



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(2) of the Companies Act 1981 allows the court to appoint a provisional liquidator between the presentation of a winding-up petition and its final hearing. The act also allows for urgent appointment of a provisional liquidator provided it is in the best interest of creditors, specifically if the following risks are apparent: a) a risk that assets will be dissipated in the period between presentation of the petition and the final hearing, b) the event that restructuring is capable of being achieved under the supervision and control of an independent court officer and with the benefit of the stay of other legal proceedings.

All in all, 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 winding-up order will be made if the court considers that a provisional liquidator should be appointed in all circumstances of the cases.

Largely correct, but a bit imprecise.

4 marks.

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Question 2.2 [maximum 2 marks]

When can rights of set-off be exercised after the commencement of a liquidation of a Bermuda company?

In accordance with Section 37 of the Bankruptcy Act 1989, 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 fraudulent conveyance; or the dealings between the parties were mutual.

Largely correct, but a bit imprecise and incomplete.

1 mark.

Question 2.3 [maximum 4 marks]

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

The security interest will be determined by the terms of the parties' agreement, the nature of the property, and the nature of the debtor's interest. Under Bermuda Law there are a number of ways to take security over assets such as: a legal mortgage, an

equitable mortgage, a fixed charge, a floating charge, a pledge, a lien, a registered judgement and an assignment.

More specifically there are three possible ways of taking security over movable and certain intangible property under Bermuda law:

A floating charge is not fixed to a specific asset, unlike a fixed charge, but floats to a variety of assets. The debtor can sell or dispose such assets without prior consent but in the event of default by the debtor the floating charge crystallizes and converts into a fixed charge against a specific asset.

A pledge involves the creditors taking actual or constructive delivery or possession of the debtor's assets until the debt is repaid or discharged.

A lien is the right to retain possession of another person's property until performance of a special obligation. A lien is similar to pledge except that with the lien the property is deposited with creditor not for the purposes of security but for some other purpose such as custody or repair.

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.

As Bermuda has no statutory equivalent of Chapter 15 of the US's Bankruptcy Code, section 426 of the UK's Insolvency Act 1986, or the UK's Cross border Insolvency Regulations 2006, the Privy Council's decision in the Cambridge Gas Transaction Corp V Navigator Holdings plc has led to the common law allowing the Supreme Court of Bermuda to recognize the liquidators appointment by the court of the domiciling company and the effects of a winding-up order made by the court with the discretionary ability to assist in a similar matter of a domestic insolvency.

While Bermudian court's power to assist have been heavily debated following the Singularis Holdings Limited v PwC and the PwC v Saad Investments Company Limited case and are also subject to the particulars of a specific case, the Bermudian court will likely recognise the winding up order of reign courts and fully assist foreign liquidators in the following circumstances:

- 1. There is a sufficient connection between the foreign court's jurisdiction and the foreign company making it the most appropriate or convenient jurisdiction to*

have made an order for the winding up of the company and appointment of foreign liquidators;

- 2. 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; The foreign company has former stakeholders within the jurisdiction of Bermuda; and or the foreign company needs to be involved in litigation or arbitration within Bermuda's jurisdiction*
- 3. There is no public policy reason under Bermudian law to the contrary*

However, it is important to note that there is some limit to the recognition and assistance provided in Bermuda. As the following circumstances are not eligible for recognition or assistance:

- 1. Application for an order for production of documents by an entity within the Bermuda's jurisdiction a foreign liquidator does not have the power to assist a voluntary winding up.*
- 2. The court does not have power to assist foreign liquidators to do something which they could not do under the law by which they were appointed.*
- 3. The foreign liquidator would not be recognized when they have not yet requested active assistance or otherwise would have been refused.*

Largely correct, but a little bit thin on the citation of case law.

6 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 court judgement has no direct legal effect in Bermuda and is not enforceable in Bermuda unless specific steps are taken to have the foreign judgement legally enforced. A foreign judgement under the Judgements (Reciprocal Enforcement) Act 1958 will not be registered or enforced in Bermuda if the Supreme Court is satisfied that:

- 1. It is not covered by the 1958 act or was registered in contravention of the 1958 act;*
- 2. The foreign court had no jurisdiction in the circumstances of the case;*
- 3. 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;*
- 4. It was obtained by fraud;*

5. *The rights under it were not vested in the person by whom the application for registration was made; and*
6. *The matter in dispute which gave rise to the judgement had been subject of a final and conclusive judgement by a court having jurisdiction in the matter.*

This seems to overlook the position at common law.

Additionally, we must consider whether a foreign scheme of arrangement can be recognised and enforced in Bermuda as a matter of common law. There have been uncertainty on whether it can be recognised and enforced in absence of a local scheme of arrangement implemented in parallel. Nonetheless it is important to highlight that despite the Supreme Court of Bermuda showing a willingness to recognise foreign unopposed court orders approving foreign schemes their position on it remain unclear when there is a contentious situation.

A good effort, but a bit short and incomplete.

4 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 US bondholders could seek the compulsory windup of Bercoffee Limited in Bermuda under section 161 of the Companies Act 1981 as Bercoffee would be deemed unable to pay its debts pursuant to section 162 as the US Bondholders have served a statutory demand on the Company in Bermuda which has been neglected and unsatisfied for longer than three weeks and if the court deems the total outstanding current and prospective debt to be unpayable.*
- B) *The defendants of any against whom the US Bondholders could take action is the Bercoffee for their fraudulent misrepresentation of financial performance and the directors of Bercoffee for their questionable actions and payment of bonuses after ignoring the US Bondholders statutory demand.*
- C) *Upon making the winding up order there is an automatic stay of proceedings against the Bercoffee in Bermuda. Insolvency proceedings also allow for the scrutiny/reviewable transactions related to the fraudulent preferences and floating charges. Insolvency proceedings would render the floating charges on Bercoffee's shares and assets of its subsidiaries invalid under section 239 of the Companies as the Company was not automatically solvent once received creation of charge. Also, insolvency proceedings allow for the setting aside of fraudulent preferences under section 237 and 236 of the Companies Act 1981.*

D) The causes of action available are as follows:

- a. *The Company had fraudulently misrepresented its financial performance in the offering documents associated with the bonds which is fraud in inducement. Seek damages and interest on late payment.*
- b. *Against the Directors of the Company for payment of bonuses and dividends to shareholders while the company is unable to pay their debts and for failure to provide fiduciary duties of acting in the best interest of the Company with honesty and good faith, not breach trust, seek claims pursuant to section 247 (personal liability of directors for fraudulent preferences and breach of trust) 54 (unlawful return of capital via dividends) and 97 (breach of fiduciary duties) of the Companies act 1981 respectively.*

This does not engage with the questions relating to jurisdiction or the pros and cons of litigation v. insolvency proceedings.

3 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 take steps to restructure its debt obligations via submission of an application to the Bermuda court, the incorporating location.

What sort of application?

Since BerCoffee has offices and a substantial business presence in Hong Kong and capital assets in the PRC they should apply either for a foreign recognition or conversely enter provisional liquidation as it possible for provisional liquidators with the principal purpose of restructuring to be granted recognition in Hong Kong. During the provisional liquidation the Company can seek to reorganize their capital.

There is also the option of seeking the Supreme Court of Bermuda’s recognition of foreign scheme of arrangement provided this is not a contentious situation.

This is a very thin answer, since it offers no detail of the Scheme process; or any of the potential cross-border recognition challenges; and there is no discussion of the ‘debt for equity’ swap issue.

[2 marks](#)

[TOTAL: 33 out of 50.](#)

*** End of Assessment ***