and apply to have it recognised in Bermuda. The problem with this approach, however, is

that it is not presently clear the extent to which the Bermuda courts will recognise foreign sanctioned schemes of arrangement. It is therefore advisable that parallel schemes of arrangement are pursued, such that the Company need not worry about potential challenges by creditors when it attempts to have the Hong Kong scheme recognised in Bermuda.

*If the restructuring plan involved a “debt-for-equity” swap, the US Bondholders would need to pay close attention to the governing law of the bonds. This is due to the rule from *Gibbs*, which provides that a debt can only be extinguished in the jurisdiction of its governing law. If the bonds are governed by Bermudian law, then there is no issue with a debt-for equity swap in a Bermudian scheme of arrangement. The Bermudian courts will recognise that the Company’s debt to the US Bondholders has been satisfied by the swap. It will not be advisable to seek a scheme in Hong Kong, because, due to the rule in *Gibbs*, the Bermudian courts will not recognise that the Bermudian governed debt was extinguished by the Hong Kong scheme. The Company could avoid this problem if the US Bondholders submit to whichever jurisdiction the scheme is sought under.*

[A thorough and thoughtful answer - 8 marks](#)

[TOTAL: 47 out of 50](#)

*** End of Assessment ***

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